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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:
BRENNON TY BISHOP and MICHELLE
BISHOP,
Debtors.
ELECTRONIC FUNDS SOLUTIONS, LLC,
as successor-in-interest to RICHARD A.
MARSHACK, Chapter 7 Trustee,
Plaintiff,
v.
FEDCHEX, LLC; FEDCHEX RECOVERY,
LLC; ED ARNOLD; RODNEY DAVIS;
FEDCHEX MERCHANT SERVICES;
FEDCHEX/DS GROUP; YELLOW PAGES
DIRECTORY SERVICES, LLC; YELLOW
PAGES 2000, INC.; BYSB, INC.; NICHE
DIRECTORIES, LLC; CONVERGENTDS,
LLC; DIRECT VISION; DS MARKETING;
YK2000; iEXCHANGE,
Defendants.

Case No. 2:12-bk-16000-RK
Chapter 7
Adv. No. 2:12-ap-01302-RK

**MEMORANDUM DECISION ON
PLAINTIFF'S FOURTH AMENDED
COMPLAINT TO AVOID AND RECOVER
INTENTIONAL AND CONSTRUCTIVE
FRAUDULENT TRANSFERS AND
POST-PETITION TRANSFERS**

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1 **PROCEDURAL HISTORY**

2 On August 19, 2003, Richard A. Marshack, the Chapter 7 Trustee in this
3 bankruptcy case (“Trustee”) of debtors Brennon Ty Bishop (“Bishop”) and his wife,
4 Michelle Bishop, commenced this adversary proceeding. Subsequently, Electronic
5 Funds Solutions, LLC (“EFS” or “Plaintiff”) became the plaintiff as a successor-in-interest
6 to Trustee.

7 The defendants in this adversary proceeding originally were FedChex, LLC
8 (“FedChex”), FedChex Recovery, LLC (“FedChex Recovery”), Ed Arnold (“Arnold”),
9 Rodney Davis (“Davis”), along with various entities owned by Davis alleged in the
10 adversary complaint to be his alter egos, including DS Group, FedChex/DS, Yellow
11 Pages, Yellow Pages 2000, Merchant, BSYB, Niche, Convergentds, Direct Vision, DS
12 Marketing, YK 2000, and/or iExchange (collectively referred to as the “Davis Entities”).
13 On August 26, 2009, this court dismissed with prejudice the following defendants: Yellow
14 Pages Directory Services, LLC, Yellow Pages 2000, Inc., BSYB, Inc., Niche Directories,
15 LLC dba Yellow Pages 2000, Convergentds, LLC aka CDS, DS Group, LLC, Direct
16 Vision, DS Marketing, YK 2000, Performance Asset Management and iExchange.

17 The operative complaint in this adversary action against these defendants is
18 Plaintiff’s Fourth Amended Complaint, which sets forth seven claims for relief as follows:
19 (1) “FIRST CLAIM FOR RELIEF - Avoidance Of Intentional Fraudulent Transfers under
20 11 U.S.C. § 548”; (2) “SECOND CLAIM FOR RELIEF - Avoidance of Constructive
21 Fraudulent Transfers, 11 U.S.C. § 548”; (3) THIRD CLAIM FOR RELIEF - Avoidance of
22 Post-Petition Transfers, 11 U.S.C. § 549”; (4) “FOURTH CLAIM FOR RELIEF - Recovery
23 of Avoided Transfers, 11 U.S.C. §550”; (5) FIFTH CLAIM FOR RELIEF - Disallowance of
24 Claims 11 U.S.C. § 502(d)”; (6) SEVENTH CLAIM FOR RELIEF - Fraudulent
25 Conveyance Under State Law”;¹ and (7) “EIGHTH CLAIM FOR RELIEF - Breach of

26 _____
27 ¹ There is no numbered SIXTH CLAIM FOR RELIEF in the Fourth Amended Complaint because “Sixth” is
28 skipped. *Fourth Amended Complaint* at 21-24. The “sixth” claim for relief for fraudulent transfer under
state law is mislabeled as “SEVENTH CLAIM FOR RELIEF,” and will be referred to herein as “Sixth” Claim

1 Contract.”² *Fourth Amended Complaint (Docket No. 112)*, filed on August 19, 2005. On
2 March 3, 2006, the parties filed a stipulation of dismissal of the breach of contract claim,
3 thus the only live claims for determination are claims (1) through (6) listed above, the
4 First, Second, Third, Fourth, Fifth and Sixth Claims for Relief. *Stipulation of Dismissal of*
5 *Seventh Cause of Action Only (Mislabelled Eighth Cause of Action) for Breach of Contract*
6 *in Plaintiff’s Fourth Amended Complaint (as to All Defendants)(Docket No. 202)*, filed on
7 March 3, 2006; *Joint Pre-Trial Order*, filed on May 13, 2010.

8 The trial in this adversary proceeding was conducted before the undersigned
9 United States Bankruptcy Judge on January 14, 15, 21 and 22, February 4, 5, 18 and 19,
10 April 2, May 6 and 7, June 2, and 30, 2010. Einar Wm. Johnson, of the law firm of
11 Johnson and Associates, appeared on behalf of the Plaintiff EFS. Louis H. Altman, of the
12 law firm Haberbusch & Associates, LLP, appeared on behalf of the Defendants. After the
13 evidence was closed, the parties submitted post-trial briefs in lieu of closing arguments
14 and submitted proposed findings of fact and conclusions of law and made objections
15 thereto. Subsequently the court took this matter under submission on December 13,
16 2011 after further objections to proposed findings of fact and conclusions of law were
17 filed. Having considered the testimony of the witnesses and the other evidence admitted
18 at trial, as well as the oral and written arguments of the parties, the court hereby issues
19 this memorandum decision setting forth its findings of fact and conclusions of law.

20 **FACTUAL BACKGROUND**

21 Most of the relevant facts were not stipulated to in this case. *See Joint Pre-Trial*
22 *Order*, filed on May 10, 2010. The parties submitted, and the court approved, a Joint
23 Pre-Trial Order (“JPTO”). *Id.* Besides basic jurisdictional facts, however, the JPTO is

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25 for Relief. *Id.* The Joint Pre-Trial Order correctly refers to the claim as the Sixth Claim for Relief. *See Joint*
Pre-Trial Order (Docket No. 456), filed on May 13, 2010, at 34-35, 56.

26 ² Because there is no numbered SIXTH CLAIM FOR RELIEF in the Fourth Amended Complaint because
27 “Sixth” is skipped. *Fourth Amended Complaint* at 21-24. The “seventh” claim for relief for breach of
28 contract is mislabeled as “EIGHTH CLAIM FOR RELIEF,” and will be referred to herein as “Seventh” Claim
for Relief. *Id.* at 24-26.

1 relatively unhelpful in establishing the background facts for this matter. The facts of this
2 case are complex and convoluted, involving numerous individuals and various entities
3 with similar sounding names. This factual background section begins with a
4 chronological introduction of the various players, i.e., the people and the various
5 businesses formed by some or all of them. Next, the court will discuss the state court
6 litigation that shed light on many of the facts pertaining to the transactions at issue, which
7 Plaintiff alleges are fraudulent transfers in this adversary proceeding. Finally, the court
8 will outline all of the various alleged fraudulent transfers resulting from the creation and
9 alteration of these businesses.

10 **1. THE PEOPLE AND THEIR VARIOUS BUSINESSES**

11 a. Formation of Electronic Funds Solutions, LLC (“EFS”)

12 Prior to March 2000, Michael Murphy (“Murphy”), Bishop, and Michael Barry
13 (“Barry”) became business acquaintances and, in or about March 2000, they agreed to
14 start a business together and entered into agreements to form what would ultimately be
15 Electronic Funds Solutions, LLC (“EFS”). EFS was formed for the purpose of engaging in
16 a variety of services to assist merchants with the processing of funds through electronic
17 means, including helping merchants to electronically collect checks returned for “Not for
18 Sufficient Funds” (“NSF”), also known as “bounced” checks. *Trial Declaration of Michael*
19 *Barry (“Barry Trial Declaration”)* at 9:18-20 (citations to written testimony and some
20 pleadings are made to page:line(s)). On May 22, 2000, EFS filed its Articles of
21 Incorporation of EFS with the California Secretary of State. *Plaintiff’s Trial Exhibit 1,*
22 *Articles of Organization of Electronic Funds Solutions, LLC, filed May 22, 2000.*

23 EFS maintained offices at 438 East Katella, Suites 216 and 217, Orange,
24 California (the “OC Office”) and at 608 Silver Spur Rd., Suite 222, Rolling Hills Estates,
25 California (the “Rolling Hills Office”). *Barry Trial Declaration* at 4:20-21 and 6:14-16.
26 Murphy and Bishop worked out of the OC Office, and Barry worked out of the Rolling Hills
27 Office. *Id.* at 4:2-4 and 6:14-16. According to Barry, he, Bishop, and Murphy agreed
28 orally that Barry would act as the CEO and president of the company while Murphy and

1 Bishop would manage the day-to-day operations of EFS, subject to Barry's direction,
2 management, and control. *Barry Trial Declaration* at 3:15-18. According to Barry,
3 Murphy and Bishop did not have management authority in EFS. *Id.* at 3:18-22. The OC
4 Office maintained EFS's business records, including client contracts, client contact
5 information, and financial and computer records. *Id.* at 15:16-18.

6 According to Barry, the ability to collect NSF checks via electronic means was a
7 "cutting edge opportunity for businesses not directly engaged in the banking industry,
8 based upon a Federal Reserve change, to assist merchants in the collection of bad
9 checks, and collection of the NSF fee, automatically and electronically." *Barry Trial*
10 *Declaration* at 9:20-22. EFS offered merchants a variety of services, including an
11 automatic payment service for recovery of NSF fees, checks by phone, online electronic
12 checks, electronic check conversion, and pre-authorized checking for merchants. *Id.* at
13 9:22-24. One of the more important of these services was the automatic payment service
14 for recovery of NSF fees. *Id.* at 9:22-26. Merchants contracting with EFS had clients
15 who would agree that, at the time the client issued a check, any dishonored check would
16 be collected through electronic deduction from the check-issuer's bank account. *Id.* at
17 9:27-10:1. There would be an additional "bounced check" fee deducted from the check-
18 issuer's bank account from which EFS was paid for its services. *Id.* at 10:1-10:5.

19 In order to adequately process these funds acquired electronically, EFS used
20 third-party processors such as National Bank Drafting Systems, Inc. ("NBDS"), which had
21 the necessary software and banking relationships needed to actually process the
22 electronic payments. *Barry Trial Declaration* at 10:7-11. In his trial testimony, Barry
23 described companies such as NBDS as "wholesalers of the types of services offered by
24 EFS", which would take a portion of the dishonored check fee for their services. *Id.* at
25 10:9-10. While EFS worked with NBDS, EFS established relationships with retail
26 merchants through which bad checks returned to the merchant as unpaid due to
27 insufficient funds were sent directly from the merchant to NBDS. *Trial Testimony of*
28 *Brennon Ty Bishop ("Bishop Trial Testimony"), January 21, 2010, at 11:11-11:12 a.m.*

1 Because NBDS kept a large portion of each dishonored check fee, EFS actively sought
2 out other processing providers that could offer better rates. *Barry Trial Declaration* at
3 10:22-26; *Trial Testimony of Michael Barry (“Barry Trial Testimony”)*, June 30, 2010, at
4 11:05-11:06 a.m.

5 b. Formation of ePayment Technologies, Inc.

6 Around December 2000, Murphy and Bishop indicated to Barry that they would not
7 sign a written operating agreement for EFS, indicating their intent to terminate their
8 business relationship with Barry. *Barry Trial Declaration* at 13:1-5; *Plaintiff’s Trial Exhibit*
9 *14, Draft Operating Agreement of Electronic Funds Solutions, LLC*. Murphy and Bishop
10 told Barry that they no longer wanted to do business with him. *Barry Trial Declaration* at
11 13:1-5.

12 On January 11, 2001, Murphy and Bishop formed ePayment Technologies, Inc.
13 (“EPT”) and filed Articles of Incorporation for EPT with the California Secretary of State.
14 *Plaintiff’s Trial Exhibit 21, Articles of Incorporation of ePayment Technologies, Inc.* EPT
15 engaged in the business of processing bounced checks for its clientele through electronic
16 means as its main business upon formation, but also offered other services involving the
17 processing of funds electronically, which EFS had offered as part of its business.
18 *Transcript of Deposition of Michael Murphy (“Murphy Deposition”)*, April 5, 2002, at 39:7-
19 40:20. On January 15, 2001, Bishop wrote to Barry announcing that Murphy and Bishop
20 would be moving forward with their own business independent of Barry. *Plaintiff’s Trial*
21 *Exhibit 23, Letter from Michael Murphy and Ty Bishop to Michael Barry, dated January*
22 *15, 2001*. Instead of leaving EFS's OC office and opening another space for EPT,
23 however, Murphy and Bishop changed the locks at the OC Office and did not provide
24 Barry with a key to the new lock. *Bishop Trial Testimony, January 21, 2010* at 1:54-1:55
25 p.m.

26 Murphy and Bishop also changed the passwords used for accessing the EFS
27 website and told Gene Levi (“Levi”), the website constructor: “We are going through some
28 internal changes around here. So if you receive any direction to change the website

1 other than from me please reconfirm any changes with me.” *Plaintiff’s Trial Exhibit 19,*
2 *Email dated Dec. 27, 2000, from Ty Bishop to Gene Levi.* Bishop also told Levi that he
3 might need the “exact same web site we have worked on together but with a different
4 company name and a few minor changes.” *Plaintiff’s Trial Exhibit 20, Email from Ty*
5 *Bishop to Gene Levi dated Dec. 30, 2000.* Barry attempted to gain access to the website
6 through Levi himself, but Levi did not take instruction from anyone but Bishop. *Barry Trial*
7 *Declaration* at 20:19-22.

8 At that time, Barry stopped receiving any phone messages from the OC Office of
9 EFS that had been left for him. *Barry Trial Declaration* at 17:21. By January 15, 2001,
10 Barry was unable to access the NBDS database kept by EFS as well as EFS’s bank
11 account. *Id.* at 19:11-12; 20:24-26.

12 Before and after January 15, 2001, Barry demanded that Bishop and Murphy
13 provide full accounting to him of EFS, as well as its client contacts, but they did not
14 comply. *Barry Trial Declaration* at 20:5-17. On or about February 16, 2001, Barry and
15 EFS commenced a lawsuit against Murphy, Bishop, and EPT, filed in Orange County
16 Superior Court. See *Plaintiff’s Trial Exhibit 65, Complaint.* This lawsuit, referred to
17 herein as the state court action, is discussed below.

18 On February 3, 2003, during the pendency of the state court action, EPT filed its
19 own bankruptcy case by filing a voluntary petition for relief under Chapter 7 of the
20 Bankruptcy Code.

21 c. Formation and Existence of FedChex, LLC (FedChex”), and FedChex
22 Recovery, LLC (“FedChex Recovery”)

23 Not long after EFS and Barry sued Bishop, Murphy, and EPT in the state court
24 action, Bishop and Murphy became acquainted with Davis and Arnold. *Transcript of*
25 *Deposition of Rodney Davis (“Davis Deposition”), January 29, 2008* at 21:16-19; *Trial*
26 *Testimony of Rodney Davis (“Davis Trial Testimony”), February 4, 2010,* at 10:03-10:04
27 a.m.; *Transcript of Deposition of Ed Arnold (“Arnold Deposition”), February 8, 2008,* at
28 25:19-24. Davis and Arnold were business partners in other existing businesses. *Davis*

1 *Deposition, January 29, 2008*, at 19:14-20:10. Bishop and Murphy talked to Davis and
2 Arnold about the returned check processing business and discussed the possibility of
3 going into business together. *Davis Deposition, January 29, 2008*, at 21:20-24:25.

4 Davis and Arnold agreed to start a new returned check processing business with
5 Bishop and Murphy, which was called FedChex, and they also started a related separate
6 business called FedChex Recovery to collect checks that FedChex could not collect on.
7 *Davis Deposition, January 29, 2008*, at 43:19-24; 45:2-8.

8 On September 5, 2001, Articles of Organization for both FedChex and FedChex
9 Recovery were filed with the California Secretary of State, creating these businesses as
10 California Limited Liability Companies ("LLCs"). *Plaintiff's Trial Exhibit 100, Limited*
11 *Liability Company Articles of Organization of FEDCHEX, LLC; Plaintiff's Trial Exhibit 101,*
12 *Limited Liability Company Articles of Organization for FedChex Recovery, LLC.* Bishop,
13 Murphy, Davis and Arnold were the original members of these LLCs. *JPTO Undisputed*
14 *Fact 1.22.*

15 On or about October 1, 2001, Bishop, Murphy, Davis, and Arnold entered into and
16 executed an Operating Agreement for FedChex and FedChex Recovery. *JPTO,*
17 *Undisputed Fact 1.20.* Each member of these LLCs (i.e., Bishop, Murphy, Davis and
18 Arnold) made a \$2,000 contribution to both FedChex and FedChex Recovery in October
19 2001 for a 25% interest in each of the companies, and all four members acted as
20 managers of both companies. *JPTO Undisputed Facts 1.21 and 1.23; Section 1.20 of*
21 *Plaintiff's Trial Exhibit 102, Operating Agreement for FEDCHEX, LLC; Section 1.20 of*
22 *Plaintiff's Trial Exhibit 103, Operating Agreement for FEDCHEX RECOVERY, LLC.*
23 Bishop acted as Chief Executive Officer of FedChex and FedChex Recovery. *JPTO*
24 *Undisputed Fact No. 1.27.* Murphy acted as President of FedChex and FedChex
25 Recovery. *Arnold Deposition, February 8, 2008*, at 119:6-10 and 120:12-21. Davis acted
26 as Chief Financial Officer of FedChex and FedChex Recovery. *Transcript of Deposition*
27 *of Brennon Ty Bishop ("Bishop Deposition"), March 5, 2008*, at 95:21-98:11. Arnold
28 acted as Chief Technical Officer of FedChex and FedChex Recovery since their

1 formation. *Bishop Deposition, March 5, 2008*, at 96:10-98:23. FedChex and FedChex
2 Recovery both did business in Orange County, California. *JPTO, Undisputed Facts 1.8*
3 *and 1.9*. As discussed below, Plaintiff alleges that these entities, FedChex and FedChex
4 Recovery, are alter egos of EPT, which were created for the sole purpose of avoiding
5 potential liability to EFS and Barry from the state court action.

6 **2. THE STATE COURT ACTION AND ITS DISCOVERY PROCESS**

7 In the complaint against Bishop, Murphy, and EPT in the state court action, Barry
8 and EFS alleged the following causes of action based on Bishop and Murphy's alleged
9 "gutting" of EFS through their new business, EPT: (1) breach of fiduciary duty;
10 (2) conversion; (3) intentional interference with economic relations; (4) intentional
11 interference with prospective economic relations; (5) negligent interference with
12 economic relations; (6) negligent interference with prospective economic relations;
13 (7) misappropriation of trade secrets; (8) unfair competition and untrue and misleading
14 advertising; (9) trespass as to real and personal property; (10) accounting;
15 (11) declaratory relief; and (12) money had and received." *Plaintiff's Trial Exhibit 65,*
16 *Complaint.*

17 During discovery in the state court action, Barry and EFS obtained copies of
18 documents that they contend show a pattern by Bishop and Murphy to essentially
19 commandeer the assets and clients of EFS to form and make profitable their new
20 business, EPT. For example, this discovery included copies of letters from EPT to all
21 existing EFS customers. One such letter stated that although Bishop and Murphy were
22 going into business as EPT, "the only difference you will notice is the name on the top of
23 the paperwork." *Barry Trial Declaration at 23:22-24:6; Plaintiff's Trial Exhibit 41, Letter*
24 *dated February 13, 2001, from Michael Murphy to Tapitio Markets.* Barry testified that he
25 received copies of identical letters from numerous EFS customers, stating that they were
26 canceling their contracts with EFS. *Barry Trial Declaration at 24:10-15.* Barry also
27 testified that he sent responsive letters to these customers that had sent EFS
28 cancellation notices, but ultimately to no avail as EFS lost those customers to EPT. *Id.*

1 The state court defendants, Bishop and Murphy, also produced during discovery an EPT
2 customer list as of April 4, 2002, which indicated clients who moved from EFS to EPT.
3 *Barry Trial Declaration* at 25:16-18; *Plaintiff's Trial Exhibit 47, Document* entitled
4 *"Electronic Funds Solutions Customer Phone List" dated April 4, 2002.*

5 The state court action continued after Bishop and his wife filed their voluntary
6 petition for relief under Chapter 7 of the Bankruptcy Code on November 19, 2002,
7 commencing this bankruptcy case. On May 15, 2003, the court granted relief from the
8 automatic stay to allow EFS and Barry to continue the state court action. On June 23,
9 2003, Barry and EFS obtained a default judgment against Bishop, Murphy, and EPT for
10 \$8,040,272.19 in compensatory damages and \$16 million in punitive damages for
11 Bishop's misappropriation of EFS's trade secrets. *Plaintiff's Trial Exhibit 193, Judgment*
12 *as Against Ty Bishop in Electronic Funds Solutions, et al. v. Michael Murphy, et al., dated*
13 *June 23, 2003* (incorporating prior orders). The judgment was reversed on appeal and, in
14 its decision, the state appellate court gave Barry and EFS the alternatives of accepting
15 \$50,000, the amount pled in the complaint, or of amending the complaint to specifically
16 allege greater compensatory damages. *Defendants' Trial Exhibit 610, California Court of*
17 *Appeal Opinion in Electronic Funds Solutions, et al. v. Michael Murphy, et. al., dated*
18 *December 14, 2005*, at 2. EFS and Barry chose the latter alternative and amended their
19 complaint to allege claims for greater compensatory damages.

20 On February 24, 2004, Mark Alcock ("Alcock") was appointed by the receiver in
21 the state court action to act as custodian of electronic data and disks that were recovered
22 by the receiver team in the state court action. *Trial Declaration of Mark Alcock ("Alcock*
23 *Trial Declaration")* at 4:6-9; *Plaintiff's Trial Exhibit 227, Report of Court Appointed*
24 *Examiner Mark Alcock, filed January 28, 2005 in Superior Court of the State of California,*
25 *Orange County, Case No. 01CC02447.* Alcock's duties as a member of the Receiver
26 Team were to "basically oversee the operation for the receiver as far as the security and
27 also the collection of data, in particular making sure collecting of electronic data was
28 done properly." *Alcock Trial Declaration* at 4:26-5:1. According to Alcock, he and the

1 receiver team found that there was some intermingling of records, and assets of various
2 businesses shared the same premises that EPT occupied, including the FedChex
3 Entities. *Alcock Trial Declaration* at 23:16-23.

4 On March 10, 2008, a default judgment was entered in the state court action
5 against Murphy, Bishop, and EPT, jointly and severally, for \$30,072,193.14, plus
6 prejudgment interest, punitive damages, and attorneys' fees (but the award of punitive
7 damages was later stricken upon remittur on August 25, 2009). *Plaintiff's Trial Exhibit*
8 *194, Judgment against Defendants Bishop, Murphy and EPT in Electronic Funds*
9 *Solutions, et al. v. Michael Murphy, et al., dated March 10, 2008.*

10 **3. THE BASES FOR PLAINTIFF'S FRAUDULENT TRANSFER CLAIMS**

11 Plaintiff EFS alleges as its primary theory of recovery that FedChex and FedChex
12 Recovery (collectively, the "FedChex Entities") are the alter egos of EPT and were
13 created for the purpose of hindering Barry and EFS in any recovery against EPT, Bishop,
14 and Murphy in the state court action. *See, e.g., Plaintiff's Proposed Findings of Fact and*
15 *Conclusions of Law* at 4:20-6:11. Essentially, Plaintiff alleges that the creation of the
16 FedChex Entities was an intentional and/or constructive fraudulent transfer of EPT's
17 business under 11 U.S.C. § 548 and the California Uniform Fraudulent Transfer Act,
18 California Civil Code § 3439, *et seq.* Plaintiff also seeks the imposition of successor
19 liability on FedChex Entities based on the alter ego doctrine, alleging that FedChex and
20 FedChex Recovery are merely continuing the same business as EPT, rather than as
21 separate and distinct from EPT. According to Plaintiff, if it were to prevail on this type of
22 claim, FedChex and FedChex Recovery would be liable for the default judgment entered
23 in the state court action against EPT, Murphy and Bishop on March 10, 2008.

