

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NOT FOR PUBLICATION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-15-1415-JuKiTa
	)	
MORTGAGE FUND '08 LLC,	)	Bk. No. 11-49803
	)	
Debtor.	)	Adv. No. 13-04190
	)	
SUSAN L. UECKER, Liquidating	)	
Trustee of the Mortgage Fund	)	
'08 Liquidating Trust,	)	
	)	
Appellant,	)	
	)	
v.	)	<b>MEMORANDUM*</b>
	)	
ROBERT L. MONTGOMERY,	)	
	)	
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; Richard S. Miller argued for appellee  
Robert L. Montgomery.

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 11<sup>1</sup> plan for  
3 debtor, Mortgage Fund '08 LLC (MF08). Trustee filed an  
4 adversary proceeding against appellee, Robert L. Montgomery  
5 (Montgomery), seeking to avoid and recover as a fraudulent  
6 transfer under § 544 and California state law a \$150,000 payment  
7 made to Montgomery by The Mortgage Fund, LLC (TMF).<sup>2</sup> TMF was  
8 the sole owner, manager, and member of MF08.

9 Montgomery 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 Montgomery's claim, and payment on that claim, was affected by  
17 the settlement. The Texas bankruptcy court approved the  
18 settlement agreement (SA), which was incorporated into REL's  
19 confirmed plan.

20 Trustee and Montgomery filed cross-motions for summary  
21 judgment. Trustee moved for summary judgment on her  
22

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

27 <sup>2</sup> On April 8, 2015, the bankruptcy court entered a  
28 scheduling order which consolidated this adversary with Uecker v.  
Bennett, Adv. No. 13-04194, for purposes of trial.

1 constructive fraudulent transfer claim for relief, and  
2 Montgomery moved for summary judgment on, among other things,  
3 his affirmative defense of settlement and release. After a  
4 hearing, the bankruptcy court took the matters under advisement.

5 The bankruptcy court subsequently issued a decision finding  
6 that the SA covered Trustee's fraudulent transfer claim against  
7 Montgomery and that all other issues raised in the summary  
8 judgment motions were moot. See Susan L. Uecker, Trustee of the  
9 Mortgage Fund '08 Liquidating Trust v. Montgomery (In re  
10 Mortgage Fund '08 LLC), 541 B.R. 467 (Bankr. N.D. Cal. 2015).  
11 The court entered an order granting Montgomery's motion for  
12 summary judgment (MSJ) and denying Trustee's MSJ. Trustee  
13 appeals from that order.<sup>3</sup>

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

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24  
25 <sup>3</sup> Trustee also appealed the bankruptcy court's order  
26 granting summary judgment in favor of Bennett in the related  
27 adversary proceeding, BAP No. NC-14-1408. 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. FACTS<sup>4</sup>

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 Among other things, the order established the MF08 liquidating  
13 trust; 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.<sup>5</sup> 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.

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

25 <sup>5</sup> 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 Montgomery 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  
25 of raising capital through the issuance of notes to investors  
26 and making loans secured by real estate with the funds raised.  
27 In 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.<sup>6</sup> Trustee continued to assert the POC in the

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24 <sup>6</sup> 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 Montgomery's interests as a  
7 REL Noteholder), participated in a judicial mediation regarding  
8 the dispute over the POC and other disputes related to  
9 confirmation of a plan.<sup>7</sup> The parties did not reach a settlement  
10 on that date but continued to negotiate and eventually reached  
11 an 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 Montgomery,  
14 dated May 16, 2012. The committee recommended that the  
15 noteholders vote to accept the plan, explaining:

16 [T]he Plan Compromise<sup>8</sup> 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

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22 <sup>6</sup>(...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 <sup>7</sup> Development Specialists, Inc. (DSI) also participated in  
27 the all-day mediation. All the parties other than DSI agreed on  
the terms of the modified plan and the SA.

28 <sup>8</sup> 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, Montgomery was an investor in REL, an affiliate  
33 of MF08. Montgomery was not an investor in, or a creditor of,  
34 MF08.

