NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

LOS ANGELES DIVISION

In re:

SCI REAL ESTATE INVESTMENTS, LLC, a Virginia limited liability company,

SECURED CALIFORNIA INVESTMENTS, INC., a California corporation;

Debtors.

WILLIAM HOFFMAN, acting solely in his capacity as liquidating trustee in the cases of SCI REAL ESTATE INVESTMENTS, LLC, et al.,

Plaintiff,

v.

KENNETH E. and SHARRON PROVASI, Husband and Wife as Joint Tenants

Defendants.

Case No.: 2:11-bk-15975-PC

Adversary No.: 2:13-ap-01122-PC

Chapter 11

MEMORANDUM DECISION

Date: October 3, 2013
Time: 9:00 a.m.
Place: U.S. Bankruptcy Court
Courtroom # 1468
255 East Temple St.
Los Angeles, CA 90012

This matter comes before the court on the motion by the Defendants[1] seeking a dismissal of the First Amended Complaint for: (1) Avoidance and Recovery of Fraudulent Conveyances [11 U.S.C. §§ 544, 548, 550(a), and 551; Cal. Civ. Code § 3439, et seq.]; (2) Disallowance of any Claims Held by Defendant [11 U.S.C. § 502(d)]; and (3) Declaratory Relief ("First Amended Complaint") pursuant to F.R.Civ.P. 12(b)(6).[2] William Hoffman, Liquidating Trustee of the SCI Bankruptcy Liquidating Trust ("Hoffman") opposes the motion.[3] Having considered the motion, opposition and reply, the court makes the following findings of fact and conclusions of law pursuant to F.R.Civ.P. 52(a)(1), as incorporated into FRBP 7052 and applied to adversary proceedings in bankruptcy cases.[4]

A. Standard for Dismissal Under Rule 12(b)(6)

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[1] "Defendants," as used in this memorandum, includes the singular as well as the plural.

[2] Unless otherwise indicated, all "Code," "chapter" and "section" references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule" references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California ("LBR").

[3] On February 11, 2011, SCI Real Estate Investments, LLC ("SCI LLC") and Secured California Investments, Inc. ("SCI Inc.") filed voluntary petitions under chapter 11 of the Code in Case Nos. 2:11-bk-15975-PC and 2:11-bk-15987-BR, respectively, in the United States Bankruptcy Court, Central District of California, Los Angeles Division. By order entered on March 4, 2011, the SCI Inc. case was reassigned to Judge Peter H. Carroll to be jointly administered with SCI LLC under Case No. 2:11-bk-15975-PC. On June 15, 2012, the court confirmed the First Amended Joint Chapter 11 Plan of Liquidation for SCI Real Estate Investments, LLC and Secured California Investments, Inc. dated April 19, 2012. Under the confirmed plan, Hoffman is authorized as the Liquidating Trustee to prosecute and settle all causes of action owned by the trust.

[4] Defendants' motion is one of 38 filed in response to a nearly identical amended complaint filed in over 60 separate adversary proceedings instituted by Hoffman to pursue similar claims against other investors arising out of the same transaction or occurrence. In those cases in which a motion has been filed, dismissal of Hoffman's amended complaint under F.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted is sought on grounds similar to those raised in this adversary proceeding.

Rule 12(b)(6) authorizes the court, upon motion of the defendant, to dismiss a complaint for failure to state a claim upon which relief can be granted.[5] F.R.Civ.P. 12(b)(6). Under Rule 8(a), a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."[6] F.R.Civ.P. 8(a)(2). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 554, 555 (2007)). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 556). "[A] complaint [that] pleads facts that are 'merely consistent with' a defendant's liability . . . 'stops short of the line between possibility and plausibility of entitlement to relief.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 557). Further, although a court must accept as true all factual allegations contained in a complaint, a court need not accept plaintiff's legal conclusions as true. Iqbal, 556 U.S. at 678. "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Id. (quoting Twombly, 550 U.S. at 555).

