

Dated: May 4, 2017



Daniel P. Collins

Daniel P. Collins, Chief Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF ARIZONA

In re:

PHOENIX HELIPARTS, INC.,

Debtor.

Substantively Consolidated with
PHOENIX HELI-SUPPORT, L.L.C.,
ROBERT REISH,

Plaintiff,

v.

PHOENIX HELIPARTS, INC.
LIQUIDATION TRUST,

Defendant.

PHOENIX HELIPARTS, INC.
LIQUIDATION TRUST,

Counterclaimant,

v.

ROBERT C. REISH and KATHLEEN
REISH, husband and wife,

Counterdefendants.

PHOENIX HELIPARTS, INC.
LIQUIDATION TRUST,

Third-Party Plaintiff,

v.

RYUKO, INC., a Wyoming corporation,

Third-Party Defendant.

Chapter 11 Proceedings

Case No. 2:15-bk-12003-DPC

Adversary No. 2:16-ap-00331-DPC

**UNDER ADVISEMENT RULING
DENYING THE REISH PARTIES'
CROSS MOTION FOR SUMMARY
JUDGMENT, AND PARTIALLY
GRANTING THE LIQUIDATING
TRUST'S MOTION FOR SUMMARY
JUDGMENT**

[NOT FOR PUBLICATION]

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1 Before the Court are the Motion for Summary Judgment (“MSJ”) filed by the Liquidating
2 Trust and the Cross-Motion for Summary Judgment (“Cross MSJ”) filed by the Reish Parties.¹
3 In summary, the parties contend that the November 25, 2015 transfer of helicopter 41FF to Reish
4 was either a post-petition transfer avoidable under 11 U.S.C. §§ 549 and 550,² or an unavoidable
5 sale of a helicopter that belonged to Reish and never became property of the Debtor’s bankruptcy
6 estate. The parties also seek summary judgment by this Court on the question of whether a second
7 helicopter, the 229D, was property of the Debtor’s bankruptcy estate and is now property of the
8 Liquidating Trust, or whether the 229D helicopter belongs to Reish and never became property
9 of Debtor’s bankruptcy estate. Finally, the Liquidating Trust seeks summary judgment by this
10 Court finding that Debtor’s pre-petition promise to pay \$1,275,000 a year after it borrowed
11 \$850,000 is a constructive fraudulent transfer avoidable under § 548.

12 For the reasons stated below, the Court grants the Liquidating Trust’s MSJ declaring 41FF
13 and 229D property of the estate and avoiding the transfer of 41FF to Reish but denying its MSJ
14 as to its § 548 claims. The Court denies the Cross MSJ and dismisses Counts One and Two of
15 Reish’s Complaint. The Liquidating Trust is directed to lodge a partial judgment consistent with
16 this order.

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18 **PROCEDURAL BACKGROUND**

19 1. Phoenix Heliparts, Inc. (“Debtor” or “PHP”) filed its voluntary chapter 11
20 bankruptcy petition on September 18, 2015 (“Petition Date”).³ This bankruptcy filing was
21 precipitated by a January 30, 2015 Arizona Superior Court, Maricopa County (“State Court”)
22 under advisement ruling against the Debtor in the amount of \$26,051,844.21⁴ and the State
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24
25 ¹ This is a core matter under 28 U.S.C. § 157. The court has jurisdiction to enter final judgment. *See* the Reish
Complaint, ¶ 2; Answer, DE 6 ¶ 1.

26 ² Unless otherwise indicated, all Chapter, Section and Rule references are to the Bankruptcy Code (“Code”),
11 U.S.C. §§ 101-1532, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9037.

27 ³ Administrative Docket #1 in case #2:15-bk-12003-DPC (“Admin DE”). Docket entries in this adversary
proceeding (“Adversary Proceeding”) #2:16-AP-00331-DPC shall be referenced as “DE.”

28 ⁴ Admin. DE 50-1.

1 Court's subsequent September 8, 2015 minute entry order requiring PHP to post a supersedeas
2 appellate bond in the amount \$6,765,260.89.⁵

3 2. Louie Mukai ("Mukai") was appointed chapter 11 trustee for the Debtor on
4 October 22, 2015.⁶

5 3. On March 11, 2016, the Debtor was substantively consolidated with Phoenix Heli-
6 Support, L.L.C. ("PHS").⁷

7 4. On April 1, 2016, the Court entered its order approving the sale of most of the
8 Debtor's assets.⁸

9 5. On May 31, 2016, the Court entered its order ("Confirmation Order")⁹ confirming
10 Mukai's first amended chapter 11 plan ("Plan")¹⁰ of liquidation.

11 6. The Plan created the Phoenix Heliparts, Inc. Liquidation Trust ("Liquidating
12 Trust") and appointed Mukai to serve as the trustee of the Liquidating Trust. Under the Plan, the
13 Liquidating Trust was vested with all unadministered assets of the Debtor, including the rights to
14 pursue avoidance and turnover actions.¹¹

15 7. On July 1, 2016, Robert Reish ("Reish") commenced this Adversary Proceeding
16 when he filed his complaint ("Complaint")¹² against the Debtor and Mukai. In summary, the
17 Complaint seeks the Court's declaration confirming that Reish owns the 41FF¹³ helicopter and
18 that 41FF was never property of the Debtor's bankruptcy estate (Count One). Reish also seeks
19 this Court's judgment confirming that Reish owns the proceeds of sale of 41FF (\$2,150,000) to
20 the Azerbaijan Ministry of Defense ("AMOD") (Count Two).

21 . . .

22 . . .

23 ⁵ Admin. DE 50-4.

24 ⁶ Admin. DE 104.

25 ⁷ Admin. DE 307.

26 ⁸ Admin. DE 374.

27 ⁹ Admin. DE 482.

