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MAY 05 2021

CLERK U.S. BANKRUPTCY COURT
Central District of California
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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

In re:

ART & ARCHITECTURE BOOKS OF
THE 21st CENTURY,

Debtor.

Case No. 2:13-bk-14135-RK

Chapter 11

Adv. No. 2:15-ap-01679-RK

Consolidated with Adv. No. 2:14-ap-01771-RK
and Adv. No. 2:15-ap-01680-RK

**MEMORANDUM DECISION AND ORDER
ON PLAN AGENT'S MOTION FOR LEAVE
TO AMEND SIXTH AMENDED COMPLAINT**

Hearing Dates: January 7, 13 and 26, 2021

**HEARINGS CONDUCTED REMOTELY BY
ZOOM FOR GOVERNMENT**

SAM LESLIE, Plan Agent for Art &
Architecture Books of the 21st Century,

Plaintiff,

vs.

ACE GALLERY NEW YORK
CORPORATION, et al.,

Defendants.

Having considered the Motion of Plaintiff Sam Leslie, Plan Agent ("Plaintiff"), for
Leave to Amend Sixth Amended Complaint ("motion") (Docket No. 808), filed on
December 10, 2020, the oppositions filed by Defendants 400 South La Brea, LLC, and

1 related parties, Cathay Bank and Douglas Christmas, the Plaintiff's response, and
2 related supplemental briefs filed by the parties, and the oral arguments of the parties,
3 the court rules as follows.

4 As a preliminary matter, the court must decide whether Rule 15(a) and/or Rule
5 16(b) of the Federal Rules of Civil Procedure ("Civil Rules") apply.¹ These rules are
6 made applicable to these adversary proceedings by Federal Rules of Bankruptcy
7 Procedure 7015 and 7016. Generally, a court considers a motion for leave to amend
8 pleadings pursuant to the permissive standard of Civil Rule 15(a). *James v. J2 Cloud*
9 *Services, Inc.*, No. 2:16-cv-05769 CAS (PJWx), 2019 WL 184330 (C.D. Cal. Jan. 14,
10 2019), slip op. at *2, citing, *Martinez v. Newport Beach City*, 125 F.3d 777, 785 (9th
11 Cir.1997). However, if the court has entered a scheduling order establishing a deadline
12 for amending pleadings, Civil Rule 16(b) applies once the deadline has passed. *Id.*,
13

14 ¹ In the motion, Plaintiff also argues that his motion is not even necessary, even though he made it. Motion, Docket
15 No. 808 at 11. Specifically, Plaintiff's argument is as follows: "Further, the recovery of transfers between four and
16 seven years prior to the bankruptcy filing is plead in the Sixth Amended Complaint (which is the reason this Motion
is not necessary) because the Plan Agent has plead the applicability of Section 3439 [of the California Civil Code] to
the claims asserted against 400 S. La Brea." *Id.* In explaining this argument, Plaintiff states:

17 The Sixth Amended Complaint (Docket No. 699) pleads allegations for the recovery of Fraudulent
18 Transfers under California Civil Code Section 3439 in three separate claims for relief. [T]hey are the
19 Second, Third and Fourth Claims for Relief. . . There is no mention in the separately plead Third and
20 Fourth Claims for relief that the recovery of the transfers that the Plan Agent seeks to avoid are limited by
21 the four years. The four years plead are only plead in the Second Claim for relief. . . The claims plead by
22 the Plan Trustee in the Third Claim for Relief are made against the Defendants pursuant to Section 3439.05
23 of the California Civil Code and the claims in the Fourth Claim for Relief are made pursuant to Section
24 3439.05 of the California Civil Code. Each of these provisions, respecting the recovery of the very same
transfers as are discussed in the Second Claim for Relief are governed as to the limitations' period of
California Civil Code Section 3439.09 [which provides for a seven year statute of limitations from the date
of the transfer. . . There is no need to permit an amendment to the Sixth Amended Complaint. But the
Court may do so, as stated above, by simply changing one word in paragraph 213 so that the Second Claim
for Relief is consistent with what is already plead in the Third Claim for Relief and the Fourth Claim for
Relief that is found in the Sixth Amended Complaint

25 *Id.* at 15-18. In essence, the argument is that the Third and Fourth Claims for Relief are not subject to the limitation
26 of the Second Claim for Relief which expressly alleges fraudulent transfers within four years of the petition date in
27 paragraph 213 and may utilize the entire seven year period before the petition date under California Civil Code
28 Section 3439.09. The argument is flawed because: (1) the Third and Fourth Claims for Relief are subject to the
same pleading limitation of four years as the Second Claim for Relief because those claims incorporate by reference
paragraph 213 which specifically alleges actionable transfers only within four years of the petition date; and (2)
constructive fraudulent transfers are subject to an absolute statute of limitations of four years of the transfers under
California Civil Code Section 3439.09. There is no need to permit amendment based on this argument, and the
court declines to do so.

1 citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1294 (9th Cir.2000). This is
2 because once the scheduling order deadline passes, the court must first modify the
3 scheduling order to permit an amendment of pleadings pursuant to Civil Rule 16(b)(4).
4 *Id.*, citing O'Connell & Stevenson, Rutter Group Practice Guide: Federal Civil Procedure
5 Before Trial, California and Ninth Circuit Edition, ¶ 8:1469 (online edition April 2021),
6 citing inter alia, *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir.
7 1992).

8 After the status conference in these adversary proceedings on May 29, 2019, the
9 court filed and entered a scheduling order on June 6, 2020 which set a deadline to
10 complete nonexpert fact discovery by January 31, 2020 and expert discovery by April
11 30, 2020. Docket No. 594 (the "Scheduling Order"). The Scheduling Order, however,
12 did not set a specific deadline for further amending the pleadings. *Id.* On January 22,
13 2020, the court filed and entered an amended scheduling order in anticipation of the
14 filing of the Sixth Amended Consolidated Complaint which had been allowed by motion.
15 This amended scheduling order, however, did not set a specific deadline for further
16 amending the pleadings, such as the then soon to be filed Sixth Amended Complaint,
17 but otherwise set deadlines for completing nonexpert witness and expert witness
18 discovery, Docket No. 689. The Scheduling Order was further amended by stipulated
19 schedule extension orders, Docket Nos. 717, 826 and 840, filed on April 9, 2020,
20 December 16, 2020 and January 25, 2021 respectively. Pursuant to the Scheduling
21 Order as further amended, the deadline for nonexpert fact discovery was extended to
22 September 30, 2020, and nonexpert fact discovery is now closed, and the deadline for
23 completion of expert discovery was extended to April 2, 2021. *Id.* After a further
24 hearing on Plaintiff's motion to further amend the complaint on January 26, 2021, the
25 court further amended the Scheduling Order pending a ruling on Plaintiff's motion to
26 amend as follows: "(a) the deadline for service of expert rebuttal reports is extended
27 from March 2, 2021 to forty-five (45) days following the Court's issuance of a written
28 ruling on the Motions (the "Rebuttal Deadline"); and (b) the deadline for completion of

expert witness discovery is continued from April 2, 2021 to thirty (30) days after the Rebuttal Deadline.”² Docket No. 861.

On December 10, 2020, Plaintiff filed his motion for leave to amend the Sixth Amended Complaint now before the court, which was ten and one-half months after the court entered the original Scheduling Order now in effect on January 22, 2020. In the Sixth Amended Complaint, the current operative complaint, Plaintiff alleges that in the Second, Third and Fourth Claims for Relief, transfers of Debtor’s assets as prepetition rent obligations were made by Debtor to Defendant 400 S. La Brea within four years before the petition date with the actual intent to hinder, delay or defraud creditors of the Debtor to pay the rent obligations of a related nondebtor entity, Ace Museum, or such transfers were constructive fraudulent transfers and are otherwise avoidable. Sixth Amended Complaint, ¶¶ 212–228.

As alleged in the Sixth Amended Complaint, Defendant Douglas Christmas incorporated the Debtor in 1999 and was its principal and sole shareholder since incorporation through the effective date of Plaintiff’s appointment as the plan agent in this case on April 6, 2016. *Id.*, ¶ 27. As also alleged in the Sixth Amended Complaint, in 2006, Defendant Christmas entered into a three-year lease of, with a purchase option for, two parcels of real property with the street addresses of 400 S. La Brea Avenue, Los Angeles, CA, and 407 S. Sycamore Avenue, Los Angeles, CA, with Defendant 400 S. La Brea LLC as lessor and himself as lessee, which is known as the “Museum Lease” as it was the business location of Defendant Ace Museum, which was incorporated by Defendant Christmas in 2009. *Id.* ¶¶ 36–40. As also alleged in the Sixth Amended Complaint, rent related charges on the Museum Lease totaling \$2.9 million was paid by or on behalf of the Debtor into Defendant 400 S. La Brea’s checking account with Defendant Cathay Bank. *Id.*, ¶ 37. As further alleged in the Sixth Amended Complaint, in 2009, Defendant Christmas, Defendant 400 S. La Brea LLC and

² The reference to “Motions” in this further scheduling order is to Plaintiff’s motion to further amend the complaint and Defendants’ motion to strike portions of the expert report of Plaintiff’s expert, Jennifer Ziegler, Docket No. 805.

1 Defendant Ace Museum executed an amendment of the Museum Lease with the
2 purchase option assigning Christmas's rights to Ace Museum, and the amendment and
3 assignment noted that the two parcels of real property were subject to an existing \$11.9
4 million secured loan from Defendant Cathay Bank. *Id.*, ¶ 41. As also alleged in the
5 Sixth Amended Complaint, the rent on the Museum Lease totaling over \$5.4 million was
6 also paid by the Debtor from 2009 to 2013 when Debtor filed its bankruptcy petition in
7 this case, and some of this money went to pay down the loan on the properties owed by
8 400 S. La Brea to Cathay Bank. *Id.*, ¶¶ 46–57. As further alleged in the Sixth Amended
9 Complaint, in order to legitimize the Debtor's transfers of rent payments on behalf of
10 Ace Museum, Defendant Christmas caused a purported resolution of the Ace Museum
11 board of directors or trustees to authorize Ace Museum to borrow the money paid by the
12 Debtor for Ace Museum's rent as a loan with a maturity date of June 11, 2014, and that
13 this loan known as the "Museum Loan" grew to over \$4.4 million. *Id.*, ¶¶ 43–44. In the
14 Eighth Claim for Relief in the Sixth Amended Complaint, Plaintiff seeks to recover as
15 avoidable prepetition fraudulent transfers the rent related payments by Debtor on behalf
16 of Ace Museum during the four year period before the petition date from Defendants
17 400 S. La Brea LLC and related parties and Defendant Cathay Bank pursuant to 11
18 U.S.C. § 550. *Id.*, ¶¶ 245–250.

19 In the Motion, Plaintiff now seeks amendment of the Sixth Amended Complaint to
20 expand his fraudulent transfer claims to encompass alleged fraudulent transfers
21 occurring within a new three year time period between four and seven years before the
22 petition date, 2006 to 2009, with an alleged value of approximately \$12 million, as the
23 existing complaint only alleges fraudulent transfers occurring four years before the
24 petition date, 2009 to 2013.³ Motion, Docket No. 808 at 11–13. Plaintiff argues that he

25
26 ³ As set forth in the motion, Plaintiff contends that payments made to Defendant 400 S. La Brea between four and
27 seven years prior to Debtor's bankruptcy filing total \$5,583,065.28 and to the other defendants total \$6,948,702.35
28 during these years, and he should be allowed to further amend the complaint to avoid and recover these transfers as
fraudulent transfers. Motion, Docket No. 808 at 11–12. These amounts would be in addition to the payments made
to Defendant 400 S. La Brea between zero and four years before the bankruptcy filing totaling \$1,321,619.15 and to
the other defendants totaling \$4,735,519.28 during these years that Plaintiff is seeking to avoid and recover as
fraudulent transfers in the existing complaint. *Id.* Moreover, Plaintiff in the existing complaint is also seeking to

1 only needs to satisfy the standard for amendment under Civil Rule 15(a), but
2 Defendants argue that Plaintiff's proposed amendment of the existing complaint that
3 would require modifications to the scheduling order, and thus, in addition, must satisfy
4 the standard of Civil Rule 16(b)(4). *Id.* at 2; Opposition, Docket No. 830 at 9–13;
5 Opposition, Docket No. 832 at 13. Defendants assert that such amendment would
6 necessitate the modification of the Scheduling Order because nonexpert discovery is
7 now cut off and expert discovery would have to be extended because as the alleged
8 fraudulent transferees, they need modification of the Scheduling Order to take further
9 discovery to defend against Plaintiff's expanded fraudulent transfer claims. *Id.*

10 Civil Rule 16(b)(4) provides that a scheduling order may be modified “only for
11 good cause and with the judge's consent.” *See also James v. J2 Cloud Services, Inc.*,
12 No. 2:16-cv-05769 CAS(PJWx), 2019 WL 184330 (C.D. Cal. Jan. 14, 2019), slip op. at
13 *3, citing, Fed. R. Civ. P. 16(b)(4). This requirement “primarily considers the diligence
14 of the party seeking the amendment.” *Id.*, citing, *Johnson v. Mammoth Recreations,*
15 *Inc.*, 975 F.2d 604, 609 (9th Cir. 1992). The scheduling order may be modified only “if it
16 cannot reasonably be met despite the diligence of the party seeking the extension.” *Id.*
17 “Although the existence or degree of prejudice to the party opposing the modification
18 might supply additional reasons to deny a motion, the focus of the inquiry is upon the
19 moving party's reasons for seeking modification. If that party was not diligent, the inquiry
20 should end.” *Id.*

21 If the moving party shows good cause under Civil Rule 16(b), the court then
22 applies Civil Rule 15(a)'s liberal standards in determining whether to grant leave to
23 amend a pleading. *Id.*, citing, *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d at 608.
24 Civil Rule 15(a) provides that “leave [to amend] shall be freely given when justice so
25 requires.” *Id.*, citing, Fed. R. Civ. P. 15(a)(2). Generally, leave to amend under this
26 standard is “denied only upon showing of bad faith, undue delay, futility, or undue

27 _____
28 avoid and recover as postpetition transfers the payments made after the bankruptcy filing to Defendant 400 S. La
Brea totaling \$5,766,762.32 and to the other defendants totaling \$7,305,747.80. *Id.*

1 prejudice to the opposing party.” *Id.*, citing *Chudacoff v. Univ. Med. Ctr. of S. Nevada*,
2 649 F.3d 1143, 1152 (9th Cir. 2011) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)).
3 Civil Rule 15(a) “is to be applied with extreme liberality,” *Id.*, citing, *Morongo Band of*
4 *Mission Indians v. Rose*, 893 F.2d 1074, 1079 (9th Cir. 1990), and whether to permit
5 amendment is a decision “entrusted to the sound discretion of the trial court.” *Id.*, citing,
6 *Jordan v. County of Los Angeles*, 669 F.2d 1311, 1324 (9th Cir. 1982).

