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CLERK U.S. BANKRUPTCY COURT  
Central District of California  
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# NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT  
CENTRAL DISTRICT OF CALIFORNIA  
NORTHERN DIVISION

In re:

ALBERT STEPHEN MORIARTY, JR.,

Debtor.

MICHAEL P. KLEIN, Chapter 7 Trustee  
for the Bankruptcy Estate of Albert  
Stephen Moriarty, Jr.,

Plaintiff,

v.

THE BOARD OF TRUSTEES OF THE  
CALIFORNIA STATE UNIVERSITY,  
et al.,

Defendants.

Case No. 12-22878-MLB

U.S. Bankruptcy Court  
Western District of Washington

Adversary No. 9:14-ap-01131-PC

Chapter 7

## MEMORANDUM DECISION

Date: November 6, 2014

Time: 9:30 a.m.

Place: United States Bankruptcy Court  
Courtroom # 201  
1415 State Street  
Santa Barbara, CA 93101

On September 10, 2014, the Board of Trustees of the California State University, which is the State of California operating in a higher education capacity, and includes California Polytechnic State University San Luis Obispo (“Cal Poly”), and California Polytechnic State University Foundation (the “Foundation,” and collectively “Defendants”) removed to this court Case No. 14CV-0402, Klein v. The Board of Trustees of the California State University, et al.,

1 filed in the Superior Court of California, County of San Luis Obispo, on July 24, 2014, pursuant  
2 to 28 U.S.C. §§ 1331, 1334, 1441, and 1452 and FRBP 9027.<sup>1</sup> Defendants now seek to dismiss  
3 the adversary proceeding pursuant to F.R.Civ.P. 12(b)(1), (3) and (6) or, alternatively, to transfer  
4 venue of the adversary proceeding to the Western District of Washington pursuant to 28 U.S.C. §  
5 1412. Having considered the pleadings, evidentiary record and arguments of counsel, the court  
6 will (1) deny Defendants' Motion to Transfer Venue; and (2) grant, in part, and deny, in part,  
7 Defendants' Motion to Dismiss with leave to amend.

8 I. STATEMENT OF FACTS

9 On April 28, 2009, Albert Steven Moriarty, Jr. ("Debtor") and his spouse, Patty Moriarty,  
10 the Foundation, and Cal Poly entered into a gift agreement entitled the Moriarty Scoreboard  
11 Fund (the "Agreement") under the terms of which the Foundation agreed to establish the  
12 Moriarty Scoreboard Fund ("Fund"). Debtor and his spouse agreed to donate not less than  
13 \$600,000 to the Fund; and in consideration therefor, the Foundation agreed to use the Fund  
14 exclusively for the purchase of a new video scoreboard for the Alex G. Spanos Stadium on the  
15 campus of Cal Poly. Debtor and his spouse made an initial donation to the Fund through First  
16 American Title Company by a cashier's check payable to the Foundation in the amount of  
17 \$600,000 dated June 21, 2009. Debtor made a further donation to the Fund by check # 3414  
18 payable to the Foundation in the amount of \$25,000 dated August 20, 2009. According to the  
19 testimony of Chris Baker, Cal Poly's Associate Athletic Director for Advancement, "[i]n  
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23 <sup>1</sup> Unless otherwise indicated, all "Code," "chapter" and "section" references are to the  
24 Bankruptcy Code, 11 U.S.C. §§ 101-1330 after its amendment by the Bankruptcy Abuse  
25 Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, 119 Stat. 23 (2005). "Rule"  
26 references are to the Federal Rules of Bankruptcy Procedure ("FRBP"), which make applicable  
27 certain Federal Rules of Civil Procedure ("F.R.Civ.P."). "LBR" references are to the Local  
28 Bankruptcy Rules of the United States Bankruptcy Court for the Central District of California  
("LBR").

1 exchange for the monies received, per the Agreement Cal Poly agreed to place ‘Moriarty  
2 Enterprises’ at the top of the Scoreboard, where it remains to this day.”<sup>2</sup>

3 On December 31, 2012, Debtor filed a voluntary petition under chapter 7 of the Code in  
4 Case No. 12-22878-MLB, In re Albert Stephen Moriarty, Jr., Debtor, in the United States  
5 Bankruptcy Court, Western District of Washington. Michael P. Klein (“Klein”) was appointed  
6 as trustee.

7 By letter dated May 28, 2013, Klein’s counsel advised Zachary Gifford, Associate  
8 Director of the California State University, that Debtor’s donations to the Fund were, in Klein’s  
9 view, fraudulent transfers in violation of California’s Uniform Fraudulent Transfer Act  
10 (“CUFTA”), Cal. Civ. Code § 3439, et seq., and recoverable through § 544(b) of the Code.  
11 Klein’s counsel asserted that Debtor allegedly did not receive reasonably equivalent value in  
12 exchange for the transfers, and demanded that the sum of \$650,000<sup>3</sup> be turned over to the estate  
13 not later than June 28, 2013. Settlement negotiations followed without success.

14 On July 24, 2014, Klein filed a complaint against the Defendants in Case No. 14CV-  
15 0402, Klein v The Board of Trustees of the California State University, et al., in the Superior  
16 Court of California, County of San Luis Obispo, seeking to avoid the two transfers totaling  
17 \$625,000 and to recover such sum for the benefit of the estate. Klein alleges that: (1) the amount  
18 is recoverable under CUFTA § 3439.04 and 11 U.S.C. § 544(b) in that each transfer was made  
19 with the actual intent to hinder, delay or defraud creditors of the Debtor; or alternatively, (2) the  
20 amount is recoverable under CUFTA § 3439.05 and 11 U.S.C. § 544(b) because each transfer  
21 was made for less than reasonably equivalent value, and Debtor was insolvent at the time of, or  
22 became insolvent as a result of, the transfers.

