No. _____

In The
Supreme Court of the United States

ALEJANDRO DIAZ-BARBA and
MARTHA MARGARITA BARBA DE LA TORRE,

Petitioners,

v.

KISMET ACQUISITION, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

DAVID A. NIDDRIE
Counsel of Record
JOHN S. ADDAMS
NIDDRIE, FISH & ADDAMS LLP
600 West Broadway,
Suite 1200
San Diego, California 92101
Telephone: (619) 238-6065
dniddrie@nfaappeals.com

Attorneys for Alejandro Diaz-Barba and Martha Margarita Barba de la Torre

D. ANTHONY GASTON
Attorney at Law
550 West C Street,
Suite 1860
San Diego, California
92101
Telephone: (619) 234-3103
dag@gastonlaw.net

Attorney for Martha Margarita Barba de la Torre

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. Whether Article III, § 1 of the United States Constitution permits the exercise of the judicial power of the United States by the bankruptcy courts based on "consent" implied from a litigant's conduct.

2. Whether Congress intended – by granting of exclusive *in rem* jurisdiction to United States bankruptcy courts over all of the property of the estate, "*wherever located*, as of the commencement of such case" [28 U.S.C. § 1334(e)] – to extend United States bankruptcy courts' *in rem* jurisdiction over real property in a foreign country, despite the presumption that legislation of Congress applies only within the territorial jurisdiction of the United States.

3. If 28 U.S.C. § 1334(e) extends United States bankruptcy courts' *in rem* jurisdiction over real property of the estate in foreign countries, may such jurisdiction nonetheless be limited by the parties in choice of foreign law/forum selection clauses contained in recorded transfer documents?

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioners Alejandro Diaz-Barba and Martha Margarita Barba de la Torre are citizens of Mexico who reside part of the year in the United States.

Respondent Kismet Acquisition, LLC is a Delaware limited liability company, wholly-owned by Wolfgang Hahn, a German citizen.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Alejandro Diaz-Barba and Martha Barba de la Torre (collectively "Diaz-Barba") respectfully submit this petition for a writ of certiorari to review a decision of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. 1-17) is reported at *Kismet Acquisition, LLC v. Diaz-Barba, et al.* (*In re Icenhower*), 757 F.3d 1044, 1050 (9th Cir. 2014). The district court's opinion (App. 18-62) is unreported. The bankruptcy court's opinion (App. 63-67) is unreported.

JURISDICTION

The Court of Appeals entered its judgment on July 3, 2014. The Petition is therefore timely, and this Court has jurisdiction under 28 U.S.C. § 1254(1).

28 U.S.C. § 2403(a) applies in this case. The notification required by Supreme Court Rule 29.4(b) has been made to the Solicitor General of the United States. The court of appeals did not make a certification to the Attorney General pursuant to 28 U.S.C. § 2403(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, § 1 of the Constitution provides:

> The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

U.S. Const. art. III, § 1.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 157 (which is reproduced in full at App. 121-124) provides bankruptcy courts may exercise: (1) "final order" jurisdiction over "core proceedings" that either "arise under" the Bankruptcy Code or "arise in" a case under the Code [§ 157(b)(1)]; and (2) "non-final order" jurisdiction under section 157(c) over "non-core" matters that are "related to" a bankruptcy case as to which a bankruptcy court is authorized to submit proposed findings of fact and conclusions of law to the district court for entry of judgment after de novo review, unless the parties expressly consent in writing to the bankruptcy court's final resolution of the matter [§ 157(c)].

28 U.S.C. § 1334(e) provides:

The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction –

> (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and
>
> (2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

11 U.S.C. § 549, in pertinent part, states:

(a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate –

> (1) that occurs after the commencement of the case; and
>
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
>
> (B) that is not authorized under this title or by the court.

(b) In an involuntary case, the trustee may not avoid under subsection (a) of this section a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of

the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of an interest in real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of an interest in such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such real property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to such interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

STATEMENT OF THE CASE

In this case, Petitioners challenge the validity of a United States bankruptcy court's judgment avoiding Petitioners' title to certain real property located in Mexico known as "Villa Vista Hermosa" and ordering the transfer of a beneficial trust interest in said property to Respondent.

A. Petitioners are Mexican Citizens Who, in 2004, Purchased Real Property in Mexico from a Nevada Company Determined (Four Years Later) to be an Alter Ego of the Debtor in the Underlying Bankruptcy Proceeding.

Petitioners are Alejandro Diaz-Barba (Diaz) and his 74-year-old mother, Martha Margarita Barba de la Torre (Sra. Barba). Both are citizens of Mexico; they reside for part of the year in the United States.

Villa Vista Hermosa was built by friends of Diaz-Barba, the Kocherga family, atop a hill near the ocean in the State of Jalisco, Mexico. When Diaz was a boy, he and Sra. Barba frequently visited the Kochergas at Villa Vista Hermosa. The Kochergas eventually sold Villa Vista Hermosa.

In 1995, the beneficial interest in Villa Vista Hermosa was owned by an American family – with legal title being held in a *fideicomiso* trust.[1] The American family sold Villa Vista Hermosa to Jerry Icenhower (who eventually became the debtor in the underlying bankruptcy proceeding).

In March 2002, Icenhower transferred his interest in Villa Vista Hermosa to Howell & Gardner Investments, Inc. ("H&G"), a Nevada corporation

[1] Under Mexican law, a foreign-national may not directly hold title to coastal property in Mexico, but may hold the beneficial interest in a fictitious bank trust formed to hold title to the property. ER2410.

purportedly owned by several shareholders, including Icenhower. ER1271, DE711-1; ER255-276, DE940.

Over a year-and-a-half later, in December 2003, Icenhower filed for bankruptcy protection under Chapter 7 of the Bankruptcy Code. ER1358, DE710.

In 2004, H&G sold Villa Vista Hermosa to Diaz-Barba for $1.5 million (i.e., the fair market value). ER1031, DE772. Diaz-Barba were very familiar with the property from their family visits with the Kochergas, but subsequently had no meaningful connection to the property, H&G and/or Icenhower prior to the negotiations leading up to the purchase.

In connection with the sale, Diaz-Barba's Mexican lawyer performed a due diligence search of title under Mexican law. ER73-74, DE109. As a creditor of the estate, Diaz-Barba was aware of Icenhower's bankruptcy, but not the connection between Icenhower and H&G.[2] Diaz-Barba therefore went forward with the purchase of Villa Vista Hermosa, which was accomplished in August 2004, when H&G's trustee bank extinguished its *fideicomiso* trust (*see* n.1) and transferred legal title directly to Diaz-Barba, as

[2] Diaz-Barba's Mexican lawyer spoke with the president of H&G at least five times. ER976-977. He also spoke with H&G's U.S. lawyer. ER982-983. Both the Mexican Public Registry of Property and the *Notario Publico* hired by Diaz-Barba confirmed H&G had been the owner of the Villa Property Interest for two years; and, importantly, the Public Registry further confirmed there were no claims or liens against it. ER988-989, 866, 853, 1730-1731.

Mexican citizens, by way of an "*escritura publica*" (i.e., the official recorded document notifying the public of the transfer). ER540-564, DE939; ER1031-1032, DE772.

The *escrituras* for all of these various transfers of Villa Vista Hermosa contained choice of law and forum selection clauses requiring any disputes regarding the property be litigated in Mexico pursuant to Mexican law. ER555 [Diaz-Barba], 1675 [Icenhower], 1692 [H&G].

B. Respondent and the Bankruptcy Court's Judgment.

In 2004, the Bankruptcy Trustee ("Trustee") in Icenhower's bankruptcy, commenced an adversary proceeding seeking to avoid Icenhower's transfer of Villa Vista Hermosa to H&G as a fraudulent transfer (the "Fraudulent Transfer Action"). ER2117-2174, DE677. Two years later, the complaint was amended to add Diaz-Barba. ER1987-3214, DE649-6.

During the pendency of the Fraudulent Transfer Action, Kismet acquired all of the Trustee's rights in the adversary proceeding. Kismet was created and was wholly-owned by developer Wolfgang Hahn, a German citizen, for the purpose of obtaining Villa Vista Hermosa through the Icenhower bankruptcy estate. ER773-774. Hahn, through another of his corporate entities, owns the real property adjacent to, and surrounding, Villa Vista Hermosa, which he hopes to develop into an exclusive beach resort. Hahn

– through Kismet – purchased the Trustee's rights in the adversary proceeding in order to pursue Villa Vista Hermosa for his resort development.

In 2006, shortly before Kismet took over, the Trustee also filed a separate action to determine whether H&G was Icenhower's alter ego. This enabled Kismet to reach all the way back to the transfer of Villa Vista Hermosa between Icenhower and H&G in order to treat the two transactions, separated by over two years, as one post-petition transfer from Icenhower to Diaz-Barba ("the Alter Ego-Avoidance Action"). The complaint also named H&G/Icenhower as co-defendants, seeking to recover from them the $1.5 million Diaz-Barba paid for Villa Vista Hermosa. However, since Hahn was only interested in acquiring Villa Vista Hermosa so that he could build his resort, Kismet did not pursue H&G/Icenhower to recover the $1.5 million purchase price Diaz-Barba paid for the property.

On June 2, 2008, the bankruptcy court issued consolidated findings of fact and conclusions of law in favor of Kismet in the Alter Ego/Avoidance Action. App. 73-120. First, the court applied Nevada law to hold H&G was Icenhower's alter ego by "reverse piercing of the corporate veil." The court then noted that since Diaz-Barba had knowledge of *Icenhower*'s bankruptcy, the transfer of the interest from *H&G* to Diaz-Barba must not have been in good faith and thus, an unauthorized post-petition transfer avoidable under 11 U.S.C. § 549(a). Based on such reasoning, the bankruptcy court proclaimed Villa Vista

Hermosa to be part of the bankruptcy estate *nunc pro tunc* back to December 2003, when Icenhower filed his bankruptcy petition.

Alternatively, the bankruptcy court held Kismet was entitled to judgment on the fraudulent conveyance action. Applying California common law, the bankruptcy court found (1) Icenhower's transfer of Villa Vista Hermosa to H&G was avoidable as fraudulent, and therefore, (2) Kismet could recover Villa Vista Hermosa from Diaz-Barba under 11 U.S.C. § 550(a)(2).

The bankruptcy court gave Kismet the sole option to recover "either the Villa Property or its value at the time of judgment from any combination of transferees," as follows:

> (a) Diaz-Barba were ordered to take all actions necessary to execute and deliver any documents needed to undo the avoided transfer, and cause the property to be reconveyed to a *fideicomiso* trust[3] naming Kismet as the sole beneficiary for the benefit of the bankruptcy estate; or
>
> (b) Alternatively, the court reserved jurisdiction to enter a judgment at Kismet's discretion, against Diaz-Barba for the amount

[3] As noted above, Mexican law prohibits a foreign-national from directly holding title to coastal property in Mexico; a fictitious bank trust formed to hold title to the property. ER2410.

> determined to be necessary to make the estate whole at the time of judgment.

App. 70. A substantially similar order was issued in the fraudulent conveyance action. App. 71.

Since Kismet did not pursue H&G/Icenhower to recover the $1.5 million purchase price Diaz-Barba paid for the property, the court issued no judgment against H&G/Icenhower for recovery of the the money Diaz-Barba paid for the Villa Vista Hermosa. Consequently, Diaz-Barba were deprived not only of the property itself but also the fair market value they paid for it, while H&G/Icenhower reaped the spoils of their fraudulent scheme.[4]

In response to the bankruptcy court's "reserv[ation of] jurisdiction to issue any and all orders necessary to carry out and enforce this judgment," both parties filed requests for clarification of the consolidated judgment. In response to Diaz-Barba's objections to the bankruptcy court's authority to order the immediate transfer of title to Mexican real property directly to a foreign entity, the court amended its consolidated judgment on July 30, 2008, clarifying that Villa Vista Hermosa was an interest in a *fideicomiso* trust, not a fee simple, and extending the deadline for the parties' compliance with the judgment. App. 63-67.

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[4] On December 17, 2010, the U.S. District Court (Hon. Irma E. Gonzalez) in a criminal action against Icenhower (09-cr-1514-IEG) found Diaz-Barba were victims of Icenhower.

C. Appellate Proceedings in the District Court and the Court of Appeals.

The bankruptcy court's judgment was affirmed by the district court on May 21, 2010. App. 18-62.

The Court of Appeals for the Ninth Circuit affirmed the bankruptcy court's judgment in the Alter Ego/Avoidance Action. App. 1-17. The Ninth Circuit found it "need not decide whether the bankruptcy court had authority to enter a final judgment in the post-petition transfer action" because Diaz-Barba had "waived any objection they could have raised under *Stern v. Marshall*, 131 S. Ct. 2594 (2011), to the bankruptcy court's entry of final judgment. *See Exec. Benefits Ins. Agency v. Arkison*, 702 F.3d 553, 566-70 (9th Cir. 2012), aff'd on other grounds, 573 U.S. ___ (2014)." App. 8-9.[5]

As to Diaz-Barba's assertion the bankruptcy court exceeded its jurisdiction by directly ordering the transfer of Mexican real property pursuant to its *in rem* jurisdiction under the Bankruptcy Code, the Court of Appeals concluded that under 28 U.S.C. § 1334(e): (1) the bankruptcy court exercises "exclusive jurisdiction . . . of all the property, ***wherever*** located, of the debtor as of the commencement of such case, and of property of the estate"; (2) Congress

[5] Having affirmed the Alter Ego/Avoidance Action, the Ninth Circuit determined the Fraudulent Transfer Action was moot because the bankruptcy court judgment was the same for both actions. App. 9.

clearly expressed its intent to apply U.S. law extra-territorially – even in a foreign country; (3) the bankruptcy court properly declined to enforce the parties' forum selection clauses choosing Mexico as the forum for resolving disputes; and (4) the doctrine of comity did not apply because the bankruptcy court's order did not require the Mexican Government to approve, recognize or enforce the court's judgment. App. 9.

REASONS FOR GRANTING THE PETITION

I. CERTIORARI IS NECESSARY TO RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE UNITED STATES COURTS OF APPEALS ON AN IMPORTANT CONSTITUTIONAL ISSUE – I.E., WHETHER ARTICLE III PERMITS THE EXERCISE OF THE JUDICIAL POWER OF THE UNITED STATES BY THE BANKRUPTCY COURTS BASED ON "CONSENT" IMPLIED FROM A LITIGANT'S CONDUCT.

In *Stern v. Marshall*, __ U.S. __, 131 S. Ct. 2594 (2011), this Court determined whether bankruptcy courts are authorized to enter final judgment on a debtor's common-law counterclaim for tortious interference against a creditor of the estate. Section 157(b)(2)(C) of Title 28 of the United States Code lists "counterclaims by the estate against persons filing claims against the estate" as a core proceeding the bankruptcy court may adjudicate to final judgment. The Court concluded Congress had violated Article

III, § 1 of the Constitution by vesting the power to adjudicate the tortious interference counterclaim in bankruptcy court. 131 S.Ct. at 2611, 2620. *Stern v. Marshall* made clear some proceedings labeled by Congress as "core" may not be adjudicated by a bankruptcy court in the manner designated by Section 157(b).

In *Executive Benefits Ins. Agency v. Arkison*, 702 F.3d 553 (9th Cir. 2012), the Ninth Circuit Court of Appeals concluded the rationale applied by this Court in *Stern* applied equally to fraudulent transfer actions, which similarly have their origins in common law. *Id.* at 566-70. In other words, as with the tortious interference counterclaim in *Stern,* the Ninth Circuit held bankruptcy courts were constitutionally prohibited by Article III from adjudicating fraudulent transfer claims to final judgment. *Id.*

However, the Ninth Circuit also held the defendant in the *Executive Benefits* case impliedly waived its right to an Article III court by failing to timely object to adjudication of its case by the bankruptcy court. 702 F.3d at 566-67. According to the Ninth Circuit, an Article III, § 1 objection to the bankruptcy court's adjudication of its claims is "waivable" and a waiver may be implied from a litigant's actions/inactions because Article III, § 1 "serves to protect primarily personal, rather than structural, interests." *Id.* at 567. "[T]he allocation of authority between bankruptcy courts and district courts does not implicate structural interests, because bankruptcy judges are 'officer[s] of' the district court and are appointed by the Courts of Appeals." *Id.* at 567, n.9.

As noted above, in accordance with its holding in *Executive Benefits,* the Court of Appeals in this case found it "need not decide whether the bankruptcy court had authority to enter a final judgment in the post-petition transfer action" because Diaz-Barba had "waived any objection they could have raised under *Stern v. Marshall*, 131 S.Ct. 2594 (2011), to the bankruptcy court's entry of final judgment." *Kismet Acquisition, LLC v. Diaz-Barba, et al.* (*In re Icenhower*), 757 F.3d 1044, 1050 (9th Cir.2014).

However, other courts of appeals have decided a litigant may not waive his Article III, § 1 objection to a bankruptcy court's entry of final judgment on state-law claims asserted by a party under Section 157(b)(2)(C). As explained by the Court of Appeals for the Sixth Circuit in *Waldman v. Stone,* 698 F.3d 910 (6th Cir. 2012): "Article III, § 1 not only preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States, but also serves as an inseparable element of the constitutional system of checks and balances." *Commodity Futures Trading Commn. v. Schor,* 478 U.S. 833, 850 (1986); internal quotation marks omitted. "The Article III, § 1 guarantee thus has a dual character: one part personal right of the litigant, one part structural principle." *Id.* at 917.

> "Article III could neither serve its purpose in the system of checks and balances nor preserve the integrity of judicial decision-making if the other branches of the Federal

> Government could confer the Government's 'judicial Power' on entities outside Article III." *Stern*, 131 S.Ct. at 2609. Article III envisions – indeed it mandates – that the judicial Power will be vested in judges whose tenure and salary are protected as set forth in that Article. To the extent that Congress can shift the judicial Power to judges without those protections, the Judicial Branch is weaker and less independent than it is supposed to be. See *Schor*, 478 U.S. at 850, 106 S.Ct. 3245 (Article III "safeguards the role of the Judicial Branch in our tripartite system by barring congressional attempts to transfer jurisdiction to non-Article III tribunals for the purpose of emasculating constitutional courts").

Waldman v. Stone, supra, 698 F.3d at 918.

According to the Sixth Circuit, a bankruptcy court's exercise of jurisdiction over state-law claims brought under Section 157(b)(2)(C) implicates not only a litigant's personal rights, but also the structural principle advanced by Article III which the litigant cannot waive. (*Id.*)

In *Frazin v. Haynes & Boone, L.L.P.,* 732 F.3d 313, 320, n.3 (5th Cir. 2013) and *In re BP RE, L.P.*, 735 F.3d 279, 286-89 (5th Cir. 2013), the Court of Appeals for the Fifth Circuit embraced the reasoning of the Sixth Circuit in *Waldman v. Stone* – holding a bankruptcy court lack of Article III authority to enter final judgment on state-law claims cannot be cured by the litigants' consent under Section 157(b)(2)(C).

Likewise, in *Wellness Intern. Network, Ltd. v. Sharif,* 727 F.3d 751 (7th Cir. 2013), the Court of Appeals for the Seventh Circuit concluded "the Sixth Circuit [in *Waldman v. Stone*] has the better view under current law."

> *Schor* holds that waiver or consent may be a factor in determining whether delegation of judicial business to non-Article III tribunals is unconstitutional, but it cannot be dispositive because of the structural role of Article III, § 1. And *Stern* unequivocally holds that 28 U.S.C. § 157(b) violates the structural protections of Article III, § 1, in permitting a bankruptcy judge to enter final judgment in certain "core proceedings." In other words, unlike *Schor*, where party consent was permissible because the statutory scheme at issue did not implicate structural concerns, the Supreme Court has already held that the statutory scheme granting bankruptcy judges authority to enter final judgment in core proceedings does implicate structural concerns where the core proceeding at issue is "'the stuff of the traditional actions at common law tried by the courts at Westminster in 1789,'" *Stern*, 131 S.Ct. at 2609 (quoting *N. Pipeline,* 458 U.S. at 90, 102 S.Ct. 2858 (Rehnquist, J., concurring in judgment)). Therefore, we cannot agree with our colleagues on the Ninth Circuit that the allocation of authority between bankruptcy courts and district courts with regard to core proceedings does not implicate structural interests. We also observe that in *Stern*, the Court

> rejected the proposition that the fact that bankruptcy judges are appointed by Article III judges makes a difference; the Court explained that since it was the bankruptcy court itself that "exercise[d] 'the essential attributes of judicial power [that] are reserved to Article III courts,' it [did] not matter who appointed the bankruptcy judge or authorized the judge to render final judgments in such proceedings. The constitutional bar remain[ed]." *Id.* at 2619 (second alteration in original) (quoting *Schor,* 478 U.S. at 851, 106 S.Ct. 3245).

Wellness Intern. Network, Ltd. v. Sharif, 727 F.3d at 771-72.

On July 1, 2014, this Court granted certiorari in *Wellness International Network Ltd. v. Sharif* (Dkt. No. 13-395), to determine, among other things, "Whether Article III permits the exercise of the judicial power of the United States by the bankruptcy courts on the basis of litigant consent, and if so, whether implied consent based on a litigant's conduct is sufficient to satisfy Article III." Just as in *Wellness International,* the two adversary actions in this case involved claims that have their origins in the common law (i.e., fraudulent transfer claims and alter ego claims).[6] Consistent with its holding in *Executive*

[6] Kismet has suggested this case is distinguishable from *Wellness International Network Ltd. v. Sharif* because the property in *Wellness International Network* was transferred before the bankruptcy petition was filed, while the transaction in the

(Continued on following page)

Benefits Ins. Agency v. Arkison, supra, 702 F.3d 553*,* the Court of Appeals declined to address the *Stern* issue, finding Diaz-Barba had waived any objection to the bankruptcy entering final judgment in their case. App. 8. More compelling than the facts in *Wellness International,* this case was tried to judgment in 2008, three years before this Court decided *Stern v. Marshall.* Given this Court's grant of certiorari in *Wellness*, it is appropriate that the same issue also be considered by the Court in this case.

II. THE UNITED STATES BANKRUPTCY COURT'S EXERCISE OF JURISDICTION OVER THE REAL PROPERTY OF FOREIGN NATIONALS LOCATED IN A FOREIGN COUNTRY CONFLICTS WITH PREVIOUS DECISIONS OF THIS COURT AND IMPORTANT PRINCIPLES OF INTERNATIONAL COMITY.

This case is unique in that it involves not only an unwarranted extension of a United States bankruptcy

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Alter Ego/Avoidance Action occurred post-petition. This is an irrelevant distinction, however, because in the Alter Ego/Avoidance Action the transfer was actually accomplished in two phases – the first was to H&G in 2002, well before the bankruptcy was filed and the second in 2004 after Icenhower's petition. The two phases were collapsed into one by the bankruptcy court applying principles of common-law alter ego and bankruptcy post-petition-transfer principles. Since "alter ego" is normally a state court claim, the bankruptcy court is precluded by *Stern* and Article III, § 1 from making this determination, as well.

courts' *in rem* jurisdiction under 28 U.S.C. § 1334(e), but also Mexican choice of law and forum selection clauses drafted into the public documents memorializing the sale of the Villa Property and recorded by the parties.

A. Generally, U.S. Courts Lack Jurisdiction to Regulate the Distribution or Conveyance of Real Estate Located in a Foreign Country.

In *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), this Court recognized: "We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts." *Id*. at 9.

Applying this principle, various circuits have recognized a "golden rule among nations – that each must give the respect to the laws, policies and interests of others that it would have others give to its own in the same or similar circumstances." *Mich. Community Servs., Inc. v. NLRB*, 309 F.3d 348, 356 (6th Cir. 2002); *U.S. v. One Gulfstream G-V Jet Aircraft,* 941 F.Supp.2d 1, 8 (D.D.C. 2013). There is a practical purpose for this "golden rule" – i.e., to foster "international cooperation and encourage[ ] reciprocity, thereby promoting predictability and stability through satisfaction of mutual expectations." *Laker Airways, Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984); *see also JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.*, 412 F.3d 418,

423 (2d Cir. 2005) [stressing the long-recognized importance of "maintaining amicable working relationships between nations, a 'shorthand for good neighbourliness [sic], common courtesy and mutual respect between those who labour [sic] in adjoining judicial vineyards'"].

1. 28 U.S.C. § 1334(e) Does Not Authorize a U.S. Bankruptcy Court to Invalidate the Sale or Order the Conveyance of Real Property in a Foreign Country.

In *Oakey v. Bennett*, 52 U.S. 33 (1850), the Court applied this rule to a district court's use of a U.S. bankruptcy statute to invalidate title to real property in a foreign country. The Court determined that the lower court had exceeded its jurisdiction. The Court confirmed that such an act was forbidden because a U.S. court cannot "regulate the distribution or conveyance of real estate in a foreign government," explaining:

> There is no pretense that this government, through the agency of a bankruptcy law, could subject the real property in [the foreign country], or in any other foreign government, to the payment of debts. This can only be done by the laws of the sovereignty where such property may be situated.