28 ¹⁰ Admin. DE 433.

¹¹ See page 15, Section VII of the Plan and the Confirmation Order at page 3. See also TSOFF (defined in ¶9 below) #37 (DE 23) and RSOF (defined in ¶10 below) #37 (DE 31).

¹² DE 1.

¹³ See Paragraph 14(a) below.

1 8. After filing its motion to intervene,¹⁴ on July 26, 2016, the Liquidating Trust filed
2 its answer, counterclaim and third party complaint (“Liquidating Trust Claims”).¹⁵ Reish and
3 his wife Kathleen (“Ms. Reish”) were named counterdefendants. Ryuko, Inc. (“Ryuko”) was the
4 named third-party defendant. In summary, the Liquidating Trust Claims seek (a) avoidance under
5 § 549 of the post-petition transfer of 41FF to Reish (First Claim), (b) recovery under § 550 from
6 Reish of the amount AMOD contracted with Reish for AMOD’s purchase of 41FF (namely
7 \$2,322,000) (Second Claim) and (c) for a determination that the Liquidating Trust, not Reish,
8 owns 229D (Third Claim). In its Third Party Complaint against Ryuko, the Liquidating Trust
9 seeks to avoid a portion of the Ryuko Note¹⁶ as a fraudulent transfer under § 548.

10 9. On December 8, 2016, the Liquidating Trust filed its MSJ¹⁷ and Liquidating
11 Trust’s Statement of Facts (“TSOF”).¹⁸

12 10. On January 17, 2017, Reish, Ms. Reish and Ryuko (the “Reish Parties”) filed their
13 opposition to the MSJ, their Cross MSJ,¹⁹ and the Reish Parties’ Statement of Facts (“RSOF”).²⁰

14 11. On January 31, 2017, the Liquidating Trust filed its reply to the opposition to the
15 MSJ and its opposition to the Cross MSJ²¹ and its reply to the RSOF (“Reply to RSOF”).²²

16 12. Mukai’s affidavit (“Mukai Affidavit #2”) was filed on February 13, 2017 as a
17 supplement to both the Liquidating Trust’s MSJ and its response to the Cross MSJ.²³

18 13. The Court heard oral argument on the MSJ and Cross MSJ on February 16, 2017,
19 and then took this matter under advisement.

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24 ¹⁴ DE 5.

¹⁵ DE 6.

25 ¹⁶ See ¶ 15 below.

¹⁷ DE 22.

26 ¹⁸ DE 23.

¹⁹ DE 30.

27 ²⁰ DE 31.

²¹ DE 33.

28 ²² DE 34.

²³ DE 36.

1 **FACTS**

2 The facts material to this Court’s disposition of the MSJ and Cross MSJ are not in dispute.
3 The interpretation of a number of these facts, however, is hotly contested.

4 **The Helicopter Transactions**

5 14. Two helicopters and a promissory note are at the heart of the controversy between
6 these parties. A third helicopter, described as serial number 0175FF (the “175FF”), was
7 tangentially involved in transactions involving PHP and Reish. The transactions involving these
8 three helicopters are as follows:

9 (a). 175FF: This helicopter was owned by Ryuko, repaired by PHP at Ryuko’s
10 request and, with the help of Tina Cannon (“Cannon”), former president of PHP, was contracted
11 for sale by Ryuko to AMOD on November 11, 2015 for \$2,538,000.²⁴ This sale closed on
12 November 25, 2015. \$2,350,000 was paid by AMOD to Ryuko through an escrow handled by
13 Insured Aircraft Title Service, Inc. (“IATS”).²⁵

14 (b). 41FF: A helicopter described as model number MD 530F, registration and
15 serial number 0041FF (the “41FF”) was owned by Utility Aviation, Inc. who transferred 41FF to
16 XL Specialty Ins. Co. who transferred 41FF to RotorMate USA who, in turn, sold 41FF to PHP
17 in 2009.²⁶ At some point along the way, probably when 41FF was owned by Utility Aviation,
18 Inc., 41FF was encumbered by a lien in favor of Wells Fargo Bank.

19 On February 13, 2014, PHP entered into a helicopter purchase agreement (“41FF
20 Agreement”)²⁷ calling for PHP’s sale of 41FF to Reish for a total price “TBD” (i.e. to be
21 determined). The base purchase price was \$1,395,000. A \$500,000 deposit was made by Reish
22 to PHP on April 25, 2014.²⁸ Since the helicopter had been in an accident,²⁹ PHP needed to make
23 significant repairs before it could deliver the 41FF to Reish “. . . with all systems operational, a
24 Credit Airworthiness Certificate, Flight records up to date, all mandatory Airworthiness

25 ²⁴ DE 23-7. TSOF 26, exhibit 7 pages 1-3 of 6.

26 ²⁵ DE 23-12. TSOF 26, exhibit 12, page 2.

27 ²⁶ DEs 23 and 31. TSOF 30. RSOF 30, RSOF 43, attachment 43 (DE 31-5).

28 ²⁷ DE 23-1.

²⁸ DE 23-1.

²⁹ DE 23. TSOF 7 and exhibit 2 40:18-42:3 and 63:18-66:16.

