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8 **UNITED STATES BANKRUPTCY COURT**
 9 **DISTRICT OF NEVADA**

11
 12 In re
 13 Front Sight Management LLC,
 14 Debtor.

Case No. 22-11824-abl
 Chapter 11
 Adv. No. 22-01116-abl

16 Front Sight Management LLC, a Nevada Limited
 17 Liability Company,
 18 Plaintiff,

Hearing Date: July 25, 2022
Hearing Time: 9:30 a.m.

19 v.
 20 Las Vegas Development Fund LLC, a Nevada
 21 limited liability company, et al.,
 22 Defendants.

23 And all related counterclaims.
 24

25
 26
 27 **DEBTOR’S OPPOSITION TO MOTION TO REMAND**
 28

1 Front Sight Management LLC, the chapter 11 debtor in possession and plaintiff herein (the
2 “Debtor”), hereby submits its opposition (“Opposition”) to the *Motion to Remand* [Adv. ECF No. 4]
3 (the “Motion”) filed by Las Vegas Development Fund, LLC (“LVDF”).

4 I. INTRODUCTION AND SUMMARY OF ARGUMENT

5 By the Motion, LVDF seeks to remand the above captioned litigation to the state court;
6 however, in the Ninth Circuit, most, if not all, of LVDF’s claims in this action are property of the
7 estate as they either (a) are fraudulent transfer / conversion / waste / conspiracy claims or otherwise
8 allege injury to the Debtor, or (b) implicate alter ego claims. *See, In re O’Reilly*, 2014 WL 460767
9 *6 (N.D. Cal. 2014)(“The Ninth Circuit has recognized that certain causes of action seeking alter ego
10 liability, which allege injury to a debtor corporation, are properly brought by the trustee, such as
11 fraudulent conveyance, conversion and theft”), *citing Ahcom, LTD. v. Smeding* (“*Ahcom*”), 623 F.3d
12 1248, 1252 (9th Cir. 2010)(“ ‘an action by a trustee in bankruptcy to recover assets of the bankrupt
13 by setting aside *fraudulent and preferential transfers*’; ‘an action by creditors and a trustee in
14 bankruptcy for *conversion by a corporate stockholder of assets of the bankrupt corporation*’; ‘an
15 action by the trustee of a bankrupt corporation against the sole shareholders on an alter ego theory
16 upon allegations that ... *defendants deposited corporation funds into their personal bank accounts*
17 *or that corporation funds were received by defendants personally*”) (*quoting Stodd v. Goldberger*
18 (“*Stodd*”), 73 Cal.App.3d 827, 834 (1977)). Therefore, LVDF has no standing to prosecute its
19 counterclaims and third-party claims that are property of the estate, and LVDF is not entitled to
20 remand.

21 As explained herein, the Debtor is vested with the exclusive right to prosecute certain claims
22 unless and until such claims are abandoned by the estate. *Id. See also In re Valente*, 2022 WL
23 2176784, at *7 (9th Cir. BAP June 16, 2022)(“[O]nce a bankruptcy case is filed it is the bankruptcy
24 estate that owns any claim for fraudulent transfers made by the debtor. The estate owns the
25 fraudulent transfer claims for the benefit of the estate as a whole, and such claims must be pursued
26 by the trustee or the debtor-in-possession unless the court orders otherwise. This rule has long been
27 followed in the Ninth Circuit.”) Fraudulent transfer claims involving alleged transfers of a debtor’s
28 assets are claims exclusively in a debtor-in-possession’s control. *See In re Vandevort*, 2009 WL

1 7809927, at *6 (9th Cir. BAP Sept. 8, 2009); *City Nat'l Bank v. Chabot (In re Chabot)*, 100 B.R. 18,
2 23 (Bankr. C.D. Cal. 1989).

3 Because fraudulent transfer claims and conversion claims allege injury to the debtor and fall
4 within the core jurisdiction of the bankruptcy court, and only the Debtor has standing to pursue these
5 claims, remand is inappropriate. See *In re Pacific Gas & Elec. Co. ("Pacific Gas")*, 281 B.R. 1
6 (Bankr. N.D. Cal. 2002) (J. Montali). Presented with a removed state court action relating to claims
7 of fraudulent transfer, the *Pacific Gas* court rejected a creditor's request for remand in light of the
8 obvious fact that the creditor did not have standing to prosecute such claims. *Id.*, at 13 and 15
9 ("Because ... Behr lacks standing to assert her Fraudulent Transfer Claim. . . , those particular claims
10 should not be remanded. Such claims belong to the estate of Debtor and fall within this court's core
11 jurisdiction ... For the same reasons that Behr lacks standing to pursue her Fraudulent Transfer
12 Claim and her Bulk Transfer Claim, CSSF lacks standing to pursue the conversion claim and the
13 unjust enrichment claim, which belong to the estate."); see also *Ahcom, supra*, 623 F.3d at 1250
14 ("When the trustee [or debtor-in-possession] does have standing to assert a debtor's claim, that
15 standing is exclusive and divests all creditors of the power to bring the claim.")

16 To be clear, all of LVDF's counterclaims (save one), although given different labels such as
17 conversion and conspiracy, are founded on alleged fraudulent transfers and LVDF does not argue
18 otherwise. Indeed, LVDF acknowledges in its companion motion to terminate the automatic stay
19 that this Court may "determine[] that any of the claims are property of the bankruptcy estate and
20 should not be prosecuted by LVDF" [ECF No. 206, at 2:8-10] but fails utterly to address in either
21 motion the dispositive impact of LVDF's obvious lack of standing. As held already in the state court
22 action, all of the monies loaned by LVDF were used by the Debtor in accordance with the terms
23 required by the LVDF loan for construction purposes. See, p. 7:14-17 of the *Findings of Fact,*
24 *Conclusions of Law, and Order Denying Defendant Las Vegas Development Fund LLC's Motion to*
25 *Dissolve Temporary Restraining Order and to Appoint a Receiver* entered on January 23, 2020 in the
26 state court LVDF litigation. Thus, to the extent LVDF claims the existence of fraudulent transfers,
27 such claims are not even tethered to their loan proceeds, and LVDF has no independent right to
28 pursue such claims.

