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FILED & ENTERED
JUL 07 2020
CLERK U.S. BANKRUPTCY COURT
Central District of California
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NOT FOR PUBLICATION

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

In re:
PROTOTYPE ENGINEERING &
MANUFACTURING, INC.,
Debtor.

WESLEY H. AVERY, Chapter 7 Trustee,
Plaintiff,
v.
LEYA TECHNOLOGIES, LLC; BAHRAM
BORDBAR, INDIVIDUALLY, AND AS
TRUSTEE OF THE BORDBAR FAMILY
TRUST; MALAHAT BORDBAR,
INDIVIDUALLY, AND AS TRUSTEE OF
THE BORDBAR FAMILY TRUST; SARA
BORDBAR; AND DOES 1-10,
INCLUSIVE,
Defendants.

Case No. 2:17-bk-21018-RK
Chapter 7
Adv. No. 2:19-ap-01332-RK

**MEMORANDUM DECISION GRANTING
IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO EXPUNGE
LIS PENDENS**

Pending before the court in this adversary proceeding is the motion of defendants Bahram and Malahat Bordbar (the "Bordbars"), individually and as Trustees of the Bordbar Family Trust (collectively, "Defendants"), to expunge the Notices of Pendency of Action filed by Plaintiff Wesley H. Avery, Chapter 7 Trustee (the "Trustee"), Electronic Case Filing ("ECF") 63 (the "Motion"). The Trustee and intervening plaintiffs Jon and Maria Ternstrom,

1 Cameron and Michelle Witzler, and Colette Carpenter, both individually and in her capacity
2 as administrator of the estate of Clayton O. Carpenter (collectively, the “Crash Victim
3 Claimants,” and together with the Trustee, “Plaintiffs”) opposed the Motion (the
4 “Opposition”). *Plaintiffs’ Opposition to Motion to Expunge Lis Pendens*, ECF 77, filed on
5 March 27, 2020. Defendants filed their consolidated reply to Plaintiffs’ Opposition on April
6 7, 2020 (the “Reply”). *Defendants’ Reply in Support of Motion to Expunge*, ECF 79. A
7 hearing on the Motion was conducted on April 30, 2020. Brian L. Davidoff, of the law firm
8 of Greenberg Glusker Fields Claman & Machtinger LLP, appeared for Defendants, the
9 moving parties. Kevin M. Davis, of the law firm of Caplin & Drysdale, Chartered, and
10 Carmela T. Pagay, of the law firm of Levene, Neale, Bender, Yoo & Brill, L.L.P., appeared
11 for Plaintiffs, the responding parties.

12 I. BACKGROUND

13 On September 6, 2019, the Trustee commenced this adversary proceeding by filing
14 a complaint alleging fraudulent transfer, breach of fiduciary duty, and unjust enrichment
15 claims, among others. ECF 1. On September 19, 2019, the Trustee filed an amended
16 complaint. *Plaintiff’s Amended Complaint*, ECF 9 (the “Amended Complaint”). In the
17 Amended Complaint, the Trustee alleged twenty-one claims for relief, including a claim for
18 substantive consolidation pursuant to 11 U.S.C. § 105(a) (the “Substantive Consolidation
19 Claim”). ECF 9 at 31 (“Claim for Relief XX”).

20 On September 24, 2019, the Trustee recorded a “Notice of Pendency of Action [Lis
21 pendens] [Cal. Civ. Proc. Code § 405.20]” on two pieces of real property allegedly owned
22 by Defendants. *Notice of Recordation of Notice of Pendency of Action [Lis Pendens]*, ECF
23 7, 8. The Trustee alleges that the first property, 140 E. 162nd Street, Gardena, CA 90248
24 (the “Gardena property”), was the business premises of debtor Prototype Engineering &
25 Manufacturing, Inc. (“Debtor”). ECF 9 at 3 (¶ 6); *see also Debtor’s Petition and Schedules*,
26 ECF 1 at 1 (listing Gardena property as Debtor’s principal place of business).¹ The
27

28 ¹ The court takes judicial notice of its files and records under Federal Rule of Evidence 201.

1 Bordbar Family Trust (the “Bordbar Trust”) leased the Gardena property to Debtor. ECF 1
2 at 25 (listing Debtor as lessee and the Bordbar Trust as lessor of the Gardena property).
3 The Trustee alleges that the second property, 21600 Brisbane Way, Yorba Linda, CA
4 92887 (the “Yorba Linda property”) is the Bordbars’ residence and the address for the
5 Bordbar Trust. ECF 9 at 11 (¶ 44); see also ECF 1 at 21 (listing Yorba Linda property as
6 mailing address of Bordbar Trust); ECF 1-1 at 4 (listing Yorba Linda property as mailing
7 address of Bahram Bordbar). Together with the Gardena property, these two parcels of
8 real property are referred to herein as “the Properties.”

9 Defendants filed a motion to dismiss the Amended Complaint. *Defendants’ Motion*
10 *to Dismiss Claims Pursuant to Rule 12(b)(6)*, ECF 10, filed on October 7, 2019;
11 *Defendants’ Supplemental Motion to Dismiss the Twenty-First Claim for Relief*, ECF 37,
12 filed on November 12, 2019. On December 12, 2019, the court granted in part and denied
13 in part the motion to dismiss the Amended Complaint, specifically dismissing the
14 Substantive Consolidation Claim without prejudice, with leave to amend, but without any
15 time limit for amendment of that claim. *Order Granting in Part and Denying in Part*
16 *Defendants’ Motion to Dismiss Plaintiff’s First Amended Complaint*, ECF 57 at 15 (¶ 1) (the
17 “December 2019 Order”).

18 On February 4, 2020, the Crash Victim Claimants filed a complaint in intervention,
19 joining the Trustee as Plaintiffs in this adversary proceeding pursuant to the court’s Order
20 Re: Stipulation Conveying Standing And Motion Of Crash Victim Claimants To Substitute
21 Trustee As Plaintiff Or, In The Alternative, To Intervene, ECF 43. *Complaint in Intervention*,
22 ECF 60. Because the court had dismissed the Trustee’s Substantive Consolidation Claim
23 in its December 2019 Order, the Crash Victim Claimants did not include a substantive
24 consolidation claim in the Complaint in Intervention filed in the adversary proceeding. ECF
25 60 at 2 (¶ B.). The Complaint in Intervention does not otherwise substantively differ from
26 the Amended Complaint, ECF 9. Thus, the court refers to Plaintiffs, instead of only the
27 Trustee, when discussing the Substantive Consolidation Claim and the Amended
28 Complaint. On February 27, 2020, Defendants filed the Motion, which requests that the

1 court expunge the two notices of pendency of action on the Properties.

2 California Code of Civil Procedure § 405.20 provides that “a party to an action who
3 asserts a real property claim may record a notice of pendency of action in which that real
4 property claim is alleged.” A notice of pendency of action is commonly referred to as a lis
5 pendens.² At common law, “[a] lis pendens is a recorded document giving constructive
6 notice that an action has been filed affecting title or right to possession of the real property
7 described in the notice.” *Kirkeby v. Superior Court*, 33 Cal.4th 642, 647 (2004) (hereinafter
8 “*Kirkeby*”) (citation omitted). Defendants assert that no claim in the Amended Complaint
9 that survived their motion to dismiss is a “real property claim” within the meaning of
10 California Code of Civil Procedure § 405.4, and therefore, the lis pendens must be
11 expunged under California Code of Civil Procedure § 405.31. *Defendants’ Motion to*
12 *Expunge Lis Pendens*, ECF 63 at 12. Defendants further contend that pursuant to
13 California Code of Civil Procedure § 405.38, the Trustee filed the lis pendens without
14 “substantial justification” and is liable to pay Defendants’ their attorneys’ fees and costs for
15 bringing the Motion. *Id.* at 13-14.

16 In their Opposition to the Motion, Plaintiffs argue that although dismissed, the
17 Substantive Consolidation Claim provides a basis for maintaining the lis pendens as they
18 have leave to amend and add such a claim. Plaintiffs specifically contend that the
19 Substantive Consolidation Claim is a “real property claim” under California Code of Civil
20 Procedure § 405.4 and the California Supreme Court’s *Kirkeby* decision. *Plaintiffs’*
21 *Opposition to Motion to Expunge Lis Pendens*, ECF 74 at 4 (citing *Amended Complaint*,
22 ECF 9 at 11, 16, 31 and 33 (¶¶ 44, 66, 180, and the Prayer for Relief at ¶ G)). As
23 discussed above, in the December 2019 Order, the court dismissed the Substantive
24 Consolidation Claim without prejudice, with leave to amend, and without any time limit on
25 amendment. ECF 57 at 15 (¶ 1). Plaintiffs assert in the Opposition that they intend to
26 pursue the Substantive Consolidation Claim and that it is premature to expunge the lis
27

28 ² Hereinafter, the court’s use of the term lis pendens encompasses the singular and the plural.

1 pendens where, as here, leave to amend has been granted. ECF 74 at 5-6.

2 In their Reply to Plaintiffs' Opposition, Defendants argue that the Substantive
3 Consolidation Claim is not a "real property claim" under California Code of Civil Procedure
4 § 405.4 because the claim is a mechanism for making property available to satisfy claims,
5 not a direct claim to title or possession of real property. *Defendants' Reply in Support of*
6 *Motion to Expunge*, ECF 79 at 6 (citing *Kirkeby*, 33 Cal.4th at 647, 649-650). Pursuant to
7 California Code of Civil Procedure § 405.20, Defendants also contend that the lis pendens
8 must be expunged because the court stated that if Plaintiffs amend the Substantive
9 Consolidation Claim, they should do so by separate motion or adversary proceeding.
10 *Defendants' Reply in Support of Motion to Expunge*, ECF 79 at 10-11.