In the bankruptcy context, Twombly means that a plaintiff can no longer simply recite the statutory language of the particular Code section under which a claim is brought and expect the complaint to give sufficient notice to a defendant of the plaintiff's claim for relief. To pass muster under Twombly, a plaintiff must state a plausible claim for relief by identifying the specific facts upon which the plaintiff relies to support a finding on each element of the plaintiff's claim. Only then will a defendant have sufficient notice of plaintiff's claim under

[5] Rule 12(b)(6) is applicable to adversary proceedings by virtue of FRBP 7012(b).

[6] Rule 8(a) is applicable to adversary proceedings by virtue of FRBP 7008(a).

Rule 8(a). See, e.g., Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009) ("the non-conclusory 'factual content,' and reasonable inferences from that content . . . [must] plausibly [suggest] a claim entitling the plaintiff to relief."); Limestone Dev. Corp. v. Vill. of Lemont, Ill., 520 F.3d 797, 802-03 (7th Cir. 2008) (stating that Twombly "teaches that a defendant should not be forced to undergo costly discovery unless the complaint contains enough detail, factual or argumentative, to indicate that the plaintiff has a substantial case").

B. Hoffman's First Amended Complaint

SCI, Inc. and SCI LLC (collectively, the "Debtors") operated approximately 60 multi-member limited liability companies engaged in the business of real estate investment. Each of the Debtors' limited liability companies would acquire equity in one or more real estate properties and offer co-ownership interests in those properties to individual investors.

According to Hoffman's First Amended Complaint, approximately 60 investors each made one or more loans to the Debtors pursuant to certain loan agreements or "Placement Agreements" ("Placement Agreement Loan"). Each Placement Agreement Loan was guaranteed by a Corporate Guarantee executed by Debtor, SCI LLC which specifically provided, in pertinent part, that the investor's "sole recourse in collecting on [the] guarantee and Loan Agreement shall be to proceed against [SCI LLC]," and the investor "waives and agrees to not pursue any attachment or action" against the property in which the funds were invested.[7] Debtors' principals, Marc Paul and Robert Robotti, also executed a Personal Guarantee in order to obtain for the Debtors one or more of the Placement Agreement Loans from the 60 private placement investors.

In January 2009, the Debtors modified the terms of each of the outstanding Placement Agreement Loans with the 60 investors. With respect to each outstanding Placement Agreement Loan, the Debtors and the investor executed the following documents: (a) a Modification and Reissuance Agreement; and (b) a Pledge and Security Agreement (together, the "Modification Transaction"). The Modification Transaction split each Placement Agreement Loan into two

[7] First Amended Complaint, Exh. 1:¶3.

parts: (1) a smaller loan guaranteed by Debtor, SCI LLC, bore interest at 3% payable monthly, with the principal amount of the loan due and payable in one year (the "Term Loan"); and (2) a larger loan due and payable in 5 years, with interest at 3% payable monthly and secured by (a) a portion of debtor's membership rights in certain LLCs, and (b) rights to certain deferred payments, referred to as "Fees," which debtors were entitled to pursuant to various transactions (the 'Secured Loan"). The Secured Loan was not guaranteed by Debtor, SCI LLC. In partial consideration therefor, each private placement investor released Debtor, SCI LLC from the original Corporate Guarantee given in conjunction with each Placement Agreement Loan. The upshot of Hoffman's First Amended Complaint is that the Modification Transaction constituted a transfer avoidable as either actually or constructively fraudulent under § 548(a)(1) and applicable state law.

Defendants contend that Hoffman's First Amended Complaint should be dismissed without leave to amend because (a) Hoffman's first and second claims for relief fall outside the two-year avoidance period under 11 U.S.C. § 548(a)(1) or, alternatively, neither the first or second claims for relief are supported by sufficient non-conclusory factual content to state a plausible claim; (2) Hoffman's third and fourth claims for relief are barred by limitations or, alternatively, neither the third or fourth claims for relief are supported by sufficient non-conclusory factual content to state a plausible claim; and (3) Hoffman's remaining claims hinge on the merits of the first four claims and fail on the merits.

