UNITED STATES BANKRUPTCY COURT **SOUTHERN DISTRICT OF CALIFORNIA** **325 West "F" Street, San Diego, CA 92101-6991**	
In re LISA KAYE GOLDEN Debtor(s)	BANKRUPTCY NO.: 17-06928-MM7
RICHARD M KIPPERMAN Plaintiff(s) **v.** LISA KAYE GOLDEN, an individual, et al. Defendant(s)	ADV NO.: 18-90021-MM **NOT FOR PUBLICATION** Date of Hearing: May 8, 2020 Time of Hearing: 10:00 a.m. Name of Judge: Margaret M. Mann

MEMORANDUM DECISION RESOLVING MOTIONS TO AMEND FIRST AMENDED COMPLAINT, INTERVENE AS TRUSTEE, AND DISMISS, DISSOLVE, OR VACATE PRELIMINARY INJUNCTION; AND MAKING FINDINGS OF FACT AND CONCLUSIONS OF LAW IN SUPPORT OF JUDGMENT FOR PERMANENT INJUNCTION AND TURNOVER OF PROPERTY OF THE ESTATE

IT IS HEREBY ORDERED as set forth on the 17 continuation pages attached.

May 29, 2020

Judge, United States Bankruptcy Court

The four matters addressed at a hearing on May 8, 2020 and in this Memorandum Decision relate to the fundamental issue in this case: Whether the property located at 520 4th Street, Imperial Beach CA ("Property") is property of the estate and subject to turnover as claimed by Trustee Richard M Kipperman ("Trustee") in the complaint in this action. Debtor Lisa Kaye Golden defends this claim asserting the Property is owned instead by an irrevocable Andreas Trust ("Trust"), in which she claims to be uninvolved, and in which she claims to hold no interest.

The first of these matters was filed by William H. Harvey ("Harvey") the purported trustee of the Trust. He brought a motion to intervene claiming he was the trustee of the Trust. At the evidentiary hearing held on May 8, 2020[1], Harvey failed to appear, and his evidence was stricken. No other trustee has appeared to defend its interests as a separate entity in this action.

The second matter is Golden's motion to amend her answer because she had previously answered acting as the trustee. She seeks to avoid a judicial admission that she was the trustee of the Trust that would preclude her from introducing evidence to the contrary. The court considered Golden's motion and offer of proof at the evidentiary hearing

The third matter is Trustee's motion for a permanent injunction, based on the extensive evidence and findings made at the preliminary injunction hearing. The court declined to rule on that matter until the first two were resolved in order to ensure that due process was afforded both Golden and Harvey. It nevertheless recognized that Trustee would be entitled to judgment if Golden were the only trustee of the Trust incapable of offering evidence to the contrary.

Finally, Golden brought a motion to vacate the preliminary injunction, which would be moot if the court were to grant the permanent injunction.

The court addresses these four matters in sequence. Because Golden is the only trustee of the Trust as a matter of judicial admission and the Trust is her alter ego under

[1] The court at the hearing noted that Judge Mann had recently been sued twice by Golden based on her rulings in this case. The court has itself addressed whether Judge Mann should recuse herself three times, and once by another judge on the court. For this fifth time, the court found the lawsuit provided no reason to sua sponte recuse itself, relying upon *United States v. Ross*, Nos. 95-50214, 95-50279, 95-50301, and 95-50513, 1997 U.S. App. LEXIS 15268, at *1 (9th Cir. June 20, 1997) (Defendant could not create a basis for recusal simply by naming federal judges as defendants in his ongoing and prolific litigation efforts.). *Ross* based its analysis on reported decisions with the same holding. Although *Ross* is an unpublished decision, the facts here are similar because Golden has stated her intent to remove Judge Mann from presiding over this case based on her rulings.

the undisputed facts, it concludes the Property is property of the estate. Accordingly, judgment for permanent injunction and turnover order will be entered and Golden's motion to set aside the preliminary injunction will be denied as moot.

I. GOLDEN'S MOTION TO FILE SECOND AMENDED ANSWER

Golden's first amended answer ("FAA") alleges she is the trustee of the Trust. She claims this allegation was a mistake caused by one of her three former attorneys in this case, David L. Speckman ("Speckman"), that she seeks to correct by a second amended answer. She contends the FAA is not a clear judicial admission since she specifically denies she is the trustee of Trust later in the FAA, and the statement only amounts to an evidentiary admission that can be contradicted by other evidence. Trustee opposes the amendment claiming it is moot, which is tantamount to a futility argument because of the rulings on the preliminary injunction motion. While preliminary injunction findings are non-binding, *Shell Offshore, Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 631 n.5 (9th Cir. 2016) (citing *Univ. of Tex. V. Camenisch*, 451 U.S. 390, 395, 101 S. Ct. 1830, 1834 (1981)), this is of no consequence since Golden cannot meet the elements of Fed. R. Civ. P. 15, made applicable by Fed. R. Bankr. P 7015.

The court must "freely give leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a) (2). Whether to deny leave to amend involves consideration of four factors: "undue delay, bad faith or dilatory motive, futility of amendment, and prejudice to the opposing party." *In re Circuit Breaker Litig.*, 175 F.R.D. 547, 550 (C.D. Cal. 1997) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962) *and DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) (denying leave to amend counterclaim after finding there was a delay, prejudice, futility, and prior opportunities to amend). One factor or a combination of factors is enough to deny leave. *Id.* Here, since the amendment of the Second Amended Answer was delayed, is sought in bad faith, and would cause prejudice, amendment will be denied.

