

AUG 15 2016

SUSAN M. SPRAUL, CLERK
U.S. BKCY. APP. PANEL
OF THE NINTH CIRCUIT

NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY APPELLATE PANEL
OF THE NINTH CIRCUIT

| | | |
|------------------------------|---|---------------------------|
| In re: |) | BAP No. NC-15-1408-JuKiTa |
| |) | |
| MORTGAGE FUND '08 LLC, |) | Bk. No. 11-49803 |
| |) | |
| Debtor. |) | Adv. No. 13-04194 |
| |) | |
| SUSAN L. UECKER, Liquidating |) | |
| Trustee of the Mortgage Fund |) | |
| '08 Liquidating Trust, |) | |
| |) | |
| Appellant, |) | |
| |) | |
| v. |) | MEMORANDUM* |
| |) | |
| WILLIAM M. BENNETT, |) | |
| |) | |
| Appellee. |) | |
| |) | |

Argued and Submitted on July 28, 2016
at San Francisco, California

Filed - August 15, 2016

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Roger L. Efremsky, Chief Bankruptcy Judge, Presiding

Appearances: Ben G. Young of Jeffer Mangels Butler and
Mitchell LLP argued for appellant Susan L.
Uecker; Martha J. Simon argued for appellee
William M. Bennett.

Before: JURY, KIRSCHER, and TAYLOR, Bankruptcy Judges.

* This disposition is not appropriate for publication.
Although it may be cited for whatever persuasive value it may
have (see Fed. R. App. P. 32.1), it has no precedential value.
See 9th Cir. BAP Rule 8024-1.

1 Appellant Susan L. Uecker is the liquidating trustee
2 (Trustee) appointed under the confirmed chapter 11¹ plan for
3 debtor, Mortgage Fund '08 LLC (MF08). Trustee filed an
4 adversary proceeding against appellee, William M. Bennett
5 (Bennett), seeking to avoid and recover as a fraudulent transfer
6 under § 544 and California state law a \$213,535.65 payment made
7 to Bennett by The Mortgage Fund, LLC (TMF).² TMF was the sole
8 owner, manager, and member of MF08.

9 Bennett answered the complaint and pleaded several
10 affirmative defenses, including settlement and release based
11 upon an agreement between MF08 and its affiliate, chapter 11
12 debtor R.E. Loans, LLC (REL). The agreement settled disputes
13 between the parties regarding MF08's \$66 million proof of claim
14 (POC) filed in REL's bankruptcy case that was commenced in
15 Texas. As an investor and noteholder in REL's bankruptcy case,
16 Bennett's claim, and payment on that claim, was affected by the
17 settlement. The Texas bankruptcy court approved the settlement
18 agreement (SA), which was incorporated into REL's confirmed
19 plan. Trustee and Bennett filed cross-motions for summary
20 judgment. Trustee moved for summary judgment on her
21 constructive fraudulent transfer claim for relief, and Bennett
22

23
24 ¹ Unless otherwise indicated, all chapter and section
25 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532,
26 "Rule" references are to the Federal Rules of Bankruptcy
Procedure, and "Civil Rule" references are to the Federal Rules
of Civil Procedure.

27 ² On April 8, 2015, the bankruptcy court entered a
28 scheduling order which consolidated this adversary with Uecker v.
Montgomery, Adv. No. 13-04190, for purposes of trial.

1 moved for summary judgment on, among other things, his twelfth
2 affirmative defense of settlement and release. After a hearing,
3 the bankruptcy court took the matters under advisement.

4 The bankruptcy court subsequently issued a decision finding
5 that the SA covered Trustee's fraudulent transfer claim against
6 Bennett and that all other issues raised in the summary judgment
7 motions were moot. The court entered an order granting
8 Bennett's motion for summary judgment (MSJ) and denying
9 Trustee's MSJ. Trustee appeals from that order.³

10 The SA provides that California law governs its
11 construction. Applying California law, we determine that the
12 record, when viewed in the light most favorable to the Trustee,
13 shows that there is no genuine issue of material fact as to the
14 proper construction of the terms "REL Transfer," "Paid by REL,"
15 and "Any Third Party" as used in the SA. Therefore, Bennett was
16 entitled to judgment as a matter of law. Accordingly, we
17 AFFIRM.

25 ³ Trustee also appealed the bankruptcy court's order
26 granting summary judgment in favor of Montgomery in the related
27 adversary proceeding, BAP No. NC-15-1415. Trustee filed a notice
28 of related appeals and a request for consolidation of the two
appeals for oral argument. On March 4, 2016, a one-judge order
set the related appeals before the same merits panel.

1 I. FACTS⁴

2 A. The MF08 and REL Bankruptcy Cases

3 On September 12, 2011, several investors filed a chapter 7
4 involuntary bankruptcy petition against MF08 in the bankruptcy
5 court for the Northern District of California. The bankruptcy
6 court converted the case to chapter 11 and entered an order for
7 relief on September 28, 2011. As of the petition date, MF08 had
8 about 472 noteholders who were owed approximately \$80 million
9 and held a real estate portfolio valued at around \$72 million.

10 The bankruptcy court approved MF08's disclosure statement
11 and confirmed its plan by order entered on February 3, 2012.
12 The confirmation order established the MF08 liquidating trust;
13 Trustee has been in place since that time.

14 REL commenced its chapter 11 case in the Northern District
15 of Texas on September 13, 2011.⁵ At the time of its filing, REL
16 had about 2,900 noteholders who were owed approximately
17 \$646 million (REL Noteholders). On September 22, 2011, the
18 United States Trustee appointed the Official Committee of
19 Noteholders (Noteholders Committee) in REL's bankruptcy case.