1 As to the one claim brought against non-debtor affiliates for alleged fraud, such claim is also
2 brought against the Debtor and, further, LVDF has alleged that the Debtor’s manager, Ignatius
3 Piazza (“Dr. Piazza”), is the alter ego of the Debtor, such that the Debtor (based upon LVDF’s own
4 allegations) has an equitable interest in this claim and it, too, is an asset of the estate. *See Henderson*
5 *v. Buchanan (In re Western World Funding, Inc.)*, 52 B.R. 743, 784 (Bankr. D. Nev. 1985), *aff’d in*
6 *part, rev’d on other grounds by sub nom. Buchanan v. Henderson*, 131 B.R. 859 (D. Nev. 1990),
7 *rev’d*, 985 F.2d 1021 (9th Cir. 1993). Further, it is not alleged that Mr. Piazza committed fraud in
8 his individual capacity but, rather, in his capacity as a managing member of the Debtor—*i.e.*, any
9 alleged misstatements were made for the benefit of the Debtor in Mr. Piazza’s capacity as an agent
10 of the Debtor. Therefore, the true principal of the alleged fraud as against LVDF is the Debtor.
11 Resolution of this claim necessarily will affect the administration of the bankruptcy case by deciding
12 the Debtor’s alleged liability to one of its creditors—either directly or as the alter ego of the other
13 defendants. More importantly, there are no damages relating to this alleged fraud distinct from
14 LVDF’s claimed contractual damages, which can be resolved through the claim objection process.

15 Likewise, all of the claims in the litigation brought by the Debtor pre-bankruptcy against
16 LVDF are core claims insofar as the affirmative claims by the Debtor clearly fall within 28 U.S.C.
17 §§ 157 (b)(2)(A), (B), (K) and (O). The Debtor’s claims against LVDF affect the extent and validity
18 of LVDF’s claims and liens, and affect the administration of the Debtor’s estate.

19 Here, LVDF already violated the automatic stay when it knowingly participated in a post-
20 bankruptcy hearing seeking to obtain terminating sanctions on the alleged fraudulent transfer claims
21 as against the transferees. Any such order is void, not voidable, as it constitutes a violation of the
22 automatic stay. *See In re Rodriguez*, 253 Fed. App. 383, 385 (9th Cir. Ap. 11, 2007). Further, in
23 light of clear Ninth Circuit authority to the effect that LVDF has no standing to prosecute these
24 claims and the fact that these are core claims, LVDF’s attempt to have this Court apply a 14-part
25 “remand” test misses the point. No court has ever applied this test where, as here, the party seeking
26 to prosecute the claims has no standing to do so.

27 LVDF pays lip service to its own admission that “the fraudulent transfer action appears to be
28 property of the Bankruptcy Estate” by arguing that the Debtor “has voluntarily chosen not to proceed

1 with the terminating sanctions against the principal of the Debtor.” ECF No. 206, at 14:7-10. But,
2 the Debtor has not abandoned the fraudulent transfer claims notwithstanding serious infirmities with
3 the claims—including the state court’s prior finding that *all* of LDVF’s loan proceeds were used for
4 construction. Furthermore, it appears that the Debtor was solvent at all relevant times referenced by
5 LVDF and that LVDF’s analysis does not take into account the significant amount of taxes paid by
6 the transferee to the Internal Revenue Service as the Debtor is a pass through entity for tax purposes.
7 LVDF seeks to pursue claims that, if they exist, belong to the estate and the creditor body as a whole
8 and in which LVDF has no right individually to the proceeds—a result that is antithetical to the
9 equitable distribution scheme provided for in bankruptcy. See *American National Bank of Austin v.*
10 *MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266, 1275–76 (5th Cir. 1983).

11 LVDF is a prepetition, oversecured, disputed creditor that currently has an over \$11 million
12 secured claim against the estate. At this point in time, the only litigation that should proceed with
13 respect to LVDF’s disputed claim is an objection to claim and a claims estimation motion.¹ To the
14 extent the Committee investigates the estate’s causes of action and determines that they have merit,
15 the Committee may then address any of its concerns with the Debtor and its insiders. The Debtor is
16 not abandoning any of the estate’s claims. The Debtor’s financial advisor continues to investigate
17 the validity of these claims and is cooperating with the Committee’s investigation of the same.
18 Any action taken with respect to these alleged claims will be subject to this Court’s scrutiny and
19 approval, and any potential recovery would inure to the benefit of general unsecured creditors or
20 equity (and not to an oversecured secured creditor). That the Debtor does not seek to piggyback on
21 terminating sanctions, which were not based on the merits of the case, which were obtained in
22 violation of the automatic stay and which actually harm the Debtor’s affirmative claims against
23 LVDF, is irrelevant and a red-herring. LVDF cites no authority for its right to prosecute claims that
24 are assets of the estate. No such authority exists.

25 Likewise, there is no authority—and LVDF cites none—for the proposition that the Court
26 could “determine[] that the fraudulent transfer should not be pursued by LVDF” [ECF No. 206, at

27
28 ¹ The Debtor is also investigating whether it is appropriate to seek to subordinate LVDF’s claim to all other allowed claims pursuant to 11 U.S.C. § 510(c).