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25 <sup>2</sup> Declaration of Christopher M. Alston in Support of Motion to Transfer Venue [Dkt. # 5-2],  
26 6:3-5.

27 <sup>3</sup> Although Klein’s counsel demanded a turnover of \$650,000, there is no evidence in the record  
28 to suggest that the subject transfers exceeded the total sum of \$625,000.

1 On September 10, 2014, Defendants removed the pending state court action to this court  
2 pursuant to 28 U.S.C. § 1446(a), 28 U.S.C. § 1452(a), and FRBP 9027. On September 17, 2014,  
3 Defendants filed their Motion to Dismiss and Motion to Transfer Venue. On October 6, 2014,  
4 Klein filed a Motion for Order Remanding Matter to the California Superior Court for the  
5 County of San Luis Obispo.<sup>4</sup> On October 23, 2014, Klein filed opposition to Defendants'  
6 Motion to Dismiss and Motion to Transfer Venue to which the Defendants replied on October  
7 30, 2014. After a hearing on November 6, 2014, Defendants' Motion to Transfer Venue and  
8 Motion to Dismiss were taken under submission.

## 9 II. DISCUSSION

10 This court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§  
11 157(b), 1334(b), 1446(a), and 1452(a). This matter is a core proceeding under 28 U.S.C. §  
12 157(b)(2)(A), (E), (H) and (O). Venue is appropriate in this court. 28 U.S.C. § 1409(a). To the  
13 extent that the claims made the basis of Klein's complaint constitute "Stern claims,"<sup>5</sup> Defendants  
14 expressly consent to the entry of a final judgment by the bankruptcy court.<sup>6</sup>

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20 <sup>4</sup> Klein withdrew his motion seeking a remand of the removed action by Voluntary Dismissal of  
21 Motion for Order Remanding Matter to the California Superior Court for the County of San Luis  
22 Obispo [Dkt. # 30] filed November 4, 2014.

23 <sup>5</sup> "These claims are called 'Stern claims,' so named after the Supreme Court's decision in Stern  
24 v. Marshall, \_\_\_ U.S., \_\_\_, 131 S.Ct. 2594, 180 L.Ed.2d 475 (2011). Stern claims are claims  
25 'designated for final adjudication in the bankruptcy court as a statutory matter, but prohibited  
from proceeding in that way as a constitutional matter.'" Mastro v. Rigby, 764 F.3d 1090, 1093  
(9th Cir. 2014) (citation omitted).

26 <sup>6</sup> Notice of Removal Pursuant to 28 U.S.C. §§ 1441 and 1452 (Civil Action Arising Under and  
27 Related to a Case Under Title 11 and Federal Question) ("Removal Notice") [Dkt. #1], 3:23 –  
28 4:2.

1 A. Defendants’ Motion to Dismiss Under F.R.Civ.P. 12(b)(3) for Improper Venue Will Be  
2 Denied.

3 Defendants claim that Klein “commenced this action in San Luis Obispo Superior Court,  
4 which is clearly an improper venue: section 1409(c) authorizes [Klein] to file suit in a district  
5 court.” (emphasis in original).<sup>7</sup> According to Defendants, “[v]enue in the Superior Court and in  
6 this Court is not proper under section 1409(a) of the Judicial Code because the Chapter 7 Case is  
7 not pending in this district.”<sup>8</sup> Defendants further claim that:

8 The Trustee fails to offer a basis for venue in this Court, as the Complaint  
9 contains no factual allegations that a creditor could have commenced a UFTA  
10 action against the Defendants in this district. The Complaint does not contain  
11 even a boilerplate assertion that venue is proper in the Superior Court, this Court,  
12 or in any court at all.<sup>9</sup>

13 Section 1409 is a federal venue statute.<sup>10</sup> It is not jurisdictional. The district court has  
14 original but not exclusive jurisdiction of “civil proceedings arising under title 11, or arising in or  
15 related to cases under title 11.” 28 U.S.C. § 1334(b). See, e.g., In re Mystic Tank Lines Corp.,  
16 544 F.3d 524, 528 (3rd Cir. 2008) (“No provision of the Bankruptcy Code requires the  
17 Bankruptcy Court to hear all ‘related to’ claims.”); Maitland v. Mitchell (In re Harris Pine Mills),  
18 44 F.3d 1431, 1434-35 (9th Cir. 1995) (“Federal courts have . . . concurrent jurisdiction over all

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19 <sup>7</sup> Defendants’ Motion to Dismiss (“Dismissal Motion”) [Dkt. # 6], 23:6-7.

20 <sup>8</sup> Defendants’ Motion to Transfer Venue (“Venue Motion”) [Dkt. # 5], 13:4-5.

21 <sup>9</sup> Dismissal Motion, 23:10-13.

22 <sup>10</sup> Section 1409(a) states, in pertinent part, that “a proceeding arising under title 11 or arising in  
23 or related to a case under title 11 may be commenced in the district court in which such case is  
24 pending.” 28 U.S.C. § 1409(a). Section 1409(c) further states, in pertinent part, that “a trustee  
25 in a case under title 11 may commence a proceeding arising in or related to such case as statutory  
26 successor to the debtor or creditors under section 541 or 544(b) of title 11 in the district court for  
27 the district where the State or Federal court sits in which, under applicable nonbankruptcy venue  
28 provisions, the debtor or creditors, as the case may be, may have commenced an action on which  
such proceeding is based if the case under title 11 had not been commenced. 28 U.S.C. §  
1409(c) (emphasis added).