11 On April 10, 2020, the court on its own motion ordered Plaintiffs to file a sur-reply to
12 further address the issue of whether a substantive consolidation claim can be considered a
13 "real property claim" within the meaning of California Code of Civil Procedure § 405.4. The
14 court ordered that any response of Defendants to Plaintiffs' sur-reply could be made orally
15 at a continued hearing on the Motion set for April 30, 2020.

16 On April 23, 2020, Plaintiffs filed their sur-reply, ECF 85 (the "Sur-reply"). In the Sur-
17 reply, Plaintiffs contend that the Substantive Consolidation Claim is a "real property claim"
18 because a substantive consolidation order would pass title to and right to possession of the
19 Properties from a non-debtor to the bankruptcy estate. Plaintiffs therefore assert that the
20 Substantive Consolidation Claim unquestionably "affect[s] . . . title to, or the right to
21 possession of" real property. *Plaintiffs' Sur-reply to Defendants' Reply in Support of Motion*
22 *to Expunge*, ECF 85 at 2-3 (quoting Cal. Civ. Proc. Code § 405.4).

23 On April 30, 2020, the court conducted a hearing on the Motion. During the hearing,
24 Defendants' counsel raised a new argument in support of the Motion, referring to the recent
25 decision of the United States Supreme Court in *Roman Catholic Archdiocese of San Juan,*
26 *Puerto Rico v. Acevedo Feliciano*, 140 S.Ct. 696 (2020) (hereinafter "*Acevedo*"), which
27 casts doubt on the authority of courts to enter *nunc pro tunc* orders. Defendants' counsel
28 contended that under *Acevedo*, the court may not grant substantive consolidation *nunc pro*

1 *tunc* to the petition date, and therefore, a substantive consolidation order would not make
2 the Properties part of the bankruptcy estate, and the court must expunge the lis pendens.
3 *April 30, 2020 Hearing on Defendants’ Motion to Expunge Lis Pendens* at 11:47–11:49,
4 Adv. No. 2:19-ap-01332-RK (argument of Defendants’ counsel). In response, the court
5 ordered the parties to file supplemental briefing addressing *Acevedo*.

6 On May 7, 2020, Defendants filed a Supplemental Brief on Plaintiff’s Request for
7 Nunc Pro Tunc Substantive Consolidation Order, ECF 86 (“Defendants’ Supplemental
8 Brief”). On May 14, 2020, Plaintiffs filed a Joint Response to Moving Defendants’
9 Supplemental Brief, ECF 87 (“Plaintiffs’ Supplemental Brief”), and the court took the matter
10 under submission.

11 Accordingly, Defendants’ Motion presents five issues for resolution: (i) whether the
12 Substantive Consolidation Claim is a “real property claim” under California Code of Civil
13 Procedure § 405.4; (ii) if so, whether the court should nevertheless grant the Motion
14 because the Substantive Consolidation Claim is dismissed without prejudice; (iii) whether
15 the lis pendens must be expunged under California Code of Civil Procedure § 405.20
16 because any amended substantive consolidation claim may not be filed in this adversary
17 proceeding; (iv) whether the Trustee recorded the lis pendens on the Properties without
18 “substantial justification,” and the court should award Defendants’ their attorneys’ fees and
19 costs as a prevailing party pursuant to California Code of Civil Procedure § 405.38; and, (v)
20 whether *Acevedo* precludes Plaintiffs from asserting that the Properties could be property
21 of the estate *nunc pro tunc* pursuant to a future substantive consolidation order, in order to
22 support the filing of the lis pendens.

23 Having considered all of the oral and written arguments of the parties, the court now
24 rules as follows.

25 II. DISCUSSION

26 Under California law, a court’s evaluation of whether a party has alleged a “real
27 property claim” supporting a lis pendens is a “demurrer-like analysis” that should be limited
28 to an examination of the allegations as pled. *Kirkeby*, 33 Cal.4th at 648-649. Thus, the

1 court must first discuss the allegations in the Amended Complaint³ and the court's
2 December 2019 Order Granting in Part and Denying in Part Defendant's Motion to Dismiss
3 the Amended Complaint.

4 The Amended Complaint alleged that it was a:

5 proceeding to avoid and recover certain prepetition transfers, to
6 substantively consolidate most of the Defendants into Prototype's
7 estate, and to obtain other relief, all for the benefit of Prototype's estate
and creditors, pursuant to 11 U.S.C. §§ 105, 544, 548, and 550, and
applicable non-bankruptcy law.

8 *Amended Complaint*, ECF 9 at 4 (¶ 15).

9 In the Amended Complaint, Plaintiffs allege that before filing for bankruptcy
10 protection, Debtor repaired and manufactured aviation parts and components for the U.S.
11 Army, Navy, and Air Force. *Id.* (¶ 16). Plaintiffs allege that Debtor operated its business
12 under the "sole direction" of defendant Bahram Bordbar. *Id.* Plaintiffs also allege that
13 Bahram Bordbar caused Debtor "to certify that a U.S. Army helicopter [that Debtor] was
14 supposed to overhaul contained a critical cotter pin, when, in fact, it did not." *Id.* at 5 (¶ 18).
15 They further allege that on January 15, 2014, the U.S. Army helicopter Debtor had
16 overhauled tragically crashed, resulting in the death of co-pilot Captain Clayton Carpenter,
17 U.S. Army, and substantial physical injuries to the other servicemen on board. *Id.* Plaintiffs
18 allege that following the helicopter crash, the United States began investigating Debtor,
19 which led to Bahram Bordbar being incarcerated and liable to the United States for nearly
20 \$1 million in civil and criminal penalties. *Id.* at 5 (¶ 19).

21 In the Amended Complaint, Plaintiffs allege that Debtor, not Bahram Bordbar, "paid
22 all the fines resulting from the civil settlement and plea agreement with the United States
23 Government" that arose from the investigation and subsequent charges brought against
24 Bahram Bordbar and Debtor. *Id.* at 5-6 (¶¶ 19-22). Plaintiffs also allege that between 2011
25 and 2017, Bahram Bordbar caused Debtor to transfer substantial amounts of cash and
26 other assets from Debtor to, or for the benefit of, Defendants, including assets of the Debtor

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28 ³ Undefined capitalized terms included herein have the meaning ascribed to them as set forth in the
Amended Complaint, ECF 9.

1 that were either transferred to the Bordbar Trust, or used to purchase assets that were
2 subsequently transferred to the Bordbar Trust. *Id.* (¶¶ 23-24). Plaintiffs essentially allege
3 that Defendants regularly removed valuable assets from Debtor and used those assets as
4 their own: transferring funds between Defendants and Debtor, entangling the affairs of
5 Defendants and Debtor, and attempting to keep Debtor’s assets out of the hands of
6 creditors. *Id.* at 6-7 (¶¶ 22-28).

7 Specifically, Plaintiffs allege in the Amended Complaint that “[Bahram Bordbar]
8 Routinely Removed Assets from [Debtor] to Keep the Assets from Creditors,” *id.* at 10,
9 including transferring substantial cash sums from Debtor to Defendants Bahram and
10 Malahat Bordbar, *id.* (¶ 43), which funds the Bordbars

11 either transferred . . . to the Bordbar Trust or used . . . to purchase real
12 estate or other assets, which they then transferred to the Bordbar
13 Trust. Indeed, following the helicopter crash and after commencement
14 of the government’s investigation concerning the crash, Barry and
15 Molly transferred three pieces of real property to the Bordbar Trust
without consideration, including the Gardena Property, which was
leased to the Debtor and was the Debtor’s business location; the real
property located at 21600 Brisbane Way, Yorba Linda, California,
which is the Bordbars’ residence and the address for the Bordbar Trust;

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17 *Id.* at 11 (¶ 44).⁴ Plaintiffs additionally allege that at the time of the alleged cash transfers
18 described above, Defendants’ finances were entangled with Debtor’s such that even
19 though the funds “no longer appeared in [Debtor’s] accounts, Debtor effectively maintained
20 control over the funds. [Debtor] has never received any consideration for these transfers.”
21 *Id.* at 11 (¶ 46).

22 Similarly, Plaintiffs allege that Defendants Bahram and Malahat Bordbar
23 “Commingled Their Personal Finances with [Debtor’s] to an Astounding Degree,” *id.* at 14,
24 contending that

25 [i]ndeed, the affairs of Barry and Molly and, by extension, the Bordbar
26 Trust, are so entangled with Prototype’s that consolidation will benefit
all creditors. The time and cost of reconstructing the books and records
of the Debtor to determine what each transaction was for, to whom it is

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28 ⁴ As defined in the Amended Complaint, ECF 9, “Barry” and “Molly” are Defendants Bahram and
Malahat Bordbar. *Id.* at 3 (¶¶ 7-8).

1 attributable, and whether it was properly recorded therein, would be
2 very expensive and extremely difficult. As such, identifying or allocating
3 assets between Prototype, Barry, Molly, and the Bordbar Trust would
not be possible without threatening the ultimate distribution to creditors
from Prototype's estate.

4 *Id.* at 16 (¶ 66). See also *id.* at 14-16 (¶¶ 56-67).

5 Plaintiffs in their Substantive Consolidation Claim against Defendants in the
6 Amended Complaint specifically allege:

7 Plaintiff repeats and re-alleges all of the allegations of paragraphs 1
8 through 76.

9 The affairs of Barry and Molly Bordbar, the Bordbar Trust, and Leya are
10 so entangled with those of the Debtor that consolidation will benefit all
creditors.

11 Substantial time and expense would be required to even attempt to
12 unscramble the financial and other commingling between the Debtor
and Barry and Molly Bordbar, the Bordbar Trust, and Leya such that no
identification or allocation of assets is possible.

