Identical **MEMORANDUM AND ORDER ON DEMAND FOR JURY TRIAL** and **ORDER SCHEDULING STATUS CONFERENCE** entered in related cases/adversarys Case No. 98-30131/Adv, No. 00-3008 and Case No. 98-30132/Adv, No. 00-3007 this same date (February 6, 2003).

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:	)	CHAPTER 7
	)	
DAVID A. SCHORSCH,	)	CASE NO. 98-30130 (ASD)
	)	
Debtor.	)	
RICHARD BELFORD, Trustee,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Adv. Pro. No. 00-3009
	)	
WILLIAM MICHAELIS, JR.,	)	
EILEEN MICHAELIS,	)	
FALCON CAPITAL FUNDING CORP.,	)	
LISEI CONSULTING CORP., INC.,	)	
CASTAWAYS YACHT CLUB, INC.,	)	
PROGRESSIVE ENTERPRISES, INC.,	)	
358-360 WEST PUTNAM CORP.,	)	
HITCHCOCK HOUSE ANTIQUES	)	
INCORPORATED,	)	
DAVID A. SCHORSCH AMERICAN	)	
ANTIQUES, INC., and	)	
ANTIQUARIAN EQUITIES, INC.,	)	
	)	
Defendants.	)	Re: Doc. I. D. No. 6

MEMORANDUM AND ORDER ON DEMAND FOR JURY TRIAL

The above-captioned contested matter was commenced through the filing of the Defendants' Demand for Jury Trial, wherein they requested a trial by jury on "all issues so

triable."[1] After due notice and a hearing thereon, the Court enters the following Memorandum and Order.

MEMORANDUM

The Seventh Amendment to the United States Constitution provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. . . ." The United States Supreme Court has consistently interpreted the phrase "Suits at common law" to refer to suits in which *legal*, and not *equitable* rights alone were to be ascertained. See, e.g., Granfinanciera, S.A. v. Norberg, 492 U.S. 33, 41 (1989). The Court in Granfinanciera instructed that a court analyzing whether the Seventh Amendment entitles a litigant to a jury trial in a bankruptcy proceeding should consider the following factors: (i) whether the action is of a nature which would have dictated its prosecution *at law* in the 18th-century courts of England; and more importantly (ii) whether the remedy sought is legal in nature. If the analysis of these factors militates in favor of a jury trial right, and the claim asserts a "public right", the court must then consider whether Congress has assigned resolution of such claim to a non-Article III adjudicative body that does not use a jury as a factfinder. See 492 U.S. at 42.

The Complaint in the instant adversary proceeding contains nine separate counts. The First through Seventh Counts state claims for the avoidance and recovery of allegedly fraudulent transfers from the Debtor to the Defendants. Each of those Counts seeks, exclusively or in the alternative, a monetary recovery from the Defendants for the value of

[1] In the instant bankruptcy case none of the Defendants have presented formal or informal claims which might be construed as a waiver of their Seventh Amendment right to a jury trial.

the allegedly transferred property.[2] The claim stated in the Eighth Count seeks, under the authority of Bankruptcy Code Section 542, an order compelling the Defendants to turn over to the Plaintiff-Trustee property of the Debtor which is in their possession. Finally, the claim stated in the Ninth Count seeks the imposition of a constructive trust upon "all assets acquired by the defendants through fraudulent conveyances . . . as well as all benefits received by defendants from such fraudulent conveyances, including all profits".

The First through Seventh Counts.

Granfinanciera confirmed that a bankruptcy trustee's fraudulent transfer claims that seek monetary judgments are "suits at common law", for which the Seventh Amendment preserves a jury trial right. 492 U.S. at 43-49. Accordingly, the Defendants are entitled to have the claims stated in Counts One through Seven of the Trustee's Complaint heard by a jury.[3]

The Eighth Count.

The Plaintiff-Trustee's claim for turnover pursuant to Code Section 542(a) - stated as the Eighth Count of the Complaint - is not so readily characterized. As a modern statutory right afforded the trustee to aid in his marshalling of a debtor's estate, the

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[2] In the case of Counts One, Two and Three the alleged transfers were of cash or cash equivalents.

[3] As a technical matter, since the analysis of the historical and remedial factors militates in favor of a jury trial right, the Court should consider whether Congress has assigned resolution of the subject claim to a non-Article III adjudicative body that does not use a jury as a factfinder. However, this third step in the analysis is triggered only where the subject claim asserts a "public right". *Granfinanciera* makes clear that the subject claims assert private, not public rights. 492 U.S. at 55-56. In addition, the Bankruptcy Court is an adjudicative body which can use a jury for fact-finding. *See* 28 U.S.C. § 157(e) (1998).

trustee's entitlement to turnover of estate property under Section 542(a) finds no direct analog in 18th century English law. However, the cause of action implied by Section 542(a)[4] is most nearly akin to an 18th century replevin action - an action at common law affording the defendant a trial by jury. The analogy is far from solid, though. Among other differences, a replevin action lies only where the defendant's possession of the plaintiff's property is wrongful; whereas Section 542(a) sets up a form of "strict liability" by compelling turnover even when the defendant's possession is otherwise rightful.