Golden's admission she is trustee of the Trust was deliberate rather than a mistake. Golden filed her initial answer on only her own behalf. Doc. 8. Since neither the Trust, nor the title holder of record MLP 1005, Inc. ("MLP") timely responded to the Complaint, Trustee sought to enter default against them both. At the hearing on entry of default, neither the Trust, nor MLP appeared. Default was then entered against MLP. To avoid default against the Trust, Golden negotiated with Trustee to answer on the Trust's behalf. Golden and Speckman were both present in court when Trustee's counsel announced this resolution, and neither refuted it. Instead, Golden filed the FAA on behalf of "LISA KAYE GOLDEN, individually and as Trustee of the ANDREAS TRUST DATED NOVEMBER 26, 2001 ("Defendant"), in answer to the Complaint filed herein." The Trust thus avoided the default as Golden intended.

Had Golden's answer on behalf of the Trust been Speckman's error, Golden could have spoken up at the default hearing. She was present and has been vocal and active at all the hearings. The court encouraged Golden to present evidence from Speckman if the avoidance of the Trust's default was error, but she never did so. Speckman is an officer of the court, and his representation that Golden was trustee of the trust is entitled to credulity without contradictory evidence.

Golden also accepted the benefit of saving the Trust from default until the court treated it as a judicial admission at the hearing on the Temporary Restraining Order in this case. Only then, when Golden realized that avoiding the default may not have been worth it, did she seek to amend the answer again to deny being the trustee of the Trust. The court cannot grant leave to amend based on a party's desire to alter the outcome of an issue since this is bad faith. *Sorosky v. Burroughs Corp*., 826 F.2d 794, 805 (9th Cir. 1987) *questioned on other grounds by Stewart v. United States Bancorp,* 297 F.3d 953, 958 n.2 (9th Cir. 2002) (denying leave to amend was proper where leave was sought to add a defendant with motive to destroy diversity jurisdiction). To permit amendment would also prejudice Trustee, who agreed to spare the Trust from default.

Because the standards of Fed. R. Civ. P. 15 have not been met, due to prejudice, bad faith, and delay, Golden's motion to amend her FAA is denied.

A. Judicial Admission

Golden and the Trust dispute Trustee's claim that Golden must be considered the trustee of the Trust pursuant to judicial admission and judicial estoppel. The difference between these two doctrines is that judicial admissions are limited to statements made in the same litigation while judicial estoppel applies to statements made in other cases. *Casa Del. Caffe Vergnano S.P.A. v. Italflavors San Diego, Ltd. Liab. Co.,* 816 F.3d 1208, 1213 (9th Cir. 2016) (citing *Rissetto v. Plumbers & Steamfitters Local 343*, 94 F.3d 597, 605 (9th Cir. 1996). While Golden stated she was trustee of the Trust in this litigation and in state court, only the elements of judicial admission are met.

A factual admission in a pleading is a judicial admission and has the effect of "withdrawing a fact from issue and dispensing wholly with the need for proof of the fact." *Am. Title Ins. Co. v. Lacelaw Corp*., 861 F.2d 224, 226 (9th Cir. 1988) (citing *In re Fordson Eng'g Corp*., 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982)). An answer is expressly identified as a pleading in Fed. R. Civ. P. 8, incorporated into Fed. R. Bankr. P. 7008. "Judicial admissions [are] conclusively binding on the party who made them." *Lacelaw Corp*., 861 F.2d at 226 (citing *White v. ARCO/Polymers, Inc.*, 720 F.2d 1391, 1396 (5th Cir. 1983) and *In re Fordson Engineering Corp*., 25 B.R. 506, 509 (Bankr. E.D. Mich. 1982)). Subsequent arguments contradictory to judicial admissions are precluded. *Faust v. Travelers*, 55 F.3d 471, 474 (9th Cir. 1995) (precluding a party's

argument in opposition to a motion for summary judgment because it was contradictory to the party's averment in the complaint).

Golden claims judicial admission does not apply because the statements in the FAA are not factual statements but legal conclusions and are not sufficiently clear. The court also finds that Golden's admission she was trustee of the Trust is a statement of fact not law. It identified which parties in this action on whose behalf Golden was acting, regardless of whether her actions comported with legal standards.

The judicial admission must be "deliberate, clear, and unequivocal." *Truckstop.Net, L.L.C. v. Sprint Commc'ns Co., L.P.*, 537 F. Supp. 2d 1126, 1135 (D. Idaho 2008)). Conclusions of law cannot be judicial admissions. *Teleglobe USA Inc. v. BCE Inc. (In re Teleglobe Commc'ns Corp.)*, 493 F.3d 345, 377 (3d Cir. 2007); *Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007)).

Because the caption of the FAA states counsel represents Golden without reference to the Trust, she claims the admission is ambiguous. But even if the caption was vague, it is immediately clarified by the opening paragraph which unequivocally avers that she is answering both individually and as trustee of the Trust. Golden's also argues ambiguity as to whether she is acting as trustee of the Trust from her allegation that:

> "Defendant is unable to admit or deny the allegations of paragraph 3 of the Complaint, and therefore denies said allegations."

Doc. 19, ¶ 3.

Viewed in context, the ambiguity disappears, however. Paragraph 3 of the Complaint in its entirety alleges:

> "Defendant LISA KAYE GOLDEN, as Trustee of the Andreas Trust ("the Andreas Trust") is named as a defendant herein solely for purposes of having all interested parties before the Court for determination of the rights and interests which are the subject of this dispute. Plaintiff is informed and believes and thereon alleges that the Andreas Trust has or claims to have an interest in the real property described below."

