

April 23, 2021

EDWARD J. EMMONS, CLERK  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

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The following constitutes the order of the Court.

Signed: April 23, 2021

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William J. Lafferty, III  
U.S. Bankruptcy Judge

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UNITED STATES BANKRUPTCY COURT

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NORTHERN DISTRICT OF CALIFORNIA

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OAKLAND DIVISION

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12 In re	)	Lead Case No. 16-40050 WJL
13 FOX ORTEGA ENTERPRISES,	)	Chapter 7
14 INC., dba PREMIER CRU,	)	
15 Debtor.	)	
16 MICHAEL G. KASOLAS,	)	Adversary Proceeding No. 18-04019
17 Trustee,	)	
18 Plaintiff,	)	<u>HEARING HELD</u>
19 v.	)	
20 WAYNE NICHOLSON,	)	DATE: February 3, 2021
21 Defendant.	)	TIME: 10:30 a.m.
	)	LOCATION: 220
		1300 Clay Street
		Oakland, CA 94604
		VIA VIDEOCONFERENCE

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**OPINION**

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William J. Lafferty, III, U.S. Bankruptcy Judge

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This matter came for hearing via videoconference on February 3, 2021, on the Motion for Partial Summary Judgment, or, Alternatively, for Order Adjudicating Facts Existing Without Controversy (for convenience hereafter, the "Second MSJ") brought by the Trustee, Michael G. Kasolas (the "Trustee" or "Plaintiff,"

1 as the context may require). Second MSJ, ECF No. 114. Kathy  
2 Bazoian Phelps and Karen Diep of Diamond McCarthy LLP appeared for  
3 the Trustee. David Rosendorf of Kozyak Tropin & Throckmorton, P.A.  
4 and Jane Kim of Keller Benvenutti Kim LLP appeared for Defendant  
5 Wayne Nicholson ("Defendant" or "Nicholson"). For the reasons set  
6 forth below, the Court GRANTS the Second MSJ.

7 Complex and multi-faceted as the issues presented in this  
8 matter are, on the most basic level, the parties simply "view" this  
9 matter through completely different lenses. These differing views  
10 pertain throughout the matter, dictate the scope and nature of the  
11 parties' disputes and their arguments, and explain the conclusion  
12 the Court reaches in this Opinion.

13 For Defendant, this is a simple case that may be resolved,  
14 simply, from his view of what he believes to be the relevant facts  
15 concerning his transaction: Defendant purchased expensive, highly  
16 sought-after wines from Premier Cru (also referred to as, the  
17 "Debtor") on a pre-arrival basis; and, though there were delays and  
18 anomalies in delivery, each of which he duly noted, in messages to  
19 Premier Cru and to its principal, John Fox, of increasing intensity  
20 and increasingly threatening tone and content, at the end of the  
21 day, he got the wine he paid for. End of story.

22 The Trustee surveys, and describes to the Court, a much  
23 broader and, in the Court's mind, more legally relevant landscape:  
24 upon filing bankruptcy, Premier Cru was massively insolvent, having  
25 "sold" to numerous customers wines that it not only did not have,  
26 or have any right to obtain, but, as set forth in a plea agreement  
27 entered into by Fox (hereinafter, the "Plea Agreement" or "Fox's  
28 Plea Agreement"), in large part never had any intention of

1 obtaining. Rather, as Fox's Plea Agreement describes, Premier Cru  
2 knowingly solicited orders it never intended to fulfill, diverted  
3 the funds obtained to personal uses of its principal, and  
4 "satisfied" the demands of insistent and suspicious customers by  
5 delivering "their" wines not via pre-arrival orders from famous  
6 chateaux, but by obtaining the wines in a "catch as catch can," ad  
7 hoc basis.

8 Against this narrative of overarching fraud, the Trustee, no  
9 longer relying on establishing a "Ponzi Scheme Presumption," as set  
10 forth in his initial attempt to obtain summary judgment, seeks to  
11 establish that particular transfers of wine to Defendant exhibited  
12 anomalies that take them outside the ordinary course of the  
13 Debtor's business as publicly represented, and which correspond to  
14 the conditions described in Fox's Plea Agreement. Each of these  
15 transfers, which occurred after Defendant had noted the same  
16 abnormalities, concluded that Premier Cru and Fox were engaged in a  
17 fraud, and threatened to reveal the scheme to the authorities, were  
18 made with actual intent to defraud.

19 Having reviewed the evidence and the arguments presented,  
20 which include the Plea Agreement and evidence establishing that the  
21 transfers he seeks to avoid were made under circumstances that  
22 constitute badges of fraud as contemplated by the relevant  
23 statutes, and having concluded that Defendant has neither presented  
24 facts that would demonstrate the existence of a genuinely disputed  
25 question of fact, nor effectively questioned the inferences that  
26 the Trustee seeks to have the Court draw, nor asserted any counter-  
27 inferences that would have the slightest plausibility, the Court  
28 concludes that the Trustee has met his burden of demonstrating that

1 the transfers identified were made by Premier Cru (acting through  
2 its principal John Fox) with actual intent to hinder, delay, and  
3 defraud creditors of the Debtor, and summary judgment is  
4 appropriate.

5 Moreover, in light of the existence of the circumstances that  
6 demonstrate the fraudulent nature and intent of the transfers, and  
7 the fact that Defendant was not only aware of essentially all of  
8 these circumstances but also had concluded from those circumstances  
9 that the Debtor's business was fraudulent, and had used that  
10 information to demand prompt delivery of his wine, the Trustee has  
11 also satisfied any reasonable burden to show that Defendant had not  
12 acted "in good faith" with respect to the transfers, and summary  
13 judgment is appropriate on that ground as well.

14 **I. PROCEDURAL AND FACTUAL BACKGROUND**

15 The Court has jurisdiction over this matter pursuant to 28  
16 U.S.C. §§ 1334(b) and 157(b) (2) (H), and the General Order of  
17 Reference promulgated by the United States District Court for the  
18 Northern District of California (G.O. 24).<sup>1</sup> Venue is appropriate  
19 in this district pursuant to 28 U.S.C. § 1409(a).

20 \_\_\_\_\_

21 <sup>1</sup> The Court intends to enter an Order Granting Motion for Partial Summary  
22 Judgment, contemporaneous with this Opinion. The Court is mindful of  
23 Defendant's declination to consent to this Court entering a final order or  
24 judgment in this proceeding. Answer Compl. 2, ECF No. 10. Pursuant to  
25 Bankruptcy Local Rule 7016-2, this Court hereby determines that the Court may  
26 enter a final order or judgment herein based upon (a) the Court's conclusion  
27 that there are no genuinely disputed issues of material fact as to the claims  
28 for which summary judgment is sought in this matter; the Court is therefore not  
making determinations of disputed issues of fact that would implicate a  
deferential standard of review by an Article III tribunal, and (b) an order  
granting summary judgment will be subject to de novo review upon appeal in any  
event. *United States v. Phattey*, 943 F.3d 1277, 1280 (9th Cir. 2019) (citation  
omitted). Moreover, though Defendant has asserted a right to a jury trial in  
this action to recover a fraudulent transfer, that right is only applicable to  
the extent that the matter need be decided via trial, and is not subject to  
summary disposition. *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 63-64  
(1989); *Johnson v. Neilson (In re Slatkin)*, 525 F.3d 805, 811 (9th Cir. 2008).

1        This Opinion constitutes the Court's Findings of Fact and  
2 Conclusions of Law as set forth in Federal Rule of Bankruptcy  
3 Procedure 7052.

4        Some procedural and factual background is necessary fully to  
5 understand this factually and legally complex matter, and to  
6 explain the Court's disposition.

7        **A. The Trustee's Complaint**

8        This adversary proceeding was commenced by the Trustee's  
9 filing of a Complaint on January 5, 2018. The Complaint contained  
10 five causes of action based on 11 U.S.C. § 548(a)(1)(A) (transfer  
11 made with actual intent to hinder, delay, or defraud), 11 U.S.C. §§  
12 544 and 550, and California Civil Code section 3439.04(a)(1)<sup>2</sup> ((1)  
13 transfers made with actual intent to hinder, delay, or defraud,  
14 state law via trustee's strong arm powers, and (2) obligations  
15 incurred with actual intent to hinder, delay, or defraud, state law  
16 via trustee's strong arm powers), and 11 U.S.C. §§ 544 and 550, and  
17 CUVTA section 3439.04(a)(2) ((1) constructively fraudulent  
18 transfers made, state law via trustee's strong arm powers, and (2)  
19 constructively fraudulent obligations incurred, state law via  
20 trustee's strong arm powers), and sought to avoid as actually and  
21 constructively fraudulent, transfers of wine made to and  
22 obligations incurred to Defendant.

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24        <sup>2</sup> California Civil Code section 3439.01 et seq. is known as the California  
25 Uniform Voidable Transactions Act, hereinafter referred to as CUVTA. CUVTA is  
26 California's adoption of the Uniform Fraudulent Transfer Act, renamed the  
27 Uniform Voidable Transactions Act in 2014. It has been adopted by 43 states,  
28 the District of Columbia, and the U.S. Virgin Islands. *Fraudulent Transfer Act*,  
Uniform Law Commission,  
<https://www.uniformlaws.org/committees/community-home?CommunityKey=4226ae7c-91c0-4ce9-b488-8520dbc39ea3> (last visited April 20, 2021). For convenience, the  
Court will mainly discuss the claims using the term "fraudulent transfer" as  
opposed to "voidable transfer."

1           Defendant filed an Amended Answer to Complaint on July 20,  
2 2018, contesting the Trustee's assertions.

3           **B. The Initial Summary Judgment Motion and Defendant's**  
4 **Responses**

5           On January 29, 2019, the Trustee filed his Motion for Summary  
6 Judgment or, Alternatively, for Order Adjudicating Facts Existing  
7 Without Controversy, and supporting pleadings and documents  
8 (collectively, the "Initial MSJ"). Initial MSJ, ECF Nos. 24-25,  
9 27-29, 32. The Initial MSJ sought relief on the bankruptcy-law  
10 based and state-law based claims that Defendant had received  
11 transfers of wine that were voidable (and recoverable) as actually  
12 fraudulent to a creditor of this estate, and targeted specifically  
13 and solely transfers that had been made to Defendant after  
14 Defendant had sent an email to the Debtor accusing the Debtor of  
15 running a Ponzi Scheme, and threatening action (hereinafter, the  
16 "Ponzi Email").

17           The Initial MSJ sought relief based on the assertion that  
18 Debtor's business operation was a Ponzi Scheme, based primarily on  
19 the Plea Agreement. The Trustee further asserted that if the Court  
20 so found, governing case law established that such a finding would  
21 entitle the Trustee to utilize the Ponzi Scheme Presumption, which  
22 would conclusively establish that the transfers were made with  
23 actual intent to hinder, delay, or defraud. Alternatively, the  
24 Trustee asserted that the transfers were made with the presence of  
25 numerous "badges of fraud," as set forth in CUVTA section  
26 3439.04(b), that would support inferences that the transactions  
27 were made with actual intent to defraud. In addition, the Trustee  
28 relied on Defendant's emails as both supporting one of the badges

1 of fraud, as well as negating any good faith defense by Defendant  
2 under CUVTA section 3439.08(a).

3 In response, Defendant filed both an Opposition to the Initial  
4 MSJ (the "Opp to Initial MSJ") and a Motion for Summary Judgment on  
5 the Pleadings, etc. (the "MSJOP"). Opp to Initial MSJ, ECF No. 39;  
6 MSJOP, ECF No. 40. In brief, Defendant's Opp to Initial MSJ argued  
7 that (a) it would be inappropriate to use CUVTA to determine that  
8 the subject transfers were in aid of a Ponzi Scheme, based on what  
9 Defendant alleged other state courts had concluded in allegedly  
10 similar circumstances, (b) as a matter of law, a Ponzi Scheme could  
11 not be found outside of the fraudulent securities-based investment  
12 scheme scenarios, and (c) the Trustee's pleading failed to  
13 establish that he was entitled to the Ponzi Scheme Presumption,  
14 based on a failure to demonstrate that the Debtor's business was in  
15 fact a Ponzi Scheme or, at a minimum, that, given the limited scope  
16 of the Ponzi Scheme, as asserted by Defendant, that the subject  
17 transfers were made in aid of such a scheme. Defendant further  
18 asserted that the subject transfers were made in good faith within  
19 the meaning of CUVTA section 3439.08(a), and that the Trustee had  
20 failed to establish that the transfers were not made in good faith,  
21 because they were made for value, because Defendant acted in good  
22 faith and without knowledge of the voidability of the transfers.

23 The MSJOP reiterated the arguments regarding the insufficiency  
24 of the Trustee's pleadings, and argued that (a) the Complaint  
25 should be dismissed as not having provided adequate specificity  
26 concerning fraud claims, (b) the Complaint should be dismissed  
27 and/or the Initial MSJ should be denied and relief granted to  
28 Defendant based on the arguments that relief was not available

1 under CUVTA on a Ponzi Scheme theory, (c) the Trustee's Complaint  
2 and the Initial MSJ failed to allege competently or to demonstrate  
3 the existence of a Ponzi Scheme, and (d) Defendant was entitled to  
4 judgment as a matter of law on his good faith defense.

5 Defendant's pleadings were also accompanied by objections to  
6 the Trustee's evidence for the Initial MSJ, and the pleadings were  
7 interspersed with critiques of the relevancy or the sufficiency of  
8 the Trustee's evidence, and complaints about the Trustee's alleged  
9 failure to respond to Defendant's discovery requests. Objs. Evid.  
10 Initial MSJ, ECF No. 39-1. Most prominently, Defendant urged the  
11 Court to exclude Fox's Plea Agreement from admission, or at the  
12 least not to consider it probative on the question whether the  
13 Debtor was actually operating a Ponzi Scheme.

14 **C. The Court's September 5 Memo Ruling on the Motions**

15 After a lengthy oral argument on April 3, 2019, and  
16 supplemental post-hearing briefing by the parties on certain  
17 issues, the Court took the matter under submission. On  
18 September 5, 2019, the Court issued its seventy-nine page Amended  
19 Memorandum of Decision (the "September 5 Memo"). Sept. 5 Mem., ECF  
20 No. 76. In brief, the September 5 Memo essentially denied all of  
21 the relief requested in the Initial MSJ and the MSJOP, with the  
22 exception of ruling that there was no genuine dispute but that the  
23 subject transfers were made to Defendant after Defendant had  
24 delivered numerous angry and threatening email messages to Debtor,  
25 culminating in the Ponzi Email.

26 The September 5 Memo is quite lengthy and represented the  
27 Court's attempt not only to deal comprehensively with the issues  
28 presented, but also to provide as comprehensive an explanation as

1 possible of the Court's rulings and its reasoning, particularly in  
2 light of the fact that the September 5 Memo resolved very little of  
3 the disputes between the parties, and it was obvious to the Court  
4 that most, if not all, of these issues would be revisited in  
5 subsequent pleadings, as is indeed the case.

6 The Court hereby incorporates, but will not restate in this  
7 Opinion, all of the background facts and reasoning contained in its  
8 September 5 Memo. Rather, in the interests of brevity, the Court  
9 will refer to the September 5 Memo for background as necessary in  
10 this disposition. However, the Court believes that it is  
11 appropriate and it should assist in the disposition of this matter  
12 quickly to summarize the holdings from the September 5 Memo.

13 As an initial matter, in the September 5 Memo, the Court  
14 declined Defendant's request to exclude the Plea Agreement from  
15 evidence and essentially rejected the insufficient evidence and  
16 discovery-related arguments set forth in the MSJOP.

17 The Court declined to determine that the Trustee had  
18 established that the Debtor's business was a Ponzi Scheme to such  
19 an extent that the Trustee would be entitled to the Ponzi Scheme  
20 Presumption, which would have established that all of the subject  
21 transactions were fraudulent and were made with actual intent to  
22 hinder, delay, or defraud. Sept. 5 Mem. 23-24, 44. The Court made  
23 this determination based on review of case law that required  
24 greater certainty than the Trustee had provided with respect to the  
25 scope of the Ponzi Scheme activity in the Debtor's business.  
26 Stated differently, although the Court accepted into evidence and  
27 considered the Plea Agreement as setting forth, generally, the fact  
28 that at least a portion of the Debtor's business was run as a Ponzi

1 Scheme, it was not clear from the evidence before the Court that  
2 the subject transfers were made in furtherance of that scheme.<sup>3</sup>

3 The Court also rejected the more sweeping assertions in the  
4 MSJOP and the Opp to Initial MSJ, that the Trustee was precluded  
5 from using CUVTA to determine that the subject transfers were part  
6 of a Ponzi Scheme, and that a Ponzi Scheme determination must be  
7 limited to fraudulent securities-based investment schemes, as not  
8 supported by the case law.

9 The Court also declined to determine on summary judgment that  
10 the subject transfers were made with actual intent to defraud based  
11 on the Trustee's assertions of the presence of numerous "badges of  
12 fraud," based on the Court's conclusion that the evidence provided  
13 by the Trustee on these points either did not establish that there  
14 was no genuine issue of disputed fact, and that granting the  
15 Initial MSJ would have required the Court impermissibly to indulge  
16 inferences in favor of the Trustee, that would have run afoul of  
17 the rule that, on a motion for summary judgment, the Court may not  
18 "weigh evidence," or grant the motion where a counter inference  
19 might have been accepted by the trier of fact.