35 Montgomery had \$924,887 invested in REL as of December 31,  
36 2007. In February 2008, Montgomery submitted a written request

1 to REL to return \$450,000, or half of his principal investment,  
2 based on his decision to decrease his investment in real estate  
3 as an asset class. REL then sold Montgomery's ownership shares  
4 in \$150,000 increments, on June 17, 2008, July 23, 2008, and  
5 August 21, 2008, for a total of \$450,000 as requested. Checks  
6 representing these distributions were sent directly to  
7 Montgomery's Wells Fargo IRA account, with a contemporaneous  
8 statement indicating that all three payments came from REL.  
9 Trustee seeks to recover the second \$150,000 transfer because it  
10 was made by a check written on TMF's bank account whereas the  
11 other two payments were made from REL's account.

12 The bank documents offered by both Trustee and Montgomery  
13 show the following sequence of events:

- 14 1. On July 21, 2008, REL transferred \$528,791 to MF08.
- 15 2. On July 21, 2008, MF08 transferred \$528,791 to TMF.
- 16 3. On July 22, 2008, TMF wire transferred \$400,000 to Troy  
17 Demanes, another REL Noteholder.
- 18 4. On July 23, 2008, TMF wrote check no. 1020 for \$150,000  
19 made payable to "WFB IRA Services fbo Montgomery."
- 20 4. On July 25, 2008, REL transferred \$447,566 to MF08.
- 21 5. On July 28, 2008, MF08 transferred \$447,566 to TMF.
- 22 6. On July 28, 2008, TMF's bank honored the \$150,000 check  
23 to Montgomery. Montgomery's IRA statement shows his account had  
24 received this \$150,000 as of July 31, 2008.

25 From this sequence of events, the record shows that it is  
26 undisputed that in July 2008, REL transferred \$528,791 to MF08  
27 and then transferred \$447,566 to MF08 and MF08 immediately  
28 transferred these exact amounts to TMF. It is also undisputed

1 that when sufficient funds were in the TMF account, TMF's bank  
2 honored the check to Montgomery and it was credited to his IRA  
3 account on July 31, 2008.

4 **G. The Underlying Adversary Proceeding**

5 On October 6, 2014, Trustee filed an amended complaint  
6 seeking to avoid and recover the \$150,000, alleging that amount  
7 was fraudulently transferred by MF08 to TMF and then paid to  
8 Montgomery on July 23, 2008, with funds that could be traced to  
9 MF08. The amended complaint further alleged that the \$150,000  
10 transfer to Montgomery was both intentionally and constructively  
11 fraudulent under California law.

12 On October 23, 2014, Montgomery answered the complaint.  
13 Montgomery denied that the \$150,000 transfer to him by MF08 was  
14 intentionally or constructively fraudulent and alleged seven  
15 affirmative defenses. In his second affirmative defense,  
16 Montgomery alleged that the court-approved SA in REL's  
17 bankruptcy case and REL's confirmed plan operated as a  
18 settlement and release of any fraudulent transfer claims MF08  
19 could assert against him. He also maintained that since he  
20 agreed under the SA to give up a valid claim of \$450,000 in  
21 favor of MF08 and other creditors in return for MF08 obtaining  
22 priority repayment of the first \$5 million in income from REL,  
23 this constituted value or reasonably equivalent value for  
24 purposes of § 548.<sup>9</sup>

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27 <sup>9</sup> Although the complaint did not assert fraudulent transfer  
28 claims under § 548, Montgomery mentioned this section in his  
answer.

1 **H. The MSJs**

2 On August 3, 2015, Trustee filed a MSJ on the  
3 constructively fraudulent claim under § 544 and Cal. Civ. Code  
4 § 3439.04(a)(2)(A). Trustee argued that the undisputed facts  
5 showed that MF08 was entitled to avoid the transfer of \$528,791  
6 from MF08 to TMF and may recover \$150,000 of it from Montgomery  
7 as either the initial transferee or the immediate transferee of  
8 the initial transferee as permitted under § 550(a). Trustee  
9 also asserted that she was entitled to summary judgment  
10 disposing of Montgomery's affirmative defense under § 550(b)  
11 because there is no evidence that he gave value to TMF or MF08  
12 and his interpretation of the SA was incorrect.

