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MICHAEL G. KASOLAS  
7

8 **UNITED STATES BANKRUPTCY COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA**  
10 **SAN FRANCISCO DIVISION**  
11

12 In re  
13 HASHFAST TECHNOLOGIES LLC, a  
14 California limited liability company,  
15 Debtor.

16 MICHAEL G. KASOLAS, Liquidating Trustee,  
17 Plaintiff,

18 v.

19 MARC A. LOWE, an individual, aka Cypherdoc  
20 and/or CIPHERDOC,  
21 Defendant.

Case No. 14-30725 DM

Chapter 11

(Substantively Consolidated with In re  
HashFast LLC, Case No. 14-30866)

Adversary Proceeding No. 15-03011 DM

Date: February 19, 2016

Time: 10:00 a.m.

Place: 450 Golden Gate Avenue, 16<sup>th</sup> Floor  
Courtroom 17  
San Francisco, CA 94102

23 **MEMORANDUM OF POINTS AND AUTHORITIES**  
24 **IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**  
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DUANE MORRIS LLP  
SAN FRANCISCO

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1 Plaintiff and liquidating trustee Michael G. Kasolas (“Trustee”) respectfully submits this  
2 Memorandum of Points and Authorities in support of the Trustee’s Motion for Partial Summary  
3 Judgment (“Motion”), and represents as follows:

4 **I. INTRODUCTION**

5 By the captioned adversary proceeding, the Trustee seeks to avoid and recover 3,000  
6 bitcoin<sup>1</sup> that debtors Hashfast Technologies LLC and Hashfast LLC (together, “Debtors”)  
7 transferred to defendant Marc A. Lowe (“Defendant”) in September of 2013. At the time of the  
8 transfers, the bitcoin were worth \$363,861.43. The price of bitcoin has increased significantly since  
9 that time. As a result, those 3,000 bitcoin are now worth (at this writing) approximately \$1.3  
10 million.  
11

12 Section 550(a) of the Bankruptcy Code permits a trustee, once a transfer has been avoided,  
13 to recover, for the benefit of the estate, either the property transferred or the value of the property.  
14 Typically, when currency is transferred, there is no question over the form of recovery: avoidance  
15 of a \$100 transfer leads to a \$100 recovery.<sup>2</sup> However, when other types of property are  
16 transferred, the form of recovery becomes relevant, since the property could increase or decrease in  
17 value following the transfer.  
18

19 To that end, section 550(a) is designed to place a bankruptcy estate in the financial position  
20 it would have enjoyed had a transfer not occurred, and allows a court, in its discretion, to award a  
21 trustee the property transferred or its value, including, as this Court previously pointed out, “the  
22 value ... measured at the time of recovery where the property naturally increases in value.” Heller  
23

24  
25  
26 <sup>1</sup> The term “bitcoin” encompasses both the singular and plural.

27 <sup>2</sup> The common meaning of currency is “something (as coins, treasury notes, and banknotes) that is in  
28 circulation as a medium of exchange: paper money in circulation: a common article for bartering.” See  
<http://www.merriam-webster.com/dictionary/currency>.

1 Ehrman LLP v. Jones Day (In re Heller Ehrman), 2014 Bankr. LEXIS 382, \*25-26 (Bankr. N.D.  
2 Cal., Jan. 29, 2014).

3 In this instance, it is true that bitcoin are described as a “virtual currency” and, in certain  
4 circumstances (illicit or otherwise), are accepted as a medium of exchange. Nonetheless, in  
5 practice, bitcoin operate as something other than mere currency. Bitcoin are a commodity, like  
6 gold, silver or pork bellies, that fluctuates in price based upon market conditions. This is the  
7 position of the U.S. Commodity Futures Trading Commission (“CFTC”), which recently issued an  
8 order finding that bitcoin are a commodity covered by the Commodity Exchange Act. The Internal  
9 Revenue Service (“IRS”) likewise has issued a formal notice stating that bitcoin are property, not  
10 currency, with the result that taxes must be paid on gains arising from the sale of bitcoin.  
11

12 The Motion is directed to the narrow and purely legal issue of whether bitcoin constitute  
13 mere currency, i.e., the equivalent of dollar bills, or are a commodity. For reasons discussed below,  
14 this Court, consistent with recent decisions by the CFTC and IRS, should rule that bitcoin are not  
15 currency for purposes of recovery under section 550(a), but rather a commodity that, like any  
16 commodity, can rise or fall in value.  
17

