UNITED STATES BANKRUPTCY COURT

CENTRAL DISTRICT OF CALIFORNIA

SANTA ANA DIVISION

In re

Andrea Steinmann Downs,

Debtor.

Thomas H. Casey, Chapter 7 Trustee,

Plaintiff,

v.

Lora Rae Steinmann, et al.,

Defendants.

Case No. 8:16-bk-12589-SC

Chapter 7

Adv No: 8:18-ap-01168-SC

MEMORANDUM DECISION GRANTING JUDGMENT ON THE PLEADINGS IN FAVOR OF THE DEFENDANTS AND DENYING PLAINTIFFS' MOTION TO AMEND COMPLAINT

Date: November 4, 2020
Time: 11:00 a.m.
Place: Courtroom 5C
Ronald Reagan Federal Building and Courthouse
411 West Fourth Street
Santa Ana, CA 92701-4593

I. INTRODUCTION

This matter is before the Court on the Motion for Judgment on the Pleadings Pursuant to Federal Rule of Civil Procedure 12(c) ("Motion") (Dkt. No. 262),[1] which was filed on October 14, 2020, by Defendants Lora Rae Steinmann ("Mrs. Steinmann"), Heinz H. Steinmann ("Mr. Steinmann" and together with Mrs. Steinmann, the "Parents"), and Eric Steinmann ("E. Steinmann," and together with the Parents, the "Steinmann Trustee Defendants"). Also before the Court is the Joinder to the Motion ("Joinder" and together with Motion, the "Motion for Judgment on the Pleadings") (Dkt. No. 264) filed that same day by Defendants Susanna Steinmann Wilson, Thomas Steinmann, John Steinmann, Mary Sypkens, Teresa Steinmann Stapleton, Katy Steinmann Belknap, Jeff Steinmann, and Heinz J. Steinmann (collectively, the "Sibling Defendants" and together with the Steinmann Trustee Defendants, "Defendants").

On October 21, 2020, Plaintiff and Chapter 7 Trustee Thomas H. Casey ("Plaintiff" or "Trustee") and Intervenors Hausman Holdings, LLC, and David and Pamela Moellenhoff (collectively, "Intervenors" and together with Plaintiff, the "Plaintiffs") filed their Joint Opposition to Defendants' Motion for Judgment on the Pleadings Under Rule 12(c) and, in the Alternative, Motion to Amend Complaint ("Joint Opposition") (Dkt. No. 274). On October 28, 2020, Defendants filed their Reply to the Joint Opposition ("Reply") (Dkt. No. 287).

The matter came on for hearing on November 4, 2020. Appearances were as noted on the record.

Having considered the parties' arguments and the applicable legal authority, as discussed more fully below, the Court **GRANTS** the Defendants' Motion for Judgment on the Pleadings, awards judgment in favor of the Defendants, and **DENIES** the

[1] References to "Dkt. No. X" refer to the docket in the instant adversary proceeding, while references to "Bk. Dkt. No. X" refer to the docket in the main bankruptcy case.

Plaintiffs' Motion to Amend Complaint, which was made within the Plaintiffs' Joint Opposition to the Motion for Judgment on the Pleadings.

II. BACKGROUND

A. Factual History

The Court was randomly reassigned the chapter 7 bankruptcy case of *In re Andrea Steinmann Downs* on July 31, 2020, by virtue of the retirement of a judicial colleague (Dkt. No. 178). Several affiliated adversary proceedings, including this one, were pending at the time of the reassignment.

The bankruptcy case, originally filed as a Chapter 11, has been pending since June 19, 2016. It was converted to Chapter 7 on September 7, 2017, and this adversary proceeding was brought by the Chapter 7 Trustee on September 6, 2018.

The Debtor, Andrea Steinmann Downs ("Debtor"), is not a defendant in this adversary proceeding. The eleven Defendants are certain members of the Debtor's family, including her senior citizen mother and father, and her nine adult siblings.

The Chapter 7 Trustee, Thomas H. Casey (defined above as "Plaintiff" or "Trustee"), is the plaintiff in this action; however, two sets of unsecured creditors, Hausman Holdings, LLC and David and Pamela Moellenhoff (defined above, collectively, as "Intervenors"), who together hold approximately $5,000,000 in non-dischargeable unsecured claims against the Debtor, seem to be the primary beneficiaries to the prosecution of this case.

B. Procedural History

On September 6, 2018, the Plaintiff filed a Complaint: (1) to Avoid and Recover Fraudulent Transfer Pursuant 11 U.S.C. §§ 548(a)(1)(A), 544(b) and 550;[2] (2) for Imposition of a Resulting Trust; (3) for Declaratory Relief; (4) for Preservation of the

[2] While the Complaint's caption and the Fourth Claim for Relief for Preservation of Estate Property, refer to a claim for relief under section 548(a)(1)(A) of the Bankruptcy Code, no such claim for relief is actually stated within the Complaint.

Transfer for the Benefit of the Estate; and (5) for Attorneys' Fees and Costs ("Complaint") (Dkt. No. 1).

On November 8 and 9, 2018, two motions to dismiss were filed by the Sibling Defendants and the Steinmann Trustee Defendants, respectively (together, "Motions to Dismiss") (Dkt. Nos. 25 and 27). On December 26, 2018, the Trustee filed an opposition to the Motions to Dismiss ("Opposition to Motions to Dismiss") (Dkt. No. 39). On January 2, 2019, the Steinmann Trustee Defendants and the Sibling Defendants, respectively, filed replies (Dkt. Nos. 41 and 42). On January 15, 2019, the Court entered orders denying each of the Motions to Dismiss (together, "Orders Denying Motions to Dismiss") (Dkt. Nos. 49 and 50). Neither the Orders Denying the Motions to Dismiss, nor the predecessor Court during the hearing, set forth any findings of fact or conclusions of law.

On January 23, 2019, the Sibling Defendants and the Steinmann Trustee Defendants filed their respective answers to the Complaint (Dkt. Nos. 53, 55 (as amended by Dkt. No. 56), and 57.)

On January 29, 2019, the Steinmann Trustee Defendants and the Sibling Defendants each, respectively, filed notices of appeal of the Orders Denying Motions to Dismiss (Dkt. Nos. 58 and 60). Shortly thereafter, the Defendants each filed motions for leave to pursue an interlocutory appeal (Dkt. Nos. 59 and 61) and respective motions for stay pending appeal ("Motions for Stay Pending Appeal") (Dkt. Nos. 63 and 65).

On February 12, 2019, the Trustee filed Oppositions to the respective Motions for Stay Pending Appeal (Dkt. Nos. 71 and 72), asserting, among other things, that "The Court should not issue a stay pending Defendants' appeal … from the Interlocutory Order. Defendants have failed to prove that they have a strong likelihood of succeeding on the merits of the Appeal." Opposition to Motion for Stay, Dkt. No. 72, page 2:18-20.

On February 26, 2019, hearings were held on the Motions for Stay Pending Appeal, and on March 28, 2019, the predecessor Court granted stays pending the appeals (Dkt. Nos. 107, 108).[3]

On September 17, 2019, the Intervenors—two sets of unsecured creditors holding approximately $5,000,000 in non-dischargeable claims against the Debtor—sought leave to intervene in the adversary proceeding ("Motion to Intervene") (Dkt. No. 122), which the Defendants opposed (Dkt. No. 135). The Motion to Intervene was partially granted on December 11, 2019, but only as to the second and third claims for relief in the Complaint (Dkt. No. 145).[4] The Intervenors also loaned $250,000 to the estate to partially fund the Trustee's legal fees in this matter. *See* motion filed on March 17, 2020 (Bk. Dkt. No. 798) and granted on April 7, 2020 (Bk. Dkt. No. 841). The Trustee, in a sworn declaration, asserted that the litigation funding was necessary and appropriate in order to provide a means of continuing the "investigation and pursuit of assets." Declaration of Thomas H. Casey, Bk. Case Dkt. No. 798, page 8 of 16, ¶ 5. *See also* Motion for Order Authorizing the Trustee to: (1) Incur Debt Pursuant to 11 U.S.C. § 364(d); and (2) Enter into Transactions Outside the Ordinary Course of Business Pursuant to 11 U.S.C. § 363(b), *Id.*, pages 2 and 6 of 16.

Upon reassignment of this case in July 2020, this Court carefully read every pleading, filing, and order in this adversary proceeding, as well as every pleading, filing,

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[3] This Court infers that the predecessor Court concluded that the appealing Defendants had a likelihood of success on the merits of the appeal. Indeed, had this Court been the one to rule on the request for a stay, it would be a moral certainty - a probability so great as to allow no reasonable doubt - that the appeal issues raised, whether in an interlocutory appeal or an appeal on a final judgment or order, would most likely succeed on the merits. However, the Bankruptcy Appellate Panel ("BAP") correctly dismissed the appeal as interlocutory**, and further observed that the Bankruptcy Court had issued no findings of facts or conclusions of law in its decision.** *See* June 4, 2019 Mandate, Dkt. No. 118, page 2 ("Since the bankruptcy court has not made a determination of crucial factual issues, including the character of the trust, and whether the trust is estate property under applicable state and federal law, the interests of judicial economy would not be served by granting leave to appeal.").