Doc. 19, ¶ 3.

Of these two sentences, Golden had the ability to admit or deny that she was trustee of the Trust if that was her intent. She did as much by claiming to be trustee in the opening paragraph of the FAA to protect the Trust from being defaulted in the suit. The numerous times in state court that Golden similarly appeared as trustee of the Trust also support that she knew what she was doing in so appearing. She admitted as such

in a declaration where she stated she would appear on the Trust's behalf as trustee to protect it. Doc. 64.

Golden's claim of being unable to admit or deny trustee status in the context of Paragraph 3 of the Complaint must be viewed as responding only that she is unable to admit or deny Trustee's purposes. Viewing this paragraph differently would countenance game playing and bad faith, since Golden peripatetic assertion of trustee status was strategic. *Provident Energy Assocs. of Mont. v. Bullington*, 77 F. App'x 427, 430 (9th Cir. 2003) (citing *Sicor Ltd. v. Cetus Corp*., 51 F.3d 848, 859-60 (9th Cir. 1995) (defendant submitted a brief and declaration from counsel that sufficiently explained the admission in the amended answer was erroneous); *Bauer v. Goss*, No. C 12-00876 JSW, 2012 U.S. Dist. LEXIS 95334, at *9 (N.D. Cal. July 10, 2012) (plaintiff was bound by judicial admission because counsel's explanation that he "erroneously" relied on certain documents was insufficient and the judicial admission hindered plaintiff's ability to challenge the motion to dismiss); *Cadelli v. United Transp. Union*, No. 98-55998, 1999 U.S. App. LEXIS 5347, at *2 (9th Cir. Mar. 23, 1999) (plaintiff provided explanation regarding the date he received a letter, but it was not an effective amendment to the judicial admission in the original and first amended complaint).

Golden's statement that she is the trustee of the Trust is a binding judicial admission that precludes her from offering any evidence to the contrary. *See Lacelaw Corp*., 861 F.2d at 226; *Jacobson v. Ormsby (In re Jacobson)*, Nos. 04-51572-RBK, 04-5084-RBK, 05-CV-1125-XR, 2006 U.S. Dist. LEXIS 70433, at *55 (W.D. Tex. Sep. 26, 2006) ("a judicial admission may not be explained or controverted").

B. Judicial Estoppel

A finding of judicial estoppel, in contrast, is not warranted here. Golden's representations in various state court pleadings are merely evidence that she had regularly represented she is trustee of the Trust. Judicial estoppel occurs where: (1) a party's later position is "clearly inconsistent" with it previous position; (2) a court accepted the previous position; and (3) the party would obtain an unfair advantage or "impose an unfair detriment on the opposing party if not estopped." *Ah Quin v. Cty. of Kauai Dep't of Transp*., 733 F.3d 267, 270 (9th Cir. 2013) (citing *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001) (factors are not "inflexible prerequisites or an exhaustive formula"); *Dzakula v. McHugh*, 746 F.3d 399, 401 (9th Cir. 2014) (clarifying *Ah Quin* and the applicable meaning of mistake and inadvertence). Judicial estoppel is intended to protect the integrity of the court. *Id.* at 275. Because the state court action did not proceed to trial, the court cannot assess whether there was an unfair advantage or acceptance by the state court.

II. MOTION TO INTERVENE

Harvey's motion to intervene asserts he is the trustee of the Trust, which is a valid irrevocable trust. Since Harvey failed to appear at the evidentiary hearing, and Golden is precluded from contesting her own trustee status, Harvey's motion is devoid of evidentiary support.

The court required in its January 31, 2020 Order Scheduling Motions for Hearing, Doc. 453 that Harvey appear and be cross-examined regarding his declarations. The hearings were continued to May 8, 2020 because of the pending appeal. Because of the COVID 19 crisis, the court required testimony via video transmission at the May 8, 2020 hearing. The court sent an email to all parties, including Harvey, with the video conference information and alternate call in instruction if the video conference did not work. Doc. 515. Harvey failed to appear via videoconference or telephone, so the court has stricken his declaration in support of the Motion to Intervene. This evidentiary hearing is the second at which Harvey failed to appear. Harvey submitted a declaration to oppose the preliminary injunction yet failed to appear at the evidentiary hearing to be examined on his declaration. The court struck this declaration as well.

The court took pains to ensure that Harvey was aware his presence was required, despite his evanescent participation in this case. Harvey lists his address for service of process as either Golden's address at P.O. Box 180376, Coronado, CA 92178, or no address at all. Docs. 184, 393. Harvey does not live in San Diego, California and has signed declarations from several other cities. When he filed this motion, Harvey was represented by attorney, Darvy Mack Cohan ("Cohan"), who later withdrew based on Harvey's failure to communicate or cooperate with him. Harvey failed to meet with Cohan, refused to return telephone calls, or provide a physical address. The court's only option for contact with Harvey was through the email address left by Cohan upon his withdrawal as counsel. Cohan's proof of service of his motion to withdrawn, Doc. 175, contains the email address.