18 Accordingly, the Court should grant the Motion and enter an order directing that if the  
19 subject transfers are avoided, the estate’s recovery shall be either the 3,000 bitcoin themselves or  
20 the value of those bitcoin at the transfer date or time of recovery, whichever is greater. This result  
21 is consistent with both established Ninth Circuit law and section 550(a)’s purpose of restoring the  
22 estate to the financial condition it would have enjoyed had the transfers not occurred. To find  
23 otherwise would ignore section 550’s clear mandate and deny creditors of the estate a million  
24 dollars in post-transfer appreciation.  
25

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1 **II. FACTUAL BACKGROUND**

2 As set forth in the First Amended Complaint [Docket No. 24] (“FAC”), the Debtors  
3 transferred 3,000 bitcoin to the Defendant between September 5, 2013 and September 23, 2013.  
4 FAC at ¶ 17.<sup>3</sup> A true and correct copy of the FAC, without exhibits, is attached as **Exhibit A** to the  
5 Request for Judicial Notice (“RJN”), filed herewith. The FAC seeks to avoid the bitcoin transfers  
6 under Bankruptcy Code sections 548 and 544 and California Civil Code section 3439, and recover  
7 the bitcoin, or the value of the bitcoin, for the benefit of the estate.<sup>4</sup> See FAC at pp. 9-13 (RJN,  
8 Exhibit A).

9  
10 On May 29, 2015, the Defendant filed an answer to the FAC [Docket No. 33]. RJN,  
11 **Exhibit B**. While the Defendant denies many of the allegations in the FAC, he does not dispute  
12 that the Debtors transferred 3,000 bitcoin to him in the amounts and on the dates alleged in the  
13 FAC. See Answer at ¶ 17 (RJN, Exhibit B).

14  
15 As mentioned, the Motion is not directed to avoidance of the bitcoin transfers, but rather to  
16 the discrete legal issue of whether, once avoided, the bitcoin constitute mere currency – the  
17 equivalent of dollars – or a commodity which can rise or fall in value based upon changing market  
18 conditions. As discussed below, the latter interpretation is the correct one, as it comports with both  
19 the CFTC’s and IRS’s rulings, and fulfills section 550(a)’s rationale of restoring the estate to the  
20 financial condition it would have enjoyed had the transfers not occurred.

21  
22 **III. STANDARD FOR SUMMARY JUDGMENT**

23 Fed. R. Civ. P. 56, as incorporated through Fed. R. Bankr. P. 7056, provides that a court  
24 “shall grant summary judgment if the movant shows that there is no genuine dispute as to any

25  
26 <sup>3</sup> The initial complaint and FAC were filed by the Debtors as debtors-in-possession. The Trustee substituted  
27 in as party plaintiff pursuant to a Notice of Substitution of Plaintiff and Appearance of Counsel, filed  
28 September 11, 2015 [Docket No. 38].

<sup>4</sup> Although not relevant to the Motion, the FAC also seeks to avoid as a preference a separate \$37,800  
payment made to the Defendant.

1 material fact and the movant is entitled to judgment as a matter of law.” Anderson v. Liberty  
2 Lobby, Inc., 477 U.S. 242, 247-48, 106 S.Ct. 2505, 2510 (1986).

3 A dispute about a material fact is genuine if there is sufficient evidence for a reasonable trier  
4 of fact to find for the non-moving party. Id. at 248. The non-moving party must come forward  
5 with “specific facts” showing that there is a genuine issue for trial and “must do more than simply  
6 show that there is some metaphysical doubt as to the material facts.” Matsushita Elec. Indus. Co.,  
7 Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1356 (1986).

9 Moreover, Rule 56(a) expressly provides for partial summary judgment, thus allowing  
10 parties to move for summary judgment, or “summary adjudication,” on fewer than all claims in an  
11 action. 11 Moore’s Civil Practice, § 56.122[1] (Matthew Bender 3d Ed.)

#### 12 **IV. DISCUSSION**

##### 13 **A. There Are No Material Facts in Dispute.**

14 The Motion is directed to single legal issue: whether the transferred bitcoin constitute  
15 currency or a commodity for purposes of determining the available forms of recovery under section  
16 550(a). There are no disputed material facts related to this issue, since there is no dispute that the  
17 Debtors transferred 3,000 bitcoin to the Defendant in September of 2013 as alleged in the FAC.  
18 See RJN, Exhibit A at ¶ 17, Exhibit B at ¶ 17.

##### 19 **B. Bitcoin Is a Commodity, Not Mere Currency.**

20 There is no published case law on whether bitcoin constitute currency for purposes of  
21 section 550(a). However, two different government entities, the CFTC and IRS, recently addressed  
22 whether bitcoin constitute currency, both coming down squarely on the side of “not currency.” On  
23 September 17, 2015, the CFTC issued an order finding that bitcoin and other so-called “virtual  
24 currencies” are commodities subject to regulation under the Commodities Exchange Act (“CEA”).  
25 See RJN, Exhibit C at p. 3, Exhibit D. Commodities under the CEA include wheat, cotton, rice,  
26  
27  
28



1 corn, oats, barley, and many other types of crops and farm products, as well as “all other goods and  
2 articles” and “all services, rights, and interests ... in which contracts for future delivery are  
3 presently or in the future dealt in.” See 7 U.S.C. § 1a(9).

