

United States District Court  
Northern District of California

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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

JAMES GANSMAN,  
Plaintiff,

v.

MICHAEL A. TANENBAUM, et al.,  
Defendants.

Case No. 23-cv-03667-BLF

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

JAMES GANSMAN,  
Plaintiff,

v.

JAMES KEALE,  
Defendant.

Case No. 23-cv-03671-BLF

**I. INTRODUCTION**

Plaintiff James Gansman, the Liquidating Trustee (“Trustee”) of the Sedgwick LLP Liquidating Trust, brought this action to recover funds paid to Defendants James Keale and Michael Tanenbaum by Sedgwick LLP (“Debtor”) in 2017. 23-3667 ECF No. 1-1 (“Tanenbaum Compl.”); 23-3671 ECF No. 1-4 (“Keale Compl.”). The Trustee originally brought six claims: (1) breach of fiduciary duty; (2) return of distributions pursuant to Cal. Corp. Code § 16957(a)(1); (3) return of distributions pursuant to Cal. Corp. Code § 16957(a)(2); (4) avoidance of two-year fraudulent transfers (constructive fraud) pursuant to 11 U.S.C. §§ 548(a)(1)(B) and 550; (5) avoidance of preferential transfers pursuant to 11 U.S.C. §§ 547 and 550; and (6) recovery of avoided transfers pursuant to 11 U.S.C. §§ 544, 547, 548, and 550 and Cal. Civ. Code § 3439.07. *See* Tanenbaum Compl. ¶¶ 55–91; Keale Compl. ¶¶ 54–93. The Trustee’s claim for breach of fiduciary duty (Claim 1) was settled and dismissed while this action was still pending before the

1 Bankruptcy Court. *See* ECF No. 15 at 2 n.1.

2 In December 2020, the parties stipulated to the withdrawal of the bankruptcy reference,  
3 effective after the Bankruptcy Court’s final pretrial conference and the Bankruptcy Court’s  
4 certification that the adversary proceeding was ready for trial. 23-3667 ECF No. 1; 23-3671 ECF  
5 No. 1-3. In July 2023, the Bankruptcy Court certified that this proceeding was ready for trial and  
6 recommended that this Court withdraw the reference from the Bankruptcy Court. 23-3667 ECF  
7 No. 2; 23-3671 ECF No. 1-1. In August 2023, the Court withdrew the reference from the  
8 Bankruptcy Court, 23-3667 ECF No. 3; 23-3671 ECF No. 3, and consolidated the cases for trial.  
9 23-3667 ECF No. 10.

10 The Court held a bench trial as to the Trustee’s remaining claims on March 25, 26, and 27.  
11 ECF Nos. 43–45. At the end of trial and in his trial brief, the Trustee stated that he is no longer  
12 pursuing his claim for avoidance of preferential transfers (Claim 5). *See* ECF No. 55 (“Trustee  
13 Br.”); ECF No. 52 at 437:15–18. Thus, only Claims 2, 3, 4, and 6 remain. Having considered the  
14 evidence and oral argument presented at trial, the Court makes the following findings of fact and  
15 conclusions of law.

## 16 **II. LEGAL STANDARD**

17 “In an action tried on the facts without a jury or with an advisory jury, the court must find  
18 the facts specially and state its conclusions of law separately.” Fed. R. Civ. P. 52(a)(1). “The  
19 findings and conclusions may be stated on the record after the close of the evidence or may appear  
20 in an opinion or a memorandum of decision filed by the court.” *Id.* “Findings of fact, whether  
21 based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing  
22 court must give due regard to the trial court’s opportunity to judge the witnesses’ credibility.”  
23 Fed. R. Civ. P. 52(a)(6).

24 “One purpose behind Rule 52(a) is to aid the appellate court’s understanding of the bases  
25 of the trial court’s decision.” *Simeonoff v. Hener*, 249 F.3d 883, 891 (9th Cir. 2001) (internal  
26 citations omitted). “The district court is not required to base its findings on each and every fact  
27 presented at trial.” *Id.*

28

**III. FINDINGS OF FACT**

**A. Stipulated Facts**

The parties stipulated to the following facts in their Joint Pretrial Statement (“JPS”) and in a separate stipulation filed before trial. *See* ECF No. 15 (“JPS”) at 6–11; ECF No. 40.

1. The Debtor was founded in 1933 and was registered as a limited liability partnership with the California Secretary of State on January 1, 2003. The Debtor operated as an international litigation and business law firm with offices located in San Francisco, Los Angeles, New York, Orange County, Newark, Dallas, Chicago, Houston, Austin, Fort Lauderdale, Seattle, Washington D.C., Miami, Kansas City, London, and Bermuda. JPS at 6.

2. Defendants are former equity partners of the Debtor based in the Newark, New Jersey office. *See* JPS at 2. Between 2007 to 2015, Tanenbaum served as Chairman of the executive committee of the Debtor, stepping down on February 4, 2015, after the election of Michael Healy to Chairman. *Id.* at 6–7. During 2016, Keale was a member of the Debtor’s executive committee, stepping down on December 31, 2016. *Id.*

3. The Defendants are each an “insider” of the Debtor, as that term is defined by 11 U.S.C. § 101(31)(C). JPS at 10.

4. In October 2016, the Debtor reduced payments to retired partners by approximately 82.6% for the months of October, November, and December 2016. JPS at 7.

5. On November 13, 2016, Keale sent an email to the Healy regarding presenting to the rest of the executive committee on a plan to restructure the firm from three divisions down to two, distribute money on a budgeted basis throughout the year, and reduce future retirement benefits, among other things. JPS at 7.

6. On December 12, 2016, the Debtor’s primary lender, Citibank, advised that it was waiving the anticipated violation by Debtor for December 31, 2016 of the covenant contained in Article VI, Section 6.01 (b) Net Income/Cash flow, as it relates to (iii) each of its fiscal years commencing with its fiscal year ending on December 31, 2011, Cash flow of not less than the greater of (C) \$30,000,000 and (D) 85% of the Cash flow for its immediately preceding fiscal year. JPS at 7.

1           7.       On December 31, 2016, Ralph Guirgis sent an email to the Debtor’s Executive  
2 Committee proposing the framework for changes to equity partner distributions, including  
3 changing the quarterly draws to greater align with a partner’s overall yearly compensation,  
4 quarterly distributions at pre-set net income thresholds, and the funding of minimum net income  
5 thresholds would be through the firm line of credit with Citigroup. JPS at 7.

6           8.       The first week of January 2017, Keale met with Healy in San Francisco, and  
7 advised him that Defendants and Thomas Robertson, another equity partner, were leaving the firm.  
8 JPS at 7.

9           9.       On or about January 5, 2017, Defendants and Robertson announced they were  
10 leaving the Debtor to create their own firm. JPS at 8.

11          10.      On January 9, 2017, Tanenbaum and Keale notified the Debtor’s executive  
12 committee that they intended to leave the Debtor effective on January 31, 2017. JPS at 9.

13          11.      On January 11, 2017, Keale emailed Healy that the Sedgwick New Jersey office  
14 employees will be offered jobs in the new Tanenbaum Keale law firm and indicated that the option  
15 for the New Jersey office employees to stay employed at the Debtor was “not a reality.” JPS at 8.

16          12.      In early January 2017, the Debtor’s executive committee was notified that a group  
17 of partners in the Newark, New Jersey office were withdrawing from the partnership effective  
18 January 31, 2017 and forming their own law firm. The new firm, led by Tanenbaum and Keale,  
19 agreed to take the majority of associates and staff who worked in the Newark office. They also  
20 agreed to sublease a substantial portion of the firm’s office space in Newark. JPS at 6, 8.

