

MAY 31 2017

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NOT FOR PUBLICATION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 Nos. | CC-16-1322-FTaKu |
| |) | | CC-16-1323-FTaKu |
| CASTLE TRADING, INC., |) | | CC-16-1324-FTaKu |
| |) | | CC-16-1352-FTaKu |
| Debtor. |) | | CC-16-1353-FTaKu |
| _____ |) | | CC-16-1354-FTaKu |
| |) | | (Related Cross-appeals) |
| RICHARD K. DIAMOND, Chapter 7 |) | | |
| Trustee, |) | Bk. No. | 2:13-bk-15021-BB |
| |) | | |
| Appellant/Cross-Appellee, |) | Adv. Nos. | 2:14-ap-01022-BB |
| |) | | 2:14-ap-01122-BB |
| v. |) | | 2:14-ap-01312-BB |
| |) | | |
| MESISCA RILEY & KREITENBERG |) | | |
| LLP, |) | | |
| |) | MEMORANDUM* | |
| Appellee/Cross-Appellant.) |) | | |
| _____ |) | | |

Argued and Submitted on May 18, 2017
at Pasadena, California

Filed - May 31, 2017

Appeals from the United States Bankruptcy Court
for the Central District of California

Honorable Sheri Bluebond, Chief Bankruptcy Judge, Presiding

Appearances: George E. Schulman of Danning, Gill, Diamond & Kollitz, LLP argued on behalf of Appellant/Cross-Appellee Richard K. Diamond, Chapter 7 Trustee; Dennis P. Riley of Mesisca Riley & Kreitenberg, LLP argued on behalf of Appellee/Cross-Appellant Mesisca Riley & Kreitenberg LLP.

Before: FARIS, TAYLOR, and KURTZ, 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 **INTRODUCTION**

2 Debtor Castle Trading, Inc. retained Appellee/Cross-
3 Appellant Mesisca Riley & Kreitenberg LLP ("MRK") to provide
4 specified legal services. To pay for these future services,
5 Castle Trading signed a promissory note in favor of MRK and deeds
6 of trust encumbering certain properties. After Castle Trading
7 filed for bankruptcy protection, Appellant/Cross-Appellee Richard
8 K. Diamond, Chapter 7¹ Trustee ("Trustee"), sought to avoid the
9 promissory note and deeds of trust as fraudulent transfers,
10 arguing that the prepetition executory contract for MRK's future
11 legal services did not provide "reasonably equivalent value" in
12 exchange for the promissory note and deeds of trust. The
13 bankruptcy court disagreed, holding that the promise of future
14 services was reasonably equivalent value.

15 On appeal, the Trustee argues that the bankruptcy court
16 erred because the value of the executory contract was uncertain
17 or limited and did not provide reasonably equivalent value. MRK
18 cross-appeals, arguing that the agreement could not have been a
19 fraudulent transfer because Castle Trading was not insolvent
20 inasmuch as a \$3.8 million "shareholder loan" was actually a
21 capital contribution, as opposed to a liability.

22 We AFFIRM the bankruptcy court's holding that the agreement
23 provided reasonably equivalent value. We need not reach the
24 points of error raised in MRK's cross-appeals.

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

1 **FACTUAL BACKGROUND**

2 **A. The 2008 Action and 2011 Action**

3 Yuri and Natalia Plyam are the sole owners, directors, and
4 officers of Castle Trading. It began as a commodities brokerage
5 but later transitioned to real estate development and investment.

6 In January 2008, Precision Development, LLC ("Precision"), a
7 company previously owned by Mr. Plyam, filed a complaint against
8 the Plyams in the state superior court (the "2008 Action").

9 Essentially, Precision alleged that the Plyams diverted
10 substantial funds that Precision's investors had wired to them
11 for a real estate development project and instead used the money
12 for personal gain. In July 2010, MRK substituted in as counsel
13 for the Plyams.

14 Following a jury trial, the superior court entered judgment
15 against the Plyams in the amount of \$10.3 million. The Plyams
16 unsuccessfully appealed the judgment.