4  
5 In making its ruling, the CFTC noted that Bitcoin, as a virtual currency, “does not have legal  
6 tender status in any jurisdiction.” See Exhibit C at p. 2, n. 2. Moreover, “Bitcoin and other virtual  
7 currencies are distinct from ‘real’ currencies, which are the coin and paper money of the United  
8 States or another country that are designated legal tender, circulate, and are customarily used and  
9 accepted as a medium of exchange in the country of issuance.” Id.

10 Similarly, in 2014 the IRS issued a notice entitled IRS Virtual Currency Guidance  
11 (“Notice”). See RJN, Exhibit E. In the Notice, the IRS, like the CFTC, noted that virtual currency  
12 “may be used to pay for goods or services, or held for investment ... but [ ] does not have legal  
13 tender status in any jurisdiction.” Id. at Section 2. The IRS concluded that for federal tax purposes,  
14 virtual currency such as bitcoin “is treated as property[,]” with the result that gains realized through  
15 a sale or exchange of bitcoin are a taxable event. See RJN, Exhibit E at Section 4, Q-1 and Q-6.  
16 The IRS also clarified that virtual currency “is not treated as currency that could generate foreign  
17 currency gain or loss for U.S. federal tax purposes.” Id. at Section 4, Q-2.

18  
19 The upshot of the CFTC and IRS determinations is that bitcoin are not currency, but rather a  
20 commodity (or, in the case of the IRS, non-currency property) that can rise or fall in price based  
21 upon supply and demand. To be sure, bitcoin can also serve as a medium of exchange, as can  
22 commodities such as gold and silver. However, unlike a transfer of \$3,000, a transfer of 3,000  
23 bitcoin is a transfer of property capable of increasing in value. Under well-established Ninth  
24 Circuit law, a post-transfer increase in value should inure to the benefit of creditors and the estate.

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1           **C. Under Section 550(a), the Estate is Entitled to Either the Bitcoin or the Value of**  
2           **the Bitcoin at the Transfer Date or Time of Recovery, Whichever is Greater.**

3           Section 550(a) gives a trustee two alternative remedies following avoidance of a transfer:  
4 recovery of the property transferred or the value of the property. Federal Savings Bank v. Thacker  
5 (In re Taylor), 599 F.3d 880, 889-90 (9<sup>th</sup> Cir. 2010). A court has discretion over which remedy to  
6 award. Id. at 890. The purpose of section 550(a) is “to restore the estate to the financial condition  
7 it would have enjoyed if the transfer had not occurred.” Id., quoting Aalfs v. Wirum (In re  
8 Straightline Invs., Inc.), 525 F.3d 870, 883 (9<sup>th</sup> Cir. 2008). To that end, a bankruptcy court “has  
9 discretion on how to value ... property so as to put the estate in its pre-transfer position.” Id., citing  
10 Joseph v. Madray (In re Brun), 360 B.R. 669, 674 (Bankr. C.D. Cal. 2007).

11           In Brun, Judge Ryan noted that under section 550(a) a trustee is entitled “to recover the  
12 greater of the value of the transferred property *at the transfer date or the value at the time of*  
13 *recovery.*” 360 B.R. at 674 (emphasis added, internal quotes and citations omitted). This result  
14 makes sense, Judge Ryan explained, because it “is consistent with the well-established purpose of  
15 § 550, to restore the estate to the position it would have occupied had the property not been  
16 transferred.” Id. at 674-75. Moreover, the court pointed to section 550(e) as evidence of “the intent  
17 of Congress that any appreciation not attributable to the actions of a good faith transferee inure to  
18 the benefit of the estate. Id. at 675.

19           As noted in the Introduction, this Court, relying on the Ninth Circuit’s Taylor decision, is in  
20 accord with Brun: “Certainly, courts can award the value of the property measured at the time of  
21 recovery where the property naturally increases in value.” Heller Ehrman, 2014 Bankr. LEXIS 382  
22 at \*25-26; see also Sanders v. Hang (In re Hang), 2007 Bankr. LEXIS 2836, \*15-16 (Bankr. E.D.  
23 Cal., Aug. 16, 2007) (under section 550(a), “The Trustee is entitled to recover the ‘greater of the  
24 value of the transferred property at the transfer date or the value at the time of recovery.’” (citations  
25 omitted))  
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1 The law on recovery under section 550(a) is well-settled and indisputable. The Court should  
2 grant the Motion and enter an order directing that, if the transfers are avoided, the estate is entitled  
3 to recover either the 3,000 bitcoin or the value of the bitcoin measured at the transfer date or the  
4 time of recovery, whichever is greater.