24 In addition to its alter ego theory, Plaintiff also alleges six claims against
25 defendants for fraudulent prepetition transfers and unauthorized postpetition transfers.
26 These transfers can be grouped into three categories.

27 First, Plaintiff alleges that fraudulent transfers of Bishop's membership interests in
28 FedChex and FedChex Recovery occurred when the other LLC members engaged in a

1 number of capital contribution calls designed to dilute Bishop's shares in both LLCs.
2 Second, Plaintiff alleges that a fraudulent transfer of \$50,000 occurred when Bishop paid
3 that sum to FedChex for an independent sales organization ("ISO") license for him to
4 make referrals of merchants to FedChex in exchange for commissions. Third, Plaintiff
5 alleges that unauthorized post-petition transfers of Bishop's membership interests in the
6 LLCs occurred through further capital contribution calls by Davis, Murphy, and Arnold
7 after Bishop filed his bankruptcy petition, which diluted and eliminated his membership
8 interests in the LLCs.³ Plaintiff alleges that all of these transfers took place in order to
9 hinder EFS from collecting on its state court judgment against EPT, Murphy, and Bishop.

10 a. Capital Contributions to Dilute Bishop's Shares in FedChex and FedChex
11 Recovery: January 2002 to December 2002

12 Sometime in early January 2002, all members of FedChex and FedChex Recovery
13 held a membership meeting where they agreed that additional capital contributions were
14 required to continue operations of FedChex and FedChex Recovery. The members
15 agreed that money put into FedChex and FedChex Recovery by either Davis or the Davis
16 Entities (i.e., YPDS, Niche Directories, and DS Group) would be allocated as capital
17 contributions into FedChex and FedChex Recovery, and that ownership interests in the
18 LLCs would be adjusted accordingly. *Trial Declaration of Edward Arnold Concerning*
19 *Case in Chief* at 4:16-23; *Bishop Deposition, October 20, 2008*, at 11:8-13:5. These
20 agreements were memorialized in written documents signed by the members. *Plaintiff's*
21 *Trial Exhibit 138 Document entitled "Change in Captial (sic) Contributions" referencing*
22 *FedChex, LLC and referencing a date of January 9, 2002; Plaintiff's Trial Exhibit 140,*
23 *Document entitled "Change In Captial (sic) Contributions" referencing FedChex, LLC and*
24 *referencing a date of April 3, 2002; Plaintiff's Trial Exhibit 142, Document entitled*
25 *"Change in Captial (sic) Contributions" referencing FedChex, LLC and referencing a date*

26 _____
27 ³ The Joint Pretrial Order refers to these transfers separately, but also refers to them collectively as the
28 "FedChex \$96,000 Transfers." See, e.g., *JPTO Undisputed Fact 1.33*. The court will not refer to the
transfers collectively, but will analyze them separately for purposes of clarity.

1 of July 10, 2002; Plaintiff's Trial Exhibit 144, Document entitled "Change in Captial (sic)
2 Contributions" referencing FedChex, LLC, and referencing a date of October 9, 2002.

3 On January 9, April 3, July 10, and October 9, 2002, Bishop, Murphy, Davis and
4 Arnold signed four separate documents, all entitled "Change in Captial [sic]
5 Contributions" (collectively, the "FedChex capital contribution documents") with respect to
6 capital contributions made to FedChex. Plaintiff's Trial Exhibit 138, Document entitled
7 "Change in Captial (sic) Contributions" referencing FedChex, LLC and referencing a date
8 of January 9, 2002; Plaintiff's Trial Exhibit 140, Document entitled Change in Captial (sic)
9 Contributions" referencing FedChex, LLC and referencing a date of April 3, 2002;
10 Plaintiff's Trial Exhibit 142, Document entitled "Change in Captial (sic) Contributions"
11 referencing FedChex, LLC and referencing a date of July 10, 2002; Plaintiff's Trial Exhibit
12 144, Document entitled "Change in Captial (sic) Contributions" referencing FedChex, LLC
13 and referencing a date of October 9, 2002. On the same dates, Bishop, Murphy, Davis
14 and Arnold signed four other documents entitled "Change in Captial [sic] Contributions"
15 (collectively, the "Fedchex Recovery capital contribution documents") with respect to
16 capital contributions to FedChex Recovery. Plaintiff's Trial Exhibit 139, Document
17 entitled "Change in Captial (sic) Contributions" referencing FedChex Recovery, LLC and
18 referencing a date of January 9, 2002; Plaintiff's Trial Exhibit 141, Document entitled
19 "Change in Captial (sic) Contributions" referencing FedChex Recovery, LLC and
20 referencing a date of April 3, 2002; Plaintiff's Trial Exhibit 143, Document entitled
21 "Change in Captial (sic) Contributions" referencing FedChex Recovery, LLC and
22 referencing a date of July 10, 2002; Plaintiff's Trial Exhibit 145, Document entitled
23 "Change in Captial (sic) Contributions" referencing FedChex Recovery, LLC and
24 referencing a date of October 9, 2002. Each of these "Change in Capital Contributions"
25 documents set forth the amounts of the capital contributions and transfers of membership
26 interest as the date of the document. All eight of these documents recited the following:

- 27 1) All four members held a meeting;

28

- 1 2) Davis announced a requirement for additional capital contributions to continue
- 2 operating FedChex;
- 3 3) Money put into the business or expenses paid by Davis or the Davis Entities
- 4 should be allocated as capital contributions; and
- 5 4) Adjustments would be made on a quarterly basis.

6 *Plaintiff's Trial Exhibits 138-145*. The only differences between the documents were the
7 dates of the transactions, the amounts transferred by Davis and Bishop, and whether the
8 capital contributions were for FedChex or FedChex Recovery. *Id.* No other documents
9 were offered into evidence at trial regarding the conduct of these membership meetings
10 and what took place at them. *Davis Deposition, January 29, 2008*, at 182:13-16
11 (regarding the January meeting of FedChex), 184:24-185:11 (regarding the January
12 meeting of FedChex Recovery), 190:12-23 (regarding the April meeting of FedChex),
13 196:5-10 (regarding the April meeting of FedChex Recovery), 200:14-19 (regarding the
14 July meeting of FedChex), 204:15-19 (regarding the July meeting of FedChex Recovery),
15 and 207:24-25 (regarding the October meeting for FedChex).

16 Section 3.2 of FedChex and FedChex Recovery's operating agreements stated:

17 . . . To the extent unanimously approved by the Managers and Member
18 who hold a majority interest, from time to time, the Members shall be
19 permitted to make additional Capital Contributions or Equivalents if and to
20 the extent they so desire, and if the Managers determine that such
21 additional Capital Contributions or Equivalents are necessary or
22 appropriate for the conduct of the Company's business. In that event, the
23 Members shall have the opportunity, but not the obligation, to participate
24 in such additional Capital Contributions or Equivalents, the Percentage
25 Interests shall be adjusted by the Managers to reflect the new relative
26 proportions of the Capital Accounts of the Members.

24 *Planitiff's Trial Exhibit 102, Operating Agreement for FedChex, LLC* at ¶ 3.2; *Plaintiff's*
25 *Trial Exhibit 103, Operating Agreement for FedChex Recovery, LLC* at ¶ 3.2.

26 At these membership meetings of FedChex and FedChex Recovery regarding
27 calls for capital contributions, Davis and Bishop were the only members who received
28 credit for additional capital contributions to the LLCs. *Plaintiff's Trial Exhibit 138*,

1 Document entitled "Change in Captial (sic) Contributions" referencing FedChex, LLC and
2 referencing a date of January 9, 2002; Plaintiff's Trial Exhibit 139, Document entitled
3 "Change in Captial (sic) Contributions" referencing FedChex Recovery, LLC and
4 referencing a date of January 9, 2002; Plaintiff's Trial Exhibit 140, Document entitled
5 "Change in Captial (sic) Contributions" referencing FedChex, LLC and referencing a date
6 of April 3, 2002; Plaintiff's Trial Exhibit 141, Document entitled "Change in Captial (sic)
7 Contributions" referencing FedChex Recovery, LLC and referencing a date of April 3,
8 2002; Plaintiff's Trial Exhibit 142, Document entitled "Change in Captial (sic)
9 Contributions" referencing FedChex, LLC and referencing a date of July 10, 2002;
10 Plaintiff's Trial Exhibit 143, Document entitled "Change in Captial (sic) Contributions"
11 referencing FedChex Recovery, LLC and referencing a date of July 10, 2002; Plaintiff's
12 Trial Exhibit 144, Document entitled "Change in Captial (sic) Contributions" referencing
13 FedChex, LLC and referencing a date of October 9, 2002; Plaintiff's Trial Exhibit 145,
14 Document entitled "Change in Captial (sic) Contributions" referencing FedChex
15 Recovery, LLC and referencing a date of October 9, 2002. According to Arnold, the LLC
16 members understood that any invested capital or resources not repaid by the FedChex
17 Entities to the investing members would be treated by the members as capital
18 contributions. *Trial Declaration of Edward Arnold concerning Case in Chief* at 3:2-5.

19 At the January 9, 2002 meeting of the FedChex and FedChex Recovery members,
20 Davis received credit of \$73,885.14 for additional capital contributions to FedChex and
21 \$20,515.37 to FedChex Recovery. *Plaintiff's Trial Exhibit 138, Document entitled*
22 *"Change in Captial (sic) Contributions" referencing FedChex, LLC and referencing a date*
23 *of January 9, 2002; Plaintiff's Trial Exhibit 139, Document entitled "Change in Captial*
24 *(sic) Contributions" referencing FedChex Recovery, LLC and referencing a date of*
25 *January 9, 2002. These credits diluted and reduced Bishop's membership interest in*
26 *FedChex to 2.44% and his interest in FedChex Recovery to 7.01%. Id.*

27 Additional meetings of the LLC members occurred on April 3, 2002, July 10, 2002,
28 and October 9, 2002 where additional capital contribution calls were made. As reflected

1 in the April 3, 2002 member agreements, Davis received credit of \$91,682.07 for
2 additional capital contributions to FedChex and \$10,127.74 to FedChex Recovery.
3 *Plaintiff's Trial Exhibit 140, Document entitled "Change in Captial (sic) Contributions"*
4 *referencing FedChex, LLC and referencing a date of April 3, 2002; Plaintiff's Trial Exhibit*
5 *141, Document entitled "Change in Captial (sic) Contributions" referencing FedChex*
6 *Recovery, LLC and referencing a date of April 3, 2002.* As reflected in those
7 agreements, Davis's capital contributions diluted and reduced Bishop's membership
8 interests in FedChex to 1.15% and in FedChex Recovery to 5.18%.

9 As reflected in the July 10, 2002 member agreements, Davis received credit of
10 \$156,448.95 for additional capital contributions to FedChex and \$15,708.28 to FedChex
11 Recovery. *Plaintiff's Trial Exhibit 142, Document entitled "Change in Captial (sic)*
12 *Contributions" referencing FedChex, LLC and referencing a date of July 10, 2002;*
13 *Plaintiff's Trial Exhibit 143, Document entitled "Change in Captial (sic) Contributions"*
14 *referencing FedChex Recovery, LLC and referencing a date of July 10, 2002.* Also, as
15 reflected in those agreements, Bishop received credit of \$19,000 in additional capital
16 contributions to FedChex and \$19,000 in additional capital contributions to FedChex
17 Recovery. *Id; JPTO Undisputed Fact 1.33.* Bishop made these capital contributions by
18 borrowing on a line of credit against his residence. *Plaintiff's Trial Exhibit 122, Document*
19 *entitled "Washington Mutual Equity Loan Detail"; Bishop Trial Testimony, February 19,*
20 *2010, at 10:51 a.m.* Because of Bishop's additional capital contributions, his membership
21 interest in FedChex increased to 6.02%, while his interest in FedChex Recovery
22 decreased to 3.68%. *Plaintiff's Trial Exhibit 142, Document entitled "Change in Captial*
23 *(sic) Contributions" referencing FedChex, LLC and referencing a date of July 10, 2002;*
24 *Plaintiff's Trial Exhibit 143, Document entitled "Change in Captial (sic) Contributions"*
25 *referencing FedChex Recovery, LLC and referencing a date of July 10, 2002.*

26 As reflected in the October 9, 2002 member agreements, Davis received credit of
27 \$150,271.33 for additional capital contributions to FedChex and \$21,423.68 to FedChex
28 Recovery. *Plaintiff's Trial Exhibit 144, Document entitled "Change in Captial (sic)*

1 *Contributions” referencing FedChex, LLC and referencing a date of October 9, 2002;*
2 *Plaintiff’s Trial Exhibit 145, Document entitled “Change in Captial (sic) Contributions”*
3 *referencing FedChex Recovery, LLC and referencing a date of October 9, 2002. Also, as*
4 *reflected in the October 9, 2002 FedChex, LLC agreement, Bishop received credit for*
5 *\$27,000⁴ in additional capital contributions to FedChex, thereby increasing his ownership*
6 *percentage to 9.12%. Plaintiff’s Trial Exhibit 144, Document entitled “Change in Captial*
7 *(sic) Contributions” referencing FedChex, LLC and referencing a date of October 9, 2002.*
8 *Bishop’s previous contribution of \$19,000 to FedChex Recovery was removed without*
9 *explanation on the October 9, 2002 FedChex Recovery agreement, which reduced his*
10 *ownership interest in that entity to 2.64%. Plaintiff’s Trial Exhibit 145, Document entitled*
11 *“Change in Captial (sic) Contributions” referencing FedChex Recovery, LLC and*
12 *referencing a date of October 9, 2002.*

13 By October 9, 2002, Davis had a 90.12% membership interest in FedChex, and
14 92.08% membership interest in FedChex Recovery. *Plaintiff’s Trial Exhibit 144,*
15 *Document entitled “Change in Captial (sic) Contributions” referencing FedChex, LLC and*
16 *referencing a date of October 9, 2002; Plaintiff’s Trial Exhibit 145, Document entitled*
17 *“Change in Captial (sic) Contributions” referencing FedChex Recovery, LLC and*
18 *referencing a date of October 9, 2002. The effect of Davis’s capital contributions resulted*
19 *in reductions of Bishop’s membership interests in FedChex and FedChex Recovery to*
20 *9.12% and 2.64% respectively. Id. However, Bishop on his bankruptcy schedules listed*
21 *his membership interest in FedChex as 8.5% and his interest in FedChex Recovery as*
22 *1.8%. Plaintiff’s Trial Exhibit 195, Voluntary Petition of Brennon Ty Bishop with Summary*
23 *of Schedules, at 11.*

24

25 _____
26 ⁴ The evidence shows that Bishop loaned \$10,000 to FedChex on September 4, 2002 and \$17,000 on
27 September 19, 2002. *JPTO Undisputed Fact 1.33.* The October 9, 2002 capital contribution documents
28 show these amounts as capital contributions to FedChex. See *Plaintiff’s Trial Exhibit 144, Document*
entitled “Change in Captial (sic) Contributions” referencing FedChex, LLC and referencing a date of
October 9, 2002.

1 As alleged by Plaintiff, Davis's additional capital contributions to FedChex and
2 FedChex Recovery resulted in a constructive fraudulent transfers of Bishop's assets,
3 namely, his membership interests in FedChex and FedChex Recovery, through dilution of
4 his membership interests in these companies. See, e.g., *Plaintiff's Proposed Findings of*
5 *Fact and Conclusions of Law* at 94:9-14. As further alleged by Plaintiff, Bishop's specific
6 capital contributions to the LLCs of \$19,000 and \$27,000 were also fraudulent transfers
7 because he did not receive reasonably equivalent value for these transfers.

8 b. Bishop's Transfer of \$50,000 to FedChex under the ISO Agreement

9 On November 18 or 19, 2002, just before he filed for bankruptcy, Bishop bought a
10 sales license to sell for FedChex by purchasing an Independent Sales Organization
11 Agreement ("ISO Agreement") from FedChex for \$50,000. *Bishop Trial Testimony,*
12 *February 19, 2010, at 1:01-1:09 p.m.; Plaintiff's Trial Exhibit 170, Memo dated November*
13 *18, 2002 to Ty Bishop with purported dealer agreement.* Bishop testified at trial that the
14 reason for his purchase of the ISO Agreement was because he had no means of income
15 due to the fact that he was no longer a member of FedChex and that his business at EPT
16 was "tenuous at best." *Bishop Trial Testimony, February 19, 2010, at 2:02 p.m.* Bishop
17 testified that his goal in buying the ISO agreement was to have a revenue source so that
18 he could support his family. *Id.* at 2.06 p.m. However, Bishop has admitted that he did
19 not make any sales under the ISO agreement and had stopped making efforts to sell
20 FedChex services. *Bishop Deposition, March 5, 2008, at 70:21-71:15.*

21 c. Post-Petition Transfers of Bishop's Remaining Interests in FedChex and
22 FedChex Recovery

23 Bishop's bankruptcy case filing was a dissolution event under FedChex and
24 FedChex Recovery's operating agreements. See *Sections 1.12 and 8.1 of Plaintiff's Trial*
25 *Exhibit 102, Operating Agreement for FedChex, LLC; Section 1.12 and 8.1 of Plaintiff's*
26 *Trial Exhibit 103, Operating Agreement for FedChex Recovery, LLC.* After Bishop filed
27 his bankruptcy case, on November 19, 2002, Davis, Arnold, and Murphy had an
28 emergency meeting regarding Bishop's membership interests in FedChex and FedChex

1 Recovery. Davis, Arnold, and Murphy agreed and decided to terminate Bishop's
2 membership interests in FedChex and FedChex Recovery pursuant to Section 8.1 of the
3 operating agreements of the LLCs. *Davis Deposition, January 29, 2008*, at 228:5-230:21;
4 *Plaintiff's Trial Exhibit 148, Document entitled "Termination of Member Interest, Removal*
5 *of Officer, Removal of Manager" referencing FedChex, LLC and referencing a date of*
6 *November 19, 2002*. They also agreed and decided to remove Bishop as a manager of
7 FedChex and FedChex Recovery and to replace him with Davis as CEO of FedChex and
8 FedChex Recovery. *Id.*

9 Bishop's membership interests continued to be reflected in FedChex and FedChex
10 Recovery documents until December 4, 2002. *Plaintiff's Trial Exhibit 150, Document*
11 *entitled "Completion of Section 8.1 Promissory Note Calculations, Former Member*
12 *Interest and Capital Contribution" referencing FedChex, LLC and referencing a date of*
13 *December 4, 2002; Plaintiff's Trial Exhibit 151, Document entitled "Completion of Section*
14 *8.1 Promissory Note Calculations, Former Member Interest and Capital Contribution"*
15 *referencing FedChex Recovery, LLC and referencing a date of December 4, 2002;*
16 *Plaintiff's Trial Exhibit 168, Document entitled "Completion of Section 8.1 Promissory*
17 *Note Calculations, Former Member Interest and Capital Contribution" referencing*
18 *FedChex, LLC and referencing a date of December 4, 2002*. After the October 2002
19 capital contribution agreements, Bishop's membership interests in FedChex and
20 FedChex Recovery were 9.12% and 2.64% respectively. See *Plaintiff's Trial Exhibit 144,*
21 *Document entitled "Change in Captial (sic) Contributions" referencing FedChex, LLC and*
22 *referencing a date of October 9, 2002; Plaintiff's Trial Exhibit 145, Document entitled*
23 *"Change in Captial (sic) Contributions" referencing FedChex Recovery, LLC and*
24 *referencing a date of October 9, 2002*. As reflected in the December 4, 2002 member
25 agreements, Bishop's interests in FedChex and FedChex Recovery were reduced to
26 8.14% and 2.19% respectively. *Plaintiff's Trial Exhibit 150, Document entitled*
27 *"Completion of Section 8.1 Promissory Note Calculations, Former Member Interest and*
28 *Capital Contribution" referencing FedChex, LLC and referencing a date of December 4,*

1 2002; *Plaintiff's Trial Exhibit 151, Document entitled "Completion of Section 8.1*
2 *Promissory Note Calculations, Former Member Interest and Capital Contribution"*
3 *referencing FedChex Recovery, LLC and referencing a date of December 4, 2002.*
4 However, there is no explanation for these decreases in his membership interests, and
5 Bishop testified at trial that his ownership percentages in FedChex and FedChex
6 Recovery were incorrectly stated on his bankruptcy petition. *Bishop Trial Testimony,*
7 *February 19, 2010, at 1:48–1:49 p.m.* Bishop testified that he believed his interest in
8 FedChex was worth \$62,000, but did not know the relative percentage ownership. *Id.*
9 Bishop also testified that he believed his membership interest in FedChex Recovery was
10 worth \$2,000 as of the petition date, but did not know the percentage. *Id., February 19,*
11 *2010, at 1:49 p.m.*

12 After Bishop filed his bankruptcy petition, on December 4, 2002, he sold his
13 remaining interests in FedChex and FedChex Recovery to the remaining members of the
14 LLCs. *Plaintiff's Trial Exhibit 152, Document entitled "Former Members Purchase Price"*
15 *referencing FedChex, LLC and referencing a date of December 4, 2002 and referencing*
16 *Ty Bishop's receipt of \$62,000; Plaintiff's Trial Exhibit 154, Document entitled "Former*
17 *Members Purchase Price" referencing FedChex Recovery, LLC and referencing a date of*
18 *December 4, 2002, and referencing Brennon Ty Bishop's receipt of \$2,000.* Bishop
19 received \$62,000 for his \$48,000 capital balance in FedChex. *Plaintiff's Trial Exhibit 152,*
20 *Document entitled "Former Members Purchase Price" referencing FedChex, LLC and*
21 *referencing a date of December 4, 2002 and referencing Ty Bishop's receipt of \$62,000.*
22 The additional \$14,000 over Bishop's balance of \$48,000 capital account was believed by
23 the remaining members to be "fair consideration" for sale of the last of his member
24 interest. *Id.* Bishop also received \$2,000 for his 2.19% member interest in FedChex
25 Recovery. *Plaintiff's Trial Exhibit 154, Document entitled "Former Members Purchase*
26 *Price" referencing FedChex Recovery, LLC and referencing a date of December 4, 2002,*
27 *and referencing Brennon Ty Bishop and the amount of \$2,000.* In this transaction,
28 Bishop waived his right to an appraisal of his membership interest and did not have

1 approval of the trustee or the court for the transaction. *Plaintiff's Trial Exhibit 153,*
2 *Document entitled "Promissory Note Balloon Payment" referencing and bearing a*
3 *signature of FedChex, LLC, dated December 22, 2002 with Ty Bishop as payee in the*
4 *amount of \$62,000; Plaintiff's Trial Exhibit 155, Document entitled "Promissory Note*
5 *FedChex Recovery Balloon Payment" referencing and bearing a signature by FedChex,*
6 *LLC dated December 22, 2002 with Ty Bishop as payee in the amount of \$2,000; Trial*
7 *Declaration of Leonard Shulman ("Shulman Trial Declaration"), filed June 30, 2009, at 7*
8 ¶ 5. At this point, Bishop was completely bought out from his membership interests in
9 FedChex and FedChex Recovery. See *Plaintiff's Trial Exhibit 150, Document entitled*
10 *"Completion of Section 8.1 Promissory Note Calculations, Former Member Interest and*
11 *Capital Contribution" referencing FedChex, LLC and referencing a date of December 4,*
12 *2002; Plaintiff's Trial Exhibit 151, Document entitled "Completion of Section 8.1*
13 *Promissory Note Calculations, Former Member Interest and Capital Contribution"*
14 *referencing FedChex Recovery, LLC and referencing a date of December 4, 2002.*

15 However, Davis did not pay Bishop cash for the purchase of Bishop's remaining
16 membership interests. Instead, Davis gave promissory notes to Bishop, one in the
17 amount of \$62,000 (buying out Bishop's interest in FedChex) and one in the amount of
18 \$2,000 (buying out Bishop's interest in FedChex Recovery), with an interest rate of 5
19 percent on the Promissory Notes. *Plaintiff's Trial Exhibit 153, Document entitled*
20 *"Promissory Note Balloon Payment" referencing and bearing a signature of FedChex,*
21 *LLC, dated December 22, 2002 with Ty Bishop as payee in the amount of \$62,000;*
22 *Plaintiff's Trial Exhibit 155, Document entitled "Promissory Note FedChex Recovery*
23 *Balloon Payment" referencing and bearing a signature by FedChex, LLC dated*
24 *December 22, 2002 with Ty Bishop as payee in the amount of \$2,000. The FedChex*
25 *Promissory Note provided that full payment plus interest would be made within 5 years of*
26 *the purchase. Plaintiff's Trial Exhibit 153, Document entitled "Promissory Note Balloon*
27 *Payment" referencing and bearing a signature of FedChex, LLC, dated December 22,*
28 *2002 with Ty Bishop as payee in the amount of \$62,000. The FedChex Recovery*

1 Promissory Note provided that full payment plus interest would be made on or before
2 March 1, 2003. *Plaintiff's Trial Exhibit 155, Document entitled "Promissory Note*
3 *FedChex Recovery Balloon Payment" referencing and bearing a signature by FedChex,*
4 *LLC dated December 22, 2002 with Ty Bishop as payee in the amount of \$2,000.*
5 Bishop never received payment for his ownership interests. *Davis Deposition, January*
6 *29, 2008, at 256:12-257:18, and 260:23-261:1; Shulman Trial Declaration, ¶ 5.*

7 DISCUSSION

8 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C.
9 §§ 157(b) and 1334(b). This matter is a core proceeding under 28 U.S.C. § 157(b)(2)(A),
10 (E), (H), and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a).