C. First and Second Claims for Relief in Hoffman's First Amended Complaint are Time-Barred as Pled

Paragraph 44 of Hoffman's First Amended Complaint states that the date of the transfer sought to be avoided is "January 2009 (the 'Transfer Date')."[8] Defendants claim that, as a result, Hoffman's first and second claims for relief fall outside the two-year avoidance period contained in § 548(a)(1). Hoffman responds that the "Transfer Date" of January 2009 was pleaded in error, and that the true "Transfer Date" is July 9, 2009 – the date the alleged transfer was perfected.

[8] First Amended Complaint, 9:9.

Hoffman asserts the perfection date of July 9, 2009 for the first time in opposition to Defendants' motion, and attaches as evidence certain UCC-1 financing statements to support his contention.

Defendants are correct. However, the court takes judicial notice of the fact that "January of 2009" was the Transfer Date alleged in Hoffman's original complaint filed on February 4, 2013,[9] and that Defendants did not raise an issue regarding the alleged Transfer Date in a prior Rule 12(b)(6) motion filed on April 8, 2013, that sought dismissal of such complaint and prompted the filing of Hoffman's First Amended Complaint. Because Hoffman's First Amended Complaint as presently pled fails to state a claim under § 548(a)(1) upon which relief can be granted, Defendants' motion is granted and Hoffman's first and second claims for relief are dismissed with leave to amend.

D. Third and Fourth Claims for Relief in Hoffman's First Amended Complaint are Not Time-Barred as Pled

Defendants contend that the fraudulent transfer claims based on California's Uniform Fraudulent Transfer Act ("UFTA") are time barred as well because the adversary complaint was not filed until February 4, 2013, exceeding the four year statute of limitations for such claims based on a transfer date of January 1, 2009. In the opposition, Hoffman properly points out that the applicable time period is calculated by the petition date plus two years pursuant to § 546(a)(1)(A) and § 108(a)(2). See Leonard V. Coolidge (In re Nat'l Audit Defense Network), 367 B.R. 207, 219 n. 15 (Bankr. D. Nev. 2007) ("Section 546(a) of the Bankruptcy Code preserves to a trustee any viable right existing on the petition date for up to two years after the filing of the petition. 11 U.S.C. § 546(a)"). Therefore, Defendants' motion to dismiss Hoffman's Third and Fourth Claims for Relief as barred by limitations is denied.

E. Hoffman's First Amended Complaint Fails to State a Plausible Claim for Avoidance and Recovery of an Actually Fraudulent Transfer

[9] Complaint for: (1) Avoidance and Recovery of Fraudulent Conveyances [11 U.S.C. §§ 544, 548, 550(a), and 551; Cal. Civ. Code § 3439, et seq.]; (2) Disallowance of any Claims Held by Defendants [11 U.S.C. § 502(d)]; and (3) Declaratory Relief [Dkt. # 1], 4:3.

Rule 9(b) states that, "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." F.R.Civ.P. 9(b). Rule 9(b)'s heightened pleading standard applies to allegations of fraud and allegations sounding in fraud, including false misrepresentations. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106-07 (9th Cir. 2003); Neilson v. Union Bank of Cal., N.A., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003). Allegations under Rule 9(b) must be stated with "specificity including an account of the time, place, and specific content of the false representations as well as the identities of the parties to the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). "To comply with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the particular misconduct which is alleged to constitute the fraud charged so that they can defend against the charge and not just deny that they have done anything wrong." Bly-Magee v. California, 236 F.3d 1014, 1019 (9th Cir.2001) (citations/ internal quotations omitted). Moreover, where a plaintiff pleads allegations of fraud against more than one defendant, Rule 9(b) "requires that a plaintiff plead with sufficient particularity attribution of the alleged misrepresentations or omissions to each defendant." In re Silicon Graphics, Inc. Sec. Litig., 970 F.Supp. 746, 752 (N.D. Cal. 1997).

To state a claim for fraud, the plaintiff must also plead knowledge of falsity, or scienter. See In re GlenFed, Inc. Sec. Litig., 42 F.3d 1541, 1546 (9th Cir. 1994) (en banc). The requirement for pleading scienter is less rigorous than that which applies to allegations regarding the "circumstances that constitute fraud" because Rule 9(b) states that "[m]alice, intent, knowledge, and other conditions of a person's mind may be alleged generally." F.R.Civ.P. 9(b). However, the plaintiff must "set forth facts from which an inference of scienter could be drawn." Cooper v. Pickett, 137 F.3d 616, 628 (9th Cir. 1997) (quoting GlenFed, 42 F.3d at 1546).