21          13.      The Defendants’ new law firm, Tanenbaum Keale LLP, had 100% of its 2017  
22 revenue come from former Sedgwick clients who departed after the Defendants left Sedgwick in  
23 January 2017. JPS at 11.

24          14.      On January 9, 2017, the Debtor’s executive committee was notified in a combined  
25 communication that a group of four equity partners in the Dallas, Texas office were withdrawing  
26 from the partnership effective January 31, 2017 and joining the law firm Drinker Biddle LLP. The  
27 majority of partners, associates, and staff who worked in the Dallas office also left to join Drinker  
28 Biddle. The Debtor’s management negotiated with Drinker Biddle for Drinker Biddle to assume

1 the Dallas office lease in its entirety effective February 1, 2017. Drinker Biddle also purchased  
2 certain fixed assets from the Debtor. JPS at 8.

3 15. Based on the “Sedgwick Real Estate Portfolio Overview 2017,” there was a  
4 sublease in place for a portion of the San Francisco property. JPS at 6.

5 16. The Newark and Dallas offices represented approximately 46% of the Debtor’s net  
6 income—the Dallas office was 21.2% of the Debtor’s net income in 2016 and the Newark office  
7 was 25% of the Debtor’s net income in 2016—which was lost in January 2017. The Newark and  
8 Dallas partners each disassociated with the Debtor on the same day, January 31, 2017, and their  
9 respective offices were similar in size of their profitability. JPS at 8.

10 17. Between January to March 2017, eleven equity partners as well as non-equity  
11 partners, associate attorneys, and staff departed the Debtor’s firm. Management estimated that  
12 annual revenue related to the departing attorneys was approximately \$38 million, or approximately  
13 25% of the 2016 revenue. JPS at 8–9.

14 18. On March 10, 2017, the Debtor’s Chief Financial Officer (CFO), James Nations,  
15 departed the firm. JPS at 9.

16 19. On March 14, 2017, the New Jersey partners, Tanenbaum, Keale, and Thomas  
17 Robertson, entered an agreement for the Debtor to pay them \$476,864 (total) from the final  
18 distribution of Partnership Net Income for calendar year 2016. In addition, Debtor agreed to pay  
19 Tanenbaum \$20,730.94 per month and Keale \$6,322.07 per month on the 15th calendar day of  
20 each month until and including December 15, 2017. This agreement acknowledged that  
21 Tanenbaum and Keale disagreed with the calculation of their respective Capital Accounts and  
22 contended that the amounts of their Capital Accounts were \$1,644,591.77 for Tanenbaum and  
23 \$485,401.02 for Keale. JPS at 9.

24 20. Per the Debtor’s reviewed financial statements for 2017, Note 8 – Retirement  
25 Arrangements, “The Firm’s partnership agreement provides for certain retirement arrangements  
26 for retired partners based upon various factors. The Firm paid \$1,008,421 and \$1,805,370 to  
27 retired partners under these arrangements during 2017 and 2016, respectively.” JPS at 7.

28 21. As indicated in the Debtor’s reviewed financial statements in its Note 8, Debtor’s

1 payments to retired partners “. . . may not exceed 5% of the Firm’s distributable net income in any  
2 one year.” JPS at 7.

3 22. By March 31, 2017, the Debtor’s internal financial statements indicated that the  
4 Debtor’s total cash dropped by over 70% to approximately \$2.9 million, where it had been in the  
5 range of \$10 million to \$20 million at all relevant times before. JPS at 9.

6 23. The Debtor’s total cash balances for January through August of 2017 are as  
7 follows: January 2017 (\$9,289,091.52); February 2017 (\$6,742,921.49); March 2017  
8 (\$2,934,374.29); April 2017 (\$2,657,266.10); May 2017 (\$1,763,492.56); June 2017  
9 (\$4,405,433.73); July 2017 (\$3,728,713.50); and August 2017 (\$3,855,130.49). JPS at 9.

10 24. On December 31, 2017, all remaining offices of the Debtor were closed for the  
11 purposes of practicing law. JPS at 9.

12 25. On December 31, 2017, the Debtor’s actual cash-based 2017 revenue was down  
13 \$52.7 million or 31.5% when compared to 2016, per the CPA reviewed financials. The internal  
14 financials indicate that the Debtor had 2017 losses of approximately \$14.3 million on a modified  
15 accrual basis, and lost money during most months in 2017. The 12/31/2017 CPA reviewed  
16 financial statements mention: “There is a likelihood that the Firm will be unable to settle all of its  
17 liabilities through the course of the liquidation process, in which case the Firm would likely  
18 commence voluntary bankruptcy proceedings.” The 12/31/2017 CPA reviewed financial  
19 statements also state: “Due to the decision to dissolve the Firm effective 12/31/2017 and the  
20 excess of liabilities and obligations over assets, it is highly unlikely that the Firm will be able to  
21 repay partners’ capital to former equity partners.” JPS at 9–10.

22 26. On October 2, 2018, the Debtor filed a voluntary chapter 11 bankruptcy petition  
23 (the “Petition Date”). In the Debtor’s amended bankruptcy schedules and statements, which were  
24 filed on December 20, 2018, the Debtor scheduled assets of \$3,528,809.69 and liabilities of  
25 \$69,308,897.99. The scheduled assets consisted of approximately \$1.44 million in cash, \$166,000  
26 in deposits (including security deposits and utility deposits), \$1 million in accounts receivable  
27 (estimated net collectible), \$745,000 for a 78% interest in Sedgwick UK, and \$175,323 in tax  
28 refunds. The scheduled liabilities consisted of approximately \$143,441 in taxes payable to the

1 federal government and multiple states, \$66.2 million in real estate lease claims, and \$3 million in  
2 miscellaneous trade debts. JPS at 6.

3 27. Despite the Debtor's bankruptcy schedules, the total amount of lease claims filed in  
4 the bankruptcy case was approximately \$40.4 million, with \$35.1 million related to office lease  
5 claims and \$5.3 million related to office equipment lease claims. The total amount of claims filed  
6 against the Debtor's estate to date is approximately \$46.1 million. JPS at 6.

7 28. On March 5, 2020, the Bankruptcy Court entered an order confirming the Second  
8 Amended Joint Plan of Liquidation of Sedgwick, LLP (the "Plan"), which specifically provided  
9 for the Trustee to seek the return of funds that were the subject of fraudulent transfers from the  
10 Debtor to former partners of the Debtor. The Trustee has standing to bring the claims in these  
11 actions. JPS at 10.

12 29. On September 9, 2020, the Trustee filed the complaints against Defendants  
13 initiating these consolidated actions. On October 13, 2020, the Defendants filed answers to the  
14 respective complaints. JPS at 10; ECF No. 40 ¶¶ 1–2.