17 In July 2011, Precision filed a lawsuit against Castle
18 Trading, the Plyams, and Ms. Plyam's mother, Anna Logvin, in
19 state court (the "2011 Action"), alleging that the Plyams
20 fraudulently transferred assets to Castle Trading. Precision
21 recorded a lis pendens against each of Castle Trading's real
22 property assets.

23 **B. The Fee Agreement between Castle Trading and MRK**

24 Because of MRK's familiarity with the Plyams and Castle
25 Trading, the defendants sought MRK's representation in the 2011
26 Action.

27 On September 7, 2011, Castle Trading entered into a fee
28 agreement with MRK (the "Fee Agreement"). MRK agreed to

1 represent Castle Trading in three state court proceedings:
2 (1) the 2011 Action; (2) Castle Trading, Inc. v. Aframian, a
3 breach of contract action (the "Aframian Action"); and (3) Castle
4 Trading, Inc. v. Greer, an unlawful detainer action (the "Greer
5 Action"). The Fee Agreement recited that, because of the
6 substantial judgment against the Plyams in the 2008 Action,
7 Castle Trading did not have the financial ability to pay MRK.
8 Therefore, the parties agreed that: (1) MRK would represent
9 Castle Trading in the Aframian Action for an earned fee of
10 \$202,500, based on an estimate of 270 hours at \$750 per hour;
11 (2) MRK would represent Castle Trading in the 2011 Action for an
12 earned fee of \$412,500, based on an estimate of 550 hours, and
13 \$750 per hour for time spent in excess of 550 hours; and (3) MRK
14 would represent Castle Trading in the Greer Action for an earned
15 fee of \$20,000, based on an estimate of 40 hours at \$500 per
16 hour. Castle Trading acknowledged that it would be indebted to
17 MRK for the total amount of \$635,000 (plus any amount billed over
18 the estimated 550 hours in the 2011 Action). Accordingly, Castle
19 Trading executed a promissory note in favor of MRK in the amount
20 of \$635,000.

21 MRK agreed to delay collection of the \$635,000 and instead
22 take as security deeds of trust encumbering certain real property
23 owned by Castle Trading. The deeds of trust were recorded
24 against five of Castle Trading's properties in California, which
25 were known as: (1) the "Hayvenhurst Property," (2) the "Alta Mesa
26 Property," (3) the "Meadow Bay Property," (4) the "Bay View
27 Property," and (5) the "Angelo Property."

28 MRK advised Castle Trading to consult independent counsel

1 prior to entering into the Fee Agreement. Ms. Plyam testified
2 that three other attorneys told her that the Fee Agreement was a
3 "great deal," especially because no other attorney would likely
4 agree to represent Castle Trading.

5 MRK represented Castle Trading in each of the three
6 lawsuits. It obtained a judgment in favor of Castle Trading in
7 the Aframian Action, successfully ejected the tenants in the
8 Greer Action, and represented Castle Trading in the 2011 Action
9 until Castle Trading filed for bankruptcy.² According to its
10 billing records, if MRK were billing Castle Trading on an hourly
11 basis, its fee (based on the recorded time) would have been
12 \$217,819.³

13 **C. Castle Trading's bankruptcy filing and the Trustee's**
14 **adversary proceedings**

15 On February 23, 2013, Castle Trading filed a chapter 7
16 petition in the United States Bankruptcy Court for the Central
17 District of California. On the same day, the Plyams filed a
18 joint chapter 7 petition. The bankruptcy court initially
19 appointed Alberta P. Stahl as chapter 7 trustee in both cases;
20 Ms. Stahl later resigned from the Castle Trading case to avoid a
21 conflict with her role as trustee in the Plyams' personal
22

23
24 ² In February 2012, the state of California suspended Castle
25 Trading's corporate status for nonpayment of taxes. On March 23,
26 2012, Castle Trading filed a Notice of Suspension and Inability
27 to Participate in Litigation in the 2011 Action.