13 In the alternative, any such effort will threaten realization of any net
14 assets for all creditors. Substantive consolidation of these entities is
15 necessary to avoid inequitable diminution of the Debtor's estate and to
protect the Debtor's creditors.

16 It is, therefore, necessary and appropriate that the business affairs of
17 Barry and Molly Bordbar, the Bordbar Trust, and Leya be administered
and resolved in conjunction with the affairs of the Debtor in its
bankruptcy estate.

18 *Id.* at 31 (¶¶ 179-183). As indicated above, the Substantive Consolidation Claim includes
19 all of the foregoing substantive allegations regarding the Debtor's alleged involvement in
20 the helicopter crash and the alleged fraudulent transfer of Debtor's assets to Defendants.

21 *Id.* (¶ 179). In the Prayer for Relief in the Amended Complaint, Plaintiffs requested the
22 following relief from the court on the Substantive Consolidation Claim:

23 On [the Substantive Consolidation Claim], that Barry and Molly
24 Bordbar, the Bordbar Trust, and Leya be substantively consolidated
25 into the Debtor's bankruptcy estate *nunc pro tunc* to the Petition Date,
26 or such other date that the Court deems appropriate, and for
substantive consolidation of such Defendants' assets and liabilities with
those of the Debtor's estate;

27 *Amended Complaint*, ECF 9 at 33 (Prayer For Relief, ¶ G).

28 In its December 12, 2019 Order Granting in Part and Denying in Part Defendants'

1 Motion to Dismiss the Amended Complaint, the court specifically granted Defendants’
2 request to dismiss the Substantive Consolidation Claim because Plaintiffs “did not give
3 notice of the claim for substantive consolidation to the creditors of Defendants, who and
4 which are nondebtor parties[.]” ECF 57 at 2 (citing *Leslie v. Mihranian (In re Mihranian)*,
5 937 F.3d 1214, 1218 (9th Cir. 2019) (“A party moving for substantive consolidation must
6 provide notice of the motion to the creditors of a putative consolidated non-debtor.”).
7 Because the court was dismissing the Substantive Consolidation Claim on insufficiency of
8 service grounds, the court expressly declined to reach the merits of whether the
9 Substantive Consolidation Claim should be dismissed for failure to state a claim upon
10 which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). ECF 57
11 at 2. The court also recommended that Plaintiffs file any amended substantive
12 consolidation claim as a separate proceeding. *Id.* The court’s order dismissed the
13 Substantive Consolidation Claim without prejudice and with leave to amend, and the court
14 did not set any time limit on Plaintiffs’ amendment of the Substantive Consolidation Claim.
15 *Id.* at 15. Accordingly, although the Substantive Consolidation Claim has been dismissed,
16 it is not finally resolved since Plaintiffs may still file an amended claim.

17 As noted above, the five questions presented by the Motion before the court are: (i)
18 whether the Substantive Consolidation Claim is a “real property claim” under the California
19 expungement statutes; (ii) if so, whether the court should grant the Motion, even though the
20 to-be-amended Substantive Consolidation Claim was dismissed without prejudice; (iii)
21 whether the lis pendens must be expunged because any amended substantive
22 consolidation claim may not be filed in this action; (iv) whether the Trustee recorded the lis
23 pendens on the Properties without “substantial justification,” and Defendants should be
24 awarded fees and costs; and (v) whether *Acevedo* precludes Plaintiffs from asserting that
25 the Properties could be property of the estate. The court addresses each of these
26 questions in turn.

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1 i. **PLAINTIFFS’ SUBSTANTIVE CONSOLIDATION CLAIM IS A “REAL
PROPERTY CLAIM”**

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3 Whether a substantive consolidation claim may be a “real property claim” supporting
4 a lis pendens under California law is apparently an issue of first impression. The parties
5 agree that California law governs this court’s evaluation of the Motion. See, e.g., *In re*
6 *Gonzalez*, BAP No. CC-11-1162-MkCaPa, 2012 Bankr. LEXIS 673, 2012 WL 603747, at *5
7 (9th Cir. BAP Feb. 2, 2012) (affirming bankruptcy court’s expungement of lis pendens
8 pursuant to California Code of Civil Procedure § 405.30). The most recent pronouncement
9 of California law addressing the state’s expungement statutes, the California Supreme
10 Court decision in *Kirkeby v. Superior Court*, 33 Cal.4th 642 (2004) (holding that fraudulent
11 transfer claim was a “real property claim”) governs the court’s analysis.

12 As set forth below, the court determines that Plaintiffs’ Substantive Consolidation
13 Claim is a “real property claim” within the meaning of California Code of Civil Procedure §
14 405.4 because the effect of an order for substantive consolidation of a non-debtor entity is
15 the combining of that entity’s assets and liabilities with the bankruptcy estate. A
16 substantive consolidation cause of action is a request that the bankruptcy court ignore legal
17 forms and marshal assets into the court’s jurisdiction because the property belonging, in
18 form, to the putative consolidated entity is, in substance, property of the estate, 11 U.S.C. §
19 541(a). Moreover, similar to the fraudulent transfer claim in *Kirkeby*, the ostensible “real
20 property claim” here is an equitable remedy of substantive consolidation that disregards the
21 corporate form by bringing non-debtor assets into the estate to satisfy creditors’ claims.
22 The court therefore concludes that an order consolidating a non-debtor’s real property into
23 the bankruptcy estate is more akin to the avoidance and recovery of real property by a
24 fraudulent transfer claim, *Kirkeby*, 33 Cal.4th at 649, than the imposition of a constructive
25 trust or equitable lien on real property, *Urez Corp. v. Superior Court*, 190 Cal.App.3d 1141,
26 1149, 235 Cal.Rptr. 837 (1987) (holding that constructive trust and equitable lien claims
27 may not support a lis pendens). Additionally, the precise impact of a substantive
28 consolidation order—pooling assets and liabilities previously held by separate legal entities

1 into a single body—is not diminished when a case involves substantive rights relating to
2 title of real property. Thus, an order granting a substantive consolidation claim would
3 “affect” title to and possession of real property within the meaning of California Code of Civil
4 Procedure § 405.4 because the consolidated property becomes property of the bankruptcy
5 estate available to satisfy the claims of all creditors.

6 Below, the court discusses the California expungement statutes and related
7 authorities, and the nature and effect of substantive consolidation, before returning to
8 examining the Amended Complaint in order to undertake the “demurrer-like analysis” that
9 *Kirkeby* requires, 33 Cal.4th at 648.

10 **1. The California Lis Pendens Regime**

11 A lis pendens is a “notice of the pendency of an action in which a real property claim
12 is alleged.” California Code of Civil Procedure § 405.2. A “real property claim” is defined,
13 in pertinent part, as “a cause or causes of action in a pleading which would, if meritorious,
14 affect . . . title to, or the right to possession of, specific real property[.]” California Code of
15 Civil Procedure § 405.4. If an underlying action does not assert a “real property claim,” as
16 defined by California Code of Civil Procedure section 405.4, the owner of the subject
17 property may move to expunge the lis pendens. California Code of Civil Procedure §§
18 405.30 and 405.31. The party opposing a motion to expunge lis pendens has the burden to
19 demonstrate the existence of a “real property claim.” California Code of Civil Procedure §
20 405.30.

21 The court deciding a motion to expunge lis pendens based on the absence of a real
22 property claim “shall order the notice expunged if the court finds that the pleading on which
23 the notice is based does not contain a real property claim.” California Code of Civil
24 Procedure § 405.31. The limited determination of whether a complaint contains a “real
25 property claim” is a “demurrer-like analysis,” as stated in *Kirkeby*, 33 Cal.4th at 647-648.
26 Because “the purpose of a lis pendens is to notify ‘the world’ as to a claim on specific real
27 property,” at a minimum, a “real property claim” must identify the specific real property that
28 is the subject of the lis pendens. *Gale v. Superior Court*, 122 Cal.App.4th 1388, 1396, 19

1 Cal.Rptr. 3d 554 (2004) (“it is most assuredly not enough . . . merely to give notice to one's
2 adversary. Adversaries in all likelihood already know about any claims. It is third parties—
3 potential buyers or moneylenders—who need to be able to ascertain from the pleadings the
4 nature of any claim to specific real property.”).

5 There are two lines of California lis pendens cases that the parties rely on: those
6 analyzing constructive trust and equitable lien causes of action, and those interpreting
7 fraudulent transfer claims. In *Kirkeby*, the California Supreme Court discussed many
8 authorities examining whether a claim for constructive trust or equitable lien may support a
9 lis pendens but left that particular question unresolved. 33 Cal.4th at 650 n.7 (“Because it
10 is not presented in this case, we do not address the question of whether a claim that seeks
11 to impose a constructive trust or equitable lien may be a basis for a lis pendens.”).