20 The Court declined to grant the MSJOP based on its view that  
21 Defendant's arguments about the applicability of CUVTA and the  
22 scope of Ponzi Schemes were not well-taken, and that Defendant's  
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24  
25 <sup>3</sup> As the Court noted in the September 5 Memo: "Were the Court to apply the  
26 Ponzi Scheme Presumption, the Court would find that Premier Cru's fraudulent  
27 business was specifically a Ponzi Scheme, and that because it was a Ponzi Scheme  
any transfers made by Premier Cru were inherently fraudulent and made with the  
intent to hinder, delay, or defraud creditors. The Ponzi Scheme Presumption  
renders unnecessary analyses of individual transfers, because the Presumption  
recognizes that the Ponzi Scheme had no legitimate business purpose and that the  
only point of the Scheme was to perpetuate the fraud." Sept. 5 Mem. 13, ECF No.  
76.

1 arguments concerning the facts that the Trustee might establish  
2 were, at best, premature and inappropriate at that stage of the  
3 litigation. The Court also determined that the Trustee's Complaint  
4 and subsequent pleadings set forth claims of fraud with sufficient  
5 particularity, and denied the MSJOP on that basis.

6 Finally, the Court denied the MSJOP's request that the Court  
7 determine, essentially as a matter of law, that Defendant was  
8 entitled to assert the "good faith defense" set forth at CUVTA  
9 section 3439.08(a) against recovery of the subject transfers, based  
10 on the Court's reading of the relevant California case law, and the  
11 undisputed statements in Defendant's emails concerning his  
12 suspicions about and allegations against the Debtor. And while the  
13 Court did not rule as a matter of law that Defendant could not have  
14 been acting in good faith, in light of the uncertainty concerning  
15 the Trustee's allegations concerning badges of fraud, the Court  
16 indicated that if the Trustee actually established the existence of  
17 the badges of fraud that he had asserted, it appeared highly  
18 unlikely that the Court could simultaneously determine that  
19 Defendant had acted in good faith.

20 While the Court affirmatively decided only one issue in the  
21 Trustee's favor in the Initial MSJ, it is important to note that  
22 the Court also declined to decide any issues in the negative. In  
23 other words, the Court did not conclude that the Trustee could not  
24 establish issues critical to his case, or even foreclose the  
25 possibility that the Trustee, on a different showing, and under  
26 differently framed criteria, might establish some of his claims via  
27 a motion for summary judgment. For example, while the Court  
28 declined to agree that the Trustee was entitled to wield the Ponzi

1 Scheme Presumption in the Initial MSJ, the Court neither concluded  
2 that Premier Cru's business was not, to a significant extent, a  
3 Ponzi Scheme, nor that the admissions in the Plea Agreement could  
4 not support a finding of actual fraud in fact throughout Premier  
5 Cru's business, and provide a further basis to demonstrate the  
6 existence of badges of fraud in the transactions and the intent  
7 behind them. This clarification demonstrates further that the  
8 question in this matter is not so much whether the Debtor's  
9 business was, at least in part, a Ponzi Scheme, but whether the  
10 aspects of the business that were so tainted extended to the  
11 subject transactions.

12 **II. THE TRUSTEE'S SECOND MOTION FOR SUMMARY JUDGMENT**

13 **A. The Trustee Reasserts Claim for Actual Fraudulent**  
**Transfers**

14 On November 10, 2020, the Trustee filed a Motion for Partial  
15 Summary Judgment or, Alternatively, for Order Adjudicating Facts  
16 Existing Without Controversy, and supporting declarations and  
17 pleadings (collectively, the "Second MSJ"). Pl.'s Second MSJ, ECF  
18 Nos. 114 through 114-8. In filing this Second MSJ, the Trustee  
19 shifts focus from establishing an entitlement to rely on the Ponzi  
20 Scheme Presumption to demonstrating that transfers of wine were  
21 made with actual fraudulent intent through reference to badges of  
22 fraud. The Trustee still relies on Debtor's Plea Agreement to set  
23 the fraudulent background of the transfers, and that document  
24 provides a highly relevant and valuable road map to the fraud  
25 perpetrated here. But in this Second MSJ, the Trustee analyzes  
26 each of the subject transfers, i.e., each post Ponzi Email delivery  
27 of wine to Defendant, to show why and how the transfers fit within  
28 the Debtor's admitted scheme.

1 The Trustee's Second MSJ seeks to avoid, as transfers made  
2 with actual intent to hinder, delay, and defraud under (a) §§  
3 548(a)(1)<sup>4</sup> and 550 of the Bankruptcy Code and (b) section  
4 3439.04(a)(1)<sup>5</sup> of CUVTA, made applicable by §§ 544 and 550 of the  
5 Bankruptcy Code, the transfer of 140 bottles of wine (plus a  
6 replacement bottle) valued at \$154,306.60 (collectively, the  
7 "Subject Transfers"). These claims correspond to the first and  
8 second claims for relief as set forth in the Complaint.<sup>6</sup> The  
9 Subject Transfers are made up of five different types of wine:  
10 2007 Chateauneuf da Capo, Pegau ("Capo"), 2009 Latour ("Latour"),  
11 2009 Cheval Blanc ("Cheval Blanc"), 2009 Chateau d'Yquem 1/2  
12 ("d'Yquem"), and 2009 Lafite Rothschild ("Lafite").

13 To demonstrate that the Subject Transfers fall within Debtor's  
14 admitted fraudulent scheme, the Trustee attempts to show that:

18       <sup>4</sup> "The trustee may avoid any transfer (including any transfer to or for the  
19 benefit of an insider under an employment contract) of an interest of the debtor  
20 in property, or any obligation (including any obligation to or for the benefit  
of an insider under an employment contract) incurred by the debtor, that was  
made or incurred on or within 2 years before the date of the filing of the  
petition, if the debtor voluntarily or involuntarily--

23       5 "A transfer made or obligation incurred by a debtor is voidable as to a  
24 creditor, whether the creditor's claim arose before or after the transfer was  
made or the obligation was incurred, if the debtor made the transfer or incurred  
the obligation as follows:

25 (1) With actual intent to hinder, delay, or defraud any creditor of the  
debtor." CUVTA § 3439.04(a)(1).

26       <sup>6</sup> Although the Trustee's Second MSJ seeks to avoid the transfer of 141  
27 bottles, that quantity includes a bottle of Lafite that was used to replace one  
28 of the Subject Transfers that was broken. The Trustee has subsequently agreed  
that the replacement bottle does not need to be counted as an extra transfer.  
Pl.'s Statement Re Second MSJ 2, ECF No. 149.

1       • After Defendant in several emails accused Debtor and  
2            Premier Cru of operating a Ponzi Scheme and fraud, Debtor  
3            scrambled to fulfill Defendant's orders through retail  
4            purchases, ahead of other customers that had placed their  
5            orders in advance of Defendant;  
6        • In his scrambling efforts to fulfill Defendant's orders,  
7            Debtor consistently paid more for the wine than Defendant  
8            had paid.

9            In order to establish that the Subject Transfers are linked to  
10          the various badges of fraud, the Trustee primarily relies upon the  
11          Declaration of Brian Nishi, a former employee of Premier Cru for  
12          approximately 20 years, and its accompanying exhibits  
13          (collectively, the "Nishi Declaration"). Nishi Decl., ECF No. 114-  
14        5. The Nishi Declaration, which includes supporting materials, is  
15          based upon Mr. Nishi's personal knowledge and reconstruction of  
16          Premier Cru's records based on his review of the company's MAS500  
17          software and physical records.

18           The Trustee asserts a good faith defense is not possible due  
19          to the long trail of emails between Defendant and Premier Cru in  
20          which Defendant complains about delays, Premier Cru's inability to  
21          respond to Defendant's complaints, delayed refunds, and, most  
22          notably, Defendant's August 15, 2013 email in which he accuses  
23          Premier Cru of fraud and running a Ponzi Scheme and threatens to  
24          report the entity to the authorities. The Trustee argues that  
25          these emails demonstrate that Defendant had actual knowledge of  
26          facts that demonstrated Premier Cru's fraudulent intent, rendering  
27          the good faith defense inapplicable.

28

1                   **B.     Defendant's Opposition**

2                   Defendant filed an Opposition<sup>7</sup> that challenges the Trustee's  
3 Second MSJ on the bases that the underlying factual support is  
4 unreliable and inadmissible and that, even if the underlying  
5 support is accepted by the Court, there are holes in the Trustee's  
6 badges of fraud theory and material disputes of fact for a jury to  
7 decide. Def.'s Opp'n Second MSJ 7, ECF No. 126. Further,  
8 Defendant asserts that there are disputed facts as to what  
9 Defendant knew, in regard to Debtor's intent, and therefore,

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12                   <sup>7</sup> Following the Court's September 5 Memo, both parties indicated that they  
13 might need to supplement their prior disclosures and discovery responses. Joint  
14 Status Conf. Statement, ECF No. 95. By April 2020, the Trustee had provided  
15 supplemental documents and responses to Defendant and informed Defendant that he  
16 may perform additional discovery and was evaluating filing a new summary  
17 judgment motion. Stip. Cont., ECF No. 101. The Trustee proceeded to conduct  
18 discovery over the next couple of months. See Stip. Cont. Status Conf., ECF No.  
19 104; Joint Status Conf. Report, ECF No. 107. In a Joint Status Conference  
20 Statement in August, Defendant stated that he understood fact discovery to be  
21 closed until he received Requests for Admission from the Trustee, and he  
22 reserved the right to conduct his own fact discovery. ECF No. 107.

23                   On November 3, 2020, the parties filed a Stipulation Continuing Hearing,  
24 later made an order of the Court, in which it was revealed that the Trustee  
25 anticipated imminently filing a motion for partial summary adjudication. ECF  
26 No. 111. The stipulation stated that the parties agreed to meet and confer with  
27 respect to a briefing schedule and date for the motion to be heard by the Court  
28 and requested that the status conference scheduled for November 4 be continued  
to December 9. *Id.*

29                   On November 10, the Trustee filed his Second MSJ and set the hearing on  
30 the motion for December 9. ECF No. 114. Defendant did not timely file an  
31 opposition to the Trustee's Second MSJ. Instead, on December 7, just two days  
32 prior to the scheduled status conference and hearing on the Second MSJ, the  
33 parties filed a Joint Status Conference Statement in which the Trustee argued  
34 that discovery was closed and that the Second MSJ was to be heard on December 9,  
35 while Defendant sought to conduct further discovery and claimed he had  
36 understood that December 9 was only intended to be a status conference per the  
37 prior stipulation. ECF No. 117.

38                   After a hearing and additional pleading on the discovery issue by  
39 Defendant, the Court held that no further discovery would be allowed, finding  
40 that it would be inappropriate for Defendant to conduct discovery after the  
41 Trustee filed his motion, where Defendant had more than a year to conduct  
42 further discovery, was on notice that a new summary judgment motion was going to  
43 be filed for more than six months, and was aware of the contested basis for that  
44 motion.

45                   The Court permitted Defendant to file an opposition to the Second MSJ and  
46 set a briefing schedule and a hearing date therefor. Order Hr'g, ECF No. 124.  
47 The Court ultimately heard lengthy argument on the Trustee's Second MSJ on  
48 February 3.

1 summary judgment on whether Defendant received the transfers in  
2 good faith is inappropriate.

3 The Court will note here that Defendant's Opposition is  
4 accompanied by a thirteen-page "Exhibit A" that is really just  
5 additional argument, in that it provides a transfer-by-transfer  
6 analysis in response to the Trustee's Second MSJ. The Trustee  
7 requested that the Court strike Exhibit A because with that  
8 document Defendant significantly exceeded the permitted page limit  
9 (which had already been increased by Court order, based upon  
10 Defendant's statement that he would limit his pleading to thirty  
11 pages). The Trustee's Reply 15, ECF No. 131; Order Authorizing  
12 Oversize Briefing Def.'s Resp., ECF No. 130. The Court agrees with  
13 the Trustee that Defendant's inclusion of Exhibit A, which really  
14 was just additional argument, was inappropriate, but for reasons  
15 stated on the record at the February 3 hearing and in the Order at  
16 docket number 143, and to allow for full and complete argument of  
17 the matter, the Court accepts Nicholson's Exhibit A and the  
18 Trustee's counter exhibit, at docket number 131, and will consider  
19 them in this Opinion.

20 Furthermore, in a footnote, Nicholson continues to object to  
21 the Court taking judicial notice of the Fox Plea Agreement.  
22 However, the Court overrules this objection as it has already found  
23 the Plea Agreement admissible under Federal Rules of Evidence 807,  
24 and sees no reason to vary that ruling in this context. Sept. 5  
25 Mem. 22, ECF No. 76.

26

27

28

1      **III. RELEVANT LEGAL STANDARDS**

2      **A. Summary Judgment**

3            "The court shall grant summary judgment if the movant shows  
4            that there is no genuine dispute as to any material fact and the  
5            movant is entitled to judgment as a matter of law." Fed. R. Civ.  
6            P. 56. The Court is to look to substantive law to determine which  
7            facts are material, and those facts that affect the ultimate  
8            outcome, under the substantive law, are material facts. *Anderson*  
9            *v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute over  
10          material facts is genuine where a reasonable jury could return a  
11          verdict for the non-moving party based on the evidence presented.  
12          *Id.*

13            The parties must support their position by "citing to  
14          particular parts of materials in the record" or by "showing that  
15          the materials cited do not establish the absence or presence of a  
16          genuine dispute, or that an adverse party cannot produce admissible  
17          evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A)-(B). A  
18          motion for summary judgment may not be defeated "by evidence that  
19          is merely colorable or is not significantly probative." *C.A.R.*  
20          *Transp. Brokerage Co. v. Darden Rests., Inc.*, 213 F.3d 474, 480  
21          (9th Cir. 2000) (quoting *Anderson*, 477 U.S. at 249-50). While the  
22          Court needs only to consider the cited materials, it may consider  
23          other materials in the record, in determining whether to grant  
24          summary judgment. Fed. R. Civ. P. 56(c)(3).

25            When the moving party would not bear the burden of proof at  
26          trial, the burden on the moving party may be discharged by  
27          "'showing' . . . that there is an absence of evidence to support  
28          the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S.

1 317, 325 (1986). "The evidence of the non-movant is to be  
2 believed, and all justifiable inferences are to be drawn in his  
3 favor." *Anderson*, 477 U.S. at 255. However, "[w]here the record  
4 taken as a whole could not lead a rational trier of fact to find  
5 for the non-moving party, there is no genuine issue for trial."  
6 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S.  
7 574, 587 (1986).

8 In the September 5 Memo, the Court provided a caveat regarding  
9 the question of whether relying on inferences was appropriate at  
10 summary judgment. Sept. 5 Mem. 53-54, ECF No. 76. There, the  
11 Court noted that the weighing of evidence is prohibited at summary  
12 judgment, and accordingly, applying inferences is inappropriate  
13 where there are two permissible inferences to be made. *Id.* As  
14 will be explored more fully below at section V.B., Defendant has  
15 neither raised nor pointed to any facts that effectively challenge  
16 the Trustee's proposed inferences, nor identified any genuinely  
17 disputed issues of fact on the matters for which summary judgment  
18 is sought, nor asserted any counter-inferences from the facts  
19 presented that are appropriate or sufficiently plausible.  
20 Accordingly, the Court is left with the firm conviction that no  
21 rational trier of fact could reach a different outcome at trial,  
22 and the Court's use of what are essentially irrefuted inferences is  
23 appropriate to grant summary judgment.

24 **IV. ADMISSIBILITY OF THE TRUSTEE'S SUPPORTING EVIDENCE**

25 Before examining the Trustee's asserted badges of fraud, and  
26 Defendant's challenges to them, the Court must address issues  
27 raised by Defendant regarding the admissibility and reliability of  
28

1 the evidence upon which the Trustee supports his case, primarily  
2 the Nishi Declaration.

3       The exhibits attached to the Nishi Declaration include sales  
4 orders, purchase orders, pick lists, pack lists, and transaction  
5 spreadsheets. The sales orders are documents generated by Premier  
6 Cru's software showing transactions between Premier Cru and  
7 Defendant, while the purchase orders are also generated by Premier  
8 Cru's software but evidence transactions between Premier Cru and  
9 other vendors. See Nishi Decl. Exs. 4, 8, 12-13, 15, 18, 20-21,  
10 26, 31-32, ECF No. 114-5. The pick lists are documents that show  
11 which bottles were pulled from inventory in preparation for  
12 shipment. See *id.* at Exs. 6, 10, 16, 22, 24. The pick lists have  
13 handwritten notes regarding the particular shipment and the  
14 initials of the employee that pulled the wines, inspected the  
15 wines, and packed the wines for shipment. *Id.* The pack lists, or  
16 packslips, are documents included with the shipments that describe  
17 the contents of the shipment. See *id.* at Exs. 7, 11, 17, 23, 25,  
18 27, 29.