[4] Intervenors were granted standing to intervene only as to the second and third claims for relief in the Complaint for Resulting Trust and Declaratory Relief, respectively. *See* Order Granting in Part and Denying in part Motion to Intervene, Dkt. No. 149, ¶ 2 ("2. The Motion is granted as to the permissive intervention under Federal Rules of Civil Procedure 24(b)(1)(B) with the following limitations: 1. The scope of the Movants' intervention is limited to the second and third claims raised in the Complaint, **which means that their discovery efforts, all motions and trial arguments must be related to the second and third claims**…") (emphasis added); *see also* Memorandum of Decision on Motion to Intervene, Dkt. No. 145.

and order in the main bankruptcy case and other affiliated adversary actions. It has carefully reviewed all pleadings that have been presented to the Court with respect to on-going discovery disputes. It has reviewed carefully the obviously lightly considered early 2019 Motions to Dismiss[5], the oppositions, the limited, non-specific orders of the Bankruptcy Court, and the Order Dismissing Appeal and appellate mandate of the Bankruptcy Appellate Panel. It is safe to say that ignorance of, or turning a blind eye to, rudimentary California trust and estate law manifested itself in the creation and continuation of this expensive and wasteful adversary proceeding for so long. It was only to the Trustee's credit that he sought to lay-off his and his counsel's risk (up to $250,000) by negotiating a litigation financing loan to the estate by the Intervenors.

On October 2, 2020, this Court, *sua sponte*, ordered that the Defendants file a Motion for Judgment on the Pleadings.[6] No party objected to the issuance of this order.

On October 14, 2020, the Defendants filed their Motion for Judgment on the Pleadings (Dkt. No. 262), and, not surprisingly, the next day, on October 15, 2020, the Plaintiffs filed their Motion to Dismiss Claims (1) to Avoid and Recover Fraudulent Transfers Pursuant to Fraudulent Transfers Pursuant to 11 U.S.C. §§ 548(a)(1)(a), 544(b) and 550; (4) for Preservation of the Transfer for the Benefit of the Estate; and (5)

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[5] The statement by the predecessor Court was:

"THE COURT: I appreciate all the great arguments. This is a lot more interesting than most of the cases I get on a daily basis. And I appreciate all the wonderful lawyering that's gone into this. I think it's clear that we're going to survive a motion to dismiss right now. This is the very beginning. I don't know where this is headed, but given how much there is that's involved, we're going to have to go forward. This is not ripe for a motion to dismiss to be granted. And I look forward to it. It's very interesting issues and cutting edge and we'll see what happens next, but it's pretty clear based on how much time it took just to argue this that we have enough here to go forward. At least a little bit more. So I am going to deny the motions to dismiss and so where does that leave us?" Transcript of Hearings held January 8, 2019, Dkt. No. 48, pages 36:17-37:6.

[6] Courts may *sua sponte* set a hearing and enter judgment provided that all parties are provided with sufficient notice. *See generally Easley v. City of Riverside*, 2018 U.S. App. LEXIS 12925 (9th Cir. 2018). The parties were also reminded within the Court's Order that, pursuant to Federal Rule of Civil Procedure Rule 12(d), if "matters outside of the pleadings are presented to and not excluded by the Court, the motion must be treated as one for summary judgment under Rule 56 [and] all parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Order Setting Hearing *Sua Sponte* on Motion for Judgment on the Pleadings and Establishing Briefing Schedule (Dkt. No. 233).

for Attorneys' Fees and Costs ("Motion to Voluntarily Dismiss Certain Claims") (Dkt. No. 268).

The Plaintiffs, in the Motion to Voluntarily Dismiss Certain Claims, seek to dismiss their primary claims for relief (but not all of them) (*See* Dkt. No. 268). The Plaintiffs wish to dismiss the fraudulent transfer claim for relief, the claim for relief to preserve estate property, and the claim for relief for attorney's fees. By the Motion to Voluntarily Dismiss Certain Claims, the Plaintiffs sought to maintain the claim for relief for "Resulting Trust" (the Second Claim for Relief) and for Declaratory Relief that the property sought to be recovered was estate property (the Third Claim for Relief).[7] On October 21, 2020, the Plaintiffs filed their Joint Opposition to Defendants' Motion for Judgment on the Pleadings (Dkt. No. 274).

This Memorandum Decision addresses each of the Claims for Relief, and for all **GRANTS** Judgment on the Pleadings in favor of the Defendants and against the Plaintiffs. The Court also denies with prejudice the request by the Plaintiffs to amend the Complaint, as the Plaintiffs have made no suggestions as to how any factual amendments could be adjusted, and this Court finds that no amendment with respect to further factual allegations could cure any defect of the Complaint. An amendment to the Complaint would be an entirely futile act. There is simply no basis to conclude an amended pleading would save this Complaint from dismissal under a later Rule 12(b)(6) motion, including the "Resulting Trust" and Declaratory Relief claims for relief, as described below.

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[7] The Motion to Voluntarily Dismiss Certain Claims is addressed in a separate Order of this Court. However, for informational purposes, a plaintiff cannot use Rule 41, either pursuant to (a)(1) or (a)(2), to dismiss specific causes of action and keep the remainder, so instructs the Ninth Circuit Court of Appeals. They must amend their Complaint under Rule 15(a). The relevant case law holds that "a plaintiff wishing to eliminate a particular claim from the action should amend the complaint under [Federal Rule of Civil Procedure] 15(a) rather than move to dismiss it under Rule 41(a)." *Sleep Sci. Partners, Inc. v. Lieberman,* No. C 09-04200 CW, 2011 U.S. Dist. LEXIS 72883, 2011 WL 2669494, at *1 (N.D. Cal. July 7, 2011 (citing *Ethridge v. Harbor House Restaurant,* 861 F.2d 1389, 1392 (9th Cir. 1988)). *See also G.P.P., Inc. v. Guardian Prot. Prod., Inc.*, No. 1:15-CV-00321-SKO, 2018 WL 385372, at *13 (E.D. Cal. Jan. 9, 2018). This Court finds that an amendment would be, among other things, futile. See Section III.I., below.

III. DISCUSSION

A. The Legal Standard Governing a Motion for Judgment on the Pleadings

"After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." Fed. R. Civ. P. 12(c). "Judgment on the pleadings is properly granted when there is no issue of material fact in dispute, and the moving party is entitled to judgment as a matter of law." *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009).

Put another way, "[a] judgment on the pleadings is properly granted when, taking all the allegations in the non-moving party's pleadings as true, the moving party is entitled to judgment as a matter of law." *Fajardo v. Cnty. of Los Angeles*, 179 F.3d 698, 699 (9th Cir. 1999). "Judgment may only be granted when the pleadings show that it is beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Enron Oil Trading & Transp. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997).

In determining whether judgment on the pleadings should be entered, a district court may consider the allegations made in the complaint and the answer, materials attached to the complaint in accordance with Rule 10(c) of the Federal Rules of civil Procedure ("Rules"), and any other materials that are (1) specifically referred to the in the complaint, (2) central to the plaintiff's claim, and (3) of uncontested authenticity. *Californians for Disability Rights, Inc. v. California Dep't of Transp.*, 249 F.R.D. 334, 337 (N.D. Cal. 2008) (citing *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006)). "If any other materials are to be considered, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Fed. R. Civ. P. 56." *Id.* (citing Fed. R. Civ. P. 12(c)).

Where a court grants a motion for judgment on the pleadings under Rule 12(c), leave to amend should be freely given, even if not requested, if it is possible that further factual allegations possibly be cured by the allegation of other consistent facts.[8]

Just to round out the legal standards, and to amplify this Court's determination that no factual amendments could be alleged to cure the Complaint, we are reminded that in California, "[t]he interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein." *Estate of Pittman*, 63 Cal. App. 4th 290, 296 (1998).