28 ³ In the 2011 Action, MRK's recorded fees and costs totaled
\$197,317.25. In the Aframian Action, MRK's recorded fees and
costs totaled \$18,652.87. In the Greer Action, MRK's recorded
fees and costs totaled \$1,849.

1 bankruptcy case. The bankruptcy court thereafter appointed
2 Mr. Diamond as successor chapter 7 trustee.

3 In its schedules, Castle Trading estimated that it held
4 assets totaling \$3,262,242. It listed liabilities of
5 \$16,070,990, including \$1,932,533 in secured debts and a
6 \$3,814,457 "loan from shareholder" as an unsecured, nonpriority
7 debt. The schedules identified Mr. Plyam as the creditor on the
8 shareholder loan.

9 Proofs of claims were filed by a number of creditors. Of
10 relevance to this proceeding, Ms. Stahl, the Plyams' chapter 7
11 bankruptcy trustee, filed a claim for \$3,316,568.04 based on the
12 shareholder loan. MRK filed a proof of claim against Castle
13 Trading in the amount of \$728,769.83, based on the terms of the
14 Fee Agreement.

15 The bankruptcy court approved the Trustee's sale of the
16 Hayvenhurst Property, Alta Mesa Property, Meadow Bay Property,
17 and Bay View Property. The court order directed that the
18 disputed liens held by MRK and others were removed from the
19 properties and attached to the net sale proceeds.

20 After the sale of Castle Trading's properties, the Trustee
21 filed adversary complaints to avoid the liens and recover
22 fraudulent transfers concerning the Hayvenhurst Property, the
23 Alta Mesa Property, and the Meadow Bay Property.⁴ As relevant to
24

25 ⁴ The Trustee filed three separate complaints, one per
26 property. Diamond v. Greater Atlantic Bank, Adv. Pro.
27 2:14-ap-01022-BB concerns the Meadow Bay Property and is on
28 appeal as BAP No. CC-16-1322; Diamond v. Logvin, Adv. Pro.
2:14-ap-01122-BB concerns the Hayvenhurst Property and is on
(continued...)

1 these appeals, the Trustee alleged that Castle Trading "received
2 less than a reasonably equivalent value in exchange for the MRK
3 Deed of Trust and the MRK Obligation" and that he "is entitled to
4 avoid the MRK Obligation and the MRK Deed of Trust."

5 **D. The trial**

6 The bankruptcy court scheduled a consolidated trial for
7 August 24, 2016 in all three adversary proceedings.⁵ Prior to
8 the trial, the bankruptcy court entered joint pretrial orders
9 (collectively, the "Pretrial Order") in the three adversary
10 proceedings. The Pretrial Order provided that the following
11 issues of fact, among others, remained to be litigated:

12 13. What type of fee agreement was the 2011
13 Agreement?

14 14. When the 2011 Fee Agreement was signed, was
15 the entire fee earned upon receipt?

16 15. When the 2011 Fee Agreement was signed, was
17 the entire fee earned upon receipt of the Deeds of
18 Trust?

19 The Pretrial Order included the following issues of law to
20 be litigated:

21 5. Whether reasonably equivalent value was
22 provided by MRK to the Debtor in exchange for the MRK
23 Deeds of Trust and the MRK Note.

24

25 13. Whether the 2011 Fee Agreement provides for an
26 earned on receipt retainer or a flat fee.

27 ⁴(...continued)
28 appeal as BAP No. CC-16-1323; and Diamond v. Logvin, Adv. Pro.
2:14-ap-01312-BB concerns the Alta Mesa Property and is on appeal
as BAP No. CC-16-1324.

⁵ The Trustee settled with all other defendants prior to
trial; MRK was the only remaining party.