13 In support of her interpretation of the SA, Trustee  
14 maintained that the plain language of the SA showed that MF08  
15 had released only a limited set of claims; i.e., claims against  
16 REL Noteholders who were paid by REL. Because Montgomery  
17 received the funds from TMF, Trustee asserted that under  
18 section 4.01 of the SA, her right to "bring any action against  
19 any third party" was preserved, and Montgomery qualified as a  
20 "third party." Finally, Trustee argued that there was nothing  
21 in the SA evidencing that the intent of the parties was to  
22 affect claims that were unknown at the time the SA was signed.

23 On August 17, 2015, Montgomery filed his MSJ, asserting  
24 that Trustee was barred from bringing the fraudulent transfer  
25 claim against him by MF08's prior settlement with REL in which  
26 it waived its rights to bring an avoidance action against him.  
27 He also argued that the actual source of the repayment of  
28 \$150,000 was REL monies as shown by his tracing. In support of

1 his MSJ, Montgomery requested the bankruptcy court to take  
2 judicial notice of numerous documents, including: (1) his REL  
3 investor portfolio account statement in which REL took credit  
4 for the \$150,000 payment TMF ostensibly made to him; (2) the  
5 Noteholders' Committee's letter to the REL Noteholders; (3) the  
6 findings of fact and conclusions of law in support of the REL  
7 Confirmation Order; and (4) his Wells Fargo Bank IRA statement  
8 indicating payments had come from REL.

9 Two weeks later, Montgomery filed his opposition to  
10 Trustee's MSJ basically reiterating what he argued in his  
11 motion.

12 The bankruptcy court heard the motions on September 10,  
13 2015. At the hearing, Trustee's counsel asserted that the  
14 primary question raised in the motions was whether MF08 released  
15 the avoidance action claims against Montgomery under the SA.  
16 Counsel argued that only a narrow category of claims were  
17 settled through the SA as shown by sections 2.04 and 2.05 of the  
18 SA. That is, only those avoidance claims that were paid by REL  
19 and not claims paid by TMF. He also maintained that the release  
20 in the SA under Cal. Civ. Code § 1542 was a "general release,"  
21 and section 4.01 of the SA preserved unknown claims by  
22 authorizing Trustee to file any action against any "third  
23 party."

24 Following argument, the bankruptcy court took the matter  
25 under submission. On November 19, 2015, the bankruptcy court  
26 issued its memorandum decision finding that the release in the  
27 SA covered Trustee's claims in the adversary proceeding and that  
28 all other issues were moot. On the same day, the bankruptcy

1 court entered an order granting Montgomery's MSJ and denying  
2 Trustee's MSJ. Trustee filed a timely notice of appeal from  
3 that order.

## 4 **II. JURISDICTION**

5 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.  
6 §§ 1334 and 157(b)(2)(H). We have jurisdiction under 28 U.S.C.  
7 § 158.

## 8 **III. ISSUE**

9 Whether the bankruptcy court erred in finding that the SA  
10 between MF08 and REL barred MF08's fraudulent transfer claims  
11 against Montgomery.

## 12 **IV. STANDARDS OF REVIEW**

13 We review de novo the bankruptcy court's decision on cross-  
14 motions for summary judgment, applying the same standard used by  
15 the bankruptcy court. Brown v. City of L.A., 521 F.3d 1238,  
16 1240 (9th Cir. 2008); Furnace v. Sullivan, 705 F.3d 1021, 1026  
17 (9th Cir. 2013).

18 We also review de novo determinations of whether contract  
19 language is ambiguous, Tyler v. Cuomo, 236 F.3d 1124, 1134 (9th  
20 Cir. 2000), and "whether the written contract is reasonably  
21 susceptible of a proffered meaning." Brinderson-Newberg Joint  
22 Venture v. Pac. Erectors, Inc., 971 F.2d 272, 277 (9th Cir.  
23 1992); see also Winet v. Price, 4 Cal.App.4th 1159, 1165 (1992)  
24 (the court reviews determinations of whether contract language  
25 is ambiguous de novo); Scheenstra v. Cal. Dairies, Inc.,  
26 213 Cal.App.4th 370, 393 (2013) (even where uncontroverted  
27 evidence allows for conflicting inferences to be drawn,  
28 interpretation of contract is solely a judicial function);

1 Sunniland Fruit, Inc. v. Verni, 233 Cal.App.3d 892, 898 (1991)  
2 (de novo review “where the interpretation [of the contract] does  
3 not turn on the credibility of extrinsic evidence” and “where  
4 the extrinsic evidence points only one way, or is  
5 uncontested.”); Wolf v. Super. Ct., 114 Cal.App.4th 1343, 1351  
6 (2004) (where the extrinsic evidence points only one way, or is  
7 uncontested, the meaning of the language in question may be  
8 ascertained as a matter of law).