11 I. SECOND AND SIXTH CLAIMS FOR RELIEF: AVOIDANCE OF 12 CONSTRUCTIVE FRAUDULENT TRANSFERS UNDER 11 U.S.C. § 548 AND CALIFORNIA UNIFORM FRAUDULENT TRANSFER ACT

13 By the Second Claim for Relief, Plaintiff seeks to avoid the transfers of the
14 Bishop's assets, including the member interests and cash transfers, pursuant to 11
15 U.S.C. § 548(a)(1)(B) as constructively fraudulent transfers. Alternatively, by the Sixth
16 Claim for Relief, Plaintiff seeks to avoid the transfers as constructively fraudulent under
17 the California Uniform Fraudulent Transfer Act ("CUFTA"), California Civil Code, § 3439
18 et seq., pursuant to 11 U.S.C. § 544(b).

19 In order to protect the interests of a bankruptcy estate, a trustee—or in this case, a
20 successor-in-interest to the trustee—may bring an action to avoid a transfer that is either
21 intentionally fraudulent (11 U.S.C. § 548(a)(1)(A)) or constructively fraudulent
22 (§ 548(a)(1)(B)). Section 548(a)(1)(B) provides:

23 The trustee may avoid any transfer . . . of an interest of the debtor in
24 property, or any obligation . . . incurred by the debtor, that was made or
25 incurred on or within 2 years before the date of the filing of the petition,⁵ if
the debtor voluntarily or involuntarily—

26
27 ⁵ For our purposes however, the reach-back period under section 548 is **only one year**, because the
Bishop's bankruptcy petition was filed before April 21, 2006. See 11 U.S.C. § 548 (2005).

1 (B)(i) received less than a reasonably equivalent value in exchange for
2 such transfer or obligation; and

3 (ii)(I) was insolvent on the date that such transfer was made or
4 such obligation was incurred, or became insolvent as a result of
such transfer or obligation;

5 (II) was engaged in business or a transaction, or was about to
6 engage in business or a transaction, for which any property
remaining with the debtor was an unreasonably small capital;

7 (III) intended to incur, or believed that the debtor would incur, debts
8 that would be beyond the debtor's ability to pay as such debts
matured; or

9 (IV) made such transfer to or for the benefit of an insider, or
10 incurred such obligation to or for the benefit of an insider, under an
11 employment contract and not in the ordinary course of business.

12 11 U.S.C. § 548(a)(1)(B)(emphasis added). Thus, a transfer is constructively fraudulent,
13 and recoverable pursuant to 11 U.S.C. § 550, when the debtor makes a transfer within
14 two years (one year in this case) of the petition date, received less than reasonably
15 equivalent value for the transfer, and one of four resulting situations occur. See *In re*
16 *Fitness Holdings International, Inc.*, 714 F.3d 1141, 1145 (9th Cir. 2013). These
17 elements are similar to CUFTA,⁶ except that CUFTA permits a longer reach-back period,
18 and the standard for reasonably equivalent value is somewhat different, which is
19 discussed *infra*. See California Civil Code, § 3439.09(a); *Monastra v. Konica Business*

20 _____
21 ⁶ California Civil Code § 3439.04 provides:

22 (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor,
whether the creditor's claim arose before or after the transfer was made or the obligation
was incurred, if the debtor made the transfer or incurred the obligation as follows: . . .

23 (2) Without receiving a reasonably equivalent value in exchange for the transfer or
24 obligation, and the debtor either:

25 (A) Was engaged or was about to engage in a business or a transaction for which the
remaining assets of the debtor were unreasonably small in relation to the business or
transaction.

26 (B) Intended to incur, or believed or reasonably should have believed that he or she
27 would incur, debts beyond his or her ability to pay as they became due.

28 California Civil Code, § 3439.04(a)(2)(A) and (B).

1 *Machines, U.S.A., Inc.*, 43 Cal. App. 4th 1628, 1645-1646 (1996). The court therefore
2 analyzes the alleged fraudulent transfers under the Bankruptcy Code and CUFTA
3 provisions simultaneously and will note any differences where applicable. *In re AFI*
4 *Holding, Inc.*, 525 F.3d 700, 703 (9th Cir. 2008); *In re United Energy Corp.*, 944 F.2d 589,
5 594 (9th Cir. 1991); *In re Maddalena*, 176 B.R. 551, 553 (Bankr. C.D. Cal. 1995).

6 **A. Transfers of Bishop’s Membership Interests in FedChex and FedChex**
7 **Recovery: Alter Ego/Successor Liability to EPT**

8 By this action, Plaintiff seeks to avoid the alleged transfer of EPT’s business into
9 the FedChex Entities. *Plaintiff’s Proposed Findings of Fact and Conclusions of Law* at
10 5:14-19. The complaint characterized these allegations merely as “alter ego” and
11 “conspiracy” allegations. *See Fourth Amended Complaint* at 6-10. However, it is clear
12 from Plaintiff’s Proposed Findings that the real issue is whether or not there was a
13 fraudulent transfer of EPT into FedChex and FedChex Recovery. As outlined above,
14 Plaintiff alleges that Bishop and Murphy wrongfully took the business of EFS from Barry,
15 created their own business, EPT and, in order to escape any potential liability under the
16 state court action, Bishop and Murphy entered into agreements with Davis and Arnold to
17 carry on the same business as EPT through two new LLC’s, FedChex, LLC and FedChex
18 Recovery, LLC. *See Plaintiff’s Proposed Findings of Fact and Conclusions of Law* at
19 4:20-27. Thus, as Plaintiff asserts, “the formation of the [two FedChex Entities]
20 constituted an indirect intentional [and/or constructive] fraudulent transfer of 50% of the
21 ownership interest in EPT to Davis and Arnold, with Bishop and Murphy retaining the
22 other 50% interest in EPT in the form of a 25% interest to each of them in the two newly
23 formed LLCs which would substantially, if not completely, step into the shoes of EPT
24 relative to the operation of the business in which EPT was engaged—the same business
25 it had taken from EFS.” *Plaintiff’s Proposed Findings of Fact and Conclusions of Law* at
26 5:14-19. As Plaintiff further asserts, while EPT was on the verge of bankruptcy, FedChex
27 and FedChex Recovery were growing and earning profits by diverting those profits from
28 EPT. *See Plaintiff’s Proposed Findings of Fact and Conclusions of Law* ¶ 192, at 65.

1 Plaintiff first bears the burden of demonstrating a transfer of an interest of the
2 debtor in property or an obligation incurred by the debtor. 11 U.S.C. § 548. Under the
3 Bankruptcy Code, “transfer” means:

4 (A) The creation of a lien;

5 (B) The retention of title as a security interest;

6 (C) The foreclosure of a debtor’s equity of redemption; or

7 (D) Each mode, direct or indirect, absolute or conditional, voluntary or
8 involuntary, of disposing of or parting with—

9 i. Property; or

10 ii. An interest in property.

11 11 U.S.C. § 101(54). For the purposes of Section 548, “interest of the debtor” has
12 generally been held to be equivalent to “property of the estate” as defined in section 541.
13 See *Begier v. Internal Revenue Service*, 496 U.S. 53, 59 (1990). Thus, Section 548 only
14 applies to those transfers that affect property that would have been property of the
15 bankruptcy estate but for the transfer. See 5 *Resnick and Sommer, Collier on*
16 *Bankruptcy*, ¶ 548.03[2][a], at 548-44 (16th ed. 2013). In order to establish a Section 548
17 claim, there must be an improper transfer of property of the estate that diminishes the
18 value of the debtor’s bankruptcy estate from the standpoint of the creditors. *In re Jeffrey*
19 *Bigelow Design Group*, 956 F.2d 479, 485 (4th Cir. 1992). Property of the bankruptcy
20 estate may include intangible assets, such as corporate goodwill and a “book of
21 business.” See *Stoumbos v. Kilimnik*, 988 F.2d 949, 963-964 (9th Cir. 1993). The
22 transfer of an ongoing business concern may constitute a fraudulent transfer. See, e.g.,
23 *id.* In an action to establish a fraudulent transfer, Plaintiff must establish each requisite
24 element by a preponderance of evidence. *In re Consolidated Meridian Funds*, 487 B.R.
25 263, 267 (Bankr. W.D. Wash. 2013); *Whitehouse v. Six Corp.*, 40 Cal. App. 4th 527, 533-
26 534 (1995).

27 Bishop had a property interest in EPT and he had a property interest in FedChex
28 and FedChex Recovery because he was a partial owner of all of these companies.

1 Plaintiff's biggest obstacle in proving a fraudulent transfer of EPT's business to Davis and
2 his entities, however, is establishing the existence of the first element of a fraudulent
3 transfer: that a *transfer* of debtor's interest in property ever took place, which would
4 require in effect a factual finding that FedChex and FedChex Recovery are the same
5 business as EPT. In its attempt to establish such a transfer, Plaintiff argues that EPT and
6 its members, Bishop and Murphy, essentially transferred the "guts" of EPT's business—
7 its clients, workforce, and trade secrets—into the two FedChex Entities, FedChex and
8 FedChex Recovery. In Plaintiff's view, this transfer had the effect of causing EPT to falter
9 and fail while the FedChex Entities experienced growth and profitability.

10 As discussed herein, the court finds that Plaintiff has not established the required
11 element of a "transfer" by a preponderance of the evidence and, as such, it cannot prevail
12 on its claims for constructive fraudulent transfer under Section 548 of the Bankruptcy
13 Code or under the CUFTA.

14 1. Plaintiff Has Not Established That EPT Transferred its Client List or Clientele to
15 the FedChex Entities

16 Plaintiff contends that EPT's business was transferred to the FedChex Entities as
17 shown by transfer of EPT's client list. As discussed previously, Bishop, Murphy, Davis
18 and Arnold formed FedChex as a returned check processing business and FedChex
19 Recovery as a business to collect on checks upon which FedChex was unable to collect.
20 *Davis Deposition, January 29, 2008, at 43:19-24; 45:5-7; Davis Trial Declaration*
21 *Concerning Case in Chief at 2:1-4:18; Arnold Trial Declaration Concerning Case in Chief*
22 *at 2:26-5:5. When FedChex Recovery was formed, EPT began using FedChex*
23 *Recovery to collect checks that FedChex could not collect through electronic means.*
24 *Davis Trial Testimony, May 7, 2010, at 10:31-10:35 a.m.; Arnold Deposition, February 8,*
25 *2008, at 94:21 - 96:19. Plaintiff contends that because EPT needed to give names and*
26 *information of EPT's clientele to FedChex Recovery in order for FedChex Recovery to be*
27 *able to do collection work for EPT, FedChex obtained EPT's client list to "acquire those*
28 *clientele upon any bankruptcy filing and/or cessation of business by EPT, if not sooner."*

1 See e.g., *Plaintiff's Proposed Findings of Fact and Conclusions of Law* ¶ 191.5 at 60; see
2 also, *Davis Trial Testimony, May 7, 2010*, at 3:45-3:47 p.m. In response to such
3 allegations, Davis testified that “[n]either FEDChex Recovery nor FEDChex, LLC actively
4 sought to take any customer from ePT or EFS” and that neither entity “ever took any
5 proprietary information from EFS or ePT.” *Davis Trial Declaration Concerning Case in*
6 *Chief* at 2:17 and 2:8-9. Thus, the issue is raised whether FedChex Entities improperly
7 appropriated EPT’s (and thus EFS’s) customer list or clientele.

8 FedChex apparently had some access to EPT’s client list because it processed
9 checks for EPT as its customer. *Davis Trial Testimony, May 7, 2010*, at 10:58-10:59
10 a.m.; *Arnold Deposition, February 8, 2008*, at 94:21 – 95:7, 96:10-19. However, neither
11 side offered into evidence EPT’s customer list at trial, and there is no indication that the
12 customer list was ever offered into evidence in the state court action. Thus, Plaintiff has
13 not adequately shown that the FedChex Entities directly appropriated EPT’s customer list
14 in general.

15 As acknowledged by Plaintiff, at the time FedChex Recovery was formed, EPT
16 was using a different collection company before FedChex Recovery for collection of
17 checks by conventional non-electronic means, but Murphy and Bishop had FedChex
18 Recovery undertake this work, which shows that the FedChex Entities had appropriated
19 EPT’s customer list. *Plaintiff's Proposed Findings of Fact and Conclusions of Law* ¶
20 191.2 at 58, *citing Davis Trial Testimony, May 7, 2010*, at 3:45-3:47 p.m. The court is not
21 sure how this allegation shows a misappropriation of a customer list by the FedChex
22 Entities because EPT decided to use a different subcontractor to handle conventional,
23 non-electronic check recovery work. Moreover, the cited testimony does not necessarily
24 establish that EPT gave its entire customer list to FedChex Recovery, but that customer
25 information was given by EPT to FedChex Recovery in order to do the collection work.
26 *Id.*

27 Plaintiff apparently attempts to show that the FedChex Entities improperly
28 acquired EPT’s customer list by arguing that at least two EPT customers were serviced

1 by the FedChex Entities. Emerald City, a Pizza Hut franchise in Seattle, Washington,
2 was identified as one of EPT's customers in the period preceding EPT's bankruptcy filing
3 on February 3, 2003. See *Plaintiff's Proposed Findings of Fact and Conclusions of Law*
4 ¶ 191.5, at 60-61. On February 20, 2003, Emerald Pizza was listed as one of FedChex's
5 customers, and in 2003 was listed as one of FedChex's top six generators of revenue.
6 See *Plaintiff's Trial Exhibit 206, FedChex Customer List with Customer List*
7 *Supplemental; Davis Deposition, September 10, 2004*, at 8:20-9:20. Also, FedChex
8 acquired Domino's Corporate as a client in September 2002 because Murphy already
9 had knowledge and information regarding how to service Domino's franchises based on
10 his experience in servicing them for EPT. *Davis Trial Testimony, May 7, 2010*, at 11:49
11 a.m.; *Plaintiff's Trial Exhibit 245, Entrepreneur Magazine Printout*.

12 In the court's view, these two isolated instances in which the FedChex Entities
13 serviced prior EPT clients do not by themselves show that EPT transferred its customer
14 list to FedChex. Plaintiff did not offer into evidence EPT's customer list to compare with
15 FedChex's customer list. Instead, Plaintiff offered into evidence Exhibit 245, a reprinted
16 article from Entrepreneur.com indicating that FedChex had Domino's Pizza as an
17 account. While Plaintiff points out these two instances in which the FedChex Entities did
18 business for two of EPT's prior customers, this evidence does not provide a full account
19 to show that FedChex appropriated EPT's customer list.

20 Plaintiff also offered some evidence that FedChex ISOs contacted EPT customers
21 by letter and by using EPT's name to promote FedChex, including a letter from Greg
22 Blanchard to Home Depot (dated December 17, 2001), and an email from Kenny D.
23 Aquila to a representative of Brunswick (dated January 13, 2002), which were customers
24 of EPT. *Plaintiff's Trial Exhibit 226, Supplemental Statement, with Newly Discovered*
25 *Evidence, in Support of Motion to Amend Judgment to Reflect the Names of Additional*
26 *Judgment Debtors, Declaration of Mark Alcock, Declaration of Einar Wm. Johnson,*
27 *Documents Attached to Supplemental Statement*, at 40; 67-72; *Plaintiff's Trial Exhibit*
28 *227, Report of Court Appointed Examiner Mark Alcock* at 21; 25-26. These letters stated

1 that FedChex was the new name of EPT. *Id.* Alcock, as part of the Receiver team for
2 EPT, attested that these letters are examples of several similar letters. *Plaintiff's Trial*
3 *Exhibit 227* at 4 lines 5-8. Two letters do not indicate that FedChex appropriated EPT's
4 entire clientele or customer list; whether this was a common practice among all of
5 FedChex's ISOs or just a few instances is unclear from the record before the court.

6 Plaintiff also points to statements by Arnold in his deposition admitting that Arnold
7 believed, but was not certain, that clientele of EPT became clientele of FedChex
8 sometime between the formation of FedChex and Bishop filing for bankruptcy. *Arnold*
9 *Deposition, February 8, 2010*, at 97:8-14. Plaintiff points to Barry's trial declaration,
10 where Barry describes several calls he had made to former EFS clients to determine if
11 they were now FedChex clients. *Barry Trial Declaration* at 45:24-27; *Plaintiffs' Trial*
12 *Exhibit 207; Phone Notes of Michael Barry in May of 2003*. Barry's notes from these calls
13 only list five FedChex clients that were previously EFS clients, two of which represent
14 Domino's franchises. *See Plaintiffs' Trial Exhibit 207, Phone Notes of Michael Barry in*
15 *May of 2003*. Furthermore, nothing shows that these five clients were EPT clients before
16 becoming FedChex clients. Barry admits that, during his calls with these five companies,
17 there was no mention of EPT. *Barry Trial Declaration* at 45:25. The limited number of
18 clients and the absence of evidence that these clients were indeed previous EPT clients
19 fails to show that the EPT business was being transferred wholesale to FedChex.

20 The evidence indicates that after EPT began struggling financially and eventually
21 filed for bankruptcy on February 3, 2003, some clients migrated from EPT to FedChex.
22 *Arnold Trial Declaration Concerning Case in Chief* at 4:2-5; *Bishop Trial Testimony,*
23 *February 19, 2010*, at 9:41 a.m. But the evidence also shows that FedChex, as a more
24 technologically advanced check processing business, had the ability to reach large
25 corporations like Pizza Hut Corporation or Swans Foods, which EPT was not able to
26 serve. *Arnold Trial Declaration Concerning Case in Chief* at 4:5-12; *Arnold Trial*
27 *Testimony, May 6, 2010*, at 11:39-11:42 a.m.; *Arnold Deposition, February 8, 2008*, at
28 79:21 – 80:21, 81:10-15, 82:12 - 83:24; *Bishop Trial Testimony, February 19, 2010*, at

1 9:38-9:39 a.m. Although FedChex and EPT both worked with EFT Network, a third-party
2 processor of checks, FedChex scanned in check items and electronically read checks
3 while EPT did not have this capability. *Id.* FedChex had integrated software to automate
4 much of what was required to process the checks to EFT, while EPT had its workers
5 manually entering the information and outsourced much of their processing work. *Arnold*
6 *Trial Declaration Concerning Case in Chief* at 4:5-12; *Arnold Trial Testimony, May 6,*
7 *2010*, at 9:35-9:36 a.m.; *Arnold Deposition, February 8, 2008*, at 81:10-15. EPT's
8 business was more designed for smaller "mom and pop" clients, like a local dry cleaners.
9 *Arnold Trial Testimony, May 6, 2010*, at 11:40-11:42 a.m.; *Arnold Deposition, February 8,*
10 *2008*, at 79:21 – 80:21, 81:10-15, 82:12 - 83:24. Plaintiff's assertion that EPT and
11 FedChex serviced both "mom and pop" business customers and large business
12 customers is not supported by the evidence; EPT simply was not set up to handle large-
13 scale clients in the way that FedChex was, which allowed FedChex to move forward
14 while EPT could not. *Id.*

15 The court finds that Plaintiff has not proven by a preponderance of the evidence
16 that EPT transferred its customer list or clientele to the FedChex Entities for purposes of
17 its fraudulent transfer claims under federal or state law because the circumstantial
18 evidence is inconclusive that there was such a transfer rather than former customers of
19 EPT going to the FedChex Entities for service by offering more competitive services and
20 for EPT's business failure.

21 2. Plaintiff Has Not Established That EPT Transferred Its Workforce to the
22 FedChex Entities

23 Plaintiff contends that EPT's business was transferred to the FedChex Entities as
24 shown by the transfer of EPT's workforce to FedChex when Bishop and Murphy joined
25 Davis and Arnold to create FedChex. See e.g., *Plaintiff's Proposed Findings of Fact and*
26 *Conclusions of Law* ¶ 191.3 at 59-60. More precisely, Plaintiff alleges that FedChex
27 gained an unfair advantage in the market by fraudulently acquiring EPT (or EFS's)
28 workforce, namely, their salespeople. It is not disputed that both EPT and the FedChex

1 Entities used “IBOs” and “ISOs”—essentially independent contractors acting as
2 salespeople—as their sales and marketing force. *Davis Trial Testimony, May 7, 2010*, at
3 11:28-11:30 a.m. Murphy acknowledged that he considered recruiting the better “IBOs”
4 (salespeople) from EPT for FedChex’s sales force. *Trial Testimony of Michael Murphy,*
5 *February 5, 2010*, at 10:58-10:59 a.m. Davis denied that it was his goal and FedChex’s
6 intent to take EPT’s salesforce. *Davis Trial Testimony, February 4, 2010*, at 9:51 a.m.

7 However, use of some of the same people as IBOs and ISOs in one company to
8 the next does not necessarily establish the transfer of a workforce from one business to
9 another for purposes of a fraudulent transfer claim. EPT had a sales force of its own
10 before FedChex was formed, but Plaintiff did not offer evidence of exactly how many
11 ISOs transferred from EPT to FedChex. It is similarly unclear from the record whether
12 the ISOs who did transfer from EPT to FedChex did so because EPT was a failing
13 business by the beginning of 2003, and perhaps the workers saw a better economic
14 opportunity for sales at a new company. Accordingly, the court finds that Plaintiff has not
15 proven by a preponderance of the evidence that EPT transferred its workforce to the
16 FedChex Entities for purposes of its fraudulent transfer claims under federal or state law
17 because the circumstantial evidence is inconclusive that there was such a transfer as
18 shown by the number of workers going over to the FedChex Entities or that any workers
19 went over to FedChex for reasons other than EPT’s business failure or FedChex offering
20 a better working environment.