1 Following the trial, the bankruptcy court orally ruled that
2 the Trustee was not entitled to avoid the promissory note and
3 deeds of trust as fraudulent transfers. It held that the Trustee
4 did not meet his burden to prove an actual fraudulent transfer.
5 As to constructive fraudulent transfer, the bankruptcy court
6 considered whether Castle Trading received reasonably equivalent
7 value by looking at the work done by MRK, its billing records,
8 its time estimates, and other circumstances surrounding the
9 litigation. It concluded that the Trustee did not provide
10 sufficient evidence to establish lack of reasonably equivalent
11 value.

12 On September 22, 2016, the bankruptcy court issued its
13 findings of fact and conclusions of law in the three adversary
14 proceedings. In relevant part, it found that: (1) the Fee
15 Agreement was a flat fee for two of the matters and a flat fee
16 for a certain number of hours then hourly thereafter for the
17 third matter; (2) MRK's records reflect \$212,165.00 in hourly
18 billing and \$6,554.12 in costs for litigation in the three
19 matters identified in the Fee Agreement; (3) the deeds of trust
20 were not provided by Castle Trading to MRK as security for an
21 Earned on Receipt Retainer; and (4) the deeds of trust secured
22 payment of the fee charged by MRK to handle the three
23 proceedings.

24 In relevant part, the court made the following conclusions
25 of law: (1) MRK provided Castle Trading with reasonably
26 equivalent value in exchange for the deeds of trust and
27 promissory note; (2) the Trustee may not avoid the deeds of trust
28 and promissory note as fraudulent transfers pursuant to § 544(b)

1 and California state law; and (3) the Trustee failed to meet his
2 burden to prove that the transfers were fraudulent transfers and
3 avoidable.

4 The Trustee timely filed his notices of appeal, and MRK
5 timely filed its "protective" cross-appeals.

6 **JURISDICTION**

7 The bankruptcy court had jurisdiction pursuant to 28 U.S.C.
8 §§ 1334 and 157(b) (2) (H). We have jurisdiction under 28 U.S.C.
9 § 158.

10 **ISSUE**

11 Whether the bankruptcy court erred in holding that MRK's
12 promise to provide future legal services under the Fee Agreement
13 represented "reasonably equivalent value" such that the
14 promissory note and deeds of trust in favor of MRK were not
15 constructive fraudulent transfers.

16 **STANDARDS OF REVIEW**

17 As a general rule, we review the bankruptcy court's findings
18 of fact for clear error and its conclusions of law de novo.
19 Decker v. Tramiel (In re JTS Corp.), 617 F.3d 1102, 1109 (9th
20 Cir. 2010).

21 We review de novo questions of statutory interpretation,
22 including whether a particular type of consideration constitutes
23 "value." Gladstone v. Schaefer (In re UC Lofts on 4th, LLC),
24 BAP No. SC-14-1287-JuKlPa, 2015 WL 5209252, at *15 (9th Cir. BAP
25 Sept. 4, 2015) (citing Maddox v. Robertson (In re Prejean),
26 994 F.2d 706, 708 (9th Cir. 1993)). De novo review requires that
27 we consider a matter anew, as if no decision had been rendered
28 previously. United States v. Silverman, 861 F.2d 571, 576 (9th

1 Cir. 1988).

2 But when we consider whether the value is "reasonably
3 equivalent," a finding concerning the value of the transferred
4 property "is a finding of fact which may be reversed only if it
5 is shown that it was clearly erroneous." In re JTS Corp.,
6 617 F.3d at 1109 (citations omitted). "To be clearly erroneous,
7 a decision must strike us as more than just maybe or probably
8 wrong; it must . . . strike us as wrong with the force of a
9 five-week-old, unrefrigerated dead fish." Papio Keno Club, Inc.
10 v. City of Papillion (In re Papio Keno Club, Inc.), 262 F.3d 725,
11 729 (8th Cir. 2001) (quoting Parts & Elec. Motors, Inc. v.
12 Sterling Elec., Inc., 866 F.2d 228, 233 (7th Cir. 1988)); see
13 Anderson v. City of Bessemer City, 470 U.S. 564, 573 (1985) (A
14 factual finding is clearly erroneous if, after examining the
15 evidence, the reviewing court "is left with the definite and firm
16 conviction that a mistake has been committed."). The bankruptcy
17 court's choice among multiple plausible views of the evidence
18 cannot be clear error. United States v. Elliott, 322 F.3d 710,
19 714 (9th Cir. 2003).