## 9 **V. DISCUSSION**

### 10 **A. Legal Standards for Summary Judgment**

11 “The court shall grant summary judgment if the movant shows  
12 that there is no genuine dispute as to any material fact and the  
13 movant is entitled to judgment as a matter of law.” Civil  
14 Rule 56(a), made applicable here by Rule 7056. Material facts  
15 are those necessary to establish the elements of a party’s cause  
16 of action. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248  
17 (1986). A genuine issue for trial exists only if “the evidence  
18 is such that a reasonable jury could return a verdict” for the  
19 party opposing summary judgment. Id. at 248; see also Aguilar  
20 v. Atl. Richfield Co., 25 Cal.4th 826, 856 (2001) (on summary  
21 judgment a court “does not decide on any finding of its own, but  
22 simply decides what finding such a trier of fact could make for  
23 itself.”).

24 When considering a motion for summary judgment, a court may  
25 not weigh the evidence nor assess credibility; instead, “the  
26 evidence of the non-movant is to be believed, and all  
27 justifiable inferences are to be drawn in his [or her] favor.”

1 Anderson, 477 U.S. at 255.<sup>10</sup> The court is not precluded from  
2 drawing inferences against the non-moving party as long as the  
3 underlying facts are viewed in the light most favorable to that  
4 party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,  
5 475 U.S. 574, 588 (1986). In the end, the court "must determine  
6 whether the record, when viewed in the light most favorable to  
7 the non-moving party, shows that there is no genuine issue of  
8 material fact and that the moving party is entitled to judgment  
9 as a matter of law." Brown, 521 F.3d at 1240.

10 A court may grant summary judgment regarding the  
11 interpretation of ambiguous language in a contract if the  
12 non-moving party fails to point to any relevant extrinsic  
13 evidence supporting that party's interpretation of the language.  
14 Compagnie Financiere de CIC et de L'Union Europeenne v. Merrill  
15 Lynch, Pierce, Fenner & Smith, Inc., 232 F.3d 153 (2nd Cir.  
16 2000); see also Torres Vargas v. Santiago Cummings, 149 F.3d 29,  
17 33 (1st Cir. 1998) (summary judgment appropriate where extrinsic  
18 evidence presented to the court supports only one of the  
19 conflicting interpretations).

20 Under California law and summary judgment standards,  
21 Montgomery had the burden of proof on his affirmative defense to  
22 show that the SA operated as a complete defense to  
23 MF08's/Trustee's fraudulent transfer claims against him.

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26 <sup>10</sup> Trustee has not argued on appeal that the bankruptcy  
27 court erred by weighing the extrinsic evidence. Accordingly,  
28 those arguments are deemed waived for purposes of this appeal.  
Smith v. Marsh, 194 F.3d 1045, 1052 (9th Cir. 1999).

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

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

7 "Whether the contract is reasonably susceptible to a  
8 party's interpretation can be determined from the language of  
9 the contract itself," United Teachers of Oakland v. Oakland  
10 Unified Sch. Dist., 75 Cal.App.3d 322, 330 (1977), or from  
11 extrinsic evidence of the parties' intent. Winet, 4 Cal.App.4th  
12 at 1165. In California, courts are required to receive  
13 provisionally any proffered extrinsic evidence that is relevant  
14 to show whether the contractual language is reasonably  
15 susceptible to a particular meaning. Pac. Gas & Elec. Co. v.  
16 G.W. Thomas Drayage & Rigging Co., Inc., 69 Cal.2d 33, 39-40  
17 (1968) (rational interpretation of a contract requires at least  
18 a preliminary consideration of all credible evidence offered to  
19 prove the intention of the parties). Such extrinsic evidence  
20 might expose a latent ambiguity when the contract appears  
21 unambiguous on its face. Id. at 40 & n.8. "An appellate  
22 analysis of the threshold question concerning whether the  
23 contractual language is ambiguous—that is, reasonably  
24 susceptible to more than one interpretation—usually involves the  
25 examination of competing interpretations offered by the  
26 parties." Scheenstra, 213 Cal.App.4th at 393.