1 Directives and Service Bulletins complied with.”³⁰ Delivery of 41FF to Reish by PHP was
2 projected to be 7 months after the Reish deposit and after the parties agreed upon the scope of
3 work.³¹ No evidence was submitted to the Court indicating the parties to the 41FF Agreement
4 ever agreed upon a final scope of repairs or final sale price. The 41FF Agreement contains a
5 provision indicating its terms may not be changed unless executed by the parties. The Court
6 received no evidence that the parties executed any such changes to the 41FF Agreement. The
7 Court received no evidence suggesting the 41FF Agreement was ever amended. Reish contends
8 he wished to purchase 41FF for personal and/or family and consumer purposes.³² The
9 Liquidating Trust contends Reisch intended to purchase 41FF for commercial purposes.³³

10 The Liquidating Trust and Reish Parties both agree that, by March 26, 2015, Reish had
11 delivered to PHP the total sum of \$1,220,000 towards Reish’s purchase of 41FF.³⁴ Additionally,
12 Reish contends he issued “offset credits”³⁵ totaling \$175,000 to PHP to complete Reish’s
13 payments towards the purchase of 41FF.³⁶ No evidence was presented to this Court indicating
14 how or when Reish issued such “offset credits.” Further, the books and records of PHP do not
15 reflect the application of any offsets towards Reish’s purchase of 41FF or a \$175,000 reduction
16 of PHP’s obligations on the Ryuko Note.³⁷

17 PHP failed to make any meaningful progress towards the significant repairs required to
18 render 41FF airworthy.³⁸ To this date, 41FF is a helicopter shell and cannot be flown, much less
19 flown in a condition meeting federal aviation legal requirements. 41FF remains in the possession
20 of the Liquidating Trust.³⁹

21 Since PHP and RotorMate failed to properly document PHP’s 2009 purchase of 41FF,
22 Cannon arranged for title to 41FF to finally be transferred on October 18, 2015 to PHP from

23 ³⁰ DE 23-1. TSOF exhibit 1, ¶4 of the 41FF Agreement.

24 ³¹ DE 23-1. TSOF exhibit 1, ¶9 of the 41FF Agreement.

25 ³² DE 31. RSOF 45 and DE 31-10, Reish Declaration page 2.

26 ³³ DE 34. Liquidating Trust’s reply to RSOF (“TRSOF”), ¶ 45 and Reish’s POC 37. *See* page 9 below.

27 ³⁴ DE 23. TSOF § 10 and RSOF § 10.

28 ³⁵The Reish Parties use the words credit and setoff interchangeably

³⁶ DE 31-10. Reish Declaration, page 2.

³⁷ DE 36. Mukai Affidavit#2 ¶ 8. *See also* DE 23, TSOF 18 and exhibit 2 at 140:12-141:3.

³⁸ DE 23. TSOF 8 and exhibit 2 at 145:5-2 and exhibit 13, Mukai’s affidavit (“Mukai Affidavit #1”) ¶ 4.

³⁹ Oral argument on February 16, 2017 at 11:03:20.

1 RotorMate and for the Wells Fargo lien release to be processed.⁴⁰ Once title to 41FF was
2 transferred to PHP and the Wells Fargo lien released, Cannon orchestrated the transfer of title
3 from PHP to Reisch. She also facilitated the 41FF transfer from Reisch to AMOD for
4 \$2,150,000.^{41 42} Those funds were paid to Reisch via the IATS escrow by AMOD on November
5 25, 2015.⁴³ These transactions were handled by Cannon without approval of this Court and after
6 Mukai was appointed PHP's trustee.⁴⁴ Mukai did not authorize Cannon to execute any bills of
7 sale and did not authorize her to execute any bills of sale for 41FF.⁴⁵

8 (c). 229D: A helicopter described as model number MD369D, registration and
9 serial number 1170229D (the "229D") is the subject of a February 19, 2014 helicopter purchase
10 agreement ("229D Agreement")⁴⁶ between Reish and PHP. Unlike the 41FF Agreement, the
11 purchase price for the 229D was not "TBD" but, rather, was set at \$975,000. The Liquidating
12 Trust and the Reish Parties agree that, by March 26, 2015, Reish had paid \$875,000 to PHP
13 towards Reisch's purchase of 229D.⁴⁷ Additionally, Reish contends he provided "offset credits"
14 totaling \$100,000 to complete Reish's payment towards his purchase of 229D.⁴⁸ No evidence
15 was presented to this Court indicating how or when Reish issued such "offset credits." Further,
16 the books and records of PHP do not reflect the application of any offsets towards Reish's
17 purchase of 229D or a \$100,000 reduction of PHP's obligations on the Ryuko Note.⁴⁹ The Reish
18 Parties acknowledge that Reish intended to purchase 229D for commercial purposes.⁵⁰

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21 ⁴⁰ DE 23. TSOF 30 and 31, exhibit 11 (aircraft bill of sale).

22 ⁴¹ DE 23. TSOF 31 and 33, exhibits 11 and 12 (bills of sale and bank wire confirmation).

23 ⁴² As noted in ¶ 8 above, the contract between AMOD and Reish called for payment of \$2,322,000. *See* DE 23,
24 exhibit 7, pages 4-6. No evidence was submitted to the Court indicating why AMOD transferred only \$2,150,000
25 to Reish at the closing of this sale or whether other funds were also sent by AMOD to fully pay the contracted price
26 for 41FF.

27 ⁴³ The 41FF and the 175FF sales closed at the same time through the same escrow company, IATS. As noted,
28 AMOD was the purchaser of both helicopters and Cannon orchestrated both sales.

⁴⁴ DE 23. TSOF 31 and DE 36, Mukai Affidavit #2, ¶¶ 4, 5 and 6.

⁴⁵ DE 23. TSOF 31 and DE 36, Mukai Affidavit #2, ¶ 4.

⁴⁶ DE 23-3.

⁴⁷ DE 23. TSOF § 10 and RSOF § 10.

⁴⁸ DE 31-10. Reish Declaration, page 2.

⁴⁹ DE 36. Mukai Affidavit#2 ¶ 8. *See also* DE 23, TSOF 18 and exhibit 2 at 140:12-141:3.