20 DISCUSSION

21 These appeals deal only with the Trustee's contention that
22 he is entitled to avoid the promissory note and deeds of trust as
23 fraudulent transfers. The Trustee does not contend (in these
24 appeals) that the Fee Agreement is subject to challenge under
25 state law (other than state fraudulent transfer provisions). The
26 bankruptcy court correctly decided the narrow issue before it.

1 **A. The bankruptcy court did not err in holding that the Fee**
2 **Agreement represented "reasonably equivalent value."**

3 The Trustee's primary issue on appeal challenges the
4 bankruptcy court's holding that MRK provided reasonably
5 equivalent value for the \$635,000 promissory note and deeds of
6 trust. We discern no error.

7 A bankruptcy trustee may bring an action to avoid a
8 prepetition transfer that is allegedly either intentionally or
9 constructively fraudulent under §§ 548(a)(1)(A) or (B) or
10 applicable state law. In relevant part, § 548(a) provides:

11 (a)(1) The trustee may avoid any transfer . . . of an
12 interest of the debtor in property . . . that was made
13 or incurred on or within 2 years before the date of the
14 filing of the petition, if the debtor voluntarily or
15 involuntarily -

16

17 (B)(i) received less than a reasonably equivalent
18 value in exchange for such transfer or obligation;
19 and

20 (ii)(I) was insolvent on the date that such
21 transfer was made or such obligation was
22 incurred, or became insolvent as a result of
23 such transfer or obligation

24 § 548(a)(1). In other words, a transfer is constructively
25 fraudulent if (1) the debtor made the transfer on or within two
26 years before the date of filing the bankruptcy petition, (2) the
27 debtor "received less than a reasonably equivalent value in
28 exchange for such transfer or obligation," and (3) the debtor was
suffering from certain kinds of financial distress. Official
Committee of Unsecured Creditors v. Hancock Park Capital II, L.P.
(In re Fitness Holdings Int'l, Inc.), 714 F.3d 1141, 1145 (9th
Cir. 2013) (internal citations omitted). California law is

1 substantially similar. See Cal. Civ. Code §§ 3439.04, 3439.05.⁶

2 These appeals involve § 548(a)(1)(B)(i), which considers
3 whether Castle Trading received reasonably equivalent value for
4 the promissory note and deeds of trust. Our inquiry follows a
5 two-step process: "First, the court must determine that the
6 debtor received value in exchange for the transfer. . . .
7 Second, if there was value in exchange, the court must determine
8 whether the value of what was transferred was reasonably
9 equivalent to what the debtor received." Greenspan v. Orrick,
10 Herrington & Sutcliffe LLP (In re Brobeck, Phleger & Harrison
11 LLP), 408 B.R. 318, 341 (Bankr. N.D. Cal. 2009); see also Hasse
12 v. Rainsdon (In re Pringle), 495 B.R. 447, 463 (9th Cir. BAP
13 2013) ("An examination into reasonably equivalent value is
14 comprised of three inquiries: (1) whether value was given; (2) if
15 value was given, whether it was given in exchange for the
16 transfer; and (3) whether what was transferred was reasonably
17 equivalent to what was received."). The Trustee must prove each
18 element of his fraudulent transfer claim by a preponderance of
19 the evidence. Flemmer v. Weiner (In re Vill. Concepts, Inc.),
20 BAP No. EC-15-1186-JuFD, 2015 WL 8030974, at *7 (9th Cir. BAP
21 Dec. 4, 2015).