Without Harvey's declaration, and with Golden being precluded from contesting she is the trustee of the Trust, Harvey's Motion to Intervene is unsupported by evidence. A party is permitted to intervene either as a matter of right if the party is the trustee of a trust, since a trustee is the real party in interest for procedural purposes. Fed. R. Civ. P. 17(a); *see Navarro Sav. Ass'n. v. Lee,* 446 U.S. 458, 462 (1980). Under California law, only the trustee has standing to sue and defend on behalf of the trust. Fed. R. Civ. P. 17(b) (3); *Estate of Bowles,* 169 Cal. App. 4th 684, 691 (2008) (citing to Cal. Civ. Proc. Code § 369(a) (2) which identifies trustees as the real party in interest); *Portico Management Group, LLC v. Harrison,* 202 Cal. App. 4th 464, 473 (2011) (trustee is the real party in interest, not the trust itself). Alternatively, Fed. R. Civ. P. 24, as made

applicable by Fed. R. Bankr. P. 7024, provides for intervention of right or permissive intervention. Rule 24 involves a four-part test:

> "(1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the action."

Wilderness Soc. v. U.S. Forest Serv., 630 F.3d 1173, 1177 (9th Cir. 2011). These elements cannot be satisfied due to the lack of evidentiary support. Even if the motion were timely, Harvey has no protectable interest in the Property, and Golden is the trustee per her judicial admission. The motion is intervene is thus denied.

III. MOTION FOR PERMANENT INJUNCTION

Trustee's motion for a permanent injunction requires him to demonstrate actual success on the merits of his claim the Property is property of the estate. *New York Civil Liberties Union v. New York City Transit Authority*, 684 F. 3d 286, 294 (2nd Cir. 2012). If he can do so, this finding of entitlement to success on the merits will obviate consideration of the other elements of injunctive relief. *W. Sys. v. Ulloa*, 958 F.2d 864, 872 (9th Cir. 1992) ("[W]hen actual success on the merits is shown, the inquiry is over and a party is entitled to relief as a matter of law irrespective of the amount of irreparable injury which may be shown.") Whether Trustee or Golden was a better manager of the Property, an issue on which the court had earlier permitted Golden an opportunity to conduct discovery, would then be irrelevant. *Id.*

The process necessary for a permanent injunction to issue is a function of whether material issues of fact remain to be resolved by trial. *SEC v. Murphy,* 626 F.2d 633, 655-56 (9th Cir. 1980) ("The critical question, however, is not whether a court may issue a permanent injunction on summary judgment without hearing testimonial evidence, but whether . . . the moving party here, clearly established the absence of any genuine issue of fact material to the granting of the injunction."). *Cont'l Airlines, Inc. v. Intra Brokers*, 24 F.3d 1099, 1102 (9th Cir. 1994); see also 10B Federal Practice and Procedure §2731, at 88 (4th ed. 2016) ("[I]f there are no triable fact issues and the court believes equitable relief [permanent injunction] is warranted, it is fully empowered to grant it on a rule 56 motion."). In *Murphy,* 626 F.2d at 655-56, the Ninth Circuit affirmed the trial court's issuance of a permanent injunction without a trial despite a factual dispute about the sincerity of the defendant's assurances he would comply with the securities law. Noting the authority of *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978), which held that "where the trial will be to the court, it may decide mixed

questions of law and fact on summary judgment if a trial will not enhance its ability to draw inferences from the undisputed facts," the Ninth Circuit held that it could not "sanction a rule that would establish such a ritualistic dodge around a permanent injunction on a motion for summary judgment" because of the other undisputed facts in the record that justified a permanent injunction. Irrelevant factual disputes also do not preclude the issuance of a permanent injunction. *Cont'l Airlines,* 24 F.3d at 1102-03 (trial was unnecessary for issuance of a permanent injunction on affirmative defenses subject to federal preemption which were unsupported by reasonable inferences from the undisputed facts in any event).

The court concludes that plethora of undisputed facts developed from the extensive history of this case renders a trial unnecessary. Golden's judicial admission that she is the trustee of the Trust precludes her from offering any evidence to the contrary. *Lacelaw Corp.*, 861 F.2d at 226. Harvey's declarations have been stricken. MLP has been defaulted. Any attempt by Golden or some newly identified trustee to claim trustee status would be too late and not credible. *Yeager v. Bowlin*, 693 F.3d 1076, 1080-81 (9th Cir. 2012) (stating sham affidavit rule requires "a factual determination that the contradiction is a sham, and the inconsistency between" the new and old position in the testimony be clear and unambiguous).

The preliminary injunction hearing yielded numerous undisputed facts that the court considers here as evidence that the Trust is Golden's alter ego, even if those findings are not binding. *Shell Offshore, Inc. v. Greenpeace, Inc.*, 815 F.3d 623, 631 n.5 (9th Cir. 2016). A court's legal conclusions and fact-findings are not binding because they may change after further consideration. *Marilley v. McCamman*, No. C-11-02418-DMR, 2011 U.S. Dist. LEXIS 113575, at *4-5 (N.D. Cal. Oct. 3, 2011). Further consideration of the issues in this case has instead confirmed the accuracy of the preliminary injunction findings.