1 15:2-3], but still allow LVDF to prosecute the terminating sanctions motion notwithstanding that it is
2 predicated on the fraudulent transfer claims (which is now controlled by the estate). There is no
3 question that pursuant to 11 U.S.C. § 544(b) the right to prosecute these claims vested with the
4 Debtor as of the petition date and the Debtor has voluntarily agreed to cooperate with the
5 Committee's investigation of any such claims. Accordingly, remand should not be ordered because
6 LVDF simply lacks the right to prosecute these claims at this time. LVDF will not be harmed by its
7 inability to prosecute these claims for the simple reason that, assuming these claims are not
8 prosecuted and/or ultimately settled by the Debtor with Court approval, the claims will by operation
9 of law revert in LVDF once abandoned or once the bankruptcy is confirmed. *In re Chabot*, 100 B.R.
10 at 23.

11 **II. THE DEBTOR'S LAWSUIT AGAINST LVDF AND RELATED COUNTERCLAIMS²**

12 As set forth more fully in the Debtor's operative Second Amended Complaint filed in the
13 LVDF litigation and the Declaration of Ignatius Piazza filed in support of the Debtor's first day
14 emergency motions [ECF No. 14 in the bankruptcy case], the Debtor's business model centered
15 around a major expansion plan that was intended to build the Front Sight Vacation Club & Resort
16 (vacation residences, an RV Park, etc.), a retail area adjacent to the vacation club and a pavilion
17 (collectively, the "Project"). As early as August of 2012, defendant Robert Dziubla, on behalf of
18 what eventually became LVDF, EB5IC, and EB5IA, made representations to the Debtor that Dziubla
19 and his associates had the ability, experience and networking breadth with Chinese investors to
20 enable Dziubla "to put together a financing package for some, or perhaps all, of the \$150 million you
21 [Front Sight] were seeking to raise." Request for Judicial Notice ("RJN"), **Exhibit 1**, attaching
22 operative Second Amended Complaint ("SAC"), at ¶ 11.

23 After years of on and off discussions and consistent representations by Dziubla and John
24 Fleming that they could secure the necessary financing, in October of 2016, the Debtor entered into a
25
26

27 ² The recitation of the allegations in the operative complaint are not offered for the truth of the
28 matters asserted, but simply to demonstrate that the gravamen of the claims and counterclaims
implicate core bankruptcy jurisdiction.

1 construction loan agreement (“CLA”) with LVDF for \$75 million, of which only \$6,3750,000 was
2 every funded by LVDF. SAC, at ¶ 40.

3
4 During this time period, the Debtor paid the interest payments on the loan every month on
5 time and in full. By 2018, the Debtor became suspicious that the funds advanced to Dziubla and
6 Fleming (approximately \$300,000 in fees and \$220,000 for marketing) had not actually been used to
7 secure USCIS approval and for marketing the project to foreign investors, and requested that
8 Dziubla and Fleming produce such evidence. SAC, at ¶ 62.

9 Dziubla and Fleming refused to show proof of where the funds the Debtor paid had been
10 spent (SAC at ¶ 81) and apparently in retaliation for its demands, Dziubla and Fleming fraudulently
11 claimed that the Debtor was in default on a number of terms of the CLA (which the Debtor was not
12 in default). SAC, at ¶¶ 49-59, 68.

13 To sum up a very complex history, Dziubla, Fleming and LVDF defaulted on their
14 obligations, failed to raise the funds necessary to complete the Vacation Club & Resort, and
15 litigation at issue herein was commenced by the Debtor against Dziubla, Fleming, LVDF and related
16 affiliates (collectively, the “LVDF Parties”) in September of 2018. The SAC was filed on January 4,
17 2019. RJN, **Exhibit 1**.

18 Thereafter, in 2019, Dziubla, Fleming, and LVDF filed a fraudulent foreclosure action
19 against the Debtor through their Defendants’ Answer to Plaintiff’s SAC; and Counterclaim. RJN,
20 **Exhibit 2**. In the counterclaim, LVDF alleges that the Debtor breached the CLA in a multitude of
21 ways, including alleged improper use of loan proceeds and transferring assets to related parties. *Id.*

22 As to the fraudulent nature of the LVDF Parties’ foreclosure action, on January 23, 2020, the
23 state court entered its *Findings of Fact, Conclusions of Law, and Order Denying Defendant Las*
24 *Vegas Development Fund LLC’s Motion to Dissolve Temporary Restraining Order and to Appoint a*
25 *Receiver* (the “January 23, 2020 Order”). A true and correct copy of the January 23, 2020 Order is
26 attached as **Exhibit 3** to the RJN.

1 Although the LVDF Parties allege in the foreclosure action the Debtor improperly used funds
 2 and improperly transferred assets to its principals, in the January 23, 2020 Order, the state court
 3 made the following conclusions of law:

4 a. Regarding alleged Breach #1, the Court concludes that Front Sight's expenses
 5 on the Project far exceed the amount of the loan from Defendant LVDF has [sic] Defendant
 6 LVDF's assertion that Front Fight improperly used loan proceeds is without merit, and
 consequently, LVDF has failed to establish this alleged breach.

7 b. As to the second, third, and fifth through thirteenth alleged breaches, as
 8 asserted by Defendant/Counterclaimant LVDF, the Court concludes that LVDF has not
 established that Plaintiff is in breach of the Construction Loan Agreement, and consequently,
 LVDF is not entitled to the relief that it seeks by this Motion.

9 c. Regarding the fourth alleged breach, pertaining to the reduction in the size of
 10 the Patriot Pavilion, because it appears that the size of the classroom was reduced but not the
 overall size of the facility, creating an issue of fact as to this alleged breach, the Court
 11 concludes that LVDF has not established that Plaintiff is in breach of the construction Loan
 Agreement, and consequently, LVDF is not entitled to the relief it seeks by this Motion.