Under California law, a transfer made with the actual intent to hinder, delay or defraud any creditor of the debtor violates UFTA. Cal. Civ. Code § 3439.04; see Mejia v. Reed, 31 Cal.4th 657, 664 (2003). To prevail under California's UFTA § 3439.04(a)(1), Hoffman must establish by a preponderance of the evidence that the Debtors devised and implemented the

Modification Transaction with the actual intent to hinder, delay or defraud a creditor. See Wolkowitz v. Beverly (In re Beverly), 374 B.R. 221, 235 (9th Cir. BAP 2007) ("Whether there is actual intent to hinder, delay, or defraud under UFTA is a question of fact to be determined by a preponderance of evidence."). Because a debtor rarely admits to such a transfer, the evidence of intent "must of necessity consist of inferences drawn from the circumstances surrounding the transaction and the relationship and interests of the parties." Neumeyer v. Crown Funding Corp., 56 Cal.App.3d 178, 183 (1976); see Beverly, 374 B.R. at 235 ("Since direct evidence of intent to hinder, delay or defraud is uncommon, the determination typically is made inferentially from circumstances consistent with the requisite intent."). The UFTA identifies 11 non-exclusive factors, or "badges of fraud," that may be applied by a court to divine fraudulent intent:

1. Whether the transfer or obligation was to an insider.

2. Whether the debtor retained possession or control of the property after the transfer.

3. Whether the transfer or obligation was disclosed or concealed.

4. Whether the debtor was sued or threatened with suit before the transfer was made or obligation incurred.

5. Whether the transfer was of substantially all of the debtor's assets.

6. Whether the debtor absconded.

7. Whether the debtor removed or concealed assets.

8. Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or obligation incurred.

9. Whether the debtor was insolvent or became insolvent shortly after the transfer was made or obligation incurred.

10. Whether the transfer occurred shortly before or shortly after a substantial debt was incurred.

> 11. Whether the debtor transferred essential assets of the business to a lienholder who then transferred the assets to an insider of the debtor.

Cal. Civ. Code § 3439.04(b). The UFTA factors are intended "to provide guidance to the trial court, not compel a finding one way or another." Filip v. Bucurenciu, 129 Cal.App.4th 825, 834 (2005). As the court observed in Beverly:

> The UFTA list of "badges of fraud" provides neither a counting rule nor a mathematical formula. No minimum number of factors tips the scales toward actual intent. A trier of fact is entitled to find actual intent based on the evidence in 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."

374 B.R. at 236.

Hoffman's First Amended Complaint does not sufficiently allege facts that would permit the court to draw an inference that the Modification Transaction itself hindered, delayed or defrauded a creditor of the Debtors or that the Debtors intended the Modification Transaction to do so on the Transfer Date. Indeed, the fact that the Modification Transaction permitted the Debtors to renegotiate both the interest rate and maturity date for each of the outstanding Placement Agreement Loans at more favorable terms and to obtain a partial release of the original Corporate Guarantee tends to support an inference to the contrary. The mere fact that the Secured Loan resulting from the Modification Transaction may have "reduced the assets available to other creditors"[10] on the Transfer Date does not, of and by itself, support an inference that the Modification Transaction was undertaken by the Debtors with the actual intent to hinder, delay or defraud a creditor. Hoffman's First Amended Complaint fails to state a plausible claim for avoidance of the Modification Transaction as actually fraudulent absent (1) facts specifically identifying the alleged misrepresentations or omissions attributable to either Debtor in conjunction with the transaction (and the transfers pursuant thereto) which support the legal conclusions in paragraphs 65, 66, 77 and 78 of the complaint; and (2) facts describing the

[10] First Amended Complaint, 12:14; 13:24.

circumstances surrounding the transaction and relationship of the parties on the Transfer Date from which the court can infer the requisite intent.

