

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

In re:

INTELLIGENT DIRECT MARKETING,

Debtor,

THOMAS ACEITUNO, Chapter 7
Trustee,

Plaintiff,

v.

TODD VOWELL; RAEANNE VOWELL;
BEVERLY VOWELL; STEADFAST
MAILING SERVICES, INC.; SASHI
CORPORATION; JEFFREY K.
GARCIA; and FIDELIS
MARKETING, INC.,

Defendants.

Case No.: 2:12-cv-03068 JAM-EFB

Related No.: 2:09-cv-02898 JAM-
GGH

[Bky Case 07-30685-A-7]

[Bky AP No. 09-2439]

**FINDINGS OF FACT AND CONCLUSIONS
OF LAW AS TO PLAINTIFF'S CLAIMS
AGAINST TODD AND RAEANNE VOWELL,
JEFFREY GARCIA, AND FIDELIS
MARKETING INC.**

In this action, Plaintiff Thomas Aceituno's, Chapter 7
Trustee, ("Plaintiff" or "Trustee") seeks to avoid and recover
fraudulent transfers; to recover corporate distributions; to
recover damages for breach of fiduciary duty; to recover
preferential payments; to recover damages for conversion of

1 assets and conspiracy; and a declaratory judgment for successor
2 liability (Doc. #9 in the Bankruptcy Adversary Proceeding).

3 Beginning on June 23, 2014, and through June 27, 2014, the
4 Court held a bench trial and heard testimony from Todd Vowell,
5 Lawrence Lemus, Jeff Garcia, Stuart Robken, and Raenne Vowell.
6 Numerous exhibits were also submitted by the parties for the
7 Court's consideration. Following the bench trial, the Trustee
8 submitted a post-trial supplemental brief (Doc. #75) and all
9 parties submitted proposed findings of fact and conclusions of
10 law (Doc. ##73, 74, 76). For the reasons set forth below and
11 upon review of the FAC, undisputed facts, testimony, exhibits,
12 briefing, and all arguments made, the Court now enters its
13 Findings of Fact and Conclusions of Law pursuant to Federal Rule
14 of Civil Procedure 52(a).

15
16 I. FINDINGS OF FACT

17 1. The remaining parties in this lawsuit are as follows:
18 the Trustee for Intelligent Direct Marketing, Inc. ("IDM"),
19 Defendants Todd Vowell ("Mr. Vowell"), Raeanne Vowell ("Ms.
20 Vowell"), Jeff Garcia ("Mr. Garcia"), and Fidelis Marketing, Inc.
21 ("Fidelis"). Defendant Beverly Vowell is deceased and all claims
22 against her are dismissed. Defendant Sashi is a corporation and
23 all claims against it are dismissed. Defendant Steadfast Mailing
24 Services, Inc. ("Steadfast") is a suspended corporation not
25 represented by counsel. Undisputed Facts ("UF"), Amended
26 Pretrial Conference Order, Doc. #44, ¶ 1.

27 ///

28 ///

1 2. Todd Vowell began operating as an automotive direct
2 mailing service in approximately 1994 and incorporated IDM in
3 1997 as an "S" corporation. He is and at all times mentioned
4 herein was the sole shareholder, sole director, and CEO of IDM.
5 Id. ¶ 2.

6 3. On April 24, 2001, Mr. Vowell caused Sashi to be
7 incorporated. The shareholders, officers, and directors of Sashi
8 were the Vowells. Id. ¶ 3.

9 4. In or about 2001, Sashi purchased real property known
10 as 6930 Destiny Drive, Rocklin, CA 95677 ("Destiny Drive").
11 Sashi leased Destiny Drive to IDM under a lease that expired in
12 August 2005. Id. ¶ 4.

13 5. On or about December 30, 2004, Sashi purchased 5750
14 West Oaks Blvd., Rocklin, CA ("West Oaks" Property). This is a
15 commercial building with a total of 54,960 square feet. Id. ¶ 5.

16 6. IDM transferred \$1,779,039 directly to the escrow
17 account to buy the West Oaks Property. IDM's Bank Statement, Ex.
18 1, 2, and 3; Settlement Statement Regarding West Oaks property,
19 Ex. 41; Mr. Vowell's Testimony.

20 7. Mr. Vowell loaned money to Sashi in 2005 to purchase
21 the West Oaks Property. Sashi leased a portion of the West Oaks
22 Property to IDM. IDM paid Sashi rent in 2005. UF ¶ 6.

23 8. In or about December 2004, IDM moved from Destiny Drive
24 to the West Oaks Property. IDM entered into a written lease with
25 Sashi dated January 1, 2005, for 5 years for 27,200 square feet,
26 or approximately 50% of the building. The space that IDM moved
27 into had not been occupied previously. Id. ¶ 7.

28

1 9. IDM paid for the improvements of the West Oaks
2 Property. IDM's 2004 Tax Return, Ex. 62.

3 10. IDM could not afford the West Oaks Property lease. Mr.
4 Garcia's Testimony; Mr. Vowell Email Dated January 21, 2007, Ex.
5 104.

6 11. At the end of 2004, IDM was depleted of all its cash.
7 IDM's Bank Statement, Ex. 1, 2, and 3.

8 12. In 2004, IDM had gross revenues of over \$26 Million.
9 UF ¶ 8.

10 13. When Sashi sold West Oaks in June 2005, it used the
11 approximately \$3 million in sale proceeds it received in part to
12 pay \$1,576,929 to Mr. Vowell and "loan" funds to IDM of \$900,000.
13 Id. ¶ 9.