⁵⁰ DE 31-10. Reish Declaration, page 4

1 PHP failed to make any meaningful progress towards the significant repairs required to
2 render 229D airworthy.⁵¹ To this date, 229D is essentially an incomplete helicopter shell and
3 cannot be flown, much less flown in a condition meeting federal aviation legal requirements.
4 229D remains in the possession of the Liquidating Trust.⁵²

5 15. The Ryuko Note. On April 17, 2015, on behalf of PHP, Cannon executed an
6 installment note (“Ryuko Note”) in favor of “Ryuko, Inc., Trustees Robert C. Reish and/or
7 Kathleen A. Reish” calling for payment by PHP of \$1,275,000 on or before April 1, 2016. The
8 Ryuko Note indicated “Principle’s funds to be credited to Phoenix Heliparts, Inc. to cover the
9 expenses of ongoing and future Ryuko, Inc. projects including, but not limited to, Aircraft S/N
10 0175FF; S/N 0041FF; and SN 270082D.” The Ryuko Note contains a provision stating:

11 This Note shall be construed in accordance with the laws of the Sate [sic] of
12 Wyoming. Any alteration, change, or modification of or to this Note, in order to
13 become effective, shall be made by written instrument executed by both Maker
and Holder.

14 The parties provided the Court with no evidence that the Ryuko Note was ever altered or
15 amended.

16 16. PHP’s Insolvency. Due to the \$26,051,844.21 judgment against PHP referenced
17 in paragraph 1 above, PHP was insolvent when PHP executed the Ryuko Note on April 17,
18 2015.⁵³

19 17. The Ryuko Entity. Ryuko is a Wyoming corporation wholly owned by Reish and
20 Ms. Reish. *See* RSOF 41 and ¶41 of the Reply to RSOF. Ryuko is not the alter ego or
21 instrumentality of Reish and no evidence was submitted to this Court which could support a
22 piercing of Ryuko’s corporate veil.⁵⁴

23 18. The Reish Proofs of Claim. On February 16, 2016, Reish and Ms. Reish filed in
24 the PHP bankruptcy case claims numbered 35, 36, 37, 38 and 39. These claims are summarized
25 as follows:

26 ⁵¹ DE 31-10. Reish Declaration, page 3.

27 ⁵² Oral argument on February 16, 2017 at 11:03:36.

⁵³ DE 23. TSOF ¶ 15 and RSOF ¶ 15.

28 ⁵⁴ *See* the February 16, 2017 oral argument comments by counsel for the Reish Parties at 11:41:42 a.m. and following.

1 (a) Proof of Claim # 35 (“POC 35”). POC 35 is an unsecured claim in the
2 amount of \$909,372 for “[m]oney loaned on a discount note less credits...” Ryuko is identified
3 as “[o]ther names the creditor used with the debtor.” The “person who is completing and signing
4 this claim” is identified as Reish and Ryuko. An attachment to POC 35 states:

5 Discount note is attached; \$850,000 advanced with repayment to be
6 \$1,175,000 on terms stated.

7 From the face amount the following credits have been given to PHP:

8 <\$175,000.00> applied toward purchase of aircraft 0041FF;

9 <\$100,000.00> applied to purchase of aircraft 0229D;

10 <\$ 90,628.00> applied on aircraft 041FF

11 <\$365,628.00> total credits applied

12 Note balance due as of the date relief was ordered: \$909,372.00**

13 (b) Proof of Claim # 36 (“POC 36”). POC 36 is an unsecured claim in the
14 amount of \$2,150,000 for “contingent potential claim of AMOD for refund-re: 041FF helicopter.”
15 Ryuko is identified as “[o]ther names the creditor used with the debtor.” The “person who is
16 completing and signing this claim” is identified as Reish and Ryuko. An attachment to POC 36
17 states:

18 PHP brokered the sale to AMOD on Nov 11, 2015 without disclosure to
19 buyer that the craft was de-registered by the FAA due to having been
20 wrecked, and manufacturer-only refurbishment needed but was not done,
21 and craft cannot be shipped out of the USA until it is re-registered with
22 FAA, which is presently impossible

23 AMOD contract sale price \$2,150,000 plus modifications they paid PHP to
24 do; This is a contingent claim as AMOD has not yet made a demand for
25 refund; it is not liquidated unless and until such demand is made.

26 (c) Proof of Claim # 37 (“POC 37”). POC 37 is an unsecured claim in the
27 amount of \$1,747,733.34 for “[p]urchase refund, parts refund & lost lease income 041FF
28 helicopter.” Ryuko is identified as “[o]ther names the creditor used with the debtor.” The “person
29 who is completing and signing this claim” is identified as Reish and Ryuko. An attachment to
30 POC 37 states:

31 Purchase price of craft never delivered: \$1,395,000.00

32 Parts paid for and never installed 189,796.36

1 Lost rents: Fair market monthly
2 Rent exclusive of air time: \$12,000.00/mo
3 per diem: \$394.52
4 Craft purchased 1/22/14; delivery promised 7/22/14
5 & never delivered
6 Lost rents between 7/22/14 and relief order date 9/8/14:
7 413 days x \$394.52 = \$162,936.98
8 Total claim: \$1,747,733.34**

9 (d) Proof of Claim # 38 (“POC 38”). POC 38 is an unsecured claim in the
10 amount of \$241,730.12 for “labor overcharge/parts not delivered/lost rents per attachment.”
11 Ryuko is identified as “[o]ther names the creditor used with the debtor.” The “person who is
12 completing and signing this claim” is identified as Reish and Ryuko. An attachment to POC 38
13 states:

14 Purchased from a third party, deal brokered by PHP
15 PHP was to modify; parts paid for but not delivered \$31,201.00
16 Labor overcharge on work done \$27,077.32
17 \$58,272.32
18 Craft was never completed - delivery promised 6/1/14
19 Fair market guaranteed monthly rent exclusive of air time: \$12,000.00
20 Per diem: \$394.52
21 Lost income from promised delivery date until relief ordered date of 9/8/15:
22 465 days x \$394.52 = \$183,451.80
23 Claim total: \$241,730.12**