20
21 ⁴ We borrow heavily from the comprehensive facts set forth
22 in the bankruptcy court's memorandum decision on this matter and
23 its published decision in the related matter, Susan L. Uecker,
Trustee of the Mortgage Fund '08 Liquidating Trust v. Montgomery
(In re Mortgage Fund '08 LLC), 541 B.R. 467 (Bankr. N.D. Cal.
24 2015).

25 ⁵ Capital Salvage, a California corporation, and R.E.
26 Future, LLC (RE Future), also filed chapter 11 cases on the same
27 date as REL. Capital Salvage and RE Future were entities that
28 owned most of the real property obtained through foreclosure
sales by REL. REL is the sole shareholder of Capital Salvage and
the sole member of RE Future. Those cases were jointly
administered with REL's case.

1 **B. Ownership and Operation of MF08 and REL**

2 Walter Ng and his sons, Kelly Ng and Barney Ng, owned,
3 managed, and controlled, directly or indirectly, MF08 and REL
4 and their related entities.

5 Walter and Kelly Ng formed REL in January 2002. REL was an
6 investment company that issued secured loans to real estate
7 developers. To raise money, REL sold unregistered securities to
8 investors in exchange for making the investors "members" of REL.
9 Bennett was an investor and member in REL.

10 In 2007, REL faced liquidity problems due to decreasing
11 values in the real estate market. Its attorneys also advised
12 REL that that it had been violating state and federal securities
13 laws by selling securities without registration as required by
14 the Securities and Exchange Commission. Due to these
15 violations, the attorneys urged REL to immediately stop
16 soliciting new investments. As a result, by June 2007 REL had
17 \$20 million in loan commitments, had only \$1 million cash on
18 hand and could not meet the withdrawal requests from its
19 investors.

20 In November 2007, REL made its members into noteholders in
21 what is referred to as the "Exchange Transaction" and the
22 issuance of "Exchange Notes."

23 To address REL's severe cash flow problems, in December
24 2007, Walter and Kelly Ng created MF08 for the stated purpose of
25 raising capital through the issuance of notes to investors and
26 making loans secured by real estate with the funds raised. In
27 reality, MF08 was part of a scheme perpetrated by the Ngs in
28 which investors' money was funneled from MF08 to REL. According

1 to Trustee, MF08 transferred over \$66 million of the
2 approximately \$80 million raised from MF08 investors to REL.

3 As mentioned above, TMF was MF08's sole owner, manager, and
4 member. Walter Ng and Kelly Ng were the sole members of TMF and
5 thus controlled MF08.

6 **C. MF08's \$66 Million POC in the REL Case**

7 Prior to Trustee's appointment as liquidating trustee, MF08
8 filed a POC in the REL case for \$66,226,496. The attachment to
9 the POC stated:

10 [B]etween December 4, 2007, and February 4, 2009, **the**
11 **Ngs caused** the aggregate sum of \$66,226,496 to be
12 transferred from MF08's bank account to [REL] (the
13 "Cash Transfers"). The Cash Transfers were made
14 either (1) directly to [REL], (2) **indirectly through**
15 **[TMF] or Bar-K**, or (3) to [REL's] borrowers to enable
16 such borrowers to service or repay loans extended to
17 them by [REL]. (Emphasis added).

18 The POC alleged that the Ngs caused the "Cash Transfers" and
19 that they were made with the "actual intent to hinder, delay or
20 defraud entities to whom MF08 was or became, on or after the
21 dates that such transfer[s] were made, indebted." Also included
22 with the POC was a "Table of Cash Transfers from MF08 to the
23 Debtor" which detailed the dates, check numbers, and amounts
24 purportedly transferred by MF08 to REL from December 4, 2007, to
25 February 4, 2009.⁶ Trustee continued to assert the POC in the

24 ⁶ To be clear, the list of cash transfers showed only those
25 transfers made from MF08 to REL and did not identify those
26 transfers that REL made to the holders of the Exchange Notes,
27 either directly or indirectly through TMF or Bar-K. MF08
28 maintained that if it could trace the funds to the holders of the
Exchange Notes, it might have the right to pursue recovery from
them. Due to the settlement of its POC, tracing became

(continued...)

1 REL bankruptcy case after her appointment.

2 **D. MF08's Settlement with REL and Confirmation of the REL Plan**

3 REL informally objected to MF08's POC. On April 24, 2012,
4 Trustee, REL, and other principle stakeholders in the REL case –
5 Wells Fargo Capital Finances, LLC (REL's secured lender) and the
6 Noteholders Committee (representing Bennett's interests as a REL
7 Noteholder), participated in a judicial mediation regarding the
8 dispute over the POC and other disputes related to confirmation
9 of a plan.⁷ Having failed to reach a settlement on that date,
10 the parties continued to negotiate and eventually reached an
11 agreement regarding the validity and priority of MF08's POC.

12 Prior to the execution of the SA, the Noteholders Committee
13 sent a letter to the REL Noteholders, including Bennett, dated
14 May 16, 2012. The committee recommended that the noteholders
15 vote to accept the plan, explaining:

16 [T]he Plan Compromise⁸ represents a favorable outcome
17 for Noteholders when weighed against the risk,
18 uncertainty and potential cost of litigating against
19 objections to the allowance or priority of the
20 Noteholders' claims. The proposed Plan Compromise
21 resolves the debtors' and MF08's potential claims
22 against Noteholders to recover prepetition
23 distributions as alleged fraudulent conveyances,
24 ensures that current Noteholders will not be at risk
25 of being sued by the Liquidating Trustee for the

22 ⁶(...continued)

23 unnecessary. To the extent that Trustee's counsel asserted at
24 oral argument that the list defined the universe of Noteholders
25 entitled to the waiver in question, the list could not do so,
since it showed transfers to, not from, REL.

26 ⁷ Development Specialists, Inc. (DSI) also participated in
27 the all-day mediation. Other than DSI, all the parties agreed to
the terms of the modified plan and the SA.