19       Finally, Nishi's Declaration is accompanied by spreadsheets  
20 associated with each of the subject types of wine. These  
21 spreadsheets provide a chronological summary of Premier Cru's  
22 running totals of bottles in inventory, on purchase orders, and  
23 pre-sold. See *id.* at Exs. 5, 9, 14, 19, 30. The spreadsheets  
24 provide a summary accounting for Premier Cru's inventory totals as  
25 wine was purchased, sold, received, and delivered. *Id.* The data  
26 presented in the spreadsheets was generated from Premier Cru's  
27 MAS500 software system, which recorded the running totals of  
28 incoming and outgoing transactions, and the other documents

1 described above. *Id.* at 2. Aside from the spreadsheets, which  
2 provide a global view of inventory related to the subject wines  
3 during the subject time period, all of the supporting documents  
4 relate specifically to Defendant's transactions.

5 Defendant makes several arguments attacking the sufficiency  
6 and admissibility of the Trustee's evidence in support of the  
7 Second MSJ. However, as the Court remarked during oral argument on  
8 this motion, Defendant did not present his objections in the form  
9 of a separate pleading setting forth the factual and legal bases in  
10 which proffered pieces of evidence should be excluded from  
11 admission; nor did Defendant provide, even in the Opposition, any  
12 relevant legal authorities that would support his broad-based  
13 assertions that most if not all of the Trustee's proffered evidence  
14 should be excluded. Such a generalized argument is not persuasive.

15 Defendant's first argument respecting the Trustee's evidence  
16 is that the spreadsheets should not be admitted because they, and  
17 their supporting documents, were not provided to Defendant in  
18 discovery. The Trustee asserts that the data cited in the  
19 spreadsheets, as well as the supporting documents, was provided to  
20 Defendant through written discovery responses and document  
21 production. Based on the record and statements at oral argument,  
22 this Court has no basis to dispute the Trustee's assertion. At  
23 oral argument, Defendant did clarify that while he did receive the  
24 data and supporting documents to the transactions highlighted in  
25 the spreadsheets by the Trustee, he did not receive the data or  
26 supporting documents for the other customer transactions that  
27 contributed to the formulation of the running totals. Tr. Hr'g  
28 60:1-8, ECF No. 144. However, seeing that discovery is closed and

1 Defendant had not previously requested the data or documents in  
2 question, the Court sees no basis to block admission of the  
3 spreadsheets into evidence, and their consideration for the Second  
4 MSJ.

5 Second, Defendant argues that the spreadsheets are not records  
6 kept in the ordinary course of business and, therefore, are not  
7 admissible. While the spreadsheets themselves are clearly not  
8 Premier Cru's business records, the spreadsheets are based upon  
9 data that was generated by Premier Cru's MAS500 software system in  
10 the ordinary course of business, such as total sales orders, total  
11 purchase orders, identities of customers and suppliers, and total  
12 inventory. Furthermore, the areas of the spreadsheets that the  
13 Trustee has highlighted are supported by pick and pack lists,  
14 purchase orders, and sales orders, also kept in the ordinary course  
15 of business, and demonstrably so, in this instance. For example,  
16 the pick lists include handwritten notes by the employees involved  
17 in preparing wine for shipment and the pack lists identify which  
18 bottles were packed for shipment. For these reasons, the Court  
19 does not find this argument to be meritorious.

20 Third, Defendant argues that the Nishi Declaration is not  
21 based on personal knowledge and, therefore, is inadmissible or, at  
22 least, unreliable. Defendant comes to this conclusion because  
23 Mr. Nishi uses language "reflecting conjecture." Specifically, in  
24 his declaration, Mr. Nishi uses the phrase "it appears" and "it  
25 seems" in making observations about Premier Cru's records.

26 However, it has been established in the Nishi Declaration that  
27 he worked for Premier Cru for approximately 20 years, including  
28 roughly eight years as Premier Cru's "IT Technician." Nishi Decl.

1 2:8-9. Furthermore, Mr. Nishi's employment was authorized by the  
2 Court to act as an IT consultant and technician in this case. *Id.*  
3 at 2:10-14. Mr. Nishi does not purport to have personal knowledge  
4 of the individual transactions in the sense that he was present and  
5 personally observed the fulfilling of orders. Rather, Mr. Nishi is  
6 the person most familiar with Debtor's software and operations,  
7 such that he can attest to what the records, made in the ordinary  
8 course of business, show. In this sense, Mr. Nishi does qualify to  
9 testify as to what the records show under Federal Rule of Evidence  
10 803(6) and, therefore, this objection must also be rejected.

11 Finally, Defendant argues that Premier Cru's business records  
12 are unreliable. Defendant points to the Court's own statements  
13 about gaps in Premier Cru's inventory system, as well as the Plea  
14 Agreement, where Mr. Fox admitted to falsifying purchase orders and  
15 financial records. More specifically, Mr. Fox's admission refers  
16 to falsely creating purchase orders for wine that he did not  
17 actually contract to buy.

18 On this front, Defendant raises, generally, a valid concern  
19 regarding the reliability of Premier Cru's records. In light of  
20 this concern, the Trustee has attempted to build the core of his  
21 case upon records that fall outside of the scope of Fox's admitted  
22 record falsification. Although it is not clear what exactly  
23 "financial records" includes, aside from falsely inflated purchase  
24 orders, the Trustee does not rely on Premier Cru's accounting  
25 records, profit and loss reports, or other types of information  
26 indicating the financial health of the organization. To the extent  
27 that "financial records" would include documents similar to those  
28 relied on by the Trustee, the documents that the Trustee does rely

1 upon are records created in the regular course of business that can  
2 be traced to actual transactions. For example, the Trustee relies  
3 on purchase orders from third parties that are specifically tied to  
4 a retailer or the credit card used to make a purchase. As  
5 discussed previously, the Trustee also relies upon the pick and  
6 pack lists created by Premier Cru staff contemporaneously with  
7 fulfillment of the Subject Transfers. It is also worth noting that  
8 there is no dispute between the parties as to which wines were  
9 transferred to Defendant on what dates and in what quantities.

10 Finally, to the extent that Mr. Fox may have falsified  
11 purchase orders, one would expect that such falsities would work in  
12 Defendant's favor here and not the Trustee's favor. In the Plea  
13 Agreement, Fox admits that he either falsely inflated the number of  
14 bottles shown on purchase orders or he actually contracted to buy  
15 the wine but knew that Premier Cru would not be able to pay for it,  
16 so that buyers would believe that Premier Cru had contracted to buy  
17 the wine and would eventually deliver. For all these reasons, the  
18 Court finds the documents that the Trustee relies upon, attached to  
19 the Nishi Declaration, to be reliable and admissible.

20 **V. ACTUAL FRAUDULENT TRANSFERS**

21 In his Second MSJ, the Trustee again asserts that there is no  
22 genuine dispute as to the facts that demonstrate Premier Cru  
23 transferred wines to Defendant, after receipt of Defendant's Ponzi  
24 Email, with actual fraudulent intent. A transfer is actually  
25 fraudulent when made "with actual intent to hinder, delay, or  
26 defraud any creditor of the debtor." 11 U.S.C.A. § 548(a)(1)(A);  
27 CUVTA § 3439.04(a)(1).

28

1       Section 548 of the Bankruptcy Code permits the trustee to  
2 avoid any fraudulent transfer of an interest of the debtor in  
3 property that was made within two years before the date of the  
4 filing of the bankruptcy petition, while § 544(b)(1) allows the  
5 trustee to turn to state law to avoid transfers outside the two-  
6 year window that would be avoidable by a creditor holding an  
7 allowable unsecured claim. There is no shortage of such creditors  
8 here, so the Trustee is able to use § 544 to invoke the four-year  
9 look back period of CUVTA. CUVTA § 3439.09(a). Whether a transfer  
10 is avoidable under CUVTA is a question of California law for which  
11 the California Supreme Court is the final authority. *Wolkowitz v.*  
12 *Beverly (In re Beverly)*, 374 B.R. 221, 232 (B.A.P. 9th Cir. 2007).

13       Once a transfer is avoided under §§ 548 or 544, the trustee  
14 can recover the property transferred, or value of such property,  
15 from the initial transferee. 11 U.S.C. § 550(a)(1). Here,  
16 Defendant was the initial transferee and there is no question that  
17 the Subject Transfers were made within one or both of the relevant  
18 look back periods, so the only question is whether the Subject  
19 Transfers were made with the actual intent to defraud, etc.

20       **A. Ponzi Schemes and Fox's Plea Agreement**

21       The September 5 Memo contained a description of Ponzi Schemes  
22 in general, and the history of Premier Cru's business in  
23 particular. Sept. 5 Mem. 36-44, ECF No. 76. While the Court  
24 doesn't wish to repeat that discussion at length, it is worthwhile  
25 to restate the nature of Ponzi Schemes, and why they are a  
26 particularly insidious type of fraud.

27       While there is not one universal definition of a "Ponzi  
28 Scheme," it is a type of fraud made famous by its namesake,

1 Charles Ponzi. Ponzi Schemes have two important characteristics  
2 which distinguish them from other types of fraud: (1) the promise  
3 of profit that is disconnected from any legitimate business  
4 activity, such as no actual investments being made in the stock  
5 market<sup>8</sup>, or no actual purchase of postal orders<sup>9</sup>, and (2) use of new  
6 investor funds, instead of legitimate profit, to provide a return  
7 to earlier investors.

8 Ponzi Schemes typically involve a promise of return upon  
9 investment, or profit or financial advantage to clients, but in  
10 reality are scams in which moneys advanced are not used to purchase  
11 whatever the alleged product of the investment scheme or business  
12 may be, but are substantially diverted improperly to the personal  
13 use of the fraudster. See *Alexander v. Compton (In re Bonham)*, 229  
14 F.3d 750, 759 n.1 (9th Cir. 2000); *Plotkin v. Pomona Valley*  
15 *Imports, Inc. (In re Cohen)*, 199 B.R. 709, 717 n.9 (B.A.P. 9th Cir.  
16 1996). And it is the particular feature of Ponzi Schemes that the  
17 ruse of legitimate business activity, and profitability for the  
18 investors, is perpetuated by using the funds supplied by current  
19 investors or purchasers to pay the "profits" or deliver the product  
20 to prior investors. Where these circumstances are found, courts  
21 may conclude that the transactions subject to such a scheme are  
22 made with actual fraudulent intent, not merely because there is no  
23 legitimate commercial purpose to the transactions, but, critically,

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24  
25 <sup>8</sup> As happened in the Bernie Madoff scandal, see James Bandler & Nicholas  
Varchaver, *How Bernie did it*, Fortune,  
<http://archive.fortune.com/2009/04/24/news/newsmakers/madoff.fortune/index.htm>  
26 (last updated April 30, 2009).

27 <sup>9</sup> As happened in the scheme concocted by Charles Ponzi, see Mary Darby, *In*  
*Ponzi We Trust*, Smithsonian Mag. (December 1998),  
<https://www.smithsonianmag.com/history/in-ponzi-we-trust-64016168/>.

1 because the purpose of soliciting new funds and using them to pay  
2 older claims is precisely to conceal the fraud, and to allow it to  
3 continue. See, e.g., *Barclay v. MacKenzie (In re AFI Holding, Inc.)*, 525 F.3d 700, 702 (9th Cir. 2008); *Hayes v. Palm Seedlings Partners-A (In re Agric. Research & Tech. Grp.)*, 916 F.2d 528, 531 (9th Cir. 1990) [hereinafter Agritech].

7 Thus, the critical distinction between Ponzi Schemes and other  
8 types of fraud is the continuing and self-perpetuating nature of  
9 Ponzi Schemes. To wit, any single transaction that is made based  
10 upon a knowing misrepresentation by the party seeking goods,  
11 services or moneys, that is made with intent to defraud, and that  
12 is entered into with reasonable or justifiable reliance by the  
13 victim, and that results in damages to the victim, is fraudulent.  
14 See *Lazar v. Superior Court*, 12 Cal. 4th 631, 638 (1996). But as  
15 the Supreme Court reminded us, "actual fraud" is a broader concept,  
16 and need not be limited to false representations, or even false  
17 pretenses. *Husky Int'l Elecs., Inc. v. Ritz*, 136 S. Ct. 1581  
18 (2016). As the Court stated:

19 "Actual fraud" has two parts: actual and fraud.  
20 The word "actual" has a simple meaning in the context of  
21 common-law fraud: It denotes any fraud that involves  
22 moral turpitude or intentional wrong. "Actual" fraud  
23 stands in contrast to "implied" fraud or fraud "in law,"  
which describe acts of deception that may exist without  
the imputation of bad faith or immorality. Thus,  
anything that counts as "fraud" and is done with wrongful  
intent is "actual fraud."

24 *Id.* at 1586.

25 To be sure, a Ponzi Scheme is fraudulent in the traditional  
26 sense: it has elements both of representational fraud, in the  
27 sense that victims are induced to part with money to "invest" or  
28 purchase assets that the schemer promises to deliver, but neither

1 has at the time of the representation, nor has any intention of  
2 acquiring in the manner promised, as well as actual fraud, in the  
3 sense that once the "music stops" the result is, inevitably, no  
4 assets, or very few, to satisfy the claims of those who had parted  
5 with funds. And the enterprise's victims/creditors are, with the  
6 exception of a lucky few who have been paid some amount, whether by  
7 happenstance or because, as here, they were aggressive in their  
8 collection efforts, invariably left holding a very large and empty  
9 bag.

10       But Ponzi Schemes differ from simpler instances of fraud  
11 precisely because they are ongoing schemes--they rely for their  
12 "success" upon the illusion of a return, whether fake profits or  
13 goods delivered out of the ordinary course, that is funded not from  
14 actual commercial activity, but by continuing contributions  
15 typically from newer victims, that continues the illusion of  
16 legitimacy by "paying" the claims of earlier investors/victims. *In*  
17 *re Cohen*, 199 B.R. at 717 n.9. And, eventually (and inevitably),  
18 the scheme collapses because the fraudster cannot continue to  
19 attract new victims and funds sufficient to "pay" the ever  
20 increasing base of victims/investors. See *Donell v. Kowell*, 533  
21 F.3d 762, 779 (9th Cir. 2008); *In re Cohen*, 199 B.R. at 717. While  
22 the Ponzi Scheme is ongoing, the fraudster has two overriding  
23 goals: (1) find new sources of moneys via fraudulent solicitations  
24 to pay the earlier investors, and (2) continue to "pay returns" as  
25 necessary to continue the illusion of legitimacy and to avoid  
26 exposure of the fraud by suspicious and unsatisfied investors.  
27 See, e.g., *Agritech*, 916 F.2d at 537. Hence, the fraudster most  
28

1 frequently pays or satisfies the claim, by any means available, of  
2 the most aggressive and outspoken of the "investors." *Id.*

3 To the extent that the fraud in a Ponzi Scheme relies on  
4 continuing deception, it is not only ongoing, but also it is a  
5 fraud that necessarily expands and deepens. And, for precisely  
6 these reasons, in the broadest sense all of the "investors" or  
7 customers are victims of, and participants in, the fraud, in the  
8 sense that every customer parted with moneys under false pretenses,  
9 and is paid, if at all, via further fraud; and no victim is any  
10 more entitled to payment than any other. See *Donell*, 533 F.3d at  
11 779-80. For this reason, those victims of a Ponzi Scheme who by  
12 luck or by aggression receive some or all of their promised  
13 consideration before the collapse of the scheme are not simply  
14 "paid up"--rather, because they had no greater entitlement to  
15 "payment" than any of the numerous victims who were not paid, in  
16 the context of a scheme that, by definition, could not ever have  
17 paid all of the victims, they are merely the beneficiaries of the  
18 fraudster's intentionally fraudulent transfers. See *id.* at 771.

19 With this context, the Court turns to examination of the  
20 admissions in Fox's Plea Agreement. As an initial matter, it is,  
21 of course, highly unusual in any fraud case to have a confession of  
22 guilt with respect to the fraudulent nature of the transactions as  
23 well as the actual fraudulent intent of the perpetrator. And it is  
24 striking how closely the admissions in the Plea Agreement track and  
25 describe the elements of a Ponzi Scheme.

26 In the Plea Agreement, Fox admits to having taken orders for  
27 "pre-arrival wine," and cash in payment thereof, without having  
28 used the funds received to purchase wine; and, when customers

1 complained about non-delivery or delayed delivery of wine, to  
2 having obtained "their" wine via spot purchases from other  
3 retailers, Fox also states that upon filing this bankruptcy case,  
4 and for some material time before, the assets of the Debtor (i.e.,  
5 bottles of wine or rights to receive wine) were grossly inadequate  
6 to satisfy the orders of wine customers.

7 In Fox's own words:

8 First, in many instances, I falsified purchase  
9 orders for wine that I had not contracted to purchase and  
entered them into Premier Cru's inventory for sale.  
10 These falsified purchase orders took two forms-either  
purchase orders that were entirely false, wherein I had  
not contracted to purchase any of the wine, or purchase  
11 orders that were partially false, wherein I had  
contracted to purchase some of the wine but I  
12 fraudulently increased the number of bottles covered by  
the contract. I priced these wines at prices below  
13 market price, knowing that I had not and would not need  
to actually pay for this wine from any vendors. . . .  
14 Customers paid Premier Cru for these phantom wines,  
believing, based on my various representations, that  
15 Premier Cru had actually contracted to purchase them and  
would eventually deliver them. I agree that I sold or  
16 attempted to sell approximately \$20 million worth of such  
phantom wine from 2010 to 2015.