52 U.S. at 45.

On October 17, 2005, over 150 years after *Oakey* was decided, Congress enacted Chapter 15 of the Bankruptcy Code, as a means to facilitate international cooperation in the administration of cross-border insolvencies. 11 U.S.C. § 1501(a). "Chapter 15 implements the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency" ("Model Law"); courts interpreting Chapter 15 are required under § 1508 to "consider its international origin, and the need to promote an application of th[e] chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions in interpreting its provisions." *Fogarty v. Petroquest Resources, Inc.* (*In the Matter of Condor Insurance Limited*), 601 F.3d 319, 321 (5th Cir. 2010) (quoting 11 U.S.C. § 1508).

Chapter 15 places a strong emphasis on comity and cooperation with foreign bankruptcy courts. 11 U.S.C. §§ 1501(a)(1)(B), 1507(b). Chapter 15 provides: (1) in such [cross-border insolvency] cases, it is the objective of bankruptcy law to promote cooperation between courts of the United States and the courts and other competent authorities of foreign countries involved [11 U.S.C. § 1501(a)]; (2) bankruptcy law should be applied so as to promote "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor" [*id.*]; (3) bankruptcy courts "shall cooperate to the maximum extent possible with a foreign court or a foreign representative, either directly or through the trustee" [11 U.S.C.

§ 1525(a)]; and (3) such "cooperation" may be implemented by any appropriate means [11 U.S.C. § 1527]. Of significance in this case, Chapter 15 authorizes bankruptcy courts to grant a foreign representative relief to bring avoidance actions under the avoidance laws of that country through a Chapter 15 proceeding. *In the Matter of Condor, supra,* 601 F.3d at 329.

In *In re Loy*, 432 B.R. 551 (E.D. Va. 2010), a district court reviewing a bankruptcy court's decision applied these principles to rule that a transfer of property in the United States could not be avoided as a post-petition transaction where the transaction occurred after an insolvency case had commenced in the United Kingdom, but before a Chapter 15 petition was filed in the United States. Both the district court and the bankruptcy court denied avoidance of such transfer of real property in part because such ruling would expose real estate purchase and sale transactions in the United States to commercial uncertainty. *Id.* at 554, 564. The district court noted that under Chapter 15, a representative of a foreign bankruptcy proceeding must obtain recognition of such proceeding in a United States bankruptcy court prior to pursuing remedies in the United States. *Id.* at 555.

On May 13, 2005, prior to the enactment of Chapter 15, Mexico also adopted the Model Law. Part 12 of Mexico's Ley de Concursos Mercantiles (Law on Commercial Insolvency) ("LCM") is quite similar to Chapter 15 of the U.S. Bankruptcy Code (11 U.S.C. § 1501 et seq.). As in Chapter 15, under part 12 of the LCM, a foreign representative must obtain recognition of a

foreign bankruptcy proceeding in Mexican courts before proceeding to obtain appropriate relief including enforcement of judgments.

Applying the "golden rule among nations" (*Mich. Community Servs., Inc. v. NLRB, supra,* 309 F.3d at 356), and recognizing Mexico's adaptation of the Model Law (which corresponds with Chapter 15) and the court's ruling in *In re Loy,* a transfer of property in Mexico cannot be avoided as an unauthorized post-petition transaction when the transaction occurred after an insolvency case had commenced in the United States, without any action filed or notice recorded in Mexico.[7] The Ninth Circuit's endorsement of the bankruptcy court's judgment therefore exposes real estate purchase and sale transactions in Mexico to an unacceptable level of commercial uncertainty.

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[7] In a purely domestic context, a buyer of real estate is protected from claims of unauthorized post-petition transfer by 11 U.S.C. § 549(c) by the requirement that the trustee file in the appropriate records office a copy or notice of the bankruptcy petition in order to put potential buyers of real property on notice of the bankruptcy. 11 U.S.C. § 549(c). Absent such filing, a buyer is shielded from a complaint seeking to recover the property. *In re Smith Corset Shops, Inc.,* 696 F.2d 971, 976 (1st Cir.1982) [citing this Court's opinion in *Bank of Marin v. England,* 385 U.S. 99, 102 (1966)]. If that is so in a completely domestic context, how much more so should it be in an international context? Here the trustee failed to file a copy or notice of the petition either in the public registry where Villa Vista Hermosa was located or even with the bank trustee of the *fideicomiso* Trust. Had the trustee taken such actions, Appellants would not have become the victims of Icenhower's fraud.

Given the enactment of Chapter 15 and its counterpart in Mexico, and the emphasis on comity contained in those statutes, the avoidance actions in this case should have been brought in Mexico pursuant to that country's adaptation of the Model Law.

2. A U.S. Bankruptcy Court Cannot Exercise Control Over Real Property in a Foreign Country Without the Recognition and Permission of a Court of the Foreign Jurisdiction.

Even assuming *arguendo*, an American bankruptcy court has the authority under 28 U.S.C. § 1334(e) to exercise *in rem* jurisdiction over property of a debtor's estate located in a foreign country, "the bankruptcy court practically lacks the power to enforce such jurisdiction without the recognition and assistance of the courts in the foreign country." *In re International Administrative Services, Inc.*, 211 B.R. 88, 93 (Bkrtcy. M.D. Fla. 1997).

> [P]ractical limitations exist to this broad definition of property of the estate at least in connection with the enforcement of jurisdiction over property located in foreign countries. Ved P. Nanda and Ralph B. Lake, ed., *The Law of Transnational Business Transaction* § 11.04 (1996). A trustee or debtor-in-possession cannot exercise control over assets in a foreign jurisdiction that are property of the estate without first obtaining recognition and permission from the court of the foreign jurisdiction in which the assets

> are located. *Id.* Whether such permission is possible will depend upon the law of the foreign jurisdiction. *Id.*

211 B.R. at 93.

In fact, Mexican law requires foreign judgments to undergo the formal procedure known as *homologación de sentencias* ("homologation") to be enforced in Mexico. FCCP Arts. 554, 569-77. Homologation is initiated by the foreign court's issuance of a "Letter Rogatory" requesting recognition of its judgment by the Mexican court. *Id.*, Arts. 550, 554.[8]

Here, the bankruptcy court rendered a judgment directing Diaz-Barba (Mexican citizens) to convey their interest in Mexican real property to Kismet, a Delaware limited liability company, without the requirement that the judgment be homologated. ER35-38. Despite repeated requests from Diaz-Barba and the Mexican Government, the bankruptcy court did not issue a "Letter Rogatory" requesting recognition of its judgment by the Mexican court. In fact, the bankruptcy court ordered the parties to perform these tasks *in Mexico* with regard to *Mexican real property*

[8] Additionally, as argued above, Kismet could have availed itself of the remedies provided by the Mexican equivalent of Chapter 15 to try to enforce the judgment in Mexico. (*See, e.g., In re Vitro, S.A.B. de C.V.,* 473 B.R. 117 (Bankr. N.D. Tex. 2012) [court exercises jurisdiction under Chapter 15 to determine whether Mexican judgment should be enforced through ancillary proceeding in the USA].

without even knowing whether its judgment would be "enforceable in Mexico." ER49, 82.

3. The Bankruptcy Court's Judgment in this Case Conflicts with Article 27 of the Mexican Constitution, Which Grants Exclusive Jurisdiction to Mexican Courts Over Matters Regarding Title to or Interests in Mexican Land.

A United States court's exercise of jurisdiction is inappropriate where (as here) "there is in fact a true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 799 (1993). The bankruptcy court's judgment in this case conflicts with Mexican law.

First, Mexican law does not recognize foreign judgments concerning interests in Mexican real property. Código Federal de Procedimientos Civiles ("C.F.P.C."), Art. 571, ¶¶I & III)). Instead, the Mexican Constitution grants exclusive jurisdiction to Mexican courts over matters regarding title to or interests in Mexican land. Constitution, Article 27; C.F.P.C., Art. 568, ¶I. Both Mexico's Federal Civil Code and the Civil Code of the State of Jalisco ("CCSJ") require that interests in real property are to be governed by the law of the *situ*s – here, the law of Jalisco where the Villa Property is located. Código Civil Federal (Federal Civil Code of Mexico), Art. 13, ¶III; CCSJ, Art. 15, ¶V.

Also relevant here is Mexico's regulatory scheme – managed by the Ministry of Foreign Affairs – that permits foreign nationals to obtain a beneficial interest in *coastal* property – such as Villa Vista Hermosa – by way of a Mexican trust holding title, i.e., a *fideicomiso* trust. Ley de Inversión Extranjera, Título II, Capítulo II, de los Fideicomisos Sobre Bienes Inmuebles en Zona Restringida (Foreign Investment Law, Title II, Chapter II, Real Estate Trusts Concerning Real Property Within the Restricted Zone), Art. 11. More specifically, the regulatory scheme establishes a permitting process and requires the trustee of the *fideicomiso* trust to be a Mexican bank:

> A permit from the Ministry of Foreign Affairs is required for credit institutions to acquire, as trustees, rights to real estate located within the restricted zone, when the purpose of the trust is to allow the use and development of such property without constituting ownership rights in respect thereof, and the trust beneficiaries are: [¶¶] Foreign individuals or foreign entities.

Id.

The Ministry of Foreign Affairs reviews *fideicomiso* trust applications, requires annual reporting by the trustee, and reserves the right to revoke the trust in the event of a violation of the terms of the permit. Reglamento de la Ley de Inversión Extranjera y del Registro Nacional de Inversiones Extranjeras (Regulation of the Foreign Investment Law), Art. 11, ¶VIII. The requirement that foreign nationals hold interest

in land through a *fideicomiso* trust protects Mexican interests because the foreign nationals must "agree to consider themselves as Mexicans with respect to their rights as beneficiaries and, in light thereof, not to invoke the protection of their governments." Regulation of the Foreign Investment Law, Art. 11, ¶I.

Here, the bankruptcy court's consolidated judgment purported to void the previous transfer of Villa Vista Hermosa from H&G to Diaz-Barba (recognized as valid under Mexican law) and originally mandated the immediate transfer of the Mexican property within 30 days to Kismet (a foreign corporation) without providing for the creation of a *fideicomiso* trust or the permission from the Mexican Government. ER2474-2475.

4. The Bankruptcy Court Ignored the Parties' International Choice of Law and Forum Selection Agreement.

The *escrituras* (public documents) that effectuated the various transfers of Villa Vista Hermosa under Mexican law contained choice of law and forum selection clauses requiring that any disputes regarding the property be litigated in Mexico pursuant to Mexican law. ER1675 (Icenhower), 1692 (H&G), 555 (Diaz-Barba).

Normally, forum selection clauses are presumed valid and enforceable. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). "Since 1972, federal courts have rarely refused to enforce international

FSAs." J. Yackee, *Choice of Law Considerations in the Validity & Enforcement of International Forum Selection Agreements: Whose Law Applies?*, 9 UCLA J. Int'l L. & Foreign Aff. 43, 48 (2004).

In this case, the bankruptcy court ignored Diaz-Barba's invocation of the protections afforded by the Mexican choice of law and forum selection clauses in the public transfer documents for the property. Dkt. 345:8-14; 184:19. The court of appeals simply found the bankruptcy court did not abuse its discretion in declining to honor these provisions because the matters at issue constituted core proceedings and were not inextricably intertwined with non-core proceedings. App. 12.

5. The Bankruptcy Court's Exercise of Jurisdiction Over Mexican Real Property Owned By Mexican Citizens Violates Principles of International Comity.

Diaz-Barba and the Mexican Government both urged the bankruptcy court to abstain from granting injunctive-type relief – including avoidance of the sale of Villa Vista Hermosa and mandating the transfer of the property to Kismet – in the interest of international comity. The bankruptcy court ignored these pleas explaining it had subject matter jurisdiction to avoid the transfer of the property. ER86. Upon being appraised of the conflicts with Mexican law, the bankruptcy court commented, "I understand

[Diaz-Barba] may have some problems in Mexico . . . but I don't really care about Mexico's law." RJN0021-0023. The court of appeals concluded "there is no true conflict" because the bankruptcy court did not require the Mexican Government to do anything. App. 13. "Thus, . . . comity is not implicated." (*Id.*)

"Comity is 'wholly independent' of the presumption against extraterritoriality and applies even if the presumption has been overcome or is otherwise inapplicable." *In re Maxwell Communications Corp. PLC, supra,* 186 B.R. at 823 [citing *Hartford Fire Ins. Co. v. California, supra,* 509 U.S. at 815]. The bankruptcy court's exercise of jurisdiction is inappropriate where (as here) "there is in fact a true conflict between domestic and foreign law." *Hartford Fire Ins. Co. v. California, supra,* 509 U.S. at 799.

Restatement (*Third*) *of Foreign Relations Law* (1987) ("*Restatement*"), § 403(1) suggests that even when there is a basis for jurisdiction, a United States court should "not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another [country] when the exercise of such jurisdiction is unreasonable." The U.S. court should defer to the other country if that country's interest is "clearly greater." *Restatement*, § 403(3).

Under the doctrine of comity, the bankruptcy court was required to know whether its judgment was enforceable under Mexican law. *See Brady v. Brown*, 51 F.3d 810, 819 (9th Cir. 1995). At the very least, the court must obtain assurances that any judgment it

rendered will be recognized by the foreign jurisdiction. *Remington Rand Corp. v. Business Systems Inc.*, 830 F.2d 1260, 1273 (3d Cir. 1987); *Kilbarr Corp. v. Business Systems Inc.*, 990 F.2d 83 (3d Cir. 1993).

In *Brady v. Brown*, for example, the district court ordered defendant, an American citizen and Mexican resident, to execute irrevocable powers of attorney to an agent to transfer Mexican coastal property into a *fideicomiso* for the benefit of plaintiffs. 51 F.3d at 812, 815. Defendant appealed, arguing the court's judgment violated the doctrine of comity. The court of appeals held the district court's judgment did not violate the doctrine of comity because "the district court retained jurisdiction to consider alternative remedies if the trust could not be established under Mexican law." *Id.* at 819.

More specifically, the trial court in *Brady* ensured that its order would not violate Mexican law by including as part of its ruling the following:

> The February 1992 Order does not direct anyone to transfer legal ownership of the land to plaintiffs. The Court ordered trusts to be established. The Order requires the Mexican government to approve those trusts prior to the establishment. The Court's Order may not specify the exact procedure required by Mexican law, but in requiring Mexican government approval, it ensures that no party will violate the laws of that country.

RJN Ex. 2, p. 13.

As a further safeguard, the district court in *Brady* expressly permitted defendant to "file an action in a competent court in Mexico to challenge the validity of the Powers of Attorney." RJN Ex. 3, p. 3.

Since 1995, when *Brady v. Brown* was decided, Congress has emphasized the importance of comity in cross-border insolvencies by enacting Chapter 15. The Government of Mexico has adopted a reciprocal version of this law. Under Chapter 15, the bankruptcy courts routinely administer assets in this country that are property of a foreign bankrupt, to ensure compliance with U.S. law. Under the Mexican equivalent, Kismet was required to likewise enlist cooperation from the Mexican courts to effectuate the transfer of the Villa Vista Hermosa in the interests of comity.

B. The Bankruptcy Court's Reliance on *In Personam* Jurisdiction to Circumvent the Comity Principles Discussed Above Conflicts With Previous Decisions of the United States Supreme Court and Other Federal Courts of Appeals.

Bankruptcy jurisdiction, at its core, is *in rem*. *Gardner v. New Jersey*, 329 U.S. 565, 574 (1947). However, several courts have recognized bankruptcy courts also have limited *in personam* jurisdiction over those who would take actions prohibited by the Bankruptcy Code's automatic stay [11 U.S.C. § 362(a)] barring "any act to obtain possession of property of

the estate . . . or to exercise control over property of the estate." *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Securities LLC,* 474 B.R. 76, 81 (S.D.N.Y. 2012). "The stay exists to protect the estate from a chaotic and uncontrolled scramble for the Debtor's assets in a variety of uncoordinated proceedings in different courts." *Nakash v. Zur* (*In re Nakash*), 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996); internal quotation marks and citation omitted.

In order to circumvent its lack of *in rem* jurisdiction to directly affect title to real property located in Mexico, the court of appeals held the bankruptcy court's *in personam* jurisdiction over Diaz-Barba based on the Trustee's fraudulent transfer allegations empowered the bankruptcy court to issue an order, enforceable in the United States, requiring Diaz-Barba to physically travel to Mexico to take action to undo transfer. ER49, 81 [relying on *Perry v. O'Donnell*, 749 F.2d 1346, 1352 (9th Cir. 1984)].

However, since the bankruptcy court's *in personam* jurisdiction derives from the statutory stay which took effect automatically upon the filing of Icenhower's bankruptcy petition [11 U.S.C.A. § 362(a)], the bankruptcy court's *in personam* jurisdiction over Diaz-Barba must be based (if at all) on the same "reverse piercing of the corporate veil" reasoning by which the bankruptcy court held H&G was Icenhower's alter ego. In other words, at the time Diaz-Barba purchased Villa Vista Hermosa from H&G, they were unaware of any *alter ego* connection between Icenhower and H&G. (ER73-74, DE109) Nevertheless, the bankruptcy

court (exercising its implied personal jurisdiction over Diaz-Barba as *violators* of the automatic bankruptcy stay arising from Icenhower's petition), ordered Diaz-Barba to transfer Villa Vista Hermosa to a third-party opportunist based on a finding (made *six years after* Icenhower transferred the property to H&G) that Icenhower and H&G should be considered legally "one." Petitioners submit such an extension of the authority of U.S. bankruptcy courts is an unwarranted usurpation of the limited *in personam* jurisdiction implied from Bankruptcy Code's automatic stay provision.

In any event, while such a distinction may be recognized by the Ninth Circuit Court of Appeals,[9] Mexican law does not. Under Mexican law, "[t]he assignment of property to be held in trust is equal to a transfer of interest in specific property (right *in rem*)." CCSJ, Art. 1258; Ley del Registro Público de la Propiedad del Estado de Jalisco (Public Registry of Property Law of the State of Jalisco), Art. 80.

The doctrine of comity dictates that Section 157 "ought never to be construed to violate the law of nations if any other possible construction remains."[10]

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[9] To Petitioners' knowledge, this implied *in personam* jurisdiction has not been recognized by any other circuit court of appeals.

[10] As noted above, the bankruptcy court ruled Kismet was entitled to recover "either the Villa Property *or its value at the time of judgment from any combination of transferees*." Unfortunately, the bankruptcy court left the determination of

(Continued on following page)

See Murray v. The Charming Betsy, 6 U.S. 64, 118 (1804); *In re Simon*, 153 F.3d 991, 998 (9th Cir. 1998). It is generally accepted that sovereign states should refrain from prescribing laws or taking actions that govern activities connected with another sovereign "when the exercise of such jurisdiction is unreasonable." *Restatement*, § 403(1).[11]

The reasonableness of the bankruptcy court's exercise of *in personam* jurisdiction in this case is determined by evaluating: (1) the degree of conflict with foreign law or policy; (2) the nationality or allegiance of the parties and the locations of principal places of business of corporations; (3) the extent to which enforcement by either state can be expected to achieve compliance; (4) the relative significance of effects on the U.S. as compared with those elsewhere; (5) the extent to which there is explicit purpose to harm or affect American commerce; (6) the foreseeability of such effect; and (7) the relative importance to the violations charged of conduct within the U.S. as compared with conduct abroad. *Timberlane Lumber Co. v. Bank of America*, 749 F.2d 1378, 1384-86

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the appropriate remedy to "Kismet's *sole* option." Where, as here, there was and is a compelling reason to award the value of the property rather than the property itself, the court abused its discretion by not doing so. *In re Trout*, 609 F.3d 1106 (10th Cir. 2010).

[11] This Court has often relied on the *Restatement* when analyzing issues of comity. *See*, for example, *Hartford Fire Ins. Co. v. California, supra,* 509 U.S. at 799.

(9th Cir. 1984); *Metro Industries, Inc. v. Sammi Corp.,* 82 F.3d 839, 847, n.5 (9th Cir. 1996). An analysis of these factors weighs heavily in favor of abstention. In fact, "most factors weigh heavily against foreign application of the [Bankruptcy] Code." *See* Welch, "The Territorial Avoidance Power of the Bankruptcy Code," 24 Emory Bankr. Dev. J. 553, 579 (2008).

Further, the Ninth Circuit's approval of the bankruptcy court's use of its *in personam* jurisdiction under Section 157(b) to reach across the border into Mexico is inconsistent with Chapter 15 and its Mexican counterpart, and with decisions in numerous other federal circuits that have applied (in similar situations) the presumption that "legislation of Congress, unless a contrary intent appears, is presumed to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) ("ARAMCO"), superseded by statute on other issues; *In re Simon, supra*, 153 F.3d at 995.[12]

[12] *See Gushi Bros. Co. v. Bank of Guam*, 28 F.3d 1535, 1538 (9th Cir. 1994); *In re Colonial Realty Co.,* 980 F.2d 125, 131 (2d Cir. 1992); *In re Maxwell Communication Corp. PLC*, 186 B.R. 807, 815-16 (S.D.N.Y. 1995), aff'd on other issues, 93 F.3d 1036 (2d Cir. 1996); *Dunes Hotel Assocs. v. Hyatt Corp.,* 245 B.R. 492, 504-05 (D.S.C. 2000); *In re Murray*, 214 B.R. 271, 278-79 (Bankr. D. Mass. 1997); *Klingman v. Levinson,* 158 B.R. 109, 113 (N.D. Ill. 1993); *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989). But *see In re French*, 440 F.3d 145 (4th Cir. 2006).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted, or, in the alternative, the Court should hold this case pending the Court's resolution in *Wellness International Network Ltd. v. Sharif* (Dkt. No. 13-395), and depending on the decision in that case, grant the petition to address any questions left unresolved by the decision in *Wellness International Network Ltd. v. Sharif* or remand this case to the Ninth Circuit Court of Appeals for further consideration.

Respectfully submitted,

DAVID A. NIDDRIE
Counsel of Record
JOHN S. ADDAMS
NIDDRIE, FISH & ADDAMS LLP
600 West Broadway, Suite 1200
San Diego, California 92101
Telephone: (619) 238-6065
dniddrie@nfaappeals.com

Attorneys for Alejandro Diaz-Barba and Martha Margarita Barba de la Torre

D. ANTHONY GASTON
Attorney at Law
550 West C Street, Suite 1860
San Diego, California 92101
Telephone: (619) 234-3103
dag@gastonlaw.net

Attorney for Martha Margarita Barba de la Torre

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

IN THE MATTER OF: JERRY LEE ICENHOWER, etc., et al., *Debtors*,	No. 10-55933
KISMET ACQUISITION, LLC, *Plaintiff-Appellee*, v. JERRY L. ICENHOWER; DONNA L. ICENHOWER; CRAIG KELLEY, *Defendants*, and ALEJANDRO DIAZ-BARBA; MARTHA MARGARITA BARBA DE LA TORRE, *Defendants-Appellants*.	D.C. No. 3:08-cv-01446-BTM-BLM OPINION

Appeal from the United States District Court
for the Southern District of California
Barry T. Moskowitz, District Judge, Presiding

Argued and Submitted
February 11, 2014 – Pasadena, California

Filed July 3, 2014

Before: Jerome Farris, N. Randy Smith,
and Paul J. Watford, Circuit Judges.

Opinion by Judge Farris

COUNSEL

Edward I. Silverman (argued), Sandler Lasry Laube Byer & Valdez LLP, San Diego, California, for Defendant-Appellant Alejandro Diaz-Barba.

D. Anthony Gaston (argued), San Diego, California, for Defendant-Appellant Martha Margarita Barba de la Torre.

Mathieu G. Blackston and Jeffrey Isaacs, Procopio, Cory, Hargreaves & Savitch LLP, San Diego, California; Geraldine A. Valdez, Financial Law Group, La Jolla, California, for Defendants-Appellants.

Ali M.M. Mojdehi (argued), Janet D. Gertz, Brian W. Byun, and Allison M. Rego, Cooley LLP, San Diego, California, for Plaintiff-Appellee.

OPINION

FARRIS, Circuit Judge:

Alejandro Diaz-Barba and Martha Barba de la Torre (collectively, the "Diaz Defendants") challenge the bankruptcy court's and district court's orders invalidating the transfer to them of a Mexican coastal villa owned by Jerry and Donna Icenhower and requiring them to convey the property to Kismet Acquisition, LLC for the benefit of Debtors' bankruptcy estate. According to the Diaz Defendants, the bankruptcy court erred by: (1) exercising jurisdiction over Mexican land, contrary to the local action doctrine; (2) applying U.S. law extraterritorially; (3) declining

to honor the forum selection clauses in the Mexican contracts effecting the property's sale; (4) declining to abstain from ordering recovery of the property based on international comity; (5) entering judgment without Mexico, allegedly a necessary and indispensable party, having been joined; (6) applying U.S. law, rather than Mexican law, to determine whether the Diaz Defendants were good faith purchasers of the property; and (7) finding that Martha Barba de la Torre purchased the property in bad faith. We affirm.