The source of additional undisputed facts was the trial held in Rogers v. Golden, Case No. 18-90054. Certain of the findings made in that case are also entitled to federal issue preclusion. The elements for federal issue preclusion are: (1) the issue to be precluded and the issue from the former proceeding are identical; (2) the issue was actually litigated; (3) the issue was necessarily decided; (4) the decision was final and on the merits; and (5) preclusion is to be applied against a party who is the same as, or in privity with, the party from the former proceeding. *Robi v. Five Platters, Inc.*, 838 F.2d 318, 326 (9th Cir. 1988); *Marlee Elecs. Corp. v. Antonakis (In re Antonakis)*, 207 B.R. 201, 204 (Bankr. E.D. Cal. 1997) (citing *In re Silva*, 190 Bankr. 889, 892 (9th Cir. BAP 1995) (if a previous decision is from a federal court, then the federal law of issue preclusion applies). Issue preclusion is not made inapplicable by a pending appeal. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 327 (9th Cir. 1988) (citing *States*

v. Abatti, 463 F.Supp. 596, 598-99 (S.D. Cal. 1978); Restatement (Second) of Judgments § 13 comment f (1982); 18 Wright § 4433, at 305) (a district court judgment had a preclusive effect despite a pending appeal).

The issue identical to both matters is whether there was commingling of the Trust's affairs with other entities in which Golden had an interest, including MLP. The issue of commingling was actually and necessarily litigated in Case No. 18-90054 since it pertained to the accounting for the joint venture. The decision is final despite the appeal. The parties are the same to the extent that both Trustee and Golden were involved. Because all the elements are met, the court gives this finding preclusive effect in this case, and considers the undisputed facts presented as evidence in that case.

From all of these sources, the court makes the following findings of fact and conclusions of law regarding Trustee's motion for a permanent injunction.

A. Findings of Fact

i. Record Title

Title to the Property was acquired by Golden in her individual name on October 16, 2000 as a single woman. By grant deed signed on November 26, 2001 but recorded December 13, 2001, ("2001 Deed"), Golden transferred the Property to "Lisa Golden, Trustee of the Andreas Trust dated November 26, 2001 ("Trust")." The transfer deed expressly provided, "This conveyance transfers the Grantor's interest into his or her revocable trust, R&T 1911." The deed also stated there was no consideration for the transfer, no change of ownership, and no tax due as the transaction was "a Trust Transfer under § 62(d) of the Revenue and Taxation Code: Transfer to a revocable trust." These statements in the deed benefitted Golden as they exempted the transaction from taxation under Cal. Rev. & Tax Code § 62(d), and the tax statements were directed to Golden as though she were still the owner as well.

The Property was next transferred on September 10, 2004 by "George Piner, Trustee of the Andreas Trust dated November 26, 2001" as a gift to MLP per the terms of the deed. Harvey did not recognize Piner as a trustee of the Trust. But Golden admitted she knew Piner during the trial in Case No. 18-90054 and was evasive and contradictory as to his role regarding the Trust. She admitted she believed that Piner was involved in MLP. Doc. 562, 183:5-8.

ii. Bankruptcy Case

Golden filed bankruptcy on November 15, 2017, on the eve of trial in litigation with Rogers in state court over ownership of three properties. Her schedules did not list any interest in the Trust, and she denied having any interest in the Trust at the 11 U.S.C. § 341(a) Meeting of Creditors.

iii. Preliminary Injunction

Trustee commenced this action against Golden, the Trust, and MLP in this action alleging the Property is property of the estate and requesting a determination that Trustee "is entitled to the immediate turnover" of the Property. Claiming Golden was not complying with the court's order to turn over the Trust documents, or otherwise cooperating with him, Trustee sought and obtained first a Temporary Restraining Order ("TRO"), to take possession of the Property and to obtain documents regarding the Trust. Golden and Harvey, through counsel, finally complied on the day before the TRO hearing by producing some trust documents.

The court granted the TRO on July 20, 2018 and permitted expedited discovery. It made findings in support which included that Golden had answered the complaint as trustee of the Trust, the record title to the Property, and her use of Trust property. It then set an evidentiary hearing on the Preliminary Injunction. As noted, Harvey, to the apparent surprise of Cohan, failed to appear at the hearing. Golden testified but her testimony was found not credible.

iv. Case No. 18-90054

Case No. 18-90054 was filed by Rogers alleging his claim against Golden was nondischargeable. That action was later consolidated with Golden's objection to Rogers's proof of claim. Both facets of the action were based on the state court litigation between the two parties and their joint venture to acquire three properties in Otay Mesa, California. The Trust was involved in the joint venture in part since Rogers claimed he held interests in the Property. He made the same claims in the state court litigation, which led to Golden appearing as trustee of the Trust in that case as well.

The court made extensive findings after a five-day trial in November 2019 in support of its judgment in Case No. 18-90054 which is now on appeal. Golden again was found not credible as was Rogers.

Due to the extensive commingling of accounts and funds among numerous other entities including the Trust, the Mariner Trust, Mariner 54 Trust, OVHJL Trust and MLP without formalities being followed, the court found that an accounting of the partnership

affairs between Golden and Rogers was not possible. Rogers and Golden also planned to transfer their joint venture interest into a trust to facilitate a dissolution but failed to even create trust documents. As an example of commingling involving MLP, Rogers signed a deed to transfer his interest in a joint venture property to MLP that was never recorded. Later, both Rogers and Golden each recorded deeds each transferring their 50% interests in 5154 to the Mariner54 Trust, even though trust documents were never even prepared. Rogers and Golden each had a management role in MLP, which is the record owner of the Property.