B. The First Claim for Relief: To Avoid Transfer Pursuant to 11 U.S.C. § 544(b)(1).

The First Claim for Relief is for fraudulent transfer under § 544(b)(1), which provides, in pertinent part that "the trustee may avoid any transfer of an interest in the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title." 11 U.S.C. § 544(b)(1). The Plaintiffs' Complaint points to the Federal Debt Collection Procedures Act ("FDCPA"), 28 U.S.C. § 3301, et seq., as the "applicable law" under which the transfer is avoidable under § 544(b)(1). Complaint, Dkt. No. 1, at ¶¶ 35, 36. As alleged in the Complaint, under § 544(b)(1) and the FDCPA, the Trustee may step into the shoes of the United States and "may obtain--(1) avoidance of the transfer or obligation to the extent necessary to satisfy the debt to the United States…." 28 U.S.C. § 3306(a)(1). The FDCPA defines "transfer" to mean "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien

[8] It should be noted that this Court denies the Plaintiffs leave to amend because an amendment to the Complaint cannot cure the Complaint's deficiencies. *Johnson v. Mazza*, 2017 U.S. Dist. LEXIS 23149, *14, 2017 WL 663153 ("[A] district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other [consistent] facts.").

or other encumbrance." 28 U.S.C. § 3301(6). "Asset" is defined, in pertinent part, as "property of a debtor." 28 U.S.C. § 3301(2). "A transfer is not made until the debtor has acquired rights in the asset transferred." 28 U.S.C. § 3305(4).

State law determines the debtor's interest in property, while federal law determines whether that interest constitutes property and an "asset" and whether a "transfer" has occurred under 28 U.S.C. § 3301. *Exp.-Imp. Bank of the United States v. ASIA Pulp & Paper Co., LTD.*, 609 F.3d 111, 117 (2d Cir. 2010) (citing *United States v. Craft*, 535 U.S. 274, 278 (2002) (holding that the FDCPA "itself 'creates no property rights, but merely attaches consequences, federally defined, to rights created under state law'.")).

Here, the Debtor, Andrea Steinmann Downs, has living elderly parents, Lora and Heinz H. Steinmann (the "Parents"), who are named as defendants in this action. The Debtor also has (at least) nine living siblings who are named as defendants in this action (defined as the "Sibling Defendants"). Lora and Heinz Steinmann have a fully revocable living trust.[9]

But, when Lora and Heinz learned that their daughter Andrea was in financial distress, they discussed the matter with her, and Lora and Heinz removed Andrea as a beneficiary from the Trust.[10] That action of removing the Debtor as a Trust beneficiary occurred pre-petition and is the putative fraudulent "transfer" that the Trustee points to in the Complaint. *See* Complaint, Dkt. No. 1, at ¶ 30.

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[9] This has not been contested in the Plaintiff's or Intervenors' pleadings or at the November 4, 2020, hearing. Further, this Court may consider the Trust and related documents (even though outside of the pleadings), because they are readily ascertainable and referenced in the pleadings. This Court determines that the Trust is revocable. *See Burch v. George*, 7 Cal. 4th 246, 254, 27 Cal. Rptr. 2d 165, 866 P.2d 92 (1994) ("The interpretation of a will or trust instrument presents a question of law unless interpretation turns on the credibility of extrinsic evidence or a conflict therein."); *Carne v. Worthington*, 246 Cal. App. 4th 548, 563 (Cal. App. 2016).

[10] This is one reason why a settlor might prefer a revocable trust over an irrevocable trust. Circumstances in peoples' lives change over time. Adult children may develop mental or physical health issues (including becoming wards of the state where an inheritance or trust distribution might exclude them from a lifetime of government services and benefits); they may become addicts, whether based on alcohol, drug, gambling, or a multitude of other issues. And, they may encounter serious financial problems.

According to the Plaintiffs, Lora testified that the reason Andrea was removed from the Trust was that they (Heinz and Lora) did not want Andrea's creditors to be the beneficiaries of any distribution she might receive under the revocable trust. *See* Intervenors' and Trustee's Joint Notice of Motion and Motion for Terminating Sanctions, Dkt. No. 222, page 1:22-2:3.

The Complaint, read in conjunction with the relevant Trust documents, alleges that the Debtor's living parents' removal of the Debtor from their revocable trust was a fraudulent transfer of the Debtor's property pursuant to section 544(b) of the Bankruptcy Code and the FDCPA.[11] Again, paraphrasing, the Complaint further alleges that the Debtor's siblings remain beneficiaries of the still revocable trust, and that they (or someone) agreed to hold that beneficial interest for the Debtor. By such agreement, the Complaint asserts, a "resulting trust" can be equitably created by this Court. By clear principles of both California and federal law, the removal of the Debtor before the filing of her bankruptcy case, as a beneficiary to the revocable trust by the Parents was not a "transfer" of any interest of the Debtor in property or "assets" under California law, and the alleged property is not property of the bankruptcy estate under federal law. Removal of the Debtor as a beneficiary to the revocable trust by the Parents did not create any "resulting trust" attributable to any of the Sibling Defendants (i.e., they too, pursuant to the relevant Trust documents, are only named beneficiaries and can be removed at any time by the Parents). Even more so, but not at issue here, the Parents could still, at their pleasure, remove any assets in the trust or terminate the trust.[12]

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[11] The Complaint also alleges, in a quite inferential and ill-plead manner, that the Internal Revenue Service, on the date of the Petition, held an *allowable* estimated claim for $200, in an attempt to confer standing on the Trustee with respect to the Federal Debt Collection Procedures Act, 28 U.S.C. § 3001 et seq. However, the IRS does not have an allowable claim either at the time of this judgment or at the date of the filing of the bankruptcy petition, as the IRS has recently filed an amended proof of claim, relating back to the petition date, asserting a zero claim in this case, and an Objection to the initial claim has been sustained by this Court. This is an interesting matter, as the amended proof of claim did not indicate, anywhere, why the IRS amended its Proof of Claim, and the IRS never responded to the objection to the IRS claim. It simply amended its claim to zero. Further, even if the Trustee had standing for his section 544 claim, for the multitude of reasons set out in this decision, the relevant claim for relief fails.

[12] While not a part of the factual setting in this case, the Ninth Circuit Bankruptcy Appellate Panel (and courts in many other circuits) has also taught that even in cases where an inheritance has vested, and then

When the beneficiary has no property rights (as clearly set forth below), section 544(b) and the FDCPA (and/or section 548, which was mentioned in the title to the Complaint but not actually plead within the body of the Complaint as a Claim for Relief) are non-starters.[13]

1. Analysis of California Trust and Estate Law and the FDCPA.[14]

A revocable trust, such as involved here, can be revoked, changed, and altered in any way during the settlor's lifetime. Any beneficiaries' interest in such a trust is an expectancy only, as long as it is not vested. The settlor can eliminate that expectancy interest at any time. Under the provisions of the Parent's Trust, when one settlor dies, the trust becomes irrevocable, and the beneficiaries' interest in the Trust vests.

Property transferred into a revocable inter vivos trust is not considered the property of a beneficiary for the settlor's lifetime, i.e. until the settlor dies. Accordingly, the beneficiaries' interest in that property is "'merely potential' and can 'evaporate in a moment at the whim of the [settlor]'." *Steinhart v. County of Los Angeles*, 47 Cal. 4th 1298, 1319 (2010) (quoting *Johnson v. Kotyck*, 76 Cal. App. 4th 83, 88 (Cal. App. 1999)).

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pre-petition, a debtor has exercised their rights under state law to "disclaim" the inheritance (i.e., permitting a beneficiary to disclaim a testamentary gift for all purposes), the relation-back doctrine (relating back to before the vesting of the inheritance) treats the interest as never having passed to debtor. *Wood v. Bright (In re Bright),* 241 B.R. 664, 665 (9th Cir. BAP 1999). Disclaimer is not an issue here.

[13] The Plaintiffs make vague references in their pleadings and in argument about a separate irrevocable trust created by the Parents of the Debtor. That alleged trust is not involved in this action.

[14] The Defendants' Motion is efficient, articulate and accurate in the analysis of trust law and its analysis is also adopted as the Court's own.

As the Court in *Kotyck* stated:

> So long as a trust is revocable, a beneficiary's rights are merely potential, rather than vested. The beneficiary's interest could evaporate in a moment at the whim of the trustor or, in the case of a conservatorship, at the discretion of the court. Giving a beneficiary with a contingent, nonvested interest all the rights of a vested beneficiary is untenable. We cannot confer on the contingent beneficiary rights that are illusory, which the beneficiary only hopes to have upon the death of the trustor, but only if the trust has not been previously revoked and the beneficiary has outlived the trustor.

Id.

Other cases have made short work of these principles of law, as in the 1947 case of *In re Canfield's Estate* from California's Second District Court of Appeal:

> In a discretionary trust where the trustee has absolute discretion, as here, in the allocation of the trust net income between the two beneficiaries (aside from a negligible portion thereof), each beneficiary has at most a mere expectancy. Bogert, Trusts and Trustees, § 226. Consequently, neither the beneficiaries nor their creditors can directly compel any allocation to any particular beneficiary. *Canfield v. Security-First Nat. Bk.,* 13 Cal. 2d 1, 31, 87 P.2d 830; *Restatement, Trusts*, sec. 155.