1 civil proceedings arising under Title 11, or arising in or related to cases under Title 11. Those  
2 matters falling under the heading of concurrent jurisdiction . . . may be filed originally in state  
3 court, then subsequently removed by one of the parties to federal district court.”) (citations  
4 omitted)); Sanders v. City of Brady (In re Brady, Texas, Municipal Gas Corp.), 936 F.2d 212,  
5 218 (5th Cir. 1991) (“[T]he only aspect of the bankruptcy proceeding over which the district  
6 courts and their bankruptcy units have exclusive jurisdiction is ‘the bankruptcy petition itself.’  
7 In other matters arising in or related to title 11 cases, unless the Code provides otherwise, state  
8 courts have concurrent jurisdiction . . . .”) (citations omitted)).

9 Klein’s statutory duties as trustee include “collect[ing] and reduc[ing] to money property  
10 of the estate.” 11 U.S.C. § 704(a)(1). Klein, as trustee, has standing and authority to pursue  
11 avoidance actions under § 544. See 11 U.S.C. § 544(a). Any interest in property either (a)  
12 recovered by Klein under § 550; or (2) preserved by Klein for the benefit of and ordered  
13 transferred to the estate pursuant to § 551 constitutes property of the estate. 11 U.S.C. §  
14 541(a)(3) & (4). In exercising his statutory authority, Klein elected to pursue the estate’s claims  
15 against Defendants under § 544 in the Superior Court of California, which has concurrent  
16 jurisdiction to adjudicate claims that arise under or relate to a title 11 case. Venue of such an  
17 action against Defendants was appropriate in “the superior court in the county where the  
18 defendants or some of them reside at the commencement of the action.” Cal. Code Civ. P. §  
19 395(a). Klein’s complaint alleges that both Cal Poly and the Foundation are “located in San  
20 Luis Obispo County, California.”<sup>11</sup> Neither Cal Poly nor the Foundation dispute that their  
21 respective principal office or place of business is in San Luis Obispo County, California. Having  
22 determined that venue was appropriate in the Superior Court of California, County of San Luis  
23 Obispo prior to Defendants’ removal of the proceeding to this court, Defendants’ Motion to  
24 Dismiss Klein’s complaint under F.R.Civ.P. 12(b)(3) will be denied.

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26 <sup>11</sup> Removal Notice, 10:8-13. Klein’s complaint also alleges that he “has standing to assert the  
27 claims . . . because, at all times material hereto, there was and is at least one creditor of Moriarty  
28 in existence at the time of the Transfer who holds an allowed unsecured claim against Moriarty  
that was and is allowable under Bankruptcy Code § 502.” Id. at 12:17-20.

1 B. Defendants' Motion to Transfer Venue Will Be Denied

2 Defendants further assert that, even if the court was to find that venue is proper, a transfer  
3 of venue under 28 U.S.C. § 1409 would serve both the interest of justice and the convenience of  
4 the parties.<sup>12</sup> The court disagrees.

5 1. Standard.

6 Venue of an adversary proceeding may be transferred to another district "in the interest of  
7 justice or for the convenience of the parties." 28 U.S.C. § 1412. Because § 1412 is written in the  
8 disjunctive, venue of an adversary proceeding may be transferred if either criteria is satisfied.

9 A.B. Real Estate, Inc. v. Bruno's Inc. (In re Bruno's, Inc.), 227 B.R. 311, 324 (Bankr. N.D. Ala.  
10 1998). "The party that seeks to transfer venue bears the burden of showing by a preponderance  
11 of the evidence that transfer would be appropriate." TIG Ins. Co. v. Smolker, 264 B.R. 661, 668  
12 (Bankr. C.D. Cal. 2001). "The decision whether venue should be transferred lies within the  
13 sound discretion of the Court." Hechinger Inv. Co. of Del., Inc. v. Hechinger Liquidation Trust  
14 (In re Hechinger Inv. Co. of Del., Inc.), 296 B.R. 323, 325 (Bankr. D. Del. 2003).

15 To determine whether a change of venue serves the interest of justice, courts have  
16 considered the following nonexclusive factors: (1) the location of the pending bankruptcy; (2)  
17 whether the transfer would promote the economic and efficient administration of the bankruptcy  
18 estate; (3) whether the interests of judicial economy would be served by the transfer; (4) whether  
19 the parties would be able to receive a fair trial in each of the possible venues; (5) whether either  
20 forum has an interest in having the controversy decided within its borders; (6) whether the  
21 enforceability of any judgment obtained would be affected by the transfer; and (7) whether the  
22 plaintiff's original choice of forum should be disturbed. See Maya, LLC v. Cytodyn of New  
23 Mexico, Inc. (In re Cytodyn of New Mexico, Inc.), 374 B.R. 733, 742 (Bankr. C.D. Cal. 2007);  
24 TIG Ins. Co., 264 B.R. at 668. With respect to "convenience of the parties," courts have  
25 weighed the following: (1) ease of access to the necessary proof; (2) the convenience of  
26 witnesses and the parties and their relative physical and financial condition; (3) the availability of

27 <sup>12</sup> Venue Motion, 16:5-21; 17:7-20.  
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1 the subpoena power for unwilling witnesses; and (4) the expense related to obtaining witnesses.