14 14. On July 28, 2005, \$2,650,000 was deposited into Mr.
15 Vowell's bank account from the sale of the West Oaks Property.
16 Mr. Vowell's Bank Statement, Ex. 89.

17 15. On July 20, 2004, IDM entered into a one-year lease of
18 19,144 square feet of rentable space located within Building 347,
19 "B" Bay 4937 43rd Ave., McClellan CA 95652 ("McClellan
20 Property"). UF ¶ 10.

21 16. In 2005, IDM had gross revenues over \$21 Million. Mr.
22 Vowell received \$633,620.50 in wages and compensation. Mrs.
23 Vowell received \$45,200 in wages (not including contributions to
24 401k plans). Id. ¶ 11.

25 17. In 2005, IDM's total assets at the end of the year
26 were \$3,329,020 and the total liabilities were \$2,788,937.
27 IDM's 2005 Tax Return, Ex. 63.

28

1 18. In 2006, Mr. Vowell received wages of \$242,000.00 from
2 IDM (not including 401k contributions). In 2006, Mrs. Vowell
3 did not receive any wages from IDM. Id. ¶ 12.

4 19. In 2006, the Vowells transferred \$575,000 to IDM.
5 Vowells' Checks to IDM, Ex. B1, B2, and B3.

6 20. In 2007, Mr. Vowell received wages from IDM of
7 \$21,250.00. Mrs. Vowell did not receive any wages. UF ¶ 13.

8 21. By late 2006 and 2007, IDM was operating at a loss.
9 Id. ¶ 14.

10 22. On or about April 30, 2007, IDM ceased sale operations
11 or performing its contracts, and vacated the West Oaks Property.
12 Id. ¶ 15.

13 23. On October 14, 2007, Mr. Vowell received a \$454,299 tax
14 refund as a result of IDM's 2006 losses being carried back to
15 offset IDM's 2004 income. IDM's 2006 tax return, Ex. 64;
16 Application for a Tax Refund, Ex. 100.

17 24. On February 22, 2011, Mr. Vowell received a \$301,879
18 tax refund as a result of IDM's losses being carried back to
19 offset IDM's 2005 income. Mr. Vowell Bank Statement, Ex. 91, at
20 T-7-293; Changes to IDM's 2005 Tax Return, Ex. 94.

21 25. The \$454,299 tax refund was used to pay IDM's expenses.
22 Mr. Vowell's Testimony.

23 26. On May 1, 2007, Mr. Garcia started Fidelis, a direct
24 mail marketing company. Mr. Vowell's testimony; Mr. Garcia's
25 Testimony.

26 27. There were no differences between Fidelis and IDM
27 except for the debt. Mr. Vowell's testimony.

28

1 28. Mr. Vowell paid almost all of Fidelis' startup costs.
2 Mr. Vowell's Testimony.

3 29. Starting on May 1, 2007, Fidelis began performing
4 contracts with customers, including contracts with customers that
5 were former IDM customers. UF ¶ 16.

6 30. IDM granted Fidelis a right to possess IDM's goodwill,
7 income stream, and assets. Mr. Garcia Email dated March 20,
8 2007, Ex. 32, at 2; Mr. Vowell Email dated March 26, 2007, Ex.
9 110, at 1; Mr. Vowell Email Dated May 4, 2007, Ex. 108.

10 31. The transfer of assets was to prevent creditors from
11 collecting IDM's debts. See Garcia Email Dated March 20, 2007,
12 Ex. 32, at 2. Garcia Email, Ex. 110, at 2.

13 32. Mr. Vowell prepared letters to notify creditors but the
14 letters were never sent. Mr. Vowell's Testimony.

15 33. By mid-July 2007, Mr. Garcia/Fidelis and
16 Vowells/Steadfast had reached an impasse and would not reach an
17 agreement, or Fidelis/Garcia breached an agreement, regarding
18 Fidelis' exclusive use of Steadfast for printing, or Fidelis'
19 payment to Mr. Vowell of a consulting fee, or lease payments. At
20 that point, Fidelis moved out of Steadfast's Melody Lane
21 facility. UF ¶ 17.

22 34. Fidelis operated successfully in 2007 and was
23 profitable. Monthly deposits into Fidelis' account in 2007 were
24 as follows: May \$883,307.55; June \$1,161,518.87; July \$720,109;
25 August: \$945,059.11; September \$847,218.74; October \$848,142.83;
26 November \$754,835.35; December \$608,986.81. From income in 2007,
27 Fidelis set aside \$400,000 after payment of expenses. Id. ¶ 18.

28 ///

1 35. On July 26, 2007, Mr. Vowell, Steadfast, and IDM, filed
2 a lawsuit against Mr. Garcia, Tony D. Tran, and Fidelis for
3 misappropriation of trade secrets, conversion, breach of contract
4 and other claims, (Placer County Superior Court Case No. S CV
5 214314). On September 11, 2007, Defendants filed a Cross-
6 Complaint against Plaintiffs, and on December 24, 2007, filed a
7 First Amended Cross-Complaint, alleging intentional interference
8 with contractual relations, conversion, alter ego, wage claims,
9 and other claims. Id. ¶ 19.

10 36. On or about April 24, 2008, the United States
11 Bankruptcy Court, Eastern District of California, made an oral
12 ruling granting an order for relief in the state court action.
13 On June 18, 2008, the United States Bankruptcy Court, Eastern
14 District of California, issued its written Findings of Fact and
15 Conclusions of Law. On August 18, 2008, Fidelis and other
16 defendants removed the state court action to the bankruptcy court
17 (Adv. Proc. No. 08-2456), which was later stayed pending the
18 outcome of this proceeding. Id. ¶ 20.