7 Thus, the court must first consider whether Plaintiff’s proposed amendment of the
8 existing complaint, the Sixth Amended Complaint, requires modification of the
9 Scheduling Order pursuant to Civil Rule 16(b)(4). According to Plaintiff, he only
10 requests leave of court to amend the change one word in the entire Sixth Amended
11 Complaint by changing the word “four” to “seven” in paragraph 213, which could be
12 accomplished by a modification, but admits that if formal amendment of the entire
13 complaint is required, he asks for leave to file a Seventh Amended Complaint. Motion,
14 Docket No. 808 at 1. The effect of the amendment of the complaint in changing the one
15 word in paragraph 213 has the following effects: (1) paragraph 213 of the complaint in
16 the second claim for relief for avoidance of transfers under 11 U.S.C. § 544 and
17 California Civil Code § 3439.04(a)(1) (i.e., actual fraudulent transfers) would expand the
18 scope of the alleged fraudulent transfers in the claim for an additional three year period
19 between 2006 and 2009 in addition to alleged fraudulent transfers for the four year
20 period between 2009 and 2013 in the existing complaint; and (2) because paragraph
21 213 of the complaint is incorporated by reference in other claims for relief in the
22 complaint, the proposed amendment would also amend the third, fourth, eighth and
23 eleventh claims for relief for avoidance of transfers under 11 U.S.C. § 544 and
24 California Civil Code §§ 3439.04(a)(2) and 3439.05 (i.e., constructive fraudulent
25 transfers), for recovery of transfers under 11 U.S.C. § 550, for recovery of transfers
26 under 11 U.S.C. § 551 and for conversion of property of the estate under state common
27 law, would also expand these claims to include the additional alleged fraudulent
28 transfers for years 2006 to 2009. Motion, Docket No. 808 at 1; Sixth Amended

1 Complaint, Docket No. 699 at 83–90. Thus, in so amending the complaint, this would
2 have the effect of greatly expanding Plaintiff’s fraudulent transfer and related claims by
3 adding alleged fraudulent transfers to the complaint over a new three year time period
4 between 2006 and 2009 with an alleged value totaling \$12 million. *Id.*

5 Plaintiff argues that Civil Rule 16(b)(4) is inapplicable because there would be no
6 modification of the Schedule Order as he is not seeking any such modification. In
7 opposition to the motion, Defendants argue that Plaintiff’s proposed amendment
8 requires modification of the Scheduling Order under Civil Rule 16(b)(4) because the
9 expanded claims concern different property transfers totaling over \$12 million not
10 alleged in the prior complaints and would thus require additional discovery necessitating
11 modifications to the Scheduling Order pursuant to Civil Rule 16. Docket No. 832 at 12–
12 14; Docket No. 830 at 9–11. When Plaintiff filed the motion to amend on December 10,
13 2020, the parties had already agreed previously that they would complete nonexpert
14 discovery by September 30, 2020 deadline, which deadline had already passed, and
15 that they would complete expert discovery by January 31, 2021. Defendants argue, and
16 the court agrees, that the further amendment of the complaint resulting in addition of
17 alleged fraudulent transfers for an additional three year period, 2006 to 2009, beyond
18 the existing four year claims period, 2009 to 2013, would require modifications to the
19 Scheduling Order to allow the parties to conduct discovery with respect to these
20 additional claims as the discovery taken in this matter was premised on the prior
21 complaints only alleging fraudulent transfers between the petition date and four years
22 before, 2009 to 2013. Opposition, Docket No. 832 at 12–14. That is, based on the prior
23 and current complaints, Defendants only had to defend the claims alleged against them
24 fraudulent transfers between 2009 and 2013, and took discovery accordingly, and, if the
25 further amended complaint is allowed, they would have to defend the claims against
26 them amended to allege fraudulent transfers for an additional three years, 2006 to 2009,
27 allegedly worth \$12 million, with discovery now closed. Defendants argue that they
28 would have to conduct discovery regarding Plaintiff’s expanded claims of intentional and

1 constructive fraudulent transfers covering an additional three years of alleged transfers
2 with a total value of \$12 million, which would also include analysis of the Debtor's
3 alleged insolvency during this time period as well as the alleged knowledge of
4 Defendants' agents for each of these transfers.⁴ Therefore, the court determines that
5 Plaintiff must demonstrate good cause pursuant to Civil Rule 16(b) to modify the
6 existing Scheduling Order in order to amend the Sixth Amended Complaint by
7 expanding his transfer avoidance claims to add additional alleged fraudulent transfers
8 for a different three year time period not alleged in the prior complaints.

9 Accordingly, Civil Rule 16(b)(4) provides the applicable standard for plaintiff's
10 proposed amendment of the complaint that would require modifications to the court's
11 Scheduling Order. *James v. J2 Cloud Services, Inc.*, No. 2:16-cv-05769 CAS(PJWx),
12 2019 WL 184330 (C.D. Cal. Jan. 14, 2019), slip op. at *3, citing, *Jones v. City of Tulare*,
13 No. 1:17-CV-1260-SKO, 2018 WL 6271577, at *3 (E.D. Cal. Nov. 30, 2018) ("Although
14 the Court's scheduling Order does not set a specific deadline for amending the
15 complaint, Plaintiffs' motion to amend the complaint is governed by Rule 16(b)(4)
16 because granting Plaintiffs leave to amend the complaint would require amending other
17 dates in the Scheduling Order."); contra, *Santa Clara Water District v. Olin Corp.*, No. C-

18 ⁴ Defendant 400 S. La Brea's argument fairly summarizes Defendants' predicament arising from Plaintiff's
19 proposed amendment:

20 What is conspicuously absent from the voluminous Sixth Amended Complaint is any allegation that 400
21 SLB received rent payments at any time prior to the four-year pre-petition period, nor has any iteration
22 before it made such an allegation. Based on this, the 400 SLB Defendants have conducted discovery and
23 otherwise have been defending this adversary proceeding over the last four years within the bounds of the
24 Plan Agent's unambiguous allegations. If the Plan Agent were allowed, overnight, to add an entirely new
25 three-year pre-petition period to his allegations and pre-petition claims totaling at least \$5.58 million, the
26 400 SLB Defendants will be forced to essentially start from scratch regarding the new allegations. Though
27 the 400 SLB Defendants have not had sufficient time to fully assess the gravity of the blow that it would
28 suffer if \$5.58 [million] in new claims and a new three-year pre-petition period were added at this late
stage, a preliminary assessment is that the addition of such claims would required, at a minimum: (i) re-
review of some portion of what now amounts to hundreds of thousands of documents served in discovery
and exchange[d] between the parties; (ii) preparation and service of new discovery requests, including
potentially new third-party subpoenas; (iii) conducting or the retaking of appropriate depositions; and (iv)
appropriate forensic investigations through their experts. The process would invariably cost the 400 SLB
Defendants tens of thousands of dollars and months to complete. The fundamental unfairness is palpable
with respect to the Plan Agent's extremely late request.

Opposition at 14.

07-03756 RMW, 2009 U.S. Dist. LEXIS 23816 (N.D. Cal. Mar. 13, 2009); *Gerawan Farming, Inc. v. Rehrig Pacific Co.*, No. 1:11-cv-01273 LJO-BAM, 2013 U.S. Dist. LEXIS 31835 (E.D. Cal. Mar. 7, 2013); *Kingsburg Apple Packers, Inc. v. Ballantine Produce Co.*, No. 1:09-cv-00901 AWI JLT, 2012 U.S. Dist. LEXIS 28771 (E.D. Cal. Mar. 5, 2012); *Zixuan Rao v. Apple, Inc.*, No. 5:18-cv-02813 EJD, 2020 U.S. Dist. LEXIS 116928 (N.D. Cal. July 2, 2020).⁵

Civil Rule 16(b)(4) provides: “A schedule may be modified only for good cause and with the judge’s consent.” Regarding “good cause” under Civil Rule 16(b)(4), Plaintiff explains in the motion that he has worked diligently in pursuing these adversary proceedings and his delay in amending and adding these new transfers is due to the fact that “the information regarding the fraudulent transfers to the defendants which took place between four and seven years prior to the filing of this bankruptcy case was not discovered by [Plaintiff] until Jennifer Ziegler and Berkeley Research Group [i.e., Plaintiff’s expert witnesses] discovered this information in the process of preparing their report.” Motion at 2–3. Regarding his recent discovery of this information, Plaintiff further explains:

First, the only person who the Plan Agent has employed to perform the forensic analysis is Ms. Ziegler of Berkeley Research Group. The primary or sole work by Ms. Ziegler initially upon her employment was to review the postpetition transfers which were first identified by the Plan Agent within 45–60 days after he took over the Debtor’s operations pursuant to the confirmed Plan of Reorganization. That date was April 6, 2016. . . . Ms. Ziegler was never called upon to analyze the issues in the litigation (her analysis of the Postpetition Transfers necessarily pertains to the claims by the Plan Agent under Section 549 of the Bankruptcy Code) related to the prepetition transfers at all. She did not do this work until the time period in 2020 leading up to the submission of her expert report on or about October 30, 2020 to the 400 SLB Defendants . . . The Plan Agent has spent millions of dollars litigating this case and did not call upon Ms. Ziegler to do this work until the deadline set by the Court for the parties to designate expert

⁵ The court determines that *J2 Cloud Services* decided by the district court in this judicial district reflects the better view that any modification of the pretrial scheduling order must comply with Federal Rule of Civil Procedure 16(b)(4) regarding amendment of pleadings is a better reading of the rule rather than *Gerawan Farming* decided by a district court outside this judicial district relied upon by Plaintiff that Rule 16(b)(4) does not apply to modifications of a pretrial scheduling order involving amendment of pleadings unless there is an explicit deadline for amendment of pleadings. The rule does not have exceptions as concluded by the district court in *Gerawan Farming*.

1 witnesses and then exchange any reports prepared by them. That is when the
2 information to the four to seven year transfers was discovered.

3 Response to Oppositions, Docket No. 836 at 6–7.

4 Plaintiff in his reply to Defendants' oppositions further stated:

5 Here, the Plan Agent only knew about the recoverable transfers within four to
6 seven years prior to bankruptcy at most, one to 1.2 years before the within
7 Motion was filed. And even though Cathay Bank says that they provided that
8 information in discovery (or according to 400 SLB, such information was
9 available in tax returns), the Plan Agent did not know and could not have
10 presumed that the Debtor was insolvent or left with unreasonably small capital or
11 was unable to pay its obligations as they matured within four to seven years prior
12 to bankruptcy. This was only discovered by Ms. Ziegler when she analyzed the
13 prepetition transfers by the Debtor to 400 SLB (oftentimes from the Debtor's
14 account rather than through Ace Museum or the yet to be formed Ace New York
15 Corporation) and simultaneously analyzed the Debtor's financial condition at the
16 time of those transfers and afterward. This work could not have been done by the
17 Plan Agent (who has already incurred millions in fees tracing and trying to figure
18 out the business practices and fraudulent postpetition practices of 400 SLB,
19 Cathay Bank and Mr. Christmas) and it was not until Ms. Ziegler became involved
20 that the facts respecting the four to seven year transfers were uncovered. Had
21 these allegations been pled at any time before the completion of Ms. Ziegler's
22 report, and the avoidance of the \$12 Million of transfers received by these same
23 Defendants would have been subject to the same Rule 12(b) motions as were
24 filed in the *Twombly* and *Iqbal* cases and the same lawyers who now oppose this
25 Motion to Amend would be telling the Court how legally insufficient the Plan
26 Agent's allegations were. In fact, in the most recent filing by 400 SLB, their
27 lawyer has already stated that their response to the amended Complaint if the
28 Motion is granted will be a Motion to Dismiss.