In re Canfield's Estate, 80 Cal. App. 2d 443, 451-52 (Cal. App. 1947).

In a decision handed down five years ago, the Ninth Circuit recognized these plain legal principles:

> The California Court of Appeal has explained that "[a] trust beneficiary has no legal title or ownership interest in the trust assets," and as such, in civil lawsuits, a trust beneficiary's "right to sue is ordinarily limited to the enforcement of the trust, according to its terms." *Saks v. Damon Raike & Co.*, 7 Cal. App. 4th 419, 427, 8 Cal. Rptr. 2d 869 (1992). In general, therefore, a trust beneficiary is not the entity positioned to take legal recourse to protect the trust assets, unless the beneficiary is seeking only to enforce the terms of the trust.

In re Tower Park Properties, LLC, 803 F.3d 450, 459 (9th Cir. 2015).

The First Claim for Relief, which the Plaintiffs have recently moved this Court to dismiss (just after the filing of the Defendants' Motion for Judgment on the Pleadings), seeks to avoid the unavoidable. A property right must be transferred to be eligible for avoidance under section 544(b) and the FDCPA. An expectancy interest is not a property right under California law, and under the Bankruptcy Code's expanded definition of "property of the estate," expectancy rights are not property of the estate if matured rights did not exist at the time of the filing of the petition.

Considering the bankruptcy case law's expansive definition of "property of the estate" under the Bankruptcy Code, the correct application of a contingency interest (not to be confused with an expectancy interest) in trust assets is set out by the Ninth Circuit Bankruptcy Appellate Panel in *Anderson v. Rainsdon (In re Anderson)*, 572 B.R. 743, 747 (9th Cir. BAP 2017), which makes it clear that the debtor has to be a beneficiary of the revocable trust with a vested interest *at the time of the filing of the petition* (i.e., "sufficiently rooted"), and then the contingency of the settlor's death can be met later. The Bankruptcy Appellate Panel explained:

> Section 541(a) provides that the filing of a bankruptcy case creates an estate. The estate is "comprised of all the following property, wherever located any by whomever held: (1) . . . all legal or equitable interests of the debtor in property as of the commencement of the case." This definition of property of the estate has been broadly construed to encompass a debtor's contingent interest in future payments, as long as that interest is "sufficiently rooted" in the debtor's prepetition past, even if that interest is reliant on future contingencies that have not occurred as of the filing date. *Segal v. Rochelle*, 382 U.S. 375, 379-80, 86 S. Ct. 511, 15 L. Ed. 2d 428 (1966). In this Circuit, any contingent interest of the debtor "sufficiently rooted in the pre-bankruptcy past" is estate property, even if the contingency is not satisfied until after the bankruptcy is filed. See *Neuton v. Danning (In re Neuton),* 922 F.2d 1379, 1382-83 (9th Cir. 1990) (beneficial interest in an inter vivos trust constituted property of the bankruptcy estate as debtor's interest vested upon the death of the preceding beneficiary which occurred after the bankruptcy petition was filed); *Rau v. Ryerson (In re Ryerson),* 739 F.2d 1423, 1425-26 (9th Cir. 1984) (contingent interests in payments due under a prepetition contract were property of the estate and passed to the trustee).

Anderson v. Rainsdon (In re Anderson), 572 B.R. 743, 747 (9th Cir. BAP 2017).

The above discussion is useful to illustrate the differences between "contingency interest" with an expectancy interest, and that the Debtor's interest must be vested at the time of the filing of the petition.

Therefore, under California law, the Debtor had no property interest in the revocable Trust at the time that she was removed as a beneficiary, but rather her interest was merely an expectancy interest—the Debtor never acquired an interest in property and she never transferred any such interest. Under the FDCPA, the Debtor never directly or indirectly parted with an "asset" or an interest in an "asset" and the Debtor never "acquired rights in the asset transferred." 28 U.S.C. §§ 3301(6), 3301(2), 3305(4).

Accordingly, there was no "transfer" under the FDCPA.

The removal by the settlors/trustee of a beneficiary in a revocable trust prior to the debtor/beneficiary's filing of the bankruptcy is not a transfer of property of any type, as fully articulated by the Defendants' Motion. The First Claim for Relief cannot be maintained. Judgment is awarded to the Defendants and against Plaintiff.

C. The Second Claim for Relief: For Imposition of Resulting Trust

A "resulting trust" is a trust that arises when property is transferred under circumstances showing that the transferee was not intended to take the beneficial interest in the trust property. Restatement (Second) of Trusts § 404*; Fulton v. Jansen*, 99 Cal. 587, 590 (1893); *see also Teixeira v. Domingos*, 171 Cal. App. 2d 196, 202-203 (Cal. App. 1959).

For a resulting trust to be equitably created, a property transfer is required. The only transfer alleged by the Trustee's second claim for relief was the pre-petition removal of the Debtor as a beneficiary by the settlors/trustee from the Trust, as deemed revocable after this Court's review of the underlying Trust documents. However, the removal of a beneficiary in a non-vested revocable trust is not a transfer of property of any type. Without a transfer of a property interest, no resulting trust can be created in equity.[15]

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[15] If the legal theory regarding a resulting trust presented by the Plaintiffs is followed to its logical conclusion, it would turn the privacy of estate planning into a minefield for both (trust) trustees and beneficiaries. It is difficult to imagine how many millions of individuals are named as beneficiaries in a trust created by their parents or others. Likewise, many people name non-family members such as charities as beneficiaries. Many people and charities may not even be aware that they have been named as a beneficiary in a revocable trust. If this Court follows the resulting trust argument, any individual or charity so named in a revocable trust could be required to defend a claim brought by a creditor (or a bankruptcy trustee on behalf of creditors) of another named beneficiary.

To be clear, such beneficiaries have received no assets and may never receive any distribution from a trust which may be amended or revoked at will, but they could be required to incur the expense of defending a claim from a trustee/creditor of another beneficiary named in the same trust. This could have devastating impacts for beneficiary planning where being named would no longer solely be a potential benefit, but a liability as well. The Trustee's argument turns estate planning with revocable trusts into a nightmare for the beneficiaries. But worse than that, it turns the privacy of family and business estate planning into a treasure trove for certain types of trustees or creditors who may be willing to sue innocent beneficiaries with the hope of recovering some benefit for them or the debtor's estate. This is a risk that no individual or charity beneficiary should be forced to undertake, and legally there is no basis for them to do so.

In every reported case, there is a demonstration that "property" has been transferred to someone to be held in trust for another. Furthermore, for purposes of bankruptcy avoidance actions, the property that is transferred must be property of the debtor. There are no trust cases found anywhere, where removal of a beneficiary holding only an expectancy interest (i.e., the trust is fully revocable) has given rise to a resulting trust where the other beneficiaries are holding property for the removed beneficiary. While the Plaintiff and Intervenors seem to be enamored with the prospect of this claim for relief, it is simply a non-starter.[16] Each and every case cited by the Plaintiffs demonstrates that their action fails.

The Plaintiffs' Joint Opposition presents a string of cases that purportedly support their position on resulting trusts or else refutes the Defendants' assertions. Every relevant case cited is not only distinguishable from the allegations contained in the present adversary complaint, but the legal holdings and inferences with respect to the legal issues described in those cases fully support the analysis of this Court and that of the Defendants. This Court will go through each and every relevant one of the Plaintiffs' cited cases here.

1. *Fidelity National Title Ins. Co. v. Schroeder*, 179 Cal. App. 4th 834 (Cal. App. 2009)

Plaintiffs' Argument: First, the Plaintiffs cite to *Schroeder* to show that "a resulting trust claim for relief is appropriate and stands independent of the Complaint's prior fraudulent transfer claim." Joint Opposition, Dkt. No. 274, page 10:13-16. The Court does not disagree, and so has properly evaluated the merits of the resulting trust cause of action independent of the alleged fraudulent transfer actions.

The Plaintiffs further cite to *Schroeder*, in an apparent attempt to show that judgment creditors, like the Plaintiffs, of the beneficiary of a resulting trust may reach

[16] Within the Plaintiffs' Motion to Voluntarily Dismiss Certain Claims, they desire to maintain this claim for relief, and they attempt to defend it here. Once again, the Defendants' Motion exquisitely and correctly sets out the applicable law on this matter and is adopted by the Court.

his or her equitable interest in the resulting trust. Joint Opposition, Dkt. No. 274, page 10:18-25. However, such a statement is a mischaracterization of the law. There must be an “equitable interest” in the first place.