12 Before *Kirkeby*, the California courts evaluating expungement actions generally
13 adopted the view that “allegations of equitable remedies, even if colorable, will not support
14 a lis pendens if, ultimately, those allegations act only as a collateral means to collect money
15 damages.” *La Paglia v. Superior Court*, 215 Cal.App.3d 1322, 1329, 264 Cal.Rptr. 63
16 (1989) (quoting *Urez Corp. v. Superior Court*, 190 Cal.App.3d 1141, 1149, 235 Cal.Rptr.
17 837 (1987)); *Wardley Development Inc. v. Superior Court*, 213 Cal.App.3d 391, 394, 262
18 Cal.Rptr. 87 (1989) (same). Consistent with this line of authority, the majority of California
19 courts had concluded that constructive trust and equitable lien claims are not “real property
20 claims” because the claims seek an interest in real property merely for the purpose of
21 securing a money damage judgment.⁵ When the California Court of Appeal examined

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23
24 ⁵ See, e.g., *Burger v. Superior Court*, 151 Cal.App.3d 1013, 199 Cal.Rptr. 227 (1984) (constructive
25 trust claim appended to breach of contract and fraud claims); *Deane v. Superior Court*, 164 Cal.App. 3d 292,
26 210 Cal.Rptr. 406 (1985) (constructive trust claim appended to breach of contract claim); *Urez Corp. v.*
27 *Superior Court*, 190 Cal.App.3d 1141, 235 Cal.Rptr. 837 (1987) (constructive trust claim appended to fraud
28 and deceit claims); *Wardley Development Inc. v. Superior Court*, 213 Cal.App.3d 391, 262 Cal.Rptr. 87 (1989)
(equitable lien claim appended to default money judgment); *La Paglia v. Superior Court*, 215 Cal.App.3d
1322, 264 Cal.Rptr. 63 (1989) (constructive trust claim appended to waste, trespass, conversion, and
accounting claims); *BGJ Associates, LLC v. Superior Court*, 75 Cal.App.4th 952, 89 Cal. Rptr.2d 693 (1999)
(constructive trust claim appended to fraud and tort claims seeking compensatory and punitive damages);
Campbell v. Superior Court, 132 Cal.App.4th 904, 34 Cal.Rptr.3d 68 (2005) (constructive trust and equitable
lien claims appended to conversion and money had and received claims). But see *Coppinger v. Superior*

1 whether a fraudulent conveyance cause of action could be a “real property claim” in *Lewis*
2 *v. Superior Court*, 30 Cal.App.4th 1850, 37 Cal.Rptr. 2d 63 (1994) (hereinafter “*Lewis*”) and
3 *Hunting World, Inc. v. Superior Court*, 22 Cal.App.4th 67, 26 Cal.Rptr. 2d 923 (1994)
4 (hereinafter “*Hunting World*”), however, it narrowed the equitable remedy exclusion that
5 had been adopted in *Urez Corp. v. Superior Court*, 190 Cal.App.3d at 1149.

6 In *Lewis*, the California Court of Appeal determined that the plaintiff’s lis pendens
7 should be ordered expunged after looking to the purpose of the complaint as a whole and
8 determining that plaintiff’s fraudulent transfer claim was, in essence, a claim for
9 constructive trust. *Id.* at 1865 (“while in the abstract . . . a fraudulent conveyance claim can
10 support a lis pendens, the application of this rule in a given case depends on the specific
11 nature of the claim.”). In *Hunting World*, however, the California Court of Appeal concluded
12 that a fraudulent transfer claim was a “real property claim” where the plaintiff, after
13 receiving a money damages judgment against the debtor in federal court, sought to avoid
14 the debtor’s transfer of real property to his wife. *Id.* at 73 (“Extension of the *Urez/Wardley*
15 line of decisions is not warranted because the clear wording of the ‘real property claim’
16 prong of lis pendens law covers a claim to set aside a conveyance of real property.”).

17 In *Kirkeby*, the plaintiff alleged twenty-seven causes of action in her complaint,
18 “including a cause of action for fraudulent conveyance, and sought declaratory and
19 injunctive relief and damages in the aggregate amount of \$4.9 million on behalf of herself”
20 and the allegedly looted corporation that plaintiff owned with her brother and his wife. 33
21 Cal.4th at 646. The plaintiff alleged that her brother had obtained a loan from their
22 corporation but used the proceeds to purchase a residential income property that he
23 immediately transferred to a family limited partnership. *Id.* The plaintiff also alleged that
24 her brother transferred interests in his family residence to the same partnership, and that
25 he executed both of the transfers in order to defraud creditors. *Id.* The plaintiff specifically
26 requested that “the [loan and real property] transfers be voided to the extent necessary to

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28 *Court*, 134 Cal.App.3d 883, 185 Cal.Rptr. 24 (1982); *Okuda v. Superior Court*, 144 Cal.App.3d 135, 192
Cal.Rptr. 388 (1983).

1 satisfy the claims set forth in her complaint.” *Id.* The California Supreme Court granted
2 review after both lower courts found that the fraudulent conveyance claim was plaintiff’s
3 only claim relating to the real properties and was not a “real property claim” for the
4 purposes of the lis pendens statutes. *Id.* at 646-647.

5 The California Supreme Court in *Kirkeby* looked to the plain language of California
6 Civil Code § 3439.07,⁶ which sets forth the remedies available to a creditor bringing a
7 fraudulent transfer action, and concluded that a successful fraudulent transfer claim

8 may result in the voiding of a transfer of title of specific real property.
9 By definition, the voiding of a transfer of real property will affect title to
10 or possession of real property. Therefore, a fraudulent conveyance
11 action seeking avoidance of a transfer [to the extent necessary to
satisfy the creditor’s claim] clearly ‘affects title to, or the right to
possession of’ real property and is therefore a real property claim for
the purposes of the lis pendens statutes.

12 *Id.* at 649. Thus, the outcome of the case in *Kirkeby* was based on the plain meaning of
13 the statutory language in California Civil Code § 3439.07 and California Code of Civil
14 Procedure § 405.4. *Kirkeby*, 33 Cal.4th at 649 (citing *Hunting World*, 22 Cal.App.4th at 73).
15 The court therefore held the defendants’ argument that the court should look beyond the
16 face of the noticing party’s pleading and examine the purpose of the complaint to be
17 unavailing. *Id.* at 649-650 (declining to depart from application of the plain language of §
18 405.31 and its legislative history, which require courts “to consider only the specific claim
19 as pled[.]”).

20 Additionally, the California Supreme Court in *Kirkeby* held that *Lewis* was “inapposite
21 and actually support[ed]” the court’s conclusion, even though the California Court of Appeal
22 determined that the fraudulent transfer claim in that case was not a “real property claim.”
23 *Id.* at 650. In discussing *Lewis*, the California Supreme Court in *Kirkeby* noted that the
24 Court of Appeal held in that case that the party in interest pleaded a constructive trust claim
25 in substance, and only labelled the claim as a fraudulent transfer cause of action in form;

27 ⁶ California Civil Code § 3439.07(a)(1) provides that “[i]n an action for relief against a transfer or
28 obligation under this chapter, a creditor, . . . may obtain: [a]voidance of the transfer or obligation to the extent
necessary to satisfy the creditor’s claim.”

1 the party in interest did not allege any conveyance of property. *Id.* (citing *Lewis*, 30
2 Cal.App.4th at 1865). Thus, the *Lewis* court held that although a fraudulent conveyance
3 claim may support a lis pendens, no such claim was alleged in that case. *Id.* The
4 California Supreme Court distinguished the plaintiff's allegations in *Kirkeby* from the
5 allegations pleaded in *Lewis*, noting that the plaintiff in *Kirkeby* adequately alleged that the
6 defendant transferred title of the real property with the intent to defraud creditors. *Id.*
7 Therefore, the California Supreme Court in *Kirkeby* held that the fraudulent transfer claim, if
8 successful, would affect title to specific real property. *Id.*

9 Accordingly, *Kirkeby* directs courts applying the California expungement statutes to
10 proceed with a demurrer-like analysis of the noticing party's pleading. That analysis must
11 avoid looking beyond the pleading to the noticing party's purpose, and instead focus on the
12 specific claim as pleaded. Further, the trial court's analysis of the cause of action
13 underlying the asserted "real property claim" must begin with the plain language of that
14 cause of action. *Id.* at 649 (discussing Cal. Civ. Code § 3439.07(a)(1)).

15 Defendants argue that under *Kirkeby*, "the only analysis that matters is whether a
16 plaintiff alleges a direct claim to title or possession." *Defendants' Reply in Support of*
17 *Motion to Expunge*, ECF 79 at 9 (citing *Kirkeby*, 33 Cal. 4th at 649-650). The court
18 disagrees with this argument because the California Supreme Court did not set forth a
19 "direct claim" standard in *Kirkeby*, and the holding in that case undermines Defendants'
20 argument. Pursuant to California Civil Code § 3439.07(a)(1), the plaintiff in *Kirkeby* sought
21 to void a transfer of real property to satisfy her claim for nearly \$5 million in money
22 damages, among other requested relief. *Kirkeby*, 33 Cal. 4th at 646. The court determined
23 that if plaintiff's fraudulent transfer claim was successful, "[b]y definition,"⁷ the avoidance of
24 the transfer would "affect . . . title to, or the right to possession of, specific real property,"
25 California Code of Civil Procedure § 405.4. *Id.* at 649. Defendants are correct that the
26 California Supreme Court in *Kirkeby*, in reaching its conclusion, relied upon a statute which

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28 ⁷ *Id.* at 649.

1 allows a creditor to obtain “[a]voidance of the transfer or obligation to the extent necessary
2 to satisfy the creditor’s claim[,]” and, here, no similar statute exists. *Id.* at 649. Nothing in
3 *Kirkeby* indicates, however, that a “real property claim” determination is limited to statutory
4 causes of action.

5 In the absence of statutory language beyond 11 U.S.C. § 105(a), the court, guided
6 by *Kirkeby*, therefore evaluates the plain effect and nature of an order granting substantive
7 consolidation. The court determines that an order consolidating Defendants’ assets and
8 liabilities with the bankruptcy estate would “affect . . . title to, or the right to possession of,
9 specific real property,” California Code of Civil Procedure § 405.4. Accordingly, Plaintiffs’
10 Substantive Consolidation Claim is a “real property claim” for the purposes of the California
11 *lis pendens* statutes.