17 Second, in other instances, I actually did contract  
with Premier Cru's foreign suppliers on behalf of Premier  
Cru to purchase wine, generally with the promise to pay  
those foreign suppliers within 30 days. In many of these  
18 instances, I knew that Premier Cru would not be able to  
make payment in 30 days, or ever, because (1) I embezzled  
19 money from Premier Cru's business accounts that I should  
have used to pay Premier Cru's suppliers or (2) I  
20 diverted money coming in from current customers to obtain  
wine for prior customers who had never received their  
21 wine.

22 . . . With respect to diversion of funds to purchase  
wine for prior customers, over time, many customers  
23 complained to Premier Cru about not receiving wine for  
which they had paid. Directly or indirectly, I lied to  
these customers, offering various falsified excuses and  
24 promises for wine that I knew was not going to be  
delivered, and I instructed my salespeople or other  
employees to tell customers things I knew to be false.  
25 When customers complained repeatedly or forcefully, I  
arranged to deliver wine to them even if I had never  
26 actually contracted to buy the wine for which they had  
paid. I often did this by delivering to those customers

wine for which other customers had paid or, in many cases, by purchasing the wine from other suppliers, usually at prices much higher than those for which I had sold the wine in the first place. A substantial amount of money in Premier Cru's bank accounts went to purchase wine in this manner.

I took these and other actions to conceal my ongoing fraud, to lull customers into a false sense that Premier Cru was a legitimate business, to cause these customers to continue to purchase wine from Premier Cru, and to prevent them from complaining to law enforcement authorities. . . . and that, at the time of Premier Cru's bankruptcy, approximately 4,500 customers had not received pre-arrival wine for which they had paid. I agree that these individuals are victims of my scheme. I agree that, at the time of Premier Cru's bankruptcy, customers had paid at least \$45 million for wine that they had not received.

Request Judicial Notice Ex. 2, at 3-6, ECF No. 114-3.

Ponzi Schemes may not be precisely defined, but the fraudulent scheme detailed in Fox's Plea Agreement clearly is entirely consistent with the description of such schemes in the case law. The only remaining question is whether Defendant's transactions were sufficiently similar to those set forth in the Plea Agreement.

## B. Badges of Fraud

Subsection (b) of CUVTA section 3439.04 provides a non-exhaustive list of factors or badges of fraud that may be considered in determining actual fraudulent intent:

- (1) Whether the transfer or obligation was to an insider.
- (2) Whether the debtor retained possession or control of the property transferred after the transfer.
- (3) Whether the transfer or obligation was disclosed or concealed.
- (4) Whether before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
- (5) Whether the transfer was of substantially all the debtor's assets.
- (6) Whether the debtor absconded.
- (7) Whether the debtor removed or concealed assets.
- (8) Whether the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

1 (9) Whether the debtor was insolvent or became insolvent  
2 shortly after the transfer was made or the obligation was  
3 incurred.

4 (10) Whether the transfer occurred shortly before or  
5 shortly after a substantial debt was incurred.

6 (11) Whether the debtor transferred the essential assets  
7 of the business to a lienor that transferred the assets  
8 to an insider of the debtor.

9 CUVTA § 3439.04(b).

10 There is no minimum number of factors that are required to  
11 demonstrate fraudulent intent, and only one or two badges of fraud  
12 may suffice to find a transfer was made with actual fraudulent  
13 intent. *Ezra v. Seror (In re Ezra)*, 537 B.R. 924, 931 (B.A.P. 9th  
14 Cir. 2015); *Filip v. Bucurenciu*, 129 Cal. App. 4th 825, 834 (2005).  
15 In fact, fraudulent intent may be found even where no badges of  
16 fraud are found, when otherwise supported by the evidence. *In re  
17 Beverly*, 374 B.R. at 236. Therefore, this Court must review the  
18 badges of fraud together with all other evidence in the record to  
19 determine whether the evidence and appropriate inferences establish  
20 an overall impression of fraudulent intent.

21 **1. Transfers Made After Threat of Litigation Already  
22 Found as a Badge of Fraud in the September 5 Memo**

23 In the September 5 Memo, this Court found the fourth  
24 enumerated factor in the list of badges of fraud, transfer after  
25 threat of litigation, to have been demonstrated and to be without  
26 genuine dispute. Sept. 5 Mem. 52, ECF No. 76. This finding was  
27 based on the fact that all 140 bottles of wine, i.e., the Subject  
Transfers, were delivered to Defendant after Defendant's Ponzi  
Email sent on August 15, 2013. The Ponzi Email was the culmination  
of years of frustration, delay, and poor communication, as shown  
through prior emails.

1       In February 2011, Defendant followed up on an email that had  
2 gone almost a month without response from Premier Cru, "[s]till  
3 never had any response to this issue, you were going to check with  
4 one of the owners and get back to me." Decl. of Karen K. Diep  
5 Supp. Summ. J. Ex. 41, ECF No. 114-6. Later, in May 2013,  
6 Defendant sent a long, frustrated email to a Premier Cru employee  
7 regarding a refund for an unauthorized insurance charge:

8           Under normal circumstances I would not have any  
9 problem with leaving it as a store credit with any other  
10 store with which I do business. But at this point I am  
11 already feeling very much overextended to Premier Cru as  
12 it is, and I am not comfortable with the amount of money  
13 the store already owes me, so please instead credit my  
14 card back this amount.

15           . . . I truly wish the firm would clean up its act,  
16 and not subject customers like me to the extreme stress,  
17 anxiety and aggravation that these utterly unacceptable,  
18 unprofessional, inexcusable and deceitful practices that  
19 ensnared me into these future purchases have caused.

20           . . . I truly did not need this betrayal of trust  
21 and the additional mental anguish. I had trusted Premier  
22 Cru, due to longstanding business going back to 1986.  
23 Yours was the last firm I would have expected to have  
24 these futures problems with, which explains why the bulk  
25 of my 2009 Bordeaux purchases were with you. To be  
26 essentially be [sic] defrauded into parting with hundreds  
27 of thousands of dollars, under false pretenses that your  
28 firm had already purchased and owned these wines, is a  
position that I am absolutely not enjoying being in, and  
I look for this utter nightmare to end.

29       *Id.* at Ex. 34, at 14-15, ECF No. 114-6. Defendant followed up on  
30 this email at the end of May, "I have not yet received the credit  
31 back to my card for these unwanted insurance charges, and it has  
32 been almost three weeks." *Id.* at Ex. 42, ECF No. 114-6. And,  
33 again in June:

34           . . . I'm getting very tired, extremely tired in  
35 fact, of having to repeatedly call or email your outfit.

36           And what now, you believe that if you just ignore  
37 me, I'll go away? The credit has STILL not appeared on  
38 my bank statement. What, is Premier Cru so desperate for  
39 funds they are hesitant to process a refund?

40

1           This is the last time I will ask politely for the  
2 refund. Again, no, I do NOT want a "store credit".  
3           Given the appallingly sleazy conditions surrounding  
4 the monies your outfit already owes me, to suggest I  
5 should add to that yet additional debt I'm due is rather  
6 absurd, don't you think?

7           *Id.*

8           Finally, Defendant's frustration boiled over in the August 15,  
9 2013 Ponzi Email, titled "WARNING: LAWSUIT AND CRIMINAL FRAUD  
10 CHARGES PENDING":

11           PLEASE BE ADVISED THAT IN ADDITION TO A CIVIL SUIT  
12 FOR DAMAGES DUE TO FRAUD AND BREACH OF CONTRACT,  
13 I\*\*\*\*\*WILL\*\*\*\*\* BE PRESSING CRIMINAL CHARGES AGAINST  
14 YOU AND \*\*\*ALL\*\*\* OF YOUR STAFF THAT HAVE AIDED AND  
15 ABETTED THIS LITTLE PONZI SCHEME OF YOURS.

16           YOU HAVE UNTIL 11:00 AM TODAY, THURSDAY AUGUST 15,  
17 2013 TO TELEPHONE ME AT [REDACTED] TO DISCUSS MAKING ME  
18 WHOLE IMMEDIATELY, OR I WILL INITIATE THE COMPLAINT WITH  
19 THE ALAMEDA COUNTY DISTRICT ATTORNEY'S OFFICE.

20           CONTINUE TO IGNORE ME AT YOUR VERY, VERY GREAT  
21 PERIL.

22           Request Judicial Notice Ex. 2, 3-6, ECF No. 114-3. In finding that  
23 the above Ponzi Email was a badge of fraud, the Court found that  
24 there was no dispute as to whether Defendant sent the email on the  
25 indicated date and that Defendant received the subject wines  
26 thereafter. Sept. 5 Mem. 47, ECF No. 76.

27           This particular badge of fraud, i.e., a transfer made after  
28 threat of litigation, has been found to, "strongly suggest that a  
transaction's purpose is to defraud creditors unless some other  
convincing explanation appears." *Emmett Valley Assocs. v.*  
*Woodfield (In re Woodfield)*, 978 F.2d 516, 518 (9th Cir. 1992). As  
will be discussed infra, a convincing, alternative explanation has  
failed to appear.

## 2. The Trustee's Badges of Fraud

The Trustee further asserts three additional circumstances demonstrating the existence of fraud, not specifically listed in the statute, which are summarized into the following three categories:

- Overpromised and oversold: Premier Cru overpromised and oversold each type of wine that was transferred to Defendant;
- Scramble to fulfill orders: After Defendant's emails accused Premier Cru of operating a Ponzi Scheme and fraud, Debtor scrambled to fulfill Defendant's orders through retail purchases, ahead of other customers that had placed their orders in advance of Defendant; and
- Overpaid for wine: In his scrambling efforts to fulfill Defendant's orders, Debtor often paid more for the wine than Defendant had paid to Premier Cru for the same wine, resulting in a loss.

18       Essentially, what the Trustee is arguing through these badges  
19 of fraud is that the Subject Transfers each fall outside the  
20 ordinary course of business, in ways that are consistent with Ponzi  
21 Schemes, in general, and the Plea Agreement, in particular.  
22 Further, because the transactions were conducted in commercially  
23 unreasonable ways, and in response to a threat of litigation or  
24 prosecution, there is a strong inference that the transactions were  
25 made with the fraudulent intent to keep Defendant quiet so that the  
26 fraudulent scheme could continue.

27 By demonstrating these badges of fraud, the Trustee asks the  
28 Court to infer that the subject transactions were made pursuant to

1 the fraudulent scheme described in the Plea Agreement. Because  
2 direct evidence of fraudulent intent is rarely available, courts  
3 infer intent from the totality of the circumstances. *In re Ezra*,  
4 537 B.R. at 930; *In re Beverly*, 374 B.R. at 235. This is also true  
5 on summary judgment, where the counter evidence does not raise a  
6 genuine issue of material fact. See *In re Beverly*, 374 B.R. at  
7 236-239.

8       Although Defendant vigorously challenges the badge of fraud  
9 inferences that the Trustee would like the Court to make, Defendant  
10 does not challenge the facts, aside from the admissibility and  
11 credibility claims rejected above, or offer alternative inferences  
12 for the Court to make. Instead, Defendant's arguments are  
13 dedicated to persuading the Court that the Trustee has offered  
14 unreasonable inferences and that the transactions took place in the  
15 ordinary course of business.

16       As noted in the September 5 Memo, there is no dispute between  
17 the parties as to which bottles of wine were ordered or delivered  
18 or as to when those orders and deliveries took place. Sept. 5 Mem.  
19 12, ECF No. 76.

20       While both parties do a transfer-by-transfer analysis in their  
21 briefing, each party asks the Court to view the sequence of events  
22 through fundamentally different perspectives. The Trustee wants  
23 the Court to consider the events globally, in light of the admitted  
24 fraud and Ponzi Email. On the other hand, Defendant asks the Court  
25 to focus on what Defendant maintains is the legitimacy of the  
26 individual transactions--Defendant got the wine that he paid for--  
27 in spite of the fraudulent background.

28

a. Overpromised or Oversold

2 The Trustee's first asserted badge of fraud is that Premier  
3 Cru overpromised or oversold each of the subject wines. The  
4 significance of this allegation is that it ties the Subject  
5 Transfers to Fox's Plea Agreement, as Fox admitted selling wines to  
6 customers under the false representation that Premier Cru had  
7 purchased enough wine to fulfill their orders, when the reality was  
8 that Premier Cru either didn't have as many purchase orders as it  
9 claimed or it would not be able to maintain the purchase orders it  
10 had placed due to its inability to pay for them. Request Judicial  
11 Notice Ex. 2, 3-4, ECF No. 114-3.

12 These wines were "highly desirable" and "limited-production,"  
13 with the pre-arrival format as "the only way to source the wine  
14 before they sell out (and at optimal prices)." Initial MSJ 2, ECF  
15 No. 25. When Premier Cru failed to secure contracts for the wine,  
16 it knew it would have to resort to buying the wine at retail prices  
17 from other sellers. To demonstrate this asserted badge of fraud,  
18 the Trustee relies on the running totals of the respective wines on  
19 purchase orders, pre-sold to customers, and in inventory, as  
20 demonstrated through the Nishi Declaration.

21 Examining the record, the undisputed facts show that four out  
22 of the five subject wines were oversold at the time of delivery to  
23 Defendant, and for years thereafter. Most clearly, both Capo and  
24 Latour bottles were oversold prior to Defendant placing his orders  
25 and at all times thereafter through the eve of Premier Cru's  
26 bankruptcy in 2016. See Nishi Decl. Exs. 5, 9, ECF No. 114-5.

27 The Court does note that there is one discrepancy in the Nishi  
28 Declaration as to the Latour wines that are part of the Subject

1 Transfers: Defendant's Latour order was shipped in two separate  
2 shipments and, as noted by Defendant, the second shipment to  
3 Defendant is missing from the spreadsheet at Exhibit 9 of the Nishi  
4 Declaration, which sets forth inventory transactions for Latour  
5 bottles. *See id.* at Ex. 9. Rather, Exhibit 9 shows a shipment of  
6 twelve bottles on November 14 to another customer, Jeffrey Edwards.  
7 *Id.* The record does not clarify why Defendant's second shipment is  
8 not accounted for on the Exhibit 9 spreadsheet. Nonetheless, it is  
9 undisputed that Premier Cru shipped twelve bottles of Latour to  
10 Defendant on or about November 14, that Premier Cru only had twelve  
11 bottles in inventory at that time, and that pick and pack lists  
12 show the twelve bottles of Latour were prepared for shipment to  
13 Defendant on November 13. *See id.* at Exs. 9-11. Further, the  
14 undisputed facts show that when the twelve bottles were shipped  
15 November 14, there were 279 bottles on purchase orders and 1,103  
16 bottles pre-sold. *Id.* at Ex. 9. This leaves the Court with the  
17 only reasonable inference that the twelve bottles were in fact  
18 shipped to Defendant and that Latour bottles were significantly  
19 oversold at that time.

20 In the case of Cheval Blanc, Debtor's order actually placed  
21 Premier Cru into an oversold position. After Defendant placed his  
22 order, Premier Cru had ordered 456 bottles of Cheval Blanc but had  
23 pre-sold 480 bottles. *Id.* at Ex. 14. Further, from the point of  
24 Defendant's order on through at least December 2015, the Cheval  
25 Blanc remained significantly oversold, including as of October 31,  
26 2013, when Premier Cru shipped all forty-eight bottles to  
27 Defendant. *See id.* So, despite having enough purchase orders in  
28 place to cover the pre-sold wine prior to Defendant's order,

1 Premier Cru did not have enough bottles on purchase order to  
2 fulfill all of Defendant's order once placed or at any point  
3 thereafter, including the date of delivery.

4 In the case of the Lafite wines, while Premier Cru was not  
5 oversold at the time Defendant placed his order, it was oversold as  
6 of April 2013, when Defendant received his first shipment (which is  
7 not one of the Subject Transfers), and remained oversold throughout  
8 the time that Defendant received his second shipment in November  
9 2013, his replacement bottle in January 2014, and on through the  
10 eve of bankruptcy. See *id.* at Ex. 30.

11 Finally, d'Yquem bottles were the only subject bottles of wine  
12 delivered to Defendant that were not oversold at any point prior  
13 to, or at the time of, Defendant's order or delivery. However,  
14 even d'Yquem bottles were eventually oversold as of 2015. See *id.*  
15 at Ex. 19.

16 (1) **The Fact that Some Wines Were Not Oversold**  
17 **or Overpromised at the Time Defendant**  
18 **Placed His Order Does Not Undermine this**  
19 **Badge of Fraud.**

20 Defendant correctly points out that, under the Trustee's own  
21 evidence, three out of the five wines at issue were not oversold or  
22 overpromised at the time that Defendant placed his order. There  
23 were sufficient purchase orders of Cheval Blanc, d'Yquem, and  
24 Lafite in place to cover the bottles pre-sold, according to the  
25 spreadsheets in the Nishi Declaration. However, the significance  
26 of this fact is minimal, if not wholly irrelevant--whether the wine  
27 was oversold at the time Defendant placed his order is not the  
28 legally significant point. Per both the Bankruptcy Code and CUVTA,  
fraudulent intent is determined at the time the property is

1 transferred to a third party. 11 U.S.C. § 548(a)(1)(A); CUVTA §  
2 3439.04(a); see *In re AFI Holding*, 525 F.3d at 703; *Christian*  
3 *Brothers High Sch. Endowment v. Bayou No Leverage Fund, LLC* (*In re*  
4 *Bayou Group*), LLC, 439 B.R. 284, 304 (Bankr. S.D.N.Y. 2010); *Filip*,  
5 129 Cal. App. 4th at 829. Here, the transfer of the wine did not  
6 take place until Premier Cru shipped the bottles to Defendant.