2 Id.

3 Defendants filed a Motion for Abandonment and Relief from Stay (“Stay Relief Motion”)  
4 in Debtor’s bankruptcy case in the Western District of Washington. The matter is set for hearing  
5 on September 19, 2014. Defendants assert that a change of venue serves the interest of justice  
6 because “the Trustee’s Litigation and the Stay Relief Motion involve the Agreement” and “the  
7 Trustee [is] unfairly forc[ing] Cal Poly to fight in two different districts that are thousands of  
8 miles apart.”<sup>13</sup> Defendants also claim that “parties will be inconvenienced if they must  
9 coordinate additional travel or incur additional legal expenses litigating related issues in both this  
10 Court and the Home Court.”<sup>14</sup>

11 Defendants elected to file the Stay Relief Motion in the Debtor’s bankruptcy case in the  
12 Western District of Washington. Defendants were not forced to do so by Klein. Secondly,  
13 “[s]tay litigation is limited to issues of the lack of adequate protection, the debtor’s equity in the  
14 property, and the necessity of the property to an effective reorganization.” Johnson v. Righetti  
15 (In re Johnson), 756 F.2d 738, 740 (9th Cir. 1985), cert. denied, 474 U.S. 828 (1985). “Hearings  
16 on relief from the automatic stay are thus handled in a summary fashion. Id. (emphasis added).  
17 “The validity of the claim or contract underlying the claim is not litigated during the hearing.”  
18 Id. Finally, there is no evidence of any ongoing litigation between Klein and Defendants in the  
19 Western District of Washington, other than the Stay Relief Motion, nor is there evidence of  
20 ongoing attorneys’ fees and costs associated therewith.

21 2. Transfer of Venue Would Not Serve the Interest of Justice.

22 While the first factor weighs in favor of the Defendants in that the pending bankruptcy  
23 case is located in the Western District of Washington, the court is not convinced that a transfer  
24 would promote the economic and efficient administration of the bankruptcy estate. First, there is  
25 no evidence that this matter is so inextricably related to Debtor’s bankruptcy case that it must be

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26 <sup>13</sup> Id. at 16:15-19.

27 <sup>14</sup> Id. at 17:17-19.

1 litigated in the Western District of Washington. On the contrary, Klein's complaint alleges that a  
2 transfer was made by Debtor to the Defendants in California, and that the transfer is avoidable  
3 under California state law. Indeed, everything related to the transfer that is the subject of Klein's  
4 complaint occurred in California. The claims made the basis of Klein's complaint arise under  
5 California law, and the Agreement upon which the claims are asserted was written, signed and  
6 performed in California. Debtor is in prison in California. Each of the Defendants either resides  
7 in or maintains its principal place of business in the California. All of the material witnesses,  
8 including non-party witnesses, and the Defendants' respective agents and employees appear to  
9 be located in the state of California. None of the events relevant to Klein's claims or its defense  
10 arose in the Western District of Washington. Only Klein has ties to Washington and he elected  
11 to pursue the estate's claims in California. In light of the Defendants' connections to California  
12 and the proximity to witnesses and documents in California, the court finds that it would be  
13 significantly more burdensome and expensive for the parties to litigate this proceeding in the  
14 Western District of Washington.

15 Judicial economy "weighs in favor of transfer, based solely on the relatively meaningless  
16 fact, here, that if transferred, a single court would then be in charge of both the bankruptcy and  
17 the litigation." See Cytodyn of New Mexico, 374 B.R. at 743. But Defendants admit that "the  
18 fourth, fifth and sixth interest of justice factors do not weigh strongly for or against transfer."<sup>15</sup>  
19 Notwithstanding, a California court does have a "greater interest in deciding issues which may  
20 affect [California] residents and/or the development of [California] law." See Son v. Coal  
21 Equity, Inc. (In re Centennial Coal, Inc.), 282 B.R. 140, 148 (D. Del. 2002). Finally, Klein's  
22 original choice of forum weighs against transfer. Klein, who had the choice to file in the  
23 Western District of Washington, elected to commence the action in the California state court  
24 given the fact that, among other things: (1) the claims made the basis of Klein's complaint arise  
25 under California law; (2) Defendants each reside or maintain their principal place of business in  
26 California; (3) the Agreement upon which the claims are asserted was written, signed and

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27 <sup>15</sup> Id. at 16:18-19.  
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1 performed in California; and (4) the material witnesses and evidence appear to be located in  
2 California. As previously stated, the California state court had concurrent jurisdiction to  
3 consider Klein's claims, and venue was appropriate in the Superior Court of California, County  
4 of San Luis Obispo. Defendants chose to remove Klein's complaint to this court, but have not  
5 established why Klein's original choice of forum should be disturbed or that it would serve the  
6 interest of justice by transferring the proceeding to the Western District of Washington. In sum,  
7 only 2 of the 7 factors weigh in favor of changing venue in the interest of justice.

8 3. Transfer of Venue Is Not Warranted for the Convenience of the Parties.

9 Nor have Defendants established by a preponderance of the evidence that a transfer of  
10 venue is warranted for "the convenience of the parties." For the reasons previously stated, the  
11 court finds that factors 1, 2 and 4 relevant to convenience of the parties weigh against transfer.  
12 With respect to the third factor, the ability to subpoena non-party witnesses would be served if  
13 the litigation remained in California given the location of material witnesses and documents in  
14 California. See FRBP 9016 (incorporating F.R.Civ.P. 45(b)(2), which limits the court's  
15 subpoena power to a 100-mile radius from the courthouse). Finally, the parties would be  
16 required to bear significant travel expenses for themselves, their attorneys and witnesses were the  
17 proceeding to be litigated and tried in the Western District of Washington.