Golden and Rogers nevertheless acted as trustees for the Trust. Doc. 182, 106:13-25, 107:9-14. Golden in the state court litigation also appeared as trustee of MLP and Mariner 54, as well as on behalf of the Trust. Doc. 59-1, 1-22, Doc. 91, p. 32. She claims this was necessary to protect the Trust. Doc. 64, p.2. Golden also blames Rogers for requiring her to be trustee. Rogers and Golden were named as signatories on the Trust bank account which was used for their partnership transactions. These included Rogers repaying Golden with payment of the Property's property taxes. Debtor bought her home, 5154 Mariner Drive, with funds from the Trust in 2003.

v. The Trust

Even if the court were to consider the documents proffered by Golden and Harvey regarding the Trust, rather than deciding these matters on the alternative basis of the dearth of evidence, these documents do not create a triable issue of fact regarding whether Golden is the alter ego of the Trust.

Golden averred she created a revocable trust on November 26, 2001 and transferred title to the Property to the Trust of which Golden was the only beneficiary and the only trustee. Doc. 89-1, p. 8-23. She then claimed to realize the Trust was supposed to be an irrevocable trust, but her attorney, whose name she could not recall, prepared the wrong document. Golden testified at the preliminary injunction hearing she needed an irrevocable trust to protect the Property from family members involved in her family law case with her ex-spouse, who were trying to take the Property. Protecting the trust was her motive for appearing in state court on its behalf as well as other trust entities she created as well.

To transform the Trust from a revocable into an irrevocable trust, Golden had this unnamed attorney prepare amendment dated November 26, 2001 to the revocable trust. It states:

> Pursuant to Article III of the "ANDREAS TRUST" [Golden] hereby amend[s] this trust in whole to change its status from a REVOCABLE Trust to become an IRREVOCABLE Trust and hereby amend the

> document in its entirety to replace the Articles of this REVOCABLE Trust with the new Articles of the IRREVOCABLE Trust.

Doc. 89-1, p. 25.

Harvey's evidence, although stricken, did not include this amendment to the revocable trust, but of a newly created irrevocable trust. Doc. 90-1, Exhibit A entitled "An Irrevocable Trust" between Debtor (settlor) and William H. Harvey (Trustee)" ("Trust document"). This document provided for a transfer of the Property from Golden as settlor and not a change in the trust revocability status by amendment. Golden never expressly adopted this document, but much of her testimony regarding its terms is consistent with it. For example, both her testimony and the Trust document reflect a 501(c) (3) entity beneficiary. Doc. 182, 145:11-146:10. No clear identification of the trust documents is possible from what was presented.

The Trust document also suffered from structural ambiguities that preclude a clear determination of the beneficiary. A miscellaneous page after the second page of the Trust is titled "Distributions on Settlers or Survivors Settlers Death" which is difficult to reconcile with another section titled "Distribution." Doc. 182, 177:16-23. The miscellaneous page, Doc. 90-1, p.9, does not expressly identify a beneficiary other than naming a 501(c) (3) charitable organization as the beneficiary of the blind trust. That organization is entitled to a gift from trustee of "the full assets (sic) value" after he receives the asset. Only after Golden's death, this charitable organization is entitled to the "balance of the trust estate."

Golden claimed to be just the settlor of the Trust and not a beneficiary. Doc. 182, 143:19-22. But under the revocable trust document as amended, she was a beneficiary. The Distribution section of Harvey's document designates Golden as settlor and provides Golden's issue, during Golden's lifetime, with rights to discretionary distributions from the Trust as a safety net for their health and maintenance, including education. This was contradicted by Golden who testified her daughter would receive property from other trusts and not this Trust, Doc. 182, 146:5-147-8.

Determining the identity of the trustee for the Trust at any one time is also a challenging task. The power of appointment under the Trust is reserved to the trustee. Harvey provided evidence at the preliminary injunction hearing of various trustees, each appointed by the previous trustee: John Howard, trustee from December 1, 2002 to July 31, 2008; Mark Ramos, trustee from July 31, 2008 until his death in February 2018; and Harvey, Trustee from February 2018 to present. Piner, Golden and Rogers each appear as duplicate trustees during the appointed trustees' terms contrary to Harvey's evidence.

Golden undertook numerous actions as if she still owned the Property or was the trustee of a revocable trust even though she was not permitted to serve as such under the Trust document. Most significantly, Golden in her individual capacity signed two Deeds of Trust in February and October 2002 encumbering the Property to secure bail bonds when she was involved in criminal proceedings and incarcerated. Golden did not ask anyone, including the trustee of the Trust, for authority to sign the Deeds of Trust to King Stahlman. Doc. 182, 109:2-8. Under Harvey's evidence, Golden was still the trustee of the Trust until July 2002, but she did not sign the February bail bond as trustee. Because the Property based on record title was still held in a revocable trust and not by another trustee, Golden had apparent authority to do so. For the October bail bond, Harvey was the trustee of the Trust but Golden again signed it in an individual capacity. Golden blames the bond company and stress for this error, which the court found incredible at the preliminary injunction hearing.

Harvey's evidence attempted to refute the incontrovertible facts of Golden signing bail bonds for the Property and signing and receiving checks for the Property with a rental agreement from tenants allegedly signed by the then acting trustee, Mark Ramos. Not only was this declaration stricken, no witness established the business records exception to admit the rental agreement. Harvey was not reappointed as trustee until February 2018, right before Trustee filed his lawsuit challenging the Trust. Doc. 90-1. Harvey's testimony by declaration also avers that most of the work regarding the management of "The Property" was performed by successor trustees. How he would know is not established. In any event, as explained below, that the Property at times was managed by a separate trustee is not sufficient to outweigh all the evidence that it was also frequently managed by Golden.