I.

A. Factual History

In 1995, Debtors purchased from D. Donald Lonie and the D. Donald Lonie, Jr., Family Trust their interest in Vista Hermosa, a coastal villa in Jalisco, Mexico. The interest conveyed was not fee simple, as Mexican law prohibits foreign nationals from owning title to land within 100 kilometers of the border or 50 kilometers of the coast. *See Brady v. Brown,* 51 F.3d 810, 814, 817 n.8 (9th Cir. 1995). Rather, Debtors received the beneficial interest in a *fideicomiso* trust – an arrangement wherein a Mexican bank holds title to property and a foreign national is granted the right to its use. *See id.* A *fideicomiso* trust may be created only with a permit issued by the Mexican Ministry of Foreign Affairs. *See id.*

On March 24, 2000, the Lonies sued Debtors in the Southern District of California, seeking, *inter*

alia, a determination of the parties' respective rights and interests in the Villa interest and injunctive relief. On November 24, 2003, the district court entered judgment for the Lonies, directing Debtors either to pay damages of $1,356,830.32 or to return the Villa interest.

On March 4, 2002, while the Lonies' action against them was pending, Debtors purchased H&G, a shell company created by Laughlin International, Inc. The same day, Debtors executed an agreement to transfer the Villa interest, along with another property interest, to H&G in exchange for $100,000 and H&G's assumption of $140,000 of debt. However, the bankruptcy court found "no evidence that H&G paid any of the recited consideration," and it noted that, even after the sale, Mr. Icenhower retained "absolute control over the operation of the Villa Property" and "the right to all rental income from the villa." Further, in light of H&G's lack of capitalization beyond $3,424 contributed by Debtors, and the fact that Craig Kelley, its president and sole officer and director, served in a purely titular capacity and took orders from Mr. Icenhower, the bankruptcy court concluded that "H&G had no real corporate existence apart from Mr. Icenhower" and "had no business purpose other than as a sham company to hold the Debtors' assets."

Debtors filed for bankruptcy protection on December 15, 2003. In a closing ceremony in San Diego on June 7, 2004, H&G sold the Villa interest to the Diaz Defendants for $1.5 million. Although H&G was

represented by Mr. Kelley, the closing was controlled by Mr. Icenhower.

Prior to the closing, numerous red flags had arisen. First, although the Villa interest was purportedly sold by H&G, Mr. Icenhower was able to lower the purchase price to account for a debt he personally owed Mr. Diaz. Second, the Diaz Defendants were on notice of Debtors' bankruptcy and of the possibility of litigation to avoid Debtors' transfer of the Villa interest to H&G and to tie Debtors to H&G. Third, the Villa interest was essentially H&G's only asset, but its sale was not authorized by a shareholder resolution, as required by Nevada law and H&G's Articles of Incorporation. Finally, the Diaz Defendants were instructed to pay most of the consideration to entities other than H&G, including an entity associated with Mr. Icenhower.

B. Procedural History

In January 2004, Debtors disclosed to their creditors their March 2002 sale of the Villa interest to H&G. On August 23, 2004, the bankruptcy trustee filed an action to avoid the sale from Debtors to H&G, alleging that the sale was a fraudulent pre-petition transfer (the "fraudulent conveyance action"). On August 3, 2006, the trustee filed an action to avoid the sale from H&G to the Diaz Defendants, alleging that H&G was Debtors' alter ego and that the sale from H&G to the Diaz Defendants was an unauthorized postpetition transfer (the "postpetition transfer

action"). H&G did not appear in either action. By agreement approved by the bankruptcy court on November 30, 2006, Kismet purchased the estate's assets and was substituted for the trustee in both actions.

Following a bench trial, on June 2, 2008, the bankruptcy court issued consolidated findings of fact and conclusions of law in the two actions. First, the court ruled for Kismet in the postpetition transfer action. The court found that H&G was Debtors' alter ego and substantively consolidated H&G with the bankruptcy estate, such that the Villa interest was part of the estate *nunc pro tunc* to the petition date. As such, the transfer of the interest to the Diaz Defendants was an unauthorized postpetition transfer avoidable under § 549(a). The Diaz Defendants had no defense to avoidance under § 549(c) since they were aware of Debtors' bankruptcy prior to the closing. Further, as initial transferees of the interest, they were strictly liable under § 550(a)(1) to return the interest or its value to the estate.

Alternatively, the bankruptcy court held that Kismet was entitled to judgement on the fraudulent conveyance action. Pursuant to § 544(b)(1) and California law, Debtors' transfer of the Villa interest to H&G was avoidable as a fraudulent transfer. Under § 550(a)(2), Kismet could recover the Villa interest from the Diaz Defendants, subsequent transferees not in good faith.

The bankruptcy court ruled that, under either action, Kismet was entitled to recover "either the Villa Property or its value at the time of judgment from any combination of transferees." However, "the equities favor an order directing the return of the Villa Property where it appears Mr. Diaz conspired with Mr. Icenhower to use the clear title in Mexico to defeat the Trustee."

On the same day it issued its decision, the court issued a separate judgment. In the postpetition transfer action, the Diaz Defendants were ordered:

> [a] to take all actions necessary to execute and deliver any and all documents needed to undo the avoided transfer, and to take all actions necessary to cause the property to be reconveyed to a *fideicomiso* trust naming [Kismet] as the sole beneficiary for the benefit of the bankruptcy estate; or
>
> [b] alternatively, at [Kismet]'s sole option made upon proper noticed motion, the court reserves jurisdiction to enter a monetary judgment in favor of Kismet, and against Defendants, in an amount necessary to make the estate whole at the time of judgment.

A substantially similar order was issued in the fraudulent conveyance action. Finally, the court "reserve[d] jurisdiction to issue any and all orders necessary to carry out and enforce this judgment." On July 30, 2008, the court filed an amended consolidated judgment in which it clarified that the Villa interest was an interest in a *fideicomiso* trust, not a fee simple,

and extended the deadline for compliance. The bankruptcy court's judgment was affirmed by the district court on May 21, 2010.

II.

Our role in a bankruptcy appeal is "essentially the same" as that of the district court, *In re Caneva,* 550 F.3d 755, 760 (9th Cir. 2008) (quoting *Parker v. Cmty. First Bank,* 123 F.3d 1243, 1245 (9th Cir. 1997)), thus we "directly review the bankruptcy court's decision," *id.* We review findings of fact for clear error and conclusions of law and of mixed questions of law and fact *de novo. Banks v. Gill Distrib. Ctrs., Inc.,* 263 F.3d 862, 867 (9th Cir. 2001). Matters committed to the bankruptcy court's discretion, such as whether to abstain based on comity or to enforce a forum selection clause, are reviewed for abuse of discretion. *Vasquez v. Rackauckas,* 734 F.3d 1025, 1036 (9th Cir. 2013); *Fireman's Fund Ins. Co. v. M.V. DSR Atl.,* 131 F.3d 1336, 1338 (9th Cir. 1997).

III.

We affirm the bankruptcy court's judgment on the postpetition transfer action. We need not decide whether the bankruptcy court had authority to enter a final judgment in the postpetition transfer action. The Diaz Defendants concede that they waived any objection they could have raised under *Stern v. Marshall,* 131 S. Ct. 2594 (2011), to the bankruptcy court's entry of final judgment. *See Exec. Benefits Ins.*

Agency v. Arkison, 702 F.3d 553, 566-70 (9th Cir. 2012), *aff'd on other grounds,* 134 S. Ct. 2165 (2014). Since the bankruptcy court's judgment for Kismet was the same in both actions, our judgment here renders the fraudulent conveyance action moot. *See Dhangu v. I.N.S.,* 812 F.2d 455, 459-60 (9th Cir. 1987) (citing 13A C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* § 3533.2 at 241-45 (1984)).

A.

We begin with the local action doctrine, a federal common law rule barring district courts from exercising jurisdiction over actions directly affecting land in a different state. *See United States v. Byrne,* 291 F.3d 1056, 1060 (9th Cir. 2002).

In the context of a postpetition transfer action, this rule is preempted by statute. *See City of Milwaukee v. Illinois & Michigan,* 451 U.S. 304, 313 (1981). Specifically, 28 U.S.C. § 1334(e) grants the bankruptcy court "exclusive jurisdiction – (1) of all the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate." 28 U.S.C. § 1334(e); *see also In re Simon,* 153 F.3d 991, 996 (9th Cir. 1998). Property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case," "wherever located and by whomever held." 11 U.S.C. § 541(a). Here, on the petition date, the Villa interest was held by H&G. But the bankruptcy court ruled that H&G was Debtors' alter ego and substantively

consolidated H&G with the bankruptcy estate *nunc pro tunc* to the petition date. The Diaz Defendants have not demonstrated that this ruling should be overturned. Thus, the Villa interest was property of the estate as of the petition date. Notwithstanding the local action doctrine, 28 U.S.C. § 1334(e) granted the bankruptcy court exclusive *in rem* jurisdiction over the Villa interest.

B.

We next address the Diaz Defendants' argument that the bankruptcy court improperly applied U.S. law extraterritorially. In *Morrison v. National Australia Bank Ltd.,* 130 S. Ct. 2869 (2010), the Supreme Court established a two-part test for deciding extraterritoriality questions. First, unless Congress clearly expressed its intent to apply a statute extraterritorially, a court "must presume [the statute] is primarily concerned with domestic conditions." *Id.* at 2877 (quoting *E.E.O.C. v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991)). Second, if a statute applies only domestically, the question becomes: which domestic acts "are the objects of the statute's solicitude"? *Id.* at 2884. Which domestic acts does "the statute seek[ ] to 'regulate' "? *Id.* Not merely any contact by a defendant with the United States is sufficient; rather, the defendants' domestic conduct must implicate "the 'focus' of congressional concern." *Id.* (quoting *Aramco,* 499 U.S. at 255).

In the postpetition transfer action, the bankruptcy court's order was proper. "Congress intended extraterritorial application of the Bankruptcy Code as it applies to property of the estate." *In re Simon,* 153 F.3d 991, 996 (9th Cir. 1998); *see also* 28 U.S.C. § 1334(e). Here, given the court's ruling that H&G was Debtors' alter ego and its substantive consolidation of H&G with the bankruptcy estate, the Villa interest was property of the estate as of the petition date.

C.

We turn now to the Diaz Defendants' argument that the bankruptcy court abused its discretion by failing to honor the contractual selection of a Mexican forum. The transfers of the Villa interest from the Lonie family to Debtors and from Debtors to H&G, and the transfer of title from the bank to the Diaz Defendants, were formalized through *escrituras,* or Mexican contracts. Each *escritura* contained a clause selecting a Mexican forum for resolving disputes related to the "interpretation" of or "compliance" with the agreement.

A court may decline to enforce a forum selection clause if, *inter alia,* "'enforcement would contravene a strong public policy of the forum in which suit is brought.'" *Petersen v. Boeing Co.,* 715 F.3d 276, 280 (9th Cir. 2013) (quoting *Murphy v. Schneider Nat'l Inc.,* 362 F.3d 1133, 1140 (9th Cir. 2003)). One of the Bankruptcy Code's primary objectives is "centralization of

disputes concerning a debtor's legal obligations." *In re Eber,* 687 F.3d 1123, 1131 (9th Cir. 2012); *see also In re Rader,* 488 B.R. 406, 416 (B.A.P. 9th Cir. 2013). Thus, courts in which a bankruptcy proceeding is pending have declined to honor contractual selections of other forums where the matters at issue constitute core proceedings and are not inextricably intertwined with non-core proceedings. *See, e.g., In re Iridium Operating LLC,* 285 B.R. 822, 836-37 (S.D.N.Y. 2002) (citing cases). Here, both actions are core proceedings and are not inextricably intertwined with non-core proceedings. *See* 28 U.S.C. § 157(b)(2); *In re Jones,* Nos. CC-06-1105-MoBK, CC-06-1106-MoBK, 2006 WL 6810992, at *3-*4 (B.A.P. 9th Cir. Dec. 6, 2006). The bankruptcy court properly declined to enforce the forum selection clauses.

D.

We next consider comity, a doctrine which effectuates "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation." *In re Simon,* 153 F.3d 991, 998 (9th Cir. 1998) (quoting *Hilton v. Guyot,* 159 U.S. 113, 163-64 (1895)). The doctrine applies only if there is "a true conflict" between domestic and foreign law, *id.* at 999 (quoting *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 798 (1993)), which there is not if "a person subject to regulation by two states can comply with the laws of both." *Hartford,* 509 U.S. at 799 (quoting *Restatement (Third) of Foreign Relations Law* § 403, Comment *e*).

Here, there is no true conflict. Mexican law permitted the Diaz Defendants to convey the Villa interest to Kismet. *See Brady v. Brown,* 51 F.3d 810, 815, 819 (9th Cir. 1995) (holding that a district court order requiring defendants "to execute irrevocable powers of attorney to an agent to transfer the [Mexican property at issue] into a Mexican government-approved trust, or 'fideicomiso,' for the benefit of [plaintiffs]" "did not violate Mexican law"). Further, although the bankruptcy court ordered the *Diaz Defendants* "to take all actions necessary" to create a *fideicomiso* trust, it did not require the Mexican government to approve the trust or to recognize or enforce its judgment. Thus, there is no true conflict, and comity is not implicated.

E.

We turn now to the Diaz Defendants' argument that the bankruptcy court's order should be vacated since Mexico is a necessary and indispensable party, yet is immune from suit as a sovereign nation. Under Rule 19(a) of the Federal Rules of Civil Procedure, a party is necessary if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:

> (i) as a practical matter impair or impede the person's ability to protect the interest; or
>
> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a).

Here, Mexico is not a necessary party. First, the bankruptcy court was capable of awarding complete relief in Mexico's absence. If the Mexican government was amenable to the *fideicomiso,* the Diaz Defendants' compliance with the judgment would have led to the trust being created. If the government was not amenable, the bankruptcy court could have issued a further order, pursuant to its reservation of jurisdiction "to issue any and all orders necessary to carry out and enforce [its] judgment," requiring the Diaz Defendants to pay Kismet the value of the Villa interest. *See* 11 U.S.C. § 550. Second, even if Mexico has a cognizable interest in who owns coastal real property, the bankruptcy court's order did not impede Mexico's ability to protect this interest. Rather, the court crafted a remedy consistent with Mexico's *fideicomiso* system. Further, the court did not require Mexico to approve the *fideicomiso* trust that the Diaz Defendants were ordered to create. Finally, the Diaz Defendants have not identified any sense in which the court's order left them at risk of incurring multiple or inconsistent obligations.

F.

We next consider the Diaz Defendants' argument that the bankruptcy court erred in applying U.S. law instead of Mexican law to determine whether they were good faith purchasers. Although this argument relies exclusively on *In re Tippett,* 542 F.3d 684 (9th Cir. 2008), that case is distinguishable.

In *Tippett,* the debtors sold their California home after filing their bankruptcy petition. *Id.* at 687. Although the parties agreed that, under California law, the buyer was a bona fide purchaser, *id.* at 686, the trustee argued that "the Bankruptcy Code occupies the field of title transfers initiated by Chapter 7 debtors and accordingly preempts California's statute protecting bona fide purchasers such as [the buyer]." *Id.* at 689. This argument was rejected. *Id.* With the preemption issue settled, there was apparently no dispute that California law applied to determine whether the buyer was a bona fide purchaser.

Here, unlike in *Tippett,* the parties do not agree that, absent preemption, Mexican law determines whether the Diaz Defendants purchased the Villa in good faith. Rather, Kismet argues that the bankruptcy court properly applied U.S. law, specifically 11 U.S.C. §§ 549(c) and 550(b). This position is at least colorable, as H&G's sale of the Villa interest to the Diaz Defendants closed in San Diego. Thus, *Tippett* does not establish that Mexican law determines whether the Diaz Defendants were good faith purchasers. Citing no other authority, the Diaz

Defendants have failed to show that the bankruptcy court erred.

G.

Finally, we address the Diaz Defendants' argument that, since Martha Barba de la Torre was insulated from the interactions and due diligence leading up to her purchase of the Villa, the bankruptcy court clearly erred in finding that she purchased the Villa in bad faith. This argument fails. A party "is considered to have 'notice of all facts, notice of which can be charged upon [her] attorney.'" *Garcia v. I.N.S.,* 222 F.3d 1208, 1209 (9th Cir. 2000) (per curiam) (quoting *Link v. Wabash R.R.,* 370 U.S. 626, 634 (1962)). Here, the bankruptcy court found that Martha "relied on her son and their attorney to handle all aspects of the transaction for her." The attorney had notice of numerous red flags surrounding the sale, thus Martha is charged with notice of those red flags. This conclusion is not disturbed by the "equal dignities rule," which mandates that "an authority to enter into a contract required by law to be in writing can only be given by an instrument in writing." Cal. Civ. Code § 2309. The imputation of notice to Martha is based, not on her attorney's execution of a contract on her behalf, but rather on her attorney's investigation leading up to the sale of the Villa interest. Even beyond the attorney-client relationship, moreover, Martha would have had personal knowledge of the red flags if she had exercised reasonable diligence. *See In re Richmond Produce Co.,* 195 B.R. 455, 464

(N.D. Cal. 1996) (citing *Bonded Fin. Servs., Inc. v. European Am. Bank,* 838 F.2d 890, 897-98 (7th Cir. 1988)).

Finally, the Diaz Defendants' argument that Martha never received the beneficial interest from H&G, but rather received only title from the bank, is unconvincing. As a court of equity, the bankruptcy court properly looked past the formalities of Mexican law to recognize the reality that each of the Diaz Defendants received the Villa interest from H&G.

We **AFFIRM** the bankruptcy court's judgment with respect to the postpetition transfer action. The fraudulent conveyance action is moot as a result. We grant the requests for judicial notice filed by Kismet and the Diaz Defendants.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

ALEJANDRO DIAZ-BARBA, et al., Defendants/Appellants, vs. KISMET ACQUISITION, LLC, Plaintiff/Appellee.	Case No. 08cv1446 BTM (BLM) consolidated with 08cv1572 BTM (BLM) **ORDER AFFIRMING JUDGMENT OF BANKRUPTCY COURT** (Filed May 20, 2010)

Alejandro Diaz-Barba and Martha Margarita Barba de la Torre have appealed under 28 US.C. § 158(a)(1) from a judgment of the United States Bankruptcy Court for the Southern District of California. For the following reasons, the Court **AFFIRMS** the judgment.

I. BACKGROUND

This is an appeal from a judgment in two bankruptcy avoidance actions. The object of those avoidance actions was the sale of a coastal villa in Mexico (the "Villa"). The Villa is at the heart of this dispute, and both Appellants and Appellee claim that they are its lawful owners.

A. The Icenhowers Purchase the Villa

The Villa has been the object of litigation and bought and sold several times in recent history. In

1995, the D. Donald Lonie, Jr., Family Trust ("Lonie Trust") owned the beneficial interest in the Villa.[1] (Excerpts of Record ("ER") 18-51, June 2, 2008 Consolidated Findings of Fact and Conclusions of Law ("FFCL") ¶ 3.) The Lonie Trust agreed to sell its interest in the Villa to Jerry and Donna Icenhower (collectively the "Icenhowers" or "Debtors"). (*Id.*) Mr. Icenhower executed promissory notes in exchange for the Villa, but a dispute arose regarding the notes and the Lonie Trust sued the Icenhowers in the United States District Court for the Southern District of California.[2] (*Id.*)

The lawsuit sought a determination of the parties' respective rights in the Villa. (*Id.* at ¶ 4.) The Lonie Trust prevailed, and in 2003 the district court entered judgment against the Icenhowers. (*Id.* at ¶ 5.) The judgment required the Icenhowers to either (1) pay damages of about $1.36 million and re-register a lien on the Villa as security for the damages; or (2) reconvey the Villa to the Lonie Trust, free of any encumbrances. (*Id.*)

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[1] Under Mexican law, a foreign national may not directly hold title to coastal property in Mexico, but may hold the beneficial interest in a *fideicomiso* bank trust formed to hold title to the real property. Unless stated otherwise, all references to the transfer of the Villa refer to the transfer of the beneficial interest.

[2] That action is entitled *Lonie v. Icenhower,* 00cv612.

B. The Icenhowers Transfer the Villa to a Shell Corporation

But before the district court entered that judgment, the Icenhowers had already transferred the Villa to Howell & Gardner Investors, Inc. ("H&G"), a shell corporation. (*Id.* at ¶ 16.) The Icenhowers received virtually nothing in exchange for transferring the Villa to H&G. (*Id.*) And under the terms of the sale, Mr. Icenhower retained total control over the Villa. (*Id.* at ¶ 17.) Not only did Mr. Icenhower control the Villa, but Mr. Icenhower also controlled H&G; it had no real corporate existence apart from him and had no business purpose other than as a sham company to hold the Icenhowers' assets. (*Id.* at ¶ 14.) Thus, when the district court entered judgment against the Icenhowers and ordered them to either pay damages or return the Villa to the Lonie Trust, H&G – and not the Icenhowers – purportedly owned the Villa.

C. The Icenhowers File for Bankruptcy

Shortly after the district court entered judgment against the Icenhowers, on December 15, 2003 the Icenhowers responded by filing a Chapter 7 bankruptcy petition. (FFCL ¶ 6.) During the course of the bankruptcy, the Icenhowers (or "Debtors") disclosed that they had transferred the Villa to H&G. (*Id.* at ¶ 44.) And in August 2004, the bankruptcy trustee filed a fraudulent conveyance action to avoid the transfer and recover the Villa (the "Fraudulent Transfer

Action"). (*Id.* at ¶ 45.) But by the time the Court entered a preliminary injunction preventing H&G from transferring the Villa, Mr. Icenhower had caused the Villa to be transferred yet again – this time to Appellants Martha Barba Diaz[3] and her son Alejandro Diaz-Barba (collectively the "Diaz Family"). (*Id.* at ¶ 37.)

D. The Diaz Family Agrees to Purchase the Villa and Conducts Due Diligence

Mr. Icenhower met Mr. Diaz through a mutual friend, and Mr. Diaz understood Mr. Icenhower to be the manager of the Villa. (*Id.* at ¶ 27.) Mr. Diaz was interested in purchasing the Villa, and during 2003 and 2004 they negotiated and finally agreed on a purchase price of $1.5 million. (*Id.* at ¶¶ 28-29.) After agreeing on the price, Mr. Diaz began his due diligence. (*Id.* at ¶ 29.)

While Mr. Diaz conducted his due diligence, Mr. Icenhower asked him for a $100,000 personal loan to invest in a golf-pro shop. (*Id.* at ¶ 29.) Mr. Icenhower made only one payment on the loan before he filed for bankruptcy in December 2003. (*Id.* at ¶ 29.) Although Mr. Icenhower did not tell Mr. Diaz of the filing, Mr. Diaz received notice of the bankruptcy because Debtors listed the $100,000 loan in their filing. (*Id.* at ¶ 31.)

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[3] Appellants' briefing papers refer to Ms. Barba Diaz as Martha Barba De La Torre. The Court will adhere to the FFCL's reference to Appellant as Martha Barba Diaz or Ms. Barba Diaz.

Mr. Diaz was shocked and concerned about the bankruptcy, but Mr. Icenhower assured Mr. Diaz that he was forced to file due to an unfair judgment against him. (*Id.* at ¶ 32.) Mr. Icenhower further assured Mr. Diaz that he would pay back the $100,000 personal loan through an equivalent reduction in the purchase price of the Villa. (*Id.*) Mr. Diaz accepted Mr. Icenhower's explanation and did not believe he needed to separately investigate why, given that H&G purportedly owned the Villa, Mr. Icenhower had authority to lower the sales price of the Villa to repay Mr. Icenhower's personal loan. (*Id.*)

The Diaz Family hired Eduardo Sanchez, a lawyer licensed only in Mexico, to conduct due diligence on their purchase of H&G's interest in the Villa. (*Id.* at ¶ 33.) The scope of Mr. Sanchez's due diligence was the following: (1) he confirmed H&G's corporate existence by obtaining its Articles of Incorporation; (2) he confirmed from the State of Nevada that H&G was in good standing; (3) he obtained a corporate resolution authorizing Craig Kelley, H&G's sole office [sic] and director, to sell the Villa; and (4) he reviewed the property records in the property office in Autlan, Mexico and determined that the previous transfers of the Villa were legally correct and that there were no liens or claims against it. (*Id.* at ¶ 34.)