12 **Exhibit 3**, pp. 7-8 (emphasis added).

13 Notwithstanding the state court's findings in the January 23, 2020 Order, on June 4, 2020,
 14 the LVDF Parties' filed a redacted version of Defendants' Answer to Plaintiff's Second Amended
 15 Complaint; and First Amended Counterclaim against, among others, the Debtor, its principal Dr.
 16 Ignatius Piazza, the VNV Dynasty Trust I and the VNV Dynasty Trust II (together with the VNV
 17 Dynasty Trust I, the "Trust Defendants"), and Jennifer Piazza, Dr. Piazza's wife. A true and correct
 18 copy of this counterclaim is attached to the RJN as **Exhibit 4** (and as previously mentioned the
 19 operating Counterclaim is attached as Exhibit 1).

20 In relevant part, the Counterclaim includes the following causes of action:

- 21 a. First, fraud against the Debtor and Dr. Piazza;
- 22 b. Second, fraudulent transfers against the Debtor and the Trust Defendants;
- 23 c. Third, intentional interference with contractual relationships against Dr.
 24 Piazza, Jennifer Piazza, and the Trust Defendants;
- 25 d. Fourth, conversion against the Debtor, Dr. Piazza, and Jennifer Piazza;
- 26 e. Fifth, civil conspiracy against, among others, the Debtor, Dr. Piazza, Jennifer
 27 Piazza, and the Trust Defendants;
- 28 f. Sixth, judicial foreclosure against the Debtor; and

1 g. Seventh, waste against the Debtor, Dr. Piazza, and the Trust Defendants.

2 Additionally, the Counterclaim includes allegations that the Debtor is the alter ego of Dr.
3 Piazza. Counterclaim, ¶¶ 15-16.

4 All of the LVDF Parties' counterclaims (save one), although given different labels such as
5 conversion and conspiracy, are founded on alleged fraudulent transfers set forth in the second cause
6 of action. None of the counterclaims are or could be based on harm suffered by LVDF individually.

7 Specifically, as to the third, fourth, fifth, sixth, and seventh causes of action in the
8 Counterclaim, the LVDF Parties' allege, in relevant part, as follows:

9 a. Dr. Piazza, Jennifer Piazza, and the Trust Defendants induced the Debtor "to
10 improperly use funds for the personal benefit of Counter Defendants Ignatius Piazza, Jennifer
11 Piazza, and VNV Trust Defendants." (Counterclaim, ¶ 92);

12 b. The Debtor, Dr. Piazza, and Jennifer Piazza misappropriated the loan
13 proceeds and spent the monies "for purposes other than that for which it was intended."
14 (Counterclaim, ¶ 98);

15 c. Dr. Piazza and Jennifer Piazza conspired with the Debtor and the Trust
16 Defendants, "using Front Sight and VNV Trust Defendants to achieve their unlawful
17 objective of diverting monies from Front Sight that were needed to maintain Front Sight's
18 solvency and its ability to meet its obligations under the CLA regarding timely completion of
19 the Project and repayment of the loan, for their own individual advantage and benefit."
20 (Counterclaim, ¶ 103).

21 d. "Based on Counter Defendants' conduct and inequitable result of allowing the
22 transferred funds to remain in control of Counter Defendants, a constructive trust should be
23 placed on all monies transferred from Front Sight to the VNV Trust Defendants."
24 (Counterclaim, ¶ 107);

25 e. The Debtor has breached the deed of trust in favor of LVDF by, among other
26 things, "improper use of loan proceeds; . . . diverting Front Sight assets out of Front Sight for
27 the benefit of the individual Counter Defendants. . . ."

28 f. The Debtor, Dr. Piazza, and the Trust Defendants committed corporate waste
by "improperly using funds earmarked for development of the Property for the personal
benefit of Counter Defendants Ignatius Piazza, Jennifer Piazza, and the VNV Trust
Defendants; selling unregistered securities which create substantial legal and financial
liability to Front Sight, misappropriating Front Sight's assets for the personal benefit of
Ignatius and Jennifer Piazza and other beneficiaries of the VNV Trust Defendants, and
selling various instruments which include rights to Front Sight's resort property for highly
reduced rates which further encumbers the Property." (Counterclaim, ¶ 120).

The state court has already found that the Debtor did not improperly use funds and that the
Debtor was not in breach of the CLA as late as January 2020. Thus, to the extent there were any
fraudulent transfers, those transfers were unrelated to LVDF's loan proceeds.

1 On May 12, 2022, LVDF brought a *Motion for Case Dispositive Sanctions* (the “Terminating
2 Sanctions Motion”) in the state court action, which was set for hearing on May 25, 2022. The
3 Terminating Sanctions Motion was based on the Debtor’s, Dr. Piazza, Jennifer Piazza, and the Trust
4 Defendants’ failure to appear for their depositions. Through the Terminating Sanctions Motion,
5 LVDF requested that the state court strike the Debtor’s Second Amended Complaint and enter
6 judgment in favor of LVDF on the Debtor’s claims, and strike Dr. Piazza, Jennifer Piazza, and the
7 Trust Defendants’ answers and affirmative defenses to the Counterclaim and enter default judgment
8 in LVDF’s favor.

9 On May 24, 2022, the Debtor filed its chapter 11 petition.

10 On May 24, 2022, the Debtor filed a *Suggestion of Bankruptcy* and on May 25, 2022, the
11 Debtor filed a *Notice of Bankruptcy Filing and Notice of Bankruptcy Stay* in the state court action.

12 At the May 25, 2022 hearing on the Terminating Sanctions Motion, and notwithstanding the
13 Debtor’s pending bankruptcy case, LVDF’s counsel incorrectly argued that the automatic stay did
14 not stay the entire state court action and requested that the state court proceed with ruling on the
15 Terminating Sanctions Motion.