Reply to Oppositions, Docket No. 848 at 22–23.

18 Defendants argue that Plaintiff has failed to show good cause required under
19 Civil Rule 16(b) that he as the party seeking amendment was diligent. Opposition of
20 400 South La Brea Defendants, Docket No. 832, filed on December 24, 2020;
21 Opposition of Defendant Cathay Bank, Docket No. 830, filed on December 24, 2020.
22 The 400 South La Brea Defendants argue that Plaintiff had the facts available to him to
23 discover the four to seven year prepetition alleged fraudulent transfers when he took
24 over the books and records of the Debtor on April 6, 2016 as the plan agent pursuant to
25 the confirmed plan of reorganization. Docket No. 832 at 10. Defendants argue that
26 based on Plaintiff's review of these books and records of the Debtor, he had expanded
27 and refined his claims in these adversary proceedings, amending the complaint a total
28 of five times since he was appointed as plan agent in April 2016. *Id.* at 11. However,

1 none of these earlier complaints, including the Sixth Amended Complaint, alleged
2 claims for fraudulent transfer against Defendants for the time period between four and
3 seven years before the petition date.

4 Defendant Cathay Bank argues that Plaintiff was on notice of potential claims
5 against Defendants arising from the transfers during the four to seven year time period
6 before the petition date at least by October 3, 2018 when he filed the Fifth Amended
7 Complaint on October 3, 2018, which alleges that documents produced by Defendant
8 400 S. La Brea LLC showed that payments totaling \$2,940,668.72 were paid by or on
9 behalf of Debtor paid under the terms of the Museum Lease between its execution in
10 2006 through July 2009, during which time that Defendant Christmas was the lessee,
11 which are transfers during the four to seven year time period before the petition date
12 that Plaintiff now seeks to add in a further amended complaint. Docket No. 842 at 5;
13 Docket No. 830 at 8; see *also*, Fifth Amended Complaint, ¶ 37. Defendant Cathay Bank
14 further argues that by this time, October 2018, Plaintiff had been in possession of the
15 Debtor's books and records for more than two years, and was aware of the transfers
16 that he now seeks to add as new claims, but has waited another two years to assert
17 these new claims in his motion to amend, filed in December 2020. *Id.* Moreover, as to
18 Defendant Cathay Bank itself, in August 2019, it had produced to Plaintiff bank
19 statements for 400 South La Brea's bank account during the four to seven year period
20 before the petition date and the complete loan transaction history for its loan to 400
21 South La Brea, showing subsequent transfers of the funds from Debtor through 400
22 South La Brea to Cathay Bank, but Plaintiff did not assert his new claims as to these
23 transfers until over another year later in December 2020 when he filed the motion to
24 amend. Docket No. 830 at 8.

25 Plaintiff contends that he has acted diligently with respect to these additional
26 transfers because his expert witness only analyzed the transfers during her recent work
27 for her October 2020 expert report, yet he provides no reasonable explanation for why it
28 took him so long to ask her to analyze the four to seven year prepetition fraudulent

1 transfers as the complaints as amended have alleged four year prepetition fraudulent
2 transfers since he was aware of prepetition transfers by Debtor to or on behalf of Ace
3 Museum when his appointment as plan agent became effective on April 6, 2016 when
4 he took over management of the Reorganized Debtor. This is evident in the original
5 and first amended complaints filed by his predecessor, the official committee of
6 unsecured creditors, represented by the same counsel, SulmeyerKupetz, in November
7 2014 and January 2015 that alleged fraudulent transfers by Debtor to or on behalf of
8 Ace Museum since July 2009. Complaint, Docket No. 1, Adv. No. 2:14-ap-01771-RK,
9 filed on November 26, 2014, ¶¶ 8-10, 51-67; First Amended Complaint, Docket No. 11,
10 Adv. No. 2:14-ap-01771-RK, filed on January 22, 2015, ¶¶ 10-15, 82-103. These were
11 the only complaints relating to prepetition transfers involving Ace Museum filed within
12 the statute of limitations of 11 U.S.C. §546(a) of two years of the petition date of
13 February 19, 2013, which was February 19, 2015.

14 On November 26, 2014, the Official Committee of Unsecured Creditors as the
15 plaintiff filed the original complaint in Adv. No. 2:14-ap-01771-RK. Complaint, Docket
16 No. 1, Adv. No. 2:14-ap-01771-RK. The only defendant named in the original complaint
17 was Ace Museum. *Id.* There were no other parties in this adversary proceeding at this
18 time. *Id.*

19 The original complaint in paragraph 8 alleged: “8. Plaintiff is informed and
20 believes, and based thereon alleges, that, on or about July 9, 2009, a meeting of the
21 Board of Directors of Ace Museum occurred, at which Ace Museum resolved to borrow
22 from the Debtor an initial amount of no less than \$3,143,994.02, plus additional
23 amounts as necessary from time to time, with no interest.” Complaint, Docket No. 1,
24 Adv. No. 2:14-ap-01771-RK, ¶ 8. The original complaint in paragraph 9 alleged: “9.
25 Plaintiff is informed and believes, and based thereon alleges, that in fact, Ace Museum
26 borrowed, or otherwise obtained, from the Debtor, and the Debtor lent, or otherwise
27 provided to, Ace Museum, funds in the aggregate of no less than \$4,482,586.00 (the
28 “Loan”), and that Ace Museum became indebted to the Debtor in at least that amount

1 (the “Loan Obligation”). Plaintiff is further informed and believes, and based thereon
2 alleges, that the Loan was provided or made to one or more transfers of the Debtor’s
3 funds from the Debtor to Ace Museum since July 9, 2009 (each, a “Transfer” and
4 collectively, the “Transfers”).” *Id.* at ¶ 9. The original complaint in paragraph 10 alleged:
5 “10. Plaintiff is informed and believes, and based thereon alleges, that, at the time or as
6 a result of, each Transfer, the Debtor was or became insolvent, was left with an
7 unreasonably small capital to engage in its business, and/or otherwise was not paying
8 or became unable to pay its debts as such debts matured.” *Id.*, ¶ 10. These allegations
9 were the basis for the constructive fraudulent transfer claims in the original complaint,
10 the Sixth, Seventh and Eighth Claims for Relief, pursuant to 11 U.S.C. §§ 544 and
11 548(a)(1)(B) and California Civil Code §§ 3439.04(a)(2) and 3439.05. *Id.*, ¶¶ 51-64.

12 The original complaint did not allege or refer to transfers to parties other than Ace
13 Museum or to transfers before July 9, 2009. *Id.*, ¶¶ 1–78. The alleged transfers
14 pertained to Debtor’s transfers to Ace Museum pursuant to the purported “Loan” and did
15 not refer to any rent obligations. *Id.* Paragraph 9 of the original complaint alleged that
16 the actionable transfers by the Debtor to Ace Museum were “since July 9, 2009”, and
17 the sixth, seventh and eighth claims for relief sought to avoid each of these transfers.
18 *Id.*, ¶¶ 9, 51-64.

19 On January 22, 2015, the Official Committee of Unsecured Creditors as the
20 plaintiff filed the first amended complaint in Adv. No. 2:14-ap-01771-RK.⁶ First Amended
21 Complaint, Docket No. 1, Adv. No. 2:14-ap-01771-RK. In the First Amended Complaint,
22 Plaintiff Creditors’ Committee named Douglas Christmas as a party defendant in addition
23

24 ⁶ On January 22, 2015, Plaintiff Creditors’ Committee also filed a motion for leave to amend the complaint to allow
25 it to file the first amended complaint, but such a motion to amend was unnecessary because the Committee could
26 amend the original complaint as of right pursuant to Federal Rule of Bankruptcy Procedure 7015 and Federal Rule
27 of Civil Procedure 15(a)(1)(B) within 21 days of a responsive pleading or a motion under Federal Rule of Civil
28 Procedure 12(b), (e) or (f) to the original complaint was a pleading to which responsive pleading was required and a
responsive pleading or Rule 12 motion had not been served the then only defendant, Ace Museum, as indicated on
the case docket. Thus, the first amended complaint was deemed filed on January 22, 2015. In any event, the first
amended complaint was deemed filed before the two year statute of limitations of 11 U.S.C. § 546(a) had expired on
February 19, 2015, two years after the petition date of February 19, 2013, as by stipulation and order filed and
entered on February 18, 2015, the filing of the first amended complaint was authorized by the court. Docket Nos. 26
and 28, Adv. No. 2:14-ap-01771-RK.

1 to Ace Museum. *Id.* There were no other parties in this adversary proceeding at this
2 time. *Id.*

3 The allegations of fraudulent transfers by the Debtor to Ace Museum in the
4 original complaint were reiterated in the First Amended Complaint in paragraphs 10, 12
5 and 15 and amplified by paragraphs 13 and 14 to allege additional claims of intentional
6 fraudulent transfer in the Seventh and Tenth Claims for Relief pursuant to 11 U.S.C. §§
7 544 and 548(a)(1)(A) and California Civil Code § 3439.04(a)(1). First Amended
8 Complaint, Docket No. 11, Adv. No. 2:14-ap-01771-RK, ¶¶ 10-15, 82-103. That is,
9 specifically, the allegations that Debtor made transfers of funds not less than
10 \$4,482,586.00 were made to Ace Museum since July 9, 2009 to the petition date on
11 February 19, 2013 were contained in the First Amended Complaint. *Id.*, ¶ 12.
12 Paragraph 12 of the first amended complaint alleged: "Plaintiff is further informed and
13 believes, and based thereon alleges, that the Museum Loan was provided or made
14 pursuant to one or more transfers of the Debtor's funds from the Debtor to Ace Museum
15 since July 9, 2009 or such other later date or dates before the Petition Date (defined
16 below) (each, an 'Ace Museum Transfer' and, collectively, the 'Ace Museum
17 Transfers')" *Id.*

18 The First Amended Complaint also referred to, and attached, copies of the
19 Museum Lease entered into between Christmas and 400 South La Brea LLC in 2006 as
20 well as the amendment of the lease and assignment to Ace Museum entered into
21 between these parties and Ace Museum in 2009. *Id.*, ¶¶ 29-32 and Exhibits 1-3
22 attached thereto. The copies of the Museum Lease, assignment and amendment
23 attached to the First Amended Complaint indicated that Plaintiff's predecessor in
24 interest, the Creditors' Committee, had knowledge of the contractual relationship
25 between Christmas, Debtor's principal and sole shareholder, 400 South La Brea, LLC,
26 the landlord, and Ace Museum, under the Museum Lease and the
27 amendment/assignment, and had knowledge that Christmas and Ace Museum had
28 obligations to pay rent to 400 South La Brea LLC under the Museum Lease, and that

1 Ace Museum had minimal revenue other than “Contributions and Grants” as shown by
2 its tax returns for 2010 and 2011 to pay its rent obligations under the Museum Lease.
3 *Id.*, ¶¶ 29–38 and Exhibits 1-3 attached thereto. The First Amended Complaint also
4 sought preliminary injunctive relief for appointment of a receiver to exercise the
5 purchase option under the Museum Lease to purchase the 400 South La Brea and
6 Sycamore properties. *Id.*, and Prayer for Relief on First Claim for Relief. The First
7 Amended Complaint in these allegations referred to the Debtor’s prepetition transfers to
8 Ace Museum as “the profligate, irresponsible transfer of more than \$4,000,000 from the
9 Debtor to Ace Museum.” *Id.*, ¶ 38.

10 The first amended complaint did not allege or refer to transfers to parties other
11 than Ace Museum or Christmas or to transfers before four years before the petition date.
12 *Id.*, ¶¶ 1–146. As in the original complaint, the alleged transfers pertained to Debtor’s
13 transfers to Ace Museum pursuant to the purported “Loan” and did not refer to any rent
14 obligations under the Museum Lease. *Id.* Paragraph 9 of the original complaint alleged
15 that the alleged actionable fraudulent transfers by the Debtor to Ace Museum were
16 “since July 9, 2009 or such other later date or dates before the Petition Date since July
17 9, 2009”, and the seventh, eighth, ninth, tenth and eleventh claims for relief sought to
18 avoid each of these transfers. *Id.*, ¶¶ 12, 82–103. Paragraph 83 in the seventh claim
19 for relief of the first amended complaint alleged that “Plaintiff is informed and believes,
20 and based thereon alleges, each of the Transfers was made by the Debtor within four
21 years before the Petition Date,” therefore, indicating that the actionable transfers
22 were within four years of the petition date of February 19, 2013, and this allegation is
23 also incorporated by reference in the eighth, ninth, tenth and eleventh claims for relief.
24 *Id.*

25 Knowledge of the Ace Museum prepetition transfers and the Museum Lease as
26 alleged in the original and first amended complaints is imputed to Plaintiff as of April 6,
27 2016 when he took over Debtor’s operations and control over these adversary
28 proceedings for the Creditors’ Committee pursuant to the confirmed plan of

1 reorganization as well as Plaintiff's counsel, who were counsel for the Creditors'
2 Committee and prepared and filed the original and first amended complaints for the
3 committee in November 2014 and January 2015.