5  
6 **D. The Few Anti-Money Laundering Cases Addressing Bitcoin Are Inapplicable.**

7 A few decisions in the criminal law realm have found that bitcoin fall within the definition  
8 of “money” or “funds” under the anti-money laundering statute, 18 U.S.C. § 1960. See, e.g., United  
9 States of American v. Faiella, 39 F. Supp. 3d 544, 545 (S.D.N.Y. 2014). These cases are  
10 inapposite, as the money laundering statute is concerned with shutting down criminal enterprises,  
11 and so defines the terms “funds” and “money” as broadly as possible. As the court explained in  
12 Faiella:

13  
14 Section 1960 was ... designed to prevent the movement of funds in connection  
15 with drug dealing. Congress was concerned that drug dealers would turn  
16 increasingly to nonbank financial institutions to convert street currency into  
17 monetary instruments in order to transmit the proceeds of their drug sales.  
18 Indeed, it is likely that Congress designed the statute to keep pace with such  
19 evolving threats, which is precisely why it drafted the statute to apply to any  
20 business involved in transferring ‘funds ... by any and all means.’ 18 U.S.C.  
21 § 1960(b)(2).

22 39 F. Supp. 3d at 545-46 (internal quotes and citations omitted).

23 Section 1960 is designed to be as inclusive as possible in defining “money” and “funds” so  
24 as to achieve the statute’s ends. In fact, not just bitcoin, but gold itself has been held to constitute  
25 “funds” under the statute. See United States of America v. Day, 700 F.3d 713, 725-26 (4<sup>th</sup> Cir.  
26 2012) (holding that gold can constitute “funds” under anti-money laundering statute since it is an  
27 asset readily convertible to cash); United States of America v. Ulbricht, 31 F. Supp. 3d 540, 570  
28 (S.D.N.Y. 2014) (“There is no doubt that if a narcotics transaction was paid for in cash, which was  
later exchanged for gold, and then converted back to cash, that would constitute a money laundering  
transaction.”)

1 The money laundering statutes were designed to include within the definitions of “money”  
2 and “funds” virtually every conceivable form of property that can facilitate the movement of money  
3 and, hence, criminal activity. Section 550(a) of the Bankruptcy Code, in contrast, has an entirely  
4 different goal: placing a bankruptcy estate in the financial position it would have enjoyed had an  
5 avoided transfer not occurred, including providing the estate with the benefit of any post-transfer  
6 appreciation of the transferred property. Accordingly, the few money laundering cases addressing  
7 the status of bitcoin are inapposite.  
8

9 **E. Even If the Court Determines that Bitcoin Are Currency, and Not a**  
10 **Commodity, the Court Should Still Award Either the Bitcoin or Their Value at**  
11 **the Transfer Date or Time of Recovery, Whichever is Greater.**

12 Even if the Court determines that Bitcoin are currency, and not a commodity, it should still  
13 grant the Motion and enter an order finding that, if the transfers are avoided, the estate is entitled to  
14 recover either the 3,000 bitcoin or the value of the bitcoin measured at the transfer date or time of  
15 recovery, whichever is greater. That is to say, if the Court determines that bitcoin are currency  
16 indistinguishable in form, purpose and use from any legal tender, then the Court should, at the least,  
17 treat bitcoin as a currency different from the dollar.

18 For example, if the Debtors had transferred 3,000 euros to the Defendant, and the price of  
19 the euro increased relative to the dollar in the months between transfer and recovery, the estate  
20 should be entitled to either the euros or the value of the euros in (U.S.) dollars as of the date of  
21 recovery. Under Taylor, this would restore the estate to the financial condition it would have  
22 enjoyed if the transfer had not occurred. The result should be no different where the transferred  
23 “currency” is a virtual one. Upon avoidance of the transfers, the estate should be entitled to recover  
24 the 3,000 bitcoin or their value as of the transfer date or the time of recovery, whichever is greater.  
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1 **V. CONCLUSION**

2 For all the foregoing and proper reasons, the Court should grant the Motion and enter an  
3 order finding that for purposes of recovery under section 550(a) bitcoin are a commodity, not  
4 currency, and directing that if the subject transfers are avoided the estate is entitled to either the  
5 3,000 bitcoin or the value of the bitcoin as of the transfer date or time of recovery, whichever is  
6 greater.  
7

8 Dated: January 22, 2016

**DUANE MORRIS LLP**

9 By: /