There were several things, however, that Mr. Sanchez did not review or confirm. Because he viewed the transaction as governed by Mexican law, he did not review any relevant U.S. law. (*Id.* at ¶ 35.) Although Mr. Sanchez had H&G's Articles of Incorporation,

which required shareholder authorization for a transaction selling substantially all of H&G's assets, he never requested or obtained that authorization. (*Id.*) Nor was he concerned that Mr. Icenhower asked the Diaz Family to pay consideration to entities other than H&G for transfer of the Villa. (*Id.*) He knew of Mr. Icenhower's personal bankruptcy, but was unconcerned about this too because he viewed the transaction as a purchase from H&G, not Mr. Icenhower. (*Id.*) He did not check either the bankruptcy court or call the bankruptcy trustee. (*Id.*) Lastly, although Mr. Icenhower had warned Mr. Diaz that the trustee was looking into the Debtors' sale of the Villa to H&G, Mr. Sanchez testified that he was unaware that the transaction was under review. (*Id.*)

E. Mr. Icenhower and the Diaz Family Close the Deal

Still, Mr. Sanchez and the Diaz Family proceeded with the transaction. In June 2004, the Diaz Family executed a purchase agreement for the Villa. (FFCL ¶ 37.) The actual agreed price was $1.5 million. (*Id.*) But the stated consideration in the purchase agreement was $7,508,800 Mexican pesos, equivalent to $658,071 USD. (*Id.*) The Diaz Family, their lawyer, and Mr. Icenhower admitted that the lower price was a ruse to avoid Mexican taxes. (*Id.*)

Mr. Icenhower, Mr. Diaz, Mr. Sanchez, and Mr. Kelley (H&G's sole officer and director) were present at the closing in Chula Vista, California. (*Id.* at ¶ 38.)

Although Mr. Kelley signed the transaction documents on behalf of H&G, he was only a passive participant and followed Mr. Icenhower's directions. (*Id.*) The Diaz Family only paid $25,000 of the purchase price directly to H&G. (*Id.* at ¶ 39.) At the closing, Mr. Icenhower directed them to pay the balance to third parties: $675,000 USD to Buckeye International Funding, Inc.; $398,663 USD to Western Financial Assets, Inc.; and $191,567 USD to Icenhower Investments. (*Id.* at ¶ 39.) The $675,000 was paid from an account owned by Ms. Barba Diaz, and the other two payments were made from accounts owned by Mr. Diaz. (SER 416-18.)

Neither Mr. Diaz nor Mr. Sanchez thought it odd that Mr. Icenhower directed them to pay virtually all of the consideration to third parties and not to H&G. (FFCL ¶ 40.) In addition, although the Villa constituted all the property H&G owned, there was no shareholder resolution authorizing the sale as required by H&G's Articles of Incorporation. (*Id.* at ¶ 41.)

F. The Bankruptcy Trustee Files Actions to Avoid the Transfers of the Villa

As mentioned above, the bankruptcy trustee filed the Fraudulent Transfer Action to avoid the transfer from Debtors to H&G in August 2004. (FFCL ¶ 45.) Once the trustee learned that H&G had transferred the Villa to the Diaz Family, the trustee added them as defendants in that action. (*Id.* at ¶ 46.) Later, in

August 2006, the trustee filed an alter ego and avoidance action, seeking a finding that H&G was the Debtors' alter ego and for substantive consolidation of Debtors and H&G *nunc pro tunc* to the petition date, and to recover the postpetition transfer of the Villa (the "Postpetition Transfer Action") (collectively with Fraudulent Transfer Action, "Avoidance and Recovery Actions"). (*Id.* at ¶ 48.)

During the course of the Avoidance and Recovery Actions, Kismet Acquisition, LLC ("Kismet" or "Appellee") intervened and purchased the estate's assets, including those actions. (*Id.* at ¶ 50-51.) Kismet replaced the trustee in the actions and is the Appellee here. (*Id.* at ¶ 52.)

G. The Bankruptcy Court's Findings of Fact and Conclusions of Law

After the conclusion of a bench trial in the Avoidance and Recovery Actions, the bankruptcy court issued its findings of fact and conclusions of law. Its findings of fact were substantially similar to the facts recited above. Based on these facts, the bankruptcy court made several conclusions of law.

First, based on the claims in the Postpetition Transfer Action, the court held that H&G was Debtors' alter ego. The Court therefore consolidated H&G's assets with the bankruptcy estate *nunc pro tunc* to the petition date. The consolidation had the effect of treating the Villa as part of the bankruptcy estate as of the date of filing.

Second, based on the consolidation, the Villa's transfer to the Diaz Family was avoidable under 11 U.S.C. § 549 as an unauthorized postpetition transfer. The bankruptcy court ruled that the Diaz Family had no defense to the avoidance because they admitted knowledge of Debtors' bankruptcy filing. As a result of the avoidance, the court could recover the Villa under 11 U.S.C. § 550(a)(1);

Third, the court alternatively held based on the claims in the Fraudulent Transfer Action, that the Villa's transfer to H&G was a fraudulent transfer and therefore avoidable. And the court could recover the Villa from the Diaz Family under 11 U.S.C. § 550(a)(2) because, due to their insufficient due diligence in light of all the red flags, they were not good-faith transferees.

In its Amended Consolidated Judgment ("ACJ"), the bankruptcy court ordered the Diaz Family to undo the avoided transfer and convey the Villa to a *fideicomiso* trust naming Kismet as the sole beneficiary. Alternatively, Kismet could elect to receive a make-whole monetary judgment. The Diaz Family eventually satisfied an oral amendment to the judgment after the bankruptcy court entered coercive and remedial sanctions.

The Diaz Family appeals the ACJ.

II. STANDARDS OF REVIEW

The Court has jurisdiction over the appeals under 28 U.S.C. § 158(a). The Court reviews the

bankruptcy court's factual findings for clear error. *See Harsh Investment Corp. v. Bialac (In re Bialac),* 712 F.2d 426, 429 (9th Cir. 1983). Conclusions of law are subject to *de novo* review, *id.*, as are most mixed questions of fact and law, *Biggs v. Stovin (In re Luz Int'l., Ltd.),* 219 B.R. 837, 840 (B.A.P. 9th Cir. 1998).

III. DISCUSSION

A. Local-Action Doctrine

Appellants first argue that in avoiding the Villa's transfer from H&G to them, and ordering Appellants to transfer the Villa to Kismet, the bankruptcy court exceeded its jurisdiction. The bankruptcy court, they argue, purportedly exercised *in rem* jurisdiction over the Villa. But because the Villa is in Mexico, Appellants contend, it is beyond the *in rem* jurisdiction of the court. In support of this argument, Appellants invoke the local-action doctrine.

The local-action doctrine is a common-law doctrine that prevents federal courts from exercising subject-matter jurisdiction[4] over certain actions involving out-of-state real property. When "the remedies [a party] seeks would act *directly* upon the land

[4] Federal courts disagree over whether the local-action doctrine affects subject-matter jurisdiction or merely venue. 14D Charles Alan Wright et al., Federal Practice and Procedure § 3822 (3d ed. 2009). The Ninth Circuit, however, has treated the issue as affecting subject-matter jurisdiction. *McGowan,* 219 F. at 370. The Court follows that rule here.

itself, jurisdiction is properly exercised in the state where the land is situated." *See U.S. v. Byrne,* 291 F.3d 1056, 1060 (9th Cir. 2002) (emphasis added). Local actions are essentially actions *in rem* and may only be prosecuted "where the thing on which they are founded is situated." *Casey v. Adams,* 102 U.S. 66, 68 (1880).

On the other hand, causes of action that are related to a particular defendant are called transitory actions. Unlike local actions, which must be brought where the *res* at issue is located, transitory actions may be brought in any district where the court has *in personam* jurisdiction over that defendant. *See Massie v. Watts,* 10 U.S. (6 Cranch) 148, 160 (1810).

Although the line between transitory and local actions is not always clear, what is clear is that actions for fraud are transitory. *Massie,* 10 U.S. (6 Cranch) at 160 ("[T]his court is of opinion that, in a case of fraud . . . the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree."); *Safeway Stores,* 743 F.2d at 506-09; *Neet v. Holmesk* 19 Cal. 2d 605, 611 (1942) (same is true under California law). Similarly, actions filed by a bankruptcy trustee to avoid a fraudulent transfer under 11 U.S.C. § 548 are also transitory. *Coffey v. Managed Properties,* 85 F.2d 88, 90 (2d Cir. 1936); *Kalso Systemet, Inc. v. Jacobs,* 474 F.Supp. 666, 668-69 (D.C.N.Y. 1979); *see also Safeway Stores, Inc.,* 743 F.2d at 506-09 (listing cases holding actions to avoid fraudulent transfer are

transitory); *Sax v. Sax,* 294 F.2d 133, 136-37 (5th Cir.1961) (suit to avoid fraudulent conveyance is transitory); *Tcherepnin v. Franz,* 439 F.Supp. 1340, 1345 (D.C. Ill. 1977) ("It is well-settled that in an action to set aside a fraudulent conveyance of land the court has jurisdiction wherever the person can be found, although lands not within the jurisdiction may be affected by the court's decree."). *But c.f. Mann v. Hanil Bank,* 900 F. Supp. 1077 (E.D. Wis. 1995) (holding non-bankruptcy fraudulent transfer action is local in nature). The Court holds that actions to avoid a fraudulent conveyance are transitory and may be brought wherever the court has *in personam* jurisdiction over the defendant.

In transitory actions, a court may use its *in personam* jurisdiction over a defendant to indirectly act upon out-of-state real property. *See, e.g., Fall v. Eastin,* 215 U.S. 1, 8 (1909) ("A court of equity, having authority to act upon the person, may indirectly act upon real estate in another state, through the instrumentality of this authority over the person."); *Sax,* 294 F.2d at 137 (court could declare agreement invalid due to fraud and use coercive sanctions to compel action with respect to out-of-state property). Using its *in personam* jurisdiction, at least one court in this jurisdiction has transferred interests in Mexican land by ordering defendants to effect the transfer themselves. *See Brady v. Brown,* 51 F.3d 810, 819 (9th Cir. 1995) (affirming district court's judgment requiring defendants to execute power of

attorney transferring interests in Mexican land into *fideicomiso* trust).

Here, the bankruptcy court had *in personam* jurisdiction over Appellants and therefore had jurisdiction to hear the Avoidance and Recovery Actions. Avoidance actions are transitory, *see, e.g., Coffey,* 85 F.2d at 90, and cases cited *supra,* and transitory actions may be brought wherever the court has *in personam* jurisdiction over the defendants, *e.g.*, *Watts,* 10 U.S. (6 Cranch) at 160. Furthermore, once it had avoided the transfers, the bankruptcy court had the authority to recover the property because it could do so through its *in personam* power over Appellants. *See, e.g., Central Virginia Cmty. Coll. v. Katz,* 546 U.S. 356, 372 (2006) (After avoiding transfer in bankruptcy, action to recovery property "might itself involve *in personam* process.")

Alternatively, the bankruptcy court's exercise of jurisdiction was proper under 28 U.S.C. § 1334(b), which gives district courts (and bankruptcy courts under 28 U.S.C. § 157) original jurisdiction over all civil proceedings arising in or related to bankruptcy cases.[5] *Celotex Corp. v. Edwards,* 514 U.S. 300, 308

[5] As the Court mentions above *supra* n. 4, federal courts disagree over whether the local-action doctrine goes to subject matter jurisdiction or venue. 28 U.S.C. § 1334(b) addresses subject-matter jurisdiction and under that statute the bankruptcy court below had jurisdiction to hear the claims. Even if the Court assumes the local-action doctrine addresses venue, venue was proper in the bankruptcy court under 28 U.S.C. § 1408(1) because Debtors and Appellants resided in San Diego County.

(1995); 28 U.S.C. §§ 157, 1334(b). Congress has explicitly granted bankruptcy courts with subject-matter jurisdiction to hear avoidance and recovery actions like the ones at issue here. *See* 28 U.S.C. §§ 157, 1334(b). Thus, even if an action to avoid a fraudulent transfer was a local action under federal common law, the bankruptcy court would still have jurisdiction because Congress's broad grant of jurisdiction supersedes the common-law doctrine. *See City of Milwaukee v. Illinois,* 451 U.S. 304, 313 (1981) (federal statutes supersede federal common law).

Appellants cite no case holding that a bankruptcy trustee must bring actions to avoid the transfer of real property in the state where the real property is located. Appellant's most helpful case held that a district court lacked jurisdiction to hear a fraudulent transfer action regarding property located in Korea. *Mann v. Hanil Bank,* 900 F. Supp. 1077 (E.D. Wis. 1995). This holding is not binding on the Court. But more importantly, the avoidance action in *Mann* did not arise from a bankruptcy case. This is a crucial distinction because Congress has granted bankruptcy courts with broad jurisdiction to hear all civil proceedings related to a bankruptcy, *see* 28 U.S.C. § 1334(b), and this statutory jurisdiction was not present in *Mann.*

Appellants also attempt to distinguish between a bankruptcy court's jurisdiction over avoidance and its jurisdiction over recovery. Appellants are correct that a court's avoidance of a transfer of real property under § 548 is distinct from a court's subsequent

recovery of that property under § 550. *Dzikowski v. N. Trust Bank of Fl. (In re Prudential of Florida Leasing, Inc.),* 478 F.3d 1291, 1301 (11th Cir. 2007); *Suhar v. Burns (In re Burns),* 322 F.3d 421, 427 (6th Cir. 2003). But in this context the distinction is immaterial. As explained above, the Court may indirectly act upon out-of-jurisdiction real property through its *in personam* power over defendants. Furthermore, Congress explicitly granted bankruptcy courts jurisdiction to hear not only avoidance actions, but also recovery actions. *In re Gandy,* 299 F.3d 489, 496 (5th Cir. 2002); 28 U.S.C. § 1334 (bankruptcy court has jurisdiction over all civil proceedings related to bankruptcy); 28 U.S.C. § 157(b)(2)(H) (action to recover property is core proceeding). Thus, even assuming the local-action doctrine would otherwise apply to recovery actions, Congress's grant of jurisdiction overrides the purported application of the common-law doctrine. *See City of Milwaukee,* 451 U.S. at 313.

For these reasons, the Court holds that the local-action doctrine did not preclude the bankruptcy court from exercising jurisdiction over, and entering judgment in, the avoidance and recovery actions.

B. Extraterritorial Application of Avoidance and Recovery Provisions

Federal laws are presumed to be inapplicable to conduct outside the United States unless Congress "clearly expresses a contrary intent." *See Gushi Bros. Co. v. Bank of Guam,* 28 F.3d 1535, 1538-42 (9th Cir.

1994). This is called the presumption against extraterritoriality. *Id.* at 1540. Appellants argue that the bankruptcy court erred in recovering the Villa from them under § 550 because Congress did not intend the avoidance and recovery statutes to apply to extraterritorial transactions. In order to succeed on this argument, Appellants must establish (1) the transaction at issue occurred outside of the United States and (2) the avoidance and recovery statutes do not apply extraterritorially.

1. Appellants Have Not Waived the Presumption Against Extraterritoriality

As a threshold matter, Appellee argues that Appellants have waived this argument by submitting to the jurisdiction of the bankruptcy court. Appellee correctly states that when a party affirmatively invokes the jurisdiction of the bankruptcy court, the presumption against extraterritoriality does not apply to that party. *In re Simon,* 153 F.3d at 997. But here Appellants did not voluntarily submit to the jurisdiction of the bankruptcy court. They were made defendants in an adversary proceeding and moved to dismiss the adversary complaint. Only after they were made defendants and their motion to dismiss was denied did they voluntarily participate in the bankruptcy proceedings to protect their interests. Appellants, therefore, have not waived this argument

2. Did the Transaction At Issue Occur Within the United States?

The presumption against extraterritoriality does not apply to "conduct occurring within, or having effect within, the territory of the United States. . . ." *Omega S.A. v. Costco Wholesale Corp. .,* 541 F.3d 982, 987 (9th Cir. 2008). But acts inside the United States that are merely preparatory or incidental to the conduct at issue are, by themselves, insufficient to confer federal jurisdiction. *Gushi Bros. Co. v. Bank of Guam,* 28 F.3d 1535, 1538 (9th Cir. 1994).

The Villa was transferred twice – first from the Icenhowers to H&G and then from H&G to Appellants. The parties dispute which transfer should be the subject of the extraterritoriality analysis. There are only two choices: either (1) the transfer from the Icenhowers to H&G or (2) the transfer from H&G to Appellants.

The parties fail to recognize that the relevant transfer is different depending on the action. As mentioned above, the trustee filed both a Fraudulent Transfer Action and a Postpetition Transfer Action. These actions focus on different transfers. The Postpetition Transfer Action necessarily focuses on the transfer from H&G to Appellants. This is because under the theory of this action, H&G was the alter ego of Debtors and H&G's asset – the Villa – was consolidated with the Debtors' estate. When H&G later transferred the Villa to Appellants, it would therefore be treated as a postpetition transfer depleting the assets of the estate. Therefore, the only

transfer at issue in the Postpetition Transfer Action is the one from H&G to Appellants.

With respect to the Fraudulent Transfer Action, the focus is different. In this action, the trustee sought to avoid the transfer from Debtors to H&G as a fraudulent transfer because H&G paid no consideration for the Villa. After H&G then transferred the Villa to Appellants, the trustee sought to recover the Villa from them under § 550(a)(2) as immediate transferees of H&G. Under the Fraudulent Transfer Action, the Court affirms the bankruptcy court's ruling that the relevant transfer was the first transfer from the Icenhowers to H&G. This is because the first transfer is the *only* transfer that the bankruptcy court avoided in its ACJ.

The bankruptcy court entered judgment against Appellants in the Fraudulent Transfer Action based only on 11 U.S.C. § 550(a)(2) and its authority under that section to recover improperly transferred property. Indeed, in its February 13, 2007 order the bankruptcy court dismissed any avoidance claims aimed directly against the Diaz Family. (ER 55.) Thus, the Court looks exclusively to § 550 to determine which transfer is relevant to the extraterritoriality analysis.

With some exceptions, the bankruptcy court's authority under § 550(a) to recover property is coextensive with its authority to avoid fraudulent transfers. *In re Richmond Produce Co.,* 195 B.R. 455, 463 (N.D. Cal.1996) ("[O]nce the trustee proves that a transfer is avoidable under section 548, he may seek to recover against any transferee. . . .") In other

words, when a transfer may be avoided, generally the property may also be recovered. 28 U.S.C. § 550(a) ([T]o the extent that a transfer is avoided . . . the trustee may recover, for the benefit of the estate, the property transferred. . . .") Thus, although avoidance and recovery are distinct claims, *In re Burns,* 322 F.3d at 427, they are not completely independent because a transfer must be avoided before the property may be recovered.

Because a § 550 claim is dependent on the avoidance of a transfer, and because a court's recovery power is generally coextensive with its avoidance power, the relevant transfer for purposes of determining whether the presumption against extraterritoriality applies is only the transfer that has been avoided. And in this case, that is the first transfer from the Icenhowers to H&G.

But even when the focus of the extraterritoriality analysis is the transfer from H&G to the Appellants – as in the Postpetition Transfer Action – the presumption against extraterritoriality still will not apply. This is because both the transfer to H&G and the transfer to Appellants occurred within the United States.

i. *The Transfer from the Icenhowers to H&G Occurred Within the United States*

The bankruptcy court found that the transfer from Debtors to H&G occurred within the territorial jurisdiction of the United States. (ER 55.) The Court

reviews this finding for clear error. *In re Bialac,* 712 F.2d at 429.

Debtors are U.S. citizens and residents of San Diego County, California.[6] H&G was a Nevada corporation and Debtors' alter ego. The transfer between these parties was executed in the United States, and it had significant effects on the suit initiated by the Lonie Trust and on the bankruptcy proceedings. Indeed, by transferring the property to H&G, Debtors intended to thwart the Lonie Trust's attempts to recover the property.

Under these circumstances, when the acts central to the avoided transaction occurred within the United States, the parties to the transaction are domestic, and the transfer had significant, intentional effects within the territory of the United States, the presumption against extraterritoriality does not apply. *See Hong Kong & Shanghai Banking Corp. v. Simon (In re Simon),* 153 F.3d 991, 995 (9th Cir. 1998) (holding presumption does not apply when conduct is "intended to, and results in, substantial effects within the United States").

Appellants focus on Debtors' and H&G's purported actions in Mexico to complete the transfer. Essentially, Appellants argue that because Debtors and

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[6] Although the FFCL does not explicitly state that Debtors reside in San Diego County, the Court takes judicial notice of this fact based on the venue of the bankruptcy filing and numerous references to Debtors' residence in the record.

H&G went to Mexico to sign documents transferring the Villa to H&G, the transfer occurred in Mexico. But the execution of that document in Mexico was made in furtherance of the principal agreement to transfer the property. The object of the avoidance action is not the document signed in Mexico, but the contract signed in the United States.

ii. *The Transfer from H&G to the Diaz Family Also Occurred Within the United States*

For similar reasons, the Villa's transfer from H&G to the Diaz Family also occurred within the United States and the presumption against extraterritoriality is therefore inapplicable.[7]

First, although Ms. Barba Diaz and Mr. Diaz are citizens of Mexico, they are residents of San Diego County. (FFCL ¶ 22.) Both Ms. Barba Diaz and Mr. Diaz are officers, directors, or members of numerous limited liability companies and corporations having a principal place of business in San Diego County. (*Id.* at ¶ 23.)

Second, Mr. Diaz and Mr. Icenhower had several contacts in San Diego related to the Diaz Family's purchase of the Villa. Mr. Diaz and Mr. Icenhower

[7] The bankruptcy court did not make a factual finding regrading [sic] this point. Nevertheless, the record amply supports a finding that this transaction also occurred within the United States.

first met in Pacific Beach in San Diego County. When Mr. Diaz learned that Mr. Icenhower filed for bankruptcy, they met at Mr. Diaz's home in San Diego to discuss Mr. Diaz's concerns about the bankruptcy. And at the same meeting, they discussed a reduction in the Villa's price. Importantly, Mr. Diaz and Mr. Kelley (H&G's sole officer) signed the closing documents in Chula Vista, California, which is within this district's territorial jurisdiction. Furthermore, it is evident from the record that in causing H&G to transfer the Villa, Mr. Icenhower intended to thwart the efforts of the bankruptcy trustee to recover the property.

Under these circumstances, when the parties reside in San Diego, negotiation largely occurred in the United States, the transfer was executed in the United States, and the transfer had the intended effect of stymying the Villa's recovery for the bankruptcy estate, the presumption does not apply. *See In re Simon,* 153 F.3d at 995.

Appellants again focus on the execution of documents in Mexico. But H&G and the Diaz Family executed the principal purchase agreement in San Diego. Any later actions were in furtherance of, and incidental to, the original purchase agreement, which documented the bargained-for exchange. Appellants also argue that because they are Mexican citizens, the transaction did not occur in the United States. But Appellants resided in San Diego County, and they executed the principal purchase agreement there. Furthermore, even though a Mexican bank was the

trustee for the interests in the Villa, Mr. Icenhower or H&G exercised control over those property rights. Even when taken together, the transaction's connections to Mexico are insufficient to invoke the presumption in light of the parties' substantial actions in the United States.

3. The Bankruptcy Code Applies Extraterritorially to Protect Property of the Estate

Even if either transaction at issue did occur within Mexico, the bankruptcy court could recover the property under the holding of *In re Simon,* 153 F.3d at 996. The bankruptcy court may exercise jurisdiction over all property of the bankruptcy estate, even if it is located outside the territorial jurisdiction of the United States. *Id.* The provisions of the Bankruptcy Code, as they relate to property in the bankruptcy estate, apply extraterritorially. *Id.* ("[W]e conclude that congress intended extraterritorial application of the Bankruptcy Code as it applies to the property of the estate.")

In this case, the bankruptcy court ruled that H&G, as Debtors' alter ego, would be consolidated *nunc pro tunc* to the petition date. Consequently, the Villa was part of the bankruptcy estate upon filing the petition. The bankruptcy court therefore properly exercised its jurisdiction over the Villa in ordering its recovery and transfer to Appellee. *See id.*

Appellants cite cases holding that Congress did not intend the avoidance statutes to apply extraterritorially. *Maxwell Commc'n Corp. PLC v. Societe General PLC (In re Maxwell Commc'n Corp. PLC),* 186 B.R. 807 (S.D.N.Y. 1995); *Barclay v. Swiss Fin. Corp. (In re Midland Euro Exch., Inc.),* 347 B.R. 708 (Bankr. C.D. Cal. 2006). But these cases are distinguishable because the property at issue in those cases was not already a part of the bankruptcy estate. Here, as a result of the bankruptcy court's judgment, the Villa was a part of the bankruptcy estate from the date Debtors filed their petition. And under the reasoning of *In re Simon,* the bankruptcy court properly exercised jurisdiction over it.