12 **2. The Effect of Substantive Consolidation**

13 “A bankruptcy court’s power of substantive consolidation has been considered part
14 of the bankruptcy court’s general equitable powers since the passage of the Bankruptcy Act
15 of 1898.” *Alexander v. Compton (In re Bonham)*, 229 F.3d 750, 763 (9th Cir. 2000) (citing
16 *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 219 (1941) (hereinafter
17 “*Sampsell*”). Although uncodified, the authority of a bankruptcy court to substantively
18 consolidate the estate of a separate debtor or non-debtor derives from the court’s “general
19 equity powers as expressed in [11 U.S.C. § 105].” *In re Bonham*, 229 F.3d at 764 (citation
20 omitted) (hereinafter “*Bonham*”); *see also, In re Mihranian*, 937 F.3d at 1216 (citing
21 *Bonham*). The official commentary for the Federal Rules of Bankruptcy Procedure also
22 acknowledges the propriety of substantive consolidation. The Advisory Committee Note to
23 Federal Rule of Bankruptcy Procedure 1015 provides that “[c]onsolidation, as distinguished
24 from joint administration, is neither authorized nor prohibited by this rule since the propriety
25 of consolidation depends on substantive considerations and affects the substantive rights
26 of the creditors of the different estates.” *Id.* (citing *Sampsell*, 313 U.S. 215 (1941)).

1 In *Sampsell*, the Supreme Court “tacitly approved”⁸ substantive consolidation of a
2 non-debtor entity with a bankruptcy estate. 313 U.S. at 219-220 (reversing the judgment of
3 the Circuit Court of Appeals and affirming the District Court’s “order consolidating the
4 estates”). Prepetition, the individual debtor in *Sampsell* had fraudulently transferred assets
5 to a dummy corporation and in consideration received all of the corporation’s stock. *Id.* at
6 216-217. After the bankruptcy referee ordered that the corporation’s assets be turned over
7 to the estate, a creditor of the non-debtor corporation requested priority as to the
8 distribution of the consolidated corporation’s assets. *Id.* at 217. The bankruptcy referee
9 determined that the creditor, “with knowledge of [debtor’s] indebtedness, was instrumental
10 in getting him to form the corporation and had full knowledge of its fraudulent character.”
11 *Id.* Thus, the bankruptcy referee disallowed the creditor’s request for priority but permitted
12 the creditor’s claim as a general unsecured claim. *Id.* Because the Supreme Court
13 affirmed the bankruptcy referee’s determination that the creditor was “entitled only to *pari*
14 *passu* participation” with debtor’s other unsecured creditors, the court, “perhaps
15 inadvertently,”⁹ approved consolidation as a remedy to at once: (i) avoid a fraudulent
16 transfer, (ii) subordinate an inequitable claim, and (iii) disregard legal forms to “absorb [non-
17 debtor] assets into the bankruptcy estate” to satisfy the claims of a consolidated body of
18 creditors. *Id.* at 219 (“The power of the bankruptcy court to subordinate claims or to
19 adjudicate equities arising out of the relationship between the several creditors is
20 complete.”) (citation omitted).

21 Accordingly, substantive consolidation is “an uncodified, equitable doctrine[,]” as
22 observed by the Bankruptcy Appellate Panel of the Ninth Circuit,¹⁰ that allows bankruptcy
23 courts to “combine the assets and liabilities of separate and distinct—but related—legal
24 entities into a single pool and treat them as though they belong to a single entity[,]” in the
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26 ⁸ *Bonham*, 229 F.3d at 764.

27 ⁹ *In re Owens Corning*, 419 F.3d 195, 206 (3d Cir. 2005).

28 ¹⁰ *Luxury Jewels, LLC v. Akers (In re Aronsakool)*, BAP No. SC-13-1206-JuKuPa, 2014 Bankr. LEXIS
1234, 2014 WL 1273696, at *8 (9th Cir. BAP Mar. 28, 2014).

1 words of the Ninth Circuit in *Bonham*, 229 F.3d at 764. In *Bonham*, the Ninth Circuit set
2 forth the legal standard for establishing a substantive consolidation claim and its effect on
3 non-debtor assets and liabilities if the claim is granted. *Id.* at 766-771. Defendants’
4 challenge to Plaintiffs’ lis pendens is on grounds that the Amended Complaint does not
5 include a “real property claim” under California Code of Civil Procedure § 405.31, which
6 looks to the effect of a purported “real property claim” if meritorious.¹¹ Thus, the court’s
7 analysis is limited to *Bonham*’s discussion of the effect of a substantive consolidation order
8 on the Properties.

9 In *Bonham*, the chapter 7 trustee initially brought fraudulent transfer claims against
10 numerous investors that had received assets from two non-debtor companies that the
11 individual debtor had used to engage in a Ponzi scheme. 229 F.3d at 759-760. After the
12 investor-defendants moved to dismiss the trustee’s fraudulent transfer claims for lack of
13 standing, the trustee filed a motion to substantively consolidate the debtor’s estate with the
14 non-debtor companies *nunc pro tunc* to the petition date. *Id.* at 760. Discussing the
15 significant consequences of a substantive consolidation order, the Ninth Circuit noted “that
16 substantive consolidation ‘is no mere instrument of procedural convenience . . . but a
17 measure vitally affecting substantive rights.’” *Id.* at 762 (citation omitted). A substantive
18 consolidation order allows a bankruptcy court to seriously affect the rights of non-debtor
19 third parties “in order to reach assets for the satisfaction of debts of a related [entity].” *Id.* at
20 764 (citation and internal quotation omitted). Further, “[t]he consolidated assets create a
21 *single fund* from which all claims against the consolidated debtors are satisfied; duplicate
22 and intercompany claims are extinguished; and, the creditors of the consolidated entities
23 are combined for purposes of voting on reorganization plans.” *Id.* (emphasis added). See

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25 ¹¹ Defendants’ challenge to Plaintiffs’ lis pendens is not under California Code of Civil Procedure §
26 405.32 requiring expungement of a lis pendens “if the court finds that the claimant has not established by a
27 preponderance of the evidence the probable validity of the real property claim.” Defendants did not move to
28 expunge the lis pendens in this case by challenging the “probable validity” of the Plaintiffs’ “real property
claim” because the argument is that there is no such real property claim. Under the “probable validity” test of
California Code of Civil Procedure § 405.32, the court would determine the probable validity of a substantive
consolidation claim, and the parties would be entitled to take discovery and submit evidence, but the court
does not decide the merits of any such potential claim here.

1 *also In re Owens Corning*, 419 F.3d 195, 206 (3d Cir. 2005) (“[Substantive consolidation]
2 brings all the assets of a group of entities into a *single survivor*.”) (emphasis added).
3 Absent the authority to substantively consolidate, “debtors could insulate money through
4 transfers among inter-company shell corporations with impunity.” *Bonham*, 229 F.3d at
5 764.

6 Defendants contend that *Bonham* instructs courts to only “treat [consolidated assets]
7 as though they belong to a single entity.” *Id.* Defendants assert that such treatment falls
8 short of affecting title to or possession of consolidated property. *Defendants’ Reply in*
9 *Support of Motion to Expunge*, ECF 79 at 7-8. Defendants’ reliance on the phrase “as
10 though,” however, unduly minimizes the effect of substantive consolidation because
11 substantive consolidation is a remedy “vitally affecting substantive rights.” *Bonham*, 229
12 F.3d at 762 (citation and internal quotation omitted). The resulting “single fund”¹² or “single
13 survivor”¹³ is not a procedural construct that hardly affects ownership and control of
14 consolidated assets. The single fund is the bankruptcy estate. The estate consists of all
15 property that will be subject to the exclusive jurisdiction of the bankruptcy court, 28 U.S.C. §
16 1334(e)(1), and may be used to satisfy creditors’ claims. *Elliott v. Weil (In re Elliott)*, 523
17 B.R. 188, 192 (9th Cir. BAP 2014) (“When a debtor files a bankruptcy petition, all of his
18 assets become property of the estate and may be used to pay creditors” (citation
19 omitted)); 11 U.S.C. § 541(a)(1) (estate property includes “all legal or equitable interests of
20 the debtor in property as of the commencement of the case”), § 541(a)(7) (estate property
21 includes “[a]ny interest in property that the estate acquires after the commencement of the
22 case.”).

23 *Bonham* supports the proposition that upon issuance of a substantive consolidation
24 order, the property of a consolidated non-debtor becomes property of the estate under 11
25 U.S.C. § 541. 229 F.3d at 766-767 (citing *Kroh Bros. Development Co. v. Kroh Bros.*
26 *Management Co. (In re Kroh Bros. Dev. Co.)*, 117 B.R. 499, 502 (W.D. Mo. 1989) (lien

27 ¹² *Id.* at 764.

28 ¹³ *In re Owens Corning*, 419 F.3d at 206.

1 avoidance claims of non-debtor party that come into the bankruptcy estate are part of the
2 estate *nunc pro tunc*); see also, *Kismet Acquisition, LLC v. Icenhower (In re Icenhower)*,
3 757 F.3d 1044, 1050 (9th Cir. 2014) (finding that non-debtor’s real property became
4 property of the bankruptcy estate as a result of substantive consolidation order). A
5 substantive consolidation order imposes bankruptcy court jurisdiction on non-debtor assets
6 and therefore affects title to and possession of those assets. See *Schwab v. Reilly*, 560
7 U.S. 770, 794 n. 21 (2010) (“Section 541 is clear that title to the [debtor’s property] passed
8 to [the bankruptcy] estate at the commencement of her case”); *Mwangi v. Wells Fargo*
9 *Bank, N.A. (In re Mwangi)*, 764 F.3d 1168, 1178 (9th Cir. 2014) (debtors have “no right to
10 possess or control estate property while it is property of the estate”); cf. *Giovanazzi v.*
11 *Schuetz (In re Lebbos)*, BAP No. EC-11-1735-KiDJu, 2012 Bankr. LEXIS 5962, 2012 WL
12 6737841, at *8 (9th Cir. BAP Dec. 31, 2012) (“Because the bankruptcy court had
13 jurisdiction over the [real property] by virtue of [11 U.S.C.] § 541(a) and 28 U.S.C. §
14 1334(e)(1), it had jurisdiction to enter [a judgment] vesting title to the [real property] in
15 Trustee.”); Federal Rule of Bankruptcy Procedure 7070 (allowing a bankruptcy court to
16 “enter a judgment divesting the title of any party and vesting title in others whenever the
17 real or personal property involved is within the jurisdiction of the court.”). Like the
18 fraudulent transfer avoidance action in *Kirkeby*, here, “[b]y definition,”¹⁴ the combining of a
19 consolidated entity’s assets and liabilities with the bankruptcy estate will affect title to or
20 right to possession of any consolidated real property asset.