27 In seeking reversal of the bankruptcy court's order in  
28 favor of Montgomery, Trustee repeats many of the arguments that

1 she made before the bankruptcy court. Trustee relies upon the  
2 language of the SA itself for her interpretation and offers no  
3 extrinsic evidence in support. In a nutshell, she contends that  
4 Montgomery was not protected under the terms of the SA because  
5 he was paid by TMF and not from REL's general account. Thus,  
6 according to Trustee, he was not part of the protected class of  
7 REL Transferees under the SA, making MF08's waiver of avoidance  
8 claims inapplicable as to him.

9 To support her argument, she urges us to look at the  
10 defined terms in sections 2.04-2.06 of the SA. Section 2.04  
11 defines a "REL Transfer" as payments made out of REL's general  
12 account to the holders of Exchange Notes issued to REL's  
13 Noteholders. Trustee asserts that this provision plainly shows  
14 that MF08 released only its claims against REL Noteholders for  
15 recovery of amounts **paid** by REL and that these are the MF08  
16 Potential Avoidance actions MF08 agreed to release under section  
17 2.06. She again also relies on section 4.01 which states that  
18 "this Agreement shall not limit or restrict the right of MF08 to  
19 bring **any** action against **any** third party." (Emphasis added).  
20 According to Trustee, the phrases "any action" and "any third  
21 party" are broad and include her avoidance action against  
22 Montgomery.

23 Montgomery also repeats his previous arguments in his  
24 opposing brief. He claims he was an REL Transferee within the  
25 meaning of the SA and, therefore, he is protected by MF08's  
26 waiver of the avoidance claims. To support his interpretation,  
27 he relies on extrinsic evidence such as the surrounding  
28 circumstances under which MF08 and REL negotiated or entered

1 into the SA, including the SA's relationship to REL's confirmed  
2 plan, and the language in MF08's POC. Montgomery points out  
3 that the main objective of the SA was to avoid expensive and  
4 uncertain litigation over whether MF08 had a legal basis to  
5 claim REL Transferees had received \$66 million of MF08's monies.  
6 He further refers to MF08's admission in its POC that the Ng  
7 family controlled the bank accounts of REL, MF08, and TMF, and  
8 could have and did use MF08 monies to pay REL investors - the  
9 "Ngs caused the transfer" of \$66 million, the transfers were  
10 made "either directly to REL, indirectly through TMF . . . , or  
11 [directly] to REL's borrowers."

12       Montgomery also traces the monies coming from REL's account  
13 that flowed to MF08 and then to TMF, and ultimately to his IRA  
14 account. Based upon this tracing, he contends that the \$150,000  
15 used to pay him was "directly" from the general account of REL.

16       In addition, Montgomery offered other extrinsic evidence to  
17 shed light on the mutual intention of the parties: (1) his REL  
18 investor portfolio account statement in which REL takes credit  
19 for the \$150,000 payment TMF ostensibly made to him; (2) the  
20 Noteholders' Committee's letter to the REL Noteholders; and  
21 (3) his Wells Fargo Bank IRA statement indicating payments had  
22 come from REL.

23       In conducting our independent review into whether an  
24 ambiguity exists, we examined the SA and the POC and considered  
25 Montgomery's proffered extrinsic evidence. Based upon our  
26 review, we determine that the bankruptcy court did not err in  
27 ruling that the SA was ambiguous with respect to the terms "REL  
28 Transfer," "Paid by REL," or "Any Third Party," as those terms

1 were reasonably susceptible to the parties' competing  
2 interpretations. Accordingly, the bankruptcy court properly  
3 admitted all credible extrinsic evidence to aid it in  
4 interpreting the SA. Pac. Gas & Elec. Co., 69 Cal.2d at 37.