21 3. Plaintiff Has Not Established That EPT Transferred Its Goodwill or Trade
22 Secret Information to the FedChex Entities

23 Plaintiff further argues that Bishop and Murphy brought to FedChex their familiarity
24 with the business of processing funds electronically, including collection of NSF checks
25 electronically, which they gained from their experience at EPT and EFS. See e.g.,
26 *Plaintiff’s Proposed Findings of Fact and Conclusions of Law* ¶ 191.1, at 58. Plaintiff also
27 points out that Davis and Arnold had not even heard of this type of business before
28 meeting Bishop and Murphy. *Plaintiff’s Proposed Findings of Fact and Conclusions of*

1 Law ¶ 191.1, at 58, citing *Arnold Trial Testimony*, May 6, 2010, at 1:39–1:40 p.m. As
2 alleged by Plaintiff, Davis acknowledged a benefit to having Bishop and Murphy involved
3 in the business because they had some industry knowledge through their experience in
4 the business, such as EFS and EPT. *Id.*, citing *Davis Deposition*, January 29, 2008, at
5 43:25-44. Plaintiff also alleges that FedChex and FedChex Recovery used EFS’s
6 membership in NACHA (a database for companies involved in the electronic movement
7 of money and financial data) to transfer EPT’s processing relationships to the FedChex
8 Entities. See *Plaintiff’s Proposed Findings of Fact and Conclusions of Law* ¶ 63, at 27 (“It
9 took substantial money and effort for EFS to find EFT, including a membership in NACHA
10 which Barry acquired, expending \$5,000 of his own funds . . . membership in NACHA
11 was required to get information regarding [check] processors. . . . It is noted that Bishop
12 and Murphy never had a membership in NACHA.”) (citations to the record omitted).

13 Although it is true that Bishop and Murphy may have brought in their knowledge of
14 processing funds electronically, it is unclear what proprietary information belonging to
15 EFS was wrongly appropriated by Defendants. According to Arnold and Davis, Bishop
16 and Murphy told them about the business of NSF check recovery for customers, but
17 knowledge of the existence of this type of business is not proprietary trade secret type
18 knowledge itself. *Arnold Trial Declaration Concerning Case in Chief* at 2:1-15; *Davis Trial*
19 *Declaration Concerning Case in Chief* at 2:1-14; *Arnold Deposition*, February 8, 2008, at
20 20:11-40:2. The fact that Davis and Arnold were not familiar with the check recovery
21 industry does not make the existence of the industry proprietary information. *Id.*

22 Arnold and Davis brought into FedChex their expertise in business, infrastructure,
23 and programming—something apparently missing from both EFS and EPT. *Arnold Trial*
24 *Declaration Concerning Case in Chief* at 2:1- 3:15; *Davis Trial Declaration Concerning*
25 *Case in Chief* at 2:1- 3:16; *Arnold Deposition*, February 8, 2008, at 20:11-40:2; *Murphy*
26 *Trial Testimony*, February 5, 2010, at 2:57-3:01 p.m. Davis was an entrepreneur who
27 had influence over several businesses and eventually was the main source of capital
28 investments when FedChex required capital. *Davis Trial Declaration Concerning Case in*

1 *Chief* at 2:22-27 and 3:12-16; *Arnold Trial Declaration Concerning Case in Chief* at 1:26 –
2 5:3; *Arnold Deposition, February 8, 2008*, at 20:11-25:18, Davis and Arnold saw an
3 opportunity to add to the business their expertise in programming and infrastructure in
4 order to build a better product than what was currently in the marketplace—including EPT
5 and EFS. *Davis Trial Declaration Concerning Case in Chief* at 2:10-14; *Arnold Trial*
6 *Declaration Concerning Case in Chief* at 1:26 – 5:3; *Arnold Deposition, February 8, 2008*,
7 at 83:6-24. According to Arnold, he and Davis in forming FedChex “were going to do
8 [electronic check recovery] in a much more sophisticated way.” *Arnold Deposition,*
9 *February 8, 2008*, at 83:6-7. Specifically, Arnold stated:

10 We were going to image all of our checks. We were going to
11 professionally data enter all of our items. We were going to
12 build direct relationships with financial institutions, as well as
13 third-party processors, for the submission of electronic items.
14 We were going to run very sophisticated reporting and back
15 office and website access for these clients. We were going to
16 provide a seamless integration with a traditional check
17 collections through FedChex Recovery from the perception of
18 the client. We were going to do – it is the difference between
19 a tricycle and a pretty serious car. We were going to do a lot.

16 *Id.* at 83:12-24. Arnold told Bishop and Murphy that FedChex was “going to do it [i.e.,
17 electronic check recovery] completely differently than how EPT functioned.” *Id.* at 84:11-
18 13. For example, as Arnold testified at trial, he and Davis wanted to have a direct
19 relationship with the banks so that they would no longer need to pay the extra expense of
20 using third party check processors such as EFT or NBDS, which EPT and EFS had to
21 use. *Arnold Trial Testimony, May 6, 2010*, at 9:36 a.m. Arnold testified that EPT’s
22 technology was inadequate for the business that he and Davis wanted FedChex to be in
23 electronic check recovery. For example, EPT ran the Access database software
24 program, which was bundled with Microsoft Office software suite, that would have been,
25 in his opinion, inadequate to run a company of any scale or reliability. *Arnold Trial*
26 *Testimony, May 6, 2010*, at 3:56-3:57 p.m. EPT also used a phone switching system
27 that, according to Arnold, was suited for a four-to-six person business rather than a larger
28 business. *Arnold Trial Testimony, May 6, 2010*, at 3:57-3:58 p.m.

1 The court finds that the evidence regarding the differences between FedChex and
2 EPT, and Arnold's testimony in particular, was credible. The evidence indicates that
3 FedChex and FedChex Recovery were separate entities from EPT. Although, as
4 discussed above, the EPT receiver team uncovered some intermingling of computer
5 records, personnel, etc. between EPT and the FedChex Entities, the businesses were
6 different. The record reflects that, although EPT and the FedChex Entities were located
7 in the same office, EPT paid its own rent and utilities. *Bishop Trial Testimony, February*
8 *19, 2010, at 9:36-9:37 a.m; Davis Trial Testimony, February 18, 2010, at 9:45-9:48 a.m.*
9 The companies had separate computer systems, including separate domain servers, and
10 there were firewalls to limit access. *Arnold Trial Testimony, May 6, 2010, at 10:15 a.m.*
11 EPT maintained 4 or 5 computers, while FedChex had 18-24 desktops and servers. *Id. at*
12 *10:26-10:27 a.m.* EPT also maintained separate books and records from those of
13 FedChex, had separate bookkeepers, and paid separate taxes. *Bishop Trial Testimony,*
14 *February 19, 2010, at 9:36-9:37 a.m* EPT had separate employees from those of
15 FedChex. *Bishop Trial Testimony, February 19, 2010, at 9:36-9:37 a.m; Arnold Trial*
16 *Testimony, May 6, 2010, at 9:22-9:23, 10:17.* This included computer programmers and
17 graphic designers who worked only for FedChex, and computer programmers who
18 worked only for EPT. *Arnold Trial Testimony, May 6, 2010, at 10:25-26 a.m.* FedChex
19 did provide some technical support for EPT, such as backing up computers at night, but
20 no programming services. *Id. at 10:27 a.m.* In the event that any employees did provide
21 work for another company, their time was tracked and the employee was paid by the
22 other company. *Davis Trial Testimony, May 7, 2010, 11:04-11:06 a.m.*

23 Although Bishop and Murphy were involved in both EPT and FedChex, Davis and
24 Arnold were not involved in EPT. *Bishop Trial Testimony, February 19, 2010, at 9:31-35;*
25 *Murphy Trial Testimony, February 5, 2010, at 10:11 a.m., 3:16 p.m.; Davis Trial*
26 *Declaration Concerning Case in Chief at 2:1-2; Arnold Trial Declaration Concerning Case*
27 *in Chief at 1:26-27; Joint Pre-Trial Order, entered January 14, 2010, at Undisputed Facts*
28 *1.14, 1.20; Joint Pre-Trial Order, entered May 13, 2010, at Undisputed Facts 1.14, 1.20.*

1 As discussed above, the evidence indicates that a key difference between the
2 businesses was the presence of Davis and his injection of new capital and new
3 technology and business models to improve the returned check business model. *Arnold*
4 *Trial Declaration Concerning Case in Chief* at 2:1- 3:15; *Davis Trial Declaration*
5 *Concerning Case in Chief* at 2:1- 3:16; *Arnold Deposition, February 8, 2008*, at 20:11-
6 40:2. Bishop testified that FedChex had the ability to increase the NSF check collection
7 rate significantly over what EPT could offer its clients. *Bishop Trial Testimony, February*
8 *19, 2010*, at 9:33-9:34 a.m.

9 FedChex was much more technologically advanced and had multiple services it
10 offered to customers that EPT did not have. *Davis Trial Testimony, February 4, 2010*, at
11 11:20-11:23 a.m.; *Murphy Trial Testimony, February 5, 2010*, at 3:13-3:15 p.m.; *Bishop*
12 *Trial Testimony, February 19, 2010*, at 9:34 a.m. This included proprietary software
13 developed by FedChex that allowed it to offer many of the services. *Davis Trial*
14 *Testimony, February 4, 2010*, at 11:20-11:23 a.m. That is why, at some point, EPT
15 ended up paying FedChex for processing its checks because EPT could not support itself
16 in the market. *Bishop Trial Testimony, February 19, 2010*, at 9:33-9:34 a.m. Davis
17 testified that FedChex was able to provide EPT's customers with scanned copies of
18 checks so that the customers could see the checks, and customers could "go in and take
19 a check out of the collection process if a customer came in to pay for that check." *Davis*
20 *Trial Testimony, February 18, 2010*, at 2:57-2:59 p.m. FedChex also gave EPT's
21 customers the ability to track and report transactions in a way that EPT could not do.
22 *Arnold Trial Testimony, May 6, 2010*, at 10:22-23 a.m. These enhanced services
23 included the imaged checks and documents and real-time tracking of the processing. *Id.*
24 at 10:23 a.m., 11:46 a.m. FedChex developed and began providing its enhanced
25 services within a few months after it began operations. *Id.* at 10:45 a.m. FedChex
26 essentially "built a better mouse trap" than EPT. *Id.* at 10:46-10:47 a.m.

27 For the foregoing reasons, the court finds that Plaintiff has not proven by a
28 preponderance of the evidence that EPT transferred its goodwill or trade secret

1 information to the FedChex Entities for purposes of its fraudulent transfer claims under
2 federal or state law because the circumstantial evidence is insufficient to show any
3 transfer of such goodwill or information, and the evidence indicates FedChex and
4 FedChex Recovery were separate businesses from EPT (and therefore from EFS).
5 Accordingly, the court finds that Plaintiff has not met its burden of establishing by a
6 preponderance of the evidence the first element of a claim under § 548 or CUFTA, that a
7 transfer of the debtor's interest in property ever took place. Accordingly, Plaintiff has not
8 proven a constructive fraudulent transfer as to the creation of FedChex or FedChex
9 Recovery.

10 4. Related Issue: Successor Liability Under an Alter Ego Theory

11 Plaintiff's papers seem to argue alter ego liability of FedChex and FedChex
12 Recovery under the federal standard for alter ego successor liability. See *JPTO*,
13 *Disputed Issue of Fact 2.1* ("Were [all defendants] created by Davis and/or Arnold and /or
14 Ty Bishop and Murphy with the intent at the time of their formation, or with the intent
15 formed after their formation in the course of their operation, to work an injustice upon
16 and/or defraud creditors of Defendant Davis and/or Arnold and/or Ty Bishop and Murphy
17 by creating the illusion of entities separate and distinct from each other, when, in fact,
18 there was a failure to give true and proper respect to the purported separate identity of
19 said entities?"). In *RRX Industries, Inc. v. Lab-Con, Inc.*, the Ninth Circuit stated that the
20 alter ego doctrine of liability arises where "(1) such a unity of interest and ownership
21 exists that the personalities of the corporation and individual are no longer separate, and
22 (2) an inequitable result will follow if the acts are treated as those of the corporation
23 alone." 772 F.2d 543, 545 (9th Cir. 1985), citing, *Automotriz Del Golfo De California S.A.*
24 *de C.V. v. Resnick*, 47 Cal. 2d 792, 796 (1957); see also, *Wady v. Provident Life &*
25 *Accident Insurance Co. of America*, 216 F. Supp. 2d 1060, 1066 (C.D. Cal. 2002)(also
26 citing *Automotriz Del Golfo De California .S.A. de C.V.*).

27 This is somewhat of a non-issue because the operative complaint, Plaintiff's
28 Fourth Amended Complaint, seeks relief as against all defendants under each claim—

1 essentially seeking joint and several liability. Thus, regarding the claims on which
2 Plaintiff prevails, Plaintiff prevails as to all defendants, and the same is true for those
3 claims on which Plaintiff does not prevail. Therefore, plaintiff does not have to establish
4 successor liability of any one defendant named in the complaint; either they are all liable,
5 or none of them are. However, as discussed above, the evidence indicates that FedChex
6 and FedChex Recovery are separate entities from EPT and the debtor, Bishop, and are
7 thus not alter egos of the latter.

8 **B. Capital Contributions: January 2002 to October 2002**

9 Plaintiff alleges that the dilution of Bishop's membership interests through Davis's
10 additional capital contributions to FedChex and FedChex Recovery between January and
11 October 2002, as well as the \$19,000 and \$27,000 paid by Bishop to FedChex, were
12 constructive fraudulent transfers.

13 1. Dilution of Bishop's Membership Interests Resulting from Davis's Additional
14 Capital Contributions Were Transfers of Debtor's Interests in Property

15 There is no factual dispute that Bishop transferred funds in the amounts of
16 \$19,000 and then \$27,000 to FedChex in that Bishop used these funds to acquire
17 additional ownership interests in FedChex and FedChex Recovery. However,
18 Defendants argue that there was no transfer when Davis's contributions had the effect of
19 reducing Bishop's ownership in FedChex and FedChex Recovery, contending that a
20 transfer fully authorized by statute cannot be a fraudulent conveyance. *See Helvering v.*
21 *Metro Edison Co.*, 306 U.S. 522, 529 (1939) ("A transfer fully authorized by statute
22 cannot be a fraudulent conveyance . . ."). Defendants also rely on *BFP v. Resolution*
23 *Trust Corp.*, 511 U.S. 531 (1994), to show that a transfer following state law proceedings
24 cannot be a fraudulent transfer as a matter of law. However, *BFP* involved the specific
25 situation of a transfer of property at a foreclosure sale, not the membership interests in a
26 privately held LLC. Furthermore, the holding in *BFP* is not, as Defendants argue, that
27 "finding a foreclosure sale that followed state law proceedings cannot be a fraudulent
28 transfer as a matter of law." *See Defendants' Proposed Findings of Fact and*

1 *Conclusions of Law* at 110:12-14. The Supreme Court in *BFP* held that “a ‘reasonably
2 equivalent value,’ for foreclosed property, is the price in fact received at the foreclosure
3 sale, so long as all the requirements of the State’s foreclosure law have been complied
4 with.” 511 U.S. at 545.

5 The definition of “transfer” under 11 U.S.C. § 101(54) is so broad that it has been
6 characterized to “literally encompass[] ‘every’ mode of parting with an interest in
7 property.” *Matter of Besing*, 981 F.2d 1488, 1494 (5th Cir. 1993). Here, the transfers of
8 a percentage of Bishop’s member interest in FedChex diminished the assets of Bishop’s
9 bankruptcy estate from the standpoint of his creditors because these transfers deprived
10 creditors from receiving distributions pursuant to his membership interests in the LLCs.
11 *See, e.g., Halverson v Funaro (In re Funaro)*, 263 B.R. 892, 898 (8th Cir. BAP 2001) (“As
12 a result, actions taken by the owner [of an S Corporation] for his own benefit, at the
13 expense of the corporation and its creditors, are subject to review in the corporation’s
14 bankruptcy.”). Bishop’s bankruptcy estate would receive a reduced share of profits from
15 FedChex and FedChex Recovery for the reduced membership interests that Bishop had
16 after Davis acquired increased membership interests through his additional capital
17 contributions.

18 Therefore the court determines that the Plaintiff has met its burden in showing by a
19 preponderance of the evidence that the dilution of Bishop’s membership interests in
20 FedChex and FedChex Recovery due to Davis’s additional capital contributions listed
21 below were “transfers” for the purposes of Section 548 and the CUFTA:

- 22 - January 9, 2002: \$73,885.14 to FedChex by Davis
- 23 - January 9, 2002: \$20,515.37 to FedChex Recovery by Davis
- 24 - April 3, 2002: \$91,682.07 to FedChex by Davis
- 25 - April 3, 2002: \$10,127.74 to FedChex Recovery by Davis
- 26 - July 10, 2002: \$156,448.95 to FedChex by Davis
- 27 - July 10, 2002: \$15,708.00 to FedChex Recovery by Davis
- 28 - July 10, 2002: \$19,000 to FedChex by Bishop
- July 10, 2002: \$19,000 credit to FedChex Recovery by Bishop—
interest percentage not affected
- September 4, 2002: \$10,000 to FedChex by Bishop
- September 19, 2002: \$17,000 to FedChex by Bishop

- 1 - October 9, 2002: \$150,271.33 to FedChex by Davis
- 2 - October 9, 2002: \$15,708.28 to FedChex Recovery by Davis.

3 2. The Alleged Transfers Occurred within One Year of the Petition Date

4 The filing date of Bishop's bankruptcy petition was November 19, 2002. The
5 dilution of Bishop's membership interests based on Davis's additional capital
6 contributions occurred between January 2002 and October 2002, which is within one
7 year of the petition date. See 11 U.S.C. § 548(a)(1) (2002). Therefore, the alleged
8 transfers occurred within the statutory period for Section 548 to apply, as well as under
9 CUFTA, which provides that the trustee must bring an action at least within *four* years of
10 the alleged transfer. California Civil Code, § 3439.09(a) and (b).

11 3. Plaintiff Has Not Demonstrated a Lack of Reasonably Equivalent Value
12 Given for the Transfers

13 Both 11 U.S.C. § 548(a)(1)(B) and California Civil Code § 3439.05 define a
14 constructive fraudulent transfer as one for which the debtor did not receive reasonably
15 equivalent value. "Reasonably equivalent value" is not defined by the Bankruptcy Code.
16 *BFP v. Resolution Trust Corp.*, 511 U.S. at 535-536. "Value" means "property, or
17 satisfaction or securing of a present or antecedent debt of the debtor." *Id.*, quoting and
18 citing 11 U.S.C. § 548(d)(2)(A). When a transfer constitutes repayment of a debtor's
19 antecedent or present debt, the transfer is not constructively fraudulent because it is
20 made for reasonably equivalent value. See *In re Fitness Holdings International, Inc.*, 714
21 F.3d at 1145-1146 (citation omitted). Finding reasonably equivalent value does not
22 require exact equality in value. *BFP v. Resolution Trust Corp.*, 511 U.S. at 540 n. 4 ("Our
23 discussion assumes that the phrase 'reasonably equivalent' means 'approximately
24 equivalent,' or 'roughly equivalent.'"). Thus, to determine this element, the court must
25 first determine the value of the property interest transferred by the debtor and the value of
26 the property received in exchange for the transfer, and then the court must determine
27 whether the latter value is reasonably equivalent to the former. See *Corzin v. Fordu (In
28 re Fordu)*, 201 F.3d 693, 707-708 (6th Cir. 1999). The court must consider all the

1 circumstances surrounding the transfer. *In re Brobeck, Phleger & Harrison LLP*, 408 B.R.
2 318, 341 (Bankr. N.D. Cal. 2009). The “totality of the circumstances” test used in
3 determining if reasonably equivalent value was received for a transfer is generally fact-
4 intensive and may include consideration of fair market value, the arms’-length nature of
5 the transaction, economic circumstances and relationship of the parties, the maturity,
6 competitiveness, and efficiency of the market, industry standards, and other factors. *In re*
7 *3dfx Interactive, Inc.*, 389 B.R. 842, 863 (Bankr. N.D. Cal. 2008). Plaintiff bears the
8 burden of proof on this issue, and asset appraisals and expert testimony are often
9 required to enable the court to make a proper determination of value. *In re Roosevelt*,
10 176 B.R. 200, 205-208 (9th Cir. BAP 1994).

11 On its face, Plaintiff’s case-in-chief does not provide any evidence of the value of
12 the FedChex Entities at the time of the disputed capital contributions during 2002. This
13 valuation evidence is essential to Plaintiff’s fraudulent transfer claims based on these
14 transfers because if the court is to find that dilution of Bishop’s interests in the FedChex
15 Entities resulted in fraudulent transfers, the court would need to determine how much
16 value was transferred and the value of what was received in exchange—in this case,
17 increasing and decreasing ownership interests in two LLCs. It is key, therefore, to know
18 how much, for example, a 25% membership interest in FedChex was worth in January
19 2002. However, Plaintiff has not offered any evidence of this.

20 Instead of offering valuation evidence, such as appraisals and expert testimony,
21 Plaintiff argues that the capital contributions purportedly made by Davis did not *actually*
22 *happen* or were invalid based upon the inability of the FedChex members to remember at
23 trial specific facts about the capital contributions and based on alleged inconsistencies in
24 their testimony. See *Plaintiff’s Proposed Findings of Fact and Conclusions of Law*, at
25 95:26-98:3 and 101:2-106:6. If Plaintiff’s contentions are correct, this would mean that
26 Bishop’s membership interests were indirectly transferred to Davis through inflation of
27 Davis’s membership interests, thereby diluting Bishop’s interests, through fictitious and
28 unsubstantiated capital contributions by Davis. Thus, under Plaintiff’s theory, the

1 transfers of Bishop's membership interests through dilution were made without
2 reasonably equivalent value exchanged for the dilution.

3 Plaintiff claims that the only record that analyzes the purported capital
4 contributions of Davis to FedChex is found in Plaintiff's Trial Exhibit 227, at bates
5 stamped page 42. Exhibit 227 consists of several documents retrieved by the receiver
6 team in the state court action. Exhibit 227 at bates stamped page 42 lists a series of
7 purported loans made by Yellow Pages Directory Services ("YPDS"), one of the Davis
8 Entities, to FedChex for payroll allocation and capital improvements, and by Niche,
9 another Davis Entity, which loaned rent payments to FedChex to an unidentified payee.
10 *Davis Trial Testimony, February 4, 2010, at 11:59 a.m.-12:01 p.m.* The number of
11 employees, hourly rates, hours spent, or the nature of the work for payroll allocations
12 were not identified in Exhibit 227. *Id.* at 11:38 a.m.

13 In response to Plaintiff's contentions, Defendants offered their Exhibit 602, which
14 was a collection of copies of FedChex bills and checks made out to FedChex during the
15 months of December 2001 through July 2002. *See Defendants' Trial Exhibit 602, Copies*
16 *of FedChex Bills Due and Checks Made Out to FedChex from December 2001 through*
17 *July 2002.* These documents in Exhibit 602 also included charts that show the hourly
18 rates, number of employees, employee names, and number of hours worked related to
19 the payroll allocations, giving credibility to the payments made by the Davis Entities for
20 the purpose of payroll and capital improvements. *Id.* In examining Defendants' Exhibit
21 602 and Plaintiff's Exhibit 227 together, the court finds that these documents substantiate
22 Davis's additional capital contributions to FedChex and FedChex Recovery at the time
23 that they were made, and provides the necessary supporting details as to what
24 constituted these capital contributions. Thus, the court determines that Davis did make
25 the subject additional capital contributions, warranting increases in his membership
26 interest percentages in the LLCs and the reductions in Bishop's membership interests.

27 For example, Davis contended that \$73,885.14 in additional capital contributions
28 made on January 9, 2002 to FedChex from YPDS were used to pay workers on Yellow

1 Pages payroll who performed work for FedChex for the calendar quarter of September
2 through December 2001. *Davis Trial Testimony, February 4, 2010*, at 11:09-11:12 a.m.,
3 11:06-11:07 a.m., and 11:17-11:18 a.m.; *see also Plaintiffs' Trial Exhibit 227, Report of*
4 *Court Appointed Examiner Mark Alcock at 42*. This testimony is consistent with the data
5 appearing on both Defendant's Trial Exhibit 602 and Plaintiff's Trial Exhibit 227 at 42, and
6 the court finds that this evidence supporting Davis's additional capital contribution
7 credible.