20 II. OPINION

21 The Trustee brought this action against Defendants alleging
22 the following causes of actions: (1) avoidance and recovery of
23 fraudulent transfers, 11 U.S.C. §§ 548, 544; California Civil
24 Code sections 3439.04, 3439.05, against Mr. Vowell; (2) recovery
25 of corporate distributions, California Corporation Code section
26 500, against Mr. Vowell; (3) breach of fiduciary duty against Mr.
27 Vowell; (4) avoidance and recovery of fraudulent transfers
28 against Mrs. Vowell; (5) avoidance and recovery of fraudulent

1 transfers against Beverly Vowell; (6) avoidance and recovery of
2 fraudulent transfers against Steadfast and Mr. Vowell;
3 (7) avoidance and recovery of preferential payments against
4 Steadfast and Mr. Vowell; (8) conversion and conspiracy to
5 convert assets against Mr. Vowell, Mrs. Vowell, Steadfast,
6 Fidelis, and Mr. Garcia; (9) avoidance and recovery of fraudulent
7 transfers against Mr. Vowell, Mrs. Vowell, Steadfast, Fidelis,
8 and Mr. Garcia; and (10) successor liability against Fidelis and
9 Mr. Garcia.

10 According to the First Amended Complaint ("FAC"), the first
11 two causes of actions are based on the following transfers: (1)
12 the \$1.6 million transfer from IDM to Mr. Vowell (FAC ¶¶ 18, 36);
13 (2) Mr. Vowell's 2005 compensation (FAC ¶¶ 19,36); (3) Mr.
14 Vowell's 2006 compensation ("2006 compensation")(FAC ¶¶ 19,36);
15 (4) \$350,000 promissory note from Mr. Vowell to IDM ("promissory
16 note")(FAC ¶¶ 20, 36);
17 (5) \$750,000 in advances made from IDM to officers
18 ("advances")(FAC ¶¶ 20, 36); (6) the compensation paid by IDM to
19 Mrs. Vowell and Beverly Vowell during the period of 2005 through
20 2008; (7) Mrs. Vowell's American Express charges (FAC ¶¶ 23, 36);
21 and (8) property of IDM retained by Mr. Vowell and not turned
22 over to the Trustee.

23 As mentioned above, all claims against Beverly Vowell and
24 Sashi have been dismissed. During the bench trial, the Court
25 granted in part and denied in part the Vowell's motion for
26 judgment on partial findings. Pursuant to Federal Rule of Civil
27 Procedure 52(c), the Court dismissed the claims based on the
28 promissory note, advances, 2006 compensation, the fourth cause of

1 action, and the seventh cause of action as to any other amount
2 not in evidence. Further, in the Trustee's proposed findings of
3 fact and conclusions of law, he proposes that there was
4 insufficient basis for recovery of the 2005 compensation. See
5 The Trustee's Proposed Findings of Fact and Conclusions of Law
6 ("Trustee's Proposed F&C"), Doc. 74, ¶ 54.

7 In the Trustee's supplemental post-trial brief, he moves to
8 amend the pleadings to conform them to the evidence and to raise
9 unpleaded issues pursuant to Federal Rule of Civil Procedure
10 15(b)(2) ("Rule 15(b)(2)"). Trustee's Supp. Post-Trial Brief
11 ("Trustee's Supp. PTB"), Doc. #75, at 1-2. In particular, the
12 Trustee wants to include claims based on the tax refunds Mr.
13 Vowell received in 2007 and 2011. Under Rule 15(b)(2), "When an
14 issue not raised by the pleadings is tried by the parties'
15 express or implied consent, it must be treated in all respects as
16 if raised in the pleadings." Fed. R. Civ. P. 15(b)(2). In this
17 case, the tax refunds were included in the Amended Pretrial
18 Conference Order and were tried without objection during the
19 bench trial. Moreover, in the FAC, the Trustee mentions that Mr.
20 Vowell received substantial tax refunds as a result of the tax
21 returns filed by IDM and he requests "for such other and further
22 relief as the Court deems appropriate." FAC ¶ 25; FAC Prayer for
23 Relief ¶ 7. Accordingly, the Court need not grant the motion to
24 amend the pleadings because the allegations are in the FAC.

25 In addition, the Court holds that all the claims not
26 discussed in either the Trustee's proposed findings of fact and
27 conclusions of law or the Trustee's supplemental post-trial brief
28 are abandoned. Therefore, the remaining claims in this case are

1 as follows: (1) avoidance and recovery of the \$2,650,000 paid to
2 Mr. Vowell on July 28, 2005, from the West Oaks Property as a
3 fraudulent transfer under 11 U.S.C. §§ 548, 544 and California
4 Civil Code sections 3439.04, 3439.05; (2) recovery of the
5 \$2,650,000 corporate distribution under California Corporation
6 Code section 500; (3) breach of fiduciary duty based on the
7 \$2,650,000 transfer; (4) unjust enrichment of the \$454,299 tax
8 refund paid to Mr. Vowell on October 17, 2007, and the \$301,879
9 tax refund paid to Mr. Vowell on February 22, 2011; (5)
10 conversion and conspiracy to convert assets against Mr. Vowell,
11 Steadfast, Fidelis, and Mr. Garcia; (6) avoidance and recovery of
12 fraudulent transfers against Mr. Vowell, Fidelis, and Mr. Garcia;
13 and (7) successor liability against Fidelis and Mr. Garcia.¹

14 A. \$2,650,000 Fraudulent Transfer

15 The Trustee's fraudulent transfer claims arise under federal
16 bankruptcy law, 11 U.S.C. §§ 548, 544, as well as state law,
17 California Civil Code sections 3439.04, 3439.05. Section 544(b)
18 of the Bankruptcy Code permits the Trustee to stand in the shoes
19 of a creditor to assert any state law claims that a creditor may
20 have.