15 30. During 2017, Tanenbaum received the following payments/distributions from the  
16 Debtor:

Date	Distribution Amount
1/13/2017	\$374,862.00
1/30/2017	\$17,000.00
3/13/2017	\$374,862.00
3/13/2017	\$20,730.94
4/14/2017	\$20,730.94
5/12/2017	\$20,730.94
6/14/2017	\$20,730.94
7/14/2017	\$20,730.94
8/16/2017	\$20,730.94
9/14/2017	\$20,730.94
10/13/2017	\$20,730.94
11/15/2017	\$20,730.94
12/15/2017	\$20,730.94
<b>Total</b>	<b>\$974,033.40</b>

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27 31. During 2017, Keale received the following payments/distributions from the Debtor:  
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Date	Distribution Amount
1/13/2017	\$99,228.25
1/30/2017	\$17,000.00
3/13/2017	\$99,228.25
3/17/2017	\$6,322.27
4/19/2017	\$6,322.27
5/17/2017	\$6,322.27
6/20/2017	\$6,322.27
7/18/2017	\$6,322.27
8/14/2017	\$6,322.27
9/14/2017	\$6,322.27
10/13/2017	\$6,322.27
11/15/2017	\$6,322.27
11/30/2017	\$6,322.27
<b>Total</b>	<b>\$278,679.01</b>

The \$17,000.00 payments on January 30, 2017 to Tanenbaum and Keale was for their last monthly base salary payment (i.e., a monthly draw) before they departed from the Debtor—the remaining other payments to the Defendants in 2017 are “distributions” based on their equity in the Debtor and are a return of capital. JPS at 10–11.

32. The total payments made to Defendants and Tom Robertson (who is no longer a defendant) through January 2017 total \$599,512. JPS at 11.

33. The total payments to Defendants during the entire year 2017 was \$1,252,712 while the total payments to all of the Debtor’s partners was \$18,597,878. Therefore, Defendants’ portion of the payments made by the Debtor during 2017 was only 6.7% of the total payments made to all the Debtor’s partners in 2017. JPS at 11.

34. Rock Creek Advisors was engaged by the liquidating trustee as a financial advisor on the Sedgwick liquidating trust matter. ECF No. 40 ¶ 3.

35. Michael Hayes, the managing director at Rock Creek Advisors, was deposed in these cases on July 7, 2021. ECF No. 40 ¶ 4.

36. Hayes testified that Rock Creek Advisors had not completed an insolvency analysis regarding the Debtor. ECF No. 40 ¶ 5

37. Christopher Peirce, the Vice President of Rock Creek Advisors, was deposed in these cases on November 7, 2022. ECF No. 40 ¶ 6.



1           38. Peirce testified at his deposition that Rock Creek Advisors had not performed an  
2 insolvency analysis regarding the Debtor. ECF No. 40 ¶ 7.

3           39. Prior to filing the complaints against Defendants, the Trustee did not retain an  
4 expert to perform an insolvency analysis regarding the Debtor. ECF No. 40 ¶ 8.

5           **B. Facts Found at Trial**

6           The Court finds the following facts based on the evidence presented at trial.

7           40. Following the departure of the Newark and Dallas offices, James Nations, the  
8 Debtor’s Chief Financial Officer (“CFO”), conducted a financial analysis to assess the financial  
9 impact of the departure of the two offices on the Debtor. *See* 3/25/24 Tr. at 48:22–49:12.

10           41. Nations conducted the analysis in conjunction with the executive committee, and  
11 Ralph Guirgis in particular, and the Debtor brought back its former CFO, Pat Williamson, to  
12 “have a second set of eyes and view this analysis [and] confirm the analysis was reasonable.”  
13 3/25/24 Tr. at 49:1–24 (testimony of Chairman Michael Healy).

14           42. The Debtor held an equity partner retreat in the first quarter of 2017 in Arizona, at  
15 which Nations’s analysis was presented. 3/25/24 Tr. at 49:22–50:1.

16           43. Nations’s analysis concluded that “if the firm sort of sustained its financial  
17 performance, absent those departures,” the Debtor “would be doing pretty well, but not as well as  
18 before.” Sustaining the firm’s financial performance meant “taking out a portion of the overhead,  
19 taking out the productivity of those departing, if the status quo remained, meaning other partners  
20 with business did not leave and we controlled our expenses.” 3/25/24 Tr. at 50:6–13.

21           44. Christopher Marks, the managing partner of the Debtor’s Seattle office, testified  
22 that he “was led to believe throughout 2017, that we were financially viable, but long-term, the  
23 plan was to grow or to be acquired.” 3/25/24 Tr. at 53:4–6, 64:22–24.

24           45. The Debtor’s management committee gave the partnership frequent updates about  
25 the status of the firm’s finances, and Marks testified that at least until mid-Summer 2017:

26           My impression from their representation was that we were financially  
27 sound. . . . So I absolutely believed that we were in a good spot and I  
28 absolutely believed that Clyde & Co. was going to, even if it didn’t  
end up being a solution for me personally, it was going to be an  
opportunity for most of the lawyers, and certainly the lawyers in our

1 largest markets. . . . So I thought that it was a real opportunity and we  
2 were fine financially, and that's what we were told.

3 3/25/24 Tr. at 65:11–24.

4 46. The Debtor responded quickly to the departures of the Newark and Dallas offices  
5 by subletting most of the Newark office space to the new firm and assigned the Dallas office lease  
6 to Drinker Biddle. This comports with Marks' recollection. 3/25/24 Tr. at 63:6–13.

7 47. Marks agreed with the statement that “with over 85 percent of its equity partnership  
8 remaining intact, the firm and its equity partners remained committed to stay while Sedgwick  
9 adjusted to the type of changes that comes with the contraction and expansion all law firms face as  
10 they react to a changing economy and legal markets.” 3/25/24 Tr. at 66:6–24.

11 48. Marks believed the Debtor was solvent and viable until the end of October 2017.  
12 *See* 3/25/24 Tr. at 67:10–20; *see also id.* at 69:6–13 (similar).

13 49. The Debtor's balance on its line of credit with Citibank from December 31, 2016 to  
14 January 31, 2017 was zero dollars. *See* 3/25/24 Tr. at 228:11–25.

15 50. Between December 31, 2016 and January 31, 2017, the Debtor reduced its accounts  
16 payable by over \$652,000 without borrowing on its line of credit, which is evidence that the  
17 Debtor was able to pay its debts as they became due. 3/26/24 Tr. at 350:2–21.

18 51. On August 2, 2017, the Debtor's primary lender, Citibank, terminated the Debtor's  
19 \$22 million line of credit, citing a default in the loan terms and conditions due to a decline in  
20 equity partners that had left the firm beginning in January 2017. Ex. 47. Citibank did not  
21 terminate the line of credit based on the Debtor's financial condition. *See id.*; 3/25/24 Tr. at  
22 224:6–12.

23 52. The distributions to the Defendants in 2017 were within two years of the Petition  
24 Date. *See* JPS at 6, 10–11.

25 53. Austin Wade, a certified public accountant and a partner at Bachecki, Crom & Co.,  
26 LLP, testified as an expert witness for the Trustee. 3/25/24 Tr. 100:8, 101:4–13.

27 54. D. Paul Regan, a certified public accountant certified in financial forensics and  
28 partner at Hemming Morse, LLC, testified as an expert in forensic accounting for Defendants.

1 3/26/24 Tr. at 312:25–313:12, 316:24–317:2. Regan testified as an expert in the bankruptcy cases  
2 of two other large law firms: Heller Ehrman LLP and Dewey LeBoeuf LLP. *Id.* at 317:17–24.

3 55. Regan did not perform his own solvency analysis and instead responded to Wade’s  
4 analysis.

5 56. Wade purported to value the Debtor as a going concern. 3/25/24 Tr. at 137:22–24.

6 57. A going concern “assumes the entity is going to realize its assets in the ordinary  
7 course of its operations and liquidate its liabilities in the course of its operations.” 3/26/24. Tr. at  
8 324:13–16.

9 58. Valuation must be done using data and information that was known and knowable  
10 at the time, rather than with hindsight. 3/26/24 Tr. at 243:17–22.

11 59. Wade’s insolvency analysis used three valuation methods: the asset (or balance  
12 sheet) approach, the income approach, and the market approach. 3/25/24 Tr. at 108:16–21.