21 Substantive consolidation’s relationship with fraudulent transfer law also
22 demonstrates that a substantive consolidation claim is a “real property claim” that may
23 support a lis pendens. This court’s decision in *In re Parkway Calabasas*, 89 B.R. 832
24 (Bankr. C.D. Cal. 1988), *aff’d*, 949 F.2d 1058 (9th Cir. 1991), preceded *Bonham* and was
25 discussed therein. See *Bonham*, 229 F.3d at 769. In *Parkway Calabasas*, the bankruptcy
26 court held that a fraudulent transfer claim arising from one debtor’s pre-petition payment of
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28 ¹⁴ *Kirkeby*, 33 Cal. 4th at 649.

1 a debt that was owed by a separate debtor is rendered moot if the two estates are
2 consolidated. 89 B.R. at 839 (“[s]ubstantive consolidation accomplishes the merger of the
3 two estates . . .”).

4 The court’s discussion of “the nature and consequences of substantive
5 consolidation, and . . . fraudulent conveyance[.]” in *Parkway Calabasas* is instructive. *Id.* at
6 836. “[S]ubstantive consolidation substitutes a single debtor, a single estate with a
7 common fund of assets, and a single body of creditors. Assets and liabilities of each entity
8 are pooled and inter-entity accounts and claims are eliminated.” *Id.* at 837 (citations
9 omitted). Where a putative consolidated non-debtor is an alleged transferee or indirect
10 beneficiary of a fraudulent transfer—as is the case here—the impact of a substantive
11 consolidation order is similar to the effect of a fraudulent transfer remedy. Much like the
12 effect of avoidance of a fraudulent transfer and recovery of the transferred asset,
13 substantive consolidation eliminates the harm to a transferor’s creditors and the unjust
14 enrichment of a transferee or indirect beneficiary. *Id.* at 839. A substantive consolidation
15 order remedies these ills by enlarging the asset pool available to pay the transferor’s
16 creditors and allowing those creditors to look to the assets of the transferee, or indirect
17 beneficiary, for payment. *Id.* (“Substantive consolidation . . . leav[es] no party unjustly
18 enriched and no creditors looking to an impoverished asset pool for payment.”).

19 Other courts’ analysis of the relationship between fraudulent transfer and
20 substantive consolidation claims comport with the Ninth Circuit authorities discussed
21 above. See, e.g., *Luxury Jewels, LLC v. Akers (In re Aroonsakool)*, BAP No. SC-13-1206-
22 JuKuPa, 2014 Bankr. LEXIS 1234, 2014 WL 1273696, at *3 (9th Cir. BAP Mar. 28, 2014)
23 (discussing the bankruptcy court’s conclusion that a “request . . . to obtain standing to
24 assert fraudulent conveyance theories as to transfers of [a] non-debtor’s assets, is
25 tantamount to a request for substantive consolidation.”); *Schnelling v. Crawford (In re*
26 *James River Coal Co.)*, 360 B.R. 139, 172 (Bankr. E.D. Va. 2007) (“Substantive
27 consolidation is a form of relief related to fraudulent transfer law. It is not strictly limited to
28 cases in which fraudulent transfers have been proven. In fact, it can be an alternative to

1 fraudulent transfer litigation.”). In *In re Owens Corning*, the Third Circuit described the
2 “subtle differences” between “remedies for corporate disregard” such as veil piercing,
3 fraudulent transfer, equitable subordination, and substantive consolidation. 419 F.3d at
4 205-206.

5 Turnover and fraudulent transfer bring back to the transferor debtor
6 assets improperly transferred to another (often an affiliate).
7 Substantive consolidation goes in a direction different (and in most
8 cases further) than any of these remedies; it is not limited to
9 shareholders, it affects distribution to innocent creditors, and it
mandates more than the return of specific assets to the predecessor
owner. It brings all the assets of a group of entities into a single
survivor.

10 *Id.* at 206. In *In re James River Coal Co.*, the bankruptcy court for the Eastern District of
11 Virginia reached a similar conclusion regarding the interrelationship between veil piercing,
12 fraudulent transfer, and substantive consolidation. 360 B.R. at 172.

13 Ultimately, substantive consolidation (like veil-piercing) boils down to
14 the issue of when the court should disregard the [entities’
15 separateness] because the [entities] involved effectively disregarded it
16 themselves. When entities are effectively alter-egos and the allocation
17 of assets and liabilities between them is not based on economic reality,
then the [structural separateness of the entities] should neither control
creditor recoveries nor put creditors in the position of spending
inordinate amounts of time and money to prove fraudulent transfers.

18 *Id.* As discussed above, the Supreme Court in *Sampsel* also addressed the interplay
19 between remedies such as equitable subordination, avoidance of fraudulent transfers, and
20 substantive consolidation, which all disregard corporate forms. 313 U.S. at 217-219
21 (recovering fraudulently transferred assets by consolidating non-debtor corporation with the
22 bankruptcy estate). That substantive consolidation, like an avoidance action, disregards
23 legal forms to satisfy creditors’ claims bolsters the conclusion that a substantive
24 consolidation claim may be a “real property claim” supporting a *lis pendens*.

25 In *Kirkeby*, the alleged “real property claim” under California Civil Code §
26 3439.07(a)(1) expressly provided for avoidance of a fraudulent or voidable transfer “to the
27 extent necessary to satisfy the creditor’s claim.” Here, similarly, substantive consolidation
28 provides for recovering ostensibly non-debtor assets to satisfy claims against the estate. 2

1 Collier on Bankruptcy ¶105.09 [3], at 105-110-11 (16th ed. 2019) (“In general, substantive
2 consolidation results in the combination of the assets of both [entities] into a single pool
3 from which the claims of creditors of both [entities] are satisfied ratably.”). Accordingly,
4 substantive consolidation is a remedy similar to avoidance of a fraudulent transfer, and
5 such a cause of action may be a “real property claim.”

6 Further, the effect of substantive consolidation is not diminished when a case
7 involves real property assets. *In re Icenhower*, 757 F.3d at 1049 (“The court . . .
8 substantively consolidated [the non-debtor entity] with the bankruptcy estate, such that the
9 [real property] interest was part of the estate *nunc pro tunc* to the petition date.”); *Sharp v.*
10 *Salyer (In re SK Foods, LP)*, 499 B.R. 809, 843-844 (Bankr. E.D. Cal. 2013) (ordering
11 substantive consolidation where “the assets that will be consolidated into the Debtors’
12 estate consist of real property”); *cf. Committee of Tort Litigants v. Catholic Diocese of*
13 *Spokane (In re Catholic Bishop of Spokane)*, 329 B.R. 304, 312-313 (Bankr. E.D. Wash.
14 2005) (“Even though a non-debtor entity may have a legal existence separate from the
15 debtor, that does not necessarily defeat substantive consolidation. Nor does the fact that
16 title to real estate is held in the name of a non-debtor preclude a determination that the
17 debtor has an interest in that real estate.”) (citation omitted). The court has found no
18 authority indicating that the effect of an order for substantive consolidation is limited, or
19 altered, when the consolidated assets include real property. A substantive consolidation
20 order transfers a consolidated entity’s assets, including real property, to the bankruptcy
21 estate. The consolidated assets are then available to satisfy the claims of the consolidated
22 creditors. A substantive consolidation order involving real property therefore plainly affects
23 title to and possession of real property pursuant to California law. California Code of Civil
24 Procedure § 405.4. This result is consistent with *Kirkeby* and the plain language of
25 California Code of Civil Procedure § 405.4.

3. **Plaintiffs' Allegations and Claims in the Amended Complaint**

1 Undertaking the “demurrer-like analysis” required by *Kirkeby*,¹⁵ the court determines
2 that the Amended Complaint states a “real property claim” under California Code of Civil
3 Procedure section 405.4. Plaintiffs allege in the Amended Complaint that Debtor and
4 Defendants executed numerous unlawful transfers of Debtor’s assets to, or for the benefit
5 of, Defendants, *Amended Complaint*, ECF 9 at 18-28 (¶¶ 77-150, Claims for Relief I – XIV)
6 (fraudulent transfer claims), including transfers in connection with the acquisition of the
7 Properties, *id.* at 11 (¶ 44). Plaintiffs also allege that Debtor and Defendants commingled
8 their affairs and assets to such an extent that substantive consolidation is necessary to
9 benefit the estate and creditors. *Id.* at 11 (¶¶ 44-46), 14-16 (¶¶ 56-67), 31 (¶¶ 179-183).
10 Plaintiffs seek to avoid and recover the value of those allegedly fraudulent transfers but
11 only request relief under fraudulent transfer theories as to the Bordbar Transfers, the Legal
12 Fee Transfers, the Leya Transfers, the Plea and Settlement Transfers, and the BMW
13 Transfer.¹⁶ *Id.* at 27-28 (¶¶ 143-150, Claims for Relief XIII and XIV).
14

15 As noted above, Plaintiffs, discussing the Bordbar Transfers, allege that the
16 Bordbars “either transferred [cash] assets to the Bordbar Trust, or used these assets to
17 purchase real estate or other assets, which they then transferred to the Bordbar Trust.” *Id.*
18 at 11 (¶ 44). Plaintiffs did not specifically allege, however, that the Bordbar Trust was an
19 “immediate or mediate transferee” under California Civil Code § 3439.08(b)(1)(B) or 11
20 U.S.C. § 550. Nor did Plaintiffs name the Bordbar Trust in the eleventh or twelfth claim for
21 relief in the Amended Complaint, which request avoidance of fraudulent transfers under
22 California common law.¹⁷ The court therefore considers the alleged transfers related to the
23 Properties, *id.* at 11 (¶ 44), with the Substantive Consolidation Claim in mind, because
24 Plaintiffs do not allege fraudulent transfer claims against the non-debtor Defendants as

25 ¹⁵ 33 Cal.4th at 647-648.

