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CLERK, U.S. BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY _____ DEPUTY

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF CALIFORNIA**

In re:

**JERRY L. ICENHOWER dba
Seaview Properties, and DONNA L.
ICENHOWER,**

Debtors.

**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.

Case No. 03-11155-A7

**Adv. No. 06-90369-A7
Adv. No. 04-90392-A7**

**CONSOLIDATED FINDINGS OF
FACT AND CONCLUSIONS OF
LAW**

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

1 Chamela in the Municipality of La Huerta, State of Jalisco, Mexico (the “Villa
2 Property”) pursuant to §§ 544(b), 550 and 551.¹ The second is an action by Kismet,
3 as successor to the Trustee, to determine that defendant Howell & Gardner Investors,
4 Inc. (“H&G”) is the alter ego of debtors Jerry and Donna Icenhower (collectively
5 “Debtors”) and/or for substantive consolidation of Debtors and H&G *nunc pro tunc*
6 to the petition date, and to avoid and recover H&G’s postpetition transfer of the Villa
7 Property to defendants, Martha Barba Diaz and her son Alejandro Diaz Barba
8 pursuant to §§ 549, 550 and 551 (collectively the “Diaz Defendants”).² The
9 remaining defendants in these actions are the Debtors, H&G and the Diaz
10 Defendants.³

11 The Court has subject matter jurisdiction over the actions pursuant to 28 U.S.C.
12 § 1334(b). The actions are core proceedings pursuant to 28 U.S.C. §§ 157(b)(1) and
13 (2)(B), (E), (F), (H) and (O). Venue is proper in the Southern District of California
14 pursuant to 28 U.S.C. § 1409(a).

15 II.

16 FINDINGS OF FACT

17 A. Background – Debtors’ Relationship with the Lonie Trust.

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

23
24 ¹ *Kismet v. Icenhower et al.*, Adv. Proc. No. 04-90392 (hereinafter the “Fraudulent
25 Conveyance Action”).

26 ² *Kismet v. Icenhower et al.*, Adv. Proc. No. 06-90369 (hereinafter the “Alter Ego -
27 Avoidance Action”).

28 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).

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

5 3. Prior to Mr. Lonie's death, the Lonie Trust agreed to sell its interest in
6 the Villa Property to the Debtors. The parties executed a Real Estate Purchase
7 Contract, and Mr. Icenhower executed two promissory notes, an English note and a
8 Spanish note to be recorded in Mexico, reflecting a different dollar amount to avoid
9 Mexican taxes. Thereafter, the Lonie Trust agreed to release its lien on the Villa
10 Property to assist Mr. Icenhower in consummating a sale of the Villa Property to a
11 third party with the agreement he would re-record the lien if the sale fell through.
12 Mr. Icenhower did not consummate the sale, and he disputed his obligation to re-
13 record the lien. Additionally, a dispute arose regarding which note was the operative
14 note – the English note or the Spanish note.

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

21 5. On November 24, 2003, the district court entered judgment in favor of
22 the Lonie Trust. The judgment directed the Debtors to either: (1) pay damages in the
23 amount of \$1,356,830.32 and re-register a lien on the Villa Property as security for
24 the damages until paid by a date certain; or (2) reconvey the Villa Property to the
25

26 ⁴ Under Mexican law, a foreign national may not directly hold title to coastal real property
27 in Mexico, but may hold the beneficial interest in a *fideicomiso* bank trust formed to hold title to the
28 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.

1 Lonie Trust, free of any encumbrance, claim, lien, or liabilities placed on the Property
2 as a result of the Debtors' actions or inactions. [Pretrial Order ("PTO") entered
3 4/14/08 in Adv. Proc. 06-90369, Doc. # 191, Admitted Facts at ¶ 44]

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

6 **B. Debtors' Relationship with H&G.**

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

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

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

22 10. Craig Kelley ("Mr. Kelley") served as the sole officer and director of
23 H&G. Mr. Kelley's testimony at trial is that he agreed to serve in these capacities in
24 name only. Mr. Kelley did not understand his duties as the officer and director of a
25 corporation; he testified that he was a president on paper only. He took all orders
26 from Mr. Icenhower, and executed all documents because Mr. Icenhower told him to
27 sign them. Mr. Kelley testified that he never attended or called any shareholders
28 meeting. He never met or spoke to any of H&G's purported shareholders and was

1 unaware if there were any shareholders. Also, he was unaware of whether H&G was
2 capitalized.

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

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

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

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

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

28 ///

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

2 16. On March 4, 2002, prior to judgment in the district court action, Debtors
3 entered into an agreement to transfer the Villa Property to H&G (the "H&G Purchase
4 Agreement"). The H&G Purchase Agreement provided that H&G would pay
5 \$100,000 cash and assume Debtors' intra-family debt in the amount of approximately
6 \$140,000 in exchange for Debtors' interest in the Villa Property and another property
7 known as the El Zafiro Property. [Ex. 53] However, there is no evidence that H&G
8 paid any of the recited consideration in exchange for transfer of the properties.