28 ⁸ The "Plan Compromise" is explained below.

1 recovery of distributions paid out years ago, and
2 insulates Noteholders from the expense of defending
against such litigation.

3 The parties, including Trustee, executed the SA on May 30, 2012.

4 The SA allowed REL to proceed with confirmation of its plan.

5 REL filed a motion for approval of the SA under Rule 9019
6 (Motion). At the same time, REL filed its Modified Fourth
7 Amended Joint Chapter 11 Plan of Reorganization, dated June 1,
8 2012, which had been amended to comply with the requirements of
9 the SA with MF08.

10 In the Motion seeking approval, REL generally reiterated
11 the provisions set forth in the SA. REL stated that MF08
12 contended, based on various theories, including that the
13 transfers may have constituted intentional or constructive
14 fraudulent transfers, that REL was liable to it for the
15 \$66 million received. The Motion defined the "REL Transfers" as
16 the transfer of \$66 million made between December 2007 and
17 "approximately August of 2008" and REL's commingling of that
18 amount in its general account with other REL funds. The Motion
19 also stated that MF08 contended that "if it [could] trace the
20 funds that it transferred to REL from REL to any given [REL]
21 Noteholder, MF08 might have the right to pursue recovery from
22 that [REL] Noteholder as a subsequent transferee pursuant to
23 Bankruptcy Code § 550(b)." This potential right to assert
24 claims against noteholders that received REL Transfers was
25 defined as the "MF08 Potential Avoidance Actions."

26 The Motion then described the response by REL and the
27 Noteholders Committee to MF08's contentions:

28 [REL] and the Noteholders Committee contend that

1 Noteholders who received the REL Transfers who were
2 not insiders of [REL] cannot be liable to MF08 because
3 (a) it is not possible to trace the dollars received
4 from MF08 to any specific REL Transfer or transferee;
5 and (b) each [REL] Noteholder that received an REL
6 Transfer, with the possible exception of insiders of
7 [REL], received any such REL Transfer on account of a
8 debt payable by [REL] for value, in good faith, and
9 without knowledge of the voidability of the transfer
10 from MF08 to [REL] (even assuming that transfer is
11 avoidable) and, therefore, would be shielded from
12 liability pursuant to Bankruptcy Code § 550(b).

13 The Motion also described the "prior plan compromise" which
14 had been negotiated by REL and the Noteholders Committee and the
15 change to it which was now required by the proposed settlement
16 with MF08. The prior plan compromise provided that if the REL
17 Noteholders voted to accept the plan, the REL Noteholders' lien
18 on REL assets would be released, they would share pro rata with
19 holders of general unsecured claims and their claims would not
20 be "subordinated or challenged," but each REL Noteholders' claim
21 would be reduced by 50% of any cash received after the November
22 2007 Exchange Transaction through the REL petition date.

23 The proposed agreement with MF08 made one change to the
24 "prior plan compromise." Instead of the REL Noteholders sharing
25 pro rata with the REL general unsecured creditors, the first
26 \$5 million distributed was to go to the REL general unsecured
27 creditors before the REL Noteholders would share pro rata. This
28 change increased the distribution to general unsecured
creditors, primarily benefitting MF08 as the largest such
creditor, and reduced the distribution to REL Noteholders
through reallocation of the first \$5 million. In exchange for
this "enhancement," MF08 agreed to vote its \$66 million claim in
favor of the plan. Per the agreement, MF08 would also waive its

1 right to pursue all MF08 Potential Avoidance Actions against REL
2 Noteholders, and MF08 would be appointed to the trust oversight
3 committee of the liquidating trust to be created under the REL
4 Plan.

5 In seeking court approval for this agreement, REL explained
6 that, absent this agreement, the parties would be forced to
7 litigate the merits of the MF08 POC, the merits of the final
8 plan compromise, the relative priorities and rights as between
9 the holders of general unsecured claims and the REL Noteholders,
10 and the merits of the MF08 Potential Avoidance Actions. This
11 was an unattractive proposition because it would "consume
12 substantial cash that would otherwise be distributable to REL
13 Noteholders and MF08's creditors."

14 As further support, REL mentioned that many REL Noteholders
15 were also investors in MF08 and paying the professionals to
16 redistribute the limited funds available as between MF08 and REL
17 would reduce the total amount received by all creditors.
18 Litigating MF08's Potential Avoidance Actions would also likely
19 be complex and could require expensive efforts to trace funds,
20 and every dollar spent on professionals would reduce the amount
21 available for distribution to creditors. The modified plan
22 eliminated these issues and was supported by all stakeholders,
23 including the committee of MF08's noteholders.

24 On June 18, 2012, the REL bankruptcy court confirmed REL's
25 plan and approved the SA.

26 **E. The Relevant Sections of the SA**

27 The Recitals in section 2 of the SA state:

28 2.01. MF08 transferred cash in an amount equal to

1 \$66,226,496 to R.E. Loans during the period from
2 December of 2007 and through 2008.

3 2.02. MF08 contends that R.E. Loans is liable to MF08
4 for the monies received on various theories, including
5 without limitation based upon the contention that the
6 transfers may have constituted fraudulent transfers.

7 2.03. During the time period from December of 2007
8 through approximately August of 2008, R.E. Loans
9 received cash and deposited that cash into its general
10 account from multiple sources, including without
11 limitation (a) the transfers from MF08 described in
12 2.01, above, (b) payoffs by R.E. Loans' borrowers of
13 principal and interest, (c) sales of assets, and
14 (d) advances by Wells Fargo Capital Finance, LLC
15 ("Wells Fargo").

16 2.04. During the time period from December of 2007
17 through approximately August of 2008, R.E. Loans made
18 payments out of its general account to many different
19 parties, including without limitation payments to
20 various creditors, including without limitation the
21 holders of Exchange Notes issued to R.E. Loans'
22 Noteholders (REL Transfers).