24 (e) Proof of Claim # 39 (“POC 39). POC 39 is an unsecured claim in the
25 amount of \$1,110,513.80 for “[p]urchase refund, parts refund & lost lease income 229D
26 Helicopter.” Ryuko is identified as “[o]ther names the creditor used with the debtor.” The “person
27 who is completing and signing this claim” is identified as Reish and Ryuko. An attachment to
28 POC 39 states:

29 Summarized because records supporting this claim are voluminous:
30 Parts paid for but not installed: \$30,455.00
31 Purchase price paid in full but craft never delivered: \$975,000
32 Lost lease income:
33 Purchase date: 2/19/2014; delivery promised 8/19/2014 & never delivered;
34 Lease income for this craft, excluding flight time, is \$8,300 per month
35 or \$99,600/yr; \$272.88 per diem;
36 Between promised delivery date (8/19/2014) and date relief ordered
37 in this case is 385 days; 385 x \$272.88 = \$105,058.80

1 Total claim: \$30,455.00 + \$975,000.00 + 105,058.80 =
2 \$1,110,513.80**

3 19. The \$360,750 Transfer to PHP. On November 25, 2015, \$360,750 was transferred
4 to PHP. These funds apparently came from AMOD in connection with its purchase of 41FF
5 and/or 175FF.⁵⁵

6
7 **ANALYSIS**

8 I. The § 549 Factors Applied to the 41FF Transactions.

9 For the Liquidating Trust to prevail on its claim seeking to avoid the transfer of the 41FF
10 under § 549 of the Code, there must have been (1) a transfer, (2) of property of the bankruptcy
11 estate, (3) after the Petition Date, (4) that was not authorized by the Bankruptcy Code or by order
12 of the Court. The parties agree the Liquidating Trust has satisfied three of the four factors required
13 to establish a claim under § 549, namely that there has been (a) a transfer of the 41FF by PHP
14 through the unauthorized actions of its former president, Cannon, (b) made after the Petition Date
15 (and after the date Mukai was appointed chapter 11 trustee) and (3) that transfer was not
16 authorized by the Code or the Court. The sole dispute centers on whether the 41FF was property
17 of the Debtor's bankruptcy estate⁵⁶ when it was transferred by PHP to Reish on November 25,
18 2015. The facts material to this dispute are not in contest. Rather, it is a question of how one
19 interprets these facts.

20 What constitutes property of a bankruptcy estate is a federal question governed by 11
21 U.S.C. § 541; however, whether and to what extent a debtor has any legal or equitable interest in
22 the subject property as of the commencement of the bankruptcy case is determined under state
23 law. *In re Yonikus*, 996 F.2d 866, 869 (7th Cir. 1993), citing *Butner v. United States*, 440 U.S. 48,
24 59 L.Ed.2d 136, 99 S.Ct. 914 (1979), and *In re Jones*, 768 F.2d 923 (7th Cir. 1985). As the 9th
25 Circuit has noted in *In re Fitness Holdings Int'l, Inc.*, 714 F.3d 1141, 1146 (9th Cir. 2013) :

26
27 _____
⁵⁵ RSOF ¶ 42.

28 ⁵⁶ The Liquidating Trust's reply (DE 33) to the Reish opposition to the MSJ suggests ¶ 7 of the Reish Complaint admits the 41FF is property of the Debtor's bankruptcy estate. The Court disagrees.

1 The Supreme Court has “long recognized that the basic federal rule in bankruptcy is that
2 state law governs the substance of claims, Congress having generally left the
3 determination of property rights in the assets of a bankrupt's estate to state law.”
4 *Travelers Cas. & Sur. Co. of Am. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450, 127 S.Ct.
5 1199, 167 L.Ed.2d 178 (2007) (internal quotation marks omitted). This principle was
6 given its clearest statement in *Butner*, 440 U.S. 48, 99 S.Ct. 914, which held that
7 because “[p]roperty interests are created and defined by state law,” *id.* at 55, 99 S.Ct.
8 914, “[u]nless some federal interest requires a different result, there is no reason why
such interests should be analyzed differently simply because an interested party is
involved in a bankruptcy proceeding.” *Id.* This means that “when the Bankruptcy Code
uses the word ‘claim’—which the Code itself defines as a ‘right to payment,’—it is
usually referring to a right to payment recognized under state law.” *Travelers*, 549 U.S.
at 451, 127 S.Ct. 1199 (internal citation omitted).

9 Before looking to applicable state law, an important first step in determining whether the 41FF
10 was property of PHP’s bankruptcy estate is interpreting the Ryuko Note.

11 The Ryuko Note

12 The Ryuko Note is owed to Ryuko, not Reish or Ms. Reish. While it is curious that the
13 Ryuko Note references payment to “Ryuko, Inc., Trustees Robert C. Reisch and/or Kathleen A.
14 Reish, . . .”⁵⁷ the Ryuko Note’s subsequent reference to (a) “Maker” in the singular, (b) to
15 “Principle’s” as a singular payee and (c) to “Ryuko, Inc. projects” makes clear that Ryuko is
16 meant to be the sole payee under the Ryuko Note. This, of course, makes sense because the
17 \$850,000 transferred to PHP at the time the Ryuko Note was executed was wired to PHP from
18 Ryuko’s account at Allied First Bank.⁵⁸ Ryuko, and Ryuko alone, is the payee under the Ryuko
19 Note.