13 60. Under the asset approach, one converts the assets and liabilities of the company  
14 from book value to fair market value. 3/25/24 Tr. at 108:22–109:1. Fair market value is the  
15 hypothetical price for which an asset can be sold or a liability can be transferred to a hypothetical  
16 buyer. *Id.* at 127:13–15, 144:3–6.

17 61. Under the income approach, one projects the cash flows of the company and then  
18 discounts them to create a value for the company. 3/25/24 Tr. at 109:2–5.

19 62. Under the market approach, one calculates the company’s earnings capacity—most  
20 commonly earnings before interest, taxes, depreciation, and amortization (“EBITDA”)—and  
21 determines the price at which comparable companies are selling. 3/25/24 Tr. at 109:6–19.

22 63. The Debtor’s financial statements were recorded on a modified cash basis, which  
23 Wade converted to a modified accrual basis for his analysis. 3/25/24 Tr. at 122:9–13. Cash basis  
24 financial statements report revenue as it is received or deposited and expenses as they are paid. *Id.*  
25 at 121:15–17. Accrual basis financial statements recognize revenue as it is earned and expenses as  
26 they are incurred. *Id.* at 121:22–122:1.

27 64. Wade offered a general opinion that, under any of the three valuation methods for  
28 insolvency, the Debtor was insolvent on January 31, 2017. *See* 3/25/24 Tr. at 112:21–24.

1 Although Wade offered robust testimony on his balance sheet analysis for the asset approach, he  
2 offered little to no testimony on the income and market approaches.

3 65. In addition to his analysis of insolvency, Wade also offered opinions on two of the  
4 other disjunctive requirements under 11 U.S.C. § 548(a)(1)(B): whether the Debtor had  
5 unreasonably small capital and whether the Debtor was able to pay its debts as they became due.

6 **i. Balance Sheet Approach**

7 66. Wade's opinion that under a balance sheet or asset approach, the Debtor was  
8 insolvent on January 31, 2017 and all relevant times thereafter, through to the Petition Date, is not  
9 credible and entitled to little weight. *See* 3/25/24 Tr. at 112:21–24.

10 67. The first test date that Wade analyzed for purposes of his balance sheet test was  
11 January 31, 2017. 3/25/24 Tr. at 113:3–6; *see also* Ex. 20. Wade's other test dates were June 30,  
12 2017, December 31, 2017, and October 2, 2018. 3/25/24 Tr. at 174:6–12; *see also* Ex. 20.

13 68. On January 31, 2017 and June 30, 2017, both of the test dates relevant to the  
14 Trustee's claims, the Debtor's management believed the firm was solvent, could continue to  
15 operate, and that its business model remained viable. *See* 3/25/24 Tr. at 48:22–69:13.

16 69. The Court finds credible and gives significant weight to Regan's testimony that  
17 Wade did not actually analyze the Debtor as a going concern because Wade's analysis is contrary  
18 to the assumption that the Debtor would realize its assets and liquidate its liabilities in the ordinary  
19 course of its operations. 3/26/24 Tr. at 323:17–324:11.

20 70. The Court finds that Wade's balance sheet analysis of the Debtor's lease  
21 obligations, which include the Debtor's office leases totaling \$69.2 million at the end of 2017 and  
22 \$90.6 million at the end of 2016 as a liability, is not credible and entitled to little weight. *See* Ex.  
23 20. Regan credibly testified that the office leases are operating leases that are not put on balance  
24 sheets for a business operating as a going concern because such obligations are liquidated in the  
25 course of business. 3/26/24 Tr. at 325:8–326:1. If an office lease is recorded as a liability on a  
26 balance sheet, generally accepted accounting principles ("GAAP") require that a right of use asset  
27 must also be recorded. *Id.*

28 71. Although GAAP is not determinative, it is useful to evaluating the credibility of

1 Wade's opinions. *See In re Sierra Steel, Inc.*, 96 B.R. 275, 278 (B.A.P. 9th Cir. 1989).

2 72. The Court finds that Wade's balance sheet analysis of the Debtor's equipment lease  
3 obligations, which valued leasehold improvements, office furniture, and equipment as a liability  
4 valued at over \$5.6 million, is not credible and entitled to little weight. *See* 3/25/24 Tr. at 127:16–  
5 24, 169:18–24; Ex. 20. Regan credibly testified that equipment leases are future obligations that  
6 should not be listed as a liability for a business operating as a going concern, and to the extent  
7 equipment leases are listed, Wade should have recorded a corresponding right of use asset because  
8 the equipment was necessary for the Debtor to operate. 3/26/24 Tr. at 330:17–331:19.

9 73. The Court finds that Wade's balance sheet analysis of the Debtor's fixed assets,  
10 which valued fixed assets at zero, is not credible and entitled to little weight. 3/25/24 Tr. at  
11 127:16–24, 169:18–24. Regan credibly testified that a reduction of the value of fixed assets to  
12 zero is inappropriate because a business operating as a going concern would require its fixed  
13 assets to operate. 3/26/24 Tr. at 336:1–15.

14 74. The Court finds that Wade's use of a 50% discount to the Debtor's lease  
15 obligations from their book value is not credible and entitled to little weight. *See* 3/25/24 Tr. at  
16 130:18–131:25, 132:11–21; *see also* Ex. 20. The lease obligations at issue extended many years  
17 into the future beyond 2017, and Wade failed to discount the lease obligations to present value.  
18 3/26/24 Tr. at 329:7–19. Present value for an obligation due in the future is the value of the  
19 obligation discounted to an appropriate rate (i.e., the rate of interest). *Id.* at 326:8–327:19. The  
20 Court finds credible Regan's testimony that a lease obligation of this type due in 2030 might be  
21 worth \$2 million at present value because it is the only testimony regarding present value in the  
22 record. *See id.* at 326:13–17.

23 75. Regan credibly testified that a balance sheet analysis that lists a lease obligation as  
24 a liability without a corresponding right of use asset and without adjusting to present value is  
25 materially flawed and in error. 3/26/24 Tr. at 329:2–25.

26 76. The Court finds that Wade's analysis of the Debtor's lease obligations was further  
27 flawed because Wade assumed that each of the Debtor's leases was at fair market value, but  
28 he did not provide an adequate basis for this assumption or his use of a 50% reduction in the lease

1 obligations. 3/26/24 Tr. at 330:4–6.

2 77. Wade is not an expert in real estate value. 3/25/24 Tr. at 212:22–23.

3 78. The document on which Wade relied to determine the value of the Debtor’s leases  
4 does not identify the fair market value of any of the leases. *See* 3/25/24 Tr. at 213:22–214:2; Ex.  
5 74.

6 79. The Court finds that Wade’s analysis of the Debtor’s lease obligations was further  
7 flawed because it is contrary to the evidence before the Court. Wade’s analysis based his  
8 calculation of lease liabilities on a \$90 million figure that included the Newark and Dallas leases,  
9 which were assumed either in whole or in substantial part by Tanenbaum Keale and Drinker  
10 Biddle, respectively. 3/26/24 Tr. at 329:7–25.

11 80. The Court finds that Wade’s discount of the Debtor’s accounts receivable and work  
12 in progress assets by 30% is not credible and entitled to little weight. *See* 3/25/24 Tr. at 126:4–8;  
13 *see also* Ex. 20. Wade’s discount was based on the fact that between 30% and 40% of the  
14 Debtor’s accounts receivable were over 90 days past due, and in Wade’s experience, a buyer will  
15 pay almost nothing for accounts receivable that are over 90 days old. 3/25/24 Tr. at 126:12–19.  
16 However, Wade’s analysis is flawed and without proper basis because he did not receive or review  
17 documents pertinent to the Debtor’s historical collection rate for accounts receivable or work in  
18 progress. *Id.* at 203:20–205:14.