4 Each iteration of the complaint from the original complaint to the last amended
5 Sixth Amended Complaint consistently alleged claims of Plaintiff to avoid and recover
6 prepetition fraudulent transfers to or behalf of Ace Museum within four years before the
7 petition date. On December 13, 2016, Plaintiff filed his motion to consolidate adversary
8 proceedings and to file a third amended consolidated complaint, which was granted by
9 an order filed and entered on January 13, 2017. Docket Nos. 118 and 122, Adv. No.
10 2:14-ap-01771-RK. In the Third Amended Consolidated Complaint, filed on January 23,
11 2017, Plaintiff named 400 South La Brea, LLC, as a party defendant for the first time in
12 these adversary proceedings, alleging that the Debtor made direct and indirect
13 prepetition transfers to 400 South La Brea, LLC, to pay the rent obligations of Ace
14 Museum under the Museum Lease, which constituted actual and constructive fraudulent
15 transfers, commencing with rent obligations for December 2009. Third Amended
16 Consolidated Complaint, Docket No. 69, ¶¶ 30, 31, 36–46 and 135–169. Paragraph
17 136 in the eighth claim for relief of the third amended consolidated complaint alleged
18 that "Plaintiff is informed and believes, and based thereon alleges, each of the Direct La
19 Brea Rent Transfers, the Indirect La Brea Rent Transfers, the Pre-Petition Christmas
20 Rent Transfers, and/or the Ace Museum Pre-Petition Rent Transfers (collectively, the
21 'Prepetition Rent Transfers' was made by the Debtor within four years before the
22 Petition Date," therefore, indicating that the actionable transfers were within four
23 years of the petition date of February 19, 2013, and this allegation is also incorporated
24 by reference in the ninth, tenth, eleventh and twelfth claims for relief against 400 South
25 La Brea, LLC. *Id.* The eighth, ninth, tenth, eleventh and twelfth claims for relief were
26 the only claims for relief against 400 South La Brea based on alleged fraudulent
27 transfers in the third amended consolidated complaint. The third amended consolidated
28 complaint did not allege or refer to transfers relating to Ace Museum or the Museum

1 Lease before July 9, 2009. *Id.*, ¶¶ 1–283.

2 On October 3, 2018, Plaintiff filed his motion to amend the fourth amended
3 consolidated complaint and to file a fifth amended consolidated complaint, which was
4 granted by an order filed and entered on November 15, 2018. Docket Nos. 439 and
5 461. In the Fifth Amended Consolidated Complaint, filed on November 16, 2018,
6 Plaintiff named Cathay Bank as a party defendant for the first time in these adversary
7 proceedings, alleging that the Debtor made direct and indirect prepetition transfers to
8 400 South La Brea, LLC, in payment of the rent obligations of Ace Museum to its
9 landlord, 400 South La Brea, LLC, under the Museum Lease, which in turn directed the
10 payments as subsequent transfers to the landlord's lender, Cathay Bank, and all of
11 these transfers constituted actual and constructive fraudulent transfers, commencing
12 with the rent payment on August 31, 2009. Fifth Amended Consolidated Complaint, ¶¶
13 1–6, 35–60, 209–247. However, Cathay Bank was not named a defendant to the
14 fraudulent transfer claims in the second, third, fourth, fifth and sixth claims for relief in
15 the Fifth Amended Consolidated Complaint, but as a defendant in the eighth and ninth
16 claims for relief for recovery and preservation of avoidable transfers under 11 U.S.C. §
17 550 as an alleged transferee. *Id.*, ¶¶ 209–234, 242–247.

18 In paragraph 6 of the fifth amended consolidated complaint, Plaintiff summarized
19 the alleged liability of Defendants 400 South La Brea, LLC, and its principals and
20 Defendant Cathay Bank for the alleged prepetition fraudulent transfers by the Debtor to
21 them:

22 As detailed below, 400 S. La Brea, its principals, and its lender, Cathay Bank,
23 had notice and actual knowledge that Ace Museum lacked the means to pay its
24 own rent and had no reasonable prospects for remedying its lack of funds. They
25 were aware that the Debtor had been making Ace Museum's rent payments
26 directly to 400 S. La Brea's account for eighteen months before the Petition Date
27 and had been the primary source of funds before that. They were aware that the
28 Debtor's deteriorating pre-petition financial condition was the reason that the
Debtor's advances to cover Ace Museum rent fell behind right before the Petition
Date. They were aware, when 400 S. La Brea signed a Letter of Understanding
with Ace Museum one day after the Petition Date, which provided for the
dismissal of an Unlawful Detainer action in return for more than a half million
dollars of catch-up rent payments, that Ace Museum could not finance the
payments on its own. They were aware no later than five-and-a-half months after

1 the Petition Date that the Debtor was in chapter 11 proceedings, even though it
2 was the most likely source of the monthly rent payments. And they were aware of
3 many, many more indicia of the avoidable and/or fraudulent nature of the rent
4 payments, from 2009 through 2016, as detailed below, yet they consciously
5 chose to continue to receive avoidable payments in satisfaction of monthly rent.

6 *Id.*, ¶ 6.

7 In paragraphs 36 through 39 of the first amended consolidated complaint,
8 Plaintiff made the following allegations relating to the execution of the Museum Lease
9 between Christmas and 400 South La Brea, LLC, in 2006 and transfers by the Debtor to
10 400 South La Brea under the lease:

11 36. In 2006, Christmas entered into a third lease that also contained a purchase
12 option. The AIR Commercial Real Estate Association Standard
13 Industrial/Commercial Single-Tenant Lease-Net (the "Museum Lease"), dated
14 July 20, 2006, was between 400 S. La Brea as lessor, and Christmas, as lessee,
15 and provided for a three-year lease of two parcels of real property bearing the
16 street address of 400 S. La Brea Avenue, Los Angeles, CA (the "Museum
17 Premises") and 407 S. Sycamore Avenue, Los Angeles, CA (the "Sycamore
18 Lot"). The Sycamore Lot was a paved lot for parking. The Museum Premises
19 were improved with a two-story building that had served as a car dealership prior
20 to the Museum Lease.

21 37. The Museum Lease provided for base rent starting at \$100,000 each month.
22 Documents produced by or on behalf of 400 S. La Brea show that the first
23 \$2,940,668.72 in rent, property taxes, late fees, and related charges, that was
24 paid under the terms of the Museum Lease, from its execution through to July
25 2009, were paid by or on behalf of the Debtor into 400 S. La Brea's checking
26 account at Cathay Bank (the "Cathay Account"), even though the Museum
27 Premises remained an empty shell of a building, and even though the Debtor
28 received no value in return for paying Christmas' rental obligations on the
Museum Lease. See Exhibit 5.

38. In December 2008, in addition to paying rent, the Debtor paid \$112,523.99
into the Cathay Account in satisfaction of property taxes due on the Museum
Premises and Sycamore Lot. One month later, in January 2009, the Debtor paid
another \$69,270.50 into the Cathay Account to bring property taxes current. Six
months later, the Debtor wired another \$132,667.96 into the Cathay Account for
property taxes on the Museum Premises and Sycamore Lot.

39. The Museum Lease provided Christmas with an option to purchase the
Museum Premises and Sycamore Lot for a price that would range between \$26
million and \$33 million (the "Museum Purchase Option"), depending upon the
date of exercise of the option. But while the business prospects of leasing a
former car dealership in the center of Los Angeles with a potentially profitable
purchase option on the property may have seemed advisable in 2006, the
commercial real estate market crashed in 2008, and along with it went the profit
potential of the Museum Purchase Option.

Id., ¶¶ 36–39. As discussed below, these prepetition transfers were not actionable as

1 the claims for relief pertained to subsequent transfers referred in the fifth amended
2 consolidated complaint as the “Prepetition Rent Transfers.” *Id.*, ¶¶70–72, 209–234.

3 In paragraphs 58 to 60 of the fifth amended consolidated complaint, Plaintiff
4 alleged that the Debtor was already insolvent before the filing of its bankruptcy petition
5 in 2013 as follows:

6 58. When Ace Museum executed the Assignment [of the Museum Lease] in
7 2009, and the Debtor began providing the funds for payment of Ace Museum’s
8 rent, the Debtor was already insolvent. The Debtor’s tax returns for its fiscal
years of 2008, 2009 and 2010 show ongoing operational losses:

9 2008 (June 2008 to May 2009) - Net loss of \$-1,489,559
10 2009 (June 2009 to May 2010) - Net loss of \$-4,833,371
2010 (June 2010 to May 2011) - Net loss of \$-1,702,246

11 59. Throughout this period, the Debtor had no excess funds of its own to use for
12 payment of Ace Museum’s rent. Instead, the Debtor borrowed money on top of
13 an already crushing debt load. The Debtor’s tax return for 2008 showed total
14 long-term and short-term loan debt of more than \$7.7 million. By the time it filed
its 2009 return, the Debtor’s long-term and short-term loan debt was more than
\$11.6 million, while its 2010 return shows long-term and short-term loan debt of
more than \$12 million.

15 60. The Debtor’s increasing debt load was caused in part by its payment of well
16 over \$1 million each year in Ace Museum rent, for which it borrowed extensively.
17 For example, on April 9, 2010, the insolvent Debtor borrowed \$500,000 from Eric
18 Wilson, then made a same day wire of \$350,000 from its account to the Museum
19 Account, which allowed a \$400,000 check from Ace Museum to 400 S. La Brea
20 to clear that same day—a transaction that took place three weeks after entry of a
\$1.7 million judgment against the Debtor. On October 15, 2010, the Debtor
21 borrowed another \$200,000 from Wilson, then wrote a \$127,000 check to the
22 Museum Account on October 20, 2010, which allowed a \$125,000 check from
Ace Museum to 400 S. La Brea to clear. This was a standard practice in the
years before the Petition Date. In 2011 and 2012, the Debtor borrowed at least
\$875,000 from Wilson, Michael Straus and Andrea Nasher in order to fund
simultaneous payments to Ace Museum so that rent checks to 400 S. La Brea
would clear, or to make direct rent payments from the Debtor to 400 S. La Brea.
By funding Ace Museum’s rent obligations with loans, the already-insolvent
Debtor further increased its debt load, for which it received no reasonably
equivalent value.

24 *Id.*, ¶¶ 58–60.

25 In paragraphs 70 to 72 of the fifth amended consolidated complaint, Plaintiff set
26 forth his allegations of what constituted the actionable fraudulent transfers to
27 Defendants 400 South La Brea, LLC, and its principals, and Defendant Cathay Bank, as
28 follows:

70. On February 19, 2013, the Petition Date, the Debtor filed its chapter 11 petition, initiating the above-captioned Bankruptcy Case. In the four years prior to the Petition Date, 400 S. La Brea had received at least \$5,750,266.21 in rent, late fees, and property tax payments, on account of the Museum Lease (the "Prepetition Rent Transfers"). Of the total Prepetition Rent Transfers, at least \$2,328,432.47 was paid directly by the Debtor to 400 S. La Brea by wire transfer or check into the Cathay Account, composed of the following payments, for which the Debtor received no consideration.

Date	Check/Wire	Amount
07/06/09	Wire	\$132,677.96
4/13/11	Check 3979	\$125,000.00
4/22/11	Check 3980	\$15,867.00
9/28/11	Wire	\$137,500.00
10/04/11	Wire	\$137,500.00
10/21/11	Wire	\$125,000.00
10/24/11	Wire	\$110,000.00
11/17/11	Wire	\$247,500.00
12/23/11	Wire	\$137,525.00
12/27/11	Wire	\$139,961.45
01/25/12	Wire	\$75,000.00
01/31/12	Wire	\$28,904.57
02/03/12	Wire	\$50,000.00
03/02/12	Wire	\$12,500.00
03/26/12	Wire	\$72,000.00
04/05/12	Wire	\$36,031.28
04/12/12	Wire	\$36,000.00
05/08/12	Wire	\$280,186.00
06/05/12	Wire	\$142,279.21
08/03/12	Wire	\$125,000.00
10/23/12	Check 6913	\$137,000.00
02/07/13	Wire	\$25,000.00
TOTAL:		\$2,328,432.47

71. The Prepetition Rent Transfers that were paid through the conduit of the Ace Museum Account to 400 S. La Brea totaled \$3,421,833.74, and were paid almost entirely with funds of the Debtor that were first transferred into the Museum Account, and were then paid to 400 S. La Brea by an Ace Museum check deposited in the Cathay Account. For example, on June 6, 2011, when the account balance in the Museum Account was only \$5,328.36, the Debtor wired \$126,000 into the Museum Account, thereby permitting a check made out to 400 S. La Brea in the amount of \$125,000 to clear the following day. Similarly, on July 18, 2011, when the account balance in the Museum Account was only \$3,375.72, the Debtor wired \$110,000 into the Museum Account, thereby permitting a check made out to 400 S. La Brea in the amount of \$110,000 to clear that same day. These two months are not unique, but rather reflect the standard practice during most months when rent was paid to 400 S. La Brea by an Ace Museum check or wire transfer.

72. By the Petition Date, and within four years of the Petition Date, the Debtor had paid 400 S. La Brea as much as \$5,750,266.21 in satisfaction of a third party's lease obligations at a time when the Debtor was insolvent or unable to pay its own bills as they came due, for which the Debtor received no reasonably

1 equivalent value.