21 Under the Bankruptcy Code and California law, there are two
22 types of fraudulent conveyances: actual and constructive.
23 Compare 11 U.S.C. § 548(a)(1)(A); Cal. Civ. Code § 3439.04(a)(1)
24 with 11 U.S.C. § 548(b); Cal. Civ. Code §§ 3439.04(a)(2),
25 3439.05. An actual fraudulent transfer is one made with "actual
26

27 ¹ The Trustee has also moved for judgment against Steadfast and
28 Mr. Vowell (Doc. #77), which the Court addresses in a separate
order.

1 intent to hinder, delay, or defraud a creditor." See 11 U.S.C. §
2 548(a)(1)(A); Cal. Civ. Code § 3439.04(a)(1). A constructive
3 fraudulent transfer does not require an intent to defraud. See
4 11 U.S.C. § 548(b); Cal. Civ. Code §§ 3439.04(a)(2), 3439.05.
5 This claim involves a constructive fraudulent conveyance because
6 no evidence of an intent to defraud was produced.

7 1. The Bankruptcy Code

8 To prove a claim for constructive fraudulent conveyance
9 under 11 U.S.C. § 548(a)(1)(B), a plaintiff must show that
10 (1) the transfer involved property of the debtor; (2) the
11 transfer was made within two years of the filing of the
12 bankruptcy petition; (3) the debtor did not receive reasonably
13 equivalent value in exchange for the property transferred; and
14 (4)(a) the debtor was insolvent at the time of the transfer or
15 was made insolvent by the transfer or (b) the transfer was to an
16 insider under an employment contract and not in the ordinary
17 course of business. 11 U.S.C. § 548(a)(1)(B); see also In re
18 United Energy Corp., 944 F.2d 589, 594 (9th Cir. 1991) (stating
19 elements of a claim for fraudulent transfer under § 548).

20 The \$2,650,000 transfer occurred on July 28, 2005. The
21 involuntary bankruptcy petition was filed on December 10, 2007.
22 Therefore, the Trustee's claim to void and recover the \$2,650,000
23 fails under § 548 because it was not made within two years of the
24 filing of the bankruptcy petition.

25 2. California Law

26 Under California law, a transfer is constructively
27 fraudulent if the debtor made the transfer without receiving
28 reasonably equivalent value in exchange and the debtor did one of

1 the following:

2 (1) was engaged or about to engage in a business or
3 transaction for which the debtor's remaining assets
4 were unreasonably small in relation to the business or
5 transaction; or (2) intended to incur or believed (or
6 reasonably should have believed) that it would incur
debts beyond its ability to repay; or (3) was insolvent
at the time, or was rendered insolvent by the transfer
or obligation.

7 United States v. Whitman, 2:12-CV-2316-MCE-EFB, 2013 WL 3968083,
8 at *7 (E.D. Cal. July 31, 2013) report and recommendation
9 adopted, 2:12-CV-2316-MCE-EFB, 2013 WL 4516009 (E.D. Cal. Aug.
10 26, 2013). Unlike the Bankruptcy Code, the statute of
11 limitations under California law for constructive fraudulent
12 conveyances is four years. Cal. Civ. Code § 3439.09(a).

13 Based on Schedule L, Balance Sheets, of IDM's 2005 tax
14 return, IDM's total assets at the end of the year were \$3,329,020
15 and the total liabilities were \$2,788,937. The Trustee argues
16 that in 2005, IDM was already experiencing financial stress.
17 However, there is insufficient evidence to show that IDM was
18 insolvent, its remaining assets were unreasonably small in
19 relation to the 2.65 million dollar transfer, or the debtor
20 intended to incur or believed (or reasonably should have
21 believed) that it would incur debts beyond its ability to repay.
22 Accordingly, the Court holds that the Trustee's claim to void and
23 recover the \$2,650,000 as a fraudulent transfer under California
24 law fails.

25 B. \$2,650,000 Distribution

26 The Trustee seeks to recover the \$2,650,000 transfer as an
27 improper distribution under California Corporation Code section
28 500 ("Section 500"). The Vowells argue that the \$2,650,000

1 transfer should not be treated as an IDM distribution because
2 Sashi owned the property not IDM. In his supplemental brief, the
3 Trustee argues Sashi should be treated as the alter ego of IDM.

4 As a threshold matter, the Court must determine whether the
5 alter ego doctrine applies. Alter ego applies when "(1) there is
6 such a unity of interest and ownership between the corporation
7 and the individual or organization controlling it that their
8 separate personalities no longer exist, and (2) failure to
9 disregard the corporate entity would sanction a fraud or promote
10 injustice." Communist Party v. 522 Valencia, Inc., 35
11 Cal.App.4th 980, 993 (1995). First, there is a unity of interest
12 and ownership in this case because Sashi held the title to the
13 West Oaks Property but IDM purchased it under Sashi's name by
14 directly transferring \$1,779,039 into the escrow for the
15 property, prepaying rent, and paying for tenant improvements.
16 Second, failure to disregard the corporate entity would promote
17 injustice because IDM was depleted of all cash to purchase and
18 improve the West Oaks Property, which was sold and resulted in a
19 \$2,650,000 payment to the Vowells not IDM. Based on these facts,
20 the Court finds Sashi is the alter ego of IDM.