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

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

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

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

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

5 **D. The Background of the Diaz Defendants.**

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

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

14 24. Ms. Barba Diaz is a member of the board and was president of XLNC1,
15 Inc., a radio station broadcasting classical music in San Diego. Further, it is an
16 admitted fact that she is an officer or director of a number of other companies having
17 a principal place of business in San Diego County. [PTO in Adv. Proc. 06-90369,
18 Doc. # 191, Admitted Facts ¶ 8]

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

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

1 **E. Debtors' Relationship with the Diaz Defendants.**

2 27. Mr. Icenhower first met Mr. Diaz at a coffee shop in Pacific Beach; they
3 met through Eugene Kocherga ("E. Kocherga"). Mr. Diaz and E. Kocherga were
4 childhood friends, having spent many summers together at the Villa Property when
5 E. Kocherga's family owned the Villa Property. In the Summer of 2003, Mr. Diaz
6 accompanied E. Kocherga on visit to the Villa Property during the planning of a
7 Kocherga family wedding. Mr. Diaz remembers learning Mr. Icenhower was the
8 "manager" of the Villa Property.

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

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

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

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

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

10 **F. The Diaz Defendants' Due Diligence Efforts.**

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

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

1 35. Mr. Sanchez testified he was unconcerned with any requirements under
2 U.S. law for the transfer of this beneficial interest because he viewed the transaction
3 as one solely governed by Mexican real estate law. He did not request or obtain a
4 shareholders' resolution authorizing the sale of substantially all of H&G's assets and
5 he was unconcerned that the consideration for the sale was being paid to entities other
6 than H&G. Mr. Sanchez was aware of Mr. Icenhower's personal bankruptcy;
7 however, he was unconcerned with it because he viewed the transaction as the
8 purchase of the interest in the *fideicomiso* trust from H&G. He did not check either
9 the bankruptcy court file or call the Trustee. Mr. Sanchez testified that he was not
10 told by Mr. Diaz or anyone else that Mr. Icenhower had warned Mr. Diaz that the
11 Trustee was looking into the transaction by which Debtors sold the Villa Property to
12 H&G. However, the Court observes that Mr. Sanchez also testified that he does not
13 keep any emails or notes from conversations with his clients.

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

15 36. On March 31, 2004, Mr. Diaz gave H&G a check in the amount of
16 \$25,000. [Ex. D] The check states in the "memo" section that it is for the "Vista
17 Hermosa." Although this check to H&G is purportedly endorsed by Mr. Kelley,
18 Mr. Kelley testified that he did not sign it. The fact that the endorsement on the
19 check has Mr. Kelley's name misspelled corroborates Mr. Kelley's claim it is not his
20 signature, as it is highly unlikely he would misspell his own name.

21 37. On June 7, 2004, H&G and the Diaz Defendants executed a formal
22 purchase agreement for the Villa Property ("Agreement") [Ex. 2] The Agreement
23 required the Diaz Defendants to pay stated consideration of \$7,508,800 Mexican
24 pesos which is approximately equivalent to \$658,071 USD for the Villa Property.
25 However, testimony of Mr. Icenhower, the Diaz Defendants, Mr. Kelley and
26 Mr. Sanchez, establishes that the actual agreed price was \$1,500,000 USD. Mr. Diaz,
27 Mr. Sanchez, and Mr. Icenhower acknowledge that the lower stated price in the
28 Agreement was a commonly-used ruse to reduce the Mexican taxes imposed on the

1 sale.

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

12 39. The only consideration paid directly to H&G by the Diaz Defendants
13 was the \$25,000 paid in March 2004. [See FF ¶ 36] At the closing, Mr. Icenhower
14 directed the Diaz Defendants to pay the balance of the consideration to third parties
15 as follows: (i) \$675,000 USD to Buckeye International Funding, Inc. [Ex. C];
16 (ii) \$398,663 USD to Western Financial Assets, Inc. [Ex. A]; and (iii) \$191,567 USD
17 to Icenhower Investments, to a bank account controlled by Mr. Icenhower's brother
18 [Ex. B].

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

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

28 ///

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

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

8 **H. The Trustee's Litigation Against the Defendants**

9 44. The Debtors first disclosed their transfer of the Villa Property to H&G
10 at their § 341(a) meeting on January 12, 2004. [PTO in Adv. Proc. 06-90369, Doc.
11 #191, Admitted Facts ¶ 35] At the continued meeting of creditors on March 22, 2004,
12 the Trustee questioned the Debtors further regarding this transfer.

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

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

26 47. The Trustee asserted that H&G had violated the first injunction
27 precluding transfer of the Villa Property. However, the sale to the Diaz Defendants
28 had closed *before* entry of the first restraining order, and the Diaz Defendants

1 recorded their deed in the Mexican Registry *before* the Court's Amended Temporary
2 Restraining Order entered on February 5, 2005.