The second, and more important, step in this Court's analysis of the Eighth Count is a determination of whether the *remedy* sought is legal or equitable in nature. Although Section 542(a) permits a trustee to recover the detained property or its "value", the Plaintiff here has prayed only for return of the property *in kind*. Thus the Eighth Count seeks no monetary judgment; its desired remedy is in the nature of an affirmative injunction. As such, the remedy sought is equitable and not legal. In view of this fact the Court concludes that the Seventh Amendment does not afford the Defendants a jury trial right in connection with the adjudication of the Eighth Count of the Complaint. This result is consistent with the rulings of the vast majority of courts to have considered this and similar issues. E.g., Walker v. Weese, 286 B.R. 294, 299 (D. Md. 2002); Allard v. Ackhoff (In re Ackhoff), 252 B.R. 396, 398 (Bankr. E.D. Mich. 2000); Anderson v. Simchon (In re Southern Textile Knitters, Inc.), 236 B.R. 207, 213 (Bankr. D.S.C. 1999).

The Ninth Count.

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[4] By its terms, Section 542(a) does not create or authorize a cause of action, as do those sections of the Bankruptcy Code granting the trustee avoidance and recovery powers. Nonetheless, a corresponding remedy for Section 542(a)'s rights is a natural and appropriate inference from its terms.

Analysis of the availability of a jury trial for the Ninth Count is more straight-forward. The remedy of an imposition of a constructive trust is, and has always been, within the province of equity. The "*equitable remedy* of constructive trust" will arise "contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way *against equity* and good conscience, either has obtained or holds the legal right to property which he ought not, *in equity* and good conscience, hold and enjoy." Wendell Corporation, Trustee v. Thurston, 239 Conn. 109, 113-114 (Conn. 1996) (quoting 76 Am. Jur. 2d, *Trusts* § 221) (emphasis supplied). Accordingly, no Seventh Amendment right to trial by jury exists in connection with the Ninth Count of the Complaint.

Summary.

The Complaint's First through Seventh Counts are triable by jury; the Eighth and Ninth Counts are not. It appears to the Court that the parties' presentation of the jury-triable and bench-triable Counts will involve the same, or a nearly identical, factual record. Accordingly, in the interest of judicial economy, the First through Seventh Counts of the Complaint should be tried in this Bankruptcy Court before a jury,[5] but the Eighth and Ninth Counts shall be argued to, and determined by, the Court outside the hearing of the jury upon the relevant portions of the jury trial record, as supplemented by an evidentiary record, if any, relevant only to the Eighth and/or Ninth Counts.[6]

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[5] The parties have previously consented to this Court conducting a jury trial in this adversary proceeding.

[6] This supplemental record will be developed outside the hearing of the jury.

ORDER

In light of the foregoing, it is hereby

ORDERED that the Defendants' Demand for Jury Trial (Doc. I.D. No. 6) is **GRANTED** as to the claims stated in the Complaint's First, Second, Third, Fourth, Fifth, Six and Seventh Counts, and **DENIED** as to the claims stated in the Complaint's Eighth and Ninth Counts; and

IT IS FURTHER ORDERED that the First through Seventh Counts of the Complaint shall be tried in this Bankruptcy Court before a jury, but the Eighth and Ninth Counts shall be argued to, and determined by, the Court outside the hearing of the jury upon the relevant portions of the jury trial record, as supplemented by an evidentiary record, if any, relevant only to the Eighth and/or Ninth Counts.

BY THE COURT

DATED: February 6, 2003

_____
Albert S. Dabrowski
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
DISTRICT OF CONNECTICUT

In re:	)	CHAPTER 7
	)	
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DAVID A. SCHORSCH AMERICAN	)	
ANTIQUES, INC., and	)	
ANTIQUARIAN EQUITIES, INC.,	)	
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Defendants.	)	Re: Doc. I. D. No. 6

ORDER SCHEDULING STATUS CONFERENCE

WHEREAS this adversary proceeding is presently scheduled for trial on April 7, 2003, at 10:00 A.M., see Sixth Amended Pretrial Order, Doc. I. D. No. 53, and

WHEREAS by Memorandum and Order on Demand for Jury Trial, entered this same date, the Court determined and ordered, *inter alia*, that the claims asserted in the Complaint's First through Seventh Counts be tried in this Court before a jury, but that the

Eighth and Ninth Counts be argued to, and determined by, the Court outside the hearing of the jury upon the relevant portions of the jury trial record, as supplemented by an evidentiary record, if any, relevant only to the Eighth and/or Ninth Counts.

NOW, THEREFORE, IT IS HEREBY ORDERED that a status conference, scheduled on the Court's own motion pursuant to Bankruptcy Code Section 105(d)(1), to consider and determine all matters related to the trial of this proceeding, shall be held on Wednesday, March 5, 2003, at 11:30 A.M. at the United States Bankruptcy Court, Connecticut Financial Center (18th Floor), 157 Church Street, New Haven, Connecticut; and,

IT IS FURTHER ORDERED that the Plaintiff and the Defendants, through their respective counsel, shall appear before this Court at that time.

BY THE COURT

DATED: February 6, 2003

_____
Albert S. Dabrowski
United States Bankruptcy Judge