7 As described above, all of the subject wines were oversold at  
8 the time they were shipped to Defendant, aside from the bottles of  
9 d'Yquem. For these reasons, the Court does find this badge of  
10 fraud to apply to four out of the five types of wine shipped to  
11 Defendant. To the extent the Trustee shows that Premier Cru was  
12 oversold at other points in the relevant timeline, although not the  
13 legally significant point for determining intent, it would only add  
14 further support that the subject wines fit with the fraudulent  
15 scheme described in the Plea Agreement, as it shows the wines were  
16 oversold for an extended period of time, and this problem often  
17 deepened as time went on.

18 Although the d'Yquem wines were eventually significantly  
19 oversold, they were not oversold at any point prior to, or at, the  
20 time of delivery to Defendant. The fact that they were ultimately  
21 oversold does suggest that even they were eventually part of the  
22 fraudulent scheme described in the Plea Agreement. However, the  
23 fact that they were not oversold at the time Defendant's bottles  
24 were shipped does render the "oversold and overpromised" badge of  
25 fraud inapplicable. The inapplicability of this badge of fraud  
does not mean that other badges of fraud could not bring the  
d'Yquem bottles within the fraudulent scheme. Badges of fraud  
create an inference of fraud, in the aggregate. *In re Ezra*, 537

1 B.R. at 931; *In re Beverly*, 374 B.R. at 235; *Filip*, 129 Cal. App.  
2 4th at 834. The mere failure of one badge of fraud in regard to  
3 one transaction, among many, does not create a reasonable inference  
4 to the contrary. *Id.*

5 Defendant contends that a wine being oversold does not  
6 constitute a badge of fraud, which the Court also does not find  
7 convincing. Defendant argues that in some cases Premier Cru  
8 already had wines in inventory when he placed his order and,  
9 therefore, the wine was not "pre-arrival." The fact that Premier  
10 Cru may have already had some wine in inventory when Defendant  
11 placed his order is insignificant, because the customer is unaware  
12 of that fact. If Defendant was led to believe that the wine he  
13 purchased was not yet available and he would need to wait for  
14 several months, or longer, for it to arrive, based on a purchase  
15 contract with the supplier, then the purchase still fits within and  
16 supports the fraudulent scheme.

17 Defendant also argues that Premier Cru continued to buy and  
18 deliver more wines to customers both before and after the transfers  
19 to Defendant, as proof that the wines were not a part of the  
20 fraudulent scheme. However, this is not surprising in the least,  
21 as the Plea Agreement explains that Premier Cru would use funds  
22 received from some buyers to fulfill the orders of other  
23 complaining customers, like Defendant. And Premier Cru completely  
24 failed to fulfill all of the placed orders with any of the  
25 varieties of wine included in the Subject Transfers.

26 Finally, Defendant argues that Premier Cru had pre-existing  
27 purchase orders for wines in greater amounts than what Defendant  
28 ordered in each case. This argument completely ignores the fact

1 that the fraud entailed taking orders from customers that Premier  
2 Cru had no intention or ability of fulfilling. The fact that there  
3 were enough wines on purchase order or in inventory to fulfill any  
4 of a number of customers' individual orders was by design, as  
5 Premier Cru would satisfy a few disgruntled customers to keep the  
6 fraudulent scheme alive.

**b. Scramble to Fulfill Order**

8        The Trustee's second badge of fraud is that Premier Cru  
9        scrambled to fulfill Defendant's orders after the Ponzi Email was  
10       sent. This badge of fraud is meant to tie the transactions to the  
11       Plea Agreement by showing that Premier Cru was acting desperately  
12       to keep Defendant from exposing the fraudulent scheme. As evidence  
13       of Premier Cru's "scramble," the Trustee points to Premier Cru  
14       making piecemeal purchases of the wine from various retailers,  
15       often at costs above what Defendant paid.

16 The Trustee shows that Premier Cru did not have any bottles of  
17 Capo in inventory when it received a shipment of fifty-four bottles  
18 from European merchant Cellier-des-Producteurs on September 6,  
19 2013. Nishi Decl. Ex. 5, ECF No. 114-5. A little more than a  
20 month later, on October 15, Premier Cru shipped Defendant his six  
21 bottles, leaving forty bottles in inventory. *Id.*

22       Turning to the Latour wines, Premier Cru received thirty-six  
23 bottles of Latour from Barriere Freres on October 14, 2013, adding  
24 to its inventory of thirteen bottles. *Id.* at Ex. 9. By the next  
25 day, Premier Cru shipped thirty-six bottles to Defendant. *See id.*  
26 at Exs. 6-7, 9. The remaining thirteen bottles were shipped to  
27 another customer on November 5, leaving Premier Cru with no bottles  
28 in inventory, despite still owing twelve bottles to Defendant. *Id.*

1 at Ex. 9. As of November 13, Premier Cru still had no bottles of  
2 Latour in inventory, when it received a shipment of twelve bottles  
3 from a third-party vendor. *Id.* Premier Cru then shipped those  
4 twelve bottles to Defendant by the next day. *Id.* at Exs. 9-11.

5 As to the Cheval Blanc wine, Premier Cru did not have any  
6 bottles in inventory in the weeks before Defendant's Ponzi Email.  
7 *Id.* at Ex. 14. In order to fulfill Defendant's forty-eight bottle  
8 order, Premier Cru ordered twenty-four bottles from McAdam Buy  
9 Rite, a New York retailer, and thirty bottles from Jim Viner, a  
10 Kentucky broker. See *id.* at Exs. 14-15; Pl.'s Mem. Supp. Second  
11 MSJ 9, ECF No. 114-2. Premier Cru received those orders on October  
12 30, 2013, and shipped all forty-eight bottles to Defendant by the  
13 next day. See *id.* at Exs. 14, 16-17. The remaining six bottles  
14 were held in inventory until January 2014, when they were shipped  
15 to another customer. *Id.* at 14.

16 Similarly, as of a few days before the Ponzi Email, Premier  
17 Cru no longer had any bottles of d'Yquem in inventory. In order to  
18 fulfill Defendant's order, it ordered twelve bottles from  
19 Beltramo's, a wine retailer in Menlo Park, California, which were  
20 received into inventory on November 13, 2013, an additional three  
21 bottles from Beltramo's, which were received into inventory on  
22 December 19, and nine bottles from Wally's Wine and Spirits, which  
23 were also received into inventory on December 19. See *id.* at Exs.  
24 19-21. Premier Cru shipped each of these orders to Defendant  
25 within a day of receiving them. See *id.* at Exs. 19, 22-25.

26 Finally, with respect to the Lafite wines, Premier Cru had a  
27 running inventory of Lafite from the time of the Ponzi Email until  
28 Defendant's fourteen bottles were shipped. See *id.* at Ex. 30.

1 However, as of October 10, 2013, it only had eleven bottles in  
2 inventory, three short of what was needed to fulfill Defendant's  
3 open order. *Id.* On November 13, Premier Cru received fourteen  
4 bottles into inventory that were purchased from an unidentified  
5 third-party vendor. *See id.* at Exs. 30, 32. Within a day of  
6 receiving that shipment, Premier Cru shipped Defendant's fourteen  
7 bottles of Lafite. *See id.* at Exs. 28, 30. Afterward, Premier Cru  
8 maintained a running inventory of Lafite at least until January 24,  
9 2014, when it shipped the replacement bottle to Defendant due to a  
10 broken or leaking bottle in the previous shipment. *See id.* at Exs.  
11 29-30.

(1) The Record Demonstrates Numerous Logistical Challenges in Satisfying Defendant's Orders in Support of the Inference that Premier Cru "Scrambled."

In regard to the Trustee's second badge of fraud, that Premier Cru "scrambled" to fulfill Defendant's orders after the Ponzi Email, Defendant first argues that the Trustee has not sufficiently traced the bottles used to fulfill Defendant's orders sufficiently to show such a scramble.

The Court acknowledges that there is no evidence on the record that reflects personal knowledge of which bottles were shipped to Defendant and from which supplier they were sourced. However, Premier Cru's business records, as provided through the Nishi Declaration, do demonstrate the business's running inventory as well as when, how many, and from what supplier bottles were received. These records establish the exact source of the bottles delivered to Defendant in most cases and the partial source in the others.

1       In the cases of Capo, Cheval Blanc, d'Yquem, and second  
2 shipment of Latour bottles, there were no bottles in inventory  
3 before Premier Cru received a shipment of bottles from which it was  
4 able to satisfy Defendant's, and in some cases others', orders.

5       Tracing the source of the bottles used to fulfill Defendant's  
6 orders is less transparent in the case of Latour and Lafite wines.  
7 With the first Latour shipment, Premier Cru already had thirteen  
8 bottles in inventory when it received thirty-six bottles of Latour  
9 from Barriere Freres on October 14, 2013. See Nishi Decl. Ex. 9.  
10 Immediately after receiving the shipment from Barriere Freres,  
11 Premier Cru shipped thirty-six bottles to Defendant. See *id.* A  
12 few weeks later the remaining thirteen bottles were sent to another  
13 customer. See *id.*

14       One reasonable inference from this record is that the  
15 thirty-six bottles received from Barriere Freres, the exact amount  
16 needed to fulfill Defendant's order, were intended for Defendant.  
17 Another reasonable inference would be that the thirty-six bottles  
18 were used to supplement the inventory already in stock and,  
19 therefore, Defendant's shipment included bottles from both  
20 inventory and the Barriere Freres shipment. However, for purposes  
21 of the badge of fraud, which inference is applied wouldn't matter  
22 either way, because Premier Cru did not have sufficient bottles to  
23 fulfill Defendant's order and needed bottles from the incoming  
24 shipment from a retail source. In any event, Defendant had to rely  
25 on the order from Barriere Freres to satisfy Defendant.

26       Similarly, prior to Defendant's order of fourteen Lafite  
27 bottles being shipped, Premier Cru had twenty-five bottles in  
28 inventory. See *id.* at Ex. 30. Fourteen of the bottles were

1 received into inventory a day prior to Defendant's shipment and  
2 eleven bottles had previously been in inventory. See *id.* Again,  
3 it does not really matter what the composition of bottles sent to  
4 Defendant was, for purposes of the badge of fraud, since the order  
5 could not have been fulfilled without the freshly received  
6 inventory.

(2) Premier Cru's Delivery of All 140 Bottles to Defendant Within Four Months Still Constitutes a Scramble Under the Circumstances.

Defendant next argues that the delivery of 140 bottles of wine to Defendant in a matter of two to four months from the time of the Ponzi Email does not constitute a scramble, or, more specifically, a frantic effort to satisfy Defendant in order to keep him quiet. As further support, Defendant points to the fact that after the Ponzi Email Defendant continued to fulfill the orders of other customers before fulfilling Defendant's. However, the Court does not find such an inference, in light of the circumstances, to be a reasonable one.

18       First of all, at the time Defendant sent the Ponzi Email, he  
19       had already been waiting in excess of two years for his orders,  
20       even though pre-arrival wines were represented to take only six to  
21       eighteen months. See Pl.'s Supp. Second MSJ 2, 7-9, 11-12, ECF No.  
22       114-2. It was only after Defendant threatened to contact the  
23       authorities that Premier Cru delivered the subject wines to  
24       Defendant.

25       Second, as described in the Plea Agreement, Premier Cru had  
26 cash flow issues due to Fox's misappropriation of funds, requiring  
27 Premier Cru to use payment from one customer to pay for another

1 customer's product. Request Judicial Notice Ex. 2, at 4-5, ECF No.  
2 114-3. Premier Cru's cash flow issues were demonstrated in its  
3 apparent inability to promptly refund Defendant for unauthorized  
4 insurance charges, as described in section V.B.1. Decl. Karen K.  
5 Diep Ex. 42, ECF No. 114-6. Further, the Plea Agreement shows that  
6 Premier Cru would focus on fulfilling the orders of agitated  
7 customers in order to keep them quiet and the scheme alive.  
8 Request Judicial Notice Ex. 2, at 4-5, ECF No. 114-3.

9       Third, email exchanges with Defendant show that once he  
10 received reassurance that his orders would be satisfied, he  
11 relented. When advised that a Latour shipment had arrived on  
12 August 26, 2013, Defendant replied, "[w]onderful, the weather will  
13 probably be safe for you to ship to me here in Las Vegas in about  
14 3-4 weeks . . ." Decl. Karen K. Diep Ex. 40, at 83-84, ECF No.  
15 114-6. In another email sent that same day, Defendant asked, "when  
16 to expect the rest of the stuff?" *Id.* at 82. To which Fox  
17 replied, "[s]hould all be in by mid-September, in about 3 weeks[.]"  
18 *Id.*

19       Several weeks later, on October 11, Defendant sent an email to  
20 Fox letting him know he would be returning to his home and  
21 requested the wine be shipped overnight on October 14. *Id.* Fox  
22 replied that the Latour and Capo bottles were ready to ship, but  
23 the Cheval Blanc and d'Yquem would arrive late the next week. *Id.*  
24 at 81. The record shows thirty-six bottles of Latour and six  
25 bottles of Capo were shipped on or about October 14, as Defendant  
26 had requested. See *id.* at 82; Nishi Decl. Exs. 5-7, 9, ECF No.  
27 114-5. So, even though it took almost two months for the Latour to  
28

1 arrive at Defendant's site, the shipment was delayed at least  
2 several weeks at Defendant's request.

3 Fourth, other email exchanges with Defendant, when viewed in  
4 light of the undisputed facts, do show Premier Cru to be scrambling  
5 to satisfy Defendant. In an October 29, 2013 email, Defendant asks  
6 Fox, "where is the rest of my stuff? Below, on Oct. 11, you said  
7 they would be here around Oct. 18." Decl. Karen K. Diep Ex. 40, at  
8 81. The record, as discussed previously, shows that Premier Cru  
9 received thirty bottles of Cheval Blanc from a Kentucky wine broker  
10 and twenty-four bottles from a New York wine retailer on October  
11 30, forty-eight of which were shipped to Defendant by the next day.  
12 Nishi Decl. Exs. 14-15, ECF No. 114-5; Pl.'s Mem. Supp. Second MSJ  
13 9, ECF No. 114-2. The record does not show when those orders were  
14 placed. However, the undisputed facts show that Defendant was  
15 applying pressure to Premier Cru to get his wine, that Premier Cru  
16 kept delaying delivery beyond its own estimates, and it ultimately  
17 satisfied one of Defendant's orders by purchasing wine from two  
18 different retailers.

19 Fifth, it is undisputed that Defendant received some of his  
20 wines before customers that had ordered the same wine before him.  
21 The Trustee provides four such examples. The first two, customers  
22 Clarets and Weintraub, purchased bottles of Capo 412 days and 392  
23 days, respectively, before Defendant placed his order, yet customer  
24 Clarets received their wine 269 days after Defendant and customer  
25 Weintraub received their wine 549 days after Defendant. Pl.'s Mem.  
26 Supp. Second MSJ 21, ECF No. 114-2. The other two examples,  
27 customers No Limit Fine Wines and Patterson, purchased bottles of  
28 Lafite 30 days and 95 days, respectively, before Defendant but

1 received their wine 36 days and 24 days after Defendant. *Id.*  
2 While the Trustee has not argued that customers that ordered their  
3 wine prior to Defendant had a greater right to that wine than  
4 Defendant, it is telling that Premier Cru preferred fulfilling  
5 Defendant's order first, in light of the Ponzi Email. Tr. Hr'g  
6 45:24-47:7, ECF No. 144.

7 Finally, the record shows that Premier Cru did not receive  
8 large shipments directly from chateaux abroad, or from local  
9 suppliers, that were sufficient to fulfill multiple customers'  
10 orders at once. Instead, it received piecemeal shipments, often  
11 from various suppliers, that were only sufficient to fulfill, or  
12 partially fulfill, in the cases of Latour and d'Yquem, Defendant's  
13 order. Even Defendant was able to recognize irregularities with  
14 the source of the wine, as expressed in an email to Mr. Fox on  
15 October 15, 2013, about the second shipment of Latour:

16 John, I am not happy with this Latour. It is AGAIN  
17 the goddamned gray-market importer Kirkcrest product,  
18 with their import sticker plastered all over the back  
label. See attached.

19 . . . Kindly arrange to have legitimately-sourced,  
20 non-defaced set of 4 cases shipped to me promptly . . .  
21 . . . It is additionally disturbing to get this info  
22 that somehow you have the OWC's but didn't ship. This  
23 makes absolutely no sense, as I'm sure you can see, and  
the logic to withhold shipment till next week is  
inexplicable to anyone with any experience at all in  
buying wine. It instead seems clear the OWC's for these  
bottles don't exist, and you're scrounging some up in the  
meantime.

24 Decl. Karen K. Diep Ex. 39, at 47, ECF No. 114-6.

25 Against this backdrop, the only reasonable inference that can  
26 be made is that Premier Cru was scrambling to fulfill Defendant's  
27 orders so that Defendant would not report Premier Cru's fraudulent  
28 enterprise, while juggling other customers' competing interests and

1 Premier Cru's limited resources. The wines that Defendant ordered  
2 were expensive, rare, and limited production, with origins in  
3 Europe--difficult to obtain even through the traditional channels--  
4 and Premier Cru was struggling, financially and logistically, to  
5 satisfy thousands of open orders it had. Despite being vastly  
6 oversold in regard to four out of the five types of wine Defendant  
7 ordered, at the time of delivery to Defendant, Premier Cru was able  
8 to fulfill all 140 of Defendant's bottles on order, even though  
9 other customers had been waiting longer, in roughly a two-month  
10 window, through at least seven different retailers. Ninety out of  
11 Defendant's 140 bottles were delivered within a two-week period and  
12 128 out of the 140 bottles delivered within a four-week period.