19 81. The Court finds that Regan’s testimony regarding law firm collection rates is  
20 credible and entitled to significant weight. Regan examined collection rates “from specific  
21 experience of particular law firms” and noted that collection rates are “very dependent upon the  
22 practice, the professionals that are billing.” 3/26/24 at 334:13–16. He noted that he frequently  
23 saw collection rates at 88% of accounts receivable and work in progress. *Id.* at 334:17–19. Regan  
24 further testified that attorneys are not good about collecting accounts receivable and often have  
25 older accounts receivable, but this fact does not mean that amounts are not going to be paid after  
26 90 days. *See id.* at 358:19–359:10.

27 82. The Court finds that Wade’s analysis of the Debtor’s partner retirement liabilities,  
28 which recorded an over \$22.2 million liability for payments owed to retired partners over the

1 course of 10 years, is not credible and entitled to little weight. 3/25/24 Tr. at 134:23–135:4.

2 83. The Debtor’s partnership agreement caps payments to retired partners at 5% of the  
3 Debtor’s distributable income. *See* JPS at 7 (quoting Ex. 40 at 15). Wade’s failure to consider  
4 this cap makes his analysis of the partner retirement liability materially flawed.

5 84. The Court finds credible Regan’s testimony that, in accordance with the 5% cap,  
6 for the Debtor to be obligated to pay \$22 million over the course of 10 years, it would have to earn  
7 over \$440,000,000 over the relevant time period, which is almost \$1 million per equity partner.  
8 *See* 3/27/24 Tr. at 404:4–8. This calculation reveals that Wade’s analysis of the Debtor’s partner  
9 retirement liabilities is contrary to his own assumption that the Debtor would not be able to sustain  
10 its business model because it would not be able to pay its equity partners \$500,000 per year on  
11 average. *See* 3/26/24 Tr. at 282:23–283:4.

12 85. The Court finds credible Regan’s testimony that, if Wade’s analysis with respect to  
13 lease liabilities, partner retirement liability, and accounts receivable and work in progress are  
14 property accounted for, the Debtor was \$27.8 million solvent on January 31, 2024. 3/26/24 Tr. at  
15 337:15–339:24.

16 86. The Court finds credible Regan’s “reality check,” which applied Wade’s balance  
17 sheet methodology to the Debtor’s balance sheets prior to January 31, 2017 and found that, under  
18 Wade’s methodology, the Debtor would be found insolvent in 2014, 2015, and 2016. 3/26/24 Tr.  
19 at 340:18–324:7; *see also* Ex. 266.

20 **ii. Income Approach**

21 87. Wade’s opinion that under an income approach, the Debtor was insolvent on  
22 January 31, 2017 and all relevant times thereafter, through to the Petition Date, is not credible and  
23 entitled to little weight. *See* 3/25/24 Tr. at 112:21–24.

24 88. The only point at which Wade testified directly to the income approach was in  
25 response to a single question on cross examination in which Wade merely confirmed that his  
26 income approach analysis showed the Debtor to be insolvent from January 31, 2017 and all  
27 relevant times thereafter. *See* 3/25/24 Tr. 186:22–187:7.

28 89. During trial, Regan offered testimony that sought to rebut Wade’s income approach

1 analysis that was set forth only in his expert report and its related exhibits, which are not in  
2 evidence. *See, e.g.*, 3/26/24 Tr. at 370:1–371:6 (the cross examination of Regan, referring to  
3 Wade Exhibit L); *see also* ECF No. 15 at 28 (identifying Wade Exhibit L as Trial Exhibit 23,  
4 which is not in evidence).

5 90. At the close of trial, the Court noted that Regan presented a rebuttal on the income  
6 approach and asked the Trustee for clarification on his evidence in support of the income and  
7 market approaches. *See* 3/27/24 Tr. at 418:6–10.

8 91. The Trustee acknowledged that documents and exhibits in Wade’s report discuss  
9 the income and market approaches and that the Trustee’s main focus during trial was the balance  
10 sheet approach. The Trustee argued that Wade’s testimony could also support the income  
11 approach and the market approach. *See* 3/27/24 Tr. at 418:11–24.

12 92. Wade’s report and documents on the income approach have not been admitted as  
13 exhibits, and the Trustee otherwise failed to elicit testimony from Wade on the income approach  
14 that is distinct from his testimony on the asset approach.

15 **iii. Market Approach**

16 93. The Trustee failed to offer any testimony at trial that the Debtor was insolvent  
17 under the market approach.

18 **iv. Unreasonably Small Capital**

19 94. Wade’s opinion that the loss of the Dallas and Newark offices in January 2017 left  
20 the Debtor with unreasonably small capital going forward and that those losses impaired the assets  
21 and liabilities and its ability to pay its debts into the future, *see* 3/25/24 Tr. at 114:11–23, 188:6–  
22 18, is not credible and entitled to little weight.

23 95. The Court finds that Wade’s analysis is not credible because it relies on the same  
24 analysis as his balance sheet approach, and thus is undermined by the same flaws. *See* 3/26/24 Tr.  
25 at 277:18–278:3 (Wade testifying that capital refers to net assets and by Wade’s calculations, the  
26 Debtor had negative capital in January 2017).

27 96. To the extent that Wade opined that the Debtor was not able to turn a profit for any  
28 month of 2017, 3/26/24 at 275:5–25, the Court finds credible Regan’s testimony that Wade’s



1 analysis erroneously left out approximately \$40 million in assets and \$5 million in liabilities by  
 2 omitting the Debtor's contra figures. Contra figures are based on contractual rates or  
 3 arrangements that would accumulate at the end of the month. *See id.* at 351:7–355:14.

4 **v. Ability to Pay Debts as They Became Due**

5 97. Wade's opinion that the Debtor was unable to pay its debts as they became due  
 6 after the loss of the Dallas and Newark offices in January 2017, *see* 3/25/24 Tr. at 114:11–23, is  
 7 not credible and entitled to little weight because it is contrary to the evidence before the Court.

8 98. The Debtor was able to pay its debts as they became due. For example, the Debtor  
 9 reduced its accounts payable between December 31, 2016 and January 31, 2017 without drawing  
 10 down on its line of credit. 3/26/24 at 349:17–350:21. The Debtor also reduced its accounts  
 11 payable from \$5 million to \$277,000 at the end of May 2017. *Id.* at 358:11–21.

12 **vi. Conclusion**

13 99. The Court finds that the flaws identified above significantly undermine the  
 14 credibility of Wade's opinion such that Wade's opinion cannot carry the Trustee's burden of  
 15 proof.

16 **IV. CONCLUSIONS OF LAW**

17 100. The Trustee bears the burden to prove his claims by a preponderance of the  
 18 evidence. *See In re 3dfx Interactive, Inc.*, 389 B.R. 842, 863–64 (Bankr. N.D. Cal. 2008). For the  
 19 reasons stated below, the Court finds that the Trustee has failed to meet his burden.