16 **III. REMAND IS NOT APPROPRIATE WHERE, AS HERE, LVDF HAS NO STANDING 17 TO PROSECUTE ITS COUNTERCLAIMS AND THIRD-PARTY CLAIMS**

18 Section 362(a)(3) of the Bankruptcy Code, prohibits “any act to obtain possession of property
19 of the estate or of property from the estate or to exercise control over property of the estate.” 11
20 U.S.C. § 362(a)(3). “A fraudulent conveyance action becomes property of the estate upon the filing
21 of a bankruptcy petition.” *In re Koeberer*, 632 B.R. 680, 689 (B.A.P. 9th Cir. 2021) (citing *In re*
22 *Mark One Corp.*, 619 B.R. 423, 439 (Bankr. E.D. Cal. 2020)) (holding that recovery on an action for
23 “preferences or fraudulent conveyances” “is clearly within the rights of the bankruptcy estate to
24 recover fraudulent conveyances”). “The trustee's standing to sue on behalf of the estate is exclusive;
25 a debtor's creditors cannot prosecute such claims belonging to the estate absent abandonment.”
26 *Capriati Constr. Corp. v. SPER, Inc. (In re Capriati Constr. Corp.)*, BAP No. NV-17-1200-BHTa,
27 2018 WL 1404439, at *5 (9th Cir. BAP Mar. 20, 2018) (citing *Estate of Spiritos v. One San*
28 *Bernardino Cnty. Super. Ct.*, 443 F.3d 1172, 1175 (9th Cir. 2006)).

1 In *Pacific Gas, supra*, the court dealt with an almost identical situation. There, a creditor's
2 state court claims in which the creditor sought to recover for alleged fraudulent transfers was
3 removed by the debtor to bankruptcy court. The creditor sought to have the claims remanded. The
4 bankruptcy court denied the motion to remand. The court's analysis started with the settled
5 proposition that upon the filing of the bankruptcy, the trustee or debtor-in-possession has exclusive
6 standing to prosecute fraudulent transfer claims:

7 Absent court approval, only a trustee or debtor in possession has standing to assert
8 a fraudulent transfer action. *American National Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714 F.2d 1266 (5th
9 Cir.1983) (creditor's cause of action under the Texas Fraudulent Transfers Act
10 passed to trustee, who is charged with prosecuting on behalf of all creditors and
11 shareholders); *AP Industries, Inc. v. SN Phelps & Co. (In re AP Industries, Inc.)*,
12 117 B.R. 789, 800 (Bankr.S.D.N.Y.1990) (holding that initiation of state law
13 fraudulent transfer action violated the automatic stay; court sanctioned creditor)
14 ("intercession of a bankruptcy petition vests standing in a trustee or debtor-in-
possession to prosecute an action for recovery of a fraudulent conveyance ... 'It is
axiomatic that a duly qualified trustee in bankruptcy represents the estate and is the
only proper party to maintain any action under Code § 544(b) ... and that the
creditors of the estate have no right to proceed independently in their own names
... '").

15 *In re Pacific Gas*, 281 B.R. at 13; see also *In re Valente*, 2022 WL 2176785, at *7; *In re Vandevort*,
16 2009 WL 7809927, at *6; *In re Chabot*, 100 B.R. at 23.

17 The rationale behind vesting the estate with exclusive jurisdiction over fraudulent transfer
18 claims to the exclusion of an individual creditor was explained by the Fifth Circuit as follows:

19 The "strong arm" provision of the current Code, 11 U.S.C. § 544, allows the
20 bankruptcy trustee to step into the shoes of a creditor for the purpose of asserting
21 causes of action under state fraudulent conveyance acts for the benefit of all
22 creditors, not just those who win a race to judgment. [Citation omitted.] A trustee
23 acting under section 544 "acts as a representative of creditors," [citation omitted]
24 and any property recovered is returned to "the estate for the eventual benefit of all
25 creditors." [Citations omitted.] The Supreme Court has, in fact, expressly noted
26 that section "541(a)(1) is intended to include in the estate any property made
27 available to the estate by other provisions of the Bankruptcy Code," which would
28 include property made available through section 544. [Citation omitted.] Actions
for the recovery of the debtor's property by individual creditors under state
fraudulent conveyance laws would interfere with this estate and with the equitable
distribution scheme dependent upon it, and are therefore appropriately stayed
under section 362(a)(3). Any other result would produce near anarchy where the
only discernible organizing principle would be first-come-first-served. Even
without the Bankruptcy Code and the policies that support it, we would be
reluctant to elevate such a principle to a rule of law.

1 *American National Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica Corp.)*, 714
2 F.2d 1266, 1275–76 (5th Cir. 1983); *Pacific Gas*, 281 B.R. at 14 (quoting *MortgageAmerica*).

3 In an operating chapter 11 case and founded on the fact that only the estate had standing to
4 prosecute the fraudulent transfer claims, the *Pacific Gas* court concluded that remand to allow the
5 creditor to prosecute these claims was not warranted:

6 Since the estate is the only party with standing to assert the Fraudulent Transfer
7 Claim ..., Behr cannot pursue these claims. By initiating such actions Behr
8 violated the automatic stay. Moreover, since these claims belong to the estate,
they fall within this court's core jurisdiction under 28 U.S.C. § 157(H) and (F).
Consequently, the court will not remand these claims.

9 *In re Pacific Gas*, 281 B.R. at 14.