21 The Court must determine whether the distribution was
22 proper. A corporation is barred from making any distribution
23 unless it meets the requirements of Section 500. Cal. Corp. Code
24 § 500. The previous version of Section 500, which applies in
25 this case, prohibits a distribution unless (a) before the
26 distribution, the corporation's retained earnings exceed the
27 distribution, or (b) the assets after the distribution are at
28 least 125% of the liabilities and the current assets are at least

1 equal to the current liabilities. Id. (prior to the 2012
2 amendment). "Distribution" is defined in California Corporations
3 Code section 166 as "the transfer of cash or property by a
4 corporation to its shareholders without consideration, whether by
5 way of dividend or otherwise" Cal. Corp. Code § 166.

6 On this issue, the Trustee's expert testified that the
7 distribution was improper because the transfer exceeded IDM's
8 retained earnings by \$490,893 and IDM's assets did not exceed
9 125% of its liabilities. The Court finds this part of the
10 expert's testimony credible and the Vowells provided no evidence
11 to the contrary. At most, the Vowells submitted three checks to
12 show that they transferred a total of \$575,000 to IDM in 2006.
13 However, returning the money to IDM after the \$2,650,000
14 distribution does not make the distribution appropriate.

15 Accordingly, the Court holds that the \$2,650,000
16 distribution was improper, but the Vowells are entitled to a
17 \$575,000 offset against the distribution for the money that was
18 returned to IDM. The Vowells also returned money in 2008 but the
19 Court will not credit this amount because it was approximately 3
20 years after the distribution.

21 C. Breach of Fiduciary Duty

22 The Trustee claims that Mr. Vowell breached his fiduciary
23 duty to IDM by causing IDM to make distributions to him.

24 The elements of a claim for breach of fiduciary duty are
25 "(1) the existence of a fiduciary relationship; (2) the breach of
26 that relationship; and (3) damages proximately caused by the
27 breach." In re GSM Wireless, Inc., 2:12-BK-16456 RK, 2013 WL
28 4017123 , at *41 (Bankr. C.D. Cal. Apr. 5, 2013) (citing Pierce

1 v. Lyman, 1 Cal.App.4th 1093, 1101 (1991)). "Remedies for a
2 breach of fiduciary duty include damages for all harm proximately
3 caused to the corporation, as well as rescission and
4 restitution." Id. (citing Hicks v. Clayton, 67 Cal.App.3d 251,
5 264 (1977) (citations omitted)). "A director's fiduciary duty at
6 common law—generally, to act with honesty, loyalty, and good
7 faith—predated the statute by decades." Lehman v. Superior
8 Court, 145 Cal.App.4th 109, 121 (2006). Similarly, under
9 California Corporation Code section 309, a director shall perform
10 his duties as a director "in good faith, in a manner such
11 director believes to be in the best interest of the corporation
12 and its shareholders and with such care, including reasonable
13 injury, as an ordinarily prudent person in a like position would
14 use under similar circumstances." Cal. Corp. Code § 309.

15 A director is protected by the business judgment rule, which
16 provides that "a director shall be entitled to rely on
17 information, opinions, reports or statements [prepared by
18 specific parties including independent accountants] . . . so long
19 as . . . the director acts in good faith, after reasonable
20 inquiry when the need therefor is indicated by the circumstances
21 and without knowledge that would cause such reliance to be
22 unwarranted." Cal. Corp. Code § 309. However, an exception to
23 the business judgment rule exists "in 'circumstances which
24 inherently raise an inference of conflict of interest' and the
25 rule 'does not shield actions taken without reasonable inquiry,
26 with improper motives, or as a result of a conflict of
27 interest.'" Berg & Berg Enterprises, LLC v. Boyle, 178
28 Cal.App.4th 1020, 1045 (2009)(citations omitted).

1 As the sole shareholder, sole director, and CEO of IDM, Mr.
2 Vowell owed a fiduciary duty to IDM. Although Mr. Vowell
3 testified that he relied on the judgment of an accountant, the
4 business judgment rule does not protect him because there is a
5 conflict of interest in this case: Mr. Vowell was a director of
6 both IDM and Sashi and the distribution went to him. Further,
7 Mr. Vowell breached his fiduciary duty by obligating IDM to
8 transfer the money to buy the property, to pay rent it could not
9 afford, and to pay for tenant improvements. This breach caused
10 damage to IDM because as Mr. Garcia testified, IDM could not
11 afford the lease, and when they moved into the West Oaks
12 Property, "that is when the wheels started to fall off." See Mr.
13 Vowell Email Dated January 21, 2007, Ex. 104. Accordingly, the
14 Court finds that Mr. Vowell breached his fiduciary duty and IDM
15 is entitled to damages. However, the Court will not permit
16 double recovery of the \$2,650,000.

17 D. Tax Refunds

18 The Trustee claims that the \$454,299 and \$301,879 tax
19 refunds should be returned to the bankruptcy estate on an unjust
20 enrichment theory. In addition, the Trustee claims that the tax
21 refunds breached Mr. Vowell's fiduciary duty and constitute
22 improper distributions. Trustee's Proposed F&C ¶¶ 63, 64. The
23 Court will not address these two claims because neither was
24 sufficiently addressed in the Trustee's proposed findings of fact
25 and conclusions of law or in his supplemental brief.