18 Having weighed the above factors, the court concludes that Defendants have not met their  
19 burden to establish that transfer of this adversary proceeding to the Western District of  
20 Washington is either in the interest of justice or warranted for the convenience of the parties.  
21 Therefore, Defendant's Motion to Transfer Venue will be denied.  
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1 C. Defendants’ Motion to Dismiss Under F.R.Civ.P. 12(b)(1) Will Be Denied.

2 Defendants’ challenge the court’s subject matter jurisdiction to hear Klein’s complaint  
3 pursuant to F.R.Civ.P. 12(b)(1).<sup>16</sup> “A Rule 12(b)(1) jurisdictional attack may be facial or  
4 factual.” Safe Air For Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). In a facial  
5 attack, the movant asserts that the lack of subject matter jurisdiction is apparent from the face of  
6 the complaint. Id. In a factual attack, the movant disputes the truth of the allegations that  
7 otherwise would give rise to federal jurisdiction. Id. “In resolving a factual attack on  
8 jurisdiction, the district court may review evidence beyond the complaint without converting the  
9 motion to dismiss into a motion for summary judgment. Id.

10 Defendants admit in the Removal Notice that the proceeding involves a federal  
11 question.<sup>17</sup> Jurisdictional dismissals in cases premised on federal-question jurisdiction are  
12 exceptional. Sun Valley Gasoline, Inc. v. Ernst Enters., Inc., 711 F.2d 138, 139 (9th Cir. 1983).  
13 Dismissal for lack of subject matter jurisdiction is warranted only “where the alleged claim under  
14 the Constitution or federal statutes clearly appears to be immaterial and made solely for the  
15 purpose of obtaining federal jurisdiction or where such claim is wholly insubstantial and  
16 frivolous.” Id. at 140 (quoting Bell v. Hood, 327 U.S. 678, 682-83 (1946)). Dismissal is not  
17 warranted “when ‘the jurisdictional issue and substantive issues are so intertwined that the  
18 question of jurisdiction is dependent on the resolution of factual issues going to the merits’ of the  
19 action.” Id. at 139 (quoting Augustine v. United States, 704 F.2d 1074, 1077 (9th Cir. 1983);  
20 see, e.g., Save Air for Everyone, 373 F.3d at 1039-1040; Gentek Bldg Prods., Inc. v. Steel Peel  
21 Litig. Trust, 491 F.3d 320, 330 (6th Cir. 2007) (“If . . . an attack on subject-matter jurisdiction  
22 also implicates an element of the cause of action, then the district court should ‘find that  
23 jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff’s  
24 claim.”) (citation omitted) (emphasis in original)).

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26 <sup>16</sup> F.R.Civ.P. 12(b)(1) is applicable to adversary proceedings by FRBP 7012.

27 <sup>17</sup> Removal Notice, 2:5-6.  
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1 In this case, Klein has invoked § 544(b)(1) to avoid a transfer of an interest in the debtor  
2 in property that is avoidable under applicable law by an unsecured creditor of the debtor. 11  
3 U.S.C. § 544(b)(1). CUFTA is the applicable law. Defendants admit that § 106(a) abrogates  
4 sovereign immunity as to a governmental unit with respect to causes of action under § 544,  
5 notwithstanding an assertion of sovereign immunity. 11 U.S.C. § 106(a).<sup>18</sup> However, Defendants  
6 claim that this court lacks subject matter jurisdiction over Klein's complaint for two reasons: (1)  
7 Defendants assert that § 106(a)'s sovereign immunity abrogation does not extend to actions  
8 brought under § 544(b)(1) which arise under CUFTA,<sup>19</sup> and (2) while California has admittedly

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10 <sup>18</sup> Dismissal Motion, 10:26 – 11:3. "There is no question that section 106(a) of the Bankruptcy  
11 Code abrogates sovereign immunity as to governmental units 'with respect to' numerous sections  
of the Bankruptcy Code, including section 544." Id.

12 <sup>19</sup> Id. at 11:3-5. "But while section 106(a) authorizes the Trustee to sue a governmental unit  
13 under section 544, section 106(a) does not authorize a creditor outside of bankruptcy to sue a  
14 governmental unit." Id. The majority of bankruptcy courts to address this issue hold that §  
15 106(a)'s abrogation of sovereign immunity as to claims under § 544 permits a trustee to prevail  
16 on a § 544(b)(1) claim without establishing the existence of an actual unsecured creditor who  
could avoid the transfer under state law. See, e.g., VMI Liquidating Trust Dated December 16,  
17 2011 v. United States (In re Valley Mortg., Inc.), 2013 WL 5314369, at \*4 (Bankr. D. Colo.  
Sept. 18, 2013); David Cutler Indus., Inc. v. Penn. Dept. of Revenue (In re David Cutler Indus.,  
18 Ltd.), 471 B.R. 110, 113 (Bankr. E.D. Pa. 2012); Zazzali v. Swenson (In re DBSI, Inc.), 2011  
19 WL 607442, at \*5 (Bankr. D. Del. Feb. 11, 2011); Furr v. United States Dep't of Treasury (In re  
20 Pharmacy Distrib. Servs., Inc.), 455 B.R. 817, 820-21 (Bankr. S.D. Fla. 2011); Tolz v. United  
21 States (In re Brandon Overseas, Inc.), 2010 WL 2812944, \*4 (Bankr. S.D. Fla. July 16, 2010);  
22 Sharp v. United States (In re SK Foods, L.P.), 2010 WL 6431702, \*2 (Bankr. E.D. Cal. July 14,  
2010); Liebersohn v. IRS (In re C.F. Foods, L.P.), 265 B.R. 71, 85-86 (Bankr. E.D. Pa. 2001).  
Other courts, including the Seventh Circuit Court of Appeals, disagree, holding that "§ 106(a)(1)  
23 does not displace the actual-creditor requirement in § 544(b)(1). In re Equip. Acquisition Res.,  
24 Inc., 742 F.3d 743, 744 (7th Cir. 2014); see, e.g., United States v. Field (In re Abatement Envtl.  
25 Res., Inc.), 301 B.R. 830 835 (D. Md. 2003); Bauer v. G.E. Capital Corp. (In re Oncology  
26 Assocs. of Ocean County LLC), 510 B.R. 463, 470 (Bankr. D.N.J. 2014); Dilworth v. Ginn (In re  
27 Ginn – La St. Lucie Ltd., LLLP), 2010 WL 8756757, \*6 (Bankr. S.D. Fla. Dec. 10, 2010);  
28 Grubbs Constr. Co v. Fla. Dept. of Revenue (In re Grubbs Constr. Co.), 321 B.R. 346, 352  
(Bankr. M.D. Fla. 2005). Cf. Field v. Montgomery Cnty. (In re Anton Motors, Inc.), 177 B.R.  
58, 66-67 (Bankr. D. Md. 1995), aff'd, 102 Fed. Appx. 272, 275 (4th Cir. 2004). In Menotte v.  
United States (In re Custom Contractors, LLC), 745 F.3d 1342, the Eleventh Circuit recently