26 ¹⁶ As discussed above at note 3, undefined capitalized terms included herein have the meaning
ascribed to them as set forth in the Amended Complaint, ECF 9.

27 ¹⁷ The court construes Plaintiffs’ common law avoidance claims pursuant to the supplementary
28 provisions of California Civil Code § 3439.12. See generally *Jhaveri v. Teitelbaum*, 176 Cal.App.4th 740, 755
(2009) (citation omitted).

1 transferors under federal or state law.¹⁸ *Grimmett v. McCloskey (In re Wardle)*, BAP No.
2 NV-05-1000-KMoB, 2006 Bankr. LEXIS 4817, 2006 WL 6811026, at *4-5 (9th Cir. BAP
3 2006) (“Unless and until [a non-debtor defendant] is a debtor, either by a filed bankruptcy
4 petition or by substantive consolidation, there is no . . . bankruptcy estate and, thus, the
5 trustee cannot pursue § 547 and § 548 actions in its name. [. . .] [T]he only way the . . .
6 trustee could avoid the transfers of property that belonged to [the non-debtor defendant]
7 would be for [the non-debtor defendant] to become a debtor and for the cases to
8 substantively consolidate under [trustee’s] control.”); *Krohn v. Stipp (In re Plise)*, No. 2:14-
9 cv-00169-JAD-PAL, 2015 U.S. Dist. LEXIS 111143, 2015 WL 4997296, at *2 (D. Nev.
10 2015) (quoting the bankruptcy court’s order dismissing, without prejudice, trustee’s
11 fraudulent transfer and alter ego claims against non-debtor transferors: “trustee must now
12 decide what she wants to do with regard to her claims for fraudulent conveyance, in
13 particular, and whether substantive consolidation will allow her [standing] to [avoid transfers
14 by non-debtor defendants].”); see also *Spradlin v. Beads & Steeds Inns, LLC (In re*
15 *Howland)*, 674 Fed. Appx. 482, 488 (6th Cir. 2017) (“[S]everal courts have held that
16 substantive consolidation allows a trustee to bring avoidance claims involving transfers by
17 the consolidated non-debtor entity—exactly what the trustee seeks to do here.”).

18 Here, Plaintiffs have alleged that Debtor fraudulently transferred cash assets to the
19 Bordbars, who then either: (i) fraudulently transferred those same assets to the Bordbar
20 Trust, or (ii) used those assets to purchase the Properties, which the Bordbars then
21 transferred to the Bordbar Trust. *Amended Complaint*, ECF 9 at 11 (¶ 44). As discussed
22 above, an amended substantive consolidation claim brought against the Bordbars, the
23 Bordbar Trust, and Leya Technologies, if meritorious, will affect title to or possession of the
24 Properties. Here, an order granting substantive consolidation would bring the Properties

25 _____
26 ¹⁸ See generally California Civil Code §§ 3439.04(a) (“A transfer made or obligation incurred by a debtor
27 is voidable . . .”), 3439.05(a) (same); 11 U.S.C. §§ 544(a) (“The trustee . . . may avoid any transfer of
28 property of the debtor or any obligation incurred by the debtor that is voidable . . .”), 544(b)(1) (“the trustee
may avoid any transfer or an interest of the debtor in property or any obligation incurred by the debtor that is
voidable . . .”), 548(a)(1) (“The trustee may avoid any transfer . . . of an interest of the debtor in property, or
any obligation . . . incurred by the debtor . . .”).

1 into the bankruptcy estate for the benefit of creditors pursuant to 11 U.S.C. §§ 105 and
2 541(a). Under the plain language of California Code of Civil Procedure § 405.4, Plaintiffs'
3 Amended Complaint had included a substantive consolidation cause of action that, if
4 meritorious, would affect "title to, or the right to possession of, specific real property," and
5 while that claim has been dismissed, Plaintiffs have leave of court to file an amended
6 substantive consolidation claim.

7 **ii. IT WOULD BE PREMATURE TO EXPUNGE THE LIS PENDENS**

8 Plaintiffs contend that it would be inappropriate to expunge the lis pendens at this
9 juncture because the court dismissed the Substantive Consolidation Claim without
10 prejudice and with leave to amend. *Plaintiffs' Opposition to Motion to Expunge Lis*
11 *Pendens*, ECF 77 at 6-9 (citing *inter alia McGhee v. Deutsche Bank National Trust Co.*, No.
12 EDCV1300281VAPOPX, 2013 WL 12137104, at *8 (C.D. Cal. May 29, 2013); *McGough v.*
13 *Wells Fargo Bank, N.A.*, No. C12-0050 TEH, 2012 U.S. Dist. LEXIS 84327, 2012 WL
14 2277931, at *9 (N.D. Cal. June 18, 2012); *Gomez v. Plaza Home Mortg., Inc.*, No.
15 09cv2855-L(RBB), 2011 U.S. Dist. LEXIS 27444, 2011 WL 940762, at *5 (S.D. Cal. Mar.
16 17, 2011)). Although the authorities cited by Plaintiffs are generally unreported cases, the
17 court agrees that expunging the lis pendens before reaching the merits of any amended
18 substantive consolidation claim, which the court determines is a "real property claim," would
19 be premature. The court, however, notes the possible prejudice to Defendants if Plaintiffs
20 are permitted to indefinitely maintain the lis pendens while the Substantive Consolidation
21 Claim hangs in abeyance.

22 During the April 30, 2020 hearing on the Motion, the court acknowledged that its
23 December 2019 Order imposed a burden on Defendants by allowing amendment of the
24 Substantive Consolidation Claim without specifying a deadline for amendment. *April 30,*
25 *2020 Hearing on Defendants' Motion to Expunge Lis Pendens* at 12:01-12:03 p.m., Adv.
26 No. 2:19-ap-01332-RK. Noting the potential unfairness in having an open-ended time to
27 amend, the court indicated that it was inclined to grant in part and deny in part Defendants'
28 Motion. *Id.* at 12:10-12:14 p.m. The court determined that the Motion should be

1 conditionally granted in part to expunge the lis pendens, assuming Plaintiffs fail to amend
2 the Substantive Consolidation Claim within 90 days of the entry of this memorandum
3 decision and concurrent order. *Id.* The court finds that 90 days is a reasonable time
4 permitting Plaintiffs to undertake discovery and identify non-debtor Defendants' creditors
5 before filing an amended substantive consolidation claim. In other words, the lis pendens
6 will be expunged if Plaintiffs fail to amend the Substantive Consolidation Claim within the
7 reasonable time set by the court. *Id.*

8 The court, thus, conditionally grants the Motion in part and orders the lis pendens
9 expunged if Plaintiffs do not file an amended substantive consolidation claim within 90 days
10 of the entry of this decision and concurrent order.

11 **iii. PLAINTIFFS ARE NOT PRECLUDED FROM BRINGING ANY AMENDED**
12 **SUBSTANTIVE CONSOLIDATION CLAIM IN THIS ADVERSARY**
13 **PROCEEDING**

14 Defendants argue, in the alternative, that "even if the Court were to accept . . . that
15 substantive consolidation is a 'real property claim' . . . there is no 'real property claim' *in this*
16 *case* because the substantive consolidation claim must be refiled, if at all, in a separate
17 proceeding." *Defendants' Reply in Support of Motion to Expunge*, ECF 79 at 10-11 (citing
18 California Code of Civil Procedure § 405.20). Defendants contend that any amended
19 substantive consolidation claim cannot be refiled in this action based on the court's
20 December 2019 Order. ECF 79 at 11 (citing *Order Granting in Part and Denying in Part*
21 *Defendants' Motion to Dismiss Plaintiff's First Amended Complaint*, ECF 57 at 2).

22 Defendants' position, however, overstates the court's ruling. In the December 2019 Order,
23 the court stated:

24 As suggested by the court, if Plaintiff intends to file an amended
25 substantive consolidation claim or motion, he should file it as a
26 separate proceeding so that the creditors of debtor and the nondebtor
27 party defendants need not involve themselves in the other claims in this
28 adversary proceeding.

ECF 57 at 2.

The court suggested that Plaintiffs file any amended substantive consolidation claim
separately from this adversary proceeding. It does not follow that "the substantive

1 consolidation claim cannot be refiled in *this* action[.]” ECF 79 at 11. The court’s suggestion
2 was pursuant to the court’s case management authority under 11 U.S.C. § 105 and based
3 on interests of efficiency and fairness to all parties in interest. *April 30, 2020 Hearing on*
4 *Defendants’ Motion to Expunge Lis Pendens* at 12:10-12:12 p.m., Adv. No. 2:19-ap-01332-
5 RK. The court’s suggestion was permissive, not mandatory.