2 *Id.*, ¶¶ 70–72. These allegations specifically refer to the “Prepetition Rent Transfers,”
3 which were described the following manner: “[i]n the four years prior to the Petition
4 Date, 400 S. La Brea had received at least \$5,750,266.21 in rent, late fees, and
5 property tax payments, on account of the Museum Lease (the “Prepetition Rent
6 Transfers”).” *Id.*, ¶ 70.

7 Paragraph 210 in the second claim for relief of the fifth amended consolidated
8 complaint alleged that “Plaintiff is informed and believes, and based thereon alleges,
9 each of the Prepetition Rent Transfers of the Debtor’s assets that were made to 400 S.
10 La Brea, whether directly or via the conduit of the Museum Account, was made by the
11 Debtor within four years before the Petition Date . . . ,” therefore, indicating that the
12 actionable transfers were within four years of the petition date of February 19, 2013,
13 and this allegation is also incorporated by reference in the third, fourth, fifth and sixth
14 claims for relief against 400 South La Brea, LLC. *Id.* The second, third, fourth, first and
15 sixth claims for relief were the only claims for relief against 400 South La Brea based on
16 alleged fraudulent transfers in the fifth amended consolidated complaint.

17 The above-described circumstances indicate as of the effective date of his
18 appointment on April 6, 2016, Plaintiff knew about alleged prepetition transfers by
19 Debtor to or on behalf of Ace Museum going back at least four years before the petition
20 date, and even earlier, for Plaintiff’s counsel, they knew about these transfers based on
21 their preparation and filing of the original and first amended complaints in 2014 and
22 2015 to avoid and recover the Ace Museum prepetition transfers. According to Plaintiff,
23 not until about October 2020 when his expert, Ms. Ziegler was completing her expert
24 report, did he discover the alleged prepetition transfers by the Debtor to pay rent on the
25 Museum Lease then in Defendant’s Christmas’s name before the assignment to Ace
26 Museum in the four to seven year time period before the 2013 petition date, that is,
27 2006 to 2009 years. Plaintiff’s discovery in about October 2020 would be eleven to
28 fourteen years after the transfers themselves in light of a general absolute statute of

1 repose to attack alleged fraudulent transfers of seven years under California Civil Code
2 § 3439.09(c). Also, as discussed above, Plaintiff's discovery in about October 2020
3 would be four and a half years after he was put on notice of the prospect of these four to
4 seven year transfers before the petition date involving the Museum Lease upon the
5 effective date of his appointment as the plan agent in this bankruptcy case on April 6,
6 2016 when he took over these adversary proceedings as the successor to the Creditors'
7 Committee based on original and first amended complaints which sought to avoid and
8 recover other prepetition transfers involving the Museum Lease.

9 Apparently, until about October 2020, Plaintiff and his counsel never considered
10 the possibility of alleged prepetition transfers by Debtor relating to the Museum Lease
11 during the three years immediately before the four prepetition years alleged in the prior
12 complaints. This was despite the fact that when Plaintiff's appointment as the plan
13 agent became effective in April 2016, the original and first amended complaints had
14 already been filed to avoid and recover alleged prepetition fraudulent transfers by
15 Debtor relating to the Museum Lease, that is, seeking to avoid and recover transfers to
16 Ace Museum during the four years before the petition date. Thus, he had information to
17 put him on notice of other potential claims of prepetition fraudulent transfers relating to
18 the Museum Lease, such as the ones that he now seeks to assert in a further amended
19 complaint as to transfers during the four to seven years before the petition date.

20 Also, after Plaintiff's appointment as the plan agent became effective, he had
21 custody of Debtor's books and records as early as April 2016 when he took over
22 administration of the Debtor's business as the plan agent under the confirmed plan of
23 reorganization. Thus, there was no impediment to Plaintiff to be able to review Debtor's
24 business records to discover other potential prepetition fraudulent transfer claims, such
25 as the ones that he is now trying to bring. Soon after Plaintiff took over administration of
26 Debtor's business in April 2016, within 45–60 days, he had asked his expert witness,
27 Ms. Ziegler, to investigate and analyze Debtor's postpetition transfers as fraudulent
28 transfers, but did not ask her at that time to investigate and analyze the prepetition

1 transfers which had already been alleged as claims in the complaint as amended.
2 Thus, Ms. Ziegler did not investigate and analyze the prepetition transfers during the
3 four to seven year time period before the petition date until she was completing her final
4 expert report for these adversary proceedings in October 2020 because her client,
5 Plaintiff, never asked her to look at the prepetition transfers before then. Docket No.
6 836 at 10–11.

7 Only after Ms. Ziegler prepared her final expert report completed on October 30,
8 2020 did she and Plaintiff discover the information relating to the alleged fraudulent
9 transfers during the four to seven year time period before the petition date. *Id.*; see
10 Ziegler Final Report, attached as Exhibit 1 to Declaration of Jennifer E. Ziegler, CPA in
11 Support of Motion for Summary Judgment on Plaintiff's Claims for Conversion and
12 Breach of Fiduciary Duty against Defendant Douglas Christmas, Docket No. 873, filed
13 on February 12, 2021.⁷ In her final expert report, Ms. Ziegler concluded that alleged
14 fraudulent transfers by the Debtor to Defendant 400 South La Brea, LLC during the
15 three year period from July 2006 to July 2009 before the Museum Lease was
16 transferred to Ace Museum occurred through payments totaling \$5,715,743 from
17 Debtor's bank accounts "traced directly" to 400 South La Brea, LLC's Cathay Bank
18 account #1679, which was accomplished primarily through her analysis of the Debtor's
19 bank records. *Id.*, Ziegler Final Report at 24. In her final expert report, Ms. Ziegler
20 stated that she obtained the Debtor's tax returns and financial information in order to
21 evaluate its financial health before the voluntary bankruptcy filing in 2013 and concluded
22 that based her review of this information that the Debtor was insolvent and not liquid
23 from June 2006 through the petition date of February 19, 2013. *Id.* at 27–31. Based on
24 these conclusions, Ms. Ziegler opined that Debtor was damaged by these alleged
25 fraudulent transfers to Defendants. *Id.* at 31–33.

26
27 ⁷ Ms. Ziegler's final expert report of October 30, 2020 is not part of the record on Plaintiff's motion to amend, but
28 the court takes judicial notice of its filing as part of the pleadings relating to Plaintiff's motion for summary
judgment on his conversion and breach of fiduciary duty claims against Defendant Douglas Christmas pursuant to
Federal Rule of Evidence 201.

1 Based on this description of Ms. Ziegler's discovery of the alleged fraudulent
2 transfers by the Debtor to Defendants during the years from 2006 to 2009, it is evident
3 that this discovery was based on information from the Debtor's own books and records,
4 especially Debtor's bank records showing direct transfers to Defendant 400 South La
5 Brea, LLC, and Debtor's tax returns and financial information bearing on solvency,
6 which records were in the control and supervision of Plaintiff when his appointment as
7 the plan agent became effective in April 2016. Thus, at the time of his appointment in
8 2016, Plaintiff had access to this information for which discovery of the potential
9 fraudulent transfer claims for the 2006 to 2009 time period could have been made, but
10 he and his professionals did not conduct the investigation and forensic analysis to
11 discover these potential claims until the close of nonexpert factual discovery and the
12 deadline for exchange of expert reports was imminent in late 2020. Not only this was
13 four and one half years later after the effective date of his appointment in April 2016,
14 this was also six years after his counsel had filed the original complaint on behalf of his
15 predecessor, the Creditors' Committee, to attack similar prepetition transfers by Debtor
16 to Ace Museum, the assignee of the Museum Lease, filed in November 2014.

17 As argued by Defendants, Plaintiff had been aware of the prospect of such
18 transfers earlier than October 2020 as he had alleged in the Fifth Amended Complaint
19 filed on November 18, 2018 that rent was paid by the Debtor under the terms of the
20 "Museum Lease" executed on July 20, 2006 to July 2009 to Defendant 400 South La
21 Brea through its checking account with Defendant Cathay Bank, which indicated
22 awareness of the transfers which he now seeks to be alleged as fraudulent. As noted
23 before, as reflected in the first amended complaint filed in 2015, Plaintiff had earlier
24 knowledge of the Museum Lease and the amendment and assignment of the lease by
25 Christmas to Ace Museum in 2009 detailed the obligations of Christmas/Ace Museum
26 under the lease to 400 South La Brea, LLC, which required rent payments, which are
27 the subject of Plaintiff's new fraudulent transfer claims. Despite this knowledge, Plaintiff
28 did not act on it by alleging claims based on such transfers at the time the Fifth

1 Amended Complaint was filed in November 2018, and not until two years later when he
2 filed the motion to amend in December 2020, and there is no indication that Plaintiff
3 through his expert witness, Ms. Ziegler, or anyone else on his behalf, was investigating
4 these transfers as potential claims at the time or before Ms. Ziegler was preparing her
5 final expert report in about October 2020.

6 Defendants argue that the outcome of Plaintiff's motion for leave to further
7 amend the complaint case is controlled by applicable Ninth Circuit authority in *Coleman*
8 *v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000):

9 . . . Assuming expert analysis was necessary to assess transfers during the four
10 to seven year period—it does not appear to be necessary in light of the
11 allegations in the Fifth Amended Complaint about these transfers—diligence is
12 measured by when the moving party's expert could have analyzed information
13 suggesting viable claims, not when it actually analyzed the information. The Ninth
14 Circuit's opinion in *Coleman* is instructive on this point. *See Coleman v. Quaker*
15 *Oats Co.*, Civ. 96-0828, 1999 WL 34828321 (D. Ariz. Mar. 10, 1999), affirmed
16 *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1295 (9th Cir. 2000). In *Coleman*,
17 three plaintiffs brought Title VII and ADEA claims against their former employer,
18 alleging their termination was the result of disparate treatment on the basis of his
19 age. *Coleman*, 1999 WL 34828321, at *5-6. Following the close of fact discovery,
20 in response to Defendant's opposition to their summary judgement motion,
21 *Coleman* for the first time moved to amend his complaint to assert a disparate
22 impact theory of liability, citing new analysis from their statistical expert as the
23 basis for the late amendment. The Court denied the motion under Rule 16,
24 finding that *Coleman*'s failure to amend "surprising" because he had "secured his
25 statistical expert over a year ago" and was "in possession of the statistics in
26 question for months." *Id.*, at *7. The Ninth Circuit affirmed, reiterating the District
27 Court's disbelief for the Plaintiff's failure to amend when their expert could have
28 analyzed the data years earlier. *See Coleman*, 232 F.3d at 1294-95 ("Despite
having hired a statistical expert years before the summary judgment motions and
having received the first statistical report noting the disparities between the
retention of older and younger employees over a year before filing for summary
judgment, the employees had never moved to amend their complaints.").

This case is on all fours with *Coleman*. Like the *Coleman* Plaintiffs, the Plan Agent retained forensic experts in this case several years ago and was in possession of discovery reflecting transfers during the four to seven year period since October 2018. Moreover, like the *Coleman* Plaintiffs, the Plan Agent did not seek to amend its complaint until it was faced with a motion to strike after the close of fact discovery. The Plan Agent's delay in asking its previously retained expert to quantify or analyze documents it has had for two years is not

1 commensurate with the diligence required under Rule 16. *See Johnson*, 975 F.2d
2 at 609 (“[C]arelessness is not compatible with a finding of diligence and offers no
reason for a grant of relief.”).

3 Docket No. 842 at 6-7.

4 The court agrees with Defendants’ argument that the situation in this case is
5 much like the one in *Coleman*. In the court’s view, Plaintiff had the information which, if
6 he or his professionals had investigated it, would have enabled him to discover the
7 alleged fraudulent transfers involving the Museum Lease to Defendants during the four
8 to seven years before the petition date as of the effective date of his appointment as the
9 plan agent on April 6, 2016, or shortly thereafter, that are the basis of his new claims for
10 which he now seeks further amendment of the complaint four and one-half years later.
11 The court bases its view on the Plaintiff’s imputed knowledge of the allegations of the
12 original and first amended complaints filed earlier by his predecessor in interest, the
13 Creditors’ Committee, in 2014 and 2015 that had alleged fraudulent transfers totaling
14 over \$4 million by the Debtor to or on behalf of Ace Museum occurring within four years
15 before the petition date in 2013, that is, during years 2009 to 2013, the years
16 immediately following the 2006–2009 years in which similar transfers occurred that he
17 now seeks to challenge. These allegations along with the copies of the 2006 Museum
18 Lease and the 2009 lease amendment and assignment to Ace Museum put Plaintiff on
19 notice of the contractual relationships between Christmas, the original lessee, Ace
20 Museum, his assignee, and 400 South La Brea, LLC, the lessor, and substantial rent
21 obligations under the lease that Christmas and later Ace Museum were obligated to pay,
22 though the means that either one had were either doubtful or unclear in the 2009 to
23 2013 years as the original and first amended complaints alleged the insolvency of the
24 then lessee, Ace Museum. Given the potential seven year reach back of the applicable
25 statute of limitations under California Civil Code Section 3439.09(c), the allegations of
26 substantial fraudulent transfers by the Debtor to Ace Museum totaling over \$4 million in
27 the 2009 to 2013 year period and the alleged insolvency of Ace Museum during the
28 2009 to 2013 year period, Plaintiff could have and should have considered potential

1 claims concerning transfers during the preceding three year period between 2006 and
2 2009 because the original Museum Lease with substantial rent obligations to 400 South
3 La Brea was in effect during that time period, Debtor had been incorporated and was
4 operating during that time period, and Christmas, Ace Museum's principal, was the
5 lessee during that time period. Apparently, based on Plaintiff's admissions, he never
6 considered the prospect that there were similar transfers by the Debtor to pay the rent
7 obligations under the Museum Lease under the immediately preceding three year time
8 period of years 2006 to 2009 on behalf of Christmas, then the lessee until October 2020
9 when his expert, Ms. Ziegler, was completing her final expert report. The signs were
10 there, meaning the information was available to Plaintiff to discover these transfers
11 when his appointment became effective in April 2016, he never inquired or looked for
12 these transfers until four and one half years later. Whatever the reason, Plaintiff simply
13 failed to connect the dots.