C. The Forum Selection Clause

Appellants next contend that the bankruptcy court erred in refusing to enforce a forum selection clause contained in the five *escrituras.*[8] The Court reviews the bankruptcy court's refusal to enforce a forum selection clause for an abuse of discretion. *Fireman's Fund Ins. Co. v. M.V. DSR Atl.,* 131 F.3d 1336, 1338 (9th Cir. 1997).

As a preliminary matter, the Court questions whether the purported forum selection clauses even

[8] *Escrituras* are the Mexican legal documents that transferred interests in the Villa from the Icenhowers to H&G, and from H&G to Appellants.

apply to this dispute. The relevant provision in the *escrituras* states

> JURISDICTION AND COMPETENCE
>
> For everything relative to the *Interpretation* and *compliance* of this agreement, the parties expressly submit to the Laws and Tribunals of the City of Guadalajara, Jalisco or Mexico . . . [T]hey also accept to be considered as Mexicans, in regards to the rights derived from this agreement, and that they will not invoke therefore the protection of their Government, in case of breaching this agreement, they would forfeit in favor of Mexico, the rights acquired. (Emphasis added.)

The avoidance and recovery actions do not interpret or enforce the *escrituras.* Rather, the actions void a transfer of property under United States bankruptcy law. But even if the provision applied to these actions, the bankruptcy court did not err in declining to enforce it.

Generally, international forum-selection clauses are enforceable absent a strong showing that they should be set aside. *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 12-15 (1972). Forum-selection clauses should not be enforced if litigation in the selected forum would be "seriously inconvenient" or if their enforcement would violate a strong public policy of the forum in which the suit is brought. *Bremen,* 407 U.S. at 12-18. Public policy strongly favors centralization of core bankruptcy proceedings. *N. Parent, Inc. v.*

Cotter & Co. (In re N. Parent, Inc.), 221 B.R. 609, 621-22 (Bankr. D. Mass. 1998) (see listed cases holding same); *Official Comm. of Unsecured Creditors v. Transpacific Corp. (In re Commodore Int'l, Ltd.),* 242 B.R. 243, 261 (Bankr. S.D.N.Y. 1999), *aff'd on other grounds,* 2000 WL 977681 (S.D.N.Y. July 17, 2000) (see listed cases). And the Avoidance and Recovery Action are core proceedings. 28 U.S.C. § 157(b)(2)(F), (H).

Here, the *Bremen* factors weigh against enforcing the forum selection clause because the avoidance recovery actions are core proceedings. There is a strong public policy favoring consolidating these core proceedings in the bankruptcy court. *E.g., In re N. Parent,* 221 B.R. at 621-22. Based on this strong public policy alone, the bankruptcy court did not abuse its discretion in declining to enforce the forum selection clause. Furthermore, forcing Appellee to litigate its claims in Mexico would likely be extremely difficult because the causes of action are based on United States statutory law.[9]

Additionally, the forum selection clauses are not binding on Appellee. This is because Appellee, standing in the shoes of the trustee as plaintiff in the avoidance and recovery actions, is not in privity with

[9] The Court notes that the bankruptcy court did not make specific findings regarding the difficulty of Appellee pursuing its claims in Mexico. Even absent these findings, the public policy favoring consolidation of core proceedings is sufficient to support the bankruptcy court's decision.

Debtors or Appellants. *See Corzin v. Fordu (In re Fordu)*, 201 F.3d 693, 705 (6th Cir. 1999) (trustee not in privity with debtor). Debtors and Appellants are the only parties to these proceedings who signed the *escrituras*; Appellee was never a party to the *escrituras* and therefore is not bound by the documents' forum selection clauses.

For these reasons, the bankruptcy court did not abuse its discretion in declining to enforce the forum selection clause in the *escrituras*.

D. International Comity

Appellants also contend that the bankruptcy court erred in declining to exercise jurisdiction over the Avoidance and Recovery Actions based on international comity. The Court reviews the bankruptcy court's refusal to abstain based on international comity for an abuse of discretion.[10] *See Sarei v. Rio Tinto, PLC,* 487 F.3d 1193, 1211 (9th Cir.2007).

[10] It appears that although Appellants moved the bankruptcy court to abstain based on comity, the bankruptcy court never ruled on the motion. It was never formally withdrawn, but at a pre-trial hearing on January 21, 2008, Appellants did not include it in a list of outstanding motions. Nevertheless, because it was not explicitly withdrawn, the Court considers Appellants' comity argument.

1. Comity Requires a True Conflict Between Domestic and Foreign Law

"Under the international comity doctrine, courts sometimes defer to the laws or interests of a foreign country and decline to exercise jurisdiction that is otherwise properly asserted." *Id.* "Comity is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other." *Dependable Highway Express, Inc. v. Navigators Ins. Co.,* 498 F.3d 1059, 1067 (9th Cir. 2007) (citation omitted). In order for the doctrine to apply, there must be a true conflict between domestic and foreign law. *Sarei,* 487 F.3d at 1211.

Here, the Court is unpersuaded that there is a true conflict between United States and Mexican law. Appellants argue that Mexican and United States law differ in that Mexican law does not permit courts to affect interests in land through their *in personam* jurisdiction. They also argue that Mexican courts do not recognize foreign judgments concerning Mexican real property. Lastly, they argue that Mexican courts have exclusive jurisdiction over interests in Mexican land.

But the judgment at issue here affected Appellants directly and Mexican land only indirectly. The bankruptcy court only exercised jurisdiction over Appellants through its *in personam* power and did not exercise jurisdiction over the Villa itself. Thus, the judgment does not require recognition by Mexican courts in order to be effective against Appellants. *Compare Remington Rand Corp. v. Bus. Sys. Inc.,* 830

F.2d 1260, 1273 (3d Cir. 1987) (requiring Dutch court to recognize judgment, which directly attached assets in Holland, as a precondition to enforcing judgment) *with Brady v. Brown,* 51 F.3d 810, 817 (9th Cir. 1995) (approving order requiring defendant to transfer Mexican property to *fideicomiso* trust, even without prior approval of Mexican court). *See also Perry v. O'Donnell,* 749 F.2d 1346, 1351 (9th Cir. 1985) ("It is well settled that although a court may have in personam jurisdiction to order one of the parties to convey to the other party a deed to property in another state, it cannot directly affect or determine title to that real property.") (citing, *inter alia, Fall,* 215 U.S. at 11).

In addition, the portion of the judgment regarding transferring the Villa to Kismet via a *fideicomiso* trust is now moot. The bankruptcy court later orally amended the ACJ and directed Appellants to transfer the Villa "to Axolotl or other assignee that Kismet may designate . . . for the purpose of effectuating the transfer directed to be effectuated in the Court's judgment of June 2." (Appellants' RJN, Ex. 7.) The bankruptcy court's oral modification is not before the Court on this appeal, and therefore the Court declines to address the legality of its original order requiring Appellants to transfer the Villa to Kismet through a *fideicomiso* trust. The transfer to Axolotl, however, was still accomplished by the creation of a *fideicomiso* trust.[11] Accordingly, the Court addresses the whether [sic]

[11] During a status conference on May 10, 2010, the parties agreed and represented to the Court that the transfer to Axolotl still required the creation of a *fideicomiso* trust.

the ACJ properly compelled Appellants to transfer the Villa to such a trust.

Fideicomiso trusts are explicitly permitted under Mexican law. *Brady,* 51 F.3d at 819 (referencing *fideicomiso* trusts and stating "[s]uch an arrangement, if it can be accomplished, does not violate Mexican law."). These trusts are the means by which foreigners can own interests in restricted coastal land, and their creation must be approved by the Mexican government. *Brady,* 51 F.3d at 817. In *Brady v. Brown,* the Ninth Circuit approved a district court's order requiring the defendant to effect the transfer of Mexican property to a *fideicomiso* for the benefit of plaintiffs. *Id.* at 819. The district court retained jurisdiction to consider alternative remedies if the transfer could not be completed. *Id.* For these reasons, the Ninth Circuit found that the district court's order did not violate Mexican law and, therefore, comity abstention did not apply. *Id.*

Here, the substance of the bankruptcy court's order was very similar. The bankruptcy court ordered Appellants to "take all actions necessary to execute and deliver any and all documents needed to undo the avoided transfer, and to take all actions necessary to cause the property to be reconveyed to a *fideicomiso* trust naming Plaintiff as the sole beneficiary for the benefit of the bankruptcy estate." The bankruptcy court did not require the Mexican government to approve the transaction, but only required Appellants to make every effort to effect the transfer and creation of the trust. And, like in *Brady v. Brown,* the

district court effectively reserved jurisdiction to enter a monetary award if Appellee so chose or, by implication, if Appellants were somehow unable to effect the transfer.

The Court agrees with Appellee that the distinction between whether interests in a *fideicomiso* trust are *in rem* or *in personam* rights is largely academic in this context. The important facts are that the bankruptcy court did not order Appellants to do anything illegal, *Brady,* 51 F.3d at 81, and it effectively retained jurisdiction to consider alternative remedies. The ruling in *Brady* virtually forecloses Appellants' argument here and there is no true conflict of law for purposes of comity abstention. *Id.*; *cf. Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 799 (1993) (no true conflict where entity subject to regulation in two countries may comply with both sets of regulations).

2. The Seven-Factor Comity Abstention Test

But even if there was a true conflict, abstention would be inappropriate. Courts should consider seven factors when deciding whether to abstain. First, the court should consider the degree of conflict with foreign law or policy. *Timberlane Lumber Co. v. Bank of America,* 749 F.2d 1378, 1384 (9th Cir.), *overruled on other grounds by Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 799 (1993). As explained above, the degree of conflict, if any, is low.

Second, the court should consider the nationality or allegiance of the parties and the location of a corporation's principal places of business. *Id.* Here, the parties to the Avoidance and Recovery Actions were (1) Appellants, citizens of Mexico, but residents and owners of several businesses in San Diego; (2) Appellee, a United States corporation owned by a German citizen who resides in Mexico; (3) trustee, a United States citizen; and (4) Debtors, who are United States citizens and residents of San Diego. The Court finds that this factor weighs against abstention, given that each party has substantial ties to the United States.

Third, the court should consider the extent to which enforcement by either state can be expected to achieve compliance. *Id.* This factor also weighs against abstention, given that the bankruptcy court's judgment was permissible under Mexican law. *See Brady,* 51 F.3d at 819.

Fourth, the court should consider the relative significance of effects on the United States as compared with those elsewhere. *Timberlane,* 749 F.2d at 1384. The Fourth Circuit addressed this issue in a similar case involving Bahamian real property and held that the United States's "strong interest" in efficiently administrating bankruptcy estates, preventing the estates' depletion, and protecting creditor rights outweighed Bahamas' interest. *French v. Liebmann (In re French),* 440 F.3d 145, 153-54 (4th Cir. 2006). Mexico's interest here, however, is stronger than the interest in *French* because Appellants are

Mexican citizens and the Villa is in Mexico. This factor is therefore neutral.

Fifth, the court should consider the extent to which there is explicit purpose to harm or affect American commerce. *Timberlane,* 749 F.2d at 1385. The bankruptcy court found that Debtors set up H&G as a sham corporation to hide their assets. They therefore intended to harm their creditors and affected American commerce. Appellants knew, or should have known, of Debtors' bankruptcy and the effect that their purchase of the Villa would have on Debtors' creditors.

Sixth, the court should consider the foreseeability of such effect. *Id.* The effects of transferring assets out of the bankruptcy estate was foreseeable and obvious to Debtors and Appellants.

And seventh, the court should consider the location of the alleged conduct in order to assess the appropriateness of the exercise of extraterritorial jurisdiction. *Id.* As set forth *supra,* much of the conduct at issue, including the negotiation and consummation of the various transfers, occurred in the United States. Although the parties executed additional documents in Mexico, they were only in furtherance of the principal agreements signed in the United States. This factor weighs against abstention.

In sum, all the relevant factors weigh against abstention. Accordingly, the bankruptcy court did not abuse its discretion in declining to abstain based on international comity.

3. Requirement That Bankruptcy Court Obtain Recognition of Judgment by Mexico

Lastly, Appellants argue that under the doctrine of comity, the bankruptcy court was required to determine whether its judgment could be enforced under Mexican law and to retain jurisdiction to consider alternative remedies if enforcement under Mexican law was not possible. Although Appellants cite examples of courts making similar orders, they cite no binding authority requiring such orders. Nevertheless, even if the bankruptcy court was required to "retain[ ] jurisdiction to consider alternative remedies if the trust could not be established under Mexican law," *Brady,* 51 F.3d at 819, the bankruptcy court here satisfied that requirement. In the ACJ, the court stated that it "reserves jurisdiction to issue any and all orders necessary to carry out and enforce this judgment." This reservation of jurisdiction satisfied the requirement – if indeed such a requirement exists – that the court retain the ability to issue further orders should the judgment be unenforceable in its original form.[12]

E. Mexico As a Required Party Under Rule 19

Appellants next claim that Mexico is a necessary party under Federal Rule of Civil Procedure 19, and

[12] This is precisely what the bankruptcy court did in ultimately requiring Appellants to transfer the Villa through a *fideicomiso* trust to Axototl, Kismet's assignee.

that because it cannot be joined, the ACJ should be vacated and the avoidance actions dismissed. In order for Appellants to succeed on their claim, they must establish under Rule 19 that (1) Mexico is a required party and (2) the action cannot proceed, in equity and good conscience, without it. *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. State of California,* 547 F.3d 962, 969 (9th Cir. 2008).

Appellants must first establish that Mexico is a required party. A party might be required under Rule 19 for two alternative reasons: (A) in that party's absence, the court cannot accord complete relief among existing parties; or (B) the party has a legally protected interest in the proceedings. Fed. R. Civ. P. 19(a)(1); *Cachil,* 547 F.3d at 970.

Here, complete relief is possible between the parties. The avoidance and recovery actions related to transfers and rights in the Villa between Debtors, Appellants, and Appellee. Furthermore, Mexico does not have a legally protected interest in the litigation. The interest must be more than one of convenience. *N. Alaska Environmental Ctr. v. Hodel,* 803 F.2d 466, 468 (9th Cir. 1986). Mexico has a generalized interest in compliance with its laws, but the ACJ did not violate Article 27 of Mexico's Constitution, which merely requires that foreign nationals not acquire direct ownership of coastal lands. Here, the bankruptcy court did not order direct ownership, but only ordered Appellants to take all necessary action to transfer the Villa into a government-sanctioned *fideicomiso* trust.

Furthermore, as Appellants state in their brief, "Mexico was neither involved in the allegedly avoidable transaction nor holds the property. . . ." (Appellants' Br. 20.) These interests are not strong enough to be legally protected. Indeed, from a practical perspective it is difficult to imagine how Mexico would assert any rights at all if it were joined in the adversary proceedings. It has no claim of ownership over the Villa.

F. Appellants' Good Faith Defense Is Governed By United States Law

Appellants' [sic] argue that the bankruptcy court erred in applying United States law, instead of Mexican law, to Appellants' good faith defenses under 11 U.S.C. §§ 549(c), 550(b)(1).[13] Appellants argue that under Mexican law their due diligence was sufficient and would have provided a defense to the avoidance and recovery actions.

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[13] Appellants state that all the parties, including the bankruptcy court, agreed that the transfer to Appellants was governed by Mexican law. This is incorrect. First, the Appellee's expert only agreed that the transfer of the *fideicomiso* rights was governed by Mexican law. This is axiomatic, since *fideicomiso* rights are a creation of Mexican law. The bankruptcy court later reiterated Appellee's expert's statement and did not state its own opinion. (ER 1238.) Moreover, neither Appellee's expert nor the bankruptcy court agreed that the purchase agreement executed in San Diego between H&G and Appellants was governed by Mexican law.

Appellants cite primarily *In re Tippett* to support their argument. 542 F.3d 684, 686 (9th Cir. 2008). Appellants argue that *Tippett* stands for the proposition that the "Bankruptcy Code does not preempt the *law of the situs of a property* as it applies to a transfer of title to such property." (Appellants' Br. 38) (emphasis added.) Therefore, they argue, the Bankruptcy Code does not preempt Mexican law regarding what constitutes a good faith purchaser. But this is an imprecise statement of *Tippet's* holding. *Tippett* does not require application of the law of the situs of the property in every instance. In that case, there was no dispute about whether California law applied to the transaction at issue. *See id.* at 689-90. It merely held that in a case where California fraudulent-transfer law *does* apply, it is not preempted by the Bankruptcy Code. *See id.* at 690.

Here, there are several reasons why Mexican law does not apply to the transactions at issue, even though the situs of the property was Mexico. The most important reason is that the two sales of the Villa occurred in the United States. *See supra* § B. The negotiations took place in the United States. And the parties to the sales resided in the United States. Under these circumstances, it was not error for the bankruptcy court to apply United States law to Appellants' good-faith-purchaser defense.

Appellants do not contest that under United States law Appellants were not good-faith purchasers.

1. Good Faith Under Mexican Law

Even under Mexican law Appellants are not good-faith purchasers. The Court does not analyze whether Appellants were good-faith purchasers in a vacuum, and looks to the findings of the bankruptcy court. Although the Court reviews de novo the bankruptcy court's interpretation of foreign law, *Brady,* 51 F.3d at 816, the Court reviews for clear error the determination that Appellants were not good-faith purchasers under Mexican law,[14] *see United States v. McConney,* 728. F.2d 1195, 1203 (9th Cir. 1993) (mixed questions of law and fact which are essentially factual reviewed for clear error); *Hollywood Nat'l Bank v. Int'l Bus. Machines Corp.,* 38 Cal.App.3d 607, 614 (1974) (analyzing facts to determine whether purchaser was bona fide).

Appellants cite to the testimony of their Mexican-law expert, Professor Jorge Vargas, to support their contention that Appellants' diligence was adequate under Mexican law. Based on Professor Vargas's testimony, Appellants argue that under Mexican law Appellants were only required to obtain a certificate of no liens from the Mexican Public Registry of Property.

The bankruptcy court, however, rejected the opinions of Appellants' Mexican-law expert as contradictory. For example, Professor Vargas testified that rights in *fideicomiso* trusts are *in rem* rights under Mexican law because of the Calvo clause in the Mexican

[14] The Court notes that even if it were to review the bankruptcy court's findings *de novo,* it would reach the same result.

Constitution.[15] But on cross examination, he admitted that in 2006 he wrote in an article that the Calvo clause was a legal relic. More importantly, Professor Vargas admitted on cross examination that the due diligence requirements are heightened in a cross-border transaction with a United States corporation. He admitted, among other things, that (1) some investigation into the nature of the business and the reputation of the corporation should be conducted to avoid involvement in money laundering by drug or arms dealers; (2) some contact with the corporation by telephone should be attempted; (3) some information about the capitalization of the corporation should be obtained; and (4) generally, that getting into the "intricacies" of the corporation was a necessary part of the due diligence in a cross-border transaction. (ER 892-904.) He further opined that the Mexican counsel or an associate United States counsel should conduct this heightened diligence, and that failure to do so might be negligence in performing due diligence. (ER 899.)

The bankruptcy court found Appellee's expert to be more credible and consistent. Appellee's Mexican-law expert testified that Appellants exercised insufficient due diligence under Mexican law, and the bankruptcy court adopted the expert's findings.

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[15] The Calvo clause is a doctrine of Mexican law which holds that judgments rendered by foreign courts purporting to affect real property in Mexico are unenforceable as against the public interest of Mexico, and contrary to the exclusive sovereignty of Mexico over its realty.

According to Appellee's Mexican-law expert, there were several red flags that should have prompted further inquiry by Appellants. These include (1) the purchase agreement between H&G and Appellants conveyed vehicles on the Villa property, but the agreement did not provide a warranty that the vehicles were legally within Mexico; (2) there was a significant disparity between the actual purchase price ($1,500,000 USD) and the stated price ($678,071 USD); (3) payment of consideration to entities other than H&G required additional diligence to avoid Mexican money-laundering laws; and (4) the previous purchase agreement between Mr. Icenhower and H&G, which gave Mr. Icenhower total control over management and sale of the Villa, should have raised questions about the relationship between Mr. Icenhower and H&G.

Furthermore, because of irregularities in the transfers between previous holders of the *fideicomiso* trust interests, the expert testified that at a minimum Appellants should have contacted the prior owners (e.g., the Lonie Trust, its beneficiaries, or their counsel). Had Appellants done so, they would likely have learned that the Lonie Trust had obtained a judgment against the Icenhowers and that the Villa might not have free title.

The Court affirms the bankruptcy court's findings and conclusions regarding the due diligence requirements under Mexican law. The Court further holds that, for the reasons stated above, the bankruptcy court correctly held that Appellants exercised

insufficient due diligence in their cross-border transaction with H&G and Debtors and did not act in good faith.

2. Appellants' Knowledge of Debtors' Bankruptcy Precludes the Good-Faith Defense

As an alternative, even if Mexican law applies and Appellants were good-faith purchasers under Mexican law, the Court holds that Appellants' knowledge of Debtors' bankruptcy precludes the good-faith defenses under § 549(c) and § 550(b)(1). Section 549(c) states that a transfer is not avoidable if made by a "good faith purchaser without knowledge of the commencement of the case. . . ." 11 U.S.C. § 549(c). Section 550(b)(1) similarly states that a transfer is not voidable if made by a transferee that takes "in good faith, and without knowledge of the voidability of the transfer avoided. . . ." 11 U.S.C. § 550(b)(1). "Knowledge of the voidability" does not require actual knowledge; knowledge of facts to induce a reasonable person to investigate is enough. *In re Richmond Produce Co., Inc.,* 195 B.R. 455, 464 (N.D. Cal. 1996) (citing *Bonded Fin. Servs., Inc. v. European Amer. Bank,* 838 F.2d 890, 897-98 (7th Cir. 1988). Appellants do not dispute that they had knowledge of the commencement of the bankruptcy, so they cannot be good-faith purchasers under § 549(c). Only § 550(b)(1) is at issue.

Appellants argue that because H&G held title to the Villa when Appellants purchased it, knowledge of

Debtors' bankruptcy did not give it notice that the transfer might be avoidable. This argument is unconvincing.

First, Appellants admit knowledge of the bankruptcy case, which would put a reasonable person on notice about the potential voidability of the transfer. *See In re Richmond Produce,* 195 B.R. at 464. Second, there were several facts found by the bankruptcy court that put Appellants on notice of the connection between H&G and Debtors, including (1) Mr. Icenhower exercised control over the management and sale of the Villa; (2) Mr. Icenhower was able to reduce the purchase price of the Villa by $100,000 to satisfy a debt owed personally by Mr. Icenhower; (3) at the closing, Mr. Icenhower exercised control over and directed the H&G's purported officer; (4) Appellants paid part of the consideration for the Villa to Icenhower Investments; (5) Icenhower told Appellants that the trustee was challenging the Villa's transfer from Debtors to H&G; and (6) Appellants knew the trustee was trying to tie Debtors to H&G.

Under these circumstances, Appellants knew or should have known of the connection between Debtors and H&G under § 549(c). And they knew or should have known of the voidability of the transfer under § 550(b)(1). *See Hayes v. Palm Seedlings Partners (In re Agric. Research & Tech. Group, Inc.,* 916 F.2d 528, 535-36 (9th Cir. 1990) (applying objective standard of good faith).

For these reasons, the Court affirms the bankruptcy court's ruling that Appellants did not purchase the Villa in good faith under either United States or Mexican law.

G. The Case Against Ms. Barba Diaz

Finally, Appellants argue that the bankruptcy court erred in finding Ms. Barba Diaz liable in the avoidance actions. They contend that Ms. Barba Diaz had a good-faith defense against the avoidance and recovery actions because she had no knowledge of Mr. Icenhower, H&G, or the bankruptcy. The bankruptcy court's finding that Ms. Barba Diaz lacked good faith is reviewed for clear error.[16] *See United States v. McConney,* 728. F.2d 1195, 1203 (9th Cir. 1993) (mixed questions of law and fact which are essentially factual reviewed for clear error).

The burden was on Appellants to prove that Ms. Barba Diaz was a good-faith transferee.[17] *Kendall v. Sorani (In re Richmond Produce Co.),* 195 B.R. 455,

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[16] The Court notes that even if it were to review the bankruptcy court's findings *de novo,* it would reach the same result.

[17] Appellants are correct that the original purchase agreement was between H&G and Mr. Diaz only – not Ms. Barba Diaz. But Ms. Barba Diaz wired $675,000 of the purchase money directly to an entity controlled by Mr. Icenhower, and her testimony reveals that she believed she was purchasing the Villa. More importantly, she later took ownership of the Villa by deed. Thus, she would still have to prove she was a good faith transferee under 11 U.S.C. § 550(b)(1) or (b)(2).