10 Here, LVDF's claims clearly sound in fraudulent transfer and, more specifically, in harm to
11 the corporation. *See e.g.*, Counterclaim, at ¶ 92 ("improper use of funds" for the benefit of the
12 individuals), ¶ 98 ("misappropriated the loan proceeds"), ¶ 103 (conspiring to "diver[] monies from
13 Front Sight that were needed to maintain Front Sight's solvency"), ¶ 107 (seeking constructive trust
14 "on all monies transferred from Front Sight to the VNV Trust Defendants"), ¶ 113 ("improper use of
15 loan proceeds; . . . diverting Front Sight assets out of Front Sight for the benefit of the individual
16 Counter Defendants. . . ."), and ¶ 120 (corporate waste by "improperly using funds earmarked for
17 development of the Property for the personal benefit of Counter Defendants Ignatius Piazza, Jennifer
18 Piazza, and the VNV Trust Defendants").

19 The claims at issue, such as fraudulent transfers, intentional interference with contract,
20 conversion, conspiracy, corporate waste, alter ego, and the like, all sound in harm primarily to the
21 corporation and not to any single creditors. Where the injury alleged is primarily to the corporation,
22 and is injury to the plaintiff creditor only insofar as it decreases the assets of the corporation to
23 which he must look for satisfaction of his debt, then the suit is for a tort suffered by the corporation,
24 and properly brought by the trustee." *AgriBioTech, Inc.*, 319 B.R. 216, 220-221 (D. Nev. 2004)
25 quoting *In re Western World*, 52 B.R. at 775.

26 Case law is clear that it is not the label placed on a claim but the substance of the claim that
27 controls. *See In re Bernard L. Madoff Investment Securities LLC*, 739 Fed. Appx. 679, 685 (2d Cir.
28 June 27, 2018) ("substance of the allegations is relevant insofar as it helps us to determine whether,

1 despite the label Appellants attach to it, the claim asserted is actually a disguised fraudulent transfer
 2 claim that is derivative of the Trustee’s fraudulent transfer claim”). Here, the gravamen of LVDF’s
 3 counterclaims focus on the alleged improper transfer of funds from the Debtor to various individuals
 4 and entities.³ These are quintessential fraudulent transfer claims (and claims that have as their
 5 gravamen harm to the corporation as a whole and not to any single creditor) whether disguised as
 6 conspiracy, constructive trust, or conversion claims. Thus, these claims belong to the estate and
 7 LVDF has no standing to prosecute them and, thus, no basis to seek remand.

8 **IV. ALL OF THE CLAIMS ARE CORE CLAIMS THAT SHOULD BE LITIGATED IN** 9 **THE BANKRUPTCY COURT**

10 Not only does LVDF fail to address its lack of standing to prosecute the fraudulent transfer
 11 claims, which is fatal to its request for remand, it likewise fails to acknowledge that the entirety of
 12 the state court action involves core claims, claims which should properly be adjudicated in the
 13 bankruptcy court. There simply is not a claim or counterclaim brought against a third party that is or
 14 could be predicated on individual harm to LVDF, save for one (noted above). But, even this claim is
 15 impacted by the allegations of alter ego that makes such claim an asset of the estate⁴ and the fact that

16 ³ As an example, with respect to the claim for civil conspiracy “in Nevada, ‘civil conspiracy liability
 17 may attach where two or more persons undertake some concerted action with the intent to commit an
 18 unlawful objective. . . .’” *Vandalay Enterprises, Inc. v. Herrin*, 133 Nev. 1086, 390 P.3d 959 (2017)
 19 (quoting *Cadle Co. v. Woods & Erickson, LLP*, 131 Nev., Adv. Op. 15, 345 P.3d 1049, 1052
 20 (2015)). Thus, in order to properly plead a claim for civil conspiracy liability, there must be an
 21 underlying act. Here, LVDF has alleged that the underlying act is the fraudulent transfer of funds
 22 from the Debtor to Dr. Piazza, Jennifer Piazza and the Trust Defendants.

23 ⁴ As explained by the district court in *Trustees of the Const. Indus. & Laborers Health & Welfare*
 24 *Tr. v. Vasquez*, 2011 WL 4549228, at *2–3 (D. Nev. Sept. 29, 2011):

25 Where state law permits an alter ego claim to be asserted by a corporation in its own
 26 name, such a right of action is property of the estate, assertable only by the bankruptcy
 27 trustee or the debtor-in-possession, and a claim by a creditor against the debtor's affiliate
 28 based solely on an alter ego theory is therefore barred for lack of standing and under the
 automatic stay. [citations]. As recognized by the Fifth Circuit in *S.I. Acquisition*, 817
 F.2d at 1152–53, Nevada law is identical to Texas law in permitting a corporation to
 bring an alter ego claim in its own name. See *Henderson v. Buchanan (In re Western*
World Funding, Inc.), 52 B.R. 743, 783–84 (Bankr.D.Nev.1985).

Accordingly, if S & G is the alter ego of ADT, as Plaintiffs allege and which this court
 accepts as true, they “are to be regarded as identical,” *Frank McCleary Cattle Co. v.*
Sewell, 73 Nev. 279, 282, 317 P.2d 957 (Nev.1957), ADT “has an equitable interest in
 the assets of its alter ego,” *Western World*, 52 B.R. at 784, and the right to assert an alter
 ego claim against S & G is property of ADT's bankruptcy estate. See 11 U.S.C. §
 541(a)(1) (property of the estate includes “all legal or equitable interests of the debtor in
 property as of the commencement of the case”).

1 the alleged fraud was perpetrated on behalf of and for the benefit of the Debtor (i.e., with the other
2 defendants acting in their capacity as agents for the Debtor). LVDF makes no showing to the
3 contrary, nor can it credibly claim that resolution of the fraud claim would not necessarily affect the
4 administration of the bankruptcy case. Moreover, to the extent the other defendants were “alter
5 egos” of the Debtor, as LVDF claims, those rights vest in the Debtor, not LVDF.