Hoffman claims that "the Debtors, acting through Paul and Robotti, sought to exonerate Paul and Robotti of their actual or potential liability under [their] Personal Guaranties, and therefore induced the Defendants and other creditors to release the Personal Guaranties in exchange for the Transfers because the Transfers elevated Defendants' position from unsecured creditor to secured creditor."[11] However, Hoffman has not pled with particularity specific facts to support this broad accusation. "Averments of fraud must be accompanied by the 'who, what, when, where, and how' of the misconduct alleged." Vess, 317 F.3d at 1105-06. Even assuming as true the allegation that Paul or Robotti actually personally guaranteed one or more of the Placement Agreement Loans by Defendants at their inception, the court is unable to infer from the non-conclusory factual content of Hoffman's First Amended Complaint that the release of Debtor, SCI LLC's original Corporate Guarantee and Debtor, SCI LLC's execution of a Corporate Guarantee of the Term Loan in conjunction with the Modification Transaction either released Paul or Robotti of their respective Personal Guaranties or that the Modification Transaction was, in fact, a scheme concocted by Paul and Robotti, acting through the Debtors, to effectuate a release of their respective Personal Guaranties. For these reasons, Hoffman's first and third claims for relief must be dismissed for his failure to state a plausible claim upon which relief can be granted.

F. Hoffman's First Amended Complaint Fails to State a Plausible Claim for Avoidance and Recovery of an Constructively Fraudulent Transfer

Courts do not generally apply the heightened pleading standard of Rule 9(b) to constructive fraud claims. The 1849 Condominiums Assoc., Inc. v. Bruner, 2010 WL 2557711 (E.D. Cal. 2010), citing Cendant Corp. v. Shelton, 474 F.Supp.2d 377, 380 (D. Conn. 2007). Rule 9(b) is inapplicable because constructive fraud claims "are not based on actual fraud but instead rely on the debtor's financial condition and the sufficiency of the consideration provided

[11] Id. at 12:17-21; 14:1-4.

by the transferee." In re Careamerica, Inc., 409 B.R. 737, 755-56 (Bankr. E.D.N.C. 2009). Still, a constructive fraud claim must satisfy Rule 8(a) and contain sufficient facts to establish that the claim is plausible.

Under California law, constructive fraud may be found as to any present or future creditor when a debtor does not receive a reasonably equivalent value in exchange for a transfer, and either

> (A) [w]as 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, [or]
>
> (B) Intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.

Cal. Civ. Code § 3439.04(a)(2). Similarly, constructive fraud can be found under Cal. Civ. Code § 3439.05, "as to an existing creditor if the debtor does not receive reasonably equivalent value and 'was insolvent at that time or ... became insolvent as a result of the transfer" Mejia v. Reed, 31 Cal.4th at 670, quoting Cal Civ. Code § 3439.05.

Here, Hoffman's constructive fraud claims are insufficiently stated and must be dismissed. At its core, "a constructive fraudulent transfer has two elements: reasonable equivalent value and insolvency." Allstate Ins. Co. v. Countrywide Fin. Corp., 842 F.Supp.2d 1216, 1224 (C.D. Cal.2012). Hoffman's First Amended Complaint does not state sufficient facts to plausibly show that on the date of the transfer the Debtors were actually insolvent or received less than was given to the Defendants.

Hoffman claims that the Debtors received less than reasonably equivalent value in exchange for the transfers under the Modification Transaction "[b]ecause the Placement Agreement Personal Guarantees, the purported SCI, Inc. guaranty release, the purported release of collateral, and the extension of maturity date and alteration of interest rate were of no value."[12] This conclusion is not supported by facts sufficient to permit the court to properly infer that the

[12] Id. 10:22-24.

value of the transfers in relation to the value received by the Debtors under the Modification Transaction was not reasonably equivalent.

Hoffman charges that "[t]he Placement Agreement Personal Guarantees [of Paul and Robotti] were of no value to the SCI Debtors because they did not reduce or beneficially modify the SCI Debtors' obligations with respect to the Placement Agreement Loans."[13] To the extent Paul or Robotti personally guaranteed one or more of the Placement Agreement Loans by Defendants, Hoffman has not pled specific facts that would support an inference that their Personal Guaranties were released or changed in any manner by the Modification Transaction. In other words, the court is unable to infer from the facts alleged that the Modification Transaction affected the Personal Guaranties in such a manner that the transfers to the Defendants compared to the value received by the Debtors were not reasonably equivalent.