464 (N.D. Cal. 1996). The record supports the bankruptcy court's conclusion that Ms. Barba Diaz failed to carry her burden for several reasons.

First, the bankruptcy court found that Ms. Barba Diaz and Mr. Diaz hired Eduardo Sanchez, a Mexican lawyer, to conduct due diligence and execute the purchase of the Villa. Mr. Sanchez acted as Ms. Barba Diaz's agent during the transaction. She testified at length about how she trusted him to handle the transaction for her. Thus, every fact known to Mr. Sanchez can be imputed to Ms. Barba Diaz. *See, e.g., Garcia v. INS,* 222 F.3d 1208, 1209 (9th Cir. 2000) ("[E]ach party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' ")

Second, Mr. Sanchez knew of the facts underlying the bankruptcy court's finding that the Appellants lacked good faith. Mr. Sanchez knew of Debtors' bankruptcy. He knew of the irregularities in H&G's documentation. He knew there was no shareholder authorization permitting H&G to sell the Villa. He was aware that Mr. Icenhower requested Appellants pay most of the consideration to third parties other than H&G, including to Icenhower Investments. The bankruptcy court lists several other red flags in its FFCL. Ms. Barba Diaz was on notice of all of these facts. *Garcia,* 222 F.3d at 1209.

Third, even without imputation of facts from her lawyer Ms. Barba Diaz had knowledge of the red

flags. Instead of wiring money to H&G, which purportedly owned the Villa, she wired $675,000 to an entity associated with Mr. Icenhower. More importantly, her son told her that Mr. Icenhower was in bankruptcy. (ER 1262.)

Under these circumstances, the bankruptcy court did not clearly err in finding that Ms. Barba Diaz was not a good-faith transferee.

IV. CONCLUSION

For the foregoing reasons, the Court **AFFIRMS** the judgment of the bankruptcy court. The clerk shall enter judgment affirming the order and judgment of the bankruptcy court appealed herein.

IT IS SO ORDERED.

DATED: May 20, 2010

/s/ Barry Ted Moskowitz
Honorable Barry Ted Moskowitz
United States District Judge

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re: **JERRY L. ICENHOWER dba Seaview Properties, and DONNA L. ICENHOWER,** **Debtors.**	**Case No. 03-11155-A7** **Adv. No. 06-90369-A7** **Adv. No. 04-90392-A7**
KISMET ACQUISITION, LLC, a Delaware limited liability company, Successor-in-interest to Gerald H. Davis, Chapter 7 Trustee, **Plaintiff,** **v.** **JERRY L. ICENHOWER, an individual; et al.** **Defendants.**	**AMENDED CONSOLIDATED JUDGMENT** (Filed Jul. 29, 2008)

The consolidated trials of adversary proceedings 04-90392 and 06-90369 were heard from April 21 to April 25, 2008 before the Honorable Louise DeCarl Adler. Janet D. Gertz and Ali M.M. Mojdehi appeared on behalf of plaintiff, Kismet Acquisition, LLC, successor-in-interest to Gerald H. Davis, the Chapter 7 Trustee ("Plaintiff"), and Stephen B. Morris and Mark C. Hinkley appeared on behalf of defendants Alejandro Diaz Barba and Martha Margarita Barba De La Torre (aka Martha Barba Diaz) (the "Diaz

Defendants). No appearances were made on behalf of defendants Howell & Gardner Investors, Inc. ("H&G"), and Jerry and Donna Icenhower ("Debtors") (hereinafter the Diaz Defendants, H&G and Debtors are collectively the "Defendants").

Witnesses were sworn in and examined, documentary evidence was introduced on behalf of the parties and the case was argued by counsel for both the Plaintiff and the Diaz Defendants. Having carefully considered the testimony of the witnesses and arguments of counsel and the Court having made findings of fact and conclusions of law on the record in open court and the Court having entered separate Findings of Fact and Conclusions of Law concurrently herewith, and other good cause:

IT IS HEREBY ORDERED that:

1. Judgment is entered in favor of Plaintiff and against the Defendants on the complaint in adversary proceeding 06-90369. It is hereby adjudged and decreed that –

(a) H&G is the alter ego of the Debtors nunc pro tunc to the petition date;

(b) The assets of H&G are hereby substantively consolidated with the assets of the bankruptcy estate *nunc pro tunc* to petition date;

(c) the property called the Villa Vista Hermosa, located in the Village of Chamela in the Municipality of La Huerta, State of Jalisco, Mexico (the "Villa Property")[1] is property of the bankruptcy estate pursuant to 11 U.S.C. §541(a) *nunc pro tunc* to the petition date;

(d) The Debtors' unauthorized postpetition transfer of the Villa Property to H&G is avoided pursuant to 11 U.S.C. 549(a);

(e) Plaintiff is entitled to recover and preserve pursuant to 11 U.S.C. § 550(a)(1) and § 551 the Villa Property from the Diaz Defendants as the initial transferees of the avoided postpetition transfer. Within ten days of entry of this judgment, Defendants are hereby ordered and directed to take all actions necessary to execute and deliver any and all documents needed to undo the avoided transfer, and to take all actions necessary to cause the property to be reconveyed to *a fideicomiso* trust naming Plaintiff as the sole beneficiary for the benefit of the bankruptcy estate; or

(f) alternatively, at Plaintiff's sole option made upon proper noticed motion, the Court reserves jurisdiction to enter a monetary

[1] Under Mexican law, a foreign national may not directly hold title to coastal real property in Mexico, but may hold the beneficial interest in *a fideicomiso* bank trust formed to hold title to the real property. Hereinafter, unless otherwise specified, all references to the transfer or sale of the Villa Property refer to the transfer or sale of the beneficial trust interest.

judgment in favor of Kismet, and against Defendants, in an amount necessary to make the estate whole at the time of judgment.

2. Alternatively, even if the Villa Property is not property of the bankruptcy estate *nunc pro tunc* to the petition date, judgment is entered in favor of Plaintiff and against the Defendants on the remaining claims in the amended complaint in adversary proceeding 04-90392. It is hereby adjudged and decreed that –

(a) the Debtors' transfer of the Villa Property to H&G is avoided as a fraudulent transfer under 11 U.S.C. § 544(b), pursuant to Cal. Civ. Code §§ 3439.04(a)(1) and (a)(2) and § 3439.07;

Plaintiff is entitled to recover and preserve pursuant to 11 U.S.C. §§ 550(a)(1) and (a)(2) and § 551 the avoided fraudulent transfer from H&G as the initial transferee of the avoided fraudulent transfer, and from the Diaz Defendants as the "immediate or mediate" transferees of the initial transferee. Within ten days of entry of this judgment, Defendants are hereby ordered and directed to execute and deliver any and all documents needed to undo the avoided transfer, and to take all actions necessary to cause the property to be reconveyed to a *fideicomisto* [sic] trust naming Plaintiff as the sole beneficiary for the benefit of the bankruptcy estate; or

(b) alternatively, at Plaintiff's sole option made upon proper noticed motion, the Court

retains jurisdiction to enter a monetary judgment in favor of Kismet, and against Defendants, in an amount necessary to make the estate whole at the time of judgment.

3. The Court reserves for future determination made upon proper motion the issues of an award of fees and expenses, and it reserves jurisdiction to issue any and all orders necessary to carry out and enforce this judgment.

Dated: _____ _____

LOUISE DE CARL ADLER, Judge

Signed by Judge Louise DeCarl Adler July 29, 2008

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re: **JERRY L. ICENHOWER dba Seaview Properties, and DONNA L. ICENHOWER,** **Debtors.**	**Case No. 03-11155-A7** **Adv. No. 06-90369-A7** **Adv. No. 04-90392-A7**
KISMET ACQUISITION, LLC, a Delaware limited liability company, Successor-in-interest to Gerald H. Davis, Chapter 7 Trustee, **Plaintiff,** **v.** **JERRY L. ICENHOWER, an individual; et al.** **Defendants.**	**CONSOLIDATED JUDGMENT** (Filed Jun. 2, 2008)

The consolidated trials of adversary proceedings 04-90392 and 06-90369 were heard from April 21 to April 25, 2008 before the Honorable Louise DeCarl Adler. Janet D. Gertz and Ali M.M. Mojdehi appeared on behalf of plaintiff, Kismet Acquisition, LLC, successor-in-interest to Gerald H. Davis, the Chapter 7 Trustee ("Plaintiff'), and Stephen B. Morris and Mark C. Hinkley appeared on behalf of defendants Alejandro Diaz Barba and Martha Margarita Barba De La Torre (aka Martha Barba Diaz) (the "Diaz

Defendants). No appearances were made on behalf of defendants Howell & Gardner Investors, Inc. ("H&G"), and Jerry and Donna Icenhower ("Debtors") (hereinafter the Diaz Defendants, H&G and Debtors are collectively the "Defendants").

Witnesses were sworn in and examined, documentary evidence was introduced on behalf of the parties and the case was argued by counsel for both the Plaintiff and the Diaz Defendants. Having carefully considered the testimony of the witnesses and arguments of counsel and the Court having made findings of fact and conclusions of law on the record in open court and the Court having entered separate Findings of Fact and Conclusions of Law concurrently herewith, and other good cause:

IT IS HEREBY ORDERED that:

1. Judgment is entered in favor of Plaintiff and against the Defendants on the complaint in adversary proceeding 06-90369. It is hereby adjudged and decreed that –

(a) H&G is the alter ego of the Debtors *nunc pro tunc* to the petition date;

(b) The assets of H&G are hereby substantively consolidated with the assets of the bankruptcy estate *nunc pro tunc* to petition date;

(c) the real property called the Villa Vista Hermosa, located in the Village of Chamela in the Municipality of La Huerta, State of Jalisco, Mexico (the "Villa Property") is property of

the bankruptcy estate pursuant to 11 U.S.C. § 541(a) *nunc pro tunc* to the petition date;

(d) The Debtors' unauthorized postpetition transfer of the Villa Property to H&G is avoided pursuant to 11 U.S.C. 549(a);

(e) Plaintiff is entitled to recover and preserve pursuant to 11 U.S.C. § 550(a)(1) and § 551 the Villa Property from the Diaz Defendants as the initial transferees of the avoided postpetition transfer. Within thirty days of entry of this judgment, Defendants are hereby ordered and directed to take all actions necessary to execute and deliver any and all documents needed to undo the avoided transfer, and to take all actions necessary to cause the property to be reconveyed to *a fideicomiso* trust naming Plaintiff as the sole beneficiary for the benefit of the bankruptcy estate; or

(f) alternatively, at Plaintiff's sole option made upon proper noticed motion, the Court reserves jurisdiction to enter a monetary judgment in favor of Kismet, and against Defendants, in an amount necessary to make the estate whole at the time of judgment.

2. Alternatively, even if the Villa Property is not property of the bankruptcy estate *nunc pro tunc* to the petition date, judgment is entered in favor of Plaintiff and against the Defendants on the remaining claims in the amended complaint in adversary proceeding 04-90392. It is hereby adjudged and decreed that –

(a) the Debtors' transfer of the Villa Property to H&G is avoided as a fraudulent transfer under 11 U.S.C. § 544(b), pursuant to Cal. Civ. Code §§ 3439.04(a)(1) and (a)(2) and § 3439.07;

(b) Plaintiff is entitled to recover and preserve pursuant to 11 U.S.C. §§ 550(a)(1) and (a)(2) and § 551 the avoided fraudulent transfer from H&G as the initial transferee of the avoided fraudulent transfer, and from the Diaz Defendants as the "immediate or mediate" transferees of the initial transferee. Within thirty days of entry of this judgment, Defendants are hereby ordered and directed to execute and deliver any and all documents needed to undo the avoided transfer, and to take all actions necessary to cause the property to be reconveyed to a *fideicomiso* trust naming Plaintiff as the sole beneficiary for the benefit of the bankruptcy estate; or

(c) alternatively, at Plaintiff's sole option made upon proper noticed motion, the Court retains jurisdiction to enter a monetary judgment in favor of Kismet, and against Defendants, in an amount necessary to make the estate whole at the time of judgment.

3. The Court reserves for future determination made upon proper motion the issues of an award of fees and expenses, and it reserves jurisdiction to

issue any and all orders necessary to carry out and enforce this judgment.

Dated: 2 June 08 /s/ Louise DeCarl Adler
LOUISE DE CARL ADLER, Judge

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA

In re: **JERRY L. ICENHOWER dba Seaview Properties, and DONNA L. ICENHOWER,** **Debtors.**	**Case No. 03-11155-A7** **Adv. No. 06-90369-A7** **Adv. No. 04-90392-A7**
KISMET ACQUISITION, LLC, a Delaware limited liability company, Successor-in-Interest to Gerald H. Davis, Chapter 7 Trustee, **Plaintiff,** **v.** **JERRY L. ICENHOWER, an individual; et al.** **Defendants.**	**CONSOLIDATED FINDINGS OF FACT AND CONCLUSIONS OF LAW** **(Filed Jun. 2, 2008)**

I.

INTRODUCTION

The matter before this Court is the trial of two related adversary proceedings. The first is an action by Kismet Acquisition, LLC ("Kismet" or "Plaintiff"), as successor to the chapter 7 trustee ("Trustee") to avoid and recover the prepetition transfer of real property called the Villa Vista Hermosa, located in

the Village of Chamela in the Municipality of La Huerta, State of Jalisco, Mexico (the "Villa Property") pursuant to §§ 544(b), 550 and 551.[1] The second is an action by Kismet, as successor to the Trustee, to determine that defendant Howell & Gardner Investors, Inc. ("H&G") is the alter ego of debtors Jerry and Donna Icenhower (collectively "Debtors") and/or for substantive consolidation of Debtors and H&G *nunc pro tunc* to the petition date, and to avoid and recover H&G's postpetition transfer of the Villa Property to defendants, Martha Barba Diaz and her son Alejandro Diaz Barba pursuant to §§ 549, 550 and 551 (collectively the "Diaz Defendants").[2] The remaining defendants in these actions are the Debtors, H&G and the Diaz Defendants.[3]

The Court has subject matter jurisdiction over the actions pursuant to 28 U.S.C. § 1334(b). The actions are core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and (2)(B), (E), (F), (H) and (O). Venue is proper in the Southern District of California pursuant to 28 U.S.C. § 1409(a).

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[1] *Kismet v. Icenhower et al.,* Adv. Proc. No. 04-90392 (hereinafter the "Fraudulent Conveyance Action").

[2] *Kismet v. Icenhower et al.,* Adv. Proc. No. 06-90369 (hereinafter the "Alter Ego-Avoidance Action").

[3] *See* Adv. Proc. 06-90369, Doc. # 190, at Ex. 1 (listing the status of each of the defendants in both actions as of trial).

II.

FINDINGS OF FACT

A. Background – Debtors' Relationship with the Lonie Trust.

1. In or about January 1984, D. Donald Lonie ("Mr. Lonie") established the D. Donald Lonie, Jr., Family Trust under the laws of the State of Nevada (the "Lonie Trust"). Mr. Lonie died in May 1997, at which time the Lonie Trust became irrevocable. The trustees of the Lonie Trust are Stephen E. Lonie, Diane C. Oney and Thomas E. Lonie.

2. Prior to Mr. Lonie's death, Mr. Lonie and the Lonie Trust engaged in business transactions with the Debtors concerning beneficial interests in a *fideicomiso* bank trust which owned the Villa Property located in the restricted coastal zone of Mexico.[4]

3. Prior to Mr. Lonie's death, the Lonie Trust agreed to sell its interest in the Villa Property to the Debtors. The parties executed a Real Estate Purchase Contract, and Mr. Icenhower executed two promissory notes, an English note and a Spanish note to be recorded in Mexico, reflecting a different dollar amount to avoid Mexican taxes. Thereafter, the Lonie

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[4] Under Mexican law, a foreign national may not directly hold title to coastal real property in Mexico, but may hold the beneficial interest in a *fideicomiso* bank trust formed to hold title to the real property. Hereinafter, unless otherwise specified, all references to the transfer or sale of the Villa Property refer to the transfer or sale of the beneficial trust interest.

Trust agreed to release its lien on the Villa Property to assist Mr. Icenhower in consummating a sale of the Villa Property to a third party with the agreement he would re-record the lien if the sale fell through. Mr. Icenhower did not consummate the sale, and he disputed his obligation to rerecord the lien. Additionally, a dispute arose regarding which note was the operative note – the English note or the Spanish note.

4. On March 24, 2000, the Lonie Trust initiated an action against the Debtors in the United States District Court for the Southern District of California entitled *Stephen P. Lonie, Diane C. Oney and Thomas E. Lonie, Jr., Family Trust v. Jerry L. Icenhower, et al.,* Civ. No. 00-CV-612 (the "district court action"), seeking *inter alia,* a determination of the parties' respective rights and interests in the Villa Property and injunctive relief (the "district court action").

5. On November 24, 2003, the district court entered judgment in favor of the Lonie Trust. The judgment directed the Debtors to either: (1) pay damages in the amount of $1,356,830.32 and re-register a lien on the Villa Property as security for the damages until paid by a date certain; or (2) reconvey the Villa Property to the Lonie Trust, free of any encumbrance, claim, lien, or liabilities placed on the Property as a result of the Debtors' actions or inactions. [Pretrial Order ("PTO") entered 4/14/08 in Adv. Proc. 06-90369, Doc. # 191, Admitted Facts at ¶ 44]

6. In response to the judgment, Debtors filed this chapter 7 bankruptcy case on December 15, 2003.

B. Debtors' Relationship with H&G.

7. H&G is a Nevada Corporation created as a shell corporate entity by Laughlin International, Inc. ("Laughlin") in 2001.

8. On March 4, 2002, at a time when Debtors were facing a motion for preliminary injunction and for summary judgment in the district court action, Mr. Icenhower contacted Laughlin and purchased H&G, paying $3,424 with his personal credit card. There is no evidence that H&G had any capitalization other than the $3,424 contributed by Mr. Icenhower. There is no evidence any shares were ever issued in exchange for capital contributions or anything of value.

9. Mr. Icenhower arranged for Laughlin to provide a phone number, physical address and mail forwarding services. H&G had no separate physical place of business, and simply utilized Laughlin's business address as a place to receive mail. Mr. Icenhower also asked Laughlin to open a bank account in the name of H&G. However, H&G had no funds of substance in any bank account, or other funds from any source. Mr. Icenhower paid for Laughlin's continuing services with his personal funds through and including October 22, 2003.

10. Craig Kelley ("Mr. Kelley") served as the sole officer and director of H&G. Mr. Kelley's testimony at trial is that he agreed to serve in these capacities in name only. Mr. Kelley did not understand his duties as the officer and director of a corporation; he

testified that he was a president on paper only. He took all orders from Mr. Icenhower, and executed all documents because Mr. Icenhower told him to sign them. Mr. Kelley testified that he never attended or called any shareholders meeting. He never met or spoke to any of H&G's purported shareholders and was unaware if there were any shareholders. Also, he was unaware of whether H&G was capitalized.

11. Mr. Kelley was aware of Mr. Icenhower's financial and legal problems. He agreed to help Mr. Icenhower by becoming H&G's officer and director because he felt sorry for Mr. Icenhower, and because he was dating Mr. Icenhower's sister.

12. Mr. Kelley's trial testimony is inconsistent with his earlier deposition testimony and, indeed, a Declaration he executed to alter that testimony. [Ex. "K"] He explained that he gave perjured deposition testimony at Icenhower's urging, felt remorse for doing so and, after consulting his own counsel, contacted Kismet's lawyers to recant the earlier testimony he had given. He executed a Declaration disavowing the earlier testimony which was also, in part, inaccurate. [*Id.*] Many of the inaccuracies in this Declaration appear to be the result of its having been prepared by Kismet's counsel – it is full of "legalese" and Kelley, a substance abuse counselor with no business training, could not explain some of its "statements" because he did not understand them. Also, because he was still trying to protect Mr. Icenhower's sister, he admits the description of how he first met Mr. Icenhower is not accurate. The Court

observed his demeanor and his remorse at giving the earlier perjured testimony and finds his explanations to be genuine and his trial testimony sincere and credible.

13. Mr. Icenhower was the point of contact for H&G for all communications from Laughlin until December 18, 2003, at which time he asked Laughlin to remove his name from its records. Mr. Icenhower claims he was contacted by Mr. Diaz in his capacity as the manager of the Villa Property.

14. H&G had no real corporate existence apart from Mr. Icenhower. It had no business purpose other than as a sham company to hold the Debtors' assets.

15. H&G's corporate charter was revoked by the Nevada Secretary of State on January 21, 2006.

C. The Debtors' Transfer of the Villa Property to H&G.

16. On March 4, 2002, prior to judgment in the district court action, Debtors entered into an agreement to transfer the Villa Property to H&G (the "H&G Purchase Agreement"). The H&G Purchase Agreement provided that H&G would pay $100,000 cash and assume Debtors' intra-family debt in the amount of approximately $140,000 in exchange for Debtors' interest in the Villa Property and another property known as the El Zafiro Property. [Ex. 53] However, there is no evidence that H&G paid any of

the recited consideration in exchange for transfer of the properties.

17. The H&G Purchase Agreement gave Mr. Icenhower absolute control over the operation of the Villa Property, the right to all rental income from the Villa, the responsibility for the payment of the expenses of the Villa, control over any sale, a 10% commission on any sale up to $1.5 million and a right to all proceeds over $1.5 million. Further, the Purchase Agreement provided that H&G was required to sell its beneficial interest in the *fideicomiso* trust if Mr. Icenhower presented it with a buyer that made an offer to purchase that would net H&G $1.35 million.

18. One week later, the H&G Purchase Agreement was amended and through this amendment, the El Zafiro Property was released from the *fideicomiso* trust and sold to Dr. Robert Miller for $90,000. [Ex. 57] The amended agreement provided that the consideration for El Zafiro was to be paid directly to Mr. Icenhower, not H&G. The amendments further adjusted the purchase price as between the Villa Property and the El Zafiro Property; it reduced the $1.5 million number referenced in Factual Finding ("FF") ¶ 17 above to $1.4 million, and placed slightly different restrictions on H&G's right to sell the beneficial interest in the *fideicomiso* trust. All other terms of the original H&G Purchase Agreement remained the same.

19. The timing of the Debtors' purchase of H&G from Laughlin, and the execution of the H&G Purchase Agreement transferring the Villa Property from Debtors to H&G, coincided with the Lonie Trust's filing of a motion for a preliminary injunction and for summary judgment in the district court action.

20. The transfer of the Villa Property from Debtors to H&G was recorded in the Mexican Registry on September 2, 2002.

21. Debtors never disclosed they had transferred the Villa Property during the district court litigation.

D. The Background of the Diaz Defendants.

22. Mr. Diaz and Ms. Barba Diaz are citizens of Mexico but residents of San Diego County, California. Ms. Barba Diaz is Mr. Diaz' mother.

23. Mr. Diaz has a degree in math and computer science from the University of California at San Diego, and is the officer and/or director or member of numerous limited liability companies and corporations having a principal place of business in San Diego County. [PTO in Adv. Proc. 06-90369, Doc. # 191, Admitted Facts ¶ 9] Mr. Diaz testified that in 2002 he became chairman of the board of e.Digital Corp., a publicly held company, and was a member of its audit committee.

24. Ms. Barba Diaz is a member of the board and was president of XLNC1, Inc., a radio station

broadcasting classical music in San Diego. Further, it is an admitted fact that she is an officer or director of a number of other companies having a principal place of business in San Diego County. [PTO in Adv. Proc. 06-90369, Doc. # 191, Admitted Facts ¶ 8]

25. At the time period of the Villa Property transaction, Ms. Barba Diaz and her now-deceased husband were very ill. She relied on her son and their attorney to handle all aspects of the transaction for her. She never met Mr. Icenhower before this trial. She had no personal knowledge who owned the Villa Property at the time of its transfer to the Diaz Defendants.

26. Ms. Barba Diaz testified she has a warm emotional attachment to the Villa as it was the place where she spent many happy years visiting with their friends, the Kochergas She also testified that since its acquisition, she was aware the Villa had been advertised as a vacation rental. Further, she admitted that she owns five other oceanfront vacation properties in Mexico (which she does not rent).

E. Debtors' Relationship with the Diaz Defendants.

27. Mr. Icenhower first met Mr. Diaz at a coffee shop in Pacific Beach; they met through Eugene Kocherga ("E. Kocherga"). Mr. Diaz and E. Kocherga were childhood friends, having spent many summers together at the Villa Property when E. Kocherga's family owned the Villa Property. In the Summer of

2003, Mr. Diaz accompanied E. Kocherga on visit to the Villa Property during the planning of a Kocherga family wedding. Mr. Diaz remembers learning Mr. Icenhower was the "manager" of the Villa Property.