23 ⁶ "California's fraudulent conveyance statutes are similar
24 in form and substance to the Code's fraudulent transfer
25 provisions. Both allow a transfer to be avoided where 'the
26 debtor did not receive a "reasonably equivalent value" in
27 exchange for the transfer and [the debtor] was either insolvent
28 at the time of the transfer or was engaged in business with
unreasonably small capital.'" Wyle v. C.H. Rider & Family
(In re United Energy Corp.), 944 F.2d 589, 594 (9th Cir. 1991)
(citation omitted).

1 **1. MRK's promises constituted "value."**

2 The Trustee argues that MRK's promise to perform legal
3 services in the future did not qualify as "value" at all. We
4 disagree.

5 The Bankruptcy Code defines "value" as "property, or
6 satisfaction or securing of a present or antecedent debt of the
7 debtor, but does not include an unperformed promise to furnish
8 support to the debtor or to a relative of the debtor[.]"

9 § 548(d)(2)(A). State law is similar. See Cal. Civ. Code
10 § 3439.03; In re UC Lofts on 4th, LLC, 2015 WL 5209252, at *16.

11 In determining whether the debtor received value, "a court
12 must consider whether, based on the circumstances that existed at
13 the time of the transfer, it was legitimate and reasonable to
14 expect some value accruing to the debtor" Pension
15 Transfer Corp. v. Beneficiaries under the Third Amendment to
16 Fruehauf Trailer Corp. Retirement Plan No. 003 (In re Fruehauf
17 Trailer Corp.), 444 F.3d 203, 212 (3d Cir. 2006) (quotations and
18 citation marks omitted).

19 The Ninth Circuit has not explicitly stated whether an
20 executory contract or promise of future services can qualify as
21 "value." However, in Pringle, we considered the "value" prong of
22 the "reasonably equivalent value" analysis and stated: "'Case law
23 has embroidered this concept to include "any benefit" to the
24 debtor, "direct or indirect" as value.' Indeed, with only
25 limited exceptions, **'any . . . kind of enforceable executory**
26 **promise is value for purposes of section 548.'** Regardless of its
27 form, the economic benefit must be real and quantifiable."
28 In re Pringle, 495 B.R. at 463 (quoting 5 Collier on Bankruptcy

1 ¶ 548.05[5] (Alan N. Resnick & Henry J. Sommer, eds., 16th ed.
2 2013)).⁷ Other courts also adopt this view. See Mellon Bank,
3 N.A. v. Official Comm. of Unsecured Creditors (In re R.M.L.,
4 Inc.), 92 F.3d 139, 152 (3d Cir. 1996) (“[S]o long as there is
5 some chance that a contemplated investment will generate a
6 positive return at the time of the disputed transfer, we will
7 find that value has been conferred.”); Dobieco, Inc. v. Brown
8 (In re Brown), 265 B.R. 167, 175 (Bankr. E.D. Ark. 2001)
9 (assumption of obligation to pay rent is “value” given in
10 exchange for assignment of lease); Krommenhoek v. Nat. Res.
11 Recovery, Inc. (In re Treasure Valley Opportunities, Inc.),
12 166 B.R. 701, 704-05 (Bankr. D. Idaho 1994) (holding that monies
13 paid under an installment contract were not recoverable as a
14 fraudulent transfer because in exchange for the two payments, the
15 debtor received: (1) discharge of the obligation to pay the
16 transferee under the contract terms and (2) property in the form
17 of the continued vitality of the contract).

18 The Trustee’s reliance on the Second Circuit’s decision in
19 HBE Leasing Corp. v. Frank, 61 F.3d 1054 (2d Cir. 1995), is
20 unavailing. In that case, the appellate court held that the
21 judgment debtor’s transfer of bonds, a mortgage, and notes to his
22 attorney “in large part to secure the payment of future legal
23 fees and expenses” valued at \$350,000 was not “fair
24 consideration.” 61 F.3d at 1060. But that case does not stand
25

26 ⁷ The Trustee argues that Pringle is inapplicable because
27 the discussion of fraudulent conveyance law as supported by
28 Collier “is not essential to its holding.” Pringle’s statements
are persuasive even if they are dicta.