23 2.05. MF08 contends that if it could trace the funds
24 that it transferred to R.E. Loans as described in
25 Paragraph 2.01 from R.E. Loans to the holders of
26 Exchange Notes, MF08 might have the right to pursue
27 recovery from the holders of Exchange Notes as
28 "subsequent transferees" pursuant to Bankruptcy Code
§ 550(d). R.E. Loans contends that holders of
Exchange Notes who received the REL Transfers cannot
be liable to MF08 because (a) it is not possible to
trace the dollars received from MF08 to any specific
REL Transfer; and (b) each holder of an Exchange Note
that received an REL Transfer, with the possible
exception of insiders who may have received an REL
Transfer, received any such REL Transfer on account of
a debt payable by R.E. Loans for value, in good faith,
and without knowledge of the voidability of the
transfer from MF08 to R.E. Loans (even assuming that
transfer is avoidable) and, therefore, would be
shielded from liability pursuant to Bankruptcy Code
§ 550(b).

2.06. MF08's potential right to assert claims against
holders of Exchange Notes that received REL Transfers
shall be referred to herein as "MF08's Potential
Avoidance Actions".

Section 3.01-3.03 of the SA dealt with the allowance of
MF08's claim in the REL case. If REL's modified plan was

1 confirmed and the "Plan Compromise" approved by the Texas
2 bankruptcy court, then MF08's POC "shall be allowed as a general
3 unsecured claim against R.E. Loans in the amount of
4 \$66,226,496. . . ."

5 Section 4 of SA, titled "Waiver of Right to Pursue MF08
6 Potential Avoidance Actions," provides:

7 4.01. If the MF08 Claim is Allowed pursuant to
8 Paragraph 3, above, MF08 waives the right to pursue
9 any MF08 Potential Avoidance Actions; provided,
10 however, that this Agreement shall not limit or
11 restrict the right of MF08 to bring any action against
12 any third party, including any manager, member,
13 insider or professional of MF08. This provision shall
14 be void and of no further force or effect if the MF08
15 Claim is not Allowed pursuant to Paragraph 3, above.

16 4.02. With respect to the claims released herein,
17 MF08 acknowledges that it has been advised by its
18 attorneys concerning, and is familiar with,
19 California Civil Code Section 1542 and it expressly
20 waives any and all rights under California Civil Code
21 Section 1542 and under any other federal or state
22 statute or law of similar effect with respect to the
23 claims released herein. Section 1542 of the
24 California Civil Code provides as follows:

25 A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS
26 WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT
27 TO EXIST IN HIS OR HER FAVOR AT THE TIME OF
28 EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM
OR HER MUST HAVE MATERIALLY AFFECTED HIS OR
HER SETTLEMENT WITH THE DEBTOR.

29 Finally, section 8 provided that the SA be interpreted
30 according to California law.

31 **F. The Transfer at Issue**

32 As noted, Bennett was an investor in REL, an affiliate of
33 MF08. Bennett was not an investor in, or a creditor of, MF08.

34 On August 14, 2008, MF08 wrote check no. 1175 from its
35 account payable to TMF for \$237,000. TMF deposited this check
36 into its bank account on the same date. This was the only

1 deposit made into this TMF account during August 2008. On
2 August 15, 2008, TMF wrote its check no. 1027 to Bennett for
3 \$213,535.65. TMF's bank honored this check on Monday August 18,
4 2008.

5 Bennett's REL investor portfolio account statement
6 describes the \$213,535.65 payment as a "note decrease" and shows
7 a balance in the account of \$2,404 as of October 25, 2011.
8 According to Bennett, Walter Ng handed him the \$213,535.65 check
9 at Mr. Ng's home. REL's amended schedule D showed that REL owed
10 Bennett \$3,027.22 as of its September 2011 petition date.

11 **G. The Underlying Adversary Proceeding**

12 On October 6, 2014, Trustee filed an amended complaint
13 seeking to avoid and recover the \$213,535.65, alleging that
14 amount was fraudulently transferred by MF08 to TMF and then paid
15 to Bennett on August 15, 2008, with funds that could be traced
16 to MF08. The amended complaint further alleged that the
17 \$213,535.65 transfer to Bennett was both intentionally and
18 constructively fraudulent under California law.

19 On November 6, 2014, Bennett answered the complaint.
20 Bennett denied that the \$213,535.65 transfer to him by MF08 was
21 intentionally or constructively fraudulent and alleged twelve
22 affirmative defenses, including that the court-approved SA in
23 REL's bankruptcy case and REL's confirmed plan operated as a
24 settlement and release of any fraudulent transfer claims MF08
25 could assert against him. Attached to his answer as Exhibit "B"
26 was a copy of Bennett's investor account with REL that reflected
27 the payment as a "note decrease."

1 **H. The MSJs**

2 On July 27, 2015, Bennett filed his MSJ alleging that there
3 were no material issues of fact in dispute and that he was
4 entitled to judgment as a matter of law on his fourth
5 affirmative defense (good faith transferee) and his twelfth
6 affirmative defense (the SA's release). In connection with the
7 motion, Bennett requested the court to take judicial notice of
8 (1) the SA; (2) the findings of fact, conclusions of law, and
9 order confirming REL's modified Fourth Amended Joint Chapter 11
10 Plan of Reorganization, dated June 1, 2012; and (3) the order
11 approving the SA between REL and MF08.

12 On August 13, 2015, Trustee filed a MSJ on the
13 constructively fraudulent claim under § 544 and Cal. Civ. Code
14 § 3439.04(a)(2)(A). Trustee argued that the undisputed facts
15 showed that MF08 was entitled to avoid the transfer of \$237,000
16 from MF08 to TMF and may recover \$213,565 of it from Bennett as
17 either the initial transferee or the immediate transferee of the
18 initial transferee as permitted under § 550(a). She also argued
19 that Bennett's interpretation of the SA was incorrect.