14 Plaintiff was shortsighted in only asking Ms. Ziegler to analyze postpetition
15 transfers by the Debtor when her services were first retained immediately after his
16 appointment in April 2016 and never asking her to analyze the prepetition transfers
17 which had been fulsomely alleged in the original and first amended complaints for the
18 four years before the petition date. If Plaintiff had tasked Ms. Ziegler to analyze the
19 prepetition transfers alleged in the original and first amended complaints filed in 2014
20 and 2015 when she was first retained in 2021, most likely, she would have discovered
21 the prepetition transfers during the 2006 to 2009 year period earlier than she did in
22 October 2020. For some unknown reason, Plaintiff did not task her to look at all of the
23 transfers alleged in the complaint as amended until she was preparing her final expert
24 report in preparation for trial in late 2020, which is four years after she was retained as
25 his expert.

26 Meanwhile, the parties have conducted extensive litigation proceedings with
27 discovery now being closed based on the existing allegations of fraudulent transfers
28 only during the four years before the petition without any mention of the transfers during

1 three years immediately preceding that Plaintiff now wants to bring into litigation. See
2 Declaration of Elliot C. Harvey Schatmeyer, Docket No. 830-1 at 2 (“On June 9, 2019,
3 the Court entered a Scheduling Order in this proceeding setting forth deadlines for,
4 among other things, the cut-off for taking fact discovery. The fact discovery cut-off was
5 subsequently extended to September 30, 2020. Between June 6, 2019 and September
6 30, 2020, the parties have exchanged thousands of documents, served written party
7 and third-party discovery, and deposed 8 witnesses.”); Declaration of Brian L. Davidoff,
8 Docket No. 832 at 21 (“The 400 SLB Defendants have conducted discovery and
9 otherwise have been defending this adversary proceeding within the bounds of the
10 allegations contained in the Plan Agent’s Sixth Amended Complaint, and the various
11 prior iterations of the Plan Agent’s complaint, in which the Plan Agent asserts that 400
12 SLB received avoidable transfers during only a four-year prepetition period. If the Plan
13 Agent were allowed to add an entirely new three-year pre-petition period in his
14 allegations and pre-petition claims totaling at least \$5.58 million, our office, as counsel
15 for the 400 SLB Defendants, and the professionals engaged by the 400 SLB
16 Defendants, will be compelled to engage in new discovery regarding the new
17 allegations.”). Such further amendment of the complaint would necessitate modification
18 of the Scheduling Order because discovery would have to be reopened to address the
19 numerous alleged fraudulent transfers totaling over \$12 million during this additional
20 three year time period, which would result in substantial additional expenditure for the
21 parties.

22 Plaintiff’s four year delay in discovering the additional alleged fraudulent transfers
23 under these circumstances does not demonstrate diligence in seeking modification of
24 the Scheduling Order to allow further amendment of the complaint since at the effective
25 date of his appointment in April 2016, he had the imputed knowledge to discover the
26 transfers if he or his professionals had investigated the information that they had in their
27 possession and control, that is, the business records of the Debtor, such as Debtor’s tax
28 returns and bank records, which Ms. Ziegler had based her analysis leading to the

1 discovery of previously unalleged transfers, as well as the information relating to the
2 2006 original Museum Lease, and the 2009 lease amendment and assignment. This
3 lengthy delay indicates inexcusable neglect in Plaintiff's investigation and prosecution of
4 these new claims which is incompatible with the diligence required by Civil Rule
5 16(b)(4). See *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d at 209 (citations
6 omitted). Moreover, Plaintiff's lack of diligence is also shown in that he had actual
7 knowledge of the transfers he now seeks to avoid and recover in a further amended
8 complaint from discovery as reflected in the Fifth Amended Complaint that he filed in
9 November 2018, over two years before he filed his motion to further amend the
10 complaint in December 2020. Pursuant to the existing Scheduling Order, the parties
11 have conducted extensive discovery and pretrial proceedings in reliance on the
12 allegations of the existing complaint relating to alleged fraudulent transfers during the
13 four year period of 2009 to 2013, and the Scheduling Order would have to be modified
14 to permit additional discovery relating to Plaintiff's new claims of numerous alleged
15 fraudulent transfers during an additional three year time period from 2006 to 2009.

16 Plaintiff's reply to Defendants' oppositions, he argues that the court should allow
17 the amendment of the complaint because it only extends the avoidance period by three
18 years within the seven year statute of limitations under California Civil Code section
19 3439.09(c) as was allowed in the case of *Krasnoff v. Lancaster Baptist Church*, 2018
20 Bankr. LEXIS 19324 (Bankr. C.D. Cal. June 26, 2018). Reply to Oppositions, Docket
21 No. 848 at 18–19. Plaintiff's argument is as follows:

22 In *Krasnoff v. Lancaster Baptist Church*, Adv. No. 2:17-ap-10491-ER, the plaintiff
23 initially sought to avoid transfers made to defendants within a seven-year period;
24 but, upon discovering new facts after a failed mediation, the plaintiff moved to
25 amend its complaint to extend the avoidance period by an additional three years,
26 seeking to avoid transfers made within ten years of the petition date. See
Krasnoff, 2018 Bankr. LEXIS 19324, at *4. Plaintiff argued, successfully, that
there was "no merit to [Defendant]'s contention that the Trustee has not acted
diligently in seeking leave to amend the Complaint," because:

27 The Ninth Circuit decisions finding a lack of diligence by the party
28 seeking leave to amend involve situations in which the party sought
to raise new legal theories and/or add new parties to the action. *Here, the
Trustee does not seek to add new parties or raise new legal theories; the*

1 *Trustee seeks only to extend the reach-back period by an additional three*
2 *years.*

3 *Id.* at *9 (emphasis added). Given that the Plan Agent similarly seeks only to
4 extend the reach-back period by an additional three years—and makes its motion
5 shortly after receiving, from its expert, actionable facts concerning the three-year
6 period—the Court should grant the Plan Agent’s motion in its entirety.

7 *Id.* Plaintiff’s reliance on *Krasnoff v. Lancaster Baptist Church* is misplaced because the
8 circumstances of that case are distinguishable because: (1) the trustee seeking the
9 amendment was not bringing in new parties, which is not the situation here, because
10 Defendants 400 South La Brea, LLC, and its principals, and Defendant Cathay Bank,
11 are new parties to the adversary proceedings since they were not parties named in the
12 timely filed original and first amended complaints (i.e., while these defendants were
13 named parties in subsequently filed complaints, they have asserted affirmative defenses
14 in their answers, preserving their rights based on the statute of limitations); and (2) the
15 court in *Krasnoff v. Lancaster Baptist Church* held that it was inefficient to deny
16 amendment based on lack of diligence under Civil Rule 16 as the trustee could still file
17 another adversary proceeding to prosecute the new claims because the two years
18 statute of limitations under 11 U.S.C. § 546(a), which is not the situation here, as the
19 statute of limitations under 11 U.S.C. § 546(a) expired before these defendants were
20 named parties in these adversary proceedings.⁸

21 In conclusion, the court determines that plaintiff has not demonstrated that he
22 acted diligently in seeking to amend the complaint to further amend the complaint to add
23 additional fraudulent transfers between four and seven years before the petition date.
24 Furthermore, the court concludes that the addition of these claims would fundamentally

25 ⁸ The status of Defendant Christmas who is not a new party (i.e., as a named defendant in the timely first amended
26 complaint) presents a closer case under the rationale of *Krasnoff v. Lancaster Baptist Church*. However, the court’s
27 observations regarding the lack of diligence still applies as to the assertion of new claims against him, and the two
28 year statute of limitations of 11 U.S.C. § 546(a) extended to December 19, 2015 has now expired as to new claims
 against him based on the 2006-2009 transfers. Plaintiff would have to show that the new claims relate back to the
 original pleadings under Federal Rule of Civil Procedure 15(c)(1). While as a named defendant in the timely filed
 first amended complaint, Federal Rule of Civil Procedure 15(c)(1) (C) does not apply to Christmas; however, Rule
 15(c)(1)(B) does, and Plaintiff is unable to show under Rule 15(c)(1)(B) that the amendment asserts a claim that
 arose out of the conduct, transaction or occurrence, or attempted to be set out, in the original pleadings, the original
 and first amended complaints, as those pleadings only asserted claims based on alleged fraudulent transfers
 occurring within four years of the petition date after the incorporation of Ace Museum in 2009.

1 alter the nature of this litigation, requiring modification of the Scheduling Order as
2 amended, because discovery would have to be reopened because discovery was only
3 taken based on the existing allegations of the complaint which did not refer in any way
4 to the numerous alleged fraudulent transfers during the new three year time period from
5 2006 to 2009 to be added to the litigation by the proposed amendment of the complaint.

6 Accordingly, the court denies Plaintiff's motion for leave to amend the Sixth
7 Amended Complaint for lack of good cause under Federal Rule of Civil Procedure
8 16(b).

9 Alternatively, assuming *arguendo* that Plaintiff is not required to satisfy the
10 standard of Federal Rule of Civil Procedure 16 regarding modification of the pretrial
11 scheduling order, Plaintiff must then satisfy the requirements of Federal Rule of Civil
12 Procedure 15 governing amendment of pleadings. In this instance, Plaintiff's proposed
13 amendment of the Sixth Amended Complaint should be denied as futile because
14 plaintiff cannot meet the requirements of "relation back" rules of Federal Rule of Civil
15 Procedure 15(c)(1)(C). Federal Rules of Civil Procedure 15 and 16 are applicable to
16 this adversary proceeding pursuant to Federal Rules of Bankruptcy Procedure 7015 and
17 7016.

18 Plaintiff's proposed pleading, either a Seventh Amended Complaint or a Modified
19 Sixth Amendment Complaint, will amend the claims for intentional and constructive
20 fraudulent transfers and transfer avoidance from four years before the petition date to
21 seven years before the petition date. The allegations of the Sixth Amended Complaint
22 cover, or reach back to, alleged fraudulent transfers within four years before the petition
23 date, or transfers between 2009 and 2013. Plaintiff in the proposed amended complaint
24 seeks to cover additional alleged fraudulent transfers between four and seven years
25 before the petition date, or transfers between 2006 and 2009. The proposed
26 amendment expands the scope of the claims to encompass alleged fraudulent transfers
27 between four and seven years before the petition date rather than within four years of
28 the petition date, and in essence, adds new claims to contest additional alleged

1 fraudulent transfers.

2 The applicable statutes of limitations for Plaintiff's fraudulent transfer claims are
3 four years from the dates of the alleged constructive fraudulent transfers and up to
4 seven years from the dates of the alleged intentional fraudulent transfers pursuant to
5 California Civil Code §§ 3439.09(a) and (b) and 11 U.S.C. § 544(b). Assuming the date
6 of filing of the proposed amendment causes of action is the date of the filing of the
7 motion on December 10, 2020, the four year and seven year statute of limitations under
8 California Civil Code § 3439.04 would have allowed claims relating to alleged fraudulent
9 transfers to "reach back" to transfers on or after December 10, 2013 and December 10,
10 2017, not accounting for the effect of 11 U.S.C. § 546(a). California Civil Code §
11 3439.09(a) and (b). As recognized by the Ninth Circuit Bankruptcy Appellate Panel in *In*
12 *re EPD Investment Co., Ltd.*, 523 B.R. 680 (9th Cir. BAP 2015), if the applicable state
13 statute of limitations governing the claims had not yet expired on the date that the
14 bankruptcy debtor filed its bankruptcy petition, the trustee's transfer avoidance action
15 could be brought if it was filed with the limitations period set forth in the Bankruptcy
16 Code, namely, 11 U.S.C. § 546(a). A trustee's avoidance action under 11 U.S.C. § 544
17 is timely if it is commenced within "2 years after the entry of the order for relief." 11
18 U.S.C. § 546(a)(1)(A). The four year and seven year "reach back" periods under the
19 state statutes of limitations under California Civil Code § 3439.09(a) and (b) are
20 established on the date of the order for relief, or here the petition date of February 19,
21 2013, and thus, Plaintiff could seek to challenge alleged constructive and intentional
22 fraudulent transfers back to February 19, 2009 and February 19, 2006 respectively, if
23 amendment is permitted under Federal Rule of Civil Procedure 15.

