

Trustee argues eloquently, citing authorities that his firm probably used in its forensic analysis of Slatkin that a Ponzi scheme is always insolvent, even from the beginning. This pleading was used in the attempt to obtain a writ of attachment on the assets of 4 defendants.

1 his ~~family, and his business associates.~~ See Newton Decl., Ex. 1 (Slatkin Plea
2 Agreement), at 30: 1-6; 31: 6-9; and 33: 7-16. Mr. Slatkin also admits that since about
3 1985, he knew that he would have to cover the withdrawals of old investors with the
4 deposits of new investors. See Jafek Decl., Ex. 1 (Slatkin Decl.), ¶ 6. Thus, Mr.
5 Slatkin knew from the beginning, because of: (1) the limited investments he made; (2)
6 his use of investors' funds for his own benefit; and (3) the need to pay off old
7 investors, that he was incurring debts beyond his ability to pay.

8 Second, there is indirect evidence that Mr. Slatkin intended to incur debts
9 beyond his ability to repay them. See In re Taubman, 160 B.R. at 986 (examining
10 "facts and circumstances" to infer subjective intent). Mr. Slatkin admitted to running a
11 Ponzi scheme. See Newton Decl., Ex. 1 (Slatkin Plea Agreement). A Ponzi scheme
12 operator knows, by the nature of the scheme, that he will not be able to repay later
13 investors. See Clearing House, 77 B.R. at 860. Furthermore, a Ponzi scheme is

14 insolvent from its very inception. See id. at 871 ("By definition, an enterprise engaged
15 in a Ponzi scheme is insolvent from day one."); In re Taubman, 160 B.R. at 986 ("The
16 nature of a Ponzi scheme renders the operator insolvent from the beginning."). Thus, it
17 can be inferred from the fact that Mr. Slatkin ran a Ponzi scheme that he intended to
18 incur, or believed or reasonably should have believed that he would incur, debts
19 beyond his ability to pay as they became due.

20 Ms. Rosen argues that Mr. Slatkin was solvent during part of the time she
21 received transfers from Mr. Slatkin. See Opp. 23: 17-26. Ms. Rosen presumably
22 offers this as indirect evidence of Mr. Slatkin's subjective intent to show constructive
23 fraud. But even if Mr. Slatkin were solvent at some point during his Ponzi scheme,
24 that would not necessarily disprove that Mr. Slatkin subjectively intended to incur, or
25 believed or reasonably should have believed that he would incur debts beyond his
26 ability to repay them, as required by Cal. Civ. Code § 3439.04(b)(2). First, Mr.
27 Slatkin's dumb luck in falling into one successful investment, EarthLink, among his
28 hundreds of dismal failures, does nothing to rebut his expressed subjective intentions

1 regarding his inability to pay his debts. Second, the EarthLink stock could not be used
2 to repay his debts because the sale of those stocks was restricted.

3 Defendant's "expert" opines that the value of Mr. Slatkin's EarthLink stock
4 exceeded claims against Mr. Slatkin at one point in time, December, 1998. See
5 Declaration of James Crosser in support of defendant's opposition ("Crosser
6 Declaration"), Ex. 3. Mr. Crosser has not, however, considered the multiple
7 restrictions on the sale of Mr. Slatkin's stock which prevented it from being liquidated
8 in December, 1998 at the peak of the market. See e.g., 17 C.F.R. § 230.144
9 (restricting directors and other "affiliates" from selling shares except in certain
10 circumstances).

11 * * * * *

12 The Trustee has thus also demonstrated the probable validity of his constructive
13 fraudulent transfer claims. The court can easily dispose of the remaining two elements
14 needed for a writ of attachment.

15 **C. The Trustee seeks the attachment for a proper purpose.**

16 The third element of Cal. Civ. Proc. Code § 484.090(a) is whether the
17 attachment is "sought for a purpose other than the recovery on the claim upon which
18 the attachment is based." Cal. Civ. Proc. Code § 484.090(a)(3). The Trustee seeks the
19 attachment in order to guarantee that the judgment can be recovered once litigation is
20 complete. He fears that without attachment, Ms. Rosen's assets may not be available
21 to satisfy judgment. See Loeb and Loeb, 166 Cal. App. 3d at 1118 ("The usual and
22 main purpose of an attachment is to secure and insure the payment of any judgment
23 that may be recovered in the successful prosecution of an action in order that the ends
24 of successful litigation are not fruitlessly pursued or frustrated.") Thus, attachment is
25 an appropriate immediate step to insure that he recovers all the property to which the
26 creditors are legally entitled.

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