20 Setoff Credits Concerning the 41FF Agreement

21 Reish contends that, prior to the Petition Date, he fully satisfied his payment obligations
22 under the 41FF Agreement and, therefore, owned 41FF when PHP filed bankruptcy. The parties
23 agree that, by March 26, 2015, Reish had paid \$1,220,000 towards the 41FF Agreement. Reish
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27 ⁵⁷ No evidence was submitted to the Court indicating whether Reish or Ms. Reish were trustees of Ryuko or
trustees of some unidentified trust. In any event, it is clear the Reish’s were not acting in their individual capacity.

28 ⁵⁸ DE 23. TSOFF ¶ 11 and exhibit 4 (DE 23-4.)

1 contends the final \$175,000 was satisfied when Reish⁵⁹ applied “offset credits” to his 41FF
2 purchase price from the amounts owed by PHP under the Ryuko Note.

3 Arizona law governs the question of whether a payment due under the 41FF Agreement
4 has been properly made by setoff. Although Arizona once recognized that setoffs were a creature
5 of Arizona’s common law, when Arizona adopted the Uniform Commercial Code (“UCC”),
6 Article 2 included a provision which states:

7 The buyer on notifying the seller of his intention to do so may deduct all or
8 any part of the damages resulting from any breach of the contract from any
part of the price due under the same contract. A.R.S. § 47-2717.

9 In reviewing this section of the UCC, the Ninth Circuit noted that Arizona’s common law of
10 setoffs was displaced by Arizona’s adoption of the UCC. In *Amerisourcebergen Corp. v.*
11 *Dialysist West, Inc.*, 465 F.3d 946 (9th Cir. 2006), the court noted

12 Arizona’s Commercial Code provides that “principles of law and equity” apply
13 “unless [displaced] by the particular provisions of this title.” Ariz. Rev. Stat. § 47–
14 1103 (2006); *see also John Deere Co. v. First Interstate Bank*, 147 Ariz. 256, 709
15 P.2d 890, 894 (1985). Although no Arizona court has ruled on whether section 47–
16 2717 preempts a common law claim for setoff, several federal courts have indicated
17 that the corresponding UCC section preempts equitable setoffs. *See ITV Direct*, 379
18 F.Supp. 2d at 133; *Carlisle Corp. v. Uresco Const. Materials, Inc.*, 823 F.Supp.
19 271, 275 (E.D. Pa. 1993). As the court convincingly reasoned in *Carlisle*, because
20 the UCC “specifically provides for set-off’s in particular circumstances... we must
conclude that the Code drafters, and the state legislatures that have adopted the
Code, meant to displace common law set-off.” *Carlisle*, 823. F.Supp. at 275. It is
apparent that the Arizona Legislature intended section 47–217 to supersede the
common law of setoff.⁶⁰

21 *See, In re RCS Capital Dev., LLC*, No. BAP AZ-12-1381, 2013 WL 3618550, at 10
22 (B.A.P. 9th Cir. July 16, 2013) (holding that for a set-off to be effective under § 553, among other
23 things, the debts setoff must be mutual and that “for mutuality to exist the debts and claims must
24

25 ⁵⁹ Even if “Trustees Robert C. Reish and Cathleen A. Reish” were trustees of something other than Ryuko, no
26 evidence was provided by the parties suggesting such trust granted credits to PHP nor could such trust provide
offsets as there was no mutuality of parties. *See* discussion below.

27 ⁶⁰ The Court is mindful that the Ryuko Note is to be construed in accordance with Wyoming law. Wyoming has
28 adopted Article 2 of the UCC, including 2-717. While the Court could not find a Wyoming or 10th Circuit case
coming to the same conclusion as the *Amerisourcebergen* 9th Circuit Panel, this Court concludes Wyoming would
do so. Accordingly, it matters not whether Arizona law or Wyoming law controls this issue.

1 be ‘in the same right and between the same parties, standing in the same capacity.’(citation
2 omitted).”). As the Reish Parties acknowledged at oral argument, Ryuko is not the alter ego of
3 Reish. A proper setoff could not occur here as there was no mutuality of parties.⁶¹

4 Based on the undisputed evidence submitted to this Court, there was not a valid setoff
5 under Arizona or Wyoming law of \$175,000 to finish satisfying Reish’s price to purchase 41FF.
6 Since Reish had not fully paid Debtor pre-petition for the purchase price called for under the 41FF
7 Agreement, the Debtor, not Reish, owned 41FF on the Petition Date. Since no post-petition
8 payments were made to Debtor under the 41FF Agreement, the 41FF remained property of the
9 Debtor when Cannon orchestrated the November 25, 2015 41FF title transfer to Reish and then
10 brokered the November 25, 2015 transfer of 41FF to AMOD.

11 Special Property Interest in 41FF Claimed By Reish Parties

12 The Reish Parties contend that, under Article 2 of Arizona’s UCC, they held a special
13 interest in 41FF on the Petition Date and that special interest is superior to the estate’s interests.
14 Even if the Reish claimed setoff was properly effectuated and Reish had fully paid the 41FF
15 purchase price prior to the Petition Date, 41FF nevertheless remained property of the Debtor.

16 Reish claims his full payment of the 41FF purchase price gave him a “special property
17 interest” in 41FF under A.R.S. § 47-2401(1) and that, under § 47-2716(c), Reish has a vested
18 right of replevin against 41FF because he was allegedly purchasing 41FF for his personal and/or
19 family use. Reish argues that such special property interest is superior to the bankruptcy estate’s
20 interest in 41FF.

21 The Reish Parties’ special property interest argument presumes 41FF constituted “goods”
22 within the meaning of the UCC. It is only “goods” which can be the subject of a special property
23 interest under A.R.S. § 47-2401. A.R.S. § 47–2501(A) indicates when a buyer obtains a special
24 property interest in goods. That section states:

25 The buyer obtains a special property and an insurable interest in goods by
26 identification of existing goods as goods to which the contract refers even though
27 the goods so identified are nonconforming and he has an option to return or reject

28

⁶¹ Setoff law in both Arizona and Wyoming require mutuality of parties.