20 **A. Avoidance of Two-Year Fraudulent Transfers (Constructive Fraud) Pursuant to**  
 21 **11 U.S.C. §§ 548(a)(1)(B) and 550 (Claim 4)**

22 101. Section 548(a)(1)(B) of the Bankruptcy Code allows the Trustee to “avoid any  
 23 transfer . . . of an interest of the debtor in property, or any obligation . . . incurred by the debtor  
 24 that was made or incurred on or within 2 years before the date of the filing of the petition,” if the  
 25 Trustee can show:

26 [T]he debtor voluntarily or involuntarily--  
 27 (B)(i) received less than a reasonably equivalent value in exchange  
 28 for such transfer or obligation; and  
 (ii)(I) was insolvent on the date that such transfer was made or such  
 obligation was incurred, or became insolvent as a result of such  
 transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital;  
 (III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured; or  
 (IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

11 U.S.C. § 548(a)(1)(B).

102. The parties agree that the Trustee has satisfied § 548(a)(1)(B)(i). The parties stipulated that all distributions that the Trustee seeks to avoid occurred within two years of the Debtor's Petition Date and the distributions were based on equity in the Debtor and are a return of capital. *See* JPS at 10–11. On this basis, the Trustee argues that the distributions to Defendants was not “reasonably equivalent value” as defined by the Bankruptcy Code. ECF No. 55 at 11. Defendants do not contest this assertion.

103. The only contested question for this claim is whether the Trustee has satisfied any one of the disjunctive requirements under § 548(a)(1)(B)(ii).

104. The Trustee does not argue and did not present evidence relevant to § 548(a)(1)(B)(ii)(IV). *See* 3/27/24 Tr. at 420:14–17 (“[T]here’s a fourth part that we didn’t really get into and don’t plan to.”).

**i. Insolvency**

105. The Trustee conceded, and the Court accepted, that distributions prior to January 31, 2017 are not recoverable under a fair valuation analysis. 3/26/24 Tr. at 306:14–17; *see also* Trustee Br. at 10 (“[T]he Trustee submits that he has exceeded his burden in demonstrating that it is more likely than not that [the Debtor] . . . was insolvent as of January 31, 2017.”). Thus, under this subsection, the Trustee can only recover distributions to Defendants made on or after January 31, 2017.

106. Section 548(a)(1)(B)(ii)(I) requires the Trustee to show that the Debtor “was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation.”

107. The Bankruptcy Code defines “insolvent” with reference to a partnership, as a

1 “financial condition such that the sum of such partnership’s debts is greater than the aggregate of,  
2 at a fair valuation-- (i) all of such partnership’s property, exclusive of property [transferred,  
3 concealed, or removed with intent to hinder, delay, or defraud such entity’s creditors].” 11 U.S.C.  
4 § 101(32)(B)(i).

5 108. “Although the Code does not define ‘fair valuation,’ courts have generally engaged  
6 in a two-step process of analysis.” *In re DAK Indus., Inc.*, 170 F.3d 1197, 1199 (9th Cir. 1999).  
7 “First, the court must determine whether a debtor was a ‘going concern’ or was ‘on its deathbed.’  
8 Second, the court must value the debtor’s assets, depending on the status determined in the first  
9 part of the inquiry, and apply a simple balance sheet test to determine whether the debtor was  
10 solvent.” *Id.* “If the debtor was a going concern, the court will determine the fair market price of  
11 the debtor’s assets as if they had been sold as a unit, in a prudent manner, and within a reasonable  
12 time.” *Id.* at 1199 n.3. “There are three primary methods for determining ‘fair market value’: (1)  
13 the ‘market’ approach; (2) the ‘net asset’ or ‘cost’ approach; and (3) the ‘income’ approach.”  
14 *Alberts v. HCA, Inc.*, 496 B.R. 1, 6 (D.D.C. 2013).

15 109. “[T]he going concern threshold is very low.” *In re Flashcom, Inc.*, 503 B.R. 99,  
16 122 (C.D. Cal. 2013) (quoting *In re Heilig-Meyers Co.*, 319 B.R. 447, 457 (Bankr. E.D. Va.  
17 2004)), *aff’d*, 647 F. App’x 689 (9th Cir. 2016). “[A] business does not have to be thriving in  
18 order to receive a going concern valuation. Before the going concern valuation is to be  
19 abandoned, a business must be wholly inoperative, defunct, or dead on its feet.” *Id.* at 121  
20 (alteration in original) (quoting *In re Am. Classic Voyages Co.*, 367 B.R. 500, 508 (Bankr. D. Del.  
21 2007)).

22 110. The parties do not dispute that the Debtor should be valued on a going-concern  
23 basis. *See* 3/25/24 Tr. at 137:22–24 (Wade’s testimony that he valued the Debtor as a going  
24 concern).

25 111. The Court concludes that the Debtor was a going concern. On both of the two  
26 relevant test dates, the Debtor continued to have a substantial line of credit with its primary lender,  
27 Citibank, and the executive committee believed that the firm was solvent and viable. *See* JPS at 7;  
28 3/25/24 Tr. at 49:22–50:1, 65:11–24; *see also* *Flashcom*, 503 B.R. at 122 (noting that a vendor’s

1 willingness to extend substantial credit and the community's optimism about the Debtor's  
2 prospects justified valuing a Debtor as a going concern).

3 112. The Court next considers whether the Trustee has met his burden to show that the  
4 Debtor was insolvent under any of the three tests to determine the Debtor's fair market value.

5 **a. Asset (Balance Sheet) Approach**

6 113. "[T]he basic concept of the asset-based approach is that if all the company's assets  
7 and liabilities are revalued to current values, then the difference between the assets and liabilities  
8 should equal the value of the equity." *In re Brooke Corp.*, 568 B.R. 378, 403 (Bankr. D. Kan.  
9 2017) (quoting Shannon Pratt, *The Lawyer's Business Valuation Handbook* 168 (American Bar  
10 Association 2000)).

11 114. Wade's balance sheet analysis fails to meet the Trustee's burden of proof because  
12 Wade, although claiming to the contrary, failed to properly analyze the Debtor as a going concern.

13 115. Wade recorded the Debtor's lease obligations and equipment leases as liabilities  
14 without recording a corresponding right of use asset under GAAP and reduced fixed assets to zero,  
15 which is contrary to an assumption that the Debtor would continue to operate and would realize its  
16 assets and liquidate its liabilities in the ordinary course of business. *See* 3/26/24 Tr. at 323:17–  
17 324:11, 330:17–331:19, 336:1–15.

18 116. A failure to provide a valuation on a going-concern basis is sufficient for the Court  
19 to conclude that the Trustee has not met its burden. *See Flashcom*, 503 B.R. at 122.

20 117. Although the Trustee argues that Regan's criticism of Wade's analysis is flawed for  
21 referring to GAAP, which is not controlling, GAAP is still relevant in making insolvency  
22 determinations. *In re Sierra Steel, Inc.*, 96 B.R. 275, 278 (B.A.P. 9th Cir. 1989).

23 118. Wade's balance sheet analysis also fails to meet the Trustee's burden of proof  
24 because significant flaws in his analysis undermined his credibility. These flaws showed that  
25 Wade significantly and erroneously increased the Debtors liabilities and reduced its assets.

26 119. Wade's analysis of the Debtor's lease obligations discounted the Debtor's lease  
27 obligations by 50% to a liability worth over \$45 million, *see* 3/25/24 Tr. at 130:18–131:25,  
28 132:11–21; *see also* Ex. 20, but did not discount those obligations to present value, assumed that

1 the Debtor's leases were at market value without providing analysis, and did not provide an  
2 adequate basis for his 50% reduction in the lease obligations, thus making the calculation  
3 arbitrary. *See* 3/26/24 Tr. at 326:13–17, 329:7–19, 330:4–6.

4 120. Wade's analysis of the Debtor's lease obligations is also contrary to evidence  
5 before the Court because Wade's analysis is based on a figure that includes the Dallas and Newark  
6 leases, which were assumed in whole or in part by Drinker Biddle or Tanenbaum Keale,  
7 respectively. *See* 3/26/24 Tr. at 329:7–25.