5 **C. Interpretation of the SA**

6 This determination does not end our inquiry. Although the  
7 above-referenced terms are ambiguous, we still must consider  
8 whether the bankruptcy court appropriately resolved the  
9 ambiguity. The parties do not challenge the SA itself and  
10 presented no extrinsic evidence as to **their** intent at the time  
11 the SA was signed. This is not surprising since Montgomery was  
12 not a party to the SA and the negotiations and as the court  
13 ruled that the communications regarding the settlement of MF08's  
14 POC made during the mediation held in REL's bankruptcy case were  
15 confidential.<sup>11</sup>

16 The extrinsic evidence presented by Montgomery presented  
17 the context in which the contract arose and described the  
18 conduct of the parties in connection with the SA which cast  
19 light on their original intent. Although Trustee disputes the  
20 inferences to be drawn from this extrinsic evidence, the  
21 evidentiary facts themselves are not in conflict. The meaning  
22 of the terms "REL Transfer," "Paid by REL," and "Any third  
23 Party," was not dependent on the credibility of conflicting  
24 evidence. There were thus no factual issues for the bankruptcy  
25 court to resolve. Accordingly, we review the SA in the context

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26  
27 <sup>11</sup> 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 of the extrinsic evidence presented and make our own independent  
2 determination of its meaning. See Wolf, 114 Cal.App.4th at  
3 1351; Scheenstra, 213 Cal.App.4th at 390.

4 We determine the construction of the ambiguous language by  
5 applying the appropriate canons of construction governing  
6 contracts. "[W]here the language of the contract is ambiguous,  
7 it is the duty of the court to resolve the ambiguity by taking  
8 into account all the facts, circumstances and conditions  
9 surrounding the execution of the contract.'" Frankel v. Bd. of  
10 Dental Exam'rs, 46 Cal.App.4th 534, 544 (1996); Pac. Gas & Elec.  
11 Co., 69 Cal.2d at 40 (court may consider the circumstances under  
12 which the agreement was made, including its object, nature and  
13 subject matter). The goal is to interpret it to give effect to  
14 the mutual intent of the parties as it existed when they  
15 contracted. Cal. Civ. Code § 1636; see also Pac. Gas & Elec.  
16 Co., 69 Cal.2d at 38. It is the outward expression of the  
17 agreement, rather than a party's unexpressed intention, which  
18 the court will enforce. Winet, 4 Cal.App.4th at 1165.

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

20 We begin with the ambiguous terms "REL Transfer" and "Paid  
21 by REL." Relying on the plain language of the SA, Trustee  
22 maintains that since Montgomery was paid by TMF from its bank  
23 account, he was not "paid by REL." Therefore, he did not  
24 receive a "REL Transfer" within the meaning of the SA and is not  
25 protected by MF08's waiver of avoidance actions.

26 This interpretation is not supported when we consider  
27 Montgomery's undisputed extrinsic evidence and the context under  
28 which settlement of MF08's POC was reached. The undisputed

1 evidence shows - as the MF08 POC stated - that the Ngs  
2 controlled MF08, TMF, and REL and had a pattern of treating them  
3 as they wished: "the Ngs caused the \$66 million in transfers to  
4 be made, either directly or indirectly." Thus, in this Ponzi-  
5 like scheme, MF08 acknowledged in its POC that the Ngs did not  
6 differentiate between REL, MF08, or TMF.

7 The evidence also shows that by all appearances, Montgomery  
8 **had** been paid by REL and received a REL Transfer. As the  
9 bankruptcy court properly noted, Montgomery was paid during the  
10 time period described in the POC (i.e., December 2007 - February  
11 2009), and in the time period in section 2.04 of the SA (i.e.,  
12 December 2007 - August 2008) and his investor portfolio account  
13 statement showed REL took credit for making the \$150,000 payment  
14 when it was made. In other words, REL's investor's account  
15 carried payment to Montgomery on its books.

16 In addition, the Noteholders' Committee's letter sent to  
17 Montgomery and other REL Noteholders is consistent with the  
18 documentation Montgomery received from REL before any  
19 controversy arose. See S. Cal. Edison Co. v. Super. Ct.,  
20 37 Cal.App.4th 839, 851 (1995) ("The rule is well-settled that  
21 in construing the terms of a contract the construction given it  
22 by the acts and conduct of the parties with knowledge of its  
23 terms, and before any controversy has arisen as to its meaning,  
24 is admissible on the issue of the parties' intent.").