26 Tax refunds arising from pre-petition earnings or losses are
27 generally considered property of the bankruptcy estate under 11
28 U.S.C. § 541. Segal v. Rochelle, 382 U.S. 375, 380-81 (1966)

1 (holding that a loss-carryback tax refund was property of the
2 chapter 7 estate); In re Salazar, 465 B.R. 875, 881 (B.A.P. 9th
3 Cir. 2012) ("Tax refunds are property of the bankruptcy estate
4 under § 541(a).") (citing Segal v. Rochelle, 382 U.S. 375, 379
5 (1966); United States v. Sims (In re Feiler), 218 F.3d 948, 955-
6 56 (9th Cir. 2000)).

7 Tax refunds that belong to the bankruptcy estate may be
8 recovered based on an unjust enrichment theory. In re Forman
9 Enterprises, Inc., 273 B.R. 408, 413 (Bankr. W.D. Pa. 2002) ("The
10 [net operating losses] might be viewed as providing a substantial
11 benefit *for defendants* which debtor conferred on them as a result
12 of their own course of conduct and which would be unconscionable
13 for them to retain.") (emphasis in original). "When a defendant
14 receives a benefit in circumstances such that it would be
15 unwarranted to retain that benefit at the expense of another, the
16 defendant is said to be unjustly enriched." In re GSM Wireless,
17 Inc., 2:12-BK-16456 RK, 2013 WL 4017123, at *45 (Bankr. C.D. Cal.
18 Apr. 5, 2013). "Under California law, the elements of unjust
19 enrichment are: (1) the receipt of a benefit; and (2) the unjust
20 retention of the benefit at the expense of another." Id. In
21 this case, Mr. Vowell used IDM's 2006 net operating losses to
22 offset IDM's 2004 income (a "loss carryback"), which resulted in
23 a \$454,299 tax refund. Similarly, IDM's 2005 income was offset
24 by a loss carryback to receive a \$301,879.00 tax refund.² Both
25 tax refunds were a result of pre-petition earnings and therefore,
26

27 ² It is unclear which year's net operating losses were used, but
28 this information is unnecessary to determine whether the refund
belongs to the estate.

1 they belonged to the bankruptcy estate.

2 The Court must determine whether Mr. Vowell was unjustly
3 enriched by retaining the tax refunds. Mr. Vowell received the
4 benefit of a \$454,299 tax refund based on IDM's earnings and
5 losses. However, Mr. Vowell did not retain the benefit at the
6 expense of IDM. Based on Mr. Vowell's testimony, this tax refund
7 was used to pay creditors and restart IDM. Therefore, Mr. Vowell
8 was not unjustly enriched.

9 Mr. Vowell also received the benefit of a \$301,879.00 tax
10 refund based on IDM's earnings and losses. Unlike the \$454,299
11 tax refund, there is no evidence that this refund was used to pay
12 IDM's creditors or improve IDM. The money went to Mr. Vowell
13 even though IDM was going through bankruptcy proceedings when he
14 received the tax refund in 2011. Mr. Vowell, as a result, was
15 unjustly enriched at the expense of IDM.

16 Accordingly, the Court finds that Mr. Vowell must pay the
17 \$301,879.00 tax refund to the bankruptcy estate, but is not
18 obligated to pay the \$454,299 tax refund.

19 E. Conversion and Conspiracy

20 The Trustee brought a conversion claim to recover the value
21 of IDM's good will and income stream. He claims that Mr. Vowell
22 and Mr. Garcia are equally liable as co-conspirators for the
23 theft of the value of the assets on May 1, 2007.

24 Under California law, "[c]onversion is the wrongful exercise
25 of dominion over the property of another." Ross v. U.S. Bank
26 Nat. Ass'n, 542 F. Supp. 2d 1014, 1023-24 (N.D. Cal. 2008)
27 (citation omitted). "To establish conversion, a plaintiff must
28 show: (1) the plaintiff's ownership or right to possession to the

1 property at the time of conversion; (2) the defendant's
2 conversion by a wrongful act; and (3) damages." Id.

3 IDM owned its good will and income stream, but there was no
4 conversion by a wrongful act in this case. Mr. Garcia testified
5 that there was no transfer from IDM to Fidelis because the
6 customer list and contracts were worthless. However, his
7 testimony is contradicted by the emails in which both Mr. Vowell
8 and Mr. Garcia state they do not want to lose IDM's income
9 stream. Mr. Garcia Email dated March 20, 2007, Ex. 32, at 2; Mr.
10 Vowell Email dated March 26, 2007, Ex. 110, at 1. Moreover, Mr.
11 Vowell testified that IDM's assets were used to set up Fidelis,
12 he encouraged Fidelis' employees to call IDM's customers, and in
13 one email, he said, "I called him and told him IDM is not dead
14 just reorganizing or something like that." Mr. Vowell Email
15 Dated May 4, 2007, Ex. 108. Fidelis also used IDM's documents in
16 particular the employee confidentiality agreement. Mr. Vowell's
17 Testimony; Lawrence Lemus Email, Ex. 27. Therefore, the Court
18 finds that Mr. Vowell and Mr. Garcia set up Fidelis to continue
19 IDM's business by finishing IDM's contracts and using its
20 customer list, and Fidelis was initially set up using IDM's
21 assets. As a result, on May 1, 2007, IDM granted Fidelis a right
22 to possess IDM's good will, income stream, and assets until the
23 plan fell apart (i.e., IDM transferred to Fidelis its good will,
24 income stream, and assets). The transfer, however, was
25 voluntary. A voluntary transfer is not a wrongful act as
26 required to establish a conversion claim. In re Lau Capital
27 Funding, Inc., 321 B.R. 287, 304 (Bankr. C.D. Cal. 2005) ("A
28 transfer that is voluntary is not wrongful because a voluntary

1 transfer is consensual and thus, is not wrongful.") In addition,
2 after the plan fell apart, there is no evidence of conversion
3 because Fidelis moved out and it purchased its own furniture,
4 computers, servers, software, and customer list. See Ex. 13b.