1 waived its sovereign immunity on a limited basis under the Government Claims Act,<sup>20</sup> Klein (a)  
2 “cannot allege the existence of a creditor as of the petition date who could have asserted the  
3 fraudulent transfer claims” against Defendants<sup>21</sup> and (b) Klein’s alleged “failure to comply with  
4 the Government Claims Act precludes this court from exercising jurisdiction over the Trustee’s  
5 Causes of Action against” Defendants.<sup>22</sup> “[T]he determinative jurisdictional facts also go  
6 directly to the merits.” Augustine, 704 F.2d at 1077.

7 The court finds that the jurisdictional issue and substantive issues in this case are so  
8 intertwined that the question of jurisdiction is dependent on the resolution of factual issues going  
9 to the merits. Defendants have not alleged that Klein’s federal claims are immaterial, made  
10 solely for the purpose of obtaining federal jurisdiction, or wholly insubstantial and frivolous.  
11 Whether Klein’s alleged claims against Defendants come within the reach of §544(b)(1) goes to  
12 the merits of Klein’s action. For this reason, the court will assume jurisdiction over this  
13 adversary proceeding and decide the matter on the merits. The scope of § 106(a)’s sovereign  
14 immunity abrogation is an issue that will be left for another day. Defendants’ Motion to Dismiss  
15 for lack of subject matter jurisdiction pursuant to F.R.Civ.P. 12(b)(1) is denied.

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18  
19 discussed the split of authority but concluded that it “need not decide the issue . . . because [the  
20 trustee] ha[d] failed to prove that the transfers were avoidable under [Florida’s Uniform  
21 Fraudulent Transfers Act]. . . regardless of whether [a trustee] can – or must – prove the  
22 existence of an actual creditor.” Id. at 1348. The Ninth Circuit has stated that “the existence of  
23 a section 544(b) cause of action ‘depends upon whether . . . a creditor existing at the time the  
24 transfers were made . . . still had a viable claim against [the] debtor at the time the bankruptcy  
petition was filed.’ Acequia, Inc. v. Clinton (In re Acequia, Inc.), 34 F.3d 800, 807 (9th Cir.  
1994) (emphasis in original). But the Ninth Circuit has yet to address the interplay between §  
106(a) and § 544(b)(1).

25 <sup>20</sup> Cal. Gov’t Code § 945, et. seq.

26 <sup>21</sup> Dismissal Motion, 4:23-25.

27 <sup>22</sup> Id. at 9:17-19.  
28

D. Defendants' Motion to Dismiss Under F.R. Civ.P. 12(b)(6) Will Be Granted With Leave to Amend.

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

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.<sup>23</sup> 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.”<sup>24</sup> 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

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<sup>23</sup> Rule 12(b)(6) is applicable to adversary proceedings by FRBP 7012(b).

<sup>24</sup> Rule 8(a) is applicable to adversary proceedings by FRBP 7008(a).

1 muster under Twombly, a plaintiff must state a plausible claim for relief by identifying the  
2 specific facts upon which the plaintiff relies to support a reasonable inference of the defendant's  
3 liability on plaintiff's claim. Only then will a defendant have sufficient notice of plaintiff's  
4 claim under Rule 8(a). See, e.g., Moss v. U.S. Secret Serv., 572 F.3d 962, 969 (9th Cir. 2009)  
5 ("the non-conclusory 'factual content,' and reasonable inferences from that content . . . [must]  
6 plausibly [suggest] a claim entitling the plaintiff to relief."); Limestone Dev. Corp. v. Vill. of  
7 Lemont, Ill., 520 F.3d 797, 802-03 (7th Cir. 2008) (stating that Twombly "teaches that a  
8 defendant should not be forced to undergo costly discovery unless the complaint contains enough  
9 detail, factual or argumentative, to indicate that the plaintiff has a substantial case").