24 Plaintiff's proposed amended complaint is not being filed within the applicable
25 statute of limitations for the amended avoidance claims contained therein under 11
26 U.S.C. § 546(a), which requires that avoidance claims under 11 U.S.C. § 544 must be
27 brought within two years of the order for relief, or here, the date on which the Debtor's
28 voluntary petition for relief under Chapter 11 of the Bankruptcy Code was filed, on

1 February 19, 2013. Thus, the two year deadline of 11 U.S.C. § 546(a) was February
2 19, 2015. Certain parties consented to the extension of the two year statute of
3 limitations to December 19, 2015, but this consent was not given by parties affected by
4 the amendment, including the 400 South La Brea Defendants and Defendant Cathay
5 Bank. Thus, the two year statute of limitations on claims against these parties under 11
6 U.S.C. §546(a) was February 19, 2015. Plaintiff timely filed the original complaint and
7 first amended complaint before the two year statute of limitations of 11 U.S.C. §546(a)
8 expired on February 19, 2015 in *Official Committee of Unsecured Creditors v. Ace*
9 *Museum*, Adv. No. 2:14-ap-01771-RK, on November 26, 2014 and January 22, 2015
10 respectively.

11 Plaintiff's motion to allow the filing of a further amended complaint is opposed by
12 the 400 South La Brea Defendants, Defendant Cathay Bank and Defendant Douglas
13 Christmas, who contend that the proposed amendment should not be allowed pursuant
14 to Federal Rules of Civil Procedure 15 and 16.

15 The proposed amended complaint is not an amendment as a matter of course,
16 absent written consent of the other parties, Plaintiff must obtain leave of court pursuant
17 to Federal Rule of Civil Procedure 15(a)(2), but as this rule also provides, "[t]he court
18 should freely give leave when justice so requires." "Federal Rule of Civil Procedure
19 15(c) 'governs when an amended pleading relates back to the date of a timely filed
20 original pleading and is thus itself timely even though it was filed outside an applicable
21 statute of limitations.'" *Tate v. United States*, No. CV 15-9323-FMO(JFR), 2019 WL
22 6799107 (C.D. Cal.Sept. 18, 2019), slip op. at *4, citing and quoting, *Krupski v. Costa*
23 *Crociere S.p.A.*, 560 U.S. 538, 541 (2010). Thus, the proposed amended complaint
24 must "relate back" to a timely pleading within the statute of limitations pursuant to
25 Federal Rule of Civil Procedure 15(c)(1), which provides:

26 (c)(1) ***When an Amendment Relates Back.*** An amendment to a
27 pleading relates back to the date of the original pleading when:

28 (A) the law that provides the applicable statute of limitations allows
relation back;

1 (B) the amendment asserts a claim or defense that arose out of the
2 conduct or occurrence set out---or attempted to be set out---in
3 the original pleading;

4 (C) the amendment changes the party or the naming of the party
5 against whom a claim is asserted, if Rule 15(c)(1)(B) is
6 satisfied and if, within the period provided by Rule 4(m) for
7 service of the summons and complaint, the party to be brought
8 in by amendment:

9 (i) received such notice of the action that it will not be
10 prejudiced in defending the merits; and (ii) knew or should
11 have known that the action would have been brought against
12 it, but for a mistake concerning the proper party's identity.

13 Federal Rule of Civil Procedure 15(c)(1).

14 In this case, Plaintiff's proposed amended complaint would have to relate back to
15 the dates of the timely filed pleadings, either the original complaint or the first amended
16 complaint filed in Adv. No. 2:14-ap-01771 RK, before the two year statute of limitations
17 of 11 U.S.C. § 546(a) expired on February 19, 2015. The proposed amended complaint
18 adds new parties and new claims which were not alleged in the original complaint and
19 first amended complaint, that is, the proposed amended complaint adds the 400 South
20 La Brea Defendants and Defendant Cathay Bank as new parties not named in the
21 original complaint and the first amended complaint. Defendant Christmas is not a new
22 party as he was added as a party in the first amended complaint. The proposed
23 amended complaint adds new claims by expanding the scope of requested relief to
24 cover, or reach back, to additional alleged fraudulent transfers between four and seven
25 years before the petition date, that is, alleged fraudulent transfers between February 19,
26 2006 and February 19, 2009, which were not alleged in the prior timely complaints.

27 The court notes that Plaintiff is seeking to reach back and attack transfers that
28 occurred as long as 15 years ago, even though the California statute of repose on
attacking actual fraudulent transfers under California Civil Code § 3439.09(c) is only 7
years, and this would only be possible through two year statute of limitations of 11
U.S.C. § 546(a) from the petition date, which establishes the date of the reach back

1 period under the state statute of limitations. Plaintiff needs either a ruling that the
2 proposed amended complaint relates back to the timely filed original or first amended
3 complaint or that the statute of limitations is equitably tolled under the circumstances of
4 this case.

5 With respect to Plaintiff's constructive fraudulent transfer claims, amendment
6 would be futile as there is an absolute four year statute of limitations measured from the
7 date of the alleged transfers under California Civil Code §3439.09(b). While Plaintiff
8 would have two years from the petition date under 11 U.S.C. §546(a) to assert claims to
9 avoid constructive fraudulent transfers if the applicable state statute of limitations had
10 not expired as to such transfers. The four year limitation of California Civil Code
11 §3439.09(b) would only permit Plaintiff to bring constructive fraudulent transfer claims
12 as to transfers within four years before the petition date, and not earlier transfers as
13 Plaintiff seeks in a further amended complaint.

14 Plaintiff's argument in his supplemental briefing that contrary to California Civil
15 Code §3439.09(b), he may properly allege claims to avoid constructive fraudulent
16 transfers back to February 19, 2006, seven years before the petition date, on grounds
17 that where a state law fraudulent transfer claim exists on the petition date, the status
18 statute of limitations, including California Civil Code §3439.09(b), cease to have any
19 continued effect, is erroneous. See Docket No. 868 at 8-10. In making this argument,
20 Plaintiff relies upon the opinion of the Ninth Circuit Bankruptcy Appellate Panel in *Rund*
21 *v. Bank of America Corp. (In re EPD Investment Co., LLC)*, 523 B.R. 680 (9th Cir. BAP
22 2015), which stated:

23 Accordingly, we hold that so long as a state-law fraudulent transfer claim exists
24 on the petition date (or the date the order for relief is entered), i.e., the state's
25 applicable repose period governing the action has not yet expired on the petition
26 date (or the order for relief date), ***the trustee may bring the avoidance action***
27 ***under [11 U.S.C.] §544(b), provided it is filed within the limitations period in***
28 ***[11 U.S.C.] §546(a). The "reach back" period is established on the petition***
date (or order for relief date) and encompasses all transfers within the
relevant period provided by state law.

Id., citing and quoting, *In re EPD Investment Co., LLC*, 523 B.R. at 692. In making his

1 argument, Plaintiff apparently misreads the quoted passage from EPD Investment
2 because the applicable repose period to avoid constructive fraudulent transfers of four
3 years under California Civil Code § 3439.09(b) had expired as of the petition date as to
4 transfers made more than four years before that date. The BAP's opinion in *EPD*
5 *Investment* was quite clear in stating that if the state law statute of limitations on
6 avoiding a transfer had not expired as of the petition date, then the trustee could bring
7 the avoidance action as long as it was within the two year statute of limitations of 11
8 U.S.C. § 546(a), and the opinion did not say that the state law statute of limitations was
9 to be disregarded if that statute of limitations had expired with respect to earlier
10 transfers as Plaintiff apparently argues.

11 As to actual fraudulent transfers, there is an absolute seven year statute of
12 limitations measured from the date of the alleged transfers under California Civil Code §
13 3439.09(a) and (c), and Plaintiff may be potentially able to allege claims based on
14 actual fraudulent transfers within seven years before the petition date. However, since
15 the 400 South La Brea Defendants and Defendant Cathay Bank are newly added
16 defendants not included in the timely filed original complaint and first amended
17 complaint, the stringent requirements of Federal Rule of Civil Procedure 15(c)(1)(C)
18 apply. The proposed claims against them must have arisen out of the conduct alleged
19 in the timely original or first amended complaint, that the new defendants must have
20 received sufficient notice of the original action "within the period provided by [Federal
21 Rule of Civil Procedure] 4(m) for serving of the summons and complaint" so that they
22 will not be prejudiced in defending the claims on the merits and that the new defendants
23 must have known or should have known that "but for a mistake concerning the proper
24 party's identity" they would have been named in the timely filed complaints. As indicated
25 in *G.F. Co. v. Pan Ocean Shipping Co., Ltd.*, 23 F.3d 1498, 1503 (9th Cir. 1994), the
26 purpose of Rule 15(c) is to protect a plaintiff who mistakenly targets the wrong
27 defendant and then discovers after the applicable statute of limitations has run before
28 the discovery of the true identity of the proper party defendant.

1 The stringent requirements of Federal Rule of Civil Procedure 15(c)(1)(C) are not
2 met as to the 400 South La Brea Defendants and Defendant Cathay Bank because the
3 allegations of the proposed amended complaint do not arise out of the same conduct,
4 transaction or occurrence alleged in the original or first amended complaint and the
5 other conditions of Rule 15(c)(1)(C) pertinent to new parties such as these defendants
6 are not met. The original and the first amended complaints allege that the fraudulent
7 transfers were made by the Debtor to Defendant Ace Museum and Defendant Christmas
8 within four years of the petition date, primarily consisting of payments to or on behalf of
9 Defendant Ace Museum of approximately \$4 million since July 9, 2009, and payments
10 to or on behalf of Defendant Christmas of at least \$69,041.02 within one year of the
11 petition date. First Amended Complaint, ¶ 9–14. However, in the original and first
12 amended complaints, there were no allegations of fraudulent transfers before four years
13 of the petition date. *Id.* Moreover, in the original complaint or the first amended
14 complaint, there are no allegations of alleged fraudulent transfers involving the 400
15 South La Brea Defendants or Defendant Cathay Bank as none of these defendants
16 were named as a party defendant in the original or first amended complaints or were
17 referred to in any way in the original or first amended complaints, and thus, the
18 provisions governing relation back of proposed pleadings of Rule 15(c)(1)(C) applicable
19 to these defendants as newly added parties must be met. Specifically, the requirement
20 of Federal Rule of Civil Procedure 15(c)(1)(B) that the amendment asserts a claim or
21 defense that arose out of the conduct or occurrence set out---or attempted to be set out-
22 --in the original pleading is not satisfied because the original and first amended
23 complaints do not assert claims relating to alleged fraudulent transfers more than four
24 years before the petition date, and that there is no showing by Plaintiff that within the
25 period provided by Federal Rule of Civil Procedure 4(m) then in effect for service of the
26 summons and complaint, that is, 120 days of the filing of the original and first amended
27 complaints on November 26, 2014 and January 22, 2015, respectively, that the parties
28 to be brought in by amendment, i.e., the 400 South La Brea Defendants and Defendant

1 Cathay Bank had (i) received such notice of the action that they will not be prejudiced in
2 defending the merits; and (ii) knew or should have known that the action would have
3 been brought against them, but for a mistake concerning the proper party's identity.

4 There is no evidence in the record that within the 120 day time period of Rule
5 4(m) ending about the end of May 2015, the 400 South La Brea Defendants and
6 Defendant Cathay Bank had received notice of the action against them so that they
7 would not be prejudiced in defending the merits and would have known or should have
8 known that the action would have been brought against them, but for a mistake
9 concerning their identity as proper party defendants. Based on this record, evidence of
10 such a showing is nonexistent because the original and first amended complaint did not
11 allege claims of fraudulent transfers more than four years before the petition date,
12 specifically the prepetition rent transfers, and these defendants were not even named
13 as parties defendant until the Third Amended Complaint for the 400 South La Brea
14 Defendants filed on January 23, 2017 and the Fifth Amended Complaint for Defendant
15 Cathay Bank filed on November 17, 2018. Because the proposed amended complaint
16 does not meet the requirements of Rule 15(c)(1)(C) to relate back to the timely filed
17 original and first amended complaints, the amendment is futile as to the claims asserted
18 against the 400 South La Brea Defendants and Defendant Cathay Bank,

19 Plaintiff's argument that the amended claims relate back to the original complaint
20 filed on November 26, 2014 is that both the 400 South La Brea Defendants and
21 Defendant Cathay Bank had notice of Debtor's bankruptcy petition and both had
22 suspected that Debtor's transfers to them may be voidable by July 2013, if not sooner.
23 Docket No. 868 at 13–20. In support of this argument, Plaintiff submitted various
24 exhibits including copies of email messages from 2013 between agents or
25 representatives of these defendants showing knowledge of Debtor's bankruptcy petition
26 and requesting information from Debtor's principal, Christmas, about the source of the
27 rent payments for Debtor's affiliate, Ace Museum, on the lease with 400 South La Brea,
28 Cathay Bank's borrower, and discussing Christmas's credit history, and copies of

1 postpetition, preconfirmation emails between Debtor's bankruptcy counsel and
2 Christmas, Debtor's principal, regarding potential avoidance claims against transferees
3 of Debtor's assets. *Id.* Based on this evidence showing Defendants' knowledge of
4 Debtor's bankruptcy case and suspicions about the source of the rent payments on the
5 Museum Lease by Debtor's affiliate, Ace Museum, Plaintiff argues that further
6 amendment of the complaint should be allowed on grounds that the new claims relate
7 back to the timely filed original complaint:

8 When taken together, Exhibits A through F demonstrate that no later than July of
9 2013, both Defendants 400 SLB and Cathay Bank (i.) knew of Debtor's Feb. 19,
10 2013 voluntary bankruptcy petition and (ii.) doubted the Debtor's ability to make
11 payments so much that Cathay Bank informed Debtor via email on Aug. 9, 2013
12 that Cathay Bank determined that Debtor's mortgage loan encumbering the 400
13 SLB property had matured and was already in default. They determined that the
14 situation could only be cured by providing eleven items of reassurance, including
15 financial statements from Ace Museum to show the "repayment source to
16 Debtor's rent payment" and an explanation written by Mr. Christmas about the
17 bankruptcy matter and its resolution. See Ex. A. Furthermore, Debtor's own
18 bankruptcy counsel had advised him as early as December 2014, if not before, to
19 bring actions against parties who received Debtor's transfers that would be
20 subject to avoidance actions, or to negotiate extended deadlines with these
21 parties—i.e., parties such as Defendants 400 SLB and Cathay Bank.