8 121. Wade's 30% reduction in the value of the Debtor's accounts receivable and work in  
9 progress, *see* 3/25/24 Tr. at 126:4–8; *see also* Ex. 20, was not based on the Debtor's historical  
10 collection rates and was undermined by Regan's testimony, which was more specific to large law  
11 firms that would be comparable to the Debtor. *See* 3/25/24 Tr. at 203:20–205:14; 3/26/24 at  
12 334:17–19.

13 122. Wade recorded over \$22.2 million in partner retirement liabilities over 10 years, *see*  
14 3/25/24 Tr. at 134:23–135:4, but this figure did not account for the express provision of the  
15 partnership agreement creating a 5% cap on such payments and it did not discount the value of this  
16 obligation to present value. 3/26/24 Tr. at 371:13–17.

17 123. To illustrate the flaw in Wade's methodology, if it were applied to years prior to  
18 2017, the Debtor would be found insolvent in 2014 through 2016. 3/26/24 at 340:18–324:7; *see*  
19 *also* Ex. 266.

20 124. The Court finds that Wade's balance sheet analysis is not sufficiently credible to  
21 carry the Trustee's burden of proof. This finding applies to Wade's analysis as a whole and  
22 undermines its credibility with respect to both the January 31, 2017 and the June 30, 2017 test  
23 dates. *See* 3/27/24 Tr. at 442:6–19 (Trustee's counsel arguing that the Court should consider the  
24 June 30, 2017 test date).

25 125. The Trustee has not met his burden to show that the Debtor was insolvent under the  
26 asset approach.

27 **b. Income Approach**

28 126. "Under the income approach, the [valuation consultant] estimates the future

1 ownership benefits and discounts those benefits to present value using a rate suitable for the risks  
2 associated with realizing those benefits.” *Alberts v. HCA, Inc.*, 496 B.R. 1, 6 (D.D.C. 2013)  
3 (alteration in original) (quoting Jay E. Fishman, et al., *PPC’s Guide to Business Valuations*  
4 ¶ 203.2 (15th ed. 2005)).

5 127. The only testimony before the Court directly addressing the income approach is  
6 Wade’s statement of his conclusion regarding the income approach and Regan’s testimony  
7 criticizing Wade’s income approach for assuming that the Debtor would have no professional  
8 services income after 2018. *See* 3/26/24 Tr at 342:20–347:25. The Trustee has otherwise failed to  
9 elicit testimony from Wade about the income approach, and the limited testimony before the Court  
10 on the income approach is insufficient to carry the Trustee’s burden of proof.

11 128. To the extent that Wade’s testimony about his balance sheet analysis is applicable  
12 to the income approach, it fails for the same reasons. Wade’s testimony is not credible and is  
13 insufficient to carry the Trustee’s burden of proof for the reasons stated above.

14 129. The Court finds that the Trustee has not met his burden to show that the Debtor was  
15 insolvent on January 31, 2017 under the income approach.

16 130. The Trustee has also failed to offer sufficient evidence of the income approach on  
17 June 30, 2017 to carry its burden with respect to that date.

### 18 **c. Market Approach**

19 131. The market approach “is based on transactions of similar companies.” *Brooke*, 568  
20 B.R. at 402.

21 132. The Trustee has failed to meet its burden to show insolvency under a market  
22 approach because it failed to present any evidence or testimony comparing the Debtor to similar  
23 companies.

### 24 **ii. Unreasonably Small Capital**

25 133. The Trustee argues that the Debtor had unreasonably small capital as of January 13,  
26 2017. *See* Trustee Br. at 10 (“[T]he Trustee submits that he has exceeded his burden in  
27 demonstrating that it is more likely than not that [the Debtor] had unreasonably small capital as of  
28 January 13, 2017.”). Defendants argue that the Trustee has failed to meet its burden to present

1 evidence of the Debtor's debt to equity ratio, its historical capital cushion, or its need for working  
2 capital as it pertained to the Debtor's industry. *See* ECF No. 58 at 12–13.

3 134. Section 548(a)(1)(B)(ii)(II) requires the Trustee to show that the Debtor “was  
4 engaged in business or a transaction, or was about to engage in business or a transaction, for which  
5 any property remaining with the debtor was an unreasonably small capital.”

6 135. Unreasonably small capital “denotes a financial condition short of equitable  
7 insolvency” and “would refer to the inability to generate sufficient profits to sustain operations.”  
8 *In re Semcrude, L.P.*, 526 B.R. 556, 560 (D. Del. 2014) (quoting *Moody Bus. Credit, Inc.*, 971  
9 F.2d 1056, 1070 (3d Cir. 1992)).

10 136. The test for unreasonably small capital is “reasonable foreseeability.” *Id.* “A key  
11 ‘inquiry . . . is [] one that weighs raw financial data against both the nature of the enterprise itself  
12 and the extent of the enterprise's need for capital during the period in question.” *In re Lyondell*  
13 *Chem. Co.*, 567 B.R. 55, 109 (Bankr. S.D.N.Y. 2017) (quoting *Barrett v. Continental Ill. Nat'l*  
14 *Bank & Trust Co.*, 882 F.2d 1, 4 (1st Cir. 1989), *aff'd*, 585 B.R. 41 (S.D.N.Y. 2018).

15 137. In conducting this analysis, courts consider “management projections . . . when  
16 reasonably made given historical performance and reasoned views about the future,” unforeseen  
17 challenges such as interest rate fluctuations and general economic downturns, the availability of  
18 credit, and otherwise incorporate a margin of error. *See Semcrude*, 526 B.R. at 565; *Lyondell*, 567  
19 B.R. at 109.

20 138. The Court finds that Wade's analysis is inadequate to meet the Trustee's burden of  
21 proof to show that the Debtor had unreasonably small capital as of January 13, 2017.

22 139. Wade's analysis that the Debtor had negative capital in January 2017 and that the  
23 Debtor could not turn a profit in any month of 2017 is not credible for many of the same reasons  
24 that the Court discussed with respect to the balance sheet approach. *See* 3/26/24 Tr. at 275:5–25,  
25 277:18–278:3, 283:18–284:11.

26 140. To the extent that Wade concluded that the Debtor had negative capital, this  
27 conclusion is based on a similar analysis of the Debtor's assets and liabilities as his asset or  
28 balance sheet approach and thus is flawed because: (1) his calculation of the Debtor's lease

1 liability did not discount to present value, assumed without basis that the Debtor's leases were  
2 market value, and did not provide an adequate basis for his 50% reduction, *see* 3/26/24 Tr. at  
3 326:13–17, 329:7–19, 330:4–6; (2) Wade did not consider the Debtor's historical collection rates  
4 in calculating a reduction in the Debtor's accounts receivable and work in progress, *see* 3/25/24  
5 Tr. at 203:20–205:14; and (3) Wade did not consider the Debtor's partnership agreement, which  
6 capped retirement payments to 5% of distributable income, or reduce the recorded partner  
7 retirement liabilities to present value, *see* 3/26/24 Tr. at 371:13–17. Thus, based on these flaws,  
8 Wade's conclusion that the Debtor had negative capital on January 31, 2017 is not credible.

9 141. Wade's opinion that the Debtor could not turn a profit in most months of 2017 is  
10 separately flawed because he erroneously omitted contra figures from the Debtor's modified cash  
11 balance sheets. *See* 3/26/24 at 351:7–355:14; *see also* Ex. 28. Contra figures are based on  
12 contractual rates or arrangements that would accumulate at the end of the month, and their  
13 omission from Wade's analysis resulted in a significant and erroneous reduction in the Debtor's  
14 net assets. *See id.* at 351:7–355:14.