25 In the end, the extrinsic evidence shows that the parties  
26 to the SA necessarily intended that the waiver by MF08 of its  
27 right to sue any REL investor who had been paid with MF08 funds  
28 included anyone paid directly or indirectly by REL. Although

1 Trustee urges us to adopt her competing interpretation of the  
2 SA, she has offered no evidence in support of her position.  
3 Given the lack of evidence supporting Trustee's inferences and  
4 interpretation, the bankruptcy court reasonably concluded that  
5 Montgomery was entitled to judgment as a matter of law. See  
6 Anderson, 477 U.S. at 249 (holding that "there is no issue for  
7 trial unless there is sufficient evidence favoring the nonmoving  
8 party for a jury to return a verdict for that party").

9       Indeed, the thrust of Trustee's argument on appeal is that  
10 the bankruptcy court misinterpreted or misused the extrinsic  
11 evidence. First, she contends that the bankruptcy court applied  
12 the wrong legal standard to interpret the SA based on improper  
13 extrinsic evidence. In this regard, Trustee relies on the  
14 bankruptcy court's statement that "[t]he extrinsic evidence is  
15 consistent on one essential point. By everything he was told by  
16 REL, it is reasonable to interpret the Settlement Agreement as  
17 Mr. [Montgomery] does." Trustee maintains that the bankruptcy  
18 court erroneously relied upon the statements of REL, only one  
19 party to the agreement, and Montgomery, a stranger to the  
20 agreement. Trustee contends that "at most" REL's communications  
21 to Montgomery show its subjective intent, but subjective intent  
22 is irrelevant. At another point, Trustee maintains that the  
23 Noteholders' Committee's letter is another example of their  
24 subjective intent. Trustee asserts that the letter does not  
25 evidence the mutual intent of the parties. Trustee contends

1 therefore that the court should have ignored this evidence.<sup>12</sup>

2 We are not persuaded by these arguments. Error would  
3 occur, if at all, if the bankruptcy court improperly admitted  
4 extrinsic evidence showing only the undisclosed subjective  
5 intent of REL or the Noteholders Committee, which is  
6 inadmissible and incompetent under the objective theory of  
7 contracts. Founding Members of the Newport Beach Country Club  
8 v. Newport Beach Country Club, Inc., 109 Cal.App.4th 944, 960  
9 (2003) (“[U]ndisclosed statements regarding intent or  
10 understanding of” the writing “are irrelevant to contract  
11 interpretation under the objective theory of contracts”;  
12 appellate court determines writing’s meaning de novo “[a]fter  
13 winnowing out the extrinsic evidence that is irrelevant under  
14 the objective theory of contracts.”). “While a party may not  
15 testify to his undisclosed subjective intent in entering into an  
16 agreement, the rule does not preclude admission of evidence of  
17 the surrounding circumstances, usage and custom in the industry,  
18 negotiations and discussion, or any other extrinsic evidence  
19 which may shed light on the mutual intention of the parties.”  
20 Pac. Gas & Elec. Co., 189 Cal.App.3d at 1141-42.

21 We conclude that REL’s statements to Montgomery and the  
22 Noteholders’ Committee’s letter to Montgomery fall within the  
23 latter type of evidence; i.e., the surrounding circumstances,  
24 negotiations, and discussion, and were not the mere “undisclosed

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25  
26 <sup>12</sup> 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 subjective intent" of REL or the Noteholders' Committee. Id.  
2 In other words, this extrinsic evidence objectively "shed[s]  
3 light on the mutual intent of the parties."

4 Next, Trustee complains that the court erred by using the  
5 extrinsic evidence to vary or modify the terms of the SA.  
6 However, what Trustee characterizes as error is, in fact, her  
7 disagreement over the bankruptcy court's interpretation of SA  
8 based upon the extrinsic evidence which we address in this  
9 appeal.

10 Finally, Trustee challenges the bankruptcy court's finding  
11 that the payment to Montgomery was made by REL and contends that  
12 this is not supported by the evidence. According to Trustee,  
13 the undisputed evidence shows that Montgomery received a check  
14 drawn on TMF's bank account. Therefore, at the very least, this  
15 creates a genuine issue of material fact, precluding at the  
16 summary judgment stage a finding that the payment had been made  
17 by REL. Trustee also maintains that the fact MF08 obtained the  
18 funds from REL is irrelevant because there is no evidence that  
19 MF08's control over the funds was restricted or conditioned in  
20 any way. According to Trustee, funds which are transferred to a  
21 debtor and are deposited into the debtor's bank account become  
22 property of the debtor unless the debtor's right to use the  
23 funds is restricted. Adams v. Anderson (In re Superior Stamp &  
24 Coin Co.), 223 F.3d 1004, 1009 (9th Cir. 2000).