8 Davis also contended that \$70,986.68 of the \$91,682.07 capital contribution he
9 made on April 3, 2002 is attributable to one of his entities, YPDS, which paid employees
10 on the payroll of Yellow Pages for work performed for FedChex for the calendar quarter
11 between January and March 2002, and that another of his entities, Niche, loaned
12 \$13,795.39 to FedChex to pay for rent during this period at the OC Office. *Plaintiffs' Trial*
13 *Exhibit 227, Report of Court Appointed Examiner Mark Alcock at 42; Davis Trial*
14 *Testimony, February 4, 2010*, at 2:01-2:04 p.m. The court finds that this evidence
15 supporting Davis's additional capital contribution is credible.

16 Davis also contended that \$82,307.53 of his \$156,448.95 July 10, 2002 capital
17 contribution consisted of the payroll allocation for the months of April through June.
18 *Plaintiffs' Trial Exhibit 227, Report of Court Appointed Examiner Mark Alcock at 42; Davis*
19 *Trial Testimony, February 4, 2010*, at 11:31-11:32 a.m. and 2:01-2:04 p.m. Plaintiff's
20 Trial Exhibit 227 at 42 and Defendant's Trial Exhibit 602 show that between April and
21 June 2002, one of Davis's entities, Niche, loaned \$27,986.17 to FedChex for rent and
22 \$46,155.25 to FedChex to pay for capital improvements. *Id.* The court finds that this
23 evidence supporting Davis's additional capital contribution is credible.

24 Davis contended that out of his \$150,271.33 October 9, 2002 capital contribution,
25 a portion consisted of the payroll allocation for the month of July totaling \$28,051.31.
26 Niche paid FedChex's rent in the total amount of \$10,200.00 for the months of July and
27 August. *Plaintiffs' Trial Exhibit 227, Report of Court Appointed Examiner Mark Alcock at*
28

1 42; *Davis Trial Testimony, February 4, 2010*, at 2:44-2:46 p.m. The court finds this
2 evidence supporting Davis's additional capital contribution is credible.

3 The court finds that Plaintiff has not shown by a preponderance of the evidence
4 that the alleged transfers based on the diminution of Bishop's membership interests in
5 the LLCs were made for less than reasonably equivalent value because the evidence
6 admitted at trial shows that FedChex needed additional funding to continue its business,
7 which was provided by Davis and no other member, including Bishop and Murphy,
8 through payment of wages for employees of YPDS that were being used to assist
9 FedChex in its work during 2002 and payment of rent and the making of loans for
10 FedChex by Niche, one of Davis's entities. *Plaintiffs' Trial Exhibit 227, Report of Court*
11 *Appointed Examiner Mark Alcock* at 42; *Defendants' Trial Exhibit 602, Copies of*
12 *FedChex Bills Due and Checks Made Out to FedChex from December 2001 through July*
13 *2002*

14 Moreover, Davis also made capital contributions through personal loans to
15 FedChex by personal checks. *Id.* This cash assistance to FedChex was first categorized
16 as loans. *Id.* Plaintiff argues that no consideration was given to have the several loans
17 become capital contributions. Because FedChex could not pay back these loans
18 however, Davis, Murphy, Bishop, and Arnold agreed to have these loans become capital
19 contributions credited to Davis. *See Plaintiff's Trial Exhibits 138-145.* The loss of
20 Bishop's percentage in membership interest occurred because FedChex required
21 monetary assistance which Davis, YPDS, Niche, and Bishop provided.

22 In arguing that there was no consideration for loans being turned into capital
23 contributions, Plaintiff points to Paragraph 1.7 of the operating agreements for FedChex
24 and FedChex Recovery, which only allow cash to be used for capital contributions. *See*
25 *Plaintiff's Trial Exhibit 102, Operating Agreement for FedChex, LLC* at ¶ 1.7; *Plaintiff's*
26 *Trial Exhibit 103, Operating Agreement for FedChex Recovery, LLC* at ¶ 1.7. However,
27 Paragraph 1.7 of both of the operating agreements states: "Capital Contribution' shall
28 mean the total value of cash and fair market value of property contributed by Members

1 (or other assets agreed upon by member's majority vote)." *Id.* (emphasis added). The
2 evidence, taken as a whole, indicates that Bishop, Murphy, Davis and Arnold agreed
3 during their four capital contribution meetings to treat the loans previously made by
4 Davis, YPDS, and Niche as additional capital contributions by Davis and to allow him to
5 receive credit for those capital contributions in the form of increased ownership in the
6 FedChex Entities. Thus, the court concludes that these transactions comport with the
7 procedures set forth in the operating agreements for both FedChex and FedChex
8 Recovery.

9 Because the court finds that Plaintiff has not met its burden in showing by a
10 preponderance of the evidence that the alleged transfers were made for less than
11 reasonably equivalent value, the court further concludes that Plaintiff cannot prevail on its
12 Second and Sixth Claims for relief in the complaint as to these transfers.

13 **C. Bishop's \$50,000 Payment for ISO Agreement**

14 Bishop purchased the ISO agreement from FedChex on November 19, 2002 in
15 exchange for \$50,000 via a wire transfer, the day the Bishops filed for bankruptcy
16 protection. *Bishop Trial Testimony, February 19, 2010, at 1:08-1:09 p.m., 2:05 p.m.;*
17 *Plaintiff's Trial Exhibit 170, Memo dated November 18, 2002 to Ty Bishop with purported*
18 *dealer agreement.* Defendants contend that the ISO Agreement was executed by Bishop
19 on November 18, 2002. *See Defendant's Proposed Findings of Fact and Conclusions of*
20 *Law ¶ 35, at 26:6-7.* Regardless of whether or not the transfer occurred on November 18
21 or 19, 2002, Plaintiff concedes that there was no evidence provided at trial indicating that
22 the \$50,000 transfer occurred post-petition and so the court will characterize Bishop's
23 ISO agreement as a pre-petition transfer. *See Plaintiff's Proposed Findings of Fact and*
24 *Conclusions of Law ¶ 1051, at 226; JPTO Undisputed Fact 1.33.*

25 1. Debtor Transferred an Interest in Property

26 Bishop's purchase of a FedChex ISO license or agreement for \$50,000 through a
27 wire transfer of funds from his bank account constitutes a transfer for purposes of Section
28 548 and CUFTA. This transfer diminished the value of Bishop's bankruptcy estate by

1 \$50,000 because Bishop transferred his money to pay for the ISO agreement. *Bishop*
2 *Deposition, October 20, 2008*, at 22:26-23:5. The court finds that this transaction was a
3 transfer of Bishop's property.

4 2. The Transfer Occurred Within the Relevant Statutory Period

5 Bishop's bankruptcy petition was filed on November 19, 2002 at 3:27 p.m. *Court's*
6 *Taking Judicial Notice of the Bankruptcy Petition File Stamp, May 7, 2010 at 10:16 a.m.*
7 Bishop's ISO agreement purchase occurred on either the day before or the day of the
8 filing of Bishop's bankruptcy petition, which falls within the statutory period of one year of
9 the debtor's petition date under 11 U.S.C. § 548(a)(1) (2002). The transfer also falls
10 within the applicable statutory period for purposes of CUFTA. See California Civil Code,
11 § 3439.09(a), (b). The court finds that Bishop's transfer occurred during the relevant
12 statutory periods both under Section 548 and CUFTA.

13 3. Plaintiff Established that the Transfer was Made for Less than Reasonably
14 Equivalent Value

15 In order for the court to properly determine this element, the court must first
16 determine the value of the property interest transferred by the debtor and the value of the
17 property received in exchange for the transfer. Then, the court must determine whether
18 the value of the property received was reasonably equivalent to the value of the property
19 transferred. See 11 U.S.C. § 548(a)(1)(A) and (B)(i); California Civil Code, §§ 3439.04(a)
20 and 3439.05; see also, e.g., *In re Fordu*, 201 F.3d at 708.

21 a. Value of Property Interest Transferred

22 In this case, the value of the debtor's property that Bishop transferred to buy the
23 ISO Agreement was \$50,000. Next the court considers the value of the property Bishop
24 received in exchange for this transfer.

25 b. Value of the Property Received in Exchange for Transfer

26 Plaintiff argues that the ISO Agreement had no value because Bishop never
27 acquired any customers for FedChex using the ISO. *Plaintiff's Proposed Findings of Fact*
28 *and Conclusions of Law* ¶ 1065, at 228. Page 8 of Plaintiff's Trial Exhibit 170 describes

1 the different “relationship options” FedChex provided to prospective ISOs. Bishop
2 checked the box for “ISO” instead of other options such as “Agent” or “Agent Office.” See
3 *Plaintiff’s Trial Exhibit 170, Memo Dated Nov. 18, 2002 to Ty Bishop with purported*
4 *dealer agreement*, at 8. Indeed, it was possible for Bishop to become an ISO of FedChex
5 without paying any money for it. These relationships were called “Agents” under the
6 “Relationship Options,” and entitled the agent to a \$500 bonus once 500 checks were
7 collected, \$1,000 for 1,000 collected checks, \$2,500 for 2,500 collected checks, and
8 \$5,000 for 5,000 collected checks. *Plaintiff’s Trial Exhibit 170, Memo Dated November*
9 *18, 2002 to Ty Bishop with purported dealer agreement* at 8.

10 In contrast, Bishop’s ISO Agreement entitled Bishop to the following: (1) a widow’s
11 clause of 1 year continuation of residuals if Bishop died, (2) 16% per NSF fee as residual
12 income, (3) 50% of bank rebate for the life of the account, and (4) 10% of FedChex
13 Recovery revenue for Bishop’s clients. *Id.* at 9. Bishop claims that 5-10 entities had
14 purchased ISO agreements. *Bishop Deposition, October 28, 2008*, at 24-25. For
15 example, Greg Blanchard, through his entity Hey Babe Inc., also paid \$50,000 for an ISO
16 agreement with FedChex and was given a return rate of approximately \$4.00 per
17 collected fee under this type of agreement. *Davis Trial Testimony, February 4, 2010*, at
18 9:34-9:36 a.m. Hey Babe, Inc. would only be able to earn more than that by eliminating
19 or reducing rebate arrangements with prospective clientele. *Id.*

20 At trial, Bishop explained that he chose to pay the higher amount in exchange for
21 an ISO Agreement because it gave him the ability to generate a higher commission. *Ty*
22 *Bishop Trial Testimony, February 19, 2010*, at 2:04-2:05 p.m. He believed the potential
23 revenue would be ongoing and would continue to grow over time, and he hoped to
24 recoup his investment within one year of purchase. *Bishop Trial Testimony, February 19,*
25 *2010*, at 2:04-2:05 p.m. He explained that, at the time, he had no other source of income
26 and wanted to create a revenue source in order to support his family. *Id.* Even though
27 Bishop admitted at trial that he could have used that \$50,000 to pay his family’s living
28 expenses, he looked at the opportunity as a way to say in a business in which he was

1 familiar, and considered it a long-term solution rather than a short-term fix. *Bishop Trial*
2 *Testimony, February 19, 2010, at 2:06 p.m.*

3 Despite his intentions, Bishop never made any money from the ISO Agreement.
4 *Bishop Deposition, March 5, 2008, at 70:21-71:3.* Bishop admits that he stopped making
5 efforts to sell FedChex services. *Id.* at 71:4-15. Bishop even admitted that he stopped
6 trying to acquire clients for FedChex because the sale cycle was very long for these
7 types of agreements, and he “didn’t have cash to support [his] family with a long sale
8 cycle.” *Id.* at 71:12-15. Bishop’s actual realized economic benefits from the ISO
9 Agreement thus far has been nothing, and the evidence shows Bishop knew that profit, if
10 any, would not be immediate. Indeed, Bishop characterized the ISO as a long term
11 solution. *Bishop Trial Testimony, February 19, 2010, at 2:06 p.m.* Therefore the court
12 finds that Bishop’s entitlements under the ISO Agreement had a value of \$0 as of the
13 petition date because Bishop had no clients, had not been trying to obtain clients, and
14 never made any money from the ISO. There was no reasonably equivalent value given
15 in return of Bishop’s \$50,000 wire transfer of funds that could have been used to pay his
16 family’s living expenses.

17 3. Plaintiff Did Not Establish that Bishop Was Insolvent at the Time He Purchased
18 the ISO Agreement From FedChex or Became Insolvent by the Purchase

19 Finally, in order to succeed on a claim for constructive fraudulent transfer, the
20 Plaintiff must demonstrate that the debtor:

21 (B)(ii)(I) was insolvent on the date that such transfer was made or such
22 obligation was incurred, or became insolvent as a result of such transfer or
23 obligation;

24 (II) was engaged in business or a transaction, or was about to engage in
25 business or a transaction, for which any property remaining with the
26 debtor was an unreasonably small capital;

27 (III) intended to incur, or believed that the debtor would incur, debts that
28 would be beyond the debtor's ability to pay as such debts matured; or

1 (IV) made such transfer to or for the benefit of an insider, or incurred such
2 obligation to or for the benefit of an insider, under an employment contract
3 and not in the ordinary course of business.

4 11 U.S.C. § 548(a)(1)(B). As discussed above, Section 548 of the Bankruptcy Code and
5 CUFTA are generally the same with respect to analyzing fraudulent transfer. Under
6 CUFTA, a transfer is fraudulent as to a creditor if the debtor made the transfer or incurred
7 the obligation without receiving reasonably equivalent value, and the debtor either:

8 (A) Was engaged or was about to engage in a business or a transaction
9 for which the remaining assets of the debtor were unreasonably small in
10 relation to the business or transaction, or

11 (B) Intended to incur, or believed or reasonably should have believed that
12 he or she would incur, debts beyond his or her ability to pay as they
13 became due.

14 California Civil Code, § 3439.04(a)(2)(A) and (B).

15 Although similar, the analyses under Section 548 and CUFTA are not identical
16 when it comes to the determination of whether the debtor was insolvent at the time of the
17 alleged transfers. For purposes of Section 548, a debtor is “insolvent” when the debtor’s
18 debts exceed its assets, excluding assets that have been fraudulently transferred or
19 concealed. 11 U.S.C. § 101(32), *cited and quoted in Sierra Steel, Inc. v. Totten Tubes,*
20 *Inc. (In re Sierra Steel, Inc.),* 96 B.R. 275, 277 (9th Cir. BAP 1989). This is known as the
21 “balance sheet” test. An insolvency determination may only be made after establishing
22 the fair value of the debtor’s assets. 11 U.S.C. § 101(32).

23 Similarly, under CUFTA, insolvency is determined in accordance with the “balance
24 sheet” analysis. California Civil Code, § 3439.02(a). However, CUFTA also provides a
25 rebuttable presumption that the debtor was insolvent if the debtor was not able to pay his
26 debts in the ordinary course of business as they came due (which is considered the
27 “equity” or “cash flow” test). *Bay Plastics, Inc. v. BT Commercial Corp. (In re Bay*
28 *Plastics, Inc.),* 187 B.R. 315, 328 n. 22 (Bankr. C.D. Cal. 1995). No such rebuttable

1 presumption exists under Section 548; thus, the Plaintiff must *prove* the debtor's
2 insolvency under Section 548.

3 In determining whether a debtor's liabilities exceed assets under the balance sheet
4 test, the court must evaluate the debtor's assets and liabilities based upon a practical
5 assessment of their actual value—a "fair valuation"—rather than in accordance with
6 generally accepted accounting principles. *In re Bay Plastics, Inc.*, 187 B.R. at 330.
7 Furthermore, "Insolvency must exist at the time of the transfer or must result therefrom, to
8 render the transfer fraudulent as to creditors." *In re Liquimatic Systems, Inc.*, 194
9 F. Supp. 625, 628 (S.D. Cal. 1961), *quoting*, *Miller v. Keegan*, 92 Cal. App. 2d 846
10 (1949).

11 a. Balance Sheet Approach

12 On this evidentiary record, the court cannot find that, based on the "balance sheet"
13 test, Bishop was insolvent at the time he purchased the ISO Agreement from FedChex.⁷
14 Bishop purchased the ISO Agreement from FedChex on November 19, 2002 with a wire
15 transfer of his funds in the amount of \$50,000, the same day that the Bishops filed for
16 bankruptcy protection. *Bishop Trial Testimony, February 19, 2010*, at 1:08-1:09 p.m.,
17 2:05 p.m.; *Plaintiff's Trial Exhibit 170, Memo dated November 18, 2002 to Ty Bishop with*
18 *purported dealer agreement*. First, Plaintiff offered into evidence two Resolutions to
19 Continue Doing Business, one for FedChex and one for FedChex Recovery, both dated
20 November 19, 2002. See *Plaintiff's Trial Exhibit 146, Document entitled "Resolution to*
21 *Continue Doing Business" referencing FedChex, LLC and referencing a date of*
22 *November 19, 2002; Plaintiff's Trial Exhibit 147, Document entitled "Resolution to*
23 *Continue Doing Business" referencing FedChex Recovery, LLC and referencing a date of*
24 *November 19, 2002*. The resolutions both stated, "Having all members present, the

25 _____
26 ⁷ The court notes that, just because Bishop purchased the ISO Agreement on his petition date does not
27 mean Plaintiff is not required to prove insolvency. Under section 548—as opposed to CUFTA as well as
28 section 547 for preferential transfers—there arises no presumption of insolvency. Plaintiff, thus, cannot rely
on the petition date as evidence of insolvency. The court must compare the debtor's assets with his
liabilities. 11 U.S.C. § 101(32).

1 meeting began. Ty Bishop announces he is insolvent and will be filing for bankruptcy.”
2 *Plaintiff’s Trial Exhibit 146, Document entitled “Resolution to Continue Doing Business”*
3 *referencing FedChex, LLC and referencing a date of November 19, 2002; Plaintiff’s Trial*
4 *Exhibit 147, Document entitled “Resolution to Continue Doing Business” referencing*
5 *FedChex Recovery, LLC and referencing a date of November 19, 2002.* Although this
6 statement of Bishop noted in the resolutions is an admission by him of insolvency, the
7 statement is hearsay and not rendered admissible as a hearsay exception or exclusion
8 because Bishop is not a party to this adversary proceeding. Fed. R. Evid. 801(d)(2).
9 Thus, the court concludes that Plaintiff must show Bishop’s insolvency by a
10 preponderance of the admissible evidence. As stated previously, solvency is a legal
11 question that the court must determine by engaging in a fair valuation of the debtor’s
12 assets and liabilities, regardless of what a debtor may subjectively believe about his own
13 financial affairs.

14 In support of its allegations that Bishop was insolvent at the time of the transfer,
15 Plaintiff offers as evidence the bankruptcy schedules of Bishop and his wife in this case,
16 in which the debtors list a total \$1,067,061.00 assets and \$550,586.64 liabilities. See
17 *Plaintiff’s Trial Exhibit 195, Voluntary Petition of Brennon Ty Bishop with Summary of*
18 *Schedules* at 7. However, these bankruptcy schedules also listed the Bishops’ potential
19 liability from Plaintiff’s state court action as “unknown” liability amount, but disclosed that
20 EFS—the plaintiff in the state court action—requests total damages of \$24,000,000.00.
21 *Id.* at 20. Since claims may be disputed or contingent, disputed or contingent liabilities
22 must be included in determining total indebtedness for purposes of determining
23 insolvency. *In re Sierra Steel, Inc.*, 96 B.R. at 279. A contingent liability must be
24 reduced, however, to its present or expected amount before a determination on
25 insolvency can be made. *Id.* To determine a contingent liability, one must discount it by
26 the probability that the contingency will occur and the liability will become real. *Id.* As the
27 Seventh Circuit explained it this way, “Discounting a contingent liability by the probability
28 of occurrence is good economics and therefore good law, for solvency, the key to

1 § 548(a)(2), is an economic term.” *Covey v. Commercial National Bank of Peoria*, 960
2 F.2d 657, 660 (7th Cir. 1992). Thus, the appropriate discount factor the court should
3 apply is based on the reasonable foreseeability—as of the date of transfer—that the
4 contingency will come true. *In re W.R. Grace & Co.*, 281 B.R. 852, 858-859 (Bankr. D.
5 Del. 2002), *citing inter alia*, *Covey v. Commercial National Bank of Peoria*, 960 F.2d at
6 660. For example, if the court finds that entry of a \$24 million judgment against Bishop
7 was, at the time of the petition date, approximately twenty percent (20%) likely, the value
8 of the claim would be 20% of \$24 million, or \$4,800,000. If that amount, in addition to the
9 debtor’s other debts, exceeded the debtor’s assets, the court could then find the debtor
10 insolvent based on the balance sheet test. *See, e.g., Covey v. Commercial National*
11 *Bank of Peoria*, 960 F.2d at 659.

12 The state court action was filed against Bishop on February 16, 2001. Bishop
13 testified at trial that he did not believe a judgment would be entered against him in excess
14 of \$50,000 and perhaps a small amount of punitive damages. *Bishop Trial Testimony*,
15 *February 19, 2010*, at 1:42 p.m. Bishop in other testimony stated that, throughout 2002,
16 his assets exceeded his liabilities. *Bishop Deposition, October 20, 2008*, at 18:21-19:23.
17 Bishop testified that even as of the petition date, his assets were larger than his liabilities.
18 *Id.* at 19:25 – 20:1. Only when asked to consider the amount of the judgment entered
19 against him in the state court action in 2003, Bishop testified that, at that point, his
20 liabilities exceeded his assets. *Id.* at 21:1-6. The original May 15, 2003 default judgment
21 was subsequently reversed on appeal, and the state appellate court offered an
22 alternative to EFS and Barry that they take a judgment of \$50,000, the original amount of
23 compensatory damages demanded in the complaint, or replead the complaint.
24 *Defendant’s Trial Exhibit 610, California Court of Appeal Opinion in Electronic Funds*
25 *Solutions, et al. v. Michael Murphy, et. al., dated December 14, 2005* at 2. EFS and
26 Barry amended the complaint, and obtained another default judgment on March 10, 2008
27 entered against Murphy, Bishop, and EPT. *Plaintiff’s Trial Exhibit 194, Judgment against*

28

1 *Defendants Bishop, Murphy and EPT in Electronic Funds Solutions, et al. v. Michael*
2 *Murphy, et. al. dated March 10, 2008.*

3 Based on this record, the court lacks sufficient evidence to value Bishop's
4 contingent liability from the state court action as of the petition date of November 19,
5 2002. Plaintiff offered no evidence or even argument in support of valuing the state court
6 action as of the petition date – or prior to the petition date. Plaintiff points to Bishop's
7 "admission" that he did not have the means of paying a debt of \$1,800,000.00 as of
8 January 1, 2002, if it were immediately due and payable. *Plaintiff's Proposed Findings of*
9 *Fact and Conclusions of Law* ¶ 1091, at 233, *citing, Bishop Deposition, March 5, 2008, at*
10 *53:23-54:10.* Plaintiff cites another "admission" that Bishop "did not have \$24,000,000 in
11 January of 2002 and also did not have that sum on the date he filed for bankruptcy."
12 *Plaintiff's Proposed Findings of Fact and Conclusions of Law* ¶ 1092, at 233. The court
13 cannot assume a person is insolvent because he or she may not be able to pay a
14 \$24,000,000—or \$1,800,000—judgment in full at a later time. And these facts have
15 nothing to do with the reasonable foreseeability that the contingent nature of the state
16 court liability would become a reality in the future, and the court notes that the only
17 reason the state court liability became non-contingent was by way of a *default* judgment,
18 entered four months after the petition was filed, then reversed, then finally re-entered
19 based on default five years later in 2008. Based on this record, the court finds that
20 Plaintiff has not shown Bishop's insolvency at the time of the transfer by a preponderance
21 of the evidence.