15 142. Wade's analysis is contrary to the evidence before the Court. Management  
16 projections of the Debtor's finances concluded that the Debtor would continue to be viable if it  
17 sustained its financial performance. 3/25/24 Tr. at 48:22–50:13; *see also id.* at 67:10–20 (Marks  
18 testifying that he believed the Debtor was solvent and viable until the end of October 2017).  
19 Moreover, the Debtor continued to have a \$22 million line of credit with its primary lender until  
20 August 2, 2017. *See* Ex. 47; *see Semcrude*, 526 B.R. at 565 (noting that it is proper for courts to  
21 consider the availability of credit in determining unreasonably small capital).

22 143. Wade's testimony and the Trustee's argument appear, at least in part, to be based  
23 on hindsight—that is, because the Debtor ultimately failed, it was doomed to fail when the Dallas  
24 and Newark offices departed. *See* ECF No. 55 at 12–13 (noting that the Debtor “did not make it to  
25 the end of the same year [that the Dallas and Newark offices departed] before voting to dissolve”);  
26 3/26/24 Tr. at 342:20–347:25 (noting that Wade's analysis of retirement liabilities assumed that  
27 the Debtor would not have income after 2018). However, “[t]he Court must consider the  
28 reasonableness of the company's projections with respect to whether they were prudent at the time



1 made, not in hindsight.” *ASARCO*, 396 B.R. at 397. “[C]ourts do not focus on ‘what ultimately  
2 happened to the company,’ but will look to ‘whether the company’s then-existing cash flow  
3 projections (i.e., projected working capital) were reasonable and prudent when made.’” *Lyondell*,  
4 567 B.R. at 110 (quoting *In re Iridium Operating LLC*, 373 B.R. 283, 345 (Bankr. S.D.N.Y.  
5 2007)).

6 144. Accordingly, the Court finds that the Trustee has not met its burden to prove that  
7 the Debtor had unreasonably small capital as of January 13, 2017.

8 145. To the extent that the Trustee argues that the Court should also consider whether  
9 the Debtor had unreasonably small capital on June 30, 2017, the Trustee has failed to present  
10 evidence that would be sufficient to carry its burden of proof with respect to the June 31, 2017 test  
11 date.

12 **iii. Unable to Pay Debts as They Became Due**

13 146. Section 548(a)(1)(B)(ii)(III) requires the Trustee to show that the Debtor “intended  
14 to incur, or believed that the debtor would incur, debts that would be beyond the debtor’s ability to  
15 pay as such debts matured.”

16 147. The Trustee’s trial brief presents no argument for why the Debtor was unable to  
17 pay its debts as they become due.

18 148. Moreover, the evidence before the Court is insufficient to meet the Trustee’s  
19 burden. To the extent that Wade’s testimony may be understood as applying to this statutory  
20 requirement, it fails for the same reasons that the Court discussed above.

21 149. Wade’s analysis is contradicted by the evidence before the Court, which shows that  
22 the Debtor was paying its debts as they became due in January. *See* 3/26/24 Tr. at 350:2–21  
23 (noting that between December 31, 2016 and January 31, 2017, the Debtor reduced its accounts  
24 payable by over \$652,000 without borrowing on its line of credit).

25 150. Accordingly, the Court finds that the Trustee has not met its burden to prove that  
26 the Debtor was unable to pay its debts as they became due on January 31, 2017.

27 151. To the extent that the Trustee argues that the Court should also consider whether  
28 the Debtor was unable to pay its debts as they became due on June 30, 2017, the Trustee has failed

1 to present evidence that would be sufficient to carry its burden of proof with respect to the June  
2 31, 2017 test date.

3 **B. Return of Distributions Pursuant to Cal. Corp. Code § 16957 (Claims 2 and 3)**

4 152. Claim 2 is brought under subsection (a)(1), which states that “[n]o distribution shall  
5 be made by a registered limited liability partnership if, after giving effect to the distribution: . . .  
6 The registered limited liability partnership would not be able to pay its debts as they become due  
7 in the usual course of business.” Cal. Corp. Code. § 16957(a)(1).

8 153. Claim 3 is brought under subsection (a)(2), which states:

9 No distribution shall be made by a registered limited liability  
10 partnership if, after giving effect to the distribution: . . . The registered  
11 limited liability partnership’s total assets would be less than the sum  
12 of its total liabilities plus the amount that would be needed, if the  
13 registered limited liability partnership were to be dissolved at the time  
14 of the distribution, to satisfy the preferential rights of other partners  
15 upon dissolution that are superior to the rights of the partners  
16 receiving the distribution.

17 *Id.* at § 16957(a)(2).

18 154. “A distribution for purposes of this section means the transfer of money or property  
19 by a registered limited liability partnership to its partners without consideration.” *Id.* at  
20 § 16957(c).

21 155. The Court finds that both claims must be dismissed because the distributions at  
22 issue were not transferred “without consideration” and thus were not distributions for purposes of  
23 § 16957.

24 156. The Debtor’s Partnership Agreement states that “[f]or purposes of . . . Section  
25 16957 of the Code, cash distributions or draws paid to a Partner pursuant to this Agreement shall  
26 be deemed paid in consideration of such Partner’s services rendered on behalf of the Partnership.”  
27 Ex. 52 at 4–5.

28 157. The Court also finds that the Trustee has failed to meet its burden of proof under  
Claims 2 and 3.

158. As the Court found above, the Trustee failed to prove that the Debtor was not able  
to pay its debts as they became due. For those reasons, the Trustee has also failed to meet its

1 burden to prove Claim 2.

2 159. On Claim 3, the Trustee argues that § 16975(a)(2) requires the Court look to the  
3 liquidation value of the firm because the statute requires the Court to look to the assets and  
4 liabilities of the partnership if it “were to be dissolved at the time of the distribution.” *See* 3/27/24  
5 Tr. at 435:13–23. As the Court found above, Wade’s analysis is entitled to little weight and thus  
6 fails to carry the Trustee’s burden of proof. Even if the Court were to consider Wade’s analysis,  
7 his analysis did not find a liquidation value for the Debtor. *See* 3/25/24 Tr. at 138:18 (“I did not  
8 tailor my analysis to a liquidation value.”). Thus, the Trustee has failed to meet its burden to  
9 prove Claim 3.

10 **C. Recovery of Avoided Transfers Pursuant to 11 U.S.C. §§ 544, 547, 548, and 550**  
11 **and Cal. Civ. Code § 3439.07 (Claim 6).**

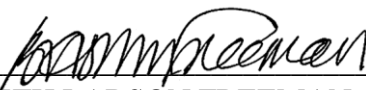
12 160. The Trustee stated at trial that its cause of action for recovery of avoided transfers  
13 requires a finding for the Trustee that he may avoid transfers under Claims 2, 3, or 4. *See* 3/27/24  
14 Tr. at 437:20–24 (“[T]o the extent you avoid it, then we are entitled to recover it under bankruptcy  
15 law.”).

16 161. Because the Court found above that the Trustee is not entitled to avoid transfers  
17 under any of its claims, it follows that the Trustee is not entitled to recover any avoided transfers.

18 **V. ORDER**

19 The Court finds FOR Defendants Michael A Tanenbaum and James Keale and AGAINST  
20 Liquidating Trustee James Gansman on Claims 2, 3, 4, and 6.

21 Dated: July 8, 2024

22   
23 \_\_\_\_\_  
24 BETH LABSON FREEMAN  
25 United States District Judge  
26  
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