Facts: In *Schroeder*, the defendant, who had a one-half interest in real property, transferred his one-half interest to the co-owner of that property for zero consideration. The defendant did so upon learning that a plaintiff creditor was planning to file a lien against the real property. The plaintiff filed a complaint alleging multiple causes of action, including fraudulent transfer and resulting trust. The plaintiff argued that the transfer was made only to insulate defendant from the debt owed to the plaintiff and that the court should find that the co-owner merely held the property in trust for the benefit of the defendant. The trial court denied the plaintiffs’ claims, but the appellate court remanded, finding that the trial court had not properly determined whether the plaintiff had proven (or could prove) that the co-owner held defendant’s one-half ownership in the property in trust under a resulting trust theory. In doing so, the appellate court noted the following:

> As support for the legal viability of its position, *Fidelity* relies on *Valente*, supra, 360 F.3d 256, a federal Court of Appeals decision that carefully analyzed the doctrine of resulting trust under Rhode Island common law and held that a creditor may pursue a resulting trust theory (in the manner suggested by *Fidelity*) as a form of common law equitable relief that would supplement the state's UFTA. (*Valente*, supra, at pp. 262–263.) *Valente* gave legal effect to the inferred intent of the debtor (as transferor) and his son (as transferee) by declaring under a “resulting trust” analysis that the debtor retained his equitable interest in the property, thus the creditor's prior execution lien was deemed to have attached to the debtor's equitable interest. (Id. at p. 264.) In effect, the creditor was allowed to step into the debtor's shoes for the purpose of establishing the existence of a resulting trust in order to allow the creditor's execution lien to attach to the debtor's equitable interest in the property. “The equitable interest found by the courts in these cases sufficed to provide the creditors relief from the debtors' fraudulent attempts to avoid attachment.” (Id. at p. 263.)

Schroeder, 179 Cal. App. 4th at 865.

The appellate court further noted that *Valente* was consistent with the circumstances presented in *Schroeder*:

> California law provides that a judgment lien attaches to all interests in real property, including equitable interests. (§ 697.340, subd.(a).) Also, under established common law in this state, a resulting trust may arise from a transfer of property under circumstances showing that the transferee was not intended to take the equitable or beneficial interest. (*Lloyds Bank California v. Wells Fargo Bank*, supra, 187 Cal.App.3d at pp. 1042–1043, 232 Cal. Rptr. 339.) Thus, allowing a judgment creditor to maintain a resulting trust cause of action in a case such as this one would merely apply a recognized legal and factual basis for concluding that the debtor actually retained an equitable interest to which a judgment lien may attach.

Id. at 866.

Relevant Analysis: The facts and law within *Schroeder* are simply not pertinent to this case. Prior to the transfer, the defendant in *Schroeder* was the actual, vested titleholder and legal co-owner of one-half interest in real property. As a vested titleholder and owner, the defendant had a matured property interest and full property rights. Accordingly, the defendant's judgment creditor had the right to attach a lien to the defendant's interests in the real property. The defendant, who possessed mature, vested ownership rights, then transferred the property.

Unlike the defendant in *Schroeder*, the Debtor has never held any vested or matured interest in the Trust assets in question. Rather, the Debtor was the beneficiary of her Parents' revocable trust. Even before her removal as a beneficiary of the revocable trust (the purported requisite "transfer" alleged by the Plaintiffs), the Debtor's interest was merely an expectancy interest.

2. *Concorde Equity II, LLC v. Miller*, 732 F. Supp. 2d 990 (N.D. Cal. 2010)

Plaintiffs' Argument: The Plaintiffs cite to *Miller* to further support their statement that, in California, a resulting trust claim for relief is appropriate and stands independent of the Complaint's prior fraudulent transfer claim. Joint Opposition, Dkt.

No. 274, page 10:13-18. Again, the Court does not disagree. However, the allegations made in the present case before the Court are wholly different than those of *Miller*.

Facts: In *Miller*, the defendants took the plaintiff's money from an escrow account and used that money to fund a loan to a third party. The plaintiff sued, asserting multiple claims, including a claim for resulting trust. The defendants, however, sought dismissal, contending that a resulting trust is a remedy, not a claim for relief. In denying the defendants' request to dismiss, the court ruled that the allegations were sufficient to state a claim for a resulting trust, stating that, "[w]hether labeled as a cause of action, or a remedy, the Court's focus is the gravamen of Plaintiff's complaint based on the alleged facts." *Miller,* 732 F. Supp. 2d at 1002.

Relevant Analysis: *Miller*, in fact, supports the Court's decision herein. Unlike the plaintiff in *Miller*, and as repeated throughout this opinion, the Debtor never had a vested property interest. Further, the *Miller* plaintiff granted the defendants a possessory interest in the money, with the expectation that the defendants would use that money for the plaintiff's benefit. There is no factual parallel here.

3. *Golden Mortg. Fund # 14 v. Kennedy (In re Golden Triangle Capital),* 171 B.R. 79 (9th Cir. BAP 1994)

Plaintiffs' Argument and Relevant Analysis: The Plaintiffs cite to *In re Golden Triangle* for the proposition that a "transaction" that has failed to carry out the parties' intent becomes a resulting trust. Joint Opposition, Dkt. No. 274, pages 10:28 – 11:1. However, in the present case, there is no transfer (or transaction) upon which an agreement, even if correctly and accurately pled, could be based.

4. *Rollins v. Neilson (In re Cedar Funding, Inc.),* 408 B.R. 299 (Bankr. N.D. Cal. 2009)

Plaintiffs' Argument: The Plaintiffs cite to *In re Cedar Funding* to support their statement that "[u]nder California law, a resulting trust . . . is enforceable in equity to carry out the inferred intent of the parties to establish a trust." Joint Opposition, Dkt. 274, page 11:4-6.

Relevant Analysis: The statement of law recited by the Plaintiffs is incomplete. First, the Debtor never had any property interest in the Trust assets, unlike the plaintiff investors in *Cedar Funding* who owned the cash investment. Second, the Debtor is not the transferor, unlike the plaintiff investors in *Cedar Funding* who voluntarily transferred their cash to the defendant. Third, there are no allegations that the Debtor attempted to obtain a security interest for an investment. In contrast, the plaintiff investors in *Cedar Funding* invested in a company and intended, but failed, to secure their investment.

5. *McGee v. Allen*, 7 Cal. 2d 468 (Cal. 1936)

Plaintiffs' Argument: The Plaintiffs assert, citing to *McGee* in support, that the Defendants' argument ignores the fact that (i) the basis for the resulting trust is an undisclosed agreement under which the Defendants are holding the property in the Trust for the benefit of the Debtor, and that (ii) an oral promise to hold certain property in trust for another legally gives rise to a resulting trust in such property. Joint Opposition, Dkt. 274, page 11:11-16.

Relevant Analysis: In *McGee*, the former client had inherited the property before seeking to transfer his interest to the first creditor. Unlike the former client in *McGee* who had inherited the property, the Debtor had not yet become an owner or vested interest-holder in the Trust assets (and still has not). The Debtor's interest in the assets remain nothing more than an expectancy interest in a revocable trust settled by her living Parents. Further, the Debtor was not the transferor of such interest.

Additionally, the *McGee* court did not explicitly rule that an oral promise gives rise to a resulting trust; rather, that court conceded that, for purposes of the argument, the defendant would still lose. However, whether an oral or written promise is required is not applicable here as the Plaintiffs cannot overcome the pertinent flaw that the Debtor did not possess a vested property interest, or seek to transfer any property interest.

6. *Kirk White & Co. v. Bleg-Hoffine Co.*, 6 Cal. App. 2d 188 (Cal. App. 1935)

Plaintiffs' Argument: The Plaintiffs argue that resulting trusts may be properly imposed on personal property. Joint Opposition, Dkt. 274, page 12:12-13.

Facts: *In Kirk White & Co*., the plaintiff filed an action against a car dealership owner on a promissory note and obtained a writ of attachment upon 35 cars. The defendant filed a third-party claim, asserting its claim of ownership of the attached property, as the defendant had furnished the money used in the owner's original purchase of the cars. The property was released to the defendant, who then placed the cars into the possession of the owner for the purpose of selling the cars. The court found that a resulting trust justifiably arose whereby the owner merely held the title, ownership, and possession of the cars in trust for the defendant, who was deemed the equitable owner of the attached cars upon its furnishing the consideration for the purchase of the cars in question.

Relevant Analysis: The Court does not disagree that a resulting trust may be imposed on personal property; however, the facts of the above case are distinguishable from the matter before the Court. In *Kirk White & Co.,* the defendant, who was deemed the equitable owner of the resulting trust, was the party from whom consideration flowed. As also noted by the *Kirk White & Co*. court, "it is an essential to the creation of a resulting trust that the consideration or money for the purchase must be shown to have been given at or prior to the time the purchase was made, and for the purpose of making the purchase." *Kirk White & Co*., 6 Cal. App. 2d at 191-192. In contrast to the defendant in *Kirk White & Co.,* here, the Debtor has never had possession or any ownership interest in the property at issue, nor has she been the party from whom consideration for the purchase flowed.