22 b. Equity or Cash Flow Approach: CUFTA Presumption of Insolvency

23 The court similarly does not find that the presumption of insolvency under CUFTA
24 arises in favor of Plaintiff. Under the "equity" or "cash flow" test, "a debtor is insolvent if
25 the present fair salable value of the debtor's assets is less than the amount required to
26 pay existing debts as they become due." *In re Bay Plastics*, 187 B.R. at 328 n. 22. A
27 presumption of insolvency arises under CUFTA if a debtor is *generally* not paying his
28 debts as they become due. California Civil Code, § 3439.02(c). Considering the debtor's

1 schedules, Plaintiff argues that Bishop had a number of outstanding debts owed to
2 various entities as of the petition date, evidencing a general pattern of not paying his
3 debts as they become due. First, debtor’s schedules list a debt owed to Bennett &
4 Fairslater—Bishop’s state court counsel—in the amount of \$167,038.84. *Plaintiff’s Trial*
5 *Exhibit 195, Voluntary Petition of Brennon Ty Bishop with Summary of Schedules* at 19.
6 Bishop also owed other state court counsel, Walsworth, Franklin, et al. \$30,122.00 as of
7 the petition date. *Id.* at 21. Bishop’s Statement of Financial Affairs filed in this
8 bankruptcy case also listed a \$50,000 payment made to prior state court counsel, Allen &
9 Yphantides, which Bishop paid on October 29, 2002 based on an invoice he received on
10 October 15, 2002 (and also is the subject of a separate adversary proceeding brought by
11 the bankruptcy Trustee). *See Plaintiff’s Trial Exhibit 174, Declaration of Brennon Ty*
12 *Bishop in Support of Chapter 7 Trustee’s Reply to Opposition to Motion for Summary*
13 *Judgment or in the Alternative Summary Adjudication of Issues in the Adversary*
14 *Proceeding of Marshack v. Allen & Yphantides in the Bishop bankruptcy* at 2; *Plaintiff’s*
15 *Trial Exhibit 195, Voluntary Petition of Brennon Ty Bishop with Summary of Schedules* at
16 28.

17 However, a finding of “generally not paying one’s debts” requires a more general
18 showing of the debtor’s financial condition and debt structure than merely establishing the
19 existence of a few unpaid debts. Indeed, the Legislative Committee Comment to
20 California Civil Code, § 3439.02(c) explains that, when making this determination:

21 [T]he court should look at more than the amount and due dates of the
22 indebtedness. The court should also take into account such factors as the
23 number of the debtor’s debts, the proportion of those debts not being paid,
24 the duration of the nonpayment, and the existence of a bona fide dispute
25 or other special circumstances alleged to constitute an explanation for the
26 stoppage of payments. The court’s determination may be affected by a
consideration of the debtor’s payment practices prior to the period of
alleged nonpayment and the payment practices of the trade or industry in
which the debtor is engaged.

27 Legislative Comment to California Civil Code, § 3439.02(c).

28

1 The best evidence of the Bishop's pattern of debt repayment as of the petition date
2 is the debtors' Schedule F and Statement of Financial Affairs ("SOFA"), filed on
3 November 19, 2002, and is in the record as Plaintiff's Trial Exhibit 195, pages 19 through
4 21 and 28 through 34, respectively. Bishop's SOFA indicates that he and his wife made
5 all required monthly payments to their secured lienholders, various tax entities, school
6 payments, insurance, etc. In Schedule F, the debtors' main unsecured claims are those
7 to various credit card companies and state court attorney's fees. Based on the totality of
8 the debtors' unsecured debt and debt repayment, therefore, the court finds that Plaintiff
9 has not shown by a preponderance of the evidence that Bishop was generally not paying
10 his debts as they became due.

11 Accordingly, the court finds that Plaintiff has not met its burden in proving by a
12 preponderance of the evidence that Bishop was insolvent as of the petition date or that
13 he was rendered insolvent by the transfer pursuant to either 11 U.S.C.
14 § 548(a)(1)(B)(ii)(I) or California Civil Code, § 3439.02.

15 5. Debtor was Not Engaged in a Business or Transaction (or was About to
16 Engage in a Business or Transaction) for Which any Property Remaining
17 with the Debtor was Unreasonably Small Capital

18 11 U.S.C. § 548(a)(1)(B)(ii)(II) tracks the language of California Civil Code
19 § 3439.04(a)(2)(A), which provides that a transfer may be avoided if the debtor is left with
20 assets that are "unreasonably small in relation to the business or transaction." California
21 Civil Code § 3439.04(a)(2)(A). "The subparagraph focuses attention on whether the
22 amount of all the assets retained by a debtor was inadequate, i.e., unreasonably small in
23 light of the needs of the business or transaction in which the debtor was engaged or
24 about to engage." California Civil Code, § 3439.04, Legislative Committee Comment
25 Note 4; *Interwest Mortgage Investment Co. v. Skidmore*, 655 F. Supp. 2d 1100, 1105-
26 1106 (E.D. Cal. 2009) (defining assets as "unreasonably small" if they are "not
27 reasonably likely to meet the debtors' present or future needs."). Unreasonably small
28 assets signify an inability to generate enough cash flow from operations and the sale of

1 assets to remain financially stable. *Duke Salisbury v. Texas Commerce Bank-Houston,*
2 *N.A. (In re WCC Holding Corp.),* 171 B.R. 972, 985-986 (Bankr. N.D. Tex 1994).

3 Plaintiff does not make an argument under this alternative element regarding
4 Bishop's purchase of the ISO Agreement. The only proposed findings regarding this
5 element focus on Plaintiff's argument that the creation of FedChex and FedChex
6 Recovery were fraudulent transfers of EPT, and Plaintiff's argument that the various 2002
7 capital contributions left Bishop with unreasonably small capital relative to his original
8 25% interest. See *Plaintiff's Proposed Findings of Fact and Conclusions of Law* ¶¶ 1100-
9 1104, at 234-235. Additionally, the court notes that, despite the fact that Bishop spent
10 \$50,000 in exchange for the ISO Agreement, his bankruptcy schedules list \$410,000 in
11 real property assets, \$17,500 in vehicles, plus approximately \$116,060.00 in various
12 personal property and retirement accounts. See *Plaintiff's Exhibit 195, Voluntary Petition*
13 *of Brennon Ty Bishop with Summary or Schedules*) at 7-14. Thus, the \$50,000 transfer
14 did not leave the debtor with unreasonably small assets in comparison to the transfer.

15 6. Plaintiff Did Not Establish that the Debtor Intended to Incur, or Believed He
16 Would Incur, Debts that Would Be Beyond His Ability to Repay

17 11 U.S.C. § 548(a)(1)(B)(ii)(III) similarly tracks the language of California Civil
18 Code § 3439.04(a)(2)(B), which provides that a transfer may be avoided if the debtor
19 "intended to incur, or believed or reasonably should have believed that he or she would
20 incur, debts beyond his or her ability to pay as they became due." Cal. Civ. Code
21 § 3439.04(a)(2)(A).

22 Similarly, Plaintiff does not make an argument under this alternative element
23 regarding Bishop's purchase of the ISO Agreement. The only proposed findings
24 regarding this element focus on Plaintiff's argument that the creation of FedChex and
25 FedChex Recovery were fraudulent transfers of EPT, and Plaintiff's argument that the
26 various 2002 capital contributions left Bishop with unreasonably small capital relative to
27 his original 25% interest. Plaintiff focuses on the liability imposed on Bishop by the
28 impending state court action. See *Plaintiff's Proposed Findings of Fact and Conclusions*

1 of Law ¶¶ 1105-1106, at 235-236 (“1105. Bishop was aware at the time of each of the
2 transactions [discussing the creation of FedChex and FedChex Recovery, as well as the
3 2002 capital contributions], that he was going to incur a debt beyond his ability to pay,
4 when due, by reason of the filing against him of the State Court Judgment. 1106. Bishop
5 should reasonably have believed at the time of each of the transactions [discussing the
6 creation of FedChex and FedChex Recovery, as well as the 2002 capital contributions],
7 that he was going to incur a debt beyond his ability to pay, when due, by reason of the
8 filing against him of the State Court Judgment.”).

9 The court notes that Plaintiff does not argue this element in regard to the \$50,000
10 ISO Agreement purchase, and further finds that it does not apply because of the
11 existence of his other assets listed in his bankruptcy schedules. *See Plaintiff’s Exhibit*
12 *195, Voluntary Petition of Brennon Ty Bishop with Summary or Schedules*) at 7-14.

13 7. Plaintiff Did Not Establish that the Debtor Purchased the ISO Agreement for
14 the Benefit of an Insider Under an Employment Contract and Not in the
15 Ordinary Course of Business

16 This alternative element does not apply to the facts of this action, nor does Plaintiff
17 appear to allege any facts whatsoever in support of them. *See Plaintiff’s Proposed*
18 *Findings of Fact and Conclusions of Law ¶¶ 1084-1106*, at 232-236.

19 8. Conclusion

20 For the foregoing reasons, the court finds that Plaintiff has not proven by a
21 preponderance of the evidence that the creation of FedChex and FedChex Recovery, the
22 various 2002 capital contributions, or Bishop’s purchase of the FedChex ISO Agreement
23 were constructive fraudulent transfers under either the Bankruptcy Code or California
24 law.

25 ///
26
27
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1 **II. FIRST AND SEVENTH CLAIMS FOR RELIEF: AVOIDANCE OF INTENTIONAL**
2 **FRAUDULENT TRANSFERS UNDER 11 U.S.C. § 548 AND CUFTA**

3 Plaintiff alleges that the various transfers discussed above are also avoidable as
4 intentional fraudulent transfers pursuant to Section 548 of the Bankruptcy Code. 11
5 U.S.C. § 548(a)(1)(A) of the Bankruptcy Code states:

6 The trustee may avoid any transfer . . . of an interest of the debtor in
7 property, or an obligation . . . incurred by the debtor, that was made or
8 incurred on or within 2 years⁸ before the date of the filing of the petition, if
the debtor voluntarily or involuntarily—

9 (A) Made such transfer or incurred such obligation with actual intent to
10 hinder, delay, or defraud any entity to which the debtor was or became,
11 on or after the date that such transfer was made or such obligation was
incurred, indebted

12 11 U.S.C. § 548(a)(1)(A). In other words, an intentional fraudulent transfer occurs when
13 a transfer is made or an obligation is incurred with the intent to hinder, delay, or defraud
14 creditors. See 5 Resnick and Sommer, *Collier on Bankruptcy*, ¶ 548.04 at 548-56. The
15 trustee must demonstrate: (1) the debtor transferred an interest in property or incurred a
16 debt, (2) on or within two years before the petition date (or one year for cases
17 commenced before April 21, 2006), (3) with actual intent to hinder, delay, or defraud a
18 present or future creditor. 11 U.S.C. § 548(a)(1)(A). These same elements must be
19 established for a claim under CUFTA, applicable to bankruptcy cases through 11 U.S.C.
20 § 544(b). See California Civil Code, § 3439.04(a)(1). To prevail, Plaintiff must establish
21 by a preponderance of the evidence that the alleged transfers were made with actual
22 intent to hinder, delay, or defraud a creditor. *Wolkowitz v. Beverly (In re Beverly)*, 374
23 B.R. 221, 235 (9th Cir. BAP 2007).

24 **A. Ownership Interests in FedChex and FedChex Recovery: Alter**
25 **Ego/Successor Liability to EPT**

26 _____
27 ⁸ As discussed *supra* regarding constructive fraudulent transfers, the reach-back period applicable to the
28 instant case is one year as opposed to two, because the case was filed before April 21, 2006. See 11
U.S.C. § 548 (2005).

1 As discussed above in Discussion Section I.A, Plaintiff has failed to prove that a
2 *transfer* of the debtor's interests in property took place, and therefore has not established
3 its claims of constructive fraudulent transfers. For much of the same reasons, the court
4 finds that Plaintiff has not proven its claims of intentional fraudulent transfer relating to the
5 creation of FedChex and FedChex Recovery.

6 **B. Capital Contributions: January to October 2002**

7 Plaintiff alleges that the various contributions to FedChex and FedChex Recovery
8 made by Davis or the Davis Entities between January and October 2002, as well as the
9 \$19,000 and \$27,000 contributed by Bishop, were intentional fraudulent transfers. The
10 court found that these transfers were not constructively fraudulent, as discussed above,
11 and for the following reasons, also finds that these transfers were not intentionally
12 fraudulent pursuant to 11 U.S.C. § 548.

13 1. The Contributions Were Transfers of Debtor's Interest in Property

14 As discussed above, the court finds that the Plaintiff has met its burden of proving
15 that the following capital contributions were "transfers" for the purposes of Section 548
16 and CUFTA:

- 17 - January 9, 2002: \$73,885.14 to FedChex by Davis
18 - January 9, 2002: \$20,515.37 to FedChex Recovery by Davis
19 - April 3, 2002: \$91,682.07 to FedChex by Davis
20 - April 3, 2002: \$10,127.74 to FedChex Recovery by Davis
21 - July 10, 2002: \$156,448.95 to FedChex by Davis
22 - July 10, 2002: \$15,708.00 to FedChex Recovery by Davis
23 - July 10, 2002: \$19,000 to FedChex by Bishop
24 - July 10, 2002: \$19,000 credit to FedChex Recovery by Bishop—
interest percentage not affected
25 - September 4, 2002: \$10,000 to FedChex by Bishop
26 - September 19, 2002: \$17,000 to FedChex by Bishop
27 - October 9, 2002: \$150,271.33 to FedChex by Davis
28 - October 9, 2002: \$15,708.28 to FedChex Recovery by Davis.

29 2. The Transfers Occurred Within One Year of the Petition Date

30 Bishop's petition date was November 19, 2002. The various capital contributions
31 by Davis and Bishop all occurred between January 2002 and October 2002, which is

1 within one year of the bankruptcy petition date. See 11 U.S.C. § 548 (2005). Therefore,
2 the alleged transfers occurred within the statutory period for section 548 to apply, as well
3 as under CUFTA, which provides that the trustee must bring an action at least within *four*
4 years of the alleged transfer. California Civil Code, § 3439.09(a), (b).

5 3. Plaintiff Has Not Established Actual Intent to Hinder, Delay, or Defraud
6 Present or Future Creditors

7 A transfer is said to be “actually fraudulent” as to a creditor if the debtor made the
8 transfer “with actual intent to hinder, delay, or defraud any creditor of the debtor.” 11
9 U.S.C. § 548(a)(1)(A); California Civil Code, § 3439.04(a)(1). Because there is often no
10 direct evidence demonstrating actual intent, courts have frequently inferred fraudulent
11 intent from circumstances surrounding the transfer. *In re Acequia, Inc.*, 34 F.3d 800, 806
12 (9th Cir. 1994). These indicia of intent or “badges of fraud” include: “(1) actual or
13 threatened litigation against the debtor; (2) a purported transfer of all or substantially all of
14 the debtor's property; (3) insolvency or other unmanageable indebtedness on the part of
15 the debtor; (4) a special relationship between the debtor and the transferee; and, after the
16 transfer, (5) debtor retaining the property involved in the putative transfer.” *Id.* “The
17 presence of a single badge of fraud may spur mere suspicion; the confluence of several
18 can constitute conclusive evidence of actual intent to defraud, absent ‘significantly clear’
19 evidence of a legitimate supervening purpose.” *Id.* (citation omitted).

20 Similarly, California Civil Code § 3439.04(b) lists a number of nonexclusive factors
21 intended to guide the court in determining actual intent. *In re Beverly*, 374 B.R. at 235-
22 236.

23 The UFTA⁹ list of “badges of fraud” provides neither a counting rule, nor a
24 mathematical formula. No minimum number of factors tips the scales toward
25 actual intent. A trier of fact is entitled to find actual intent based on the evidence in
26 the case, even if no “badges of fraud” are present. Conversely, specific evidence
may negate an inference of fraud notwithstanding the presence of a number of
”badges of fraud.”

27 ⁹ “UFTA” refers to the Uniform Fraudulent Transfer Act. See *In re Beverly*, 374 B.R. at 227.

1
2 *Id.* at 236, *citing, Filip v. Bucurenciu*, 129 Cal. App. 4th 825, 834 (2005). These
3 nonexhaustive factors include:

- 4 (1) Whether the transfer or obligation was to an insider;
- 5 (2) Whether the debtor retained possession or control of the property;
- 6 (3) Whether the transfer or obligation was disclosed or concealed;
- 7 (4) Whether before the transfer was made or obligation was incurred, the
8 debtor had been sued or threatened with suit;
- 9 (5) Whether the transfer was of substantially all of the debtor's assets;
- 10 (6) Whether the debtor absconded;
- 11 (7) Whether the debtor removed or concealed assets;
- 12 (8) Whether the value of the consideration received by the debtor was
13 reasonably equivalent to the value of the asset transferred or the amount of
14 the obligation incurred;
- 15 (9) Whether the debtor was insolvent or became insolvent shortly after the
16 transfer was made or the obligation was incurred;
- 17 (10) Whether the transfer occurred shortly before or after a substantial debt was
18 incurred; and
- 19 (11) Whether the debtor transferred the essential assets of the business to a
20 lienholder who transferred the assets to an insider of the debtor.

21 California Civil Code § 3439.04(b). Just as with the badges of fraud under section 548,
22 “[n]o minimum number of factors tips the scales toward actual intent. . . . [S]pecific
23 evidence may negate an inference of fraud notwithstanding the presence of a number of
24 ‘badges of fraud.’” *Filip v. Bucurenciu*, 129 Cal. App. 4th at 890. In considering the
25 indicia of a fraudulent transfer, the court “should evaluate all of the relevant
26 circumstances involving a challenged transfer” and “may appropriately take into account
27 all indicia negating as well as those suggesting fraud. . . .” *Annod Corp. v. Hamilton &*
28 *Samuels*, 100 Cal.App.4th 1286, 1298 (2002), *quoting*, Legislative Committee comment

1 for California Civil Code, § 3439.04, 12A West's Annotated California Civil Code following
2 California Civil Code, § 3439.04 (referring to statutory language before 2004 amendment
3 of § 3439.04).

4 The transferor's state of mind is the focus of the court's inquiry into actual intent.
5 *Plotkin v. Pomona Valley Imports, Inc. (In re Cohen)*, 199 B.R. 709, 716 (9th Cir. BAP
6 1996); *In re Beverly*, 374 B.R. at 235. Plaintiff must prove the transferor's subjective
7 intent. See *United States v. Tabor Court Realty Corp.*, 803 F.2d 1288, 1304-1305 (3d
8 Cir. 1986).

9 With regard to the various 2002 capital contributions, few of the CUFTA (and for
10 that matter § 548) badges of fraud apply to this situation because it involves transfers of
11 money in exchange for increasing or decreasing shares in two LLCs, rather than
12 transfers of real property where, for example, the debtor transfers title but still retained
13 control of the property. Additionally, there is no evidence before the court that Bishop
14 absconded or concealed these transfers in any way. Therefore, the court will focus its
15 analysis on the relevant factors: the pending litigation against Bishop in 2002, the insider
16 nature of the transactions, reasonably equivalent value, and insolvency of the debtor.

17 c. Pending Litigation Against the Debtor

18 During 2002, actual litigation was pending against Bishop, which affected his
19 capital contributions made on July 10, 2002 and on September 4 and 19, 2002.
20 However, Davis was not named as a defendant in the State Court Action. After Bishop
21 and Murphy formed EPT, EFS and Barry brought the State Court Claim against Bishop,
22 Murphy, and EPT.

23 d. Special Relationship / Insider Status

24 Under Section 548, the existence of a special relationship between the debtor and
25 the transferee can be evidence of actual intent to hinder, delay, or defraud creditors. This
26 can include family, friendship, or a close associate relationship. *Kaisha v. Dodson*, 423
27 B.R. 888, 901 (N.D. Cal. 2010). Similarly, a transfer to an insider of the debtor is
28 evidence of actual intent under CUFTA. See California Civil Code, § 3439.04(b).

1 The court finds that this factor weighs in favor of Plaintiff. Bishop, Davis, and
2 Arnold were all managing partners in FedChex and FedChex Recovery. The transfer of
3 Bishop's membership interest was to Davis. Bishop and Davis were both partners in the
4 same company at the time of the transfers.

5 e. Reasonably Equivalent Value for the Transfers

6 As discussed above in connection with constructive fraudulent transfers, the
7 Plaintiff has not met its burden in this case of demonstrating a lack of reasonably
8 equivalent value. Therefore the absence of this factor weighs in favor of the Defendants.

9 f. Insolvency of the Debtor

10 If a debtor is insolvent at the time of the transfer or becomes insolvent shortly after
11 a transfer, it is indicative of intent to defraud the debtor's creditors. As discussed above,
12 Section 548 of the Bankruptcy Code and CUFTA are relatively interchangeable when it
13 comes to a fraudulent transfer analysis. Although similar, they are not identical when it
14 comes to the court's consideration of whether the debtor was insolvent at the time of the
15 transfers. Under Section 548, a debtor is "insolvent" when the debtor's debts exceed its
16 assets, excluding assets that have been transferred, concealed, or removed with intent to
17 hinder, delay, or defraud creditors. This is known as the "balance sheet" test. *In re*
18 *Sierra Steel, Inc.*, 96 B.R. at 277. An insolvency determination may only be made after
19 establishing the fair value of the debtor's assets. 11 U.S.C. § 101(32).

20 Similarly, under CUFTA, insolvency is determined in accordance with the "balance
21 sheet" analysis. However, CUFTA also provides a rebuttable presumption that the debtor
22 was insolvent if the debtor was not able to pay his debts in the ordinary course of
23 business as they came due (which is considered the "equity" or "cash flow" test). *In re*
24 *Bay Plastics, Inc.*, 187 B.R. 315, 328 n. 22. No such rebuttable presumption exists under
25 Section 548; the Plaintiff must *prove* the debtor's insolvency.

26 In determining whether a debtor's liabilities exceed assets, the court must evaluate
27 the debtor's assets and liabilities based upon a practical assessment of their actual
28 value—a "fair valuation"—rather than in accordance with generally accepted accounting

1 principles. *In re Bay Plastics, Inc.*, 187 B.R. at 330. Intangible balance sheet assets,
2 such as goodwill, which may have no market value (either on a liquidation or going
3 concern basis) generally should be excluded from the calculation. *Id.* at 330-331.

4 1. Balance Sheet Approach

5 As discussed above, regarding the debtor's insolvency as of the petition date as
6 well as the date of the ISO Agreement, Plaintiff did not meet its burden in demonstrating
7 that the debtor was insolvent. The transfers at issue here occurred between January and
8 October 2002, thus the court looks for evidence of the debtor's insolvency at that time.
9 Under the balance sheet approach adopted by the Bankruptcy Code, the court must
10 compare the debtor's assets to his liabilities at the time of the transfer. First, with respect
11 to Bishop's assets at the time of January 2002, the court has little information. Plaintiff
12 provided the court with the Bishops' bankruptcy schedules, which were filed in November
13 2002. *See Plaintiff's Trial Exhibit 195*. Plaintiff did not provide any other evidence of
14 Bishop's purported assets in calendar year 2002, so the court infers Plaintiff relies upon
15 the equity or cash flow analysis, which if demonstrated, raises a rebuttable presumption
16 of insolvency under CUFTA. *In re Bay Plastics, Inc.*, 187 B.R. at 328 n. 22.

17 Indeed, Plaintiff's main argument regarding Bishop's insolvency at the time of the
18 2002 capital contributions centers around Bishop's potential liability under the state court
19 action. *See, e.g., Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶¶ 1085-*
20 *1096*, at 233-234. But again, based on the record, the court lacks sufficient evidence to
21 value Bishop's contingent liability from the state court action as of January 1, 2002.
22 Plaintiff offered no evidence or even argument in support of valuing the state court action
23 prior to the petition date. Plaintiff points to Bishop's "admission" that he did not have the
24 means of paying a debt of \$1,800,000 as of January 1, 2002, if it were immediately due
25 and payable. *Plaintiff's Proposed Findings of Fact and Conclusions of Law ¶¶ 1091*, at
26 *233*, *citing, Bishop Deposition, March 5, 2008*, at 53:23-25, 54:10. Plaintiff cites another
27 "admission" that Bishop "did not have \$24,000,000 in January of 2002 and also did not
28 have that sum on the date he filed for bankruptcy." *Plaintiff's Proposed Findings of Fact*

1 *and Conclusions of Law* ¶ 1092, at 233. The court cannot assume a person is insolvent
2 because he or she may not be able to pay a \$24,000,000—or \$1,800,000—judgment in
3 full at a later time. And, these facts have nothing to do with the reasonable foreseeability
4 that the contingent nature of the state court liability would become a reality in the future.
5 The court notes that the only reason the state court liability became non-contingent was
6 by way of a *default* judgment, entered four months after the petition was filed, then
7 reversed, then finally re-entered based on default five years later in 2008. Based on this
8 record, the court finds that Plaintiff has not shown by a preponderance of the evidence
9 Bishop’s insolvency at the time of the transfers under the balance sheet approach.