1 for the proposition that a contract for future legal services can
2 never amount to "value" as a matter of law; rather, it held that,
3 based on the particular facts of the case, the agreement was
4 undefined and of uncertain duration such that it could not give
5 "fair consideration." Indeed, it acknowledged that a services
6 contract may be fair consideration where the services are
7 definite and fixed. Id. at 1061. As discussed below, the
8 bankruptcy court in the present cases accepted the evidence that
9 the Fee Agreement was a flat-fee (and semi-flat-fee) agreement
10 for specific cases and services. HBE Leasing does not aid the
11 Trustee's case.

12 The only other cases on which the Trustee relies are
13 nineteenth century cases from outside of the Ninth Circuit. We
14 are not bound by any of these cases.

15 We are also guided by the principles of statutory
16 interpretation. The doctrine of *expressio unius est exclusio*
17 *alterius*, meaning "to express or include one thing implies the
18 exclusion of the other, or of the alternative," Black's Law
19 Dictionary 620 (8th ed.), "creates a presumption that when a
20 statute designates certain persons, things, or manners of
21 operation, all omissions should be understood as exclusions."
22 Silvers v. Sony Pictures Entm't, Inc., 402 F.3d 881, 885 (9th
23 Cir. 2005). "The *expressio unius* canon applies only when
24 'circumstances support[] a sensible inference that the term left
25 out must have been meant to be excluded.'" N.L.R.B. v. SW Gen.,
26 Inc., 137 S. Ct. 929, 940 (2017) (citation omitted).

27 Section 548(d)(2)(A) excludes from the definition of value
28 "an unperformed promise to furnish support to the debtor"

1 Similarly, the corresponding state statute excludes "an
2 unperformed promise . . . to furnish support to the debtor or
3 another person." Cal. Civ. Code § 3439.03. The Fee Agreement is
4 not a promise to furnish support. A reasonable reading of the
5 statute supports the negative implication that other types of
6 future promises, such as a promise of legal services, can qualify
7 as "value" under the statute. See In re Treasure Valley
8 Opportunities, Inc., 166 B.R. at 705 ("The strong negative
9 implication of this exclusion is that any other kind of
10 enforceable executory promise is value for purposes of section
11 548.").

12 The Trustee argues that the bankruptcy court erred in not
13 considering the question of "value." But the Trustee does not
14 show that he explicitly raised this issue before the bankruptcy
15 court. See Yamada v. Nobel Biocare Holding AG, 825 F.3d 536, 543
16 (9th Cir. 2016) ("[g]enerally, an appellate court will not hear
17 an issue raised for the first time on appeal"). Moreover,
18 implicit in the bankruptcy court's holding that MRK gave
19 "reasonably equivalent value" is the determination that the Fee
20 Agreement constituted value.

21 Accordingly, we hold that MRK gave "value."

22 **2. The value of MRK's promise was "reasonably equivalent."**

23 We next consider whether the value provided was reasonably
24 equivalent to \$635,000. The Trustee contends that the bankruptcy
25 court erred by considering the future value of the legal services
26 (as opposed to the value at the time the parties executed the Fee
27 Agreement) and by not limiting the value of the Fee Agreement to
28 the amounts recorded in MRK's billing records. We disagree.

1 The Bankruptcy Code does not define "reasonably equivalent
2 value." Nevertheless, we have stated:

3 it "is not an esoteric concept: a party receives
4 reasonably equivalent value . . . if it gets roughly
5 the value it gave." "Reasonably equivalent value" is a
6 key concept in fraudulent transfer law. As the
underlying goal of § 548 is to preserve estate assets,
courts assess reasonably equivalent value from the
creditors' perspective.

7 This examination requires the court to consider
8 all of the circumstances surrounding the transfer, but
9 "the focus is whether the net effect of the transaction
has depleted the bankruptcy estate."