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7. McKinnon v. McKinnon, 181 Cal. App. 2d 97 (Cal. App. 1960)

Plaintiffs' Argument: The Plaintiffs argue that resulting trusts may be properly imposed on personal property. Joint Opposition, Dkt. 274, page 12:12-13

Facts: In *McKinnon*, at the time of the parties' marriage, the wife's separate property consisted of a property interest in a hotel. The wife reinvested the proceeds from the sale of the hotel into another business. A series of business reorganizations followed, which resulted in certain shares of stock being placed in her and her husband's name. The court found that there is a legal presumption that a trust exists, which presumption is applicable to real and personal property, and that it applies in the absence of evidence of a gift or other countervailing circumstances, "where property is acquired in the name of one person, for a consideration furnished by another; the grantee holds the title on a resulting trust for the one who furnished the consideration." *McKinnon,* 181 Cal. App. 2d at 11-12.

Relevant Analysis: The Court does not disagree that a resulting trust may be imposed on personal property; however, the above case is entirely distinguishable. First, the wife in *McKinnon* was the owner of the property interest and the subsequent stock which was ultimately transferred and held to be in a "resulting trust." Conversely, the Debtor in the present case did not have a property interest in the Trust. Second, there is no presumption applicable to the circumstance at hand. Rather, the Complaint, in conjunction with the relevant Trust documents, reflects that Debtor was merely a named beneficiary of the Parent's trust, and then, as permitted under the terms of the revocable trust and applicable law, removed as a beneficiary.

8. *Official Comm. of Unsecured Creditors v. Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.),* 432 B.R. 135 (Bankr. D. Del. 2010)

Plaintiffs' Argument: The Plaintiffs argue that simply because no California court has addressed whether a resulting trust exists in the exact context before the Court does not mean one cannot exist here, and that traditional categories "are those under which a resulting trust *may* exist; not *may only* exist." Joint Opposition, Dkt. 274, page 13:1-8 (emphasis in original).

Facts: In *Catholic Diocese of Wilmington*, the debtor, the administrative arm of a diocese, operated a pooled investment program in its own name to combine the assets of the participants and to provide them with investment opportunities that would be unavailable to them individually. The non-debtor defendants who participated in the investment account were parish corporations and charitable and educational organizations within the diocese. The debtor, among other things, managed the investment accounts, chose the investment managers, and provided the non-debtor defendants with quarterly statements. Under Delaware law, the court found a resulting trust existed in favor of the non-debtor defendants because the non-debtor defendants that participated in the pooled investment program transferred money to the debtor for the debtor to deposit in the investment account and invest those funds on the investors' behalf through the purchase of securities.

Relevant Analysis: A resulting trust may be found to exist in different, perhaps untraditional, contexts; however, the circumstances before the *Catholic Diocese of Wilmington* court are quite distinguishable from the matter before this Court. First, in *Catholic Diocese of Wilmington,* the non-debtor defendants were the undisputed, vested owners of the assets transferred. In contrast, the Debtor never had more than an expectancy interest in the Trust assets held in her Parents' revocable trust. Second, the "resulting trust" relationship at issue in *Catholic Diocese of Wilmington* was akin to an investor and broker, whereby the non-debtor defendants acted as the transferors while maintaining their status as beneficiary of the assets they provided to the debtor. Conversely, the Debtor in this case was not the transferor and did not arrange to place assets to which she had a vested interest into some kind investment arrangement that the Defendants would manage at her own election. In light of these significant differences, contrary to the Plaintiffs' argument, the case further supports this Court's analysis that a property transfer, or at least the existence of a property interest that may be transferred, is requisite to the finding of a resulting trust.

In light of the foregoing and having reviewed the allegations set forth by the Plaintiffs herein, the Second Claim for Relief cannot be maintained. Judgment is awarded to the Defendants and against the Plaintiffs.

D. The Third Claim for Relief: For Declaratory Relief

The Third Claim for Relief is titled as Declaratory Relief and seeks a determination from the Court "that the Trust Assets are property of the Estate." Complaint, Dkt. No. 1, ¶ 50.

The "Trust Assets" are defined in the Complaint as follows: "The Plaintiff is informed and believes, and based thereon alleges, that assets were contributed to the Trust by her parents, including, but not limited to real property, investments, checking and savings accounts and other personal property having an unknown value (collectively the 'Trust Assets')." Complaint, Dkt. No. 1, ¶ 27.

As set forth above within the discussions of the First Claim for Relief – Fraudulent Transfer (now sought to be dismissed), and the Second Claim for Relief – Resulting Trust, the law is clear that the Trust Assets are not property of the estate. The revocable trust has not vested, the remaining Sibling Defendants, as beneficiaries, only have their own expectancy interests, which again are not property interests within California. There is no resulting trust in which the estate may claim a property interest even under the expanded definition of property of the estate under section 541. Put another way, while at least one Parent is still living, the Parents have complete control over the defined trust assets. Neither the remaining beneficiaries, nor the Trustee, nor the Intervenors, have any control (i.e., a legal or equitable interest) over the trust assets.

Thus, judgment on the pleadings in favor of the Defendants is granted with respect to the Third Claim for Relief.

E. The Fourth Claim for Relief: To Preserve Transfers for the Benefit of the Estate Pursuant to 11 U.S.C. § 551

The Complaint seeks judgment pursuant to 11 U.S.C. § 551, requesting that "the Transfer is preserved for the benefit of the Estate as the Transfer is avoidable under 11 U.S.C. §§ 544, 548[17] and 550 as set forth above." The Plaintiff, having requested that the avoidance request contained in the First Claim for Relief be dismissed, does not defend the Fourth Claim for Relief in the Defendants' Motion for Judgment on the Pleadings. It is just as well, since the alleged Transfer, as described by the Complaint, is not actionable, as fully set forth herein. The "Transfer" referred to by the Complaint is the alleged act: "just prior to the Petition Date, on May 2, 2016, in accordance with the First Amendment To The Steinmann Trust, the Debtor was disowned by Defendants which constituted a transfer (the 'Transfer') of the Trust Assets and an attempt to channel assets away from the Estate." Complaint, Dkt. No. 1, pages 8-11, ¶ 30.

As previously discussed in detail, the First Claim for Relief under §§ 544 and 550 is legally infirm, and thus this Fourth Claim for Relief (to preserve alleged transferred property) must fail.

F. The Fifth Claim for Relief: For Award of Attorneys' Fees and Costs Pursuant to Bankruptcy Rule 7008(b)

Adding to the unmeritorious aspects of the entire Complaint, the Trustee has asserted a claim for attorneys' fees and costs pursuant to Federal Rule of Bankruptcy Procedure 7008(b), which the Trustee now seeks to dismiss. This rule, however, was deleted by a 2014 amendment to the Federal Rules of Bankruptcy Procedure—roughly four years before the Complaint was filed on September 6, 2018.[18] The procedure now

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[17] This section 548 reference may arise from a copy and paste job by the Plaintiff, since a section 548 claim for relief is not pled in the Complaint. Alternatively, the suggested cause of action could have been intentionally removed prior to filing because the Trustee and his counsel fully appreciated at the time of the filing of the Complaint how a section 548 claim could not possibly stand under the facts of this case.

[18] According to the FRBP Committee Notes on Rules-2014 Amendment, "[t]he rule is also amended to delete subdivision (b), which required a request for attorney's fees always to be pleaded as a claim in an allowed pleading. That requirement, which differed from the practice under the Federal Rules of Civil

requires that a claim for attorney's fees be made by a motion filed no later than 14 days after entry of the judgment, unless the governing substantive law requires those fees to be proved at trial as an element of damages as set out in Federal Rule of Bankruptcy Procedure 7054(b)(2).

In this instance, it appears that the Defendants, if legally justified and with a timely filed motion pursuant to, among other things, Federal Rule of Bankruptcy Procedure 7054(b)(2), may request their attorney fees and cost from the Plaintiffs.[19] As this claim is not a legally cognizable, judgment for the Defendants is ordered on the Fifth Claim for Relief.

G. The Plaintiff's Law of the Case Argument

The Plaintiff and Intervenors invoke the doctrine of law of the case with respect to the Defendants' Motion for Judgment on the Pleadings.[20] Their arguments rest on the existence of the January 15, 2019, Orders Denying Motions to Dismiss entered by the predecessor Court. As set forth below, even if the Orders Denying Motions to Dismiss could be classified as being the "law of the case" in the context of the Motion for Judgment on the Pleadings, there are good reasons why the Court is not precluded by the law of the case doctrine from reconsidering those issues.

