

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

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

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

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

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

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

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1           **D. The amount sought by the attachment is more than zero.**

2           The final element is that the “amount to be secured by the attachment is greater  
3 than zero.” Cal. Civ. Proc. Code § 484.090(a)(4). Here, the Trustee seeks an  
4 attachment in the amount of \$4,376,978.71.

5           **E. The description of the property sought to be attached is adequate.**

6           Ms. Rosen makes a separate argument that even if the Court finds that a writ of  
7 attachment should issue, the Trustee’s description of the property sought to be attached  
8 is “grossly insufficient.” See Opp. 13:8. In the context, however, of an application for  
9 a writ of attachment, a general description as given in the Trustee’s application is  
10 adequate.

11           In Bank of America v. Salinas Nissan, Inc., 207 Cal. App. 3d 260, 254 Cal. Rptr.  
12 748 (1989), the plaintiff sought a right to attach order and, in his description of  
13 attachable property, included an even broader description than that used by the  
14 Trustee. There, the court approved an order authorizing attachment of “real property,  
15 personal property, equipment, motor vehicles, chattel paper, negotiable and other  
16 instruments, securities, deposit accounts, safe deposit boxes, accounts receivable,  
17 general intangibles, [etc.]” Id. at 264. The court reasoned that the statute does not  
18 “prohibit a plaintiff from targeting for attachment everything an individual owns.” Id.  
19 at 268. The court observed that such a strategy allows a plaintiff to “provoke and  
20 resolve an individual defendant’s exemptions all at once.” Id. That is exactly what the  
21 Trustee did here.

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