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

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

12 **I. Kismet's Entry into the Bankruptcy Case.**

13 50. Kismet was a stranger to this bankruptcy case until on or about July 5,
14 2006, when it filed a Notice of Transfer of Claim indicating it had purchased the
15 Lonie Trust's claims against the estate.⁵ [Main Case Doc. # 69]

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

22 52. At the hearing held November 30, 2006, the Court approved the Asset
23 Purchase Agreement and an order was entered on December 7, 2006. [Main Case
24 Doc. # 95] Pursuant to the Asset Purchase Agreement, Kismet was substituted into

25
26 ⁵ The Notice of Transfer of Claim indicates Kismet purchased Proof of Claim No. 4 filed
27 in the amount of \$1,385,950.65. This claim includes Kismet's claims arising from the judgment and
28 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.

1 these actions in place of the Trustee as the real party in interest.

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

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

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

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

- 20 ● that Mr. Icenhower had extensive correspondence with Laughlin regarding
21 payment of their fee and payment of Nevada taxes to keep H&G in good
22 standing; that Mr. Icenhower paid these fees and taxes as requested;
- 23 ● that there was no evidence of transfer of assets or other capitalization of H&G
24 other than the Icenhower-owned property (the Villa Property and El Zafiro);
- 25 ● that the transfer of the property to H&G occurred at a time when
26 Mr. Icenhower was under the threat of issuance of an injunction;
- 27 ● that there was no evidence of a corporate resolution to issue stock;

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- 1 ● that there was no evidence of shareholders whose names were recorded in the
2 corporate register;
- 3 ● that the only officer was a straw or “dummy” officer who exercised no
4 discretion but did what he was told by Mr. Icenhower;
- 5 ● that the corporation had no address or phone number other than that of
6 Laughlin, the original seller of the corporate shell;
- 7 ● that the Diaz Defendants were aware that Mr. Icenhower had previously owned
8 the Villa Property and had a continuing role in managing the property, and was
9 the sole person negotiating its sale on behalf of H&G; and
- 10 ● that the Diaz Defendants were told by Mr. Icenhower that he would reduce the
11 price of the Villa Property being purchased from H&G to repay them for the
12 \$100,000 loan discharged in his personal bankruptcy.

13 Based on the foregoing facts, it was Prof. Friedman’s opinion that
14 Mr. Icenhower had total control of H&G and that H&G is the alter ego of
15 Mr. Icenhower. The Court finds this opinion persuasive and adopts it as the finding
16 of the Court.

17 **K. Expert Testimony Concerning Due Diligence Required by Mexican
18 Law.**

19 55. Professor Jorge Vargas of the University of San Diego Law School
20 (“Prof. Vargas”), testified on behalf of the Diaz Defendants about Mexican law
21 governing the sale of interests in *fideicomiso* trusts. Prof. Vargas’ testimony
22 concerning the transaction at issue was somewhat inconsistent. First, he testified that
23 disputes involving beneficial interests in *fideicomiso* trusts holding title to real
24 property in the restricted coastal zone of Mexico are more in the nature of *in rem*,
25 rather than *in personam* actions under Mexican law because of the application of the

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1 Calvo clause.⁶ However, on cross-examination, he admitted that in an article he
2 authored in March 2007, he opined that he considered the Calvo clause a “legal relic.”

3 56. Second, Prof. Vargas testified at length on direct examination about the
4 sufficiency of the due diligence conducted by the Diaz Defendants. In his opinion,
5 once the Diaz Defendants’ counsel Mr. Sanchez determined that previous transfers
6 of the Villa Property were regular, that the transferor corporation, H&G, was in good
7 standing; that the notary public certified there were no liens or claims against the
8 Villa Property, and that there was a proper corporate resolution, the transaction could
9 close and would be a legitimate and complete transaction under Mexican law.

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

24 58. Finally, as to questions posed by the Court, Prof. Vargas stated that
25 Mexican corporations operate in a manner similar to U.S. corporations; that is, they

26
27 ⁶ The Calvo clause is a doctrine of Mexican law which holds that judgments rendered by
28 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.

1 operate through the mechanism of corporate resolutions and they require a
2 shareholders' resolution to dispose of substantially all of the property of a Mexican
3 corporation.

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

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

- 16 ● Article SIXTH of the Purchase Agreement conveys not only the *fideicomiso*
17 trust interest but also personalty, including vehicles, but there is no warranty
18 by the seller H&G that the personalty was legally within Mexico. [Ex. 2]
19 Mr. Bustamante stated this is a significant omission because vehicles, for
20 example, have to be properly imported into Mexico, otherwise they are
21 contraband. A carefully crafted purchase agreement would not only contain
22 warranties of title to the personalty but also require the seller to substantiate his
23 claim of ownership. Mr. Bustamante says that, in his opinion, such omission
24 indicates the parties were in a rush to close the transaction.
- 25 ● The disparity between the stated purchase price (\$7,508,800 Mex. Pesos or
26 \$678,071 USD), versus the actual price for the purchase of \$1,500,000 USD,
27 was irregular. It was his opinion that where there is this sort of disparity, either
28 the seller is misleading the buyer or there is collaboration between them in

1 understating the purchase price so that the transaction has a “discount” by way
2 of incurring less taxes.