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Procedure, had the potential to serve as a trap for the unwary. The procedures for seeking an award of attorney's fees are now set out in Rule 7054(b)(2), which makes applicable most of the provisions of Rule 54(d)(2) F.R. Civ. P. As specified by Rule 54(d)(2)(A) and (B) F.R. Civ. P., a claim for attorney's fees must be made by a motion filed no later than 14 days after entry of the judgment unless the governing substantive law requires those fees to be proved at trial as an element of damages. When fees are an element of damages, such as when the terms of a contract provide for the recovery of fees incurred prior to the instant adversary proceeding, the general pleading requirements of this rule still apply."

[19] On the other hand, according to various pleadings submitted to the Court, the Defendants conveyed a Bankruptcy Rule 9011 Demand to the Plaintiff and Intervenors, and the safe harbor period may have elapsed. This is not before the Court.

[20] According to the Ninth Circuit, it is an abuse of discretion for a trial court not to consider the law of the case when it is asserted. *Thomas v. Bible*, 983 F.2d 152 (9th Cir. 1993).

In one case on point, the Ninth Circuit, in *United States v. Alexander*, 106 F.3d 874 (9th Cir. 1997), addresses this issue:

> Under the "law of the case" doctrine, "a court is generally precluded from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *Thomas v. Bible*, 983 F.2d 152, 154 (9th Cir.) (cert. denied 508 U.S. 951, 124 L. Ed. 2d 661, 113 S. Ct. 2443 (1993). **The doctrine is not a limitation on a tribunal's power, but rather a guide to discretion**. *Arizona v. California*, 460 U.S. 605, 618, 75 L. Ed. 2d 318, 103 S. Ct. 1382 (1983). **A court may have discretion to depart from the law of the case where: 1) the first decision was clearly erroneous**; 2) an intervening change in the law has occurred; 3) the evidence on remand is substantially different; 4) other changed circumstances exist; or 5) **a manifest injustice would otherwise result**. Failure to apply the doctrine of the law of the case absent one of the requisite conditions constitutes an abuse of discretion. *Thomas v. Bible*, 983 F.2d at 155.

United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (emphasis added).

Neither of the Orders Denying Motions to Dismiss issued by the predecessor Court in January 2019, nor the transcript of that hearing, contain factual findings, conclusions, or rulings of any measurable type. Indeed, the Ninth Circuit Bankruptcy Appellate Panel specifically dismissed the interlocutory appeal of the predecessor Court's order, finding "[s]ince the bankruptcy court has not made a determination of crucial factual issues, including the character of the trust, and whether the trust is estate property under applicable state and federal law, the interests of judicial economy would not be served by granting leave to appeal." *See* Mandate, Dkt. No. 118, page 2.

Putting a finer point on this issue, interlocutory orders may be "reconsidered and reviewed at any time prior to final judgment." *Pittston-Luzerne Corp. v. United States*, 86 F. Supp. 460, 461 (M.D. Pa. 1949) (citation omitted). Moore's Federal Practice has observed: "Since a lower court cannot by its law of the case bind a higher court having appellate jurisdiction over it, the only sensible thing for a lower federal court . . . to do is to set itself right instead of inviting reversal above, when convinced that its law of the case is substantially erroneous." 1B Moore's Federal Practice P0.404[1], at 407 (1982) (footnotes omitted).

In the instance of successor judges involved in the same case, the Seventh Circuit explained: "We think Professor Moore's analysis is applicable to the situation in which one federal district judge believes the ruling of another district judge to be erroneous, as Judge Perry did in this case. We do not think that Judge Perry was foreclosed by the law of the case from holding that Diaz II was barred by res judicata." *Diaz v. Indian Head, Inc.*, 686 F.2d 558, 562-63 (7th Cir. 1982). This Court adopts the Seventh Circuit's analysis.

1. The Clearly Erroneous Finding

This Court has discretion to depart from the law of the case where the first decision was clearly erroneous. It is this Court's position, as demonstrated by this Memorandum Opinion, that the predecessor Court's Orders Denying Motions to Dismiss were entirely erroneous, both procedurally and on the merits. Indeed, the clear error of the predecessor Court can further be amplified by the granting of a complete Stay Pending Appeal (with respect to the Appeals to the Motion to Dismiss) by the predecessor Court, again without findings or conclusions. A further discussion is warranted.

The Motions for Stay Pending Appeal each correctly set out the requirement for a strong showing of likelihood of success on the merits.

On February 12, 2019, the Opposition to the Motion for Stay Pending Appeal was filed by the Plaintiff (Dkt. No. 72). The Opposition stated, "The Court should not issue a stay pending Defendants' appeal... from the Interlocutory Order. Defendants have failed to prove that they have a strong likelihood of succeeding on the merits of the Appeal." Opposition to Motion for Stay, Dkt. No. 72, page 2:18-20.

The predecessor Court held a hearing on February 26, 2019, and then granted the Stay Pending Appeal (Dkt. No. 107). This Court infers that the predecessor Court concluded that the appealing Defendants had a strong likelihood of success on the merits of the appeal. Indeed, had this Court been the one to rule on the stay matter, it would have been a moral certainty—a probability so great as to allow no reasonable doubt—that the issues brought forward, whether in an interlocutory appeal or an appeal on a final judgment or order, would most likely succeed on the merits. The law involved, and all of it in this matter, is so clear and obvious.

As the Ninth Circuit has stated, the "[l]ikelihood of success on the merits is the most important factor; if a movant fails to meet this 'threshold inquiry,' the court need not consider the other factors." *Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017).

Following up in 2019, the Ninth Circuit amplified the importance of the success factor, when it held "[t]he first prong in both tests—likelihood of success on the merits—is the same. And the Supreme Court has made clear that satisfaction of this factor is the irreducible minimum requirement to granting any equitable and extraordinary relief. *Trump v. Hawai'i*, 138 S. Ct. 2392, 2423 (2018). The analysis ends if the moving party fails to show a likelihood of success on the merits of its claims.*" City & Cty. of San Francisco v. United States Citizenship & Immigration Servs.*, 944 F.3d 773, 789-90 (9th Cir. 2019).

2. The Manifest Injustice Finding

This Court finds that a "manifest injustice" to the Defendants has resulted by the predecessor Court not providing findings of fact or conclusions of law with respect to the Orders Denying Motions to Dismiss. Had the predecessor Court undertaken a modicum of procedure on such an important motion and not put the burden on an appellate court to consider the law for the first time, the Bankruptcy Appellate Panel might have had the opportunity to carefully review the law on fraudulent transfers, revocable trusts, and resulting trusts, as this Court has now undertaken, and hundreds of thousands of dollars, and perhaps more than a million dollars, of legal fees might have been avoided. To put it in the words of one Defendants' counsel made during the November 4, 2020 hearing, to which this Court agrees, *"It's perverse, and it's been an abuse of this court process to engage in this lawsuit from day one."* November 4, 2020 Hearing at 12:15:19-25; Transcript, Dkt. No. 967, page 28:8-10.

H. The Inherent Power of a Court to Revisit Interlocutory Orders of Predecessor Court

The orders of the Bankruptcy Court denying the Defendant's Motion to Dismiss, entered on November 15, 2018, (Dkt. Nos. 49 and 50) were interlocutory, non-final orders. The Ninth Circuit has made it quite clear that a court has the inherent power to revisit its non-final orders, and that power is not lost when the case is assigned mid-stream to a second judge. In *Dreith v. Nu Image, Inc.*, 648 F.3d 779 (9th Cir. 2011), where at the District Court level (in the Central District) Judge Wilson replaced Judge Real, the Ninth Circuit held:

> Moreover, a district court has the inherent power to revisit its non-final orders, and that power is not lost when the case is assigned mid-stream to a second judge. Orders such as the default in this case are "subject to reconsideration and revision either by the same judge, a successor judge or a different judge to whom the case might be assigned." *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970). As the Companies state in their opening brief, almost half of Judge Wilson's twenty-five page opinion "was spent revisiting Judge Real's entry of the Companies' default." Judge Wilson stepped into Judge Real's shoes, and what he then did was manifestly appropriate in revisiting previous orders of the court. Effectively, Judge Wilson considered the matter as though he had been presented with a motion pursuant to Rule 55(c) to set aside the default.

Dreith v. Nu Image, Inc., 648 F.3d 779, 787-88 (9th Cir. 2011).