6 Moreover, Plaintiffs addressed the technical requirement in California Code of Civil
7 Procedure § 405.20 during the April 30, 2020 hearing on the Motion. *April 30, 2020*
8 *Hearing on Defendants’ Motion to Expunge Lis Pendens* at 11:38-11:40 a.m., Adv. No.
9 2:19-ap-01332-RK (statements of Plaintiffs’ counsel) (“If necessary, we will amend [the
10 substantive consolidation claim], amend this complaint, and bring [the substantive
11 consolidation claim] in this complaint, if that is what is required to keep the lis pendens on.
12 The fact that we have the opportunity to not bring this again, or to bring it in a separate
13 proceeding, shouldn’t change the conclusion that granting the Motion to Expunge would be
14 premature.”); *id.* at 12:25-12:28 p.m. (statements of Plaintiffs’ counsel suggesting Plaintiffs
15 first bring any amended substantive consolidation claim in this adversary proceeding, then
16 seek to sever the claim into a separate adversary proceeding).

17 The facts of this case are perhaps usual because no purported “real property claim”
18 is currently before the court since the one claim was dismissed. However, that one claim,
19 the Substantive Consolidation Claim, is derived from the Amended Complaint, and that
20 claim has been dismissed without prejudice, but with leave to amend, so as discussed
21 above, expungement while leave to amend is pending would be premature. The court finds
22 that its suggestion in the December 2019 Order, ECF 57 at 2, does not preclude Plaintiffs
23 from satisfying the technical requirements of California Code of Civil Procedure § 405.20
24 and bringing any amended substantive consolidation claim in this action.

25 **iv. DEFENDANTS’ REQUEST FOR FEES AND COSTS IS DENIED**

26 Defendants contend that Trustee recorded the lis pendens on the Properties without
27 “substantial justification,” such that the court should award Defendants their attorneys’ fees
28 and costs as a prevailing party pursuant to California Code of Civil Procedure § 405.38.

1 *Motion to Expunge Lis Pendens*, ECF 63 at 13-14. The court adopts its tentative ruling as
2 set forth on the record during the April 30, 2020 hearing, denying the Motion as to the
3 request for fees and costs. *April 30, 2020 Hearing on Defendants’ Motion to Expunge Lis*
4 *Pendens* at 12:13–12:15 p.m., Adv. No. 2:19-ap-01332-RK. During the hearing, the court
5 noted that neither party disputed that whether a substantive consolidation claim may be a
6 “real property claim” under California law was an issue of first impression. *Id.* Even if the
7 court would grant the Motion, the court determines that there is substantial justification for
8 asserting that a substantive consolidation order would “affect . . . title to, or the right to
9 possession of, specific real property[.]” California Code of Civil Procedure § 405.4.

10 **v. THE NUNC PRO TUNC QUESTION IS NOT RIPE FOR ADJUDICATION**

11 In their Supplemental Brief, Defendants argue that the Supreme Court’s decision in
12 *Acevedo*¹⁹ “is inconsistent with granting substantive consolidation *nunc pro tunc*.”
13 *Defendants’ Supplemental Brief*, ECF 86 at 3. Defendants contend that “since substantive
14 consolidation can be granted, if at all, only prospectively, and not *nunc pro tunc* to the
15 commencement of the . . . bankruptcy case,” the Properties cannot be property of the
16 bankruptcy estate, and therefore, the Substantive Consolidation Claim cannot be a “real
17 property claim” under the California expungement statutes. *Id.* at 4 (citing 11 U.S.C. §
18 541(a)(1)).

19 In their Supplemental Brief, Plaintiffs assert that Defendants’ reliance on *Acevedo* is
20 misplaced because *nunc pro tunc* substantive consolidation orders are permissible under
21 *Acevedo*. Plaintiffs contend, in the alternative, that *Acevedo* is inapposite because the
22 decision does not affect whether a substantive consolidation claim is a “real property claim”
23 under California law. *Plaintiffs’ Supplemental Brief*, ECF 87 at 3-4. Plaintiffs also note that
24 11 U.S.C. § 541(a)(7) provides that the bankruptcy estate includes “[a]ny interest in
25 property that the estate acquires after the commencement of the case[.]” and therefore any
26 prospective substantive consolidation order does not alter the order’s effect on title to or
27

28 ¹⁹ *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020).

1 possession of real property. *Id.* at 4-5.

2 Plaintiffs seem to have the better argument. “Property of the estate includes ‘any
3 interest in property that the estate acquires after the commencement of the case.’” *Carroll*
4 *v. Tri-Growth Centre City Ltd. (In re Carroll)*, 903 F.2d 1266, 1270 (9th Cir. 1990) (citing 11
5 U.S.C. § 541(a)(7)); *see also MacKenzie v. Neidorf (In re Neidorf)*, 534 B.R. 369, 371 (9th
6 Cir. BAP 2015) (“Section 541(a)(7) makes property of the estate any interest in property
7 that the estate (not the debtor) acquires after the petition date.”). Defendants ask the court
8 to ignore entire subsections of 11 U.S.C. § 541(a)²⁰ and find that all estate property
9 acquired after the petition date—whether by turnover,²¹ substantive consolidation, or
10 otherwise—must somehow be retroactively acquired as of the commencement of the
11 bankruptcy case, while also not disturbing the Supreme Court’s recent holding in *Acevedo*.
12 A substantive consolidation order, whether prospective or *nunc pro tunc* to the petition
13 date, makes the assets of a consolidated entity property of the estate. As discussed
14 above, a substantive consolidation claim therefore affects title to or right to possession of a
15 putative consolidated non-debtor’s property.

16 Further, the Motion before the court seeks expungement of two lis pendens under
17 the “real property claim” prong of California’s expungement statutes, California Code of
18 Civil Procedure § 405.4. The court agrees with Plaintiffs that “whether substantive
19 consolidation is ordered *nunc pro tunc* or merely prospectively . . . [only] alters the date
20 upon which the effect is deemed to have occurred.” *Plaintiffs’ Supplemental Brief*, ECF 87
21 at 4. Before *Acevedo*, bankruptcy courts in the Ninth Circuit had been permitted to
22 substantively consolidate non-debtor estates *nunc pro tunc* under certain circumstances.
23 *Bonham*, 229 F.3d at 763 (“The bankruptcy court did not err in substantively consolidating
24 the estates, nor in doing so *nunc pro tunc*.”). After *Acevedo*, that authority may be in doubt.
25 *In re Telles*, No. 8-20-70325-reg, Ch. 13, 2020 Bankr. LEXIS 1167, 2020 WL 2121254, at

26 _____
27 ²⁰ See, e.g., 11 U.S.C. § 541(a)(3) (“Any interest in property that the trustee recovers [after the
commencement of the case] under section 329(b), 363(n), 543, 550, 553, or 723 of this title.”), (a)(7) (“Any
interest in property that the estate acquires after the commencement of the case.”).

28 ²¹ 11 U.S.C. § 542.

1 *4 (Bankr. E.D.N.Y. Apr. 30, 2020) (“The landscape of the law is different post-*Acevedo*,
2 and [the bankruptcy court] is bound to follow the precedent set by the Supreme Court.”).
3 Defendants may be correct that *Acevedo* precludes the court from using “a *nunc pro tunc*
4 order to give effect to an order of substantive consolidation before such time that the court
5 actually intended to enter an order of substantive consolidation.” *Defendants’*
6 *Supplemental Brief*, ECF 86 at 5. Plaintiffs argue that *nunc pro tunc* substantive
7 consolidation orders survive *Acevedo* because the orders “‘reflect the reality’ of what has
8 already occurred.” *Roman Catholic Archdiocese of San Juan, Puerto Rico v. Acevedo*
9 *Feliciano*, 140 S. Ct. 696, 700-701 (2020) (quoting *Missouri v. Jenkins*, 495 U.S. 33, 49
10 (1990)). Whether *Bonham* and *Acevedo* may co-exist regarding the issuance of
11 substantive consolidation orders *nunc pro tunc*, however, is not ripe for adjudication here.
12 It would be premature for the court to issue, in essence, an advisory opinion on the merits
13 of any to-be-filed amended substantive consolidation claim and the relief requested therein.

14 Accordingly, the court determines that *Acevedo* does not affect whether a
15 substantive consolidation claim may be a “real property claim” under California law. The
16 court will address any request for relief when, or if, Plaintiffs file an amended substantive
17 consolidation claim. The court declines to decide whether, after *Acevedo*, courts in the
18 Ninth Circuit may issue an order for substantive consolidation *nunc pro tunc* to the petition
19 date.

20 III. CONCLUSION

21 For the foregoing reasons, the Motion is granted in part and denied in part as the
22 court determines the following:

- 23 1. The Motion is denied to the extent that Defendants seek expungement of the two lis
24 pendens under California Code of Civil Procedure §§ 405.20, 405.30, 405.31, and
25 405.4 at this time.
- 26 2. The Motion is conditionally granted in part and the lis pendens ordered expunged
27 only if Plaintiffs do not file an amended substantive consolidation claim within 90
28 days of the entry of this memorandum decision and order thereon.

1 3. The Motion is denied to the extent that Defendants seek an award of attorneys' fees
2 and costs pursuant to California Code of Civil Procedure § 405.38.

3 4. The Motion is denied to the extent that Defendants seek expungement of the lis
4 pendens following the Supreme Court's decision in *Roman Catholic Archdiocese of*
5 *San Juan, Puerto Rico v. Acevedo Feliciano*, 140 S. Ct. 696 (2020), and such denial
6 is without prejudice.

7 IT IS SO ORDERED.

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Date: July 7, 2020



Robert Kwan
United States Bankruptcy Judge