13 The Court notes that the record does not contain evidence that  
14 confirms when Premier Cru ordered the wine that was ultimately  
15 delivered to Defendant. The evidence appears to show when Premier  
16 Cru received shipments and when those shipments were shipped to  
17 Defendant. But, they do not show when the orders were placed with  
18 suppliers. While this missing detail could further strengthen the  
19 Trustee's case, it does not weaken it. Even if the orders were  
20 placed prior to the Ponzi Email, the fact that the inventory was  
21 diverted to satisfy Defendant rather than another customer would  
22 similarly support the badge of fraud.

23 Based on all of these undisputed facts and a Plea Agreement  
24 admitting to such behavior, the Court finds Premier Cru's  
25 "scramble" to fulfill Defendant's orders to serve as a badge of  
26 fraud.

27  
28

c. Overpaid

2 The Trustee's third badge of fraud is that Premier Cru often  
3 paid more for the wine delivered to Defendant than Defendant paid  
4 for his orders. This badge of fraud supports the Trustee's second  
5 badge of fraud in that Premier Cru was forced to pay higher prices  
6 for wine in order to satisfy Defendant's orders and keep him quiet.  
7 When the Court reviews the prices Premier Cru paid for wine that  
8 was shipped to Defendant, it finds that Premier Cru made a profit  
9 on Capo bottles and the first shipment of Latour bottles. However,  
10 the undisputed facts show that Premier Cru suffered a loss on all  
11 of the Cheval Blanc and d'Yquem bottles, the second shipment of  
12 Latour, and at least three bottles of the Lafite shipment.

13 Defendant paid \$325.00 per bottle for the six bottles of Capo.  
14 Nishi Decl. Ex. 4, ECF No. 114-5. As described above at section  
15 V.B.2.b., Premier Cru fulfilled Defendant's order with a purchase  
16 order from Cellier-des-Producteurs for fifty-four bottles at  
17 \$267.10 per bottle. See *id.* at Ex. 5. Therefore, Premier Cru  
18 appears to have made a profit on Capo bottles.

19       Similarly, Premier Cru did not overpay for the first shipment  
20 of Latour. As described in section V.B.2.b., the first shipment of  
21 thirty-six bottles of Latour was satisfied from an inventory of  
22 forty-nine bottles. See *id.* at Ex. 9. Of those forty-nine  
23 bottles, thirty-six were derived from Barriere Freres and twelve  
24 were sourced from a George Zicarelli, all at a cost of \$934.85 per  
25 bottle. See *id.* The remaining bottle was part of a running  
26 inventory and it is not clear at which price it was acquired. See  
27 *id.* Nonetheless, as Defendant paid \$1,099 per Latour bottle,

1 Premier Cru made more than \$165 per bottle on all but, possibly,  
2 one of these thirty-six bottles.

3 However, the second shipment of twelve Latour bottles to  
4 Defendant was satisfied through a third-party purchase order at a  
5 cost of \$1,895 per bottle, meaning Premier Cru paid nearly double  
6 what Defendant paid through his order. See *id.* at 4, Ex. 32.  
7 Therefore, Premier Cru would still appear to have taken, in the  
8 aggregate, a significant, several-thousand dollar loss on the  
9 Latour wines delivered to Defendant.

10 Similarly, Defendant only paid \$995 per bottle for forty-eight  
11 bottles of Cheval Blanc, but Premier Cru paid \$1,299.99 per bottle  
12 for one shipment of twenty-four bottles and \$1,270 per bottle for  
13 another twenty-four bottle shipment. See *id.* at 4, Exs. 12-15. In  
14 regard to d'Yquem wines, Defendant paid only \$355 per bottle for  
15 twenty-four bottles, but Premier Cru paid \$599.99 for fifteen of  
16 the bottles delivered to Defendant, and \$549.99 per bottle for nine  
17 of the bottles delivered. See *id.* at 5, Exs. 18-21. Therefore,  
18 Premier Cru also took a significant loss on all twenty-four bottles  
19 of d'Yquem and all forty-eight of Defendant's Cheval Blanc bottles.

20 Finally, Defendant purchased fourteen bottles of Lafite from  
21 Premier Cru at \$1,264.29 per bottle. *Id.* at Ex. 26. Premier Cru  
22 had a running inventory of Lafite sourced from various retailers,  
23 prior to shipment of these fourteen bottles, with costs ranging  
24 from \$1,000 to \$1,395 per bottle, making tracing particular costs  
25 to Defendant's bottles unclear. See *id.* at Exs. 30-31; Pl.'s Mem.  
26 Supp. Second MSJ 13, ECF No. 114-2 However, as described in  
27 V.B.2.b.(1), at least three of the bottles delivered to Defendant  
28 were purchased from a third-party vendor at a cost of \$1,395 per

1 bottle, more than \$130 above what Defendant paid. See *id.* at Ex.  
2 30.

3 The undisputed facts show that Premier Cru overpaid for at  
4 least eighty-seven of the 140 bottles of wine delivered to  
5 Defendant. While it is undisputed that Premier Cru made a profit  
6 on some of the wines sold to Defendant, it is also undisputed that  
7 overall Premier Cru took a significant loss on the 140 bottles sold  
8 to Defendant, which is clearly a result that falls outside the  
9 ordinary course of business. These facts lend further support to  
10 the Trustee's "scramble" badge of fraud in that it shows Premier  
11 Cru paid prices higher than those Defendant paid for his orders to  
12 promptly procure Defendant's wine.

13 (1) **Defendant's Challenge to the Overpaid**  
14 **Badge of Fraud**

15 In defending against the Trustee's claim that Premier Cru  
16 overpaid for the wine shipped to Defendant, Defendant again resorts  
17 to its claim that the Trustee cannot trace which wines were sent to  
18 Defendant. As explained above at section V.B.2.b.(1), that is only  
19 true with regard to a portion of the first shipment of Latour, at  
20 least twenty-three, if not all, of thirty-six bottles can be traced  
21 to Barriere Freres, and Lafite orders, at least three of fourteen  
22 bottles can be traced to a third-party vendor. As to the other  
23 three types of wine, all of the bottles can be traced to the  
24 supplier and the associated cost determined.

25 **C. Totality of the Circumstances**

26 The parties agree that, notwithstanding whether any particular  
27 badge of fraud is established, a finding of actual fraudulent  
28 intent requires consideration of the totality of the circumstances.

1     *In re Ezra*, 537 B.R. at 931; Pl.'s Mem. Supp. Second MSJ 18, ECF  
2     No. 114-2; Def.'s Opp'n Second MSJ 19, ECF No. 126. To grant  
3     summary judgment, the Court must find that upon consideration of  
4     the totality of the circumstances a rational trier of fact could  
5     not find for the non-moving party. *Matsushita Elec. Indus. Co.,*  
6     *Ltd. v. Zenith Radio Corp.*, 475 U.S. at 587. Unfortunately for  
7     Defendant, the only reasonable inference to take from the totality  
8     of the circumstances in this case is that Premier Cru acted with  
9     fraudulent intent in making the Subject Transfers to Defendant.

10       The Court may utilize inferences at summary judgment so long  
11     as it views the evidence in a light most favorable to the non-  
12     moving party, acknowledging alternative inferences and fair  
13     critiques of the moving party's inferences. See *Anderson v.*  
14     *Liberty Lobby, Inc.*, 477 U.S. at 255. Further, the Court is  
15     entitled to use inferences, per CUVTA section 3439.04(b), because  
16     of the difficulty of demonstrating fraudulent intent--if simple  
17     tracing were available then inferences wouldn't be necessary. See  
18     *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 805-06  
19     (9th Cir. 1994) (citation omitted); *In re Ezra*, 537 B.R. at 930; *In*  
20     *re Beverly*, 374 B.R. at 236; *Filip*, 129 Cal. App. 4th at 834. As  
21     shown *supra*, Defendant has failed to provide a reasonable,  
22     alternative inference here that Premier Cru made the Subject  
23     Transfers without the fraudulent intent admitted in the Plea  
24     Agreement.

25       The Trustee has demonstrated an overall picture of fraudulent  
26     transactions that is consistent with the Plea Agreement. The  
27     Trustee has demonstrated that, after Defendant sent an email  
28     threatening to expose Premier Cru's Ponzi Scheme, Premier Cru

1 scrambled to fulfill all of Defendant's 140 bottles (plus a  
2 replacement) in only a few months, after years of inaction, and  
3 ahead of customers that had placed their orders prior to Defendant,  
4 by purchasing the bottles from various retailers, often at retail  
5 prices above what Defendant paid. Further, the Trustee has  
6 demonstrated that four out of the five types of wine transferred to  
7 Defendant were oversold, often significantly, at the time of  
8 delivery to Defendant.

9 To the extent that not all of the badges of fraud apply to all  
10 of the Subject Transfers--i.e., d'Yquem bottles were not oversold  
11 at the time of delivery--the Court is nonetheless convinced that it  
12 is appropriate to find that all of the Subject Transfers were made  
13 with fraudulent intent due to the fact that all of the Subject  
14 Transfers were delivered after receipt of the Ponzi Email, all such  
15 deliveries were made in an apparent scramble by Premier Cru to  
16 fulfill Defendant's orders, and all were made in the face of on-  
17 going badgering from Defendant.

18 Although there has been no showing as to why other customers'  
19 orders were also fulfilled during the latter portion of 2013, the  
20 fulfillment of some orders is expected as part of the general  
21 scheme to keep up the appearance of a legitimate business.  
22 However, with all of the facts and badges of fraud discussed *supra*,  
23 it is very hard to see how a reasonable juror, in considering the  
24 totality of the circumstances, could find the Subject Transfers  
25 were made without fraudulent intent. The only reasonable inference  
26 the Court can make from the evidence before it is that Premier Cru  
27 made the Subject Transfers because it was threatened by Defendant  
28 and did not want its on-going, fraudulent scheme to be exposed.

1                   D.    Amount of Recovery

2                   As explained in section V., under § 550, once a transfer is  
3 voided, the trustee can recover the property transferred, or the  
4 value of such property, from the initial transferee. 11 U.S.C. §  
5 550(a). The Trustee may recover the entire amount transferred to  
6 Defendant, unless Defendant can show that the good faith defense  
7 applies, in which case Defendant would only be required to turn  
8 over their "profits," and not the entire amount of the transfer.  
9 *Donell*, 533 F.3d at 771.

10                  "The purpose of § 550(a) is 'to restore the estate to the  
11 financial condition it would have enjoyed if the transfer had not  
12 occurred.'" *Aalfs v. Wirum (In re Straightline Invs.), Inc.*, 525  
13 F.3d 870, 883 (9th Cir. 2008) (quoting *In re Acequia, Inc.*, 34 F.3d  
14 at 812). "A bankruptcy court ordinarily determines the value of  
15 the property to be the value at the time of the transfer, but has  
16 discretion on how to value the property so as to put the estate in  
17 its pretransfer position." *USAA Fed. Sav. Bank v. Thacker (In re  
18 Taylor)*, 599 F.3d 880, 890 (9th Cir. 2010).

19                  The Trustee asserts that the value of the Subject Transfers is  
20 \$154,306.60. Pl.'s Mem. Supp. Second MSJ 19, 24, ECF No. 114-2.  
21 The Trustee arrived at this value by summing up the amounts that  
22 Premier Cru paid for the Subject Transfers, based on the "tracing"  
23 methodology previously described. See *id.* at 19. While the  
24 Trustee's approach generally appears to be a fair and reasonable  
25 method of determining the fair market value, and Defendant has not  
26 proposed an alternative, the Court sought clarity on a few discrete  
27 issues regarding the valuation, at a hearing set by the Court on  
28 April 9, 2021.

1       First, the Court inquired as to whether it was appropriate to  
2 include the replacement bottle of Lafite within the transfer  
3 valuation. In response, the Trustee has agreed that the  
4 replacement bottle should not be counted as an extra transfer.  
5 Pl.'s Statement Re Second MSJ 2, ECF No. 149. Therefore, the Court  
6 will only include 140 bottles in the valuation.

7       Second, the Court sought clarification for the Trustee's  
8 methodology in applying a cost of \$1,395 to all fourteen bottles of  
9 Lafite. As described in V.B.2.b., only three of those bottles can  
10 be traced to a cost of \$1,395. In response, the Trustee conceded  
11 that only three of the Lafite bottles should be valued at \$1,395,  
12 while the other eleven should be valued at \$1,299.88, which is what  
13 Premier Cru paid for the replacement bottle delivered in January  
14 2014. Pl.'s Statement Re Second MSJ 2, ECF No. 149.

15       Finally, the Court inquired as to the valuation of the twenty-  
16 four bottles of d'Yquem. As described in V.B.2.b., fifteen of the  
17 d'Yquem bottles can be traced to a cost of \$599.99 per bottle,  
18 while nine can be traced to a cost of \$549.99 per bottle. However,  
19 in the Trustee's valuation, the twenty-four bottles are divided  
20 evenly between the two different costs, generating a lesser overall  
21 value for those transfers. In response to this inquiry, the  
22 Trustee agreed to concede to this lesser valuation. Pl.'s  
23 Statement Re Second MSJ 2, ECF No. 149.

24       Although the Court only sought clarification as to the  
25 Trustee's valuation theory, the Trustee's concessions are well-  
26 taken, and the Court otherwise finds the Trustee's method of  
27 valuing the Subject Transfers to be a reasonable basis for fair  
28 market value. Accordingly, the Court finds the appropriate value

1 for recovery, in consideration of the Trustee's concessions  
2 described above, to be as follows:

3 Wine	4 Quantity	5 Per Bottle Value	6 Total Value
Capo	6	\$267.10	\$1,602.60
Latour	36	\$934.85	\$33,654.60
Latour	12	\$1,895.00	\$22,740.00
Cheval Blanc	24	\$1,299.99	\$31,199.76
Cheval Blanc	24	\$1,270.00	\$30,480.00
d' Yquem	12	\$599.99	\$7,199.88
d' Yquem	12	\$549.99	\$6,599.88
Lafite	3	\$1,395.00	\$4,185.00
Lafite	11	\$1,299.88	\$14,298.68
<b>TOTAL</b>	<b>140</b>		<b>\$151,960.40</b>

13 Table 1.

14 In addition to value of the property transferred, the Trustee  
15 asserts that he can recover prejudgment interest at the rate of  
16 seven percent, payable from the date the transfers were made.  
17 Based on that calculation, the Trustee asserts that it is entitled  
18 to \$75,177.91 of prejudgment interest through October 31, 2020,  
19 plus a per diem interest of \$29.47 accruing each day thereafter.

20 The Trustee's method of calculation, including the point in  
21 time from which the interest begins to accumulate, the interest  
22 rate, and the total amount, does not appear to be contested, and  
23 the Court finds it to be appropriate. Although, the Court must  
24 adjust the values upon which interest is calculated, in  
25 consideration of the Trustee's concessions described above, as  
26 demonstrated in Table 1. Using the values provided in Table 1, the  
27  
28

1 Court find the appropriate amount of prejudgment interest, as of  
2 April 23, 2021, to be as follows:

3 Wine	4 Value	5 Ship Date	6 Interest	7 Per Diem %
Capo	\$1,602.60	10/14/2013	\$851.88	\$.31
Latour	\$33,654.60	10/14/2013	\$17,724.60	\$6.45
Latour	\$22,740.00	11/13/2013	\$11,846.12	\$4.36
Cheval Blanc	\$31,199.76	10/30/2013	\$16,337.36	\$5.98
Cheval Blanc	\$30,480.00	10/30/2013	\$15,954.88	\$5.84
d' Yquem	\$7,199.88	11/13/2013	\$3,749.46	\$1.38
d' Yquem	\$6,599.88	12/19/2013	\$3,404.87	\$1.27
Lafite	\$4,185.00	11/13/2013	\$2,173.60	\$.80
Lafite	\$14,298.68	11/13/2013	\$7,444.58	\$2.74
<b>Total</b>			<b>\$79,487.35</b>	<b>\$29.13</b>

13 Table 2.

14 Based on the above, the amount of recovery for the Trustee, as  
15 of April 23, 2021, is \$231,447.75, with a per diem amount of \$29.13  
16 accruing thereafter.

17 **VI. DEFENDANT'S DEFENSES**

18 **A. The Trustee Is Entitled to Summary Judgment on the Issue**  
19 **of Defendant's "Good Faith" Under CUVTA Section**  
**3439.08(a).**

20 The Trustee seeks summary judgment on the issue whether  
21 Defendant is entitled to invoke the good faith defense under CUVTA  
22 section 3439.08(a)<sup>10</sup>. That section provides a defense to a finding  
23 of liability on transfers made with actual fraudulent intent, upon  
24 a showing that the transferee took "in good faith" and for  
25 reasonably equivalent value. The test is conjunctive, i.e., the

26  
27 <sup>10</sup> "A Transfer or obligation is not voidable under paragraph (1) of  
28 subdivision (a) of Section 3439.04, against a person that took in good faith and  
for reasonably equivalent value given the debtor or against any subsequent  
transferee or obligee." CUVTA § 3439.08(a).