5 Accordingly, the Court finds that the Trustee's conversion
6 claim fails thereby making it unnecessary for the Court to
7 address the Trustee's conspiracy claim.

8 F. Fraudulent Transfer

9 The Trustee also seeks to avoid and recover IDM's good will
10 and income stream as a fraudulent transfer under federal
11 bankruptcy law and state law. Unlike the fraudulent transfer
12 claim for the \$2,650,000 transfer, the Trustee argues that both
13 types of fraudulent conveyances, actual and constructive, apply
14 in this instance. See Trustee's Supp. PTB at 7.

15 1. Actual Fraudulent Conveyances

16 Pursuant to 11 U.S.C. § 548(a), the Trustee may avoid any
17 transfer that was made or incurred within 2 years if the transfer
18 was made with actual intent to hinder, delay, or defraud
19 creditors. 11 U.S.C. § 548(a).

20 The transfer of IDM's good will and income stream to Fidelis
21 occurred in 2007, within two years of the filing of the
22 bankruptcy petition. From the emails and testimony, Fidelis was
23 created with the understanding that it would benefit from IDM's
24 connections and income stream while being distinguished from IDM
25 to prevent IDM's creditors from going after it. See Garcia Email
26 Dated March 20, 2007, Ex. 32, at 2 ("This would keep creditors
27 from saying its [sic] just IDM south"); Garcia Email, Ex. 110, at
28 2 ("U installed this thought that[]future biz cant be IDM or that

1 creditors could come after you" and "[h]ow do we insure that you
2 are protected from IDM's creditors on this new venture?"). Mr.
3 Vowell testified that they intended to reach out to creditors and
4 they paid the creditors they could, but Mr. Vowell and Mr.
5 Garcia's plan was never communicated to the creditors.

6 Mr. Garcia argues that although there were discussions about
7 Mr. Vowell receiving a consulting fee and using IDM's assets,
8 there was never an agreement and the Agreement for Consulting
9 Services was never finalized. See Agreement for Consulting, Ex.
10 55. However, while a formal agreement was never signed, the
11 emails and testimony show that Mr. Garcia and Mr. Vowell acted
12 pursuant to a plan to create a company that did not have IDM's
13 debt. The plan fell apart, but by that point, they had executed
14 the transfer.

15 Therefore, the Court finds that Mr. Vowell and Mr. Garcia
16 created Fidelis and transferred IDM's assets to hinder creditors.

17 2. Constructive Fraudulent Conveyance

18 As discussed above, to prove a claim for constructive
19 fraudulent conveyance under 11 U.S.C. § 548(a)(1)(B), a plaintiff
20 must show that (1) the transfer involved property of the debtor;
21 (2) the transfer was made within two years of the filing of the
22 bankruptcy petition; (3) the debtor did not receive reasonably
23 equivalent value in exchange for the property transferred; and
24 (4)(a) the debtor was insolvent at the time of the transfer or
25 was made insolvent by the transfer or (b) the transfer was to an
26 insider under an employment contract and not in the ordinary
27 course of business. 11 U.S.C. § 548(a)(1)(B); see also In re
28 United Energy Corp., 944 F.2d 589, 594 (9th Cir. 1991) (stating

1 elements of a claim for fraudulent transfer under § 548).

2 In this case, all the elements of a constructive fraudulent
3 conveyance are met: The good will and income stream belonged to
4 IDM and the transfer occurred within two years of the filing of
5 the bankruptcy petition. IDM did not receive a reasonable
6 equivalent value because none of the expected compensation under
7 the agreement was paid to IDM. Mr. Vowell received some money
8 from Fidelis but there is no evidence it was returned to IDM.
9 Finally, it is undisputed that in 2007, IDM was insolvent.

10 Accordingly, the Court finds that the transfer to Fidelis
11 was an actual and a constructive fraudulent conveyance under the
12 Bankruptcy Code. As a result, the transfer is also an actual and
13 a constructive fraudulent conveyance under state law. See Screen
14 Capital Int'l Corp. v. Library Asset Acquisition Co., Ltd., 510
15 B.R. 248, 257 (C.D. Cal. 2014) ("The federal fraudulent transfer
16 provisions are 'similar in form and substance' to California's
17 fraudulent conveyance statutes . . .") (citation omitted).

18 3. Value of IDM

19 The Court must determine the value of IDM at the time of the
20 transfer. The burden of proving the value of the goods is on the
21 trustee. Kidder Skis Int'l v. Williams, 60 B.R. 808, 811 (W.D.
22 Mo. 1985).

23 In this case, the Trustee's expert estimated that IDM's
24 value at the time it was transferred to Fidelis on May 1, 2007,
25 was between \$3,600,000 and \$4,500,000, and Fidelis adjusted
26 profit for the first 8 months was \$776,380. Based on these
27 numbers, the Trustee proposes that the Court split the difference
28 between the lowest valuation provided by the expert (\$3,600,000)

1 and Fidelis' adjusted profit (\$776,380) to set IDM's value at
2 \$2,188,190. However, there was conflicting testimony at trial
3 about IDM's "customer list" and the expert failed to itemize the
4 intangible assets he considered in his valuation of IDM.
5 Additionally, Mr. Garcia testified that he received nothing from
6 IDM, IDM had abandoned its contracts thus rendering the contracts
7 worthless, and business generated by Fidelis was the sole result
8 of new business with dealers after May 1, 2007.