- 3 ● Payment of the consideration to entities other than H&G required additional
4 due diligence by the Diaz Defendants or their counsel because a purchaser has
5 to know where the proceeds are going to avoid violating Mexican laws about
6 money laundering.
- 7 ● The 2002 H&G Purchase Agreement between Mr. Icenhower and H&G which
8 gave Mr. Icenhower total control over management and sale of the Villa
9 Property, and the right to retain all rentals, should have raised questions about
10 the relationship between Mr. Icenhower and H&G. [FF ¶ 17]

11 61. In completing his review of Mr. Sanchez’ file, it was Mr. Bustamante’s
12 opinion that the due diligence of the Diaz Defendants was lacking. Because of
13 irregularities he identified in the transfers between the prior holders of interests in the
14 *fideicomiso* trust, he believes, at minimum, Mr. Sanchez should have tried to contact
15 the prior owners of the *fideicomiso* trust interests (e.g., the Lonie Trust or its
16 beneficiaries, or their counsel) to find out if any residual interest was being asserted.
17 That investigation would have revealed the district court litigation which precipitated
18 Mr. Icenhower’s transfer to H&G. When pressed on cross-examination,
19 Mr. Bustamante characterized the failure to do this as negligent.

20 62. Further, Mr. Bustamante disagreed with Prof. Vargas’ characterization
21 of the rights in the *fideicomiso* trust as *in rem* rights, stating that they are *in personam*
22 rights. This point is critical to determining whether the Trustee or his predecessors,
23 the Lonie Trust and the Lonies, could have recorded a “preventative notice” of the
24 pending litigation, providing public notice of a claim against the trust beneficiary. It
25 was Mr. Bustamante’s uncontroverted testimony, based on his experience, that a final,
26 nonappealable judgment would first have had to be obtained before that order could
27 be domesticated into a foreign judgment in Mexico to lien *in personam* rights held
28 by a *fideicomiso* trust. Since the Lonie Trust’s judgment was prevented from

1 becoming a final, nonappealable order by Icenhower's bankruptcy, no preventative
2 notice could have been recorded against the trust interest holding the Villa. Mr.
3 Bustamante's explanation is clear, consistent and persuasive.

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

9 **L. Other Facts that Should have Triggered Further Enquiry.**

10 64. In addition to the inadequate due diligence found in Factual Findings
11 ¶¶ 57-63 above, the Court finds that Diaz Defendants knew or should have known the
12 following facts prior to the closing of the sale of the Villa Property:

13 65. Mr. Diaz knew that even though the interest in the Villa Property was
14 titled in H&G, Mr. Icenhower retained total control over the management of the Villa
15 Property and its sale price, including the right to reduce that price to repay his
16 personal debts. Mr. Diaz asked no questions about how Mr. Icenhower could adjust
17 the Villa Property sales price. Moreover, Mr. Diaz knew that Mr. Icenhower, a person
18 he barely knew, had approached him for a \$100,000 loan just two months before
19 filing bankruptcy without any warning. Mr. Diaz admits he was concerned and he
20 should have been on heightened enquiry. Had Mr. Diaz conducted *any* independent
21 investigation into the bankruptcy, he would have discovered the district court action
22 involved the Villa Property and the Trustee was questioning the Debtors' transfer of
23 the Villa Property to H&G.

24 66. The Diaz Defendants had actual notice of the possibility of litigation by
25 the Trustee (i) challenging the Debtors' sale of the Villa Property to H&G; and
26 (ii) attempting to tie Debtors with H&G. Mr. Icenhower is one hundred percent
27 certain he discussed the possibility of the litigation with the Diaz Defendants,
28 including the Trustee's claim that H&G was a "shell." He is certain these

1 conversations took place “prior to closing” because he used these facts to hurry up
2 Mr. Diaz’s decision to purchase the Villa. He wanted Mr. Diaz to understand that if
3 he wanted to purchase the Villa Property, he needed to act quickly. Mr. Diaz
4 acknowledges the conversation but disputes the timing, claiming it occurred after the
5 close of the transaction.

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

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

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

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

22 II.

23 CONCLUSIONS OF LAW

24 A. **Kismet is Entitled to Judgment on its Claims in the Alter Ego - Avoidance** 25 **Action.**

26 1. **H&G is Debtors’ alter ego.**

27 71. To prevail on a claim for alter ego, the plaintiff must demonstrate that:
28 (1) the corporation is influenced and governed by the person asserted to be the alter

1 ego; (2) there is such unity of interest and ownership that one is inseparable from the
2 other; and (3) the facts must be such that adherence to the corporate fiction of a
3 separate entity would, under the circumstances, sanction a fraud or promote injustice.
4 *Polaris Indus. Corp. v. Kaplan*, 103 Nev. 598, 601 (1987). The plaintiff in an alter
5 ego action must show the three factors by a preponderance of the evidence. *LFC Mktg.*
6 *Group, Inc. v. Loomis*, 116 Nev. 896, 904 (Nev. 2000).