10 2. Equity or Cash Flow Approach

11 The court similarly does not find that the presumption of insolvency under CUFTA
12 arises in favor of Plaintiff. Under the “equity” or “cash flow” test, “a debtor is insolvent if
13 the present fair salable value of the debtor’s assets is less than the amount required to
14 pay existing debts as they become due.” *In re Bay Plastics*, 187 B.R. at 328 n. 22. A
15 presumption of insolvency arises under CUFTA if a debtor is *generally* not paying his
16 debts as they become due. California Civil Code, § 3439.02(c). The court discussed this
17 test in depth *supra*, in Section I(C)(4)(b). For the same reasons, the court cannot find
18 that the presumption of insolvency applies to the transfers made prior to the petition date
19 between January and October 2002. Plaintiff only provided evidence of three unpaid
20 debts as of the petition date. This is not sufficient evidence to demonstrate that the
21 debtor was “generally not paying his existing debts as they became due” during the ten
22 months prior to the petition date.

23 3. Conclusion

24 The court finds that, on balance, the applicable factors weigh in favor of the
25 Defendants. Although the various capital contributions took place between insiders and
26 during a time where Bishop faced contingent yet significant liability from the state court
27 action, the other factors outweigh these concerns. Plaintiff did not meet its burden of
28 demonstrating a lack of reasonably equivalent value for these transfers, nor did it

1 demonstrate that Bishop was insolvent between January 2002 and October 2002.
2 Additionally, the record before the court indicates that the members of FedChex and
3 FedChex Recovery had good reasons for increasing Davis' ownership percentage of the
4 two companies. Indeed, FedChex required several loans in the beginning to continue
5 running its business. At trial, Arnold testified that, without the loans, FedChex would
6 have closed. *Arnold Trial Testimony, May 6, 2010*, at 12:05-12:06 p.m. Bishop
7 explained at trial that, in order to continue operations, "the company needed an infusion
8 of capital to continue operations, and that was why Mr. Davis made those contributions."
9 *Bishop Trial Testimony, February 19, 2010*, at 9:26 a.m. Due to limited cash flow,
10 FedChex was not able to repay these loans made by Davis, Bishop, YPDS, and Niche.
11 Thus, the members turned the loans into capital contributions. According to Arnold, it
12 was expected that any invested capital or resources not repaid would become capital
13 contributions in FedChex and FedChex Recovery. *Arnold Trial Declaration Concerning*
14 *Case in Chief* at 3:2-5. From Arnold's perspective, he understood that his decreased
15 ownership percentage was what was required to keep the company afloat. *Arnold Trial*
16 *Testimony, May 6, 2010*, at 2:22 p.m. (When asked about his decreasing ownership
17 percentage, Arnold stated: "One percent of success can be significant."). *Id.* The court
18 finds the testimony of these witnesses to be credible.

19 For these reasons, the court finds that Plaintiff has not established by a
20 preponderance of the evidence that the various 2002 capital contributions were
21 intentional fraudulent transfers under 11 U.S.C. § 548(a)(1)(A) or California Civil Code §
22 3439.04(b).

23 **C. \$50,000 Payment for ISO Agreement**

24 As discussed above, Bishop's payment for the ISO Agreement was not a
25 constructive fraudulent transfer because Plaintiff did not meet its burden of establishing
26 any of the four alternatives provided in 11 U.S.C. § 548(a)(1)(B). Similarly, the court finds
27 that Plaintiff did not prove that this transfer was intentionally fraudulent.

28

1 1. Debtor Transferred an Interest in Property

2 As discussed in the court's analysis of Plaintiff's claim for constructive fraudulent
3 transfer, the court finds that Bishop's transfer of funds to buy the ISO Agreement was a
4 transfer for purposes of Section 548 and CUFTA.

5 2. The Transfer Occurred Within the Statutory Period for Fraudulent Transfers

6 The transfer from Bishop's ISO agreement purchase occurred either the day
7 before or the day of Bishop's bankruptcy petition, which was within the statutory period of
8 one year of the debtor's petition date under 11 U.S.C. § 548. This transfer also falls
9 within the applicable statutory period for transfers under CUFTA. California Civil Code
10 § 3439.09(a), (b).

11 3. Plaintiff Has Not Established Actual Intent to Hinder, Delay, or Defraud
12 Present or Future Creditors

13 As with the various 2002 capital contributions, few of the CUFTA (and for that
14 matter § 548) badges of fraud apply to the circumstances surrounding Bishop's purchase
15 of the ISO Agreement. The court relies on its analysis, *supra*, regarding the 2002 capital
16 contributions to come to the same conclusion that Bishop did not have actual intent to
17 hinder, delay, or defraud creditors at the time of his purchase of the ISO Agreement.

18 Accordingly, the court finds that Plaintiff did not meet its burden of proving by a
19 preponderance of the evidence its first and sixth claims for relief that any of the alleged
20 prepetition transfers were made with actual intent to hinder, delay, or defraud creditors
21 pursuant to 11 U.S.C. § 548(a)(1)(A) or California Civil Code, § 3439.04(b).

22 **III. ALTERNATIVE ARGUMENT: PREPETITION TRANSFERS AS AVOIDABLE**
23 **PREFERENTIAL TRANSFERS**

24 In the Fourth Amended Complaint, Plaintiff did not plead a specific claim for
25 preferential transfer pursuant to 11 U.S.C. § 547. *See Fourth Amended Complaint* at 12-
26 27. However, in the Joint Pretrial Order, Plaintiff lists issues of law as to an avoidable
27 preference theory. Specifically, Plaintiff inquires:

1 4.243. Is Plaintiff entitled to a Court order avoiding as avoidable
2 preferences, the prepetition transfers of Ty Bishop's interest in FedChex
and FedChex Recovery . . . ?

3 4.249. Is Plaintiff entitled to a Court order avoiding, as an avoidable
4 preference, the FedChex Recovery \$19,000 Transfer . . . ?

5 *JPTO, Plaintiff's Issues as to Avoidable Preferences, 4.243, 4.249, at pages 51-52.*

6 Thus, Plaintiff argues as an alternative theory of relief that the various capital
7 contributions made in 2002 are also avoidable as preferential transfers under § 547(b),
8 which permits a trustee to avoid any transfer of an interest in property of the debtor:

9 (b) Except as provided in subsections (c) and (i) of this section, the trustee
10 may avoid any transfer of an interest of the debtor in property—

- 11 (1) to or for the benefit of a creditor;
12 (2) for or on account of an antecedent debt owed by the debtor
before such transfer was made;
13 (3) made while the debtor was insolvent;
14 (4) made--

(A) on or within 90 days before the date of the filing of the
petition; or

15 (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

16 (5) that enables such creditor to receive more than such creditor
would receive if--

17 (A) the case were a case under chapter 7 of this title;

18 (B) the transfer had not been made; and

19 (C) such creditor received payment of such debt to the
extent provided by the provisions of this title.

20 11 U.S.C. § 547(b). The Ninth Circuit stated the following elements for a claim under this
21 section:

- 22 (1) a transfer of an interest of the debtor in property;
23 (2) to or for the benefit of the creditor;
24 (3) for or on account of an antecedent debt;
25 (4) made while the debtor was insolvent;
26 (5) made on or within 90 days before the date of the filing of the petition; and
27 (6) one that enables the creditor to receive more than such creditor would
28 receive in a Chapter 7 liquidation of the estate.

In re Kemp Pacific Fisheries, Inc., 16 F.3d 313, 315 n.1 (9th Cir. 1994); *accord, In re Lee*,
179 B.R. 149, 155 (9th Cir. BAP 1995). The preference period is extended from 90 days

1 to one year if the creditor is an insider. 11 U.S.C. § 547(b)(4)(B). Plaintiff has the burden
2 of proving these elements by a preponderance of the evidence. *In re Lee*, 179 B.R. at
3 155. As discussed below, the court finds that a number of these elements cannot apply
4 to the capital contributions made in 2002 because Davis and FedChex Recovery—the
5 transferees in this situation—were not creditors of Bishop—the transferor.

6 **A. Plaintiff Established a Transfer of an Interest of Debtor’s Property**

7 The court can readily find that the 2002 capital contributions were transfers of an
8 interest of the debtor’s property, as discussed above. In making the \$19,000 transfer to
9 FedChex Recovery on July 10, 2002, Bishop borrowed on a line of credit on his house to
10 make the cash payment. *Plaintiff’s Trial Exhibit 143, Document entitled “Change in*
11 *Capitla (sic) Contributions” referencing FedChex Recovery, LLC and referencing a date*
12 *of July 10, 2002; JPTO Undisputed Fact 1.33; Plaintiff’s Trial Exhibit 122, Document*
13 *entitled “Washington Mutual Equity Loan Detail”; Bishop Trial Testimony, February 19,*
14 *2010, at 10:51 a.m.* It could be argued that this contribution was not actually a transfer of
15 Bishop’s property because it was merely a change in form – cash exchanged for an
16 equivalent interest in FedChex Recovery. However, the record indicates that FedChex
17 Recovery was in need of cash at the time of the transfer to meet its operating expenses
18 and it would have ceased operations if the contribution was not made. *Arnold Trial*
19 *Testimony, May 6, 2010, at 12:05-12:06 p.m.* Under those circumstances, the court is
20 inclined to view the \$19,000 contribution as more akin to a gift to FedChex without an
21 equivalent exchange or reasonable expectation of return. Absent evidence of equivalent
22 value in FedChex at the time of the contribution, the court concludes that the cash
23 infusion constituted a transfer of Bishop’s interest in the funds to FedChex Recovery.

24 **B. Plaintiff Established Only Some of the Transfers Occurred Within the**
25 **“Preference Period”**

26 Except where the transfer involves an insider, Plaintiff must prove that the transfer
27 was made within 90 days preceding the filing of the bankruptcy petition. 11 U.S.C.
28 § 547(b)(4)(A). If, however, Plaintiff establishes that the transfer was made to an insider

1 of the debtor, the transfer may be avoided if it was made up to one year prior to the
2 petition date. 11 U.S.C. § 547(b)(4)(B).

3 1. 90-day Non-Insider Preference Period

4 The Bishops filed their bankruptcy petition on November 19, 2002. Thus, transfers
5 made between August 19, 2002 and November 19, 2002 are within the preference period
6 under section 547(b)(4)(A). This time period covers the following capital contributions:

- 7 - September 4, 2002: \$10,000 to FedChex by Bishop
8 - September 19, 2002: \$17,000 to FedChex by Bishop
9 - October 9, 2002: \$150,271.33 to FedChex by Davis
- October 9, 2002: \$15,708.28 to FedChex Recovery by Davis.

10 The court therefore concludes that Plaintiff has established by a preponderance of the
11 evidence that these transfers were made within the preference period.

12 2. One-year Insider Preference Period

13 As for the remaining capital contributions, however, in order to establish a
14 preferential transfer, Plaintiff must prove that the transferees, Davis and FedChex
15 Recovery, were insiders of the transferor, Bishop. Unlike the type of “insider” relationship
16 considered under the badges of fraud, an “insider” for purposes of § 547 is statutorily
17 defined. Under the Bankruptcy Code, if the debtor is an individual, an “insider” is defined
18 as (1) a relative of the debtor or of a general partner of the debtor, (2) the partnership in
19 which the debtor is a general partner, (3) a general partner of the debtor, or (4) a
20 corporation of which the debtor is a director, officer, or person in control. 11 U.S.C.
21 § 101(31)(A).

22 a. Insider Status of Davis

23 None of these definitions apply to the situation at hand because both Bishop and
24 Davis were members of two limited liability companies, rather than a general partnership.
25 “Insider status” may also be based on a professional or business relationship that is close
26 enough to compel a conclusion that the transferee “gained an advantage attributable
27 simply to affinity rather than to the course of business dealings between the parties.”
28 *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman)*, 126 B.R. 63, 70 (9th Cir. BAP

1 1991). The Ninth Circuit Bankruptcy Appellate Panel explained, however, that “[i]t is
2 unlikely that Congress intended that complex business relationships existing over a
3 period of time, attended by some personal involvement but without control by the creditor
4 over the debtor’s business, would subject such creditor to insider status.” *Id.*

5 As is discussed in subsection (C), *infra*, Davis was not a creditor of Bishop (and
6 therefore cannot be considered a creditor with “insider status”). However, assuming the
7 court need only find that Davis is an insider of Bishop, the court similarly finds in the
8 negative. First, the statutory definition of “insider” does not apply to Bishop and Davis.
9 Second, the evidence before the court reflects that Bishop and Davis were business
10 partners. Davis did not know Bishop until he was approached by Bishop to enter into a
11 business transaction together. *Davis Deposition, January 29, 2008*, at 21:16-25:25. The
12 court finds that the more credible evidence in this case demonstrates arms’ length
13 transactions for the capital contributions made in 2002, based on legitimate needs by
14 both FedChex and FedChex Recovery to stay afloat as businesses.

15 Therefore, the following transactions were not within the preference period, and
16 cannot be avoided as preferential transfers:

- 17 - January 9, 2002: \$73,885.14 to FedChex by Davis
- 18 - January 9, 2002: \$20,515.37 to FedChex Recovery by Davis
- 19 - April 3, 2002: \$91,682.07 to FedChex by Davis
- 20 - April 3, 2002: \$10,127.74 to FedChex Recovery by Davis
- 21 - July 10, 2002: \$156,448.95 to FedChex by Davis
- 22 - July 10, 2002: \$15,708.00 to FedChex Recovery by Davis

23 **b. Insider Status of FedChex Recovery**

24 Similarly, FedChex Recovery was not a creditor of Bishop and cannot therefore be
25 considered a creditor with “insider status” for purposes of § 547(b). However, if the court
26 were only making a finding as to FedChex Recovery’s insider status, then it would
27 conclude that FedChex Recovery was an insider of Bishop. An insider of an individual
28 debtor includes a “corporation of which the debtor is a director, officer, or person in
control.” 11 U.S.C. § 101(31)(A)(iv). The definition of “corporation” under the Code
includes unincorporated limited liability companies. 11 U.S.C. § 101(9)(A)(4)(iv); *In re*

1 *Longview Aluminum, LLC*, 657 F.3d 507, 509 n. 1 (7th Cir. 2011); See also *In re Village*
2 *at Lakeridge, LLC*, 2013 WL 1397447 (9th Cir. BAP April 5, 2013) (unpublished
3 memorandum decision). FedChex Recovery is a limited liability company, and therefore
4 falls within the definition of a corporation under the Code. It appears undisputed that
5 Bishop was a person in control of FedChex Recovery, and FedChex Recovery would
6 then be an insider of Bishop. If Plaintiff were to establish that FedChex Recovery was a
7 creditor of Bishop, then the following transfers would fall within the one-year preference
8 period for insiders:

- 9 - July 10, 2002: \$19,000 to FedChex by Bishop
- 10 - July 10, 2002: \$19,000 credit to FedChex Recovery by Bishop—
interest percentage not affected

11 However, there is no evidence in the record of any debt owed by Bishop to FedChex
12 Recovery, and the court cannot find that it was an insider creditor for purposes of
13 extending the preference period under § 547(b)(4)(B).

14 **C. Plaintiff Did Not Establish that Davis or FedChex Recovery Was a**
15 **Creditor of the Debtor, Did Not Establish that the Transfer Was Made on**
16 **Account of An Antecedent Debt, and Did Not Establish that the Creditor**
17 **Received More Than it Would Have in a Chapter 7 Liquidation**

18 To be avoided as a preference, the transfer must have been made to or for the
19 benefit of a creditor. The Bankruptcy Code defines “creditor” as an entity that has a
20 prepetition claim against the debtor or the estate, including a community claim. 11
21 U.S.C. § 101(10). In other words, to determine “whether a loan repayment is ‘for or on
22 account of [a] . . . debt owed by the debtor’ is to consider whether the creditor would be
23 able to assert a claim against the estate absent the repayment.” *In re Virginia-Carolina*
24 *Financial Corp.*, 954 F.2d 193, 197 (4th Cir. 1992), *citing*, 11 U.S.C. § 101(12) (defining
25 “debt” as “liability on a claim”). “Claim” is defined by the Bankruptcy Code as any right to
26 payment or to an equitable remedy. 11 U.S.C. § 101(5).

27 In this case, Bishop was the transferor for the various contributions and Davis and
28 FedChex Recovery were the transferees. There is no argument made in this case that
Davis was a “creditor” of Bishop, because there is no evidence indicating that either

1 Davis or FedChex Recovery was entitled to any sort of prepetition claim against Bishop.
2 Thus, in that sense, Plaintiff's preference claim fails because it cannot establish that
3 Davis or FedChex Recovery was a creditor of Bishop, and they would not receive
4 anything in any bankruptcy case. Nor can Plaintiff establish that Bishop engaged in the
5 capital contributions on account of an antecedent debt owed to either Davis or FedChex
6 Recovery.

7 Instead, however, Plaintiff argues that by agreeing with Davis to dilute his interests
8 in FedChex and FedChex Recovery in order to repay the debt owed to the Davis Entities,
9 Bishop "created an obligation to himself to either transfer ownership interests to Davis or
10 to pay a portion of the purported debt by putting capital into" FedChex and FedChex
11 Recovery. *Plaintiff's Proposed Findings of Fact and Conclusions of Law* ¶¶ 1108-1109 at
12 236, and ¶¶ 1116-1117 at 237. But this assumes that Bishop owed a debt to the Davis
13 Entities based on the loans given by those entities—which were later considered capital
14 contributions by agreement of the four members. The loans made by the Davis Entities,
15 as discussed *supra*, were made in order to keep *FedChex and FedChex Recovery*
16 afloat—not Bishop individually. Thus, to the extent those contributions were considered
17 "loans," they were loans between the Davis Entities, on the one hand, and FedChex and
18 FedChex Recovery, on the other.

19 Both FedChex and FedChex Recovery are limited liability companies ("LLC's"). A
20 limited liability company is a hybrid between a limited partnership and a corporation.
21 California Corporations Code § 17001, 17101. An LLC is considered a separate entity
22 from its members or owners, and generally speaking, only the LLC is responsible for the
23 entity's debts (unless, for example, the court applies alter ego liability). California
24 Corporations Code, §§ 17003 and 17101.

25 However, the court need not engage in an alter ego analysis here; the loans made
26 by the Davis Entities were not characterized as **debt** giving rise to a **claim** in Bishop's
27 bankruptcy case because the members of FedChex and FedChex Recovery all agreed to
28 consider those loans as capital contributions and simply increase Davis' percentage

1 ownership in the entities, rather than attempting the impossible, i.e., repaying the loans
2 through the entities. Indeed, FedChex required several loans in the beginning to
3 continue running its business. At trial, Arnold testified that, without the loans, FedChex
4 would have closed. *Arnold Trial Testimony, May 6, 2010*, at 12:05-12:06 p.m. Bishop
5 explained at trial that, in order to continue operations, “the company needed an infusion
6 of capital to continue operations, and that was why Mr. Davis made those contributions.”
7 *Bishop Trial Testimony, February 19, 2010*, at 9:26 a.m. Due to limited cash flow,
8 FedChex was not able to repay these loans made by Davis, Bishop, YPDS, and Niche.
9 Thus, the members turned the loans into capital contributions. According to Arnold, it
10 was expected that any invested capital or resources not repaid would become capital
11 contributions in FedChex and FedChex recovery. *Arnold Trial Declaration* at 3:2-5.
12 Therefore, in these circumstances, even if the court were to pierce the corporate veil of
13 FedChex and FedChex Recovery to impose liability on Bishop, the court would not find
14 liability in Bishop because what were originally considered loans were transformed into
15 capital contributions before a “claim” against Bishop or the FedChex Entities would have
16 arisen.

17 Because Plaintiff cannot establish that Davis, or the Davis Entities, were creditors
18 of Bishop, Plaintiff similarly cannot establish that the transfers were made on account of
19 an antecedent debt, or that Davis or the Davis Entities received more than they would
20 have in a chapter 7 liquidation. Although Plaintiff’s theory does not address the direct
21 contribution to FedChex Recovery, Plaintiff has similarly failed to show that FedChex
22 Recovery was a creditor of Bishop or that the additional capital contribution was on
23 account of an antecedent debt. For these reasons, Plaintiff’s alternative theory of
24 preferential transfer fails.

25 **D. Plaintiff Established Insolvency for the Limited Purpose of the 90-Day**
26 **Preference Period Only**

27 As previously discussed, Plaintiff did not establish that Bishop was insolvent at the
28 time of the capital contributions, between January 2002 and October 2002, for the

1 purposes of 11 U.S.C. § 548. However, that finding was based upon the court's review of
2 Plaintiff's case in chief. Defendant did not specifically provide evidence in this case of
3 Bishop's solvency during the 90-day preference period, between August 19, 2002 and
4 November 19, 2002. In contrast to a claim for fraudulent transfer under 11 U.S.C. § 548,
5 under 11 U.S.C. § 547, Plaintiff enjoys a *presumption* of insolvency during the 90-day
6 preference period. There is no such rebuttable presumption for the extended, insider-
7 transfer preference period. 11 U.S.C. § 547(f). Thus, for the same reasons already
8 discussed, Plaintiff did not meet its burden of proving insolvency at the time of January-
9 to-August, 2002 (relating to the extended insider preference period) by a preponderance
10 of the evidence.

11 However the 90-day presumption of insolvency applies to the transfers made
12 between August 19, 2002 and November 19, 2002.¹⁰ In order to defeat the insolvency
13 presumption for transfers made during the 90-day preference period, the transferee must
14 come forward with substantial evidence of the debtor's solvency when the transfers were
15 made. *In re Sierra Steel, Inc.*, 96 B.R. at 277. In this case, the defendants did not come
16 forth with specific evidence as to the debtor's solvency. Instead, Defendants poked holes
17 in Plaintiff's case, i.e., "The more credible evidence failed to support a finding that Ty
18 Bishop was or became insolvent as a result of the transfer which allegedly occurred on
19 October 9, 2002." *Defendant's Proposed Findings of Fact and Conclusions of Law* ¶ 290,
20 at 80.

21 The court agrees with the Defendants, but for the limited purposes of the
22 presumption of insolvency afforded to Plaintiff during the 90-day preference period, the
23 court finds that the Defendants did not rebut the presumption of insolvency of the debtor
24

25 ¹⁰ Specifically, the following transfers:

- 26 - September 4, 2002: \$10,000 to FedChex by Bishop
- 27 - September 19, 2002: \$17,000 to FedChex by Bishop
- 28 - October 9, 2002: \$150,271.33 to FedChex by Davis
- October 9, 2002: \$15,708.28 to FedChex Recovery by Davis.

1 because the Defendants did not come forth with any evidence of their own that Bishop
2 was solvent during the relevant time period.

3 Regardless, because Plaintiff failed to meet the other requisite elements as
4 discussed above, the court finds that Plaintiff has not established a claim for preferential
5 transfer pursuant to 11 U.S.C. § 547 by a preponderance of the evidence.

6 **IV. THIRD CLAIM FOR RELIEF: AVOIDANCE OF POST-PETITION TRANSFERS**
7 **UNDER 11 U.S.C. § 549**

8 The only remaining alleged transfers needing discussion are the post-petition
9 purchases of Bishop's remaining interests in FedChex and FedChex Recovery. The
10 Bankruptcy Code allows a trustee to avoid a transfer of property of the estate:

11 (1) That occurs after the commencement of the case; and

12 (2) (A) that is authorized only under section 303(f) or 542(c) of this title; or

13 (B) that is not authorized under this title or by the court.

14 11 U.S.C. § 549(a). Section 549 is directed at voluntary postpetition transfers made by
15 the debtor (or made by others on the debtor's behalf). *In re Schwartz*, 954 F.2d 569, 573
16 (9th Cir. 1992). An action to avoid a postpetition transfer must be brought either within
17 two years after the date of the transfer sought to be avoided, or after the case is closed or
18 dismissed, whichever is earlier. 11 U.S.C. § 549(d).