28. Mr. Diaz met Mr. Icenhower again at the wedding in August 2003. At this meeting, Mr. Diaz learned from Mr. Icenhower that the Villa might be for sale, but he considered the price too high. In the following months, and into 2004, Mr. Icenhower contacted Mr. Diaz several times concerning a possible sale of the Villa Property at successively lower prices but Mr. Diaz continued to indicate the price was too high.

29. As a result of continuing conversations, Mr. Diaz and Mr. Icenhower finally agreed to a purchase price $1.5 million USD for the Villa Property, and Mr. Diaz commenced his due diligence. While Mr. Diaz was conducting his due diligence, Mr. Icenhower asked Mr. Diaz for a $100,000 personal loan to invest in a golf pro shop. Mr. Icenhower promised he would make monthly payments and repay the balance from the fee he would earn from H&G on the sale of the Villa Property. Although Mr. Diaz did not know Mr. Icenhower very well, he made the loan. The loan is evidenced by a promissory note dated October 7, 2003. [Ex. 1]

30. Mr. Icenhower made the first monthly payment of $750. Then he filed bankruptcy on December 15, 2003. [Ex. 121].

31. Mr. Icenhower did not contact Mr. Diaz to warn him about his bankruptcy filing. Mr. Diaz learned about the bankruptcy when he received the Notice of Commencement of Chapter 7 Bankruptcy Case. Mr. Diaz received this notice because Debtors listed the $100,000 loan in their bankruptcy schedules.

32. Mr. Diaz was shocked and concerned about the bankruptcy. He immediately contacted Mr. Icenhower, and they met at Mr. Diaz's residence. Mr. Icenhower explained he filed bankruptcy because he had lost a big judgment to the Lonie Trust which he believed to be improper and unfair. Additionally, at that time, they discussed the sale of the Villa Property. Mr. Icenhower assured Mr. Diaz the loan would be repaid through a $100,000 reduction of the purchase price by H&G. Mr. Diaz indicates he accepted Mr. Icenhower's explanation and did not feel he needed to separately investigate why Mr. Icenhower had authority to lower the sales price of the Villa Property to repay Mr. Icenhower's personal loan.

F. The Diaz Defendants' Due Diligence Efforts.

33. The Diaz Defendants used the services of Eduardo Sanchez ("Mr. Sanchez"), a lawyer licensed only in Mexico, to conduct due diligence on their purchase of the H&G interest in the *fideicomiso* trust. Mr. Sanchez testified he is not licensed in the U.S. and is not familiar with U.S. law.

34. Mr. Sanchez testified that he viewed his role in conducting due diligence as follows: to determine the legal existence of H&G; to determine that it was a corporation in good standing in the U.S.; to determine that whoever signed the documents of sale on H&G's behalf had the full power of attorney under Mexican law to sell; and to personally review the records of the title to the Villa Property to determine if previous transfers were legally correct and determine whether there were any liens against the Villa Property. To that end, Mr. Sanchez obtained the Articles of Incorporation of H&G [Ex. U-5]; obtained information from the State of Nevada confirming that H&G was a corporation in good standing [Ex. U-4]; obtained a corporate resolution authorizing Mr. Kelley, as the corporation's sole director, to consummate the sale of the beneficial rights in the *fideicomiso* trust. [Ex. 202]; and personally reviewed the property records in the property office in Autlan, Mexico, determining that previous transfers of the Villa Property were legally correct and that there were no liens or legal claims against the Villa Property.

35. Mr. Sanchez testified he was unconcerned with any requirements under U.S. law for the transfer of this beneficial interest because he viewed the transaction as one solely governed by Mexican real estate law. He did not request or obtain a shareholders' resolution authorizing the sale of substantially all of H&G's assets and he was unconcerned that the consideration for the sale was being paid to entities other than H&G. Mr. Sanchez was aware of Mr.

Icenhower's personal bankruptcy; however, he was unconcerned with it because he viewed the transaction as the purchase of the interest in the *fideicomiso* trust from H&G. He did not check either the bankruptcy court file or call the Trustee. Mr. Sanchez testified that he was not told by Mr. Diaz or anyone else that Mr. Icenhower had warned Mr. Diaz that the Trustee was looking into the transaction by which Debtors sold the Villa Property to H&G. However, the Court observes that Mr. Sanchez also testified that he does not keep any emails or notes from conversations with his clients.

G. H&G's Transfer of the Villa Property to the Diaz Defendants

36. On March 31, 2004, Mr. Diaz gave H&G a check in the amount of $25,000. [Ex. D] The check states in the "memo" section that it is for the "Vista Hermosa." Although this check to H&G is purportedly endorsed by Mr. Kelley, Mr. Kelley testified that he did not sign it. The fact that the endorsement on the check has Mr. Kelley's name misspelled corroborates Mr. Kelley's claim it is not his signature, as it is highly unlikely he would misspell his own name.

37. On June 7, 2004, H&G and the Diaz Defendants executed a formal purchase agreement for the Villa Property ("Agreement") [Ex. 2] The Agreement required the Diaz Defendants to pay stated consideration of $7,508,800 Mexican pesos which is approximately equivalent to $658,071 USD for the

Villa Property. However, testimony of Mr. Icenhower, the Diaz Defendants, Mr. Kelley and Mr. Sanchez, establishes that the actual agreed price was $1,500,000 USD. Mr. Diaz, Mr. Sanchez, and Mr. Icenhower acknowledge that the lower stated price in the Agreement was a commonly-used ruse to reduce the Mexican taxes imposed on the sale.

38. On or about June 7, 2004, the closing of the sale of the Villa Property to the Diaz Defendants took place in San Diego, California. Mr. Icenhower, Mr. Kelley, Mr. Sanchez, and Mr. Diaz were present at the closing which was held at the Chula Vista office of Peter Thompson, a lawyer. Even though Mr. Kelley physically signed the documents on behalf of H&G in his capacity as officer and director of H&G, the testimony of Mr. Kelley, and, to some extent, Mr. Diaz, was that Mr. Icenhower controlled the closing of the sale to [sic] the Villa Property to the Diaz Defendants. Mr. Kelley was a passive participant. He did what Mr. Icenhower directed him to do. Other than exchanging pleasantries at this meeting, Mr. Kelley had no interaction or communication with the Diaz Defendants.

39. The only consideration paid directly to H&G by the Diaz Defendants was the $25,000 paid in March 2004. [*See* FF ¶ 36] At the closing, Mr. Icenhower directed the Diaz Defendants to pay the balance of the consideration to third parties as follows: (i) $675,000 USD to Buckeye International Funding, Inc. [Ex. C]; (ii) $398,663 USD to Western Financial Assets, Inc. [Ex. A]; and (iii) $191,567 USD

to Icenhower Investments, to a bank account controlled by Mr. Icenhower's brother [Ex. B].

40. Neither Mr. Diaz nor Mr. Sanchez thought it odd that Mr. Icenhower directed them to pay most of the consideration (other than the initial $25,000 paid to H&G in March 2004), to third parties and not to H&G.

41. The Villa Property constituted all of the property owned by H&G. However, the only authorizations for the sale of the *fideicomiso* trust interest to the Diaz Defendants was the corporate resolution by Mr. Kelley as sole director. [Ex. 202] There is no evidence of a shareholder resolution authorizing the transfer of all of the property of the corporation as required by Nevada law and, specifically, by Article TENTH of H&G's Articles of Incorporation. [Ex. U-5]

42. The sale of the Villa Property from H&G to the Diaz Defendants was recorded in the Mexican Registry on September 8, 2004.

43. Shortly after the sale was consummated, Mr. Kelley resigned as the officer and director of H&G; Mr. Icenhower informed Laughlin that he and Mr. Kelley were no longer involved with H&G; and Laughlin ceased to provide an address, telephone or mail forwarding services for H&G, as the annual maintenance fees were unpaid.

H. The Trustee's Litigation Against the Defendants

44. The Debtors first disclosed their transfer of the Villa Property to H&G at their § 341(a) meeting on January 12, 2004. [PTO in Adv. Proc. 06-90369, Doc. #191, Admitted Facts ¶ 35] At the continued meeting of creditors on March 22, 2004, the Trustee questioned the Debtors further regarding this transfer.

45. On August 23, 2004, the Trustee filed the fraudulent conveyance action to avoid and recover Debtors' transfer of the Villa Property to H&G. Additionally, the Trustee obtained a temporary restraining order and preliminary injunction prohibiting the defendants from transferring or encumbering the Villa Property. [Adv. Proc. 04-90392, Doc. #14; #28; #42] The Trustee did not name the Diaz Defendants in the complaint because he was unaware that H&G had already transferred the Villa Property to the Diaz Defendants.

46. In or about February 2005, the Trustee learned about H&G's transfer of the Villa Property to the Diaz Defendants. Accordingly, the Trustee filed an *ex parte* application to amend the complaint to include this subsequent transfer to the Diaz Defendants, and he sought and obtained additional injunctive relief restraining the newly added defendants from further transferring or encumbering the Villa Property. [*Id.,* Doc. #63, #65, #71-72]

47. The Trustee asserted that H&G had violated the first injunction precluding transfer of the Villa Property. However, the sale to the Diaz Defendants had closed *before* entry of the first restraining order, and the Diaz Defendants recorded their deed in the Mexican Registry *before* the Court's Amended Temporary Restraining Order entered on February 5, 2005.

48. On August 3, 2006, the Trustee filed the Alter Ego-Avoidance Action to determine that H&G is Debtors' alter ego and/or for substantive consolidation of Debtors and H&G *nunc pro tunc* to the petition date, and to avoid and recover the postpetition transfer of the Villa Property pursuant to § 549 and § 550.

49. H&G did not appear in either of the actions, and has made no attempt to defend any of the claims alleged against it. The Court has entered the default against H&G in both actions. Accordingly, it is an admitted fact that, as to H&G, the facts alleged in the complaints are deemed admitted. [*See* PTO in Adv. Proc. 06-90369, PTO, Admitted Facts ¶¶ 21-29; PTO in Adv. Proc. 04-90392, Admitted Facts ¶ 14.]

I. Kismet's Entry into the Bankruptcy Case.

50. Kismet was a stranger to this bankruptcy case until on or about July 5, 2006, when it filed a Notice of Transfer of Claim indicating it had

purchased the Lonie Trust's claims against the estate.[5] [Main Case Doc. #69]

51. Thereafter, Kismet negotiated with the Trustee to purchase the estate's assets, including assignment of these actions, in exchange for payment of an amount sufficient to pay all creditors in full except its own claims which Kismet voluntarily subordinated ("Asset Purchase Agreement"). The Asset Purchase Agreement was subject to overbid. Creditors and all interested parties, including the Diaz Defendants, received notice of the motion to sell these actions.

52. At the hearing held November 30, 2006, the Court approved the Asset Purchase Agreement and an order was entered on December 7, 2006. [Main Case Doc. # 95] Pursuant to the Asset Purchase Agreement, Kismet was substituted into these actions in place of the Trustee as the real party in interest.

53. The estate remains open for administration. However, Kismet is the only creditor remaining to be paid.

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[5] The Notice of Transfer of Claim indicates Kismet purchased Proof of Claim No. 4 filed in the amount of $1,385,950.65. This claim includes Kismet's claims arising from the judgment and from a Joint Litigation Agreement with the Trustee to advance the Trustee's legal fees to prosecute these actions for the benefit of the estate.

J. Expert Testimony Concerning Due Diligence Required by United States Law and the Alter Ego Claim.

54. Professor C. Hugh Friedman of the University of San Diego Law School ("Prof. Friedman"), an expert in United States corporate law, testified regarding the level of due diligence exercised by the Diaz Defendants. He was asked to assume that the Diaz Defendants did not obtain a copy of a corporate or shareholder resolution authorizing the sale of all of H&G's property (the Villa Property); did not obtain any representations or warranties regarding proper corporate authorization to complete the sale; and did not obtain any written authorization from H&G to direct payment of the consideration for the sale to a bank in Visalia, California to the order of third parties, not H&G. Assuming these facts, which were all proved at trial, Prof. Friedman testified that the standard of care was well below the expected customary standard of care and practice for a buyer or someone acting on behalf of the buyer and, in his view, totally inadequate.

55. Prof. Friedman was further asked to assume the following facts, all of which were also proved at trial:

- that Mr. Icenhower had extensive correspondence with Laughlin regarding payment of their fee and payment of Nevada taxes to keep H&G in good standing; that Mr. Icenhower paid these fees and taxes as requested;

- that there was no evidence of transfer of assets or other capitalization of H&G other than the Icenhower-owned property (the Villa Property and El Zafiro);
- that the transfer of the property to H&G occurred at a time when Mr. Icenhower was under the threat of issuance of an injunction;
- that there was no evidence of a corporate resolution to issue stock;
- that there was no evidence of shareholders whose names were recorded in the corporate register;
- that the only officer was a straw or "dummy" officer who exercised no discretion but did what he was told by Mr. Icenhower;
- that the corporation had no address or phone number other than that of Laughlin, the original seller of the corporate shell;
- that the Diaz Defendants were aware that Mr. Icenhower had previously owned the Villa Property and had a continuing role in managing the property, and was the sole person negotiating its sale on behalf of H&G; and
- that the Diaz Defendants were told by Mr. Icenhower that he would reduce the price of the Villa Property being purchased from H&G to repay them for the $100,000 loan discharged in his personal bankruptcy.

Based on the foregoing facts, it was Prof. Friedman's opinion that Mr. Icenhower had total control of H&G and that H&G is the alter ego of Mr. Icenhower.

The Court finds this opinion persuasive and adopts it as the finding of the Court.

K. Expert Testimony Concerning Due Diligence Required by Mexican Law.

55. Professor Jorge Vargas of the University of San Diego Law School ("Prof. Vargas"), testified on behalf of the Diaz Defendants about Mexican law governing the sale of interests in *fideicomiso* trusts. Prof. Vargas' testimony concerning the transaction at issue was somewhat inconsistent. First, he testified that disputes involving beneficial interests in *fideicomiso* trusts holding title to real property in the restricted coastal zone of Mexico are more in the nature of *in rem,* rather than *in personam* actions under Mexican law because of the application of the Calvo clause.[6] However, on cross-examination, he admitted that in an article he authored in March 2007, he opined that he considered the Calvo clause a "legal relic."

56. Second, Prof. Vargas testified at length on direct examination about the sufficiency of the due diligence conducted by the Diaz Defendants. In his opinion, once the Diaz Defendants' counsel Mr.

[6] The Calvo clause is a doctrine of Mexican law which holds that judgments rendered by foreign courts purporting to affect real property in Mexico are unenforceable as against the public interest of Mexico, and contrary to the exclusive sovereignty of Mexico over its realty.

Sanchez determined that previous transfers of the Villa Property were regular, that the transferor corporation, H&G, was in good standing; that the notary public certified there were no liens or claims against the Villa Property, and that there was a proper corporate resolution, the transaction could close and would be a legitimate and complete transaction under Mexican law.

57. On cross examination, Prof. Vargas testified as to what he believed was a higher duty of due diligence in a cross-border transaction. For example, he stated that some investigation into the nature of the business and the reputation of the selling (or buying) a U.S. corporation should be conducted to avoid involvement in money laundering by drug or arms dealers; that some contact with the U.S. corporation by telephone should be attempted; that some information about the capitalization of the U.S. corporation should be obtained; and, generally, that getting into the "intricacies" of the U.S. corporation was a necessary part of due diligence in a cross-border transaction. Prof. Vargas stated that in his view, it was the obligation of Mexican counsel to do this investigation or associate U.S. counsel to assist in that investigation. He opined that failure to do this was negligence in performing due diligence. Thereafter, the next day, on redirect by the Diaz Defendants' counsel, Prof. Vargas retracted this testimony and his opinion of negligence, characterizing it as excessively academic.

58. Finally, as to questions posed by the Court, Prof. Vargas stated that Mexican corporations operate in a manner similar to U.S. corporations; that is, they operate through the mechanism of corporate resolutions and they require a shareholders' resolution to dispose of substantially all of the property of a Mexican corporation.

59. Eduardo Bustamante ("Mr. Bustamante") testified on behalf of Kismet in rebuttal to Prof. Vargas' opinion of the regularity of the Villa Property transaction and the sufficiency of due diligence. Mr. Bustamante is an attorney licensed in Mexico since 1979. He obtained a Masters in Law from a U.S. university and then returned to private practice in Mexico, doing commerical [sic] and civil litigation and eventually specializing in cross-border business and real estate transactions. He and his firm represent Fortune 500 companies. He has testified in court proceedings at least five times as an expert witness, as well as been employed in that capacity at least ten times. He is also designated as an official translator for the State Supreme Court of the Northern Baja Peninsula.

60. Mr. Bustamante identified the following items as "red flags" that required additional enquiry by the Diaz Defendants:

- Article SIXTH of the Purchase Agreement conveys not only the *fideicomiso* trust interest but also personalty, including vehicles, but there is no warranty by the seller H&G that the personalty was legally within Mexico. [Ex. 2] Mr.

Bustamante stated this is a significant omission because vehicles, for example, have to be properly imported into Mexico, otherwise they are contraband. A carefully crafted purchase agreement would not only contain warranties of title to the personalty but also require the seller to substantiate his claim of ownership. Mr. Bustamante says that, in his opinion, such omission indicates the parties were in a rush to close the transaction.

- The disparity between the stated purchase price ($7,508,800 Mex. Pesos or $678,071 USD), versus the actual price for the purchase of $1,500,000 USD, was irregular. It was his opinion that where there is this sort of disparity, either the seller is misleading the buyer or there is collaboration between them in understating the purchase price so that the transaction has a "discount" by way of incurring less taxes.

- Payment of the consideration to entities other than H&G required additional due diligence by the Diaz Defendants or their counsel because a purchaser has to know where the proceeds are going to avoid violating Mexican laws about money laundering.

- The 2002 H&G Purchase Agreement between Mr. Icenhower and H&G which gave Mr. Icenhower total control over management and sale of the Villa Property, and the right to retain all rentals, should have raised questions about the relationship between Mr. Icenhower and H&G. [FF ¶ 17]

61. In completing his review of Mr. Sanchez' file, it was Mr. Bustamante's opinion that the due

diligence of the Diaz Defendants was lacking. Because of irregularities he identified in the transfers between the prior holders of interests in the *fideicomiso* trust, he believes, at minimum, Mr. Sanchez should have tried to contact the prior owners of the *fideicomiso* trust interests (*e.g.,* the Lonie Trust or its beneficiaries, or their counsel) to find out if any residual interest was being asserted. That investigation would have revealed the district court litigation which precipitated Mr. Icenhower's transfer to H&G. When pressed on cross-examination, Mr. Bustamante characterized the failure to do this as negligent.

62. Further, Mr. Bustamante disagreed with Prof. Vargas' characterization of the rights in the *fideicomiso* trust as *in rem* rights, stating that they are *in personam* rights. This point is critical to determining whether the Trustee or his predecessors, the Lonie Trust and the Lonies, could have recorded a "preventative notice" of the pending litigation, providing public notice of a claim against the trust beneficiary. It was Mr. Bustamante's uncontroverted testimony, based on his experience, that a final, nonappealable judgment would first have had to be obtained before that order could be domesticated into a foreign judgment in Mexico to lien *in personam* rights held by a *fideicomiso* trust. Since the Lonie Trust's judgment was prevented from becoming a final, nonappealable order by Icenhower's bankruptcy, no preventative notice could have been recorded against the trust interest holding the Villa. Mr.

Bustamante's explanation is clear, consistent and persuasive.

63. The Court has weighed the testimony, experience and demeanor of Mr. Sanchez, Prof. Friedman, Prof. Vargas and Mr. Bustamante and, based on the findings made above, finds that the Diaz Defendants exercised insufficient due diligence in determining whether the purchase from H&G was legally sufficient and permitted.

L. Other Facts that Should have Triggered Further Enquiry.

64. In addition to the inadequate due diligence found in Factual Findings ¶¶ 57-63 above, the Court finds that Diaz Defendants knew or should have known the following facts prior to the closing of the sale of the Villa Property:

65. Mr. Diaz knew that even though the interest in the Villa Property was titled in H&G, Mr.Icenhower retained total control over the management of the Villa Property and its sale price, including the right to reduce that price to repay his personal debts. Mr. Diaz asked no questions about how Mr. Icenhower could adjust the Villa Property sales price. Moreover, Mr. Diaz knew that Mr. Icenhower, a person he barely knew, had approached him for a $100,000 loan just two months before filing bankruptcy without any warning. Mr. Diaz admits he was concerned and he should have been on heightened enquiry. Had Mr. Diaz conducted *any*

independent investigation into the bankruptcy, he would have discovered the district court action involved the Villa Property and the Trustee was questioning the Debtors' transfer of the Villa Property to H&G.

66. The Diaz Defendants had actual notice of the possibility of litigation by the Trustee (i) challenging the Debtors' sale of the Villa Property to H&G; and (ii) attempting to tie Debtors with H&G. Mr. Icenhower is one hundred percent certain he discussed the possibility of the litigation with the Diaz Defendants, including the Trustee's claim that H&G was a "shell." He is certain these conversations took place "prior to closing" because he used these facts to hurry up Mr. Diaz's decision to purchase the Villa. He wanted Mr. Diaz to understand that if he wanted to purchase the Villa Property, he needed to act quickly. Mr. Diaz acknowledges the conversation but disputes the timing, claiming it occurred after the close of the transaction.

67. The Court finds that although Mr. Icenhower may be partially mistaken about the scope of that conversation, the conversation about possible litigation avoiding the Debtors' transfer of the Villa Property to H&G did, in fact, take place prior to closing. Mr. Icenhower is a witness who has aligned himself with the Diaz Defendants throughout this litigation. He has no reason to lie about the timing of his disclosure of possible litigation.

68. The Diaz Defendants had in their possession prior to closing the actual Articles of Incorporation of H&G which require a shareholders' resolution to sell substantially all of the property of H&G. They knew that no such resolution had been provided.

69. Consistent with Mr. Icenhower's testimony, Mr. Diaz and Mr. Sanchez testified they were unconcerned about the possibility of litigation against Icenhower in the United States. Mr. Diaz and his counsel had done due diligence in Mexico, and relied upon their finding of no liens filed against the Villa Property

70. Craig Kelley, the purported president of H&G, did not participate in the closing of the sale other than to sign documents handed to him by Icenhower.

II.

CONCLUSIONS OF LAW

A. Kismet is Entitled to Judgment on its Claims in the Alter Ego – Avoidance Action.

1. H&G is Debtors' alter ego.

71. To prevail on a claim for alter ego, the plaintiff must demonstrate that: (1) the corporation is influenced and governed by the person asserted to be the alter ego; (2) there is such unity of interest and ownership that one is inseparable from the other; and (3) the facts must be such that adherence to the corporate fiction of a separate entity would, under the

circumstances, sanction a fraud or promote injustice. *Polaris Indus. Corp. v. Kaplan,* 103 Nev. 598, 601 (1987). The plaintiff in an alter ego action must show the three factors by a preponderance of the evidence. *LFC Mktg. Group, Inc. v. Loomis,* 116 Nev. 896, 904 (Nev. 2000).

72. In determining whether the "unity of interest and ownership" prong is satisfied, the Nevada Supreme Court requires a finding of equitable ownership, taking into consideration all factors such as comingling of funds, undercapitalization, unauthorized diversion of funds, treatment of corporate assets as the individual's own, and failure to observe corporate formalities. *See North Arlington Medical Bldg, Inc. v. Sanchez Const. Co.,* 86 Nev. 515, 522 n. 8 (1970). Moreover, under Nevada law, it is not necessary for the plaintiff to prove the alter ego's ownership of shares of the corporation in order to prove unity of ownership. *LFC Mktg. Group,* 116 Nev. at 905; *see also Mallard Automotive Group, Ltd. v. LeClair Management Corp.,* 153 F.Supp. 2d 1211, 1215 (D. Nev. 2001).

73. In determining whether the facts are such that adherence to the corporate fiction would sanction a fraud or promote injustice, courts have held an alter ego finding is appropriate where an entity has been used as an instrumentality against the rights of creditors: where the defendants "have each engaged in transactions with the actual intent to hinder, delay or defraud creditors. . . . the liability of the corporate pawns for that scheme will be visited upon the

controlling individual." *In re National Audit Defense Network,* 367 B.R. 207, 230 (Bankr. D. Nev. 2007). In this respect, "'[i]t is not necessary that the plaintiff prove actual fraud. It is enough if the recognition of the two entities as separate would result in injustice.'" *In re Giampietro,* 317 B.R. 841, 849 (Bankr. D. Nev. 2004) (citing *McCleary Cattle Co. v. Sewell,* 73 Nev. 279,282 1957)).