7 72. In determining whether the “unity of interest and ownership” prong is
8 satisfied, the Nevada Supreme Court requires a finding of equitable ownership, taking
9 into consideration all factors such as comingling of funds, undercapitalization,
10 unauthorized diversion of funds, treatment of corporate assets as the individual’s own,
11 and failure to observe corporate formalities. *See North Arlington Medical Bldg, Inc.*
12 *v. Sanchez Const. Co.*, 86 Nev. 515, 522 n. 8 (1970). Moreover, under Nevada law,
13 it is not necessary for the plaintiff to prove the alter ego’s ownership of shares of the
14 corporation in order to prove unity of ownership. *LFC Mktg. Group*, 116 Nev. at 905;
15 *see also Mallard Automotive Group, Ltd. v. LeClair Management Corp.*, 153 F.Supp.
16 2d 1211, 1215 (D. Nev. 2001).

17 73. In determining whether the facts are such that adherence to the corporate
18 fiction would sanction a fraud or promote injustice, courts have held an alter ego
19 finding is appropriate where an entity has been used as an instrumentality against the
20 rights of creditors: where the defendants “have each engaged in transactions with the
21 actual intent to hinder, delay or defraud creditors the liability of the corporate
22 pawns for that scheme will be visited upon the controlling individual.” *In re National*
23 *Audit Defense Network*, 367 B.R. 207, 230 (Bankr. D. Nev. 2007). In this respect,
24 “[i]t is not necessary that the plaintiff prove actual fraud. It is enough if the
25 recognition of the two entities as separate would result in injustice.” *In re Giampietro*,
26 317 B.R. 841, 849 (Bankr. D. Nev. 2004) (citing *McCleary Cattle Co. v. Sewell*, 73
27 Nev. 279, 282 1957)).

28 ///

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

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

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

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

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

32 77. In contrast, the Diaz Defendants have asked the Court to ignore the
33 reasonable expectations of the Lonie Trust and to focus, instead, on Kismet's
34 reasonable expectations. They point out that Kismet was never a victim of

1 Mr. Icenhower's fraudulent scheme, having been a stranger to the transaction and the
2 bankruptcy case until 2006. [FF ¶¶ 50-53] Kismet is building a golf resort which
3 surrounds the Villa Property. Kismet's alleged motive is to acquire the Villa Property
4 as a "crown jewel" for its golf resort. The Court made no findings concerning these
5 objectives because they are irrelevant to the alter ego claim. Kismet, stands in the
6 shoes of the Trustee who brought the alter ego claim on behalf of the Lonie Trust and
7 other creditors of the estate. As such, the relevant inquiry is not Kismet's objectives
8 or the timing of its entry into this case. The relevant inquiry is *the reasonable*
9 *expectations of the estate's creditors and others who dealt with the Debtors and H&G*
10 *at the time the Villa Property transaction closed.* If this enquiry reveals that
11 adherence to H&G's corporate fiction would sanction a fraud or promote injustice, the
12 remedies of alter ego and reverse veil piercing are appropriate. Here, the evidence
13 demonstrates the Lonie Trust dealt with the Debtors in good faith, and it had a
14 reasonable expectation that its claim would be paid, or the Villa Property would be
15 reconveyed to the Lonie Trust free of any encumbrances or liens. [FF ¶¶ 1-5] In
16 contrast, as more fully set forth in Conclusions of Law ("CL") ¶¶ 102-105 below, the
17 evidence demonstrates the Diaz Defendants lacked good faith. They had no
18 reasonable expectation they were dealing with H&G as a separate corporate entity, or
19 that they would be purchasing the Villa Property from H&G free of any claims of the
20 Trustee. [FF ¶¶ 54-55; ¶¶ 60-63; ¶¶ 64-70]

21 78. The Court concludes the equities of this case support the remedies of alter
22 ego and reverse piercing of the corporate veil *nunc pro tunc* to the petition date. The
23 factual reality is that Mr. Icenhower and H&G were one and the same. Mr. Icenhower
24 was the equitable owner of the Villa Property on the petition date, and the Diaz
25 Defendants had ample notice of his equitable ownership before the Villa Property
26 transaction closed.

27 79. Further, it is appropriate to substantively consolidate H&G with the
28 Debtors' bankruptcy estate. *See In re Bonham*, 229 F.3d 750, 763-64 (9th Cir. 2000).