1 them. Such identification can be made at any time and in any manner explicitly
2 agreed to by the parties. In the absence of explicit agreement identification occurs:

3 1. When the contract is made if it is for the sale of goods already existing and
4 identified;

5 2. If the contract is for the sale of future goods other than those described in
6 paragraph 3, when goods are shipped, marked or otherwise designated by the seller
7 as goods to which the contract refers;

8 3. (Not applicable).

9 However, for property to constitute “goods,” A.R.S. § 47-2105(B) requires:

10 [g]oods must be both existing and identified before any interest in them can pass.
11 Goods which are not both existing and identified are “future” goods. A purported
12 present sale of future goods or any interest therein operates as a contract to sell.

13 On the Petition Date, 41FF required significant repairs to make it airworthy and for the
14 Debtor to satisfy its obligation under the 41FF Agreement. Debtor had accomplished few if any
15 of the massive repairs required by the 41FF Agreement. At no time pertinent to transactions
16 involving 41FF could that helicopter be considered both “identified” and “existing” within the
17 meaning of A.R.S. § 47-2105(B). Although “goods need not be finished nor ready for delivery in
18 order to be identified to the contract for sale,”⁶² to constitute goods the property must also be
19 “existing.” The 41FF helicopter shell may have been “identified” but could not be considered
20 “existing” because all the components which needed to be installed into that shell had not and, to
21 this date, have not been installed. 41FF is and remains nothing more than “future goods” within
22 the meaning of § 47-2105(B).

23 The facts of this case are remarkably similar to those addressed by Bankruptcy Judge
24 Gunby in the case of *In re Carman*, 399 B.R. 599 (Bankr. Md. 2009) where the court found that:

25 The good contracted for by Mr. DeChello was a motorboat. The bare 32’ hull was not an
26 existing boat. Therefore, it was not a “good”. It was not even a nonconforming good;
27 rather, it was a “future good”. Mr. DeChello thus did not obtain a special interest in the
28 hull under section 2–501 of Maryland’s Commercial Law Code.” *Id* at 603.

Since 41FF was not and still is not “goods,” Reish never held a special property interest
in 41FF. The hypothetical lien of § 544(a) is superior to any interests the Reish Parties could
assert against the 41FF. The Court need not determine whether Reish intended to purchase 41FF

⁶² See 2 Hawklund UCC Series § 2-501:1.

1 for personal or household purposes as such determination would not alter the fact that the 41FF
2 was not “goods” and that the UCC provides no special property interest protections to Reish.⁶³
3 Moreover, the Court was supplied with no evidence that Reish waived debtor’s performance
4 under the 41FF Agreement⁶⁴ or that Reish and PHP ever finally agreed to the scope of repairs or
5 final purchase price under the 41FF Agreement. Under these facts the Court questions whether
6 PHP and Reish had a binding contract. This issue also need not be determined by the Court at
7 this time. The amount of Reish’s damages in connection with the 41FF transaction or the correct
8 amount of his claim under POC 37 is not presently before the Court.

9 Summary—41FF

10 On the Petition Date, 41FF was property of the Debtor’s bankruptcy estate. Reish had not
11 fully satisfied the purchase price nor had the Debtor fully performed its repair obligations under
12 the 41FF Agreement. Reish never waived such performance. PHP’s transfer of 41FF to Reish
13 was a post-petition transfer of property of the Debtor’s estate not authorized by the Code (as it
14 was a transaction out of the ordinary course of Debtor’s business and orchestrated by Cannon (a
15 person without the authority to execute such transfer once Mukai was appointed chapter 11
16 trustee)), and without this Court’s approval. For purposes of § 550, Reish’s transfer of 41FF to
17 AMOD on November 25, 2015, for \$2,150,000 establishes a minimum value of 41FF on that
18 date.⁶⁵ The Liquidating Trust is entitled to summary judgment on its first and second claims for
19 relief. Under the second claim the amount to be awarded under § 550 against Reish is \$2,150,000.
20 The Reish Parties Cross MSJ on Counts One and Two of the Reish Complaint are hereby denied
21 and such claims are hereby dismissed with prejudice.

22 . . .

23 . . .

24 ⁶³ There is conflicting evidence concerning Reish’s intent to purchase the 41FF for personal use. *See* footnote 27
25 above.

26 ⁶⁴ As noted in paragraph 14(b) above, the 41FF Agreement contains a provision requiring any changes be executed
27 by all parties, including changes to the 41FF Agreement requiring work to be performed by PHP. Even if Reish
28 did properly waive performance required of PHP under the 41FF Agreement, the Court doubts the 41FF shell
would magically become “goods” under A.R.S. § 47-2105(B).

⁶⁵ As noted in ¶ 19 above, \$360,750 was transferred to PHP in November 2015. It is not clear to the Court whether
these funds have anything to do with AMOD’s purchase of 41FF. If so, the 41FF value may exceed the \$2,150,000
minimum 41FF value noted in this order.