Following the Ninth Circuit's ruling in *Dreith*, a district court held:

> "[A] district court has the inherent power to revisit its non-final orders, and that power is not lost when the case is assigned mid-stream to a second judge." *Dreith v. Nu Image, Inc.,* 648 F.3d 779, 787-88 (9th Cir. 2011). See also *Perry v. Brown,* 667 F.3d 1078, 1086 (9th Cir. 2012) ("As a case progresses and circumstances change, a court may sometimes properly revise a prior exercise of its discretion, whether the new order is made by the same judge or another."); *City of L.A. v. Santa Monica BayKeeper*, 254 F.3d 882, 888 (9th Cir. 2001) (district court is vested with the "power to reconsider its own interlocutory order provided that the district court has not been divested of jurisdiction over the order."); *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 532-33 (9th Cir. 2000) ("[T]he District Court in its discretion may revisit prior interlocutory decisions entered by another judge in the same case if there are cogent reasons or exceptional circumstances."); *United States v. Houser*, 804 F.2d 565, 567 (9th Cir. 1986) ("All rulings of a trial court are subject to revision at any time before the entry of judgment."). "Generally stated, reconsideration is appropriate where . . . it is necessary to correct clear error or prevent manifest injustice." *Cachil Dehe Band of Wintun Indians Cmty. v. California*, 649 F. Supp.2d 1063, 1069 (E.D. Cal. 2009) (citing *Sch. Dist. No. 1J Multnomah Cnty., Oregon v. AC & S Inc.*, 5 F.3d 1255, 1263 (9th Cir. 1993)).

Malibu Media, LLC v. Doe, 2012 U.S. Dist. LEXIS 148215, *2-3 (E.D. Cal. 2012).

The Plaintiffs have argued that this Motion for Judgment on the Pleadings is simply a reconsideration of the November 15, 2018, Motion to Dismiss (that was determined by both the Bankruptcy Court and the Bankruptcy Appellate Panel as Interlocutory). This Court does not consider the present Motion for Judgment on the Pleadings as a motion for reconsideration; it is undertaken in the interest of correcting an otherwise avoidable and blatant error and for the purpose of remedying a manifest injustice.

I. The Court has Reviewed the Plaintiff's/Intervenors' Requests for Leave to Amend

The Ninth Circuit has identified five factors for a court to consider when determining to grant leave to amend a complaint, especially in the context of an ancillary motion of which they are opposing. These factors are described in the Ninth Circuit's *In re W. States Wholesale Nat. Gas Antitrust Litigation*, 715 F.3d 716 (9th Cir. 2013) and *United States v. Corinthian Colleges*, 655 F.3d 984 (9th Cir. 2011), which are cited by Defendants. Reply, Dkt. 287, page 16-21.

> Although Federal Rule of Civil Procedure 15(a) provides that leave to amend "shall be freely given when justice so requires," it "is not to be granted automatically." *Jackson v. Bank of Hawaii*, 902 F.2d 1385, 1387 (9th Cir. 1990). This court considers the following five factors to assess whether to grant leave to amend: "(1) bad faith, (2) undue delay, (3) prejudice to the opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his complaint." *Allen v. City of Beverly Hills,* 911 F.2d 367, 373 (9th Cir. 1990).

Learjet, Inc. v. Oneok, Inc. (In re W. States Wholesale Natural Gas Antitrust Litig.), 715 F.3d 716, 738 (9th Cir. 2013).

In this instance, the Plaintiff and Intervenors have already announced their "amendment" within their Motion to Dismiss, requesting that they maintain the Complaint's Second and Third Causes of Action. No other basis has been provided.

The Defendants have presented multiple arguments addressing these five factors, and the Court will discuss each *seriatim*.

1. Bad Faith

The Defendants identify the meaning of bad faith in the context of a motion for leave to amend as acting with intent to deceive, harass, mislead, delay, or disrupt, citing *Covert v. City of San Diego*, 2016 U.S. Dist. LEXIS 169434, at *5 (S.D. Cal. Dec 6, 2016). Their argument is that this litigation has been an unnecessary long and winding road, “filled with meritless claims void of legal basis and factual foundation.” Reply, Dkt. 287, page 17:2. They further argue that the action “is nowhere closer to stating a successful claim by Plaintiffs that it was at the time of the filing of the Complaint.” Reply, Dkt. 287, page 17:14-15.

This adversary proceeding has been pending since September 6, 2018. All discovery ended by deadline of October 30, 2020, as ordered by this Court on August 13, 2020 (Dkt. No. 189). Further, discovery was extended multiple times over the past two years. In reviewing the docket for this adversary proceeding, the Court finds ZERO instances of a demand by the Plaintiff or Intervenors to compel discovery.

This Court observes that, while the Plaintiff and Intervenors have had over two years to bring a motion to amend the Complaint, they have never done so, and they only now request (without formal motion and only as a defensive measure) the opportunity after (1) the discovery deadline has past, (2) after receiving the Defendants’ Rule 9011 demand and permitting the safe harbor time to expire, and (3) thirteen days after receiving the Defendants’ Motion for Judgment on the Pleadings. Reviewing the totality of these circumstances, this Court finds that the request to amend the Complaint is made entirely in bad faith as an intentional effort to delay the proceedings and prejudice the Defendants. The Court finds that this factor weighs in favor of disallowing amendment at this late time.

2. Undue Delay

This Court has already set forth why each cause of action in the Complaint, including the causes of action the Plaintiff and Intervenors wish to maintain, cannot survive a motion to dismiss. Any amendment allowed (and relying on the Plaintiff and Intervenors’ assertions in their Motion to Voluntarily Dismiss Certain Claims that they only wish to maintain the “Resulting Trust” and “Declaratory Relief” causes of action), would only delay a potential appeal. That appeal should have been addressed two years and hundreds of thousands of dollars ago. Discovery has been available since at least September 2018, and is now concluded. This Court finds that amendment to the Complaint would cause undue delay in the proceedings and that this factor weighs in favor of disallowing amendment at this late time.

3. Undue and Unfair Prejudice to the Opposing Party

This Court has already cited the statement of the Defendants' counsel that this adversary proceeding was, from the first instance, misguided and perverse. Had the predecessor Court issued meaningful conclusions of law in the initial denial of the 2018 Motion to Dismiss, an interlocutory appeal could have been considered over two years ago, and the legal issues resolved at a fraction of the legal costs. If an amendment to this Complaint is made, the Defendants will be prejudiced on several bases.

First, this Court has ordered the end of discovery, with no more extensions, after a period that has lasted for over two years. The argument from the Plaintiff and Intervenors that they need to amend is unpersuasive and unavailing since the only reason they seek to amend their complaint is a defensive posture—they believe they might not prevail in this particular Motion for Judgment on the Pleadings. There is nothing in the record that leads this Court to believe that they considered an amendment to their Complaint necessary prior to this time.

The Plaintiff and Intervenors have provided no underlying legal arguments to support any vision of an amendment to their complaint. On the other hand, the Defendants have filed their Motion for Judgment on the Pleadings, and they have spent the last two years and hundreds of thousands of dollars in legal fees. The prejudice to the Defendants in allowing an amendment at this late stage is quite high. The Court finds that this factor weighs in favor of disallowing amendment at this late time.

4. The Futility of any Amendment

The Plaintiff and Intervenors have vaguely asserted that there are contentions which might be added to their Complaint involving an undisclosed agreement or oral promises. This rises from the request to maintain the Resulting Trust cause of action. The inference is, although there has never been a transfer of property, or a transfer in an interest in property, either the Parents or the Sibling Defendants have a double secret, undisclosed, oral agreement to give the Debtor her share of the potential trust distribution back at the appropriate time. Even if this assertion was in the original (and only) Complaint, the assertion does not assist in the fact that no property interest was ever transferred, the requirement for the creation of a resulting trust. Or that such an agreement was enforceable. Or that the promisor might not breach the so-called agreement. Or that no consideration was given for such a promise. Or not knowing the identities of the parties to any agreement. After two years, in support of their informal request to amend the Complaint as a defensive measure to the pending Motion, the Plaintiff and Intervenors provide this Court with no evidence to support their assertion that such an agreement by and between anyone, exists. Discovery in this action has closed after two years. They further have not provided any convincing arguments or evidence that any such pleading amendments could assist their case. The Court finds that this factor weighs in favor of disallowing amendment.

5. Prior Amendments

The Plaintiff and Intervenors have not sought to amend their Complaint previously, over the past two years. Discovery has concluded. They have never provided any arguments or evidence that any pleading amendments could assist their case. While liberal amendment rights are generally favored, they are not automatic and must be based on factors that this Court has now, in its discretion, carefully considered.

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IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** the Defendants' Motion for Judgment on the Pleadings with respect to each and every Claim for Relief within the entire Complaint.

The Court also **DENIES** the Plaintiffs' Motion to Amend Complaint, which was made within the Plaintiffs' Joint Opposition to the Motion for Judgment on the Pleadings. The Court finds that any amendment would create undue, unnecessary and intentional delay, would be prejudicial to the Defendants, and would be futile, as discussed more fully above.

IT IS SO ORDERED.

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Date: November 17, 2020

Scott C. Clarkson
United States Bankruptcy Judge