10 2. Klein's Complaint Fails to State a Plausible Claim for Avoidance and Recovery of an  
11 Actual Fraudulent Transfer

12 Rule 9(b) states that, "[i]n alleging fraud or mistake, a party must state with particularity  
13 the circumstances constituting fraud or mistake." F.R.Civ.P. 9(b). Rule 9(b)'s heightened  
14 pleading standard applies to allegations of fraud and allegations sounding in fraud, including  
15 false misrepresentations. See Vess v. Ciba-Geigy Corp. USA, 317 F.3d 1097, 1106-07 (9th Cir.  
16 2003); Neilson v. Union Bank of Cal., N.A., 290 F.Supp.2d 1101, 1141 (C.D. Cal. 2003).  
17 Allegations under Rule 9(b) must be stated with "specificity including an account of the time,  
18 place, and specific content of the false representations as well as the identities of the parties to  
19 the misrepresentations." Swartz v. KPMG LLP, 476 F.3d 756, 764 (9th Cir. 2007). "To comply  
20 with Rule 9(b), allegations of fraud must be specific enough to give defendants notice of the  
21 particular misconduct which is alleged to constitute the fraud charged so that they can defend  
22 against the charge and not just deny that they have done anything wrong." Bly-Magee v.  
23 California, 236 F.3d 1014, 1019 (9th Cir.2001) (citations/ internal quotations omitted).  
24 Moreover, where a plaintiff pleads allegations of fraud against more than one defendant, Rule  
25 9(b) "requires that a plaintiff plead with sufficient particularity attribution of the alleged  
26 misrepresentations or omissions to each defendant." In re Silicon Graphics, Inc. Sec. Litig., 970  
27 F.Supp. 746, 752 (N.D. Cal. 1997).

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

8 Under California law, a transfer made with the actual intent to hinder, delay or defraud  
9 any creditor of the debtor violates CUFTA § 3439.04; see Mejia v. Reed, 31 Cal.4th 657, 664  
10 (2003). To prevail under CUFTA § 3439.04(a)(1), Klein must establish by a preponderance of  
11 the evidence that the Debtor transferred the sum of \$625,000 to the Defendants through the Fund  
12 with the actual intent to hinder, delay or defraud a creditor. See Wolkowitz v. Beverly (In re  
13 Beverly), 374 B.R. 221, 235 (9th Cir. BAP 2007) (“Whether there is actual intent to hinder,  
14 delay, or defraud under UFTA is a question of fact to be determined by a preponderance of  
15 evidence.”). Because a debtor rarely admits to such a transfer, the evidence of intent “must of  
16 necessity consist of inferences drawn from the circumstances surrounding the transaction and the  
17 relationship and interests of the parties.” Neumeyer v. Crown Funding Corp., 56 Cal.App.3d  
18 178, 183 (1976); see Beverly, 374 B.R. at 235 (“Since direct evidence of intent to hinder, delay  
19 or defraud is uncommon, the determination typically is made inferentially from circumstances  
20 consistent with the requisite intent.”). The UFTA identifies 11 non-exclusive factors, or “badges  
21 of fraud,” that may be applied by a court to divine fraudulent intent:

- 22 1. Whether the transfer or obligation was to an insider.
- 23 2. Whether the debtor retained possession or control of the property after the
- 24 transfer.
- 25 3. Whether the transfer or obligation was disclosed or concealed.
- 26 4. Whether the debtor was sued or threatened with suit before the transfer
- 27 was made or obligation incurred.
- 28

- 1 5. Whether the transfer was of substantially all of the debtor's assets.
- 2 6. Whether the debtor absconded.
- 3 7. Whether the debtor removed or concealed assets.
- 4 8. Whether the value of the consideration received by the debtor was
- 5 reasonably equivalent to the value of the asset transferred or obligation incurred.
- 6 9. Whether the debtor was insolvent or became insolvent shortly after the
- 7 transfer was made or obligation incurred.
- 8 10. Whether the transfer occurred shortly before or shortly after a substantial
- 9 debt was incurred.
- 10 11. Whether the debtor transferred essential assets of the business to a
- 11 lienholder who then transferred the assets to an insider of the debtor.

12 CUFTA § 3439.04(b). The CUFTA factors are intended “to provide guidance to the trial court,  
13 not compel a finding one way or another.” Filip v. Bucurenciu, 129 Cal.App.4th 825, 834  
14 (2005). As the court observed in Beverly:

15 The [C]UFTA list of “badges of fraud” provides neither a counting rule nor a  
16 mathematical formula. No minimum number of factors tips the scales toward  
17 actual intent. A trier of fact is entitled to find actual intent based on the evidence  
18 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.”

19 374 B.R. at 236.

20 In this case, Klein alleges in his complaint that “the Transfer was made pursuant to the  
21 Moriarty Ponzi Scheme”<sup>25</sup> and “that the Debtor’s actual intent to hinder, delay or defraud his  
22 creditors may be inferred from the mere existence of the Moriarty Ponzi Scheme.”<sup>26</sup> However,  
23 Klein’s complaint does not contain facts describing the Moriarty Ponzi Scheme nor does it  
24 contain specific facts to support a reasonable inference that the subject transfers were connected  
25 to the Moriarty Ponzi Scheme. Furthermore, Klein’s complaint does not allege sufficient facts to

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26 <sup>25</sup> Removal Notice, 11:16.

27 <sup>26</sup> Id. at 13:1-3.

1 form the basis for a finding that the subject transfers actually hindered, delayed or defrauded a  
2 creditor of the Debtor or that the Debtor intended the subject transfers to do so on the date of the  
3 transfer.

4 In paragraph 24 of the complaint, Klein alleges one “badge of fraud” from which the  
5 court is asked to divine the requisite actual intent.<sup>27</sup> However, the allegations in Klein’s  
6 complaint “set forth [few] facts from which an inference of scienter [can] be drawn.” See  
7 Cooper, 137 F.3d at 628. The allegations in paragraph 24 of Klein’s complaint constitute a legal  
8 conclusion “which may not [be] substitute[d] for well-pleaded facts allowing the Court to  
9 reasonably infer that those conclusions are true.” Allstate Ins. Co. v. Countrywide Fin. Corp.,  
10 842 F.Supp.2d 1216, 1226 (C.D. Cal.2012).