1 The *Bonham* test requires that the court consider two factors: “(1) whether creditors
2 dealt with the entities as a single economic unit and did not rely on their separate
3 identity in extending credit; or (2) whether the affairs of the debtor are so entangled
4 that consolidation will benefit all creditors.” *Id.* at 766. “The primary purpose of
5 substantive consolidation ‘is to ensure the equitable treatment of all creditors.’”
6 *Bonham*, 229 F.3d at 764 (quoting *In re Augie/Restivo Baking Co., Ltd.*, 860 F.2d 515
7 (2nd Cir. 1988)). It allows a truly equitable distribution of assets by treating the
8 corporate shell as a single economic unit with the bankruptcy estate. *Id.* at 768. Here,
9 the same facts that support alter ego and reverse veil piercing support substantive
10 consolidation to return the Villa Property (H&G’s sole asset) to the Debtors’
11 bankruptcy estate *nunc pro tunc* to the petition date. *See Id.* (finding that substantive
12 consolidation *nunc pro tunc* to the petition date would allow a truly equitable
13 distribution of assets because it would make it possible for the trustee to pursue
14 avoidance actions for the benefit of the creditors of the consolidated bankruptcy
15 estates).

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

19 80. Under 11 U.S.C. § 541(a), “[t]he commencement of a case under section
20 301, 302, or 303 of this title creates an estate.” The estate is comprised of, *inter alia*,
21 “all legal or equitable interests of the debtor in property as of the commencement of
22 the case.”

23 81. Section 549(a) allows a trustee to avoid a transfer of property of the estate
24 made after the commencement of the case which is not authorized under the
25 Bankruptcy Code or by the court. *In re Goodwin*, 115 B.R. 674, 676 (Bankr. C.D. Cal.
26 1990). Section 549(c) creates an exception to avoidance to protect innocent
27 purchasers of real property who had no knowledge of the pending bankruptcy case.
28 *In re Tippett*, 338 B.R. 82, 87-88 (9th Cir. BAP 2006).

///

1 82. The Court’s finding of alter ego and its substantive consolidation of H&G
2 into the Debtors’ estate *nunc pro tunc* to the petition date promotes the equitable
3 reality that the Villa Property was property of the estate on the petition date. The
4 transfer of the Villa Property from the bankruptcy estate to the Diaz Defendants was
5 an unauthorized postpetition transfer of property of the estate avoidable under
6 § 549(a).

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

11 **3. Kismet’s recovery of the avoided postpetition transfer pursuant to**
12 **11 U.S.C. § 550(a)(1) is absolute.**

13 84. Section 550(a) of the Bankruptcy Code provides that to the extent that a
14 transfer is avoided under §§ 544, § 545, 547, 548, 549 or 724(a), the trustee may
15 recover, for the benefit of the estate, the property transferred, or if the court so orders,
16 the value of such property, from – (1) the initial transferee of such transfer or the
17 entity for whose benefit such transfer was made; or (2) any immediate or mediate
18 transferee of such initial transferee. Quite simply put, § 550 identifies the parties
19 liable for repayment of an avoided transfer, and empowers the trustee to recover the
20 property transferred or its value for the benefit of the estate. *In re Brun*, 360 B.R. 669,
21 672 (Bankr. C.D. Cal. 2007).

22 85. The purpose of § 550(a) is “to restore the estate to the financial condition
23 it would have enjoyed if the transfer had not occurred.” *In re Straightline*
24 *Investments, Inc.*, ___ F.3d ___, 2008 WL 1970560 at *9 (9th Cir. May 8, 2008) (citing
25 *In re Acequia, Inc.*, 34 F.3d 800, 812 (9th Cir. 1994)); *Brun*, 360 B.R. at 674-75. If the
26 value of the property has declined following a fraudulent transfer, returning devalued
27 property itself would not make the estate whole. In such instances, the courts have
28 awarded a money judgment. On the other hand, when the property has appreciated,

1 the trustee is entitled to recover the property itself, or the value of the property at the
2 time of judgment. The statute, in prescribing alternatives, is purposefully flexible to
3 accomplish its remedial goal. *Brun* at 674-75; *In re American Way Service Corp.*,
4 229 B.R. 496, 531-32 (Bankr. S.D. Fla. 1999).

5 86. The Trustee's entitlement to recover an avoided transfer from the initial
6 transferee is absolute under § 550(a)(1). *In re Cohen*, 300 F.3d 1097, 1102 (9th Cir.
7 2002). In contrast, § 550(b) provides an exception to the right of recovery against an
8 "immediate or mediate" transferee of the initial transferee who takes for value, in good
9 faith and without knowledge of the voidability of the transfer avoided, or any
10 immediate or mediate good faith transferee of such transferee. This good faith
11 defense is only available to subsequent transferees. *Cohen*, 300 F.3d at 1102; *In re*
12 *Presidential Corp.*, 180 B.R. 233, 236 (9th Cir. BAP 1995).

13 87. In the present case, as more fully set forth in ¶¶ 80-83 the Diaz
14 Defendants have no defense to the Trustee's § 549 postpetition avoidance claim.
15 Pursuant to § 550(a)(1), they are strictly liable *as initial transferees* to return the
16 avoided transfer, or its value to the bankruptcy estate.