9 The Court did not find Mr. Garcia's testimony credible
10 because as mentioned above, several of his emails suggest that
11 IDM had a valuable income stream. In addition, the Court gives
12 little to no weight to the expert's testimony regarding IDM's
13 value because there were several deficiencies in his appraisal
14 methodology. In re 3dfx Interactive, Inc., 389 B.R. 842, 868
15 (Bankr. N.D. Cal. 2008) ("The court may decline to accept an
16 expert's opinion, in whole or in part, and may reject an expert's
17 opinion based upon its conclusions regarding the expert's
18 credibility. . . . Even uncontradicted expert testimony is not
19 necessarily conclusive.")

20 As a result, the Trustee failed to meet his burden of
21 proving the value of the IDM's goodwill and income stream. Even
22 though the Court finds there was a transfer and it is avoidable,
23 there is no valuation evidence on which the Court can reach the
24 conclusions urged by the Trustee. Accordingly, the Court cannot
25 award judgment for the value of IDM.

26 G. Successor Liability

27 In the alternative, the Trustee argues that successor
28 liability is an appropriate remedy based on the fraud-to-

1 creditors theory.

2 Under successor liability, "a corporation purchasing the
3 principal assets of another corporation assumes the other's
4 liabilities" only if "(1) there is an express or implied
5 agreement of assumption, (2) the transaction amounts to a
6 consolidation or merger of the two corporations, (3) the
7 purchasing corporation is a mere continuation of the seller, or
8 (4) the transfer of assets to the purchaser is for the fraudulent
9 purpose of escaping liability for the seller's debts." Maloney
10 v. Am. Pharm. Co., 207 Cal. App. 3d 282, 287 (1988) (quoting Ray
11 v. Alad Corp., 19 Cal.3d 22, 28 (1977)). Although successor
12 liability often refers to purchases, liability may extend to
13 asset transfers as well. See Stoumbos v. Kilimnik, 988 F.2d 949,
14 961 (9th Cir. 1993) (stating that successor liability can extend
15 to "transfers other than straightforward purchases")
16 (interpreting Washington law similar to California law). When
17 "actual fraud or the rights of creditors are involved, . . . the
18 courts uniformly hold the new corporation liable for the debts of
19 the former corporation." Cleveland v. Johnson, 209 Cal.App.4th
20 1315, 1327 (2012)(emphasis in original), review denied (Jan. 23,
21 2013).

22 In this case, the evidence shows that Fidelis was created
23 with the understanding that it would benefit from IDM's
24 connections and income stream while being distinguished from IDM
25 to prevent IDM's creditors from going after it. Therefore, the
26 transfer of IDM's assets to Fidelis was for the fraudulent
27 purpose of escaping liability for IDM's debt. However, the
28 agreement fell through after a few weeks and Fidelis broke all

1 ties to IDM. None of the parties address whether the lack of a
2 continuing tie is sufficient to negate successor liability.
3 Because successor liability is an equitable principle, "it is
4 appropriate to examine successor liability issues on their own
5 unique facts and [c]onsiderations of fairness and equity apply."
6 Cleveland, 209 Cal.App.4th at 1330 (internal quotations and
7 citations omitted). Under these circumstances, it would be
8 inequitable to allow Fidelis to escape liability by severing its
9 ties with IDM after it received benefits from IDM and after many
10 creditors were defrauded. Otherwise, companies could avoid
11 successor liability by restructuring the form of the transfer and
12 severing all ties after a short period.

13 Accordingly, the Court finds that Fidelis is IDM's
14 successor. The Trustee also seems to suggest that Mr. Garcia
15 should be held directly liable (see Trustee's Proposed F&C
16 ¶¶ 121-123), but he fails to address alter ego liability.

18 III. CONCLUSIONS OF LAW

19 1. The \$2,650,000 transfer was not a fraudulent transfer
20 under the Bankruptcy Code or California law.

21 2. IDM is the alter ego of Sashi.

22 3. The \$2,650,000 transfer was an improper distribution,
23 but the Vowells are entitled to a \$575,000 offset.

24 4. Mr. Vowell breached his fiduciary duty by transferring
25 the \$2,650,000.

26 5. Mr. Vowell was unjustly enriched by the \$301,879.00 tax
27 refund, but not the \$454,299 tax refund.

28 6. Fidelis, Mr. Garcia, and Mr. Vowell did not convert

1 IDM's assets because the transfer was voluntary.

2 7. The transfer of IDM's good will and income stream was
3 an actual and a constructive fraudulent transfer under the
4 Bankruptcy Code and California law; however, the Trustee failed
5 to meet his burden of proving the value of the IDM's goodwill and
6 income stream.

7 8. Fidelis is the successor of IDM because Fidelis was
8 created for the purpose of avoiding liability.

9

10 IV. ORDER

11 For the reasons set forth above, the Court orders that
12 judgment be entered against Mr. Todd Vowell and in favor of the
13 bankruptcy estate in the amount of \$2,376,879.00. The Court
14 further orders that declaratory judgment be entered against
15 Fidelis declaring it liable for IDM's debt on Plaintiff's
16 successor liability claim. Finally, the Court orders that
17 judgment be entered in favor of Raeanne Vowell and Jeffrey
18 Garcia.

19 IT IS SO ORDERED.

20 Dated: September 18, 2014

21

22

23

24

25

26

27

28



JOHN A. MENDEZ,
UNITED STATES DISTRICT JUDGE