22 Accordingly, both defendants 400 SLB and Cathay Bank had adequate notice
23 that they might be subject to avoidance actions beginning no later than August 9,
24 2013 or before. As stated earlier, the Plan Agent's predecessor filed the Original
25 Complaint in this matter on November 26, 2014. That Defendants 400 SLB and
26 Cathay Bank were not named until the filing of the third and fourth amended
27 complaints in 2017 and 2018, respectively, says nothing about their notice and
28 knowledge as of July 2013 that they may be named in a fraudulent transfer
action in connection with the Debtor's February 19, 2013 voluntary bankruptcy
petition. Defendants 400 SLB and Cathay Bank thus had more than adequate
notice and time to prepare their defense, and the amended claims, including
claims 2, 3, 4, 8, 9, and 11 affected by paragraph 213, "relate back" to the
original complaint filed in November 2014 under Rule 15(c). See *FDIC v.*
Jackson, 133 F.3d 694, 702 (9th Cir. 1998) ("While it is generally true that an
amendment supersedes an original pleading, this Circuit has held that the filing
date of an original complaint remains operative for relation-back purposes even
where otherwise superseded by amendments.").

25 *Id.* at 18–19.

26 However, the problem with Plaintiff's argument is that it does not address the
27 stringent standard of Federal Rule of Civil Procedure 15(c)(1)(C) for amending
28 pleadings adding new parties, which is not met here as discussed above. That is,

1 Plaintiff has not shown that (1) the proposed amendment asserts claims that arose out
2 of the conduct or occurrence set out---or attempted to be set out---in the original
3 pleadings, i.e., the original and first amended complaints, as the claims reaching back to
4 the four to seven year time period before the petition date would be new, not previously
5 asserted; (2) that the added defendants, 400 South La Brea Defendants and Defendant
6 Cathay Bank, within the period provided by 120 day time period of Federal Rule of Civil
7 Procedure 4(m) for service of the summons and original or first amended complaint,
8 received such notice of the action that they will not be prejudiced in defending the
9 merits; and (3) that they, within the period provided by 120 day time period of Federal
10 Rule of Civil Procedure 4(m) for service of the summons and original or first amended
11 complaint, knew or should have known that the action would have been brought against
12 it, but for a mistake concerning the proper party's identity, as they were not first named
13 or referred to in a complaint until December 2016 for the 400 South La Brea Defendants
14 and until October 2018 for Defendant Cathay Bank, which would be way behind the 120
15 day time period under Rule 4(m) measured from the filing of the original or first
16 amended complaints in November 2014 and January 2015.

17 The new claims do not arise from the conduct set forth in the original or first
18 amended complaints. As argued in Cathay Bank's supplemental brief, Docket No. 876
19 at 10–11:

20 An amendment asserting a new or changed claim relates back to the date of the
21 original pleading if the amendment "arose out of the conduct, transaction, or
22 occurrence set out . . . in the original pleading." *ASARCO, LLC v. Union Pacific*
23 *R.R. Co.*, 765 F.3d 999, 1004 (9th Cir. 2014) (quoting Rule 15(c)). To relate
24 back, "the original and amended pleadings [must] share a common core of
25 operative facts so that the adverse party has fair notice of the transaction,
26 occurrence, or conduct called into question." *Martell v. Trilogy Ltd.*, 872 F.2d 322,
27 325 (9th Cir. 1989). "In the context of avoidance actions, each preferential and
28 fraudulent transaction is treated separately and distinctly, because the proof
offered for one transaction does not govern as to another and, as such, relation
back cannot be ordered between different transactions merely for being similar or
arising from the same conduct." See *Sec. Investor Prot. Corp. v. Bernard L.*
Madoff Inv. Sec. LLC, 594 B.R. 167, 210 (Bankr. S.D.N.Y. 2018) (internal
citations and quotation marks omitted); *In re M. Fabrikant & Sons, Inc.*, 480 B.R.

480, 492 (S.D.N.Y. 2012).

The Plan Agent's Brief ignores this issue completely. That is fatal for the proposed amendment. The Original Complaint does not identify any fraudulent transfers arising from rent paid by the Debtor on the 400 SLB property. Nor does it identify (i) the recipient of any purported rent, (ii) the amounts transferred, (iii) the dates on which the transferred occurred, or (iv) any facts suggesting an "intent to hinder, delay, or defraud any creditor," e.g., the factors set forth in Civ. Code § 3439.04(b), on the part of any defendant. The Original Complaint merely alleges that the Debtor made a loan to Ace Museum is several installments post-dating July 9, 2009:

Plaintiff . . . alleges [that] Ace Museum borrowed, or otherwise obtained, from the Debtor, and the Debtor lent, or otherwise provided, to Ace Museum, funds in the aggregate of no less than \$4,482,586.00 (the "Loan"), and that Ace Museum became indebted to the Debtor in at least that amount (the "Loan Obligation"). Plaintiff is further informed and believes, and based thereon alleges, that the Loan was provided or made pursuant to one or more transfers of the Debtor's funds from the Debtor to Ace Museum since July 9, 2009 (each, a "Transfer" and, collectively, the "Transfers").

Orig. Compl., ¶ 9. The Original Complaint then asserts several causes of action arising from the unpaid balance of the loan and, in the alternative, that the post-2009 loan advances made to Ace Museum amount to constructive fraudulent transfers under Civ. Code §§ 3439.04(a)(2) and 3439.05. *Id.*, ¶¶ 18-59. However, these allegations are not hooks on which to hang a later amended complaint. The facts in the Original Complaint relate exclusively to the time period after July 9, 2009 whereas the claims in the proposed amendment arise from transfers that pre-date February 19, 2009. In addition, the allegations in the Original Complaint relate to a set of transactions (loan advances) that are entirely distinct from the transactions in the proposed amendment (prepetition rent transfers to 400 S. La Brea LLC). Put simply, there is no common core of operative facts between the Original Pleading and the new claims in the proposed amendment.

Id. The court agrees with Cathay Bank's argument and holds that Plaintiff's amendment as to it and the 400 South La Brea Defendants does not meet the stringent standards of Federal Rule of Civil Procedure 15(c)(1)(B) and (C).

For the foregoing reasons, Plaintiff's motion for leave to amend should be denied because the proposed amended complaint adding new parties and claims is filed after the applicable two year statute of limitations under 11 U.S.C. §546(a) expiring on February 19, 2015 and the claims added by the proposed amended complaint do not

1 relate back to the timely filed original and first amended complaints as required by
2 Federal Rule of Civil Procedure 15(c)(1)(C).

3 Plaintiff alternatively argues that the two year statute of limitations of 11 U.S.C.
4 §546(a) expiring on February 19, 2015 should be equitably tolled at least to the date of
5 the filing of the motion for leave to amend on December 10, 2020. Plaintiff's
6 Memorandum on the Issue of "Futility", filed on February 8, 2021, at 15–21, citing inter
7 alia, *Gladstone v. U.S. Bancorp*, 811 F.3d 1133 (9th Cir. 2016) and *In re Milby*, 545 B.R.
8 613 (9th Cir. BAP 2016). The Bankruptcy Appellate Panel in *Milby* recognized that the
9 statute of limitations of 11 U.S.C. §546(a) may be subject to equitable tolling. The Ninth
10 Circuit in *Gladstone* stated: "Under the equitable tolling doctrine, where a party 'remains
11 in ignorance of [a wrong] without any fault or want of diligence or care on his part, the
12 bar of the statute does not begin to run until the fraud is discovered, though there be no
13 special circumstances or efforts on the party committing the fraud to conceal it from the
14 knowledge of the other party.'" 811 F.3d at 1143. Plaintiff argues that he did not
15 discover the fraud relating to the transfers more than four years before the petition date
16 due to the Debtor's "track record of non-cooperation," not only in discovery in this
17 adversary proceeding, but also, as debtor in possession, when the debtor failed to take
18 legal action on behalf of the bankruptcy estate which indicates the Debtor's history of
19 concealment and refusal to produce relevant information. Plaintiff's Memorandum on
20 the Issue of "Futility", filed on February 8, 2021, at 19. In referring to Debtor, Plaintiff
21 apparently meant the Debtor as controlled by Defendant Christmas while the Debtor was
22 in possession during the preconfirmation phase of this bankruptcy case until the plan
23 effective date on April 6, 2016. Plaintiff further argues that he did not discover the
24 Debtor's prepetition insolvency beginning from at least February 19, 2006 through
25 February 19, 2013, the petition date, until after the completion of the expert report of his
26 expert witness, Ms. Ziegler, on or about October 30, 2020. *Id.* at 21; Plaintiff's
27 Response to Oppositions, filed on December 31, 2020, at 6. According to Plaintiff, he
28 had engaged Ms. Ziegler, a forensic accountant, to examine Debtor's postpetition

1 transfers within 45–60 days of his taking over the operations of the Debtor pursuant to
2 the confirmed plan of reorganization on April 6, 2016. Plaintiff's Response to
3 Oppositions, filed on December 31, 2020, at 6.

4 The court determines that based on this record, equitable tolling of the two year
5 statute of limitations under 11 U.S.C. § 546(a) to December 10, 2020 is not appropriate
6 to allow the filing of the proposed amended complaint. The two year statute of
7 limitations of 11 U.S.C. § 546(a) measured from the petition date of February 10, 2013
8 expired on February 10, 2015, and based on the allegations of fraud against Defendant
9 Christmas who was in control of the Debtor during the preconfirmation phase of this
10 bankruptcy case through the plan effective date, April 6, 2016, Plaintiff can make a
11 reasonable argument for equitable tolling through April 6, 2016, the date when his
12 appointment as the plan agent became effective, and prior to that, according to Plaintiff,
13 Defendant Christmas was supervising the Debtor during the preconfirmation phase of
14 this bankruptcy case, which concealed and refused to produce relevant information to
15 Plaintiff's predecessor, the Creditors' Committee. Docket No. 868 at 24–26. Assuming
16 *arguendo* that based on Debtor's preconfirmation concealment and refusal to produce
17 relevant information with the Creditors' Committee, equitable tolling was appropriate
18 until the effective date of Plaintiff's appointment on April 6, 2016, equitable tolling is not
19 appropriate afterwards through October 30, 2020 when his expert, Ms. Ziegler,
20 completed her report as Plaintiff could have discovered the alleged fraudulent transfers
21 between four and seven years before the petition date within a reasonable time after he
22 took over Debtor's operations on April 6, 2016. Around that time, or at least within 45–
23 60 days, Plaintiff had engaged Ms. Ziegler to examine Debtor's postpetition transfers,
24 and he could have at the same time asked her to examine its prepetition transfers
25 instead of waiting years later to ask her as part of her preparation of a final expert report
26 for trial in these adversary proceedings. When Plaintiff took over Debtor's operations on
27 April 6, 2016, Defendant Christmas was ousted from control of Debtor's operations, and
28 Plaintiff had access to Debtor's business records and could have with diligence

1 discovered the alleged fraudulent transfers between four and seven years before the
2 petition date at least within two years of his taking over Debtor's business operations, or
3 by April 6, 2018. From the timely filed original and first amended complaints filed by
4 Plaintiff's predecessor in interest, the Official Committee of Unsecured Creditors,
5 Plaintiff must have been aware of the allegations of fraudulent transfers by Debtor to, or
6 on behalf of, Ace Museum made within four years before the petition as alleged in those
7 pleadings. As alleged in the first amended complaint, Plaintiff's predecessor in interest
8 had alleged that Ace Museum had leased premises from Defendant 400 South La Brea,
9 LLC, in 2009, and there is no explanation why Plaintiff did not investigate Debtor's
10 transfers before then because the lease of the museum premises preexisted 2009.
11 Plaintiff's reason for not doing so is that he did not ask his expert to look into such
12 transfers until she was preparing her final report in 2020, but he has not provided a
13 reasonable explanation why he could not have discovered such transfers earlier since
14 he took over the business operations and records of the Debtor in April 2016, had
15 engaged Ms. Ziegler as his expert shortly thereafter, and Defendant Christmas was no
16 longer an impediment to discovery of the Debtor's books and records.

17 Accordingly, the court determines that equitable tolling is not available to allow
18 the filing of the proposed complaint amending the Sixth Amended Complaint.

19 For the foregoing reasons, the court denies the Plan Agent's motion for leave to
20 amend the Sixth Amended Complaint.

21 IT IS SO ORDERED. ###

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25 Date: May 5, 2021



Robert Kwan
United States Bankruptcy Judge