6 Rather, LVDF claims that this Court should apply a 14-factor test and that these factors augur
7 towards remand. Remand Motion, at p. 8 citing *In re Cedar Funding, Inc.*, 419 B.R. 807, 814 fn. 18
8 (B.A.P. 9th Cir. 2009). The factors are irrelevant where, as here the third party seeking remand has
9 no standing to prosecute these claims. Indeed, the Debtor’s counsel could find no case that ordered
10 remand (let alone applied those factors) where, as here, the estate, not the third-party creditor, had
11 exclusive standing to prosecute the creditor’s state law claims. *See, e.g., Pacific Gas*, 821 B.R. 1
12 (estate’s exclusive right to prosecute creditor’s fraudulent transfer claim warranted denial of
13 creditor’s motion to remand). Indeed, given that the estate has exclusive standing over these claims,
14 it is questionable that LVDF even has standing to seek remand. It simply is no longer the real party
15 in interest with respect to the claims rooted in alleged fraudulent transfers or alter ego.

16 Nevertheless, and assuming that an equitable analysis should be conducted, the *Cedar*
17 *Funding* case discussed the fact that courts “may” consider up to fourteen factors in making this
18 determination. The *Cedar Funding* court, however, recognized that the fact “that the matter is core
19 is a significant factor weighing in favor of adjudicating the dispute in the bankruptcy court.” *Id.*, at
20 821.

21 Indeed, a review of the case law reflects that courts are inclined to order remand where the
22 third-party state law claims are merely “related to” the bankruptcy, but not so inclined when the state
23 law claims are core proceedings. Compare *Slinde & Nelson, LLC. v Luneke*, 2017 WL 721242, *4-5
24 (granting remand in large measure because claims were “related to” and not “core” claims) and

25
26 *Id.* at *2 (emphasis added); *see In re Howrey LLP*, 2014 WL 3899309, at *5 (N.D. Cal. Aug. 8,
27 2014) (“To allow HC to pursue its alter ego remedy against third party non-debtors on a fraudulent
28 transfer theory would interfere with the orderly liquidation procedure the automatic stay was
designed to prevent. The prosecution of HC's adversary proceeding would interfere with the
Trustee's ability to pursue claims for the benefit of all creditors and to ensure that all similarly-
situated creditors are treated fairly.”).

1 *Health Care Service Corp. v. Mallinckrodt ARD LLC*, 2021 WL 2474272, *6 (“[w]hile this action is
2 related to the bankruptcy, it is not a core action” distinguishing *Cedar Funding*) with *Cedar*
3 *Funding*, 419 B.R. at 821 (no remand in light of fact that claims in question are core proceedings).

4 In this regard, LVDF’s brief is noticeably silent on the nature of the claims at issue. Under
5 its discussion of the fourth and fifth factors, jurisdictional basis, LVDF fails whatsoever to
6 acknowledge that these are core claims and, more importantly, that the estate has exclusive standing
7 to prosecute these claims. Remand Motion, at pp.9-10. Moreover, in discussing the degree of
8 relatedness to the bankruptcy case, on the one hand LVDF claims only limited relatedness while, on
9 the other hand, it has admitted that the state law claims will resolve LVDF’s claim in the bankruptcy.
10 Remand Motion, at 8. In point of fact, LVDF’s claim of limited relatedness is predicated on its
11 failure to acknowledge that its fraudulent transfer claims are core claims and assets of the estate.
12 LVDF’s bald claim that “the dispute raises a number of issues that are not subject to the jurisdiction
13 of the Bankruptcy Court and would only serve to distract from the efficient administration of the
14 estate” is not supported by any analysis—and, as discussed herein, the opposite is true.

15 LVDF’s superficial treatment of the other factors is obvious. For example, LVDF claims that
16 this litigation would be a substantial burden on the bankruptcy court. But, in the context of this
17 mega bankruptcy case, it is a small component and the core issues would necessarily need to be
18 examined by this Court insofar as they go directly to the validity and value of LVDF’s bankruptcy
19 proof of claim and the assets of the estate (assuming there were, in fact, fraudulent transfers). At this
20 point in time, the only litigation involving LVDF in this case will related to an objection to claim, a
21 claims estimation motion and potentially complaint for subordination if the Debtor determines it is in
22 the estate’s best interest to pursue such a claim. Undoubtedly, this Court (a specialty court itself)
23 routinely deals with claim objections, claims estimation, subordination and claims of fraudulent
24 transfer. It need not defer to a Nevada state court to assist in the adjudication of core bankruptcy
25 issues.

26 Likewise, the claim that nondebtors are involved in the dispute does not change the nature of
27 the dispute. These are core bankruptcy claims. LVDF claims that this Court “arguably does not
28 have jurisdiction over the third parties” [Remand Motion, at 12:13-14], but fails to connect the dots

1 between this bald statement and the facts. Of course, this Court would have jurisdiction over
2 persons alleged to be fraudulent transferees of the Debtor's assets notwithstanding LVDF's bald
3 statement to the contrary.

4 LVDF also complains about its loss of the right to a jury trial. But, that would happen
5 whether the claims stay with this Court or are remanded for the simple fact that until and unless the
6 Debtor abandons the claims, LVDF has no standing to prosecute them and, thus, no current right to a
7 jury trial. *See also, In re Neel*, 554 B.R. 241, 249 (Bankr. D. Oregon 2016)(where claims are within
8 the bankruptcy court's core jurisdiction, the bankruptcy court has the authority to decide them
9 without a jury).

10 In sum, while the factors do not apply in light of LVDF's lack of standing, even if applicable
11 the critical factor, that these claims are core claims, favors retention of this litigation, and the other
12 factors, likewise, support retention.