19 In this case, section 549(a)(2)(A) does not apply because: (1) this is not an
20 involuntary bankruptcy case governed by section 303, and (2) no argument has been
21 made that the existing members of FedChex and FedChex Recovery were bona fide
22 purchasers of debtor's remaining interest in the companies. See 11 U.S.C. §§ 303(f) and
23 542(c). Defendants concede that a meeting was held on the date the Bishops filed their
24 bankruptcy petition, at which meeting Bishop, Arnold, Murphy, and Davis discussed the
25 filing of the Bishops' bankruptcy case. *Davis Deposition, January 20, 2008*, at 228:5-
26 230:21; 11 U.S.C. § 542(c); *Plaintiff's Trial Exhibit 146, Document entitled "Resolution to*
27 *Continue Doing Business" referencing FedChex, LLC and referencing a date of*
28 *November 19, 2002; Plaintiff's Trial Exhibit 147, Document entitled "Resolution to*

1 *Continue Doing Business*” referencing *FedChex Recovery, LLC* and referencing a date of
2 *November 19, 2002*.

3 Thus, the court must determine whether these alleged transfers occurred without
4 authorization from the bankruptcy court., making 11 U.S.C. § 549(a)(2)(B) applicable.
5 The Plaintiff must establish the following: “(1) a transfer (2) of estate property; (3) that
6 occurred after the commencement of the case; and (4) that was not authorized by statute
7 or the court.” 11 U.S.C. § 549(a); *In re First Protection, Inc.*, 440 B.R. 821, 827-828 (9th
8 Cir. BAP 2010). Once Plaintiff establishes its prima facie case, “to the extent that a
9 transfer is avoided under § 549, the trustee may recover, for the benefit of the estate, the
10 property transferred, or the value of such property, from the initial transferee or any
11 subsequent transferee.” *In re First Protection, Inc.*, 440 B.R. at 828, citing, 11 U.S.C.
12 § 550(a)(1) and (2). Any entity seeking to establish “the validity of a transfer under § 549
13 of the Code shall have the burden of proof.” Fed. R. Bankr. P. 6001.

14 As discussed above in Factual Background Section 3(c), on December 4, 2002,
15 Bishop accepted a post-petition purchase of his remaining interest in FedChex and
16 FedChex Recovery by the remaining members of FedChex and FedChex recovery.
17 *Plaintiff’s Trial Exhibit 152, Document entitled “Former Members Purchase Price”*
18 *referencing FedChex, LLC and referencing a date of December 4, 2002 and referencing*
19 *Ty Bishop and an amount of \$62,000; Plaintiff’s Trial Exhibit 154, Document entitled*
20 *“Former Members Purchase Price” referencing FedChex Recovery, LLC and referencing*
21 *a date of December 4, 2002, and referencing Brennon Ty Bishop and the amount of*
22 *\$2,000. Bishop received \$62,000 for his \$48,000 capital balance in FedChex. Plaintiff’s*
23 *Trial Exhibit 152, Document entitled “Former Members Purchase Price” referencing*
24 *FedChex, LLC and referencing a date of December 4, 2002 and referencing Ty Bishop*
25 *and an amount of \$62,000. The additional \$14,000 over Bishop’s balance of \$48,000*
26 *was for “fair consideration” of his member interest, but Bishop does not know why the*
27 *amount was calculated that way. Id. at 224:16-17. Bishop accepted \$2,000 for his*
28 *capital balance of \$2,000 in FedChex Recovery. Plaintiff’s Trial Exhibit 154, Document*

1 *entitled "Former Members Purchase Price" referencing FedChex Recovery, LLC and*
2 *referencing a date of December 4, 2002, and referencing Brennon Ty Bishop and the*
3 *amount of \$2,000. Bishop accepted this offer and waived his right to an appraisal of his*
4 *membership interest without approval of the trustee or the court. Plaintiff's Trial Exhibit*
5 *153, Document entitled "Promissory Note Balloon Payment" bearing a signature date of*
6 *December 22, 2002 with Ty Bishop as payee in the amount of \$62,000 and referencing*
7 *FedChex, LLC; Plaintiff's Trial Exhibit 155, Document entitled "Promissory Note FedChex*
8 *Recovery Balloon Payment" referencing and bearing a signature by FedChex, LLC dated*
9 *December 22, 2002 with Ty Bishop as payee in the amount of \$2,000; Shulman Trial*
10 *Declaration, filed June 30, 2009, at 7 ¶ 5.*

11 However, the members of the FedChex Entities did not pay any cash to Bishop for
12 buying out his interest. Instead, Davis signed promissory notes on December 22, 2002
13 on behalf of FedChex and FedChex Recovery, one in the amount of \$62,000 (buying out
14 Bishop's interest in FedChex) and one in the amount of \$2,000 (buying out Bishop's
15 interest in FedChex Recovery), both with an interest rate of 5 percent (collectively, the
16 "Promissory Notes"). *Plaintiff's Trial Exhibit 153, Document entitled "Promissory Note*
17 *Balloon Payment" bearing a signature date of December 22, 2002 with Ty Bishop as*
18 *payee in the amount of \$62,000 and referencing FedChex, LLC; Plaintiff's Trial Exhibit*
19 *155, Document entitled "Promissory Note FedChex Recovery Balloon Payment"*
20 *referencing and bearing a signature by FedChex, LLC dated December 22, 2002 with Ty*
21 *Bishop as payee in the amount of \$2,000. The FedChex Promissory Note provided that*
22 *full payment plus interest would be made within 5 years of commencement. Plaintiff's*
23 *Trial Exhibit 153, Document entitled "Promissory Note Balloon Payment" bearing a*
24 *signature date of December 22, 2002 with Ty Bishop as payee in the amount of \$62,000*
25 *and referencing FedChex, LLC. The FedChex Recovery Promissory Note provided that*
26 *full payment plus interest would be made on or before March 1, 2003. Plaintiff's Trial*
27 *Exhibit 155, Document entitled "Promissory Note FedChex Recovery Balloon Payment"*
28 *referencing and bearing a signature by FedChex, LLC dated December 22, 2002. At this*

1 point, Bishop was completely bought out from his ownership interests in FedChex and
2 FedChex Recovery, but was never fully reimbursed for his ownership interests. On
3 December 4, 2002, Bishop's ownership interests in FedChex and FedChex Recovery
4 were reduced to 0%, bought out by the Promissory Notes rather than cash. *Plaintiff's*
5 *Trial Exhibit 150, Document entitled "Completion of Section 8.1 Promissory Note*
6 *Calculations, Former Member Interest and Capital Contribution" referencing FedChex,*
7 *LLC and referencing a date of December 4, 2002; Plaintiff's Trial Exhibit 151, Document*
8 *entitled "Completion of Section 8.1 Promissory Note Calculations, Former Member*
9 *Interest and Capital Contribution" referencing FedChex Recovery, LLC and referencing a*
10 *date of December 4, 2002; Plaintiff's Trial Exhibit 168, Document entitled "Completion of*
11 *Section 8.1 Promissory Note Calculations Former Member Interest and Capital*
12 *Contribution" referencing FedChex, LLC and referencing a date of December 4, 2002;*
13 *Plaintiff's Trial Exhibit 152, Document entitled "Former Members Purchase Price"*
14 *referencing FedChex, LLC and referencing a date of December 4, 2002 and referencing*
15 *Ty Bishop and an amount of \$62,000; Plaintiff's Trial Exhibit 153, Document entitled*
16 *"Promissory Note Balloon Payment" bearing a signature date of December 22, 2002 with*
17 *Ty Bishop as payee in the amount of \$62,000 and referencing FedChex, LLC; Plaintiff's*
18 *Trial Exhibit 154, Document entitled "Former Members Purchase Price" referencing*
19 *FedChex Recovery, LLC and referencing a date of December 4, 2002, and referencing*
20 *Brennon Ty Bishop and the amount of \$2,000; Plaintiff's Trial Exhibit 155, Document*
21 *entitled "Promissory Note FedChex Recovery Balloon Payment" referencing and bearing*
22 *a signature by FedChex, LLC dated December 22, 2002 with Ty Bishop as payee in the*
23 *amount of \$2,000.*

24 In connection with the FedChex Promissory Note, the Trustee received \$4,908.27
25 as partial interest payments toward the Note. These payments were deposited into a
26 trust account, and the FedChex Note has never been paid in full. *Davis Deposition,*
27 *January 29, 2008, at 256:12-257:18; Shulman Trial Declaration, ¶ 5.*

28

1 In regard to the FedChex Recovery Promissory Note, the evidence indicates that
2 no payments were ever made on this Note. *Davis Deposition, January 29, 2008*, at
3 260:23-261:1; *Shulman Trial Declaration ¶ 5*.

4 A. Plaintiff Established That a Transfer of Property of the Estate Occurred

5 Here, as with the various 2002 capital contributions discussed above, when
6 Bishop accepted a buyout of his interests in FedChex and FedChex Recovery, there was
7 a diminishment of the debtor's estate property because the transfers deprived creditors
8 from receiving distributions pursuant to Bishop's existing membership interests as of the
9 petition date. Indeed, the definition of "transfer" is broad. 11 U.S.C. § 101(54)(D)
10 ("[E]ach mode, direct or indirect, absolute or conditional, voluntary or involuntary, of
11 disposing of or parting with—(i) property; or (ii) an interest in property"). In exchange for
12 zeroing out Bishop's interests in FedChex and FedChex Recovery, Davis signed the
13 Promissory Notes entitling Bishop to eventual payment in full of \$64,000 plus interest.

14 The court must also determine what percentage of the FedChex Entities Bishop
15 owned at the time of these purchases of his remaining interests. Plaintiff urges the court
16 to find that Bishop held a 9.12% interest in FedChex as of December 3, 2002 and 2.64%
17 in FedChex Recovery, because the October 9, 2002 capital contribution documents show
18 those amounts. See *Plaintiff's Trial Exhibit 144, Document entitled "Change in Captial*
19 *(sic) Contributions" referencing FedChex, LLC, and referencing a date of October 9,*
20 *2002; Plaintiff's Trial Exhibit 145, Document entitled "Change in Captial (sic)*
21 *Contributions" referencing FedChex Recovery, LLC and referencing a date of October 9,*
22 *2002*. And, because Bishop testified that his bankruptcy schedules were likely not
23 accurate, since he did not review them thoroughly before filing, the unexplained reduction
24 of ownership interests listed in the schedules (8.5% interest in FedChex, 1.8% interest in
25 FedChex Recovery, see *Plaintiff's Trial Exhibit 195* at 11), should be given no weight.
26 Plaintiff is correct. The court does not consider Bishop's bankruptcy schedules to be
27 credible evidence of Bishop's ownership amount in the FedChex Entities for the reasons
28

1 cited by Plaintiff. See *Trial Testimony of Brennon Ty Bishop, February 19, 2010*, at 1:48-
2 1:50 p.m.

3 Additionally, it appears there is an unaccounted for gap in the evidence before the
4 court. Plaintiff's Trial Exhibits 138 through 145 demonstrate the changes in capital
5 contributions made by the four owners throughout 2002. The adjustments to ownership
6 percentages were made quarterly unless the members agreed to other time periods. See
7 *Plaintiff's Trial Exhibit 138, Document entitled "Change in Captial (sic) Contributions"*
8 *referencing FedChex, LLC and referencing a date of January 9, 2002; Plaintiff's Trial*
9 *Exhibit 139, Document entitled "Change in Captial (sic) Contributions" referencing*
10 *FedChex Recovery, LLC and referencing a date of January 9, 2002; Plaintiff's Trial*
11 *Exhibit 140, Document entitled "Change in Captial (sic) Contributions" referencing*
12 *FedChex, LLC and referencing a date of April 3, 2002; Plaintiff's Trial Exhibit 141,*
13 *Document entitled "Change in Captial (sic) Contributions" referencing FedChex*
14 *Recovery, LLC and referencing a date of April 3, 2002; Plaintiff's Trial Exhibit 142,*
15 *Document entitled "Change in Captial (sic) Contributions" referencing FedChex, LLC and*
16 *referencing a date of July 10, 2002; Plaintiff's Trial Exhibit 143, Document entitled*
17 *"Change in Captial (sic) Contributions" referencing FedChex Recovery, LLC and*
18 *referencing a date of July 10, 2002; Plaintiff's Trial Exhibit 144, Document entitled*
19 *"Change in Captial (sic) Contributions" referencing FedChex, LLC and referencing a date*
20 *of October 9, 2002; Plaintiff's Trial Exhibit 145, Document entitled "Change in Captial*
21 *(sic) Contributions" referencing FedChex Recovery, LLC and referencing a date of*
22 *October 9, 2002. As of October 9, 2002 (third quarter 2002), Bishop's total contribution*
23 *to FedChex is listed at \$48,000, for 9.12% ownership; Davis' total contribution to*
24 *FedChex is listed as \$474,287.49, for 90.12% ownership. Plaintiff's Trial Exhibit 144,*
25 *Document entitled "Change in Captial (sic) Contributions" referencing FedChex, LLC and*
26 *referencing a date of October 9, 2002. Similarly, as of October 9, 2002 (third quarter*
27 *2002), Bishop's total contribution to FedChex Recovery is listed at \$2,000, for 2.64%*
28 *ownership; Davis' total contribution to FedChex Recovery is listed at \$69,775.07, for*

1 92.08% ownership. *Plaintiff's Trial Exhibit 145, Document entitled "Change in Captial*
2 *(sic) Contributions" referencing FedChex Recovery, LLC and referencing a date of*
3 *October 9, 2002.*

4 The next capital contribution documents in the record are Plaintiff's Trial Exhibits
5 150 and 151, both dated December 4, 2002 (fourth quarter 2002). Bishop's total current
6 contribution to FedChex stayed the same from October to December: \$48,000. But his
7 ownership amount diminished to 8.14% because Davis's "current contribution" increased
8 to \$537,422.00, giving Davis 91.18% ownership. *Plaintiff's Trial Exhibit 150, Document*
9 *entitled "Completion of Section 8.1 Promissory Note Calculations, Former Member*
10 *Interest and Capital Contribution" referencing FedChex, LLC and referencing a date of*
11 *December 4, 2002.* This means that somewhere between October and December 2002,
12 Davis contributed an additional, unexplained sum of \$63,134.51.

13 Similarly, Bishop's total current contribution to FedChex Recovery stayed the
14 same from October to December 2002: \$2,000. But his ownership amount diminished to
15 2.19% because Davis's "current contribution" increased to \$85,239.80, giving Davis
16 93.43% ownership. *Plaintiff's Trial Exhibit 151, Document entitled "Completion of Section*
17 *8.1 Promissory Note Calculations, Former Member Interest and Capital Contribution"*
18 *referencing FedChex Recovery, LLC and referencing a date of December 4, 2002.* Thus,
19 somewhere between October and December 2002, Davis contributed an additional,
20 unexplained, \$22,105.29.

21 The only prepetition documents evidencing Bishop's ownership percentages in the
22 company are Plaintiff's Trial Exhibits 144 and 145, discussing the October 9, 2002 capital
23 contribution meetings, which demonstrate that Bishop held 9.12% ownership in FedChex,
24 and 2.64% ownership in FedChex Recovery. The court finds that these were the
25 ownership percentages Bishop held on the petition date.

26 Additionally, it is clear that this property was estate property because the debtor
27 possessed a legal interest in his ownership percentage in FedChex and FedChex
28 Recovery as of the petition date. 11 U.S.C. § 541(a). As a member, debtor was entitled

1 to distributions from FedChex and FedChex Recovery. *See, e.g., Plaintiff's Trial Exhibit*
2 *102, Operating Agreement for FedChex, LLC at ¶ 1.13; Plaintiff's Trial Exhibit 103,*
3 *Operating Agreement for FedChex Recovery, LLC. at ¶ 1.13.*

4 B. The Transfers Occurred Postpetition

5 In the court's view, there is no doubt that these transfers occurred postpetition
6 because the meetings in which Bishop accepted a promissory note of \$62,000 for his
7 ownership in FedChex and a promissory note of \$2,000 for his ownership in FedChex
8 Recovery occurred on December 4, 2002, almost one month after the petition was filed.
9 Regardless of whether Bishop considered himself a member of the FedChex Entities
10 immediately before he filed for bankruptcy or not, the evidence shows that the
11 Promissory Notes were executed by Davis on December 22, 2002. *Plaintiff's Trial*
12 *Exhibits 153, 155.* In fact, Defendants do not appear to seriously argue that these
13 transfers occurred prepetition. *See Defendant's Proposed Findings of Fact and*
14 *Conclusions of Law ¶¶ 307-318, 444-445.*

15 C. The Adversary Proceeding Was Timely as to the Claims Under § 549

16 Chapter 7 Trustee Richard Marshack originally filed the complaint, including claims
17 for these postpetition transfers, on August 19, 2003. The Promissory Notes were
18 executed on December 22, 2002, thus the Trustee was within the two-year time frame
19 prescribed by § 549(d).

20 D. The Transfers Occurred Without Court Approval

21 The record is clear that neither the Trustee nor the court authorized the
22 postpetition buyout of Bishop's remaining interest in FedChex and FedChex Recovery.
23 *Davis Deposition, January 29, 2008, at 252:20-254:17, 259:16-21.* These transfers were
24 similarly not authorized by any provision of the Bankruptcy Code. The Bishops filed a
25 voluntary Chapter 7 bankruptcy petition rather than a Chapter 11 petition, thus Bishop
26 was not a debtor in possession operating within the ordinary course of his business. 11
27 U.S.C. § 1107; 5 *Resnick & Sommer, Collier on Bankruptcy* ¶ 549.04[3], at 549-16 ,
28

1 *citing, In re Southeast Hotel Properties Limited Partnership*, 99 F.3d 151, 153 n. 3 (4th
2 Cir. 1996); *In re Lee*, 35 B.R. 452 (Bankr. N.D. Ga. 1983).

3 Therefore, the court finds that Plaintiff has established a claim under 11 U.S.C.
4 § 549 for these two postpetition transfers of Bishop's remaining interest in FedChex and
5 FedChex Recovery by a preponderance of the evidence. Based on the record before the
6 court, the most credible evidence of Bishop's existing interests as of the petition date
7 exists in Plaintiff's Trial Exhibits 144 and 145, discussing the October 9, 2002 capital
8 contribution meetings, which demonstrate that Bishop held 9.12% ownership in FedChex,
9 and 2.64% ownership in FedChex Recovery.

10 **V. FOURTH CLAIM FOR RELIEF: RECOVERY OF TRANSFERS PURSUANT TO**
11 **11 U.S.C. § 550 AND CUFTA**

12 Plaintiff's remaining claims are merely administrative, and seek to first recover the
13 avoided transfers discussed above and also disallow any claims filed by Defendants in
14 this bankruptcy case. Pursuant to 11 U.S.C. § 550(a):

15 To the extent that a transfer is avoided under section 544, 545, 547, 548,
16 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit
17 of the estate, the property transferred, or, if the court so orders, the value
of such property, from—

18 (1) The initial transferee of such transfer or entity for whose benefit
19 such transfer was made; or

20 (2) Any immediate or mediate transferee of such initial transfer.

21 Additionally, under CUFTA, a creditor may obtain avoidance of a transfer or obligation to
22 the extent necessary to satisfy the creditor's claim. California Civil Code,
23 § 3439.07(a)(1).

24 Section 550 provides the same time restriction as section 549: a suit to recover the
25 property transferred (or its value) is barred one year after avoidance of the transfer or
26 when the case is closed or dismissed, whichever is earlier. 11 U.S.C. § 550(f). As
27 discussed above, the Trustee's initial complaint was filed within one year of the transfers
28 to be avoided, thus this claim is timely.

1 As discussed in this memorandum decision, the following transfers are avoided
2 under 11 U.S.C. § 549 and recoverable pursuant to 11 U.S.C. § 550, and are recoverable
3 from Davis, Arnold, FedChex, and FedChex Recovery:

- 4 - FedChex's buyout of Bishop's remaining 9.12% interest pursuant to the
5 Promissory Note executed December 22, 2002; and
- 6 - FedChex Recovery's buyout of Bishop's remaining 2.64% interest pursuant to
7 the Promissory Note executed December 22, 2002.

8 Although the transfers are recoverable, the Bankruptcy Code does not provide
9 guidelines by which the court is to determine whether the Plaintiff recovers the property
10 itself, *i.e.*, the ownership interests in FedChex and FedChex Recovery, or the monetary
11 value of those interests. The intent of section 550 is "to restore the estate to the financial
12 condition it would have enjoyed if the transfer[s] had not occurred." 5 Resnick and
13 Sommer, *Collier on Bankruptcy* ¶ 550.02[3], at 550-9-550-10, *citing, In re Acequia, Inc.*,
14 34 F.3d at 811-812. However, "where the record lacks evidence of a transferred
15 property's market value, or where there is conflicting evidence on that value, the return of
16 the property transferred, rather than an award of its value, is the appropriate remedy in
17 an avoidance action. *Hopkins v. Idaho State University Credit Union (In re Herter)*, 464
18 B.R. 22, 31 (Bankr. D. Idaho 2011), *citing, USAA Federal Savings Bank v. Thacker (In re*
19 *Taylor)*, 599 F.3d 880, 891 (9th Cir. 2010). Ordinarily, the court "determines the value of
20 the property to be the value at the time of the transfer, but has discretion on how to value
21 the property so as to put the estate in its pretransfer position." *In re Taylor*, 599 F.3d at
22 890.

23 The analysis for Bishop's remaining interests in FedChex and FedChex Recovery
24 is not clear. In consideration for his relinquishment of his remaining interest in FedChex
25 and FedChex Recovery, Davis gave Bishop the FedChex Promissory Note (\$62,000) and
26 the FedChex Recovery Promissory Note (\$2,000). To date, \$4,908.27 has been received
27 and placed in a trust account by the Trustee. These payments were interest-only
28

1 payments on the FedChex Promissory Note and did not pay down any principal. *Trial*
2 *Declaration of Leonard Shulman* at ¶ 5.

3 Here, there was little evidence in the record as to the market value of FedChex
4 and FedChex Recovery in 2002. Indeed, Davis stated in his deposition that he did not
5 know these values. *See, e.g., Davis Deposition, January 29, 2008*, at 243:12-247:21.
6 Defendants offered the testimony of Michael Issa, in which Issa offered his opinion on the
7 value of FedChex and FedChex Recovery, but these values were first offered as of
8 October 13, 2004 (valuing FedChex at \$1,100,000 to \$1,300,000, and valuing FedChex
9 Recovery at \$500,000 to \$1,000,000). *See Trial Declaration of Michael Issa* at 3:8-10.
10 These values are not helpful for the Plaintiff's fourth claim for relief because the court
11 should consider the value at the time of the transfer. *In re Taylor*, 599 F.3d at 890.

12 Therefore, the court finds it is most appropriate in these circumstances that the
13 Plaintiff should recover the property transferred, rather than its value. Thus, Plaintiff shall
14 recover for the benefit of the estate Bishop's 9.12% interest in FedChex and Bishop's
15 2.64% interest in FedChex Recovery.

16 **VI. FIFTH CLAIM FOR RELIEF: DISALLOWANCE OF CLAIM PURSUANT TO 11**
17 **U.S.C. § 502(d)**

18 Finally, Plaintiff seeks disallowance of claim(s) pursuant to 11 U.S.C. § 502(d),
19 which states:

20 Notwithstanding subsections (a) and (b) of this section, the court shall
21 disallow any claim of any entity from which property is recoverable under
22 section 542, 543, 550, or 553 of this title or that is a transferee of a
23 transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549,
24 or 724(a) of this title, unless such entity or transferee has paid the amount,
or turned over any such property, for which such entity or transferee is
liable under section 522(i), 542, 543, 550, or 553 of this title.

25 Indeed, Section 502(d) requires the disallowance of a claim asserted in a bankruptcy
26 case by a transferee of a voidable transfer provided the transferee has not paid the
27 amount or turned over the property received. *See 4 Resnick and Sommer, Collier on*
28 *Bankruptcy* ¶ 502.05[1] at 502-55.