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

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

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

24 89. Under California law, an unsecured creditor may avoid a fraudulent
25 transfer to the extent necessary to satisfy the creditor's claim. *See* Cal. Civ. Code
26 §§ 3439.04 and 3439.07. A "transfer" as defined by California law, "means every
27 mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing
28 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).

1 An "asset" means unencumbered, non-exempt equity in property of a debtor. Civ.
2 Code § 3439.01(a).

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

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

18 92. There is a clear distinction between the law governing the avoidability
19 of a fraudulent transfer, and the law governing the trustee's recovery of an avoided
20 transfer. Section 550 separates the concepts of *avoiding* a transfer (*i.e.*, the transfer
21 from the Debtors to H&G), and *recovering* from the initial transferee (H&G) or any
22 immediate or mediate transferees of the initial transferee (the Diaz Defendants). *See*
23 *Acequia, Inc.*, 34 F.3d at 809. "[W]hile California law governs whether and to what
24 extent a transfer of property is voidable, the value of the avoided transfer, and
25 therefore, the recovery is governed by § 550(a), irrespective of any recovery
26 limitations imposed by California law." *Brun*, 360 B.R. at 672.

27 93. In this case, the Diaz Defendants acknowledge that the applicable transfer
28 to be *avoided* under § 544(b) and pursuant to California law, is the Debtors' transfer

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

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

10 95. There is ample evidence to conclude the Debtors' transfer to H&G is
11 avoidable both as a constructively fraudulent, and an actually fraudulent transfer.
12 H&G did not pay any consideration in exchange for the Villa Property, thereby
13 making the transfer constructively fraudulent. [FF ¶ 16] Additionally, the timing and
14 circumstances surrounding the transfer show Mr. Icenhower intended the transfer to
15 be actually fraudulent. [FF ¶¶ 7-21] Finally, there is no dispute as to the timeliness of
16 the Fraudulent Conveyance Action. [Suppl. Trial Brief at page 3:9-10, Adv. Proc.
17 04-90392 at Doc. # 496]

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

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

27 97. A subsequent transferee asserting the good faith defense must prove all
28 three elements of that defense: (1) taking a property for value; (2) in good faith; and

1 (3) without knowledge of the voidability of the transfer avoided. *In re Laguna Beach*
2 *Motors, Inc.*, 159 B.R. 562, 565-66 (Bankr. C.D. Cal. 1993)(citing *Bonded Financial*
3 *Svcs., Inc. v. European American Bank*, 838 F.2d 890, 896-97 (7th Cir. 1988). The
4 party asserting this defense bears the burden of proving the validity of the affirmative
5 defense. *Laguna Beach Motors*, 159 B.R. at 566.

6 98. The Bankruptcy Code does not define the meaning of the phrases “good
7 faith” and “without knowledge of the voidability of the transfer avoided.” *Goodwin*,
8 115 B.R. at 676. The courts have generally treated the requirements of “good faith”
9 and “lack of knowledge of voidability” synonymously and have looked to whether a
10 transferee had knowledge of the transferor’s unfavorable financial condition, or other
11 circumstances sufficient to lead a reasonable person to investigate the voidability of
12 the transfer, to determine whether the transferee acted in good faith. *In re Smoot*, 265
13 B.R. 128, 141(Bankr. E.D. Va. 1999) (a person is not a good faith transferee under
14 § 550(b)(1) if the person has knowledge of the transferor’s unfavorable financial
15 condition at the time of transfer); *Bonded Financial*, 838 F.2d at 897-98 (a recipient
16 of fraudulent transfer lacks good faith if he possessed enough knowledge of the events
17 to induce a reasonable person to investigate); *see also* 5 A. Resnick & H. Sommer,
18 eds., *Collier on Bankruptcy*, ¶ 550.03[2] and [3] at 550-23-25 (15th ed. Rev. 2007)
19 (recognizing the growing body of case law that has applied an objective standard for
20 good faith).

21 99. The courts within this circuit have adopted the objective standard for
22 good faith enunciated in *Bonded Financial*. *See e.g. In re Richmond Produce Co.,*
23 *Inc.*, 195 B.R. 455, 464 (N.D. Cal. 1996); *Goodwin*, 115 B.R. at 677; *In re Concord*
24 *Senior Housing Foundation*, 94 B.R. 180, 183 (Bankr. C.D. Cal. 1988) (overruled on
25 other grounds).⁷

26
27 ⁷ *See Rupp v. Markgraf*, 95 F.3d 936, 943 n. 1 (10th Cir. 1996) (recognizing *Concord Senior*
28 *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).

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

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

12 195 B.R. at 464 (quoting *Bonded Financial*, 838 F.2d at 897-98). The bankruptcy
13 court in *Concord Senior Housing* stated:

14 [A] transferee acts in good faith if it had no facts before it that would
15 cause a reasonable person to investigate whether the transfer would be
16 avoidable. Within the context of a section 549 proceeding, I conclude
17 that if the subsequent transferee knew, or if a reasonable person would
18 suspect, that the initial transfer was an unauthorized one from a
19 bankruptcy estate, then the immediate transferee would not have received
20 the transfer in good faith.