20 In opposition, Bennett argued that Trustee's evidence
21 showed that the Ngs intentionally co-mingled investors' money in
22 the entities they controlled. He also pointed out that the
23 language in the SA showed that the inability to trace was a
24 predicate for the settlement and that the release language in
25 the SA applied to him. Finally, Bennett asserted that the
26 entities themselves treated the return of his investment in REL
27 as a payment **by REL**. In this regard, Bennett pointed to
28 (1) REL's amended schedule D filed in 2011 which showed he was

1 owed approximately \$3,000, and (2) his REL account statements.

2 The bankruptcy court heard the motions on September 10,
3 2015. At the hearing, Trustee's counsel asserted that the
4 primary question raised in the motions was whether MF08 released
5 the avoidance action claims against Bennett under the SA.
6 Counsel argued that only a narrow category of claims were
7 settled through the SA as shown by sections 2.04 and 2.05 of the
8 SA. That is, only those avoidance claims that were paid by REL
9 and not claims paid by TMF. He also maintained that the release
10 in the SA under Cal. Civ. Code § 1542 was a "general release,"
11 and section 4.01 of the SA preserved unknown claims by
12 authorizing Trustee to file any action against any "third
13 party." Following argument, the bankruptcy court took the
14 matter under submission.

15 On November 6, 2015, the bankruptcy court issued its
16 memorandum decision finding that the release in the SA covered
17 Trustee's claims in the adversary proceeding and that all other
18 issues were moot. On November 13, 2015, the bankruptcy court
19 entered an order granting Bennett's MSJ and denying Trustee's
20 MSJ. Trustee filed a timely notice of appeal from that order.

21 **II. JURISDICTION**

22 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
23 §§ 1334 and 157(b)(2)(H). We have jurisdiction under 28 U.S.C.
24 § 158.

25 **III. ISSUE**

26 Whether the bankruptcy court erred in finding that the SA
27 between MF08 and REL barred MF08's fraudulent transfer claims
28 against Bennett.

1 **IV. STANDARDS OF REVIEW**

2 We review de novo the bankruptcy court's decision on cross-
3 motions for summary judgment, applying the same standard used by
4 the bankruptcy court. Brown v. City of L.A., 521 F.3d 1238,
5 1240 (9th Cir. 2008); Furnace v. Sullivan, 705 F.3d 1021, 1026
6 (9th Cir. 2013).

7 We also review de novo determinations of whether contract
8 language is ambiguous, Tyler v. Cuomo, 236 F.3d 1124, 1134 (9th
9 Cir. 2000), and "whether the written contract is reasonably
10 susceptible of a proffered meaning." Brinderson-Newberg Joint
11 Venture v. Pac. Erectors, Inc., 971 F.2d 272, 277 (9th Cir.
12 1992); see also Winet v. Price, 4 Cal.App.4th 1159, 1165 (1992)
13 (the court reviews determinations of whether contract language
14 is ambiguous de novo); Scheenstra v. Cal. Dairies, Inc.,
15 213 Cal.App.4th 370, 393 (2013) (even where uncontroverted
16 evidence allows for conflicting inferences to be drawn,
17 interpretation of contract is solely a judicial function);
18 Sunniland Fruit, Inc. v. Verni, 233 Cal.App.3d 892, 898 (1991)
19 (de novo review "where the interpretation [of the contract] does
20 not turn on the credibility of extrinsic evidence" and "where
21 the extrinsic evidence points only one way, or is
22 uncontested."); Wolf v. Super. Ct., 114 Cal.App.4th 1343, 1351
23 (2004) (where the extrinsic evidence points only one way, or is
24 uncontested, the meaning of the language in question may be
25 ascertained as a matter of law).

26 **V. DISCUSSION**

27 **A. Legal Standards for Summary Judgment**

28 "The court shall grant summary judgment if the movant shows

1 that there is no genuine dispute as to any material fact and the
2 movant is entitled to judgment as a matter of law." Civil
3 Rule 56(a), made applicable here by Rule 7056. Material facts
4 are those necessary to establish the elements of a party's cause
5 of action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248
6 (1986). A genuine issue for trial exists only if "the evidence
7 is such that a reasonable jury could return a verdict" for the
8 party opposing summary judgment. Id. at 248; see also Aguilar
9 v. Atl. Richfield Co., 25 Cal.4th 826, 856 (2001) (on summary
10 judgment a court "does not decide on any finding of its own, but
11 simply decides what finding such a trier of fact could make for
12 itself.").

13 When considering a motion for summary judgment, a court may
14 not weigh the evidence nor assess credibility; instead, "the
15 evidence of the non-movant is to be believed, and all
16 justifiable inferences are to be drawn in his favor." Anderson,
17 477 U.S. at 255.⁹ The court is not precluded from drawing
18 inferences against the non-moving party as long as the
19 underlying facts are viewed in the light most favorable to that
20 party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,
21 475 U.S. 574, 588 (1986). In the end, the court "must determine
22 whether the record, when viewed in the light most favorable to
23 the non-moving party, shows that there is no genuine issue of
24 material fact and that the moving party is entitled to judgment
25

26 ⁹ Trustee has not argued on appeal that the bankruptcy court
27 erred by weighing the extrinsic evidence. Accordingly, those
28 arguments are deemed waived for purposes of this appeal. Smith
v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

1 as a matter of law.” Brown, 521 F.3d at 1240.

2 A court may grant summary judgment regarding the
3 interpretation of ambiguous language in a contract if the
4 non-moving party fails to point to any relevant extrinsic
5 evidence supporting that party’s interpretation of the language.
6 Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill
7 Lynch, Pierce, Fenner & Smith, Inc., 232 F.3d 153 (2nd Cir.
8 2000); see also Torres Vargas v. Santiago Cummings, 149 F.3d 29,
9 33 (1st Cir. 1998) (summary judgment appropriate where extrinsic
10 evidence presented to the court supports only one of the
11 conflicting interpretations).