11 Absent the following facts, Klein’s complaint fails to state a plausible claim to recover an  
12 actual fraudulent transfer under § 544(b) and CUFTA § 3439.04(a)(1):

- 13 1) Facts describing the Moriarty Ponzi Scheme, and specific facts to support a  
14 reasonable inference that the subject transfers are connected to the Moriarty Ponzi  
15 Scheme;
- 16 2) The value received by Debtor in exchange for the subject transfers to the Fund,  
17 together with facts forming the basis for such valuation;
- 18 3) Facts that form the basis for Klein’s assertion in paragraph 25 of the complaint “that,  
19 at the time the Transfer was made, Moriarty was engaged or was about to engage in a  
20 business or a transaction for which the remaining assets of Moriarty were  
21 unreasonably small in relation to the business or transaction.”<sup>28</sup>
- 22 4) Facts that form the basis for Klein’s assertion in paragraph 26 of the complaint “that  
23 at the time the Transfer was made, Moriarty intended to incur, or believed or  
24 reasonably should have believed that he would incur debts beyond his ability to pay  
25 such debts as they became due.”<sup>29</sup>

26 For these reasons, Klein’s first cause of action to avoid and recover an actual fraudulent transfer  
27 must be dismissed for failure to state a claim upon which relief can be granted.

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28 <sup>27</sup> Id. at 13:4-5.

<sup>28</sup> Id. at 13:6-9.

<sup>29</sup> Id. at 13:10-12.

1           3. Klein's Complaint Fails to State a Plausible Claim for Avoidance and Recovery of a  
2           Constructively Fraudulent Transfer

3           Courts do not generally apply the heightened pleading standard of Rule 9(b) to  
4           constructive fraud claims. The 1849 Condominiums Assoc., Inc. v. Bruner, 2010 WL 2557711  
5           (E.D. Cal. 2010), citing Cendant Corp. v. Shelton, 474 F.Supp.2d 377, 380 (D. Conn. 2007).  
6           Rule 9(b) is inapplicable because constructive fraud claims “are not based on actual fraud but  
7           instead rely on the debtor’s financial condition and the sufficiency of the consideration provided  
8           by the transferee.” In re Careamerica, Inc., 409 B.R. 737, 755-56 (Bankr. E.D.N.C. 2009). Still,  
9           a constructive fraud claim must satisfy Rule 8(a) and contain sufficient facts to establish that the  
10          claim is plausible.

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

14               (A) [w]as engaged or was about to engage in a business or a transaction for which  
15               the remaining assets of the debtor were unreasonably small in relation to the  
16               business or transaction, [or]

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

19          Cal. Civ. Code § 3439.04(a)(2). Similarly, constructive fraud can be found under Cal. Civ. Code  
20          § 3439.05, “as to an existing creditor if the debtor does not receive reasonably equivalent value  
21          and ‘was insolvent at that time or ... became insolvent as a result of the transfer’” Mejia v. Reed,  
22          31 Cal.4th at 670, quoting Cal Civ. Code § 3439.05.

23          Here, Klein’s constructive fraud claim is insufficiently stated and must be dismissed. At  
24          its core, “a constructive fraudulent transfer has two elements: reasonable equivalent value and  
25          insolvency.” Allstate Ins. Co., 842 F.Supp.2d at 1224. Klein’s complaint merely recites  
26          statutory language and does not state sufficient facts to show plausibly that on the date of the  
27          transfer the Debtor was actually insolvent or received less than was given to the Defendants.  
28

Absent the following facts, Klein's complaint fails to state a plausible claim to recover a constructive fraudulent transfer under § 544(b) and CUFTA § 3439.05:

1. The value received by Debtor in exchange for the subject transfers to the Fund, together with facts forming the basis for such valuation;
2. Facts that form the basis for Klein's assertion in paragraph 29 of the complaint that "the Transfer was made for less than reasonably equivalent value."<sup>30</sup>
3. Facts that form the basis for Klein's assertion in paragraph 30 of the complaint "that Moriarty was insolvent or became insolvent as a result of the transfer."<sup>31</sup> [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)].

For these reasons, Klein's second cause of action to avoid and recover constructive fraudulent transfer must be dismissed for failure to state a claim upon which relief can be granted.

4. Klein's Complaint Properly Alleges the Existence of an Unsecured Creditor

"When analyzing the sufficiency of a complaint for purposes of Rule 12(b)(6), courts to not generally require a trustee to plead the existence of an unsecured creditor by name, although the trustee must ultimately prove such a creditor exists . . . A complaint, however, must set forth sufficient information to outline the elements of [the] claim or permit inferences to be drawn that these elements exist." In re D'Angelo, 491 B.R. 395, 405 (E.D. Pa. 2013) (quoting In re APF CO., 274 B.R. 634, 639-40 (Bankr. D. Del. 2001)). In paragraph 20 of the complaint, Klein alleges that "there was and is at least one creditor of Moriarty in existence at the time of the Transfer who holds an allowed unsecured claim against Moriarty that was and is allowable under Bankruptcy Code § 502."<sup>32</sup> Therefore, Defendants' Motion to Dismiss for Klein's failure to allege the existence of a "triggering creditor" as of the petition date is denied.

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<sup>30</sup> Id. at 13:19-20.

<sup>31</sup> Id. at 13:21-22.

<sup>32</sup> Id. at 12:18-20.