Golden's denial of ever being trustee after November 26, 2001 was based on her resignation on that date. This is inconsistent with all the evidence to the contrary including her July 20, 2002 appointment of Harvey as successor trustee with her simultaneous resignation. Doc. 90-1, p. 18. This document would be unnecessary if Harvey were already the trustee as was stated in the Trust document. Golden attempted to explain this document by blaming Harvey, who she claims lost the original resignation. Doc. 182, 99:11-100:18. Golden had no right to either be the trustee or to appoint a successor trustee under the Trust document.

At the preliminary injunction hearing, Golden admitted acting only as a courier for the trust but denied or could not recall knowing the tenants, demanding rent from them, or using the rents to pay her counsel, or having access to those funds. Doc. 182, 109:9-112:15, 114:24-115:16. Although Golden denied having authority to write checks from the Trust bank account as trustee, Doc. 182, 127:8-23, 132:22-133:12, the record is replete with checks regarding the Trust that Golden admittedly signed. Doc. 182, 122:13-123:1, 126:11-23, 128:1-25, 130:2-23, 132:5-21, 137:13-138:4, 139:6-140:5.

She denied signing only one check. Doc. 182:139-140:5. Golden proffered excuses that were not credible for all these checks, including that some checks were "left over" from the initial bank account. Doc. 182, 123:9-16. She again blames Rogers. Doc. 182, 123:17-23. She also then contradicted herself and claimed she wrote checks out of the Trust account at the direction of the trustee of the trust. Doc. 182, 131:9-132:1. Golden also admitted she received a debit card for the Trust's account but could not remember whether she used it. Doc. 182, 143:1:18.

B. Conclusions of Law

i. Alter Ego

Alter ego status of a trust can be found "where there is such a unity of interest and ownership that the individuality, or separateness, of the said person and corporation has ceased," and where "adherence to the fiction of the separate existence of the corporation would . . . sanction a fraud or promote injustice." *Goodrich v. Briones (In re Schwarzkopf),* 626 F.3d 1032, 1038 (9th Cir. 2010) (citing *Wood v. Elling Corp.*, 20 Cal. 3d 353, n.9 (1977)) (finding both that debtor was the equitable owner of property and an irrevocable trust was his alter ego because there was no maintenance of legal formalities, the trustee was inactive, the debtor intermingled funds, and used trust funds for personal use). In *Schwarzkopf, id.,* the bankruptcy trustee claimed that the debtors fraudulently transferred $4 million in assets to two irrevocable trusts known as the Apartment Trust and the Grove Trust. The Ninth Circuit found that debtor was akin to the equitable owner of the Grove Trust because he acted as such and controlled its assets and decisions. *Id.* at 1039-40. The named trustee "had no role nor took any action . . . other than to write checks as demanded." *Id.* at 1039. Despite not being an express beneficiary of the Grove Trust, the debtors acted as though they were because trust assets were used for their personal living expenses. *Id.* The debtors "also received payments from the trusts without documentation and to avoid a creditor." *Id.* Since "failure to find alter ego liability would sanction a fraud or promote injustice", the Ninth Circuit agreed with the bankruptcy court that the Grove Trust was the debtor's alter ego and reversed the district court. *Id.* at 1040. This case has similar facts as *Schwarzkopf* in many respects.

First, Golden admitted she transferred the Property to the Trust protect it from claims from her ex-husband and in-laws from making claims arising from her divorce action. She felt it was important that the trust be irrevocable for the same reason. Doc. 89-1, p. 1, ¶ 3, 4, Doc. 64, p. 3.

Second, formalities for the Trust were not followed. The only asset transferred to the Trust is the Property. Record title has been placed first in a revocable trust, and then to

MLP a mysterious entity that Rogers and Golden established which holds record title. *Id.* at 178:16-17. Other than Golden, there has been no active trustee for the Trust. Harvey and Golden have not agreed as to the controlling trust documents, or how Harvey came to be the trustee. It cannot be determined whether the irrevocable trust arose from an amendment or a new document. Neither of them mentioned Piner as trustee even though he appears as the trustee of the Trust in the document that transfers title to MLP. Harvey was unaware Rogers acted as trustee of the Trust during his relationship with Golden. Doc. 90-1, ¶ 6.

Third, Golden also acted as the equitable owner of the Property even if not an express beneficiary similar to *Schwarzkopf,* 626 F.3d at 1039. Golden controlled its assets, made decisions on its behalf, and used Trust assets as her own for her sole benefit. She used the Property as collateral for the bail bonds when she was under arrest and in jail. She used Trust assets to buy other properties and support business activities with Rogers, writing numerous checks as though she was trustee and for her benefit. She placed title in a revocable trust to save transfer tax is just another example. At times she has asserted she is trustee of the trust and at others she denies her trustee status.

Golden cannot dispute these facts so she instead claims mistake or blames someone else. These excuses are irrelevant, however, since a finding of alter ego does not consider whether the conduct occurred with wrongful intent rather than mistake. In *Relentless Air Racing, LLC v. Airborne Turbine Ltd. Partnership,* the court held that an alter ego finding does not require proof that that the "individuals acted with wrongful intent but only that the acts caused an "'inequitable *result*.'" 222 Cal.App.4th 811, 813 (2013) (emphasis in original and citation omitted). *Relentless* also held that because of the finding at trial that the alter ego parties are one and the same, it would be inequitable as a matter of law to preclude the creditor from collecting its judgment by treating the entities as separate. *Id*. at p. 816.