Next, Hoffman claims that "SCI Inc.'s guaranty release was of no value"[14] and that, as part of the Modification Transaction, Defendants "released . . . collateral . . . held for the Placement Agreement Loan[s]."[15] There are no facts in Hoffman's First Amended Complaint or the exhibits attached thereto indicating that Debtor, SCI Inc. guaranteed any of the Defendants' Placement Agreement Loans or released a guaranty of one or more of the Defendants' Placement Agreement Loans in conjunction with the Modification Transaction. Nor are there facts in Hoffman's First Amended Complaint or the exhibits attached thereto indicating that Defendants received a security interest in conjunction with the original Placement Agreement Loans or released any security interest under the Modification Transaction.

Hoffman also characterizes Debtor, SCI LLC's guaranty of Placement Agreement Loans as a "meaningless and illusory 'corporate guaranty.'"[16] This conclusory statement is not helpful absent facts from which the court can infer the value of Debtor, SCI LLC's Corporate Guarantee

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[13] Id. 10:4-6

[14] Id. 10:8.

[15] Id. 10:10-11.

[16] Id. 10:12.

of the balance due under an original Placement Agreement Loan released on the Transfer Date, as compared to the value of Debtor, SCI LLC's Corporate Guarantee of the Term Loan and the collateral securing the Secured Loan on the Transfer Date.

In alleging the value of the security interest granted by the Debtors in connection with the Modification Transaction, Hoffman simply points to exhibits attached to his First Amended Complaint, stating "[t]he value of the SCI Debtors' Transfers to Defendants are as set forth in Exhibits A, B, and C to the Pledge Agreement."[17] Exhibit A attached to the Pledge Agreement merely identifies the private placement investors subject to the Modification Transaction, while Exhibit B lists the LLCs subject to Debtor's pledge and the percentage of the Debtor's membership interest so pledged. There is little in these exhibits addressing the value of a particular LLC or the value of the membership interest in an LLC pledged by the Debtor. Exhibit C lists the "Fees" pledged by the Debtors and the monetary amount of the fees, but Exhibit C lacks a statement concerning the potential recovery of those fees or other information to assess the actual value at the time of the exchange. Although the court may look to exhibits attached to a complaint in considering a Rule 12(b)(6) motion,[18] there are insufficient facts to explain the value of the security pledged by Debtors under the Modification Transaction or to support an inference that the value of the transfer, including the pledge, made to the Defendants under the Modification Transaction exceeded the value received by the Debtors.

Finally, Hoffman alleges that "[t]he extension of the maturity date and alteration of the interest rate was of no value because (i) Defendants were taking no action to collect upon and enforce the Placement Agreement Loan and (ii) there was no ability for Defendants to collect on the Placement Agreement Loan because the Debtors were insolvent as of the Transfer Date . . . ."[19] Hoffman claims that Debtors "were insolvent as of December 31, 2007 and thereafter."[20]

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[17] Id. 10:21-22.

[18] See In re Colonial Mortg. Bankers Corp., 324 F3d 12, 16 (1st Cir. 2003); Kaufman & Broad–South Bay v. Unisys Corp., 822 F.Supp. 1468, 1472 (N.D. Cal. 1993).

[19] First Amended Complaint, 10:15-18.