25 Again, we are not persuaded. The Ninth Circuit's decision  
26 in In re Superior Stamp & Coin Co. is not helpful to Trustee's  
27 argument. There, a bank loaned money to the debtor on the  
28 express condition that the money was to be used to pay a

1 specific third-party creditor. The bank, a new creditor,  
2 substituted itself in place of the old creditor that was paid  
3 with the "earmarked" money. The Ninth Circuit defined the scope  
4 of the "earmarking" defense:

5 [T]he proper inquiry is not whether the funds entered  
6 the debtor's account, but whether the debtor had the  
7 right to disburse the funds to whomever it wished, or  
8 whether their disbursement was limited to a particular  
9 old creditor or creditors under the agreement with the  
10 new creditor.

11 223 F.3d at 1009. The earmarking doctrine is inapplicable to  
12 this case since the record shows the Ngs were operating a Ponzi-  
13 like scheme. Further, it is undisputed that the Ngs controlled  
14 the funds that were transferred from REL's general account to  
15 MF08 and then to TMF and ultimately to Montgomery in the course  
16 of this Ponzi-like scheme. Under these circumstances, it is  
17 disingenuous for Trustee to claim MF08 had dominion and control  
18 of the funds.

19 In sum, Trustee failed to raise a genuine issue of material  
20 fact as to the proper interpretation of the terms "REL Transfer"  
21 and "Paid by REL."

## 22 **2. "Any Third Party"**

23 We next consider the term "any third party" as used in  
24 section 4.01 of the SA. Trustee maintains the bankruptcy  
25 court's construction of the savings clause in this section was  
26 erroneous. Under section 4.01 of the SA, MF08 waived the right  
27 to pursue any MF08 Potential Avoidance Actions "provided,  
28 however, that this agreement shall not limit or restrict the  
right of MF08 to bring any action against any third party,  
including any manager, member, insider or professional of MF08."

1 Trustee argues that the bankruptcy court incorrectly  
2 construed this provision to mean that she could commence an  
3 action only against a "third party" that was a manager, member,  
4 insider or professional. According to Trustee, the savings  
5 clause in section 4.01 of the SA preserves **all** claims against  
6 **any** third party, other than those against REL Noteholders who  
7 were "paid by REL."

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

25 Further, the record shows that the undisputed objective of  
26 the SA was (1) to resolve the issues regarding the validity and  
27 priority of MF08's claim which was based on the alleged  
28 fraudulent transfer of \$66 million to REL where tracing was

1 problematic and the Ngs' commingling was endemic; (2) to  
2 eliminate the REL Noteholders' risk of being sued by both MF08  
3 and REL as the alleged recipients of fraudulent transfers in  
4 order to ensure their support for REL's Plan; and (3) to  
5 eliminate MF08's ability to impede confirmation because MF08's  
6 \$66 million claim made it the largest unsecured creditor in  
7 REL's case. Trustee's interpretation of "any third party" to  
8 include REL Noteholders who were paid by MF08 or TMF  
9 effectively would blunt these objectives.

10 As the bankruptcy court observed:

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

22 The Trustee obtained the \$5 million "enhancement" and  
23 the REL Noteholders agreed to reduce their claims by  
24 50% of what they had been paid on their REL  
25 investments pre-petition. The REL Noteholders were  
26 led to believe their risk of being sued by MF08 and  
27 REL—as the recipients of allegedly fraudulent  
28 transfers was eliminated.

29 In sum, Trustee failed to raise a genuine issue of material  
30 fact as to the interpretation of the savings clause under  
31 section 4.01 of the SA. In the words of the bankruptcy court:  
32 "As a REL Noteholder, Mr. Montgomery is not the type of third  
33 party the Trustee may sue" on an avoidance action.

## 34 VI. CONCLUSION

35 For the reasons stated, we AFFIRM.