13 **V. IF REMANDED, LVDF HAS ADMITTED THAT FURTHER PROSECUTION AND**
14 **DEFENSE OF THIS ACTION WILL BE COSTLY**

15 The Debtor's bankruptcy is a "mega" bankruptcy case with attendant costs associated
16 therewith. Moreover, the Debtor's assets and the stalking horse agreement entered into are sufficient
17 to make LVDF whole (assuming LVDF is entitled to anything). From an estate asset perspective, it
18 makes little sense to pour substantial financial resources into a litigation and trial in the near term,
19 which LVDF admits will be required even if were allowed to pursue terminating sanctions against
20 some of the defendants (which it cannot because it has no standing to do so).

21 One of the purposes of this bankruptcy filing was to assist the Debtor in addressing LVDF's
22 disputed oversecured claim in a cost-effective and timely manner (and not spending years litigating
23 claims that are irrelevant to the validity and extent of LVDF's secured claim). The Debtor has
24 incurred millions of dollars in attorneys' fees engaging in litigation with LDVF, which does not even
25 include the over \$1.6 million in attorneys' fees that LVDF asserts it is owed under the CLA. At this
26 point, the LVDF litigation that is necessary for the Debtor to propose and confirm its plan is a claim
27 objection, a claims estimation motion and potentially an action to subordinate LVDF's claim. LVDF
28 argues for the opposite and does so at a time when it lacks standing to prosecute the very claims it

1 wants remanded (and which are wholly irrelevant to the extent and validity of LVDF's alleged
 2 secured claim). While the Debtor seeks to reorganize and exit bankruptcy forthwith, LVDF seeks to
 3 have the Debtor pour the estate's assets into a litigation that, by LVDF's own account, will require
 4 additional depositions and a trial.

5 Indeed, looking at the fourteen factors identified by the *Cedar Fund* court (which factors do
 6 not apply here because LVDF has no standing), the very first factor is the impact on the efficient
 7 administration of the estate if the court remands. Therein, LVDF admits that the removed litigation
 8 is central to "deciding the amount of LVDF's creditor claim." Remand Motion, at 8:25-26.
 9 Efficient administration at this point mandates that remand be denied as this Court is the Court that
 10 is best equipped to determine the extent and validity of LVDF's alleged secured claim.

11 **VI. LVDF'S RIGHTS, IF ANY, ARE PROTECTED BY THE FACT THAT IF THE**
 12 **DEBTOR ABANDONS THESE CLAIMS THEY WILL REVEST IN LVDF**

13 LVDF will suffer no prejudice by the operation of bankruptcy law that vests in the Debtor the
 14 exclusive standing and right to prosecute LVDF's counterclaims. This is so because the Debtor
 15 cannot compromise these claims absent this Court's approval, which will eliminate any potential
 16 claim of collusion and, further, if the Debtor abandons these claims, the claims will revest in LVDF.
 17 As explained by the Ninth Circuit B.A.P., "prepetition standing of a creditor plaintiff is not 'lost' but
 18 rather its rights are superseded unless and until claims are abandoned under Section 544." *In re*
 19 *Vandevort*, 2009 WL 7809927, at *6. The protection afforded LVDF insofar as it could pursue the
 20 state law fraudulent transfer claims upon abandonment by the estate was discussed at length by the
 21 court in *In re Chabot*, as follows:

22 'Under Code § 544(b), the filing of a bankruptcy petition does not strip creditors of
 23 state-created rights to avoid transfers, it merely shifts that right to the creditors'
 24 representative.' 4 Norton Bankruptcy Law & Practice § 30.06, at 12 (1988). The
 25 mere fact that Section 544(b) gave the Chapter 7 Trustee standing in a
 26 representative capacity to assert the Bank's claim for a period of time did not act to
 27 destroy the Bank's rights. When a case is closed in which the trustee did not pursue
 28 a fraudulent conveyance cause of action pursuant to Section 544(b), such as
 happened in the Chabots' case, the right to pursue the state law cause of action
 reposes once again in whomever is able to assert it. *Chabot*, 100 B .R. at 23
 (emphasis added). In other words, the filing of a bankruptcy petition does not strip
 a creditor of standing to pursue a fraudulent transfer action if the trustee abandons
 it, particularly where (as here) the debtor's discharge has been denied. Rather, the
 creditor is stayed from prosecuting the claim and unless the trustee opts to
 intervene or to file his or her own fraudulent transfer action, the creditor may

1 pursue the cause of action upon closing of the bankruptcy estate (unless the matter
has become moot because the creditor's claim has been discharged).

2 *In re Chabot*, 100 B.R. 23. Thus, and assuming that the Debtor ultimately abandons these claims,
3 LVDF will be free to prosecute these claims at that time and will be free to present these claims to a
4 jury.

5 Herein lies the fatal flaw in the entirety of LVDF. It is arguing on its own account—as if it
6 stands individually to benefit from the fraudulent transfer claims if they are proven (and
7 notwithstanding the state court’s prior findings that all of LVDF’s monies were used for
8 construction). The fundamental foundation for LVDF’s arguments is misplaced. It no longer gets
9 the benefit of being the first filed. The fraudulent transfer claims are now owned by the estate and
10 any recoveries will be on behalf of general unsecured creditors, and not by LVDF. In turn, LVDF is
11 protected by the revesting of these claims if abandoned at a later time by the Debtor.

12 **VII. CONCLUSION**

13 Based on the foregoing, LVDF’s Motion should be denied.

14 Dated: July 11, 2022

Respectfully Submitted,

BG Law LLP

17
18 /s/ Susan K. Seflin

Susan K. Seflin

Admitted Pro Hac Vice

Proposed Attorneys for Chapter 11

Debtor in Possession