According to the Code, a debtor is insolvent when "the sum of such entity's debts is greater than all of such entity's property, at fair valuation." 11 U.S.C. § 101(32)(A). Hoffman's First Amended Complaint essentially states that the Debtors' books and records, coupled with the overstated value of certain unidentified assets on a balance sheet, certain unidentified liabilities not reflected on a balance sheet, and insufficient cash to fund distributions to investors, "reflect" that the Debtors were insolvent as of December 31, 2007 and thereafter.[21] Hoffman's First Amended Complaint also states that "[t]he Debtors' insolvency was also affected by revenue recognition, debt service, the interrelationship between real estate pricing and transaction volume trends necessary for the SCI Debtors profitability, the impact of borrowing rates and costs of capital for tranche of debt, the impact of industry ratios compared to the SCI Debtors' ratios, and the impact of contingent liabilities including guarantees and minimum contractual obligations."[22] While all of these factors may have impacted the Debtors' financial condition to some degree at some period of time, Hoffman has failed to allege any specific facts regarding the value of property owned by either Debtor on December 31, 2007, or the amount of debt owed by either Debtor on December 31, 2007. Nor are there specific facts regarding the assets and liabilities of each Debtor on the Transfer Date – which Hoffman now asserts is July 9, 2009. Because of the absence of such material facts, the court is unable to infer that the Debtors were actually insolvent on the Transfer Date.

For these reasons, Hoffman's second and fourth claims for relief to avoid and recover constructive fraudulent transfers must be dismissed for failure to state a claim upon which relief can be granted.

G. Hoffman's Remaining Claims for Recovery of Property – 11 U.S.C. § 550; Preservation of Avoided Transfers – 11 U.S.C. § 551; Disallowance of Claim – 11 U.S.C. § 502(d); and Declaratory Relief Regarding an Accounting and Allowed Amount of Claim

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[20] Id. 11:3.

[21] Id. 11:4-23.

[22] Id. 11:24-12:2.

Having failed to sufficiently plead the actual fraudulent transfer claims and constructive fraudulent transfer claims, Hoffman's Fifth, Sixth, Seventh and Eighth Claims for Relief must be dismissed.

H. Leave to Amend

Rule 15(a)(2) of the Federal Rules of Civil Procedure states that "[t]he court should freely give leave [to amend] when justice so requires." F.R.Civ.P. 15(a)(2).[23] If a complaint lacks facial plausibility, a court must grant leave to amend unless it is clear that the complaint's deficiencies cannot be cured by amendment. Gompper v. VISX, Inc., 298 F.3d 893, 898 (9th Cir. 2002). It is not clear to the court at this juncture whether the deficiencies in Hoffman's First Amended Complaint cannot be cured by amendment.

CONCLUSION

Because Hoffman has failed to state a claim upon which relief can be granted with respect to each of the counts in his First Amended Complaint, Defendants' motion to dismiss under F.R.Civ.P. 12(b)(6) will be granted with leave to amend. Hoffman shall file and serve Plaintiff's Second Amended Complaint not later than November 8, 2013, to cure the deficiencies identified above and to state a plausible claim for relief on each of his eight causes of action. Defendants must file and serve an answer or other response to Hoffman's Second Amended Complaint not later than December 6, 2013.

A separate order will be entered consistent with this opinion.

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Date: September 18, 2013

Peter H. Carroll
United States Bankruptcy Judge

[23] Rule 15(a)(2) is applicable to adversary proceedings by virtue of FRBP 7015.

NOTICE OF ENTERED ORDER AND SERVICE LIST

Notice is given by the court that a judgment or order entitled (*specify*): **Memorandum Decision** was entered on the date indicated as Entered on the first page of this judgment or order and will be served in the manner stated below:

1. SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF) B Pursuant to controlling General Orders and LBRs, the foregoing document was served on the following persons by the court via NEF and hyperlink to the judgment or order. As of (*date*) 09-17-2013 , the following persons are currently on the Electronic Mail Notice List for this bankruptcy case or adversary proceeding to receive NEF transmission at the email addresses stated below.

- Caroline Djang cdjang@rutan.com
- John-patrick M Fritz jpf@lnbrb.com
- Kurt Ramlo kr@lnbyb.com, marla@lnbyb.com
- Daniel H Reiss dhr@lnbyb.com
- United States Trustee (LA) ustpregion16.la.ecf@usdoj.gov

☐ Service information continued on attached page

2. SERVED BY THE COURT VIA UNITED STATES MAIL: A copy of this notice and a true copy of this judgment or order was sent by United States mail, first class, postage prepaid, to the following persons and/or entities at the addresses indicated below:

☐ Service information continued on attached page