12 Under California law and summary judgment standards,
13 Bennett had the burden of proof on his affirmative defense to
14 show that the SA waiver operated as a complete defense to MF08's
15 fraudulent transfer claims against him.

16 **B. Is the SA ambiguous?**

17 This appeal involves the interpretation of the SA under
18 California law. The threshold question is whether the SA is
19 ambiguous; that is, reasonably susceptible to more than one
20 interpretation. Winet, 4 Cal.App.4th at 1165. The question of
21 ambiguity is a question of law subject to de novo review. Id.

22 “Whether the contract is reasonably susceptible to a
23 party’s interpretation can be determined from the language of
24 the contract itself,” United Teachers of Oakland v. Oakland
25 Unified Sch. Dist., 75 Cal.App.3d 322, 330 (1977), or from
26 extrinsic evidence of the parties’ intent. Winet, 4 Cal.App.4th
27 at 1165. In California, courts are required to receive
28 provisionally any proffered extrinsic evidence that is relevant

1 to show whether the contractual language is reasonably
2 susceptible to a particular meaning. Pac. Gas & Elec. Co. v.
3 G.W. Thomas Drayage & Rigging Co., Inc., 69 Cal.2d 33, 39-40
4 (1968) (rational interpretation of a contract requires at least
5 a preliminary consideration of all credible evidence offered to
6 prove the intention of the parties). Such extrinsic evidence
7 might expose a latent ambiguity when the contract appears
8 unambiguous on its face. Id. at 40 & n.8. "An appellate
9 analysis of the threshold question concerning whether the
10 contractual language is ambiguous—that is, reasonably
11 susceptible to more than one interpretation—usually involves the
12 examination of competing interpretations offered by the
13 parties." Scheenstra, 213 Cal.App.4th at 393.

14 In seeking reversal of the bankruptcy court's order in
15 favor of Bennett, Trustee repeats many of the arguments that she
16 made before the bankruptcy court. Trustee relies upon the
17 language of the SA itself for her interpretation. In a
18 nutshell, she contends that Bennett was not protected under the
19 terms of SA because he was paid by TMF and not from REL's
20 general account. Thus, according to Trustee, he was not part of
21 the protected class of REL Transferees under the SA, making
22 MF08's waiver of avoidance claims inapplicable as to him.

23 To support her argument, she urges us to look at the
24 defined terms in sections 2.04-2.06 of the SA. Section 2.04
25 defines a "REL Transfer" as payments made out of REL's general
26 account to the holders of Exchange Notes issued to REL's
27 Noteholders. Trustee asserts that this provision plainly shows
28 that MF08 released only its claims against REL Noteholders for

1 recovery of amounts **paid** by REL and that these are the MF08
2 Potential Avoidance actions MF08 agreed to release under
3 section 2.06. She also relies on section 4.01 which states that
4 "this Agreement shall not limit or restrict the right of MF08 to
5 bring **any** action against **any** third party." (Emphasis added).
6 According to Trustee, the phrases "any action" and "any third
7 party" are broad and include her avoidance action against
8 Bennett.

9 In his opposing brief, Bennett argues that that he was an
10 REL Transferee within the meaning of the SA and therefore
11 protected by MF08's waiver of the avoidance claims. In this
12 regard, Bennett contends that Trustee ignores the "plain
13 meaning" of section 2.04 of the SA which states that REL made
14 payments ". . . . to many different parties, including without
15 limitation, payments to various creditors, including without
16 limitation the holders of Exchange Notes issued to R.E. Loans'
17 Noteholders ('REL Transfers')." According to Bennett, the words
18 "many different parties," "various creditors" and "including"
19 are plain: the payments made by [REL] between December 2007 and
20 August 2008 made to "many different parties" include any and all
21 payments [REL] made to MF08. These payments are REL Transfers.
22 Bennett further maintains that the sourcing and co-mingling of
23 MF08's money supports the fact that he received an REL Transfer.
24 Bennett points out that Trustee presented no evidence of how the
25 money came into MF08's bank account because of the inherent
26 tracing problems which were acknowledged in the SA.

27 The bankruptcy court admitted extrinsic evidence to inform
28 its decision on the meaning of the SA: (1) Bennett's REL loans

1 account statement; (2) REL's amended schedule D which showed it
2 owed approximately \$3,000 to Bennett; (3) REL's motion seeking
3 approval of the SA between REL and MF08 along with the SA; (4) a
4 letter from the REL Noteholders Committee to REL Noteholders;
5 and (5) TMF's REL investor portfolio account statement.

6 In conducting our independent review into whether an
7 ambiguity exists, we examined the SA and the POC and considered
8 the admitted extrinsic evidence. Based upon our review, we
9 determine that the bankruptcy court did not err in ruling that
10 the SA was ambiguous with respect to the terms "REL Transfer,"
11 "Paid by REL," or "Any Third Party," as those terms were
12 reasonably susceptible to the parties' competing
13 interpretations. Accordingly, the bankruptcy court properly
14 admitted the extrinsic evidence to aid it in interpreting the
15 SA. Pac. Gas & Elec. Co., 69 Cal.2d at 37.