1 party asserting the defense must establish both elements, and  
2 failure to meet either is fatal to the assertion of the defense.  
3 The Trustee focuses on the good faith element.

4 Defendant asserts that since the Trustee is the moving party  
5 on a motion for summary judgment, the Trustee has the burden of  
6 proof on this issue, even though Defendant would have the burden of  
7 proof on this issue at trial. Def.'s Opp'n Second MSJ 23 n.13, ECF  
8 No. 126. It is neither clear whether the Trustee concedes this  
9 point, nor that Defendant is correct. See, e.g., *Celotex*, 477 U.S.  
10 at 325 ("[T]he burden on the moving party may be discharged by  
11 'showing' . . . that there is an absence of evidence to support the  
12 nonmoving party's case."); *In re Oracle Corp. Securities Litig.*,  
13 627 F.3d 376, 387 (9th Cir. 2010) ("[M]oving party need only prove  
14 that there is an absence of evidence to support the non-moving  
15 party's case. . . . the burden then shifts to the non-moving party  
16 to designate specific facts demonstrating the existence of genuine  
17 issues for trial."). In any event, this question is not issue  
18 determinative; for the reasons set forth below, the Court believes  
19 that the Trustee has carried any burden that would be assigned to  
20 him as the moving party on this Motion.

21 In what he argues is another gating issue, Defendant has cited  
22 to several cases for the proposition that it is not appropriate to  
23 determine issues of good faith under CUVTA section 3439.08(a) on  
24 summary judgment. See *Banks v. Bethlehem Steel Corp.*, 870 F.2d  
25 1438, 1444 (9th Cir. 1989); *Hotel & Rest. Emps. & Bartenders Int'l  
Union v. Rollison*, 615 F.2d 788, 793 (9th Cir. 1980); *Nakao v.  
Rushen*, 542 F. Supp. 856, 860 (N.D. Cal. 1982). While certainly  
28 mindful of the admonitions against either weighing evidence or

1 indulging inferences too freely at the summary judgment stage, the  
2 Court agrees with the Trustee that Defendant's reliance on the  
3 cases cited is misplaced. The cases cited do not deal with good  
4 faith in the context of CUVTA section 3439.08(a), rather they arose  
5 in the context of civil rights cases and labor disputes, and do not  
6 appear in any way apt or helpful in the analysis the Court must  
7 perform on this matter. Moreover, in light of the lengthy, if  
8 admittedly sometimes confusing, line of cases addressing the good  
9 faith standard in the CUVTA context, there appears to be no good  
10 reason to look to other substantive areas of law to resolve the  
11 appropriateness of deciding good faith issues at summary judgment  
12 in this matter. And, there is certainly no hard and fast rule  
13 under the California cases stating that summary judgment is  
14 invariably inappropriate on this point.<sup>11</sup>

15 The term "good faith" is not defined in CUVTA, and courts have  
16 struggled to agree on a definition that fairly captures the  
17 legislative intent in enacting this statute, in large part because  
18 the Legislative Comment (1) thereto, to which the courts seeking to  
19 interpret good faith have resorted, contains a lengthy  
20 "explanation" of the requisite state of mind that is, to say the  
21 least, ambiguous. In relevant part, the comment provides that:

22 "[G]ood faith" means that the transferee acted without  
23 actual fraudulent intent and that he or she did not

---

24 <sup>11</sup> If anything, the opinion of the California Court of Appeal in *Nautilus, Inc. v. Yang*, 11 Cal. App. 5th 33 (2017), on which Defendant principally relies  
25 for his argument that he lacked requisite knowledge of the Debtor's fraudulent  
26 intent, would allay such fears—that case's invocation of a more heightened  
27 standard than had been applied in previous case law, and that requires a party  
28 objecting to another's good faith to establish "actual knowledge of facts that  
demonstrate the transferor's fraudulent intent," would indicate an openness to a  
ruling on summary judgment, which is after all an exercise in determining  
whether there are genuine disputes about any material facts.

1       collude with the debtor or otherwise actively participate  
2       in the fraudulent scheme of the debtor. The transferee's  
3       knowledge of the transferor's fraudulent intent may, in  
4       combination with other facts, be relevant on the issue of  
5       the transferee's good faith of the transferor [sic] or of  
6       the transferor's insolvency.

7       CUVTA § 3439.08(a), comment (1).

8       In the September 5 Memo, the Court noted this difficulty and  
9       undertook a lengthy review of the case law as it developed on the  
10       question of the appropriate meaning of good faith in CUVTA section  
11       3439.08(a). Sept. 5 Mem. 57-65, ECF No. 76. Since this is a  
12       question of interpreting California law, federal courts must defer  
13       to the decisions of California courts on this point. *Sec. Pac.*  
14       *Nat'l Bank v. Kirkland (In re Kirkland)*, 915 F.2d 1236, 1238 (9th  
15       Cir. 1990). And given that the California Supreme Court has not  
16       yet ruled on this issue, it is incumbent on federal courts to look  
17       to the opinions of intermediate courts of appeal to determine the  
18       state of the law in California on this point, and to determine  
19       whether the highest level state court would necessarily follow the  
20       decisions of the intermediate court. *Id.* at 1239.

21       Accordingly, the Court engaged in a lengthy discussion of the  
22       facts, the holdings and the rationales from the *Nautilus, Inc. v.*  
23       *Yang*, 11 Cal. App. 5th 33 (2017) case, which appears to be the most  
24       recent statement by a California Court of Appeal on the good faith  
25       issue, and attempted to apply the rule set forth in *Nautilus* to the  
26       somewhat unusual facts presented here. That discussion need not be  
27       repeated here in its entirety, but some points bear review and  
28       analysis, particularly in light of the Court's determinations  
     concerning "badges of fraud" and whether the Subject Transfers were  
     made with actual intent to hinder, delay, or defraud.

1       The *Nautilus* case contains a useful discussion of the history  
2 of California courts' struggles to articulate a comprehensive and  
3 accurate statement of the requirements for the good faith defense  
4 under section 3439.08(a).

5       First, *Nautilus* correctly observes that two California Court  
6 of Appeal cases analyzing a defendant's invocation of the good  
7 faith defense had been determined solely on the basis that the  
8 party claiming the good faith defense had not colluded with the  
9 transferor or actively participated in the fraud. *Nautilus*, 11  
10 Cal. App. 5th at 42-43; *see Annod Corp. v. Hamilton & Samuels*, 100  
11 Cal. App. 4th 1286, 1299-1300 (2002); *Lewis v. Superior Court*, 30  
12 Cal. App. 4th 1850, 1858-59 (1994). The *Nautilus* court observed  
13 that while the rule that the transferee's participation in a  
14 fraudulent transfer would surely negate a good faith defense, the  
15 analysis in neither case directly addressed the issue whether the  
16 applicability of the good faith defense may be based on the  
17 transferee's actual knowledge that the transferor had fraudulent  
18 intent. *See Nautilus*, 11 Cal. App. 5th at 42. The *Nautilus* court  
19 concluded that the appropriate standard would have to address the  
20 question of the extent of the transferee's knowledge of the  
21 fraudulent intent of the transferor. *Id.* at 42-43.

22       Second, the *Nautilus* court noted that, post-*Lewis*, some cases,  
23 largely in the bankruptcy courts, appeared to endorse a more  
24 inquiry type of notice. *Nautilus*, 11 Cal. App. 5th at 43-44; *see*  
25 *In re Cohen*, 199 B.R. at 719. And *Nautilus* does reject the  
26 holdings in these cases that a transferee could be held to an  
27 inquiry notice standard, such that irregularities in a transaction  
28 would require further inquiry by the transferee, and the deemed

1 discovery of whatever such inquiry would have revealed. *Nautilus*,  
2 11 Cal. App. 5th at 46.

3       Third, the *Nautilus* court noted judicial attempts to "merge"  
4 the holdings in *Lewis* and *Cohen* to state a more comprehensive  
5 standard that would also take into account the language from the  
6 Legislative Comment to CUVTA section 3439.08(a), i.e., "[k]nowledge  
7 of the facts rendering the transfer voidable would be inconsistent  
8 with the good faith that is required of a protected transferee."  
9 *Nautilus*, 11 Cal. App. 5th at 44; see *CyberMedia, Inc. v. Symantec*  
10 *Corp.*, 19 F. Supp. 2d 1070, 1075 (N.D. Cal. 1998). Attempting to  
11 resolve that issue, the court in *Cybermedia* articulated the good  
12 faith test as follows:

13       Accordingly, this Court holds that, for purposes of the  
14 UFTA, a transferee lacks good faith if he or she (1)  
15 colludes with the debtor or otherwise actively  
16 participates in the debtor's fraudulent scheme, or (2)  
17 has *actual knowledge* of facts which would suggest to a  
18 reasonable person that the transfer was fraudulent.  
19  
20       Cybermedia, 19 F. Supp. 2d at 1075. And the *Nautilus* court noted  
21 that many federal courts appeared to have accepted the test set  
22 forth in *Cybermedia*, though the exact language used might have  
23 differed slightly. See *Nautilus*, 11 Cal. App. 5th at 45-46.

24       But the *Nautilus* court found the test from *Cybermedia* still  
25 faulty, for two reasons.

26       First, the court noted that the Legislative Comment contained  
27 additional language not quoted by *Cybermedia* that raised concerns  
28 with the test set forth by that court: "Knowledge of the  
voidability of a transfer would seem to involve a legal conclusion.  
Determination of the voidability of the transfer ought not to  
require the court to inquire into the legal sophistication of the

1 transferee." *Id.* at 44 (quoting CUVTA § 3439.08(a), Comment (1)).  
2 This additional language raised concerns with the language in the  
3 *Cybermedia* good faith test that depended on the transferee's  
4 "actual knowledge of facts that would suggest to a reasonable  
5 person that the transfer was fraudulent," because that test both  
6 appeared to depend on the transferee making a legal determination  
7 about the character of the transaction, which is very difficult to  
8 discern, and to ignore the issue of the transferor's fraudulent  
9 intent, which is what the statute properly addressed. See *id.* at  
10 46.

11 Second, the court noted that the *Cybermedia* test's reference  
12 to actual knowledge of facts "which would suggest to a reasonable  
13 person" that the transfer was fraudulent, appeared to revert to an  
14 inquiry notice standard. *Id.* (emphasis added).

15 To address these difficulties and to articulate a standard  
16 consistent with the language in the Legislative Comment (and  
17 mindful of the concerns expressed therein), the *Nautilus* court  
18 stated: "Accordingly, we hold that a transferee does not take in  
19 good faith if the transferee had actual knowledge of facts showing  
20 the transferor had fraudulent intent." *Id.*

21 The test set forth by the *Nautilus* court attempts to address  
22 two problems from prior articulations of the standard--the  
23 requirement that a transferee be held to an unrealistic inquiry and  
24 imputed knowledge standard, and the requirement that the transferee  
25 determine a matter that may involve a legal conclusion. While  
26 these concerns by the *Nautilus* court are no doubt well-taken--we  
27 should avoid a rule that, in order to avoid liability for what are  
28 eventually determined to be fraudulent transfers, transferees must

1 be a combination of Sherlock Holmes and Professor Kingsfield--the  
2 exact contours of this doctrine, and the range of its protections,  
3 may be difficult to determine with precision. That  
4 notwithstanding, this Court is convinced that the rule announced in  
5 *Nautilus* would not prevent, but rather would confirm, a ruling that  
6 the Defendant in this matter is not entitled to the good faith  
7 defense of section 3439.08(a).

8 As an initial matter, remember that in this inquiry, as with  
9 the inquiry whether a transfer was made with actual intent to  
10 defraud, we are not typically given direct evidence of a party's  
11 bad intent. Put slightly differently, transferees of allegedly  
12 fraudulent transfers are no more likely to admit their culpability,  
13 or the extent of their knowledge that would deny them a good faith  
14 defense, than the fraudster is likely to admit his fraud. Thus, in  
15 both instances, courts are forced to rely on inferences from  
16 circumstances surrounding a transaction to determine the question  
17 whether a transferor acted with fraudulent intent, or a transferee  
18 acted in good faith. And the *Nautilus* court's emphasis on "actual  
19 knowledge of facts" does not change that reality--even if we lack  
20 facts that would directly support liability, such as an admission  
21 by the transferor, we may still find facts that support an  
22 inference of fraudulent intent or bad faith, and even one that,  
23 viewed fairly, admits of no other conclusion. And *Nautilus* itself  
24 makes clear that one may demonstrate the requisite actual knowledge  
25 of facts showing transferor's fraudulent intent via badges of  
26 fraud, and that such a showing should be made on a "totality of the  
27 circumstances" basis. See *Nautilus*, 11 Cal. App. 5th 46-49.

28

1       The Trustee alleges that Nicholson's emails setting forth his  
2 increasing and continuing concerns regarding the inexplicable delay  
3 in getting delivery of his wine, Premier Cru's failure to respond,  
4 or to respond credibly about the issue, the delay in processing  
5 refunds, and Nicholson's accusations of fraud and invocation of the  
6 term Ponzi Scheme and threats to go to the authorities, establish  
7 that he had requisite knowledge of the fraud at Premier Cru, as  
8 well as the transferor's fraudulent intent in making the Subject  
9 Transfers, and he cannot have taken the wines in good faith.

10       Nicholson does not dispute having sent the emails, or the  
11 accuracy of the Trustee's rendition of them. Rather, he argues  
12 that the Trustee has misstated the relevant legal standard for a  
13 finding of good faith.

14       The Court engaged in a lengthy application of the facts of  
15 this matter to the rule set forth in *Nautilus* in the September 5  
16 Memo, and observed that it would be highly unlikely that the Court  
17 would be convinced that the Subject Transfers were made with actual  
18 intent to hinder, delay, or defraud creditors based on a badges of  
19 fraud analysis, while also concluding that Defendant could claim to  
20 have taken the transfers in good faith. Sept. 5 Mem. 55-65, ECF  
21 No. 76. That analysis depended largely on the overlap between, if  
22 not the complete congruence of, the badges of fraud exhibited in  
23 the Subject Transfers and the information clearly known to  
24 Defendant, and which he himself confirmed in his recitations in a  
25 series of escalating emails to Premier Cru.

26       The Court has performed a similar exercise in this Opinion at  
27 section V.B., which addresses the "badges of fraud" asserted by the  
28 Trustee in the Second MSJ and Defendant's attempts to dispute the

1 Trustee's assertions, as well as the history of Defendant's  
2 increasingly accusatory and inflammatory emails that resulted in  
3 delivery of his wine, and concludes that there is no genuine  
4 disputed issue of material fact concerning whether those transfers  
5 were undertaken with actual intent to hinder, delay, or defraud  
6 creditors. Those analyses need not be repeated here. Rather, the  
7 Court will address why those analyses demonstrate conclusively that  
8 the "actual knowledge of facts showing that the transferor had  
9 fraudulent intent" standard in *Nautilus* has unquestionably been  
10 met.

11 Indeed, it is precisely the significant overlap between the  
12 badges of fraud and irregularities in the Subject Transfers and the  
13 statements and accusations made by Defendant in the Ponzi Email,  
14 and others, that establish that the *Nautilus* standard has been met.  
15 In addition to the overwhelming number of facts that were actually  
16 known to Defendant, because he recited them to the Debtor (e.g.,  
17 (i) unreasonable delays in wine delivery, (ii) unreasonable delays  
18 in responding to inquiries, (iii) inability to process refunds,  
19 (iv) sourcing wine in a manner clearly inconsistent with orders  
20 placed for pre-arrival wine, (v) delivery in a manner also  
21 inconsistent with the pre-arrival wines, (vi) lump sum deliveries  
22 that make it clear that the wine was not "arriving" in a manner  
23 consistent with typical pre-arrival deliveries, and (vii) delivery  
24 only after Defendant had identified the Debtor's business as a  
25 Ponzi Scheme and threatened to expose them), the overlap between  
26 the facts that demonstrate Debtor's fraudulent intent and  
27 Defendant's knowledge of those facts amply satisfies the  
28 requirement of the *Nautilus* case.

1        Stated more simply, with the exception of the later-obtained  
2 confession of guilt set forth in the Plea Agreement, Defendant  
3 knew, prior to delivery of the wine included in the Subject  
4 Transfers, literally every fact upon which the Court will base its  
5 conclusion that the Subject Transfers were made with actual intent  
6 to defraud. This knowledge of facts required no additional  
7 sleuthing or imputed knowledge. And this conclusion is also  
8 consistent with the statement in the Legislative Comment to section  
9 3439.08(a): "[k]nowledge of the facts rendering the transfer  
10 voidable would be inconsistent with the good faith that is required  
11 of a protected transferee." CUVTA § 3439.08(a), comment (1).

12        And, addressing the *Nautilus* court's second concern, that a  
13 transferee not be required to make a judgment about the voidability  
14 or fraudulent nature of a transaction, Defendant's Ponzi Email and  
15 other previously cited emails, in which he identifies, *inter alia*,  
16 the Debtor's suspicious failure to deliver wines, suspicious  
17 failure to respond to inquiries, and suspicious illiquidity, and  
18 concludes that the Debtor is operating a Ponzi Scheme, demonstrate  
19 that Defendant had no uncertainty whatsoever about what the facts  
20 that he knew established about the Debtor's business and the  
21 Subject Transfers, and no hesitancy calling the Debtor out for its  
22 fraudulent conduct.