74. Where (as here) the plaintiff seeks to pierce the corporate veil in reverse, it is proper to infer equitable ownership and pierce the corporate veil in reverse, based upon findings of the individual's dominion and control of their corporate alter ego. The Nevada Supreme Court explained:

> [Defendant entity] argues that the district court blurred the second element – unity of ownership – with the first – influence and control. [Defendant entity] underscores the fact that William does not own a single share of [Defendant entity], and thus argues that this element cannot be found. We disagree. Although ownership of corporate shares is a strong factor favoring unity of ownership and interest, the absence of corporate ownership is not automatically a controlling event. Instead, the "circumstances of each case" and the interests of justice should control. *This is especially true when considering the ease with which corporations may be formed and shares issued in names other than the controlling individual.*

LFC Mktg. Group, 116 Nev. at 904-5 (citations omitted) (emphasis added); *accord Mallard Automotive,* 153 F.Supp. 2d at 1215-16.

75. In this case, the Court found that Mr. Icenhower had complete control over H&G; that H&G had no separate corporate existence and no business purpose other than serving as a sham holding company for Debtors' assets; and that H&G is the alter ego of Mr. Icenhower. [FF ¶ 14; ¶¶ 54-55]

76. The remaining question is whether the circumstances of this case require the corporate veil to be pierced in reverse to prevent a fraud or injustice. In making this determination, the Court must weigh both the reasonable expectations of Kismet who stands in the shoes of the Trustee's predecessor, the Lonie Trust, in its dealings with Mr. Icenhower, and the reasonable expectations of the Diaz Defendants who claim to have dealt with H&G as a separate corporate entity and to have purchased the Villa Property from H&G in good faith. *See e.g. In re Flamingo 55, Inc.,* 242 Fed. Appx. 456, 457-58 (9th Cir. 2007) (Nevada).

77. In contrast, the Diaz Defendants have asked the Court to ignore the reasonable expectations of the Lonie Trust and to focus, instead, on Kismet's reasonable expectations. They point out that Kismet was never a victim of Mr. Icenhower's fraudulent scheme, having been a stranger to the transaction and the bankruptcy case until 2006. [FF ¶¶ 50-53] Kismet is building a golf resort which surrounds the Villa

Property. Kismet's alleged motive is to acquire the Villa Property as a "crown jewel" for its golf resort. The Court made no findings concerning these objectives because they are irrelevant to the alter ego claim. Kismet, stands in the shoes of the Trustee who brought the alter ego claim on behalf of the Lonie Trust and other creditors of the estate. As such, the relevant inquiry is not Kismet's objectives or the timing of its entry into this case. The relevant inquiry is *the reasonable expectations of the estate's creditors and others who dealt with the Debtors and H&G at the time the Villa Property transaction closed.* If this enquiry reveals that adherence to H&G's corporate fiction would sanction a fraud or promote injustice, the remedies of alter ego and reverse veil piercing are appropriate. Here, the evidence demonstrates the Lonie Trust dealt with the Debtors in good faith, and it had a reasonable expectation that its claim would be paid, or the Villa Property would be reconveyed to the Lonie Trust free of any encumbrances or liens. [FF ¶¶ 1-5] In contrast, as more fully set forth in Conclusions of Law ("CL") ¶¶ 102-105 below, the evidence demonstrates the Diaz Defendants lacked good faith. They had no reasonable expectation they were dealing with H&G as a separate corporate entity, or that they would be purchasing the Villa Property from H&G free of any claims of the Trustee. [FF ¶¶ 54-55; ¶¶ 60-63; ¶¶ 64-70]

78. The Court concludes the equities of this case support the remedies of alter ego and reverse piercing of the corporate veil *nunc pro tunc* to the petition

date. The factual reality is that Mr. Icenhower and H&G were one and the same. Mr. Icenhower was the equitable owner of the Villa Property on the petition date, and the Diaz Defendants had ample notice of his equitable ownership before the Villa Property transaction closed.

79. Further, it is appropriate to substantively consolidate H&G with the Debtors' bankruptcy estate. *See In re Bonham,* 229 F.3d 750, 763-64 (9th Cir. 2000). The *Bonham* test requires that the court consider two factors: "(1) whether creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit; or (2) whether the affairs of the debtor are so entangled that consolidation will benefit all creditors." *Id.* at 766. "The primary purpose of substantive consolidation 'is to ensure the equitable treatment of all creditors.'" *Bonham,* 229 F.3d at 764 (quoting *In re Augie/Restivo Baking Co., Ltd.,* 860 F.2d 515 (2nd Cir. 1988)). It allows a truly equitable distribution of assets by treating the corporate shell as a single economic unit with the bankruptcy estate. *Id.* at 768. Here, the same facts that support alter ego and reverse veil piercing support substantive consolidation to return the Villa Property (H&G's sole asset) to the Debtors' bankruptcy estate *nunc pro tunc* to the petition date. *See Id.* (finding that substantive consolidation *nunc pro tunc* to the petition date would allow a truly equitable distribution of assets because it would make it possible for the trustee to pursue

avoidance actions for the benefit of the creditors of the consolidated bankruptcy estates).

2. The Villa Property is property of the estate so the transfer to the Diaz Defendants is avoidable under 11 U.S.C. § 549 as an unauthorized postpetition transfer.

80. Under 11 U.S.C. § 541(a), "[t]he commencement of a case under section 301, 302, or 303 of this title creates an estate." The estate is comprised of, *inter alia,* "all legal or equitable interests of the debtor in property as of the commencement of the case."

81. Section 549(a) allows a trustee to avoid a transfer of property of the estate made after the commencement of the case which is not authorized under the Bankruptcy Code or by the court. *In re Goodwin,* 115 B.R. 674,676 (Bankr. C.D. Cal. 1990). Section 549(c) creates an exception to avoidance to protect innocent purchasers of real property who had no knowledge of the pending bankruptcy case. *In re Tippett,* 338 B.R. 82, 87-88 (9th Cir. BAP 2006).

82. The Court's finding of alter ego and its substantive consolidation of H&G into the Debtors' estate *nunc pro tunc* to the petition date promotes the equitable reality that the Villa Property was property of the estate on the petition date. The transfer of the Villa Property from the bankruptcy estate to the Diaz

Defendants was an unauthorized postpetition transfer of property of the estate avoidable under § 549(a).

83. The Diaz Defendants have no defense to avoidance because they admit knowledge of the Debtors' bankruptcy case prior to the closing of the Villa Property transaction. [FF ¶ 31] Further, as more fully set forth in CL ¶ 103-106 below, the Court finds the Diaz Defendants lacked good faith.

3. Kismet's recovery of the avoided postpetition transfer pursuant to 11 U.S.C. § 550(a)(1) is absolute.

84. Section 550(a) of the Bankruptcy Code provides that to the extent that a transfer is avoided under §§ 544, § 545, 547, 548, 549 or 724(a), the trustee may recover, for the benefit of the estate, the property transferred, or if the court so orders, the value of such property, from – (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee. Quite simply put, § 550 identifies the parties liable for repayment of an avoided transfer, and empowers the trustee to recover the property transferred or its value for the benefit of the estate. *In re Brun,* 360 B.R. 669, 672 (Bankr. C.D. Cal. 2007).

85. The purpose of § 550(a) is "'to restore the estate to the financial condition it would have enjoyed if the transfer had not occurred.'" *In re Straightline Investments, Inc.,* ___ F.3d ___, 2008 WL 1970560 at

*9 (9th Cir. May 8, 2008) (citing *In re Acequia, Inc.,* 34 F.3d 800, 812 (9th Cir. 1994)); *Brun,* 360 B.R. at 674-75. If the value of the property has declined following a fraudulent transfer, returning devalued property itself would not make the estate whole. In such instances, the courts have awarded a money judgment. On the other hand, when the property has appreciated, the trustee is entitled to recover the property itself, or the value of the property at the time of judgment. The statute, in prescribing alternatives, is purposefully flexible to accomplish its remedial goal. *Brun* at 674-75; *In re American Way Service Corp.,* 229 B.R. 496, 531-32 (Bankr. S.D. Fla. 1999).

86. The Trustee's entitlement to recover an avoided transfer from the initial transferee is absolute under § 550(a)(1). *In re Cohen,* 300 F.3d 1097, 1102 (9th Cir. 2002). In contrast, § 550(b) provides an exception to the right of recovery against an "immediate or mediate" transferee of the initial transferee who takes for value, in good faith and without knowledge of the voidability of the transfer avoided, or any immediate or mediate good faith transferee of such transferee. This good faith defense is only available to subsequent transferees. *Cohen,* 300 F.3d at 1102; *In re Presidential Corp.,* 180 B.R. 233, 236 (9th Cir. BAP 1995).

87. In the present case, as more fully set forth in ¶¶ 80-83 the Diaz Defendants have no defense to the Trustee's § 549 postpetition avoidance claim. Pursuant to § 550(a)(1), they are strictly liable *as*

initial transferees to return the avoided transfer, or its value to the bankruptcy estate.

B. Alternatively, Even if the Court Declined to Apply the Remedies of Alter Ego and/or Substantive Consolidation, Kismet is Entitled to Judgment on its Fraudulent Conveyance Action.

1. The Debtors' transfer of the Villa Property to H&G is avoidable under 11 U.S.C. § 544(a), pursuant to California law.

88. Pursuant to § 544(b)(1), "the trustee may avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law. . . ."

89. Under California law, an unsecured creditor may avoid a fraudulent transfer to the extent necessary to satisfy the creditor's claim. *See* Cal. Civ. Code §§ 3439.04 and 3439.07. A "transfer" as defined by California law, "means 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 or other encumbrance." Civ. Code § 3439.01(i). An "asset" means unencumbered, non-exempt equity in property of a debtor. Civ. Code § 3439.01(a).

90. A transfer is fraudulent and avoidable under California law if the debtor made the transfer or incurred the obligation as follows: "With actual

intent to hinder, delay, or defraud any creditor of the debtor." Civ. Code § 3439.04(a)(1). Alternatively, a transfer is otherwise avoidable as a fraudulent transfer if the debtor made the transfer or incurred the obligation without receiving reasonably equivalent in exchange for the transfer or obligation, and the debtor either: (A) was engaged in, or was about to engage in, a business or a transaction for which the remaining assets were unreasonably small in relation to the business or transaction; or (B) intended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay. Civ. Code § 3439.04(a)(2).

91. Further, in establishing a prima facie case for fraudulent transfer, the plaintiff is required to show that the debtor made the transfer or incurred the obligation within four years of bringing the action, or if later, within one year after the transfer or obligation was or could have reasonably been discovered by the plaintiff. Civ. Code § 3439.09(a).

92. There is a clear distinction between the law governing the avoidability of a fraudulent transfer, and the law governing the trustee's recovery of an avoided transfer. Section 550 separates the concepts of *avoiding* a transfer (*i.e.,* the transfer from the Debtors to H&G), and *recovering* from the initial transferee (H&G) or any immediate or mediate transferees of the initial transferee (the Diaz Defendants). *See Acequia, Inc.,* 34 F.3d at 809. "[W]hile California law governs whether and to what extent a transfer of property is voidable, the value of the

avoided transfer, and therefore, the recovery is governed by § 550(a), irrespective of any recovery limitations imposed by California law." *Brun,* 360 B.R. at 672.

93. In this case, the Diaz Defendants acknowledge that the applicable transfer to be *avoided* under § 544(b) and pursuant to California law, is the Debtors' transfer of the Villa Property to H&G in 2002. [Suppl. Trial Brief at 3:6-7, Adv. Proc. 04-90392 at Doc. #496] They acknowledge that the claim against the Diaz Defendants is one for *recovery* of the avoided transfer pursuant to § 550(a)(2) as a subsequent transferee of H&G. [*Id.* at page 4:1-4]

94. The fraudulent transfer claim is deemed admitted as to H&G. [FF ¶ 49] The Diaz Defendants dispute the fraudulent transfer claim, but presented no evidence at trial to show the transfer from Debtors to H&G was *not* fraudulent. [PTO in Adv. Proc. 04-90392, Remaining Issues of Law ¶ 1] In closing argument, the Diaz Defendants conceded the Debtors' transfer to H&G was likely a fraudulent transfer.

95. There is ample evidence to conclude the Debtors' transfer to H&G is avoidable both as a constructively fraudulent, and an actually fraudulent transfer. H&G did not pay any consideration in exchange for the Villa Property, thereby making the transfer constructively fraudulent. [FF ¶¶ 16] Additionally, the timing and circumstances surrounding the transfer show Mr. Icenhower intended the transfer to be actually fraudulent. [FF ¶¶ 7-21] Finally,

there is no dispute as to the timeliness of the Fraudulent Conveyance Action. [Suppl. Trial Brief at page 3:9-10, Adv. Proc. 04-90392 at Doc. #496]

2. Recovery of the Villa Property from the Diaz Defendants is permitted pursuant to 11 U.S.C. § 550(a)(2).

96. As more fully set forth in CL ¶¶ 84-85 above, to the extent a transfer is avoided, § 550(a) of the Bankruptcy Code permits *recovery* of the avoided transfer or, if the courts so orders, the value of such property, from – (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or (2) any immediate or mediate transferee of such initial transferee. [CL 86] In the present case, the Diaz Defendants have asserted the good faith defense in § 550(b) available to a subsequent transferee of the initial transferee.

97. A subsequent transferee asserting the good faith defense must prove all three elements of that defense: (1) taking a property for value; (2) in good faith; and (3) without knowledge of the voidability of the transfer avoided. *In re Laguna Beach Motors, Inc.,* 159 B.R. 562, 565-66 (Bankr. C.D. Cal. 1993) (citing *Bonded Financial Svcs., Inc. v. European American Bank,* 838 F.2d 890, 896-97 (7th Cir. 1988). The party asserting this defense bears the burden of proving the validity of the affirmative defense. *Laguna Beach Motors,* 159 B.R. at 566.

98. The Bankruptcy Code does not define the meaning of the phrases "good faith" and "without knowledge of the voidability of the transfer avoided." *Goodwin,* 115 B.R. at 676. The courts have generally treated the requirements of "good faith" and "lack of knowledge of voidability" synonymously and have looked to whether a transferee had knowledge of the transferor's unfavorable financial condition, or other circumstances sufficient to lead a reasonable person to investigate the voidability of the transfer, to determine whether the transferee acted in good faith. *In re Smoot,* 265 B.R. 128, 141 (Bankr. E.D. Va. 1999) (a person is not a good faith transferee under § 550(b)(1) if the person has knowledge of the transferor's unfavorable financial condition at the time of transfer); *Bonded Financial,* 838 F.2d at 897-98 (a recipient of fraudulent transfer lacks good faith if he possessed enough knowledge of the events to induce a reasonable person to investigate); *see also* 5 A. Resnick & H. Sommer, eds., *Collier on Bankruptcy,* ¶ 550.03[2] and [3] at 550-23-25 (15th ed. Rev. 2007) (recognizing the growing body of case law that has applied an objective standard for good faith).

99. The courts within this circuit have adopted the objective standard for good faith enunciated in *Bonded Financial. See e.g. In re Richmond Produce Co., Inc.,* 195 B.R. 455, 464 (N.D. Cal. 1996); *Goodwin,* 115 B.R. at 677; *In re Concord Senior Housing*

Foundation, 94 B.R. 180, 183 (Bankr. CD. Cal. 1988) (overruled on other grounds).[7]

100. Specifically, the district court in *Richmond Produce* rejected the defendant's argument that lack of good faith means "actual knowledge" of the voidabiltiy of the transfer by the transferee. The court explained the standard is one of objective good faith:

> [T]he recipient of a voidable transfer may lack good faith if he possessed enough knowledge of the events to induce a reasonable person to investigate. No one supposes that "knowledge of voidability" means complete understanding of the facts and receipt of a lawyer's opinion that such a transfer is voidable; some lesser knowledge will do. Some facts strongly suggest the presence of others; a recipient that closes its eyes to the remaining facts may not deny knowledge.

195 B.R. at 464 (quoting *Bonded Financial,* 838 F.2d at 897-98). The bankruptcy court in *Concord Senior Housing* stated:

> [A] transferee acts in good faith if it had no facts before it that would cause a reasonable person to investigate whether the transfer would be avoidable. Within the context of a

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[7] *See Rupp v. Markgraf,* 95 F.3d 936, 943 n. 1 (10th Cir. 1996) (recognizing *Concord Senior Housing* is overruled to the extent it supported the proposition that a corporate principal becomes an initial "transferee" by the mere act of causing the debtor to make a fraudulent transfer).

> section 549 proceeding, I conclude that if the subsequent transferee knew, or if a reasonable person would suspect, that the initial transfer was an unauthorized one from a bankruptcy estate, then the immediate transferee would not have received the transfer in good faith.

94 B.R. at 183.

101. Likewise, in considering the meaning of the phrase "without knowledge of the voidability of the transfer avoided," the bankruptcy court in *Goodwin* concluded:

> It is my view that the transferee must have knowledge of sufficient facts that (i) puts the transferee on notice that the transfer might be avoidable or (ii) requires further inquiry into the situation and such inquiry is likely to lead to the conclusion that the transfer *might* be avoidable.

115 B.R. at 677 (emphasis added).

102. Accordingly, the courts within this circuit reject an "actual knowledge" standard for § 550(b). They have consistently applied a standard of objective good faith. This standard examines what the transferee knew or should have known given the events, and whether it would cause a reasonable person to investigate. If such investigation would have likely led to the conclusion the transfer *might* be avoidable, then the transferee lacks good faith and knowledge of the voidability of the transfer is

imputed to the transferee. A transferee cannot turn a blind eye to factual circumstances that would cause a reasonable person to investigate in order to deny knowledge and claim good faith. *Bonded Financial,* 838 F.2d at 897-98.

103. The Court concludes the Diaz Defendants are liable as subsequent transferees pursuant to § 550(a)(2) because they have failed to show they received the transfer from H&G in objective good faith. First, the Court observes this *not* a situation where Mr. Diaz had no reason to question Mr. Icenhower. *Cf. Goodwin,* 115 B.R. at 677-78 (transferee had no reason to question any wrongdoing due to past business dealings and family relationship). To the contrary, Mr. Diaz barely knew Mr. Icenhower, and even he concedes their past dealings (unwittingly lending $100,000 to a bankrupt), would put any reasonable person on heightened enquiry in conducting further business with Mr. Icenhower. [FF ¶¶ 27-32; ¶ 65]

104. Second, Mr. Diaz cannot claim he failed to enquire due to lack of sophistication. He is an educated, experienced businessman who has owned companies and served on an audit committee. [*See* FF ¶ 23] Any reasonable person of similar sophistication who had made the same bad loan would have investigated circumstances surrounding the Debtors' bankruptcy, and enquired into the reason Mr. Icenhower could cause H&G to lower the Villa Property sales price to repay his personal debt. Had Mr. Diaz conducted any enquiry, he would have discovered the district court

litigation involved the Villa Property and the Trustee was questioning the Debtors' transfer of the Villa Property to H&G. [FF ¶ 65] Additionally, Mr. Diaz would have discovered what he likely already knew, that Mr. Icenhower had fraudulently transferred the Villa Property to H&G to keep it away from the Lonies.

105. Third, there were many other "red flags" that should have caused Mr. Diaz, and any other reasonable person in his shoes, to investigate the voidability of the transfer to H&G. [*See* FF ¶¶ 60-61] The Diaz Defendants and their attorney Mr. Sanchez closed their eyes to these "red flags" to avoid actual knowledge. Their own Mexican law expert (Prof. Vargas) conceded that, given the cross-border nature of this transaction, a heightened level of due diligence was required. [FF ¶ 57; ¶¶ 61-63] Had any heightened enquiry been made, the Diaz Defendants would have learned what they likely already knew, that H&G was a shell entity controlled by Mr. Icenhower.

106. Finally, the Court finds the Diaz Defendants cannot possibly be good faith transferees because, prior to closing of the Villa Property transaction, Mr. Diaz actually knew the Debtors' transfer of the Villa Property to H&G *might* be voidable by the Trustee. Mr. Icenhower is one hundred percent certain he disclosed this information to "hurry up" Mr. Diaz's decision to purchase the Villa Property while the title in Mexico remained clear. [FF ¶¶ 66-67] Mr. Diaz denies knowledge, but other facts suggest this was likely the case. [FF ¶ 60, ¶ 67] Mr. Diaz proceeded

with the Villa Property transaction because he believed the clear title in the Mexican Public Registry would defeat the Trustee. Having made the conscious decision to "hurry up" the transfer to defeat the Trustee, the Diaz Defendants cannot be good faith transferees.

107. Because the Diaz Defendants are not good faith transferees, Kismet is entitled to recover for the benefit of the estate, either the Villa Property or its value at the time of judgment from any combination of the transferees, subject to the limitation of a single satisfaction set forth in § 550(d). [CL ¶¶ 84-85] The Diaz Defendants cannot complain about the inequities of being ordered to return their cherished vacation home to the estate when the evidence shows they are renting to the public. [FF ¶ 26] Moreover, the equities favor an order directing the return of the Villa Property where it appears Mr. Diaz conspired with Mr. Icenhower to use the clear title in Mexico to defeat the Trustee. *See Straightline Investments,* 2008 WL at * 9 (requiring return of wrongfully transferred property to the estate was proper course of action where defendant was aware of the bankruptcy and conspired with Debtor's president to transfer the property).

108. The Court makes no legal conclusion concerning whether its consolidated judgment in these actions is enforceable in Mexico. As this Court has previously ruled, it has subject matter jurisdiction over claims to avoid and recover the wrongful transfer of the Debtors' interest in the *fideicomiso*

trust, and it has *in personam* jurisdiction over each of the Defendants in these actions to *order them to execute the necessary conveyance documents* to return the Villa Property to the estate, subject to enforcement through this Court's contempt powers, even though it indirectly affects title to real property in Mexico. [PTO in Adv. Proc. 06-90369, Doc. # 191, Judicially Noticeable Facts ¶ 5]; *see also Fall v. Eastin,* 215 U.S. 1, 9-12 (1909) (recognizing that a court of equity, having authority to act upon the person, may indirectly act upon real estate in another jurisdiction, and even in a foreign country, through the instrumentality of its authority over the person); A. Ahart, *Cal. Prac. Guide: Enf. J. & Debts,* Ch. 6, ¶ 6:1849.9 (The Rutter Group 2008).

109. Any findings of facts which may be considered a conclusion of law shall be deemed a conclusion of law. Any conclusions of law which may be considered a findings of facts shall be deemed a findings of facts. A separate judgment is filed concurrently with these findings.

Dated: 2 June 08 /s/ Louise De Carl Adler
LOUISE DE CARL ADLER, Judge

28 U.S.C.A. § 157

§ 157. Procedures

Currentness

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title.

(2) Core proceedings include, but are not limited to –

(A) matters concerning the administration of the estate;

(B) allowance or disallowance of claims against the estate or exemptions from property of the estate, and estimation of claims or interests for the purposes of confirming a plan under chapter 11, 12, or 13 of title 11 but not the liquidation or estimation of contingent or unliquidated personal injury tort or wrongful death claims against the estate for purposes of distribution in a case under title 11;

(C) counterclaims by the estate against persons filing claims against the estate;

(D) orders in respect to obtaining credit;

(E) orders to turn over property of the estate;

(F) proceedings to determine, avoid, or recover preferences;

(G) motions to terminate, annul, or modify the automatic stay;

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

(I) determinations as to the dischargeability of particular debts;

(J) objections to discharges;

(K) determinations of the validity, extent, or priority of liens;

(L) confirmations of plans;

(M) orders approving the use or lease of property, including the use of cash collateral;

(N) orders approving the sale of property other than property resulting from claims brought by the estate against persons who have not filed claims against the estate;

(O) other proceedings affecting the liquidation of the assets of the estate or the adjustment of the debtor-creditor or the equity security holder relationship, except personal injury tort or wrongful death claims; and

(P) recognition of foreign proceedings and other matters under chapter 15 of title 11.

(3) The bankruptcy judge shall determine, on the judge's own motion or on timely motion of a party,

whether a proceeding is a core proceeding under this subsection or is a proceeding that is otherwise related to a case under title 11. A determination that a proceeding is not a core proceeding shall not be made solely on the basis that its resolution may be affected by State law.

(4) Non-core proceedings under section 157(b)(2)(B) of title 28, United States Code, shall not be subject to the mandatory abstention provisions of section 1334(c)(2).

(5) The district court shall order that personal injury tort and wrongful death claims shall be tried in the district court in which the bankruptcy case is pending, or in the district court in the district in which the claim arose, as determined by the district court in which the bankruptcy case is pending.

(c)(1) A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

(2) Notwithstanding the provisions of paragraph (1) of this subsection, the district court, with the consent of all the parties to the proceeding, may refer a proceeding related to a case under title 11 to a

bankruptcy judge to hear and determine and to enter appropriate orders and judgments, subject to review under section 158 of this title.

(d) The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.

(e) If the right to a jury trial applies in a proceeding that may be heard under this section by a bankruptcy judge, the bankruptcy judge may conduct the jury trial if specially designated to exercise such jurisdiction by the district court and with the express consent of all the parties.