16 **C. Interpretation of the SA**

17 This determination does not end our inquiry. Although the
18 above-referenced terms are ambiguous, we still must consider
19 whether the bankruptcy court appropriately resolved the
20 ambiguity. The parties do not challenge the SA itself and
21 presented no extrinsic evidence as to **their** intent at the time
22 the SA was signed. This is not surprising since Bennett was not
23 a party to the SA and the negotiations and as the court ruled
24 that the communications regarding the settlement of MF08's POC
25 made during the mediation held in REL's bankruptcy case were
26
27
28

1 confidential.¹⁰

2 Nonetheless, as mentioned above, to inform its decision on
3 the meaning of the SA, the bankruptcy court admitted extrinsic
4 evidence. Although Trustee disputes the inferences to be drawn
5 from the extrinsic evidence, the evidentiary facts themselves
6 are undisputed. The meaning of the terms "REL Transfer," "Paid
7 by REL," and "Any third Party," was not dependent on the
8 credibility of conflicting evidence. There were thus no factual
9 issues for the bankruptcy court to resolve. Accordingly, we
10 review the SA in the context of the extrinsic evidence presented
11 and make our own independent determination of its meaning. See
12 Wolf, 114 Cal.App.4th at 1351; Scheenstra, 213 Cal.App.4th at
13 390.

14 We determine the meaning of the ambiguous language by
15 applying the appropriate canons of construction governing
16 contracts. "[W]here the language of the contract is ambiguous,
17 it is the duty of the court to resolve the ambiguity by taking
18 into account all the facts, circumstances and conditions
19 surrounding the execution of the contract.'" Frankel v. Bd. of
20 Dental Exam'rs, 46 Cal.App.4th 534, 544 (1996); Pac. Gas & Elec.
21 Co., 69 Cal.2d at 40 (court may consider the circumstances under
22 which the agreement was made, including its object, nature and
23 subject matter). The goal is to interpret the contract to give
24 effect to the mutual intent of the parties as it existed when
25 they contracted. Cal. Civ. Code § 1636; see also Pac. Gas &

26
27 ¹⁰ Trustee filed a motion seeking to prohibit the use of
28 mediation documents for any purpose in the litigation. The
bankruptcy court granted that motion.

1 Elec. Co., 69 Cal.2d at 38. It is the outward expression of the
2 agreement, rather than a party's unexpressed intention, which
3 the court will enforce. Winet, 4 Cal.App.4th at 1165.

4 **1. "REL Transfer" and "Paid by REL"**

5 We begin with the ambiguous terms "REL Transfer" and "Paid
6 by REL." Relying on the plain language of the SA, Trustee
7 maintains that since Bennett was paid by TMF from its bank
8 account, he was not "paid by REL." Therefore, he did not
9 receive a "REL Transfer" within the meaning of the SA and is not
10 protected by MF08's waiver of avoidance actions.

11 This interpretation is not supported when we consider the
12 admitted extrinsic evidence and the context under which
13 settlement of MF08's POC was reached. First, it is undisputed -
14 as the MF08 POC stated - that the Ngs controlled MF08, TMF, and
15 REL and had a pattern of treating them as they wished: "the Ngs
16 caused the \$66 million in transfers to be made, either directly
17 or indirectly." Thus, in this Ponzi-like scheme, MF08
18 acknowledged in its POC that the Ngs did not differentiate
19 between REL, MF08, or TMF.

20 The evidence also shows that by all appearances, Bennett
21 **had** been paid by REL and received a REL Transfer. As the
22 bankruptcy court properly noted: (1) Bennett was paid during the
23 time period described in the POC (i.e., December 2007 - February
24 2009), and in the time period in section 2.04 of the SA (i.e.,
25 December 2007 - August 2008); (2) his investor portfolio account
26 statement showed REL took credit for making the \$213,535.65
27 payment when it was made; and (3) REL's amended schedule D
28 showed it took credit for making this payment. The bankruptcy

1 court also correctly observed that TMF's investor portfolio
2 account statement for REL showed REL treated the \$213,535.65
3 payment as a purchase by TMF of an interest in REL that
4 corresponded - to the day and to the penny - with this
5 \$213,535.65 payment to Bennett.

6 In addition, the Noteholders' Committee's letter sent to
7 Bennett and other REL Noteholders is consistent with the
8 documentation Bennett received from REL before any controversy
9 arose. See S. Cal. Edison Co. v. Super. Ct., 37 Cal.App.4th
10 839, 851 (1995) ("The rule is well-settled that in construing
11 the terms of a contract the construction given it by the acts
12 and conduct of the parties with knowledge of its terms, and
13 before any controversy has arisen as to its meaning, is
14 admissible on the issue of the parties' intent.").

15 In the end, the evidence which does appear in the record
16 shows that the parties necessarily intended that the waiver by
17 MF08 of its right to sue any REL investor for a fraudulent
18 transfer included anyone paid directly or indirectly by REL.
19 Although Trustee urges us to adopt her competing interpretation
20 of the SA, she has offered no evidence in support of her
21 position. Given the lack of evidence supporting Trustee's
22 inferences and interpretation, the bankruptcy court reasonably
23 concluded that Bennett was entitled to judgment as a matter of
24 law. See Anderson, 477 U.S. at 249 (holding that "there is no
25 issue for trial unless there is sufficient evidence favoring the
26 nonmoving party for a jury to return a verdict for that party").

27 Indeed, the thrust of Trustee's argument on appeal is that
28 the bankruptcy court misinterpreted or misused the extrinsic

1 evidence. First, she contends that the bankruptcy court applied
2 the wrong legal standard to interpret the SA based on improper
3 extrinsic evidence. In this regard, Trustee relies on the
4 bankruptcy court's statement that "[t]he extrinsic evidence is
5 consistent on one essential point. By everything he was told by
6 REL, it is reasonable to interpret the Settlement Agreement as
7 Mr. Bennett does." Trustee maintains that the bankruptcy court
8 erroneously relied upon the statements of REL, only one party to
9 the agreement, and Bennett, a stranger to the agreement.

10 Trustee contends that "at most" REL's communications to Bennett
11 show its subjective intent, but subjective intent is irrelevant.