23        Indeed, Defendant didn't simply demonstrate the requisite  
24 knowledge under *Nautilus* to defeat his claimed good faith defense,  
25 he actually weaponized that knowledge by threatening to bring  
26 criminal and civil charges against Debtor, and expose the Ponzi  
27 Scheme. As discussed previously at V.A., it is exactly the threat  
28 of exposure, typically by customers of longer standing, that is the

1 greatest peril to the operator of a Ponzi Scheme, and which ensures  
2 that the threatening creditors are satisfied, by any means  
3 necessary. And, demonstrably, so it was in this instance.

4 And, as also pointed out in the September 5 Memo, though the  
5 Trustee does not seek to cast Defendant's actions as colluding or  
6 participating in the fraudulent scheme, which would unquestionably  
7 have destroyed his ability to assert a good faith defense, it would  
8 not have been a great stretch so to have characterized Defendant's  
9 threats. In fact, Defendant's culpability on this score is made  
10 all the clearer by the fact that, not content with getting his own  
11 wine delivered to him, and terminating his "exposure" to the  
12 Debtor, he interceded on behalf of his friend Stewart McSherry,  
13 demanding that he also receive all of his wine, and impliedly  
14 threatening, again, to expose the Debtor's fraud if his friend is  
15 not satisfied in full within ten days:

16 I also mentioned to Michael that my very, very good  
17 friend Stewart McSherry in Los Angeles also needs to have  
\*\*\*\*\*ALL\*\*\*\*\* of the rest of his stuff with you shipped to  
18 him immediately, if not sooner.

19 Ten business days is plenty, it is more than enough  
time for you to get to him his stuff which is by now  
readily available from multiple sources. And has been  
for a very long time.

20 Me, I'm not so nice, not by any stretch of the  
imagination. And I know there's no point in taking your  
21 staff's entreaties to be "patient", because I'm fully  
aware by now that you and your people will only take  
advantage of it.

22 Ten days. Kindly make sure he has all his stuff and  
nothing more left with your outfit by this coming Friday,  
January 24, 2014.

23 Decl. Karen K. Diep Ex. 36, at 111, ECF No. 114-6.

24 Against this litany of facts that demonstrate clearly Debtor's  
25 fraudulent intent and Defendant's knowledge thereof, Defendant  
26 offers a laundry list of things that he didn't actually know, as  
27

1 evidence that he lacked the requisite knowledge under *Nautilus*.  
2 Def.'s Opp'n Second MSJ 19-20, ECF No. 126. However, this position  
3 is unavailing--as *Nautilus* and other cases make clear, good faith  
4 is measured on a totality of the circumstances basis, and is  
5 dependent on facts that may support inferences. Thus, no one fact  
6 or collection of facts is necessarily determinative of the  
7 requisite knowledge, and Defendant's ignorance of particular facts  
8 is by definition not conclusive, and is in reality neither here nor  
9 there. Moreover, Defendant's protestations of ignorance are of  
10 little import, considered against the contents of the Ponzi Email,  
11 and other cited emails, which in this instance function as the  
12 equivalent of the Plea Agreement, i.e., an admission of what  
13 Defendant knew, and how probative those facts were to him.

14 Defendant's remaining objections to the Trustee's challenge to  
15 the good faith defense are really nothing more than challenges to  
16 the "badges of fraud" put forth by the Trustee. As previously  
17 discussed, Defendant largely does not dispute the facts presented  
18 and when he does dispute the facts, the objections are essentially  
19 irrelevant in light of the unique nature of this case. In truth,  
20 Defendant disputes the inference that the Trustee urges the Court  
21 adopt to conclude that the Subject Transfers were made with actual  
22 intent to defraud. But the substantial amount of evidence supplied  
23 by the Trustee concerning the irregularities of the Subject  
24 Transfers, coupled with the admissions contained in the Plea  
25 Agreement, state a powerful case in support of the Trustee's claim.

26 And the Court is convinced that no reasonable juror, properly  
27 instructed and exercising her duties faithfully, could conclude  
28

1 that Defendant did not have actual knowledge of facts showing  
2 Debtor's fraudulent intent.

3 The Court is also aware of Defendant's repeated statements  
4 that he should be entitled to testify to the jury that would be the  
5 ultimate trier of fact were this matter to proceed to trial,  
6 presumably to explain to them why, when he accused Premier Cru of  
7 running a Ponzi Scheme, he did not mean that they were, well,  
8 running a "Ponzi Scheme." But as is readily apparent, Defendant's  
9 principal difficulty in this matter is not that he will not be  
10 allowed to testify on the question of his good faith--rather it is  
11 that through numerous animated messages to the Debtor, culminating  
12 with the Ponzi Email, he already has.

13       **B. California Civil Code Section 3432 Does Not Provide a**  
14       **Defense in This Matter.**

15       In footnote 15 of its Opposition to the Second MSJ, Defendant  
16 cited to the case *Ferdman v. Ferdman (In re Ferdman)*, No. B226116,  
17 2012 Cal. App. Unpub. LEXIS 3755, at \*15 (Ct. App. May 18, 2012)  
18 for the proposition that "California courts have repeatedly held  
19 that even an insolvent debtor's decision to prefer one creditor  
20 over another, through a transfer made for proper consideration is  
21 not a transfer made to hinder, delay or defraud." Def.'s Opp'n  
22 Second MSJ 20, ECF No. 126. In addition, a recent California Court  
23 of Appeal decision, *Universal Home Improvement, Inc. v. Robertson*,  
24 51 Cal. App. 5th 116 (2020) appears to state the proposition even  
25 more directly, that because section 3432 of the California Civil  
Code expressly provides that a debtor may prefer one creditor over  
26 another, the "'badges of fraud' do not matter when value is given,  
27 such as satisfaction of an antecedent debt." *Id.* at 127 (citing  
28

1 *Annod*, 100 Cal. App. 4th 1286 (2002); *Wyzard v. Goller*, 23 Cal.  
2 App. 4th 1183 (1994)).

3 The Court apprised the parties of the recent opinion by the  
4 Court of Appeals in *Universal Home*, and asked for the parties'  
5 views on the potential application of the doctrine set forth in  
6 *Ferdman* and *Universal Home*. More specifically, the Court offered  
7 the parties the opportunity to brief this issue prior to the  
8 hearing on the Second MSJ, and also offered to continue the hearing  
9 to accommodate the parties' desire to brief the issue. Both  
10 parties declined the offer to provide further briefing, but these  
11 issues were discussed at length during the February 3 oral argument  
12 on the Second MSJ.<sup>12</sup>

13 During oral argument, Defendant argued that *Ferdman* and  
14 *Universal Home* established a rule that where the transferee paid  
15 value for the transfer, the badges of fraud utilized in connection  
16 with the inquiry whether a transfer was made with actual fraudulent  
17 intent are irrelevant, and that this rule provided him a defense on  
18 the facts in this matter. Defendant further argued that, similar  
19 to the analysis above at section VI.A., when a federal court is  
20 applying substantive state law, as the Trustee is asking the Court  
21 to do in this instance via the Trustee's "strong arm" powers as set  
22 forth in 11 U.S.C. § 544, the federal court must apply state law as  
23 the state courts have done, as reflected by the decisions of that

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24

25 <sup>12</sup> Notwithstanding his declination to provide pretrial briefing on the  
26 issue, the lengthy discussion of the issue at oral argument on the Second MSJ,  
27 and the Court's decision not to request any post-trial briefing on the issue,  
28 Nicholson first filed a post-trial brief on the issue, and then sought leave to  
do so. Mot. Suppl. Br., ECF No. 142. The Court issued an Order on February 12,  
2021, denying leave to file the post-hearing brief, and has not considered it in  
connection with this disposition. Order Mot. Suppl. Br., ECF No. 143.

1 state's highest court. *In re Kirkland*, 915 F. 2d at 1238. If the  
2 state's highest court has not opined, as Defendant argued was the  
3 case here, then a federal court must attempt to determine what the  
4 state's highest court would do, mindful of the holdings of  
5 intermediate appellate courts, i.e., this Court should essentially  
6 follow *Universal Home*. *Id.* at 1239.

7 After review, the Court is convinced that the California  
8 Supreme Court would not apply section 3432 to provide a defense to  
9 Defendant in this matter, because the facts in this matter differ  
10 markedly from those relied upon by the courts in *Ferdman* and  
11 *Universal Home*. The facts in this matter provide a basis for a  
12 finding of liability in this case that is different from the  
13 scenarios in *Ferdman* and *Universal Home*. Moreover, the Court is  
14 concerned that the argument being urged by Defendant in this  
15 matter, taken to its logical end, would render superfluous or even  
16 negate numerous provisions of CUVTA, in a manner that would be  
17 contrary to well-established principles of statutory construction,  
18 and which the Court believes the California Supreme Court would be  
19 unlikely to adopt.

20 In *Universal Home*, a defendant in litigation, prior to entry  
21 of judgment in favor of the plaintiff in her action, but mindful of  
22 the likelihood thereof, transferred assets to her sister in  
23 satisfaction of an old but otherwise valid claim that exceeded the  
24 amount transferred. The trial court ruled that the sister had a  
25 valid claim, and that while payment of that claim was probably a  
26  
27  
28

1 preference, the preference doctrine is irrelevant under California  
2 law.<sup>13</sup> *Universal Home*, 51 Cal. App. 5th at 126.

3 Nor was the alleged presence of seven badges of fraud  
4 sufficient to convince the trial court that the subject transaction  
5 was made with actual intent to hinder, delay, or defraud creditors:  
6 the trial court concluded, and the Court of Appeal agreed, that the  
7 badges of fraud analysis should not be determined as a "scorecard"  
8 test, but rather on a totality of the circumstances basis, and  
9 that, properly understood, the badges of fraud are nothing more  
10 than inferences that a court may use to determine the existence or  
11 absence of a factor that is infrequently admitted, and must almost  
12 always be shown by inferences, i.e., the intent of the transferor.  
13 *Id.* at 126-27, 128.

14 The trial court and appellate court in *Universal Home* relied  
15 on longstanding California precedent for the proposition that,  
16 since a creditor may prefer one valid creditor over another, the  
17 payment of an existing claim constitutes value, and, absent fraud,  
18 does not constitute a transfer to hinder, delay, or defraud the  
19 unfortunate creditor whose claim was not paid. *Id.* at 126.

20 But this Court believes that this state court result neither  
21 sets an absolute rule against applying badges of fraud analysis to  
22 what might also be a preference claim, nor forecloses a different  
23 result based on facts closer to those presented here. Stated

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24  
25 <sup>13</sup> The defendant made this transfer notwithstanding the fact that her  
26 sister's claim was subject to a statute of limitations defense. The trial court  
27 noted that the statute of limitations defense was waivable by the Defendant, and  
28 that the statute of limitations defense did not render the claim invalid.  
*Universal Home*, 51 Cal. App. 5th at 127-28. Other cases, including at least one  
Ninth Circuit case, have agreed that even a stale claim, if otherwise valid,  
remains an obligation. See, e.g., *Maddox v. Robertson (In re Prejean)*, 994 F.2d  
706 (9th Cir. 1993).

1 differently, the somewhat anodyne observation that satisfying a  
2 valid claim may constitute "value," does not support the broad  
3 proposition that Defendant would like the Court to take from these  
4 cases, i.e., that paying value for an alternate claim must always  
5 defeat a claim of fraud by the holder of an unsatisfied claim.

6 As an initial matter, there is no support for the proposition  
7 that paying some value for satisfaction of a claim invariably  
8 defeats a fraudulent transfer claim. As one of the cases cited by  
9 Defendant, *Kemp v. Lynch*, 8 Cal. 2d 457 (1937), and moreover, the  
10 only California Supreme Court case cited, demonstrates, the  
11 presence of fraud in a transaction, for example transferring an  
12 asset, even to pay a valid claim, for less than fair value, will  
13 support a claim for fraudulent transfer. *Id.* at 460-62.

14 The *Kemp* opinion clearly supports the Trustee's assertions  
15 during oral argument that Defendant's approach ignored the  
16 limitation on section 3432's application to an alleged fraudulent  
17 transfer, i.e., that the cases that have applied section 3432 to  
18 allegations of actually fraudulent transfers have each acknowledged  
19 that the section may apply only in the absence of fraud. This  
20 approach is consistent with the case law, makes sense, and avoids a  
21 potential disharmony in the cases that would, if Defendant's  
22 position is followed to its end, result in the courts excusing  
23 fraudulent conduct.

24 Because what is manifestly clear from *Universal Home* and its  
25 predecessors is that the courts are simply not finding fraud in the  
26 totality of the circumstances presented, and efforts to point to  
27 badges of fraud that are meant to indicate a fraudulent intent are  
28 simply unavailing absent the plaintiffs' demonstration, and the

1 courts' overall sense, of some deceptive statements or practices  
2 that have harmed the objecting creditor, other than the  
3 circumstance that one creditor got paid and another didn't.

4 The situation presented in the case before us could not be  
5 more starkly different. In this case, we know from the Plea  
6 Agreement that, at least on a general level, there is no doubt that  
7 John Fox, as the principal of the debtor, intended to commit and  
8 did in fact commit fraud. In fact, based on the Plea Agreement,  
9 there were at least two types of fraud that are consistent with an  
10 enterprise identified as a Ponzi Scheme. First, Fox sent out  
11 solicitations for orders of pre-arrival wine at attractive prices,  
12 knowing at the time of the solicitation that he neither had the  
13 wines or pre-orders sufficient to satisfy the customer orders he  
14 was soliciting, nor did he intend to use, or in fact use, the funds  
15 received to order or to purchase such wines in the future. Request  
16 Judicial Notice Ex. 2, at 3-4, ECF No. 114-3. This conduct is  
17 classic representational fraud, and would also almost certainly  
18 render any debts attributed thereto non-dischargeable in the case  
19 of an individual debtor. 11 U.S.C. § 523(a)(2).

20 Then, in classic Ponzi Scheme fashion, per Fox, when he needed  
21 to satisfy an order for a threatening customer, he would not be  
22 able to satisfy the order from wines on hand or being delivered per  
23 the fictional pro-order process, and he would use funds on hand  
24 from subsequent revenues to purchase wines for the older customers,  
25 frequently at retail.

26 There is no question but that, in this scenario where, by  
27 definition and by design, a significant number of the pre-orders of  
28 wine could not be satisfied, and Fox knew that, yet continued to

1 appear to satisfy wine orders from other sources, primarily to  
2 avoid exposure of the scheme, and thereby deepen the fraud, this  
3 conduct constitutes "actual fraud" within the meaning of *Husky*.  
4 136 S. Ct. 1581.

5 The question in this case is whether the fraud extended to the  
6 Subject Transfers, which the Trustee now seeks to demonstrate  
7 through the Debtor's accounting records and certain badges of  
8 fraud. Accordingly, the question who actually received the under-  
9 supplied wines, and why, is directly related to the fraud alleged  
10 in this case, and is not "incidental," as the state courts  
11 concluded in the litigation contexts before them.

12 And, to the extent that CUVTA section 3439.04(a)(1) prohibits  
13 transactions with actual intent to "hinder, delay or defraud"  
14 creditors, if the Trustee can demonstrate that Defendant received  
15 his wine under the badges of fraud that would link those  
16 transactions to a Ponzi Scheme, that finding would be highly  
17 material in this instance, where the effect of the Ponzi Scheme is  
18 to provide one creditor the benefit of his transaction, while  
19 knowing that others will not be receiving theirs. In such cases,  
20 the hindrance or delay suffered by other creditors is not just  
21 foreseeable, it is certain, and is a direct consequence of the  
22 scheme, which makes this situation markedly different from the  
23 scenario in which, per the state courts, if Creditor A doesn't  
24 receive the transfer, Creditor B will.

25 Further, the Court is concerned that adopting the rule urged  
26 by Defendant concerning the inapplicability of badges of fraud  
27 where a party satisfies an otherwise valid debt would elevate one  
28 badge of fraud (receipt of reasonably equivalent value) over all

1 others as an inference of fraudulent intent (and actually negate  
2 all of the other badges of fraud), and destroy the conjunctive  
3 aspect of the good faith defense of CUVTA section 3439.08(a), which  
4 requires both that the transferee have paid reasonably equivalent  
5 value, and taken in good faith.

6 In light of all of these factual and legal differences between  
7 this matter and the scenarios confronted by the courts in *Universal*  
8 *Home* and its forebears, it is inconceivable to this Court that the  
9 California Supreme Court would "follow" *Universal Home*, and  
10 conclude that (a) a significant underlying fraud was not described  
11 in this case, and (b) the fact that the transfers to Defendant were  
12 not made with actual intent to hinder, delay, or defraud creditors,  
13 simply because the Debtor was satisfying a "valid" claim due to  
14 Defendant. Rather it is highly likely that the California Supreme  
15 Court would recognize the numerous bases on which to distinguish  
16 *Universal Home* from this scenario.

17 **CONCLUSION**

18 For all of the foregoing reasons, the Trustee's Second MSJ is  
19 GRANTED. The Court will enter an Order Granting Trustee's Motion  
20 for Partial Summary Judgment concurrent with the filing of this  
21 Opinion.

22 **\*\*\*END OF OPINION\*\*\***

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## COURT SERVICE LIST