1 II. Transactions Involving the 229D

2 Unlike 41FF, 229D has not been transferred and was always intended by Reish to be used
3 for commercial purposes. As with 41FF, Reish contends he has fully satisfied payment amounts
4 under the 229D Agreement. The parties agree that, by March 26, 2015, Reish paid \$875,000
5 towards his purchase of 229D. Reish contends he issued “offset credits” totaling \$100,000 to
6 PHP to complete Reish’s payments towards the purchase of 229D. These “offset credits” were
7 allegedly in the form of a reduction of the balances due by Debtor under the Ryuko Note. No
8 evidence was presented to this Court indicating how or when Reish issued such “offset credits.”
9 Further, the books and records of PHP do not reflect the application of any offsets towards Reish’s
10 purchase of 229D or a \$100,000 reduction of PHP’s obligations on the Ryuko Note. The
11 Liquidating Trust questions whether Reish provided any notice of his intention to effectuate a set-
12 off. More importantly, however, the Ryuko Note was held by Ryuko, not Reish. Reish, not
13 Ryuko, contracted with the Debtor for the purchase of 229D. To properly effectuate a setoff
14 under Arizona or Wyoming law, there must be mutuality of parties. Mutuality did not exist here
15 and monies owed by the Debtor to Ryuko under the Ryuko Note could not be offset by Reish to
16 pay Reish’s obligations to the Debtor under the 229D Agreement. The remainder of this Court’s
17 analysis concerning setoffs and special property interests pertinent to 41FF is equally applicable
18 to the 229D analysis. 229D is property of the Liquidating Trust.

19 III. § 548(a)(1)(B) Avoidance of All But \$850,000 of the Ryuko Note

20 The Liquidating Trust contends that the unsecured claim associated with the Ryuko Note
21 should be limited to \$850,000, the amount Ryuko advanced to PHP under the Ryuko Note. The
22 Liquidating Trust argues that since \$1,275,000 was to be paid by PHP to Ryuko within one year
23 of the Ryuko Note, the difference between the loan amount and the required payment amount
24 should be avoided as a fraudulent transfer under § 548.

25 Under § 548(a)(1)(B), the Liquidating Trust:
26 may avoid . . . any obligation . . . incurred by the debtor , that was . . .
27 incurred on or within two years before the filing of the petition, if the debtor
28 voluntarily . . .

1 (B)(i) received less than a reasonably equivalent value in exchange for such . . .
obligation; and
2 (ii)(I) was insolvent on the date that such . . . obligation was incurred

3 The Ryuko Note obligation was incurred on April 17, 2015, well within two years of the
4 Petition Date. The parties agree the State Court judgment of January 30, 2015 referenced in
5 paragraph 1 above, rendered PHP insolvent.⁶⁶ The only question for § 548(a)(1)(B) purposes is
6 whether PHP’s promise to pay Ryuko \$1,275,000 within one year of an \$850,000 loan is an
7 obligation incurred for “less than reasonably equivalent value.” Other than the terms of the Ryuko
8 Note, the Liquidating Trust supplies no facts supporting a finding that this obligation was incurred
9 for less than reasonably equivalent value. Ryuko makes a strong argument that the loan
10 repayment amount simply reflects the tax costs incurred by Ryuko when it cashed in investments
11 needed to produce the \$850,000 loaned to PHP.⁶⁷ But for PHP’s agreement to repay \$1,275,000
12 in one year, PHP would not have received the loan proceeds.⁶⁸ Under the facts presented, the
13 Court cannot summarily find the Ryuko Note obligation was incurred for less than reasonably
14 equivalent value within the meaning of § 548(a)(1)(B)(i). The Liquidating Trust’s MSJ is hereby
15 denied as to the claim contained in the Liquidating Trust’s third party complaint against Ryuko.

16 The Reish Parties’ Constructive Trust Argument

17 The Reish Parties contend the Debtor acquired title to 41FF by Cannon’s post-petition
18 fraud and that, if 41FF became property of the estate, it must be held in constructive trust for
19 Reish. 41FF was property of the Debtor’s estate on the Petition Date. It was not Reish’s property
20 nor did he have a special interest in 41FF at any time. When Cannon arranged for the post-petition
21 release of the Wells Fargo lien on 41FF and for title to 41FF to finally be placed in Debtor’s name,
22 this simply confirmed what should have been confirmed by proper documentation in 2009 when
23 PHP acquired 41FF. These actions alone were not fraudulent nor did they give rise to a
24 constructive trust remedy in favor of Reish against 41FF. Furthermore, the Reish Parties provided
25 the Court with no evidence of post-petition fraud. Neither did the Reish Parties provide evidence
26 that the pre-petition transfers to PHP were embezzled by anyone at PHP. Moreover, the Reish

27 ⁶⁶ See TSOF, ¶ 15 and RSOF, ¶ 15.

28 ⁶⁷ DE 31-10, page 1.

⁶⁸ Id.

1 Parties cited no legal authority indicating this Court could impose a constructive trust on estate
2 property based on post-petition misconduct. To the extent the Reish Parties' Cross MSJ could be
3 read to seek imposition of a constructive trust against 41FF or 229D, that request is hereby denied.
4

5 **CONCLUSION**

6 Based on the foregoing, the Court hereby grants summary judgment on the Liquidating
7 Trust's Counterclaims against Reish and Ms. Reish in connection with its First Claim for Relief
8 (avoidance of the transfer of 41FF to Reish pursuant to § 549), its Second Claim for Relief
9 (recovery under § 550 of the \$2,150,000 value of the avoided 41FF transfer to Reish), and its
10 Third Claim for Relief (determining that 229D is property of the Liquidating Trust, unencumbered
11 by any interests or claim of Reish or Ms. Reish).

12 As to the Liquidating Trust's MSJ concerning its Third Party Complaint against Ryuko
13 (construction avoidance of all but \$850,000 of the Ryuko Note as a fraudulent transfer under
14 § 548(a)(1)(B)), such MSJ is hereby denied.

15 Finally, the Reish Parties' Cross MSJ is hereby denied. Count One (confirming Reish's
16 ownership of 41FF), and Count Two (confirming Reish's ownership of the proceeds of the 41FF's
17 sale to AMOD) of the Reish Complaint are dismissed with prejudice.
18

19 **DATED AND SIGNED ABOVE.**

20
21 **To be Noticed through the BNC to:**

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