In this bankruptcy, that conduct has been detrimental to creditors by increasing the expenses of the estate and putting assets that should be available to pay creditors out of reach. Since the undisputed facts establish that the Trust and its assets were treated as Golden's assets, it would be inequitable to creditors as a matter of law for this bankruptcy case to treat the Trust assets separately.

The factors cited in *Schwartzkopf,* 626 F.3d at 1039, are all present here. Golden failing to follow Trust formalities for an irrevocable trust, an inactive titular trustee, commingling funds, and using Trust assets for personal purposes that is disadvantageous to creditors of the estate. The court concludes the Trust is Golden's alter ego.

ii. Record Title

Cal. Evid. Code § 662 provides: "The owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." "[A]bsent a contrary statute, and unless ownership interests are otherwise established by sufficient proof, record title is usually determinative of characterization." *In re Marriage of Haines*, 33 Cal. App. 4th 277, 291 (1995). This presumption is applicable in bankruptcy cases. *In re Brace*, 908 F.3d 531 (9th Cir. 2018) (certifying question of whether presumption of title overcame presumption of community property putting into question earlier authority of *Hanf v. Summers (In re Summers)*, 332 F.3d 1240, 1245 (9th Cir. 2003)). The community property presumption does not apply here, and there is no clear and convincing evidence to rebut the record title presumption that the Property is held in the name of MLP.

Since MLP has defaulted on the Complaint which alleges the Property is property of the estate, an alternative basis for the court's ruling is that the record title presumption supports judgment in favor of Trustee.

iii. Revocable Trust

Trust property is considered owned by a debtor where a debtor: (1) is the trustor, trustee, and beneficiary of the Trust; (2) has the power to revoke the trust during her lifetime; and (3) retains full control over the Property. *Nielsen v. Field (In re Nielsen)*, 526 B.R. 351, 358 (Bankr. D. Haw. 2015) (permitting homestead exemption in trust property under these circumstances under Hawaiian law); *Weilert v. Gwartz (In re Weilert)*, No. EC-15-1144-JuDTa, 2016 Bankr. LEXIS 2538, at *25 (B.A.P. 9th Cir. July 8, 2016) (citing *Zanelli v. McGrath*, 166 Cal. App. 4th 615, 633 (2008)) ("Property transferred to, or held in, a revocable inter vivos trust is nonetheless deemed the property of the settlor and is reachable by the creditors of the settlor.")

The facts are undisputed that Golden is the only trustor and trustee of the Trust resulting from her judicial admission and the record in this case. Because Harvey's declarations are stricken, there is no other trustee of record. Those factors support the Trust being a revocable trust and property of the estate.

But the record contains evidence of the Trust being irrevocable. Under Cal. Probate Code § 18200: "If the settlor retains the power to revoke the trust in whole or in part, the trust property is subject to the claims of creditors of the settlor to the extent of the power of revocation during the lifetime of the settlor." Under *Laycock v. Hammer*, 141 Cal. App. 4th 25, 31 (2006) a settlor's conduct after an irrevocable trust has been established will not alter the nature of such a trust, including a breach of trust. Although

the Trust documents here are inconsistent, conflicted, and highly suspicious, neither Golden's breaches of the trust documents also do not change its revocable status.

While the court finds whether the Trust is an irrevocable trust is a disputed issue, it remains Golden's alter ego on the undisputed facts. *Schwarzkopf* held that even irrevocable trusts can be alter egos of a debtor, which the court finds here. 626 F.3d at 1038. Trial on this issue is thus unnecessary.

V. MOTION TO VACATE PRELIMINARY INJUNCTION

Because the court will grant a permanent injunction, the motion to vacate the preliminary injunction is moot and must be denied.

VI. CONCLUSION

Based upon the findings of fact and conclusions of law made pursuant to Fed. R. Bankr. P. 7052, the court rules as follows:

IT IS HEREBY ORDERED:

1. The Motion to Intervene is DENIED.

2. The Motion to Amend is DENIED.

3. The Motion for a Permanent Injunction is GRANTED and Golden is ordered to turnover possession of the Property located at 520 4th Street, Imperial Beach CA to the Trustee as it is property of the state. Trustee is to lodge a judgment to that effect within 14 days of entry of this order.

4. The Motion to Dismiss, Dissolve, or Vacate Preliminary Injunction against the Andreas Trust Property, and for Sanctions against Trustee Richard Kipperman Filed by Lisa Golden is DENIED.

IT IS SO ORDERED.

Notice Recipients

District/Off: 0974−3	User: Admin.	Date Created: 5/29/2020
Case: 18−90021−MM	Form ID: pdfO1	Total: 9

Recipients of Notice of Electronic Filing:

pla	Richard M Kipperman	Rmk@corpmgt.com
db	Lisa Kaye Golden	lisagsmail@yahoo.com
aty	Gary E. Slater	ges@slatertruxaw.com
aty	Phillip C. Wing	pwing@winglawgroup.com
aty	Timothy J. Truxaw	tjt@slatertruxaw.com

TOTAL: 5

Recipients submitted to the BNC (Bankruptcy Noticing Center):

dft	Lisa Kaye Golden, an individual	P.O. Box 180376	Coronado, CA 92178	
dft	Lisa Kaye Golden, Trustee of the Andreas Trust Dated November 26, 2001	P.O. Box 180376	Coronado, CA 92178	
intp	William H. Harvey	PO Box 180376	Coronado, CA 92178	
intp	William Harvey	P.O. Box 180379	Coronado, CA 92178	

TOTAL: 4