12 At another point, Trustee maintains that the Noteholders'
13 Committee's letter is another example of their subjective
14 intent. Trustee asserts that the letter does not evidence the
15 mutual intent of the parties. Trustee contends therefore that
16 this evidence does not come close to establishing beyond
17 controversy that the intent of the parties to the SA was to
18 release this claim.¹¹

19 We are not persuaded by these arguments. Error would
20 occur, if at all, if the bankruptcy court improperly admitted
21 extrinsic evidence showing only the undisclosed subjective
22 intent of REL or the Noteholders Committee, which is
23 inadmissible and incompetent under the objective theory of
24 contracts. Founding Members of the Newport Beach Country Club

25
26 ¹¹ Although MF08 did not author this letter, the compromise,
27 which the letter urged the Noteholders to vote in favor of, was
28 with MF08 and benefitted its POC. MF08's silence as to the
letter's accuracy may be construed as an agreement with its
assertions.

1 v. Newport Beach Country Club, Inc., 109 Cal.App.4th 944, 960
2 (2003) (“[U]ndisclosed statements regarding intent or
3 understanding of” the writing “are irrelevant to contract
4 interpretation under the objective theory of contracts”;
5 appellate court determines writing’s meaning de novo “[a]fter
6 winnowing out the extrinsic evidence that is irrelevant under
7 the objective theory of contracts.”). “While a party may not
8 testify to his undisclosed subjective intent in entering into an
9 agreement, the rule does not preclude admission of evidence of
10 the surrounding circumstances, usage and custom in the industry,
11 negotiations and discussion, or any other extrinsic evidence
12 which may shed light on the mutual intention of the parties.”
13 Pac. Gas & Elec. Co., 189 Cal.App.3d at 1141-42.

14 We conclude that REL’s statements and the Noteholders’
15 Committee’s letter to Bennett fall within the latter type of
16 evidence; i.e., the surrounding circumstances, negotiations, and
17 discussion, and were not the mere “undisclosed subjective
18 intent” of REL or the Noteholders’ Committee. Id. In other
19 words, this extrinsic evidence objectively “shed[s] light on the
20 mutual intent of the parties.”

21 Trustee also complains that the court erred by using the
22 extrinsic evidence to vary or modify the terms of the SA.
23 However, what Trustee characterizes as error is, in fact, her
24 disagreement over the bankruptcy court’s interpretation of the
25 SA based upon the extrinsic evidence which we address in this
26 appeal. In sum, Trustee failed to raise a genuine issue of
27 material fact as to the proper interpretation of the terms “REL
28 Transfer” and “Paid by REL.”

1 **2. "Any Third Party"**

2 We next consider the term "any third party" as used in
3 section 4.01 of the SA. Under this section, MF08 waived the
4 right to pursue any MF08 Potential Avoidance Actions "provided,
5 however, that this agreement shall not limit or restrict the
6 right of MF08 to bring any action against any third party,
7 including any manager, member, insider or professional of MF08."

8 Trustee argues that the bankruptcy court incorrectly
9 construed this provision to mean that she could commence an
10 action only against a "third party" that was a manager, member,
11 insider or professional. According to Trustee, the savings
12 clause in section 4.01 of the SA preserves **all** claims against
13 **any** third party, other than those against REL Noteholders who
14 were "paid by REL." We disagree.

15 Read naturally, the section's use of the word "any" as in
16 "any action" has an expansive meaning. However, we cannot
17 construe the phrase as expansively as Trustee would like because
18 the preservation of "any action" would ordinarily mean those
19 claims not settled. Here, as discussed above, Bennett was
20 included in the class of protected transferees since he received
21 a "REL Transfer" that was "Paid by REL," albeit indirectly.
22 MF08 settled and released that potential avoidance action
23 against him under the terms of the SA. We thus read the savings
24 clause to preserve claims other than MF08 potential avoidance
25 claims against the REL Noteholders which were settled. Limiting
26 the types of claims, which were preserved in this manner, is not
27 inconsistent with a construction that the word "including" in
28 the phrase "any third party, including any manager, member,

1 insider or professional of MF08" is expansive in the sense that
2 the Trustee may pursue nonavoidance action claims against the
3 expansive class of third parties.

4 This interpretation is also consistent with the undisputed
5 objectives of the SA to: (1) resolve the issues regarding the
6 validity and priority of MF08's claim which was based on the
7 alleged fraudulent transfer of \$66 million to REL where tracing
8 was problematic and the Ngs' commingling was endemic;
9 (2) eliminate the REL Noteholders' risk of being sued by both
10 MF08 and REL as the alleged recipients of fraudulent transfers
11 in order to ensure their support for REL's Plan; and
12 (3) eliminate MF08's ability to impede confirmation because
13 MF08's \$66 million claim made it the largest unsecured creditor
14 in REL's case.

15 As the bankruptcy court observed:

16 If there was an intent to carve this group of REL
17 Noteholders out of the release, it had to be precisely
18 stated before the settlement was incorporated into
19 REL's Plan. MF08 acknowledged from the start that the
20 'Ngs caused' every payment by any of these affiliated
21 entities to be made in a way that suited their designs
22 and the record shows the Trustee was in possession of
23 records that would have enabled her to trace this
24 transfer before she signed the Settlement Agreement.
25 To pretend otherwise endorses a fiction—that MF08 had
26 legitimate independent management.

27 The Trustee obtained the \$5 million 'enhancement' and
28 the REL Noteholders agreed to reduce their claims by
50% of what they had been paid on their REL
investments pre-petition. The REL Noteholders were
led to believe their risk of being sued—by MF08 and
REL—as the recipients of allegedly fraudulent
transfers was eliminated.

In sum, Trustee failed to raise a genuine issue of material
fact as to the interpretation of the savings clause under
section 4.01 of the SA. In the words of the bankruptcy court:

1 "As a REL Noteholder, Mr. Bennett is not the type of third party
2 the Trustee may sue" on an avoidance action.

3 **VI. CONCLUSION**

4 For the reasons stated, we AFFIRM.

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