21 94 B.R. at 183.

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

25 It is my view that the transferee must have knowledge of sufficient facts
26 that (i) puts the transferee on notice that the transfer might be avoidable
27 or (ii) requires further inquiry into the situation and such inquiry is likely
28 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,

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

5 103. The Court concludes the Diaz Defendants are liable as subsequent
6 transferees pursuant to § 550(a)(2) because they have failed to show they received
7 the transfer from H&G in objective good faith. First, the Court observes this *not a*
8 situation where Mr. Diaz had no reason to question Mr. Icenhower. *Cf. Goodwin*, 115
9 B.R. at 677-78 (transferee had no reason to question any wrongdoing due to past
10 business dealings and family relationship). To the contrary, Mr. Diaz barely knew
11 Mr. Icenhower, and even he concedes their past dealings (unwittingly lending
12 \$100,000 to a bankrupt), would put any reasonable person on heightened enquiry in
13 conducting further business with Mr. Icenhower. [FF ¶¶ 27-32; ¶ 65]

14 104. Second, Mr. Diaz cannot claim he failed to enquire due to lack of
15 sophistication. He is an educated, experienced businessman who has owned companies
16 and served on an audit committee. [See FF ¶ 23] Any reasonable person of similar
17 sophistication who had made the same bad loan would have investigated
18 circumstances surrounding the Debtors' bankruptcy, and enquired into the reason
19 Mr. Icenhower could cause H&G to lower the Villa Property sales price to repay his
20 personal debt. Had Mr. Diaz conducted any enquiry, he would have discovered the
21 district court litigation involved the Villa Property and the Trustee was questioning
22 the Debtors' transfer of the Villa Property to H&G. [FF ¶ 65] Additionally, Mr. Diaz
23 would have discovered what he likely already knew, that Mr. Icenhower had
24 fraudulently transferred the Villa Property to H&G to keep it away from the Lonies.

25 105. Third, there were many other "red flags" that should have caused
26 Mr. Diaz, and any other reasonable person in his shoes, to investigate the voidability
27 of the transfer to H&G. [See FF ¶¶ 60-61] The Diaz Defendants and their attorney
28 Mr. Sanchez closed their eyes to these "red flags" to avoid actual knowledge. Their

1 own Mexican law expert (Prof. Vargas) conceded that, given the cross-border nature
2 of this transaction, a heightened level of due diligence was required. [FF ¶ 57;
3 ¶¶ 61-63] Had any heightened enquiry been made, the Diaz Defendants would have
4 learned what they likely already knew, that H&G was a shell entity controlled by
5 Mr. Icenhower.

6 106. Finally, the Court finds the Diaz Defendants cannot possibly be good
7 faith transferees because, prior to closing of the Villa Property transaction, Mr. Diaz
8 actually knew the Debtors' transfer of the Villa Property to H&G *might* be voidable
9 by the Trustee. Mr. Icenhower is one hundred percent certain he disclosed this
10 information to "hurry up" Mr. Diaz's decision to purchase the Villa Property while the
11 title in Mexico remained clear. [FF ¶¶ 66-67] Mr. Diaz denies knowledge, but other
12 facts suggest this was likely the case. [FF ¶ 60, ¶ 67] Mr. Diaz proceeded with the
13 Villa Property transaction because he believed the clear title in the Mexican Public
14 Registry would defeat the Trustee. Having made the conscious decision to "hurry up"
15 the transfer to defeat the Trustee, the Diaz Defendants cannot be good faith
16 transferees.

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

1 108. The Court makes no legal conclusion concerning whether its consolidated
2 judgment in these actions is enforceable in Mexico. As this Court has previously
3 ruled, it has subject matter jurisdiction over claims to avoid and recover the wrongful
4 transfer of the Debtors' interest in the *fideicomiso* trust, and it has *in personam*
5 jurisdiction over each of the Defendants in these actions to *order them to execute the*
6 *necessary conveyance documents* to return the Villa Property to the estate, subject to
7 enforcement through this Court's contempt powers, even though it indirectly affects
8 title to real property in Mexico. [PTO in Adv. Proc. 06-90369, Doc. # 191, Judicially
9 Noticeable Facts ¶ 5]; *see also Fall v. Eastin*, 215 U.S. 1, 9-12 (1909) (recognizing
10 that a court of equity, having authority to act upon the person, may indirectly act upon
11 real estate in another jurisdiction, and even in a foreign country, through the
12 instrumentality of its authority over the person); A. Ahart, *Cal. Prac. Guide: Enf. J.*
13 *& Debts*, Ch. 6, ¶ 6:1849.9 (The Rutter Group 2008).

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

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Dated: 2 June 08



LOUISE DE CARL ADLER, Judge