10

11 [T]he value to the estate must be reasonably
12 equivalent to the value given up This
13 equivalence need not be precise. "By its terms and
application, the concept of 'reasonably equivalent
value' does not demand a precise dollar-for-dollar
exchange."

14 In re Pringle, 495 B.R. at 463-64 (internal citations omitted);
15 see In re Brobeck, Phleger & Harrison LLP, 408 B.R. at 341
16 ("Reasonable equivalence does not require exact equality in
17 value, but means 'approximately equivalent' or 'roughly
18 equivalent.'").

19 The bankruptcy court weighed the evidence to make a factual
20 determination as to whether the Fee Agreement constituted
21 reasonably equivalent value. It found the testimony of Dennis
22 Riley, an MRK attorney, credible and found that MRK's promise to
23 represent Castle Trading in the 2011 Action, the Aframian Action,
24 and the Greer Action was roughly equivalent in value to \$635,000.
25 In particular, the bankruptcy court noted that Mr. Riley
26 estimated the costs of his legal services based on prior
27 litigation with Precision and its counsel. It stated that there
28 was no evidence that the work was not completed or that the

1 litigation results were problematic. We hold that the bankruptcy
2 court did not clearly err.

3 The Trustee argues that the value of MRK's services should
4 be capped at \$217,819, which is the amount reflected in its
5 billing records. We again disagree in the context of this
6 appeal. The bankruptcy court accepted Mr. Riley's testimony that
7 the records may not have reflected all of the work done in the
8 cases because MRK was not billing by the hour. As such, there
9 was no exact dollar amount that could be associated with MRK's
10 actual work. Moreover, the value that MRK provided to Castle
11 Trading was not limited to the dollar amount in the billing
12 records. Castle Trading needed an attorney to represent it in
13 multiple lawsuits, but it was insolvent. MRK agreed to represent
14 Castle Trading, despite its financial distress, and MRK was
15 familiar with the client, its owners, the adversary, and the
16 adversary's counsel. These factors provided additional,
17 unquantifiable value. See Meeks v. Perroni (In re Armstrong),
18 234 B.R. 899, 906 (Bankr. E.D. Ark. 1999) ("reasonably equivalent
19 value includes more than the tangible hours actually expended").

20 Therefore, we hold that the bankruptcy court did not err in
21 finding that MRK provided reasonably equivalent value in exchange
22 for the \$635,000 promissory note and the deeds of trust.⁸

23 **B. The bankruptcy court did not err in applying the Pretrial**
24 **Order.**

25 The Trustee argues that the bankruptcy court erred in not
26

27 ⁸ We do not address any other grounds on which the Trustee
28 might be able to limit MRK's claim.

1 deciding two disputed questions of fact listed in the Pretrial
2 Order. The court did not err.

3 The relevant part of the Pretrial Order identifies the
4 factual issues that the parties and the court thought were
5 necessary before the trial began. After hearing the evidence and
6 arguments, the bankruptcy court decided that it did not need to
7 decide some of those factual issues. This was proper.

8 The Trustee argues at length that the bankruptcy court
9 should have found that the Fee Agreement was not an earned-on-
10 receipt retainer. As we stated above, we do not reach this
11 argument. In the fraudulent transfer analysis, the salient
12 question was whether the Fee Agreement provided reasonably
13 equivalent value to Castle Trading, and the bankruptcy court
14 appropriately held that it did; it found that the value of MRK's
15 promise was reasonably equivalent to what MRK received. The
16 bankruptcy court was not required to determine in what legal
17 cubbyhole to place the Fee Agreement because such a finding would
18 not have affected its decision that the promissory note and deeds
19 of trust were not avoidable on a fraudulent transfer theory.

20 **CONCLUSION**

21 For the reasons set forth above, the bankruptcy court did
22 not err in determining that MRK's legal services provided Castle
23 Trading with reasonably equivalent value for the promissory note
24 and deeds of trust. Therefore, the transfer was not a
25 constructive fraudulent transfer, and we AFFIRM. We do not reach
26 the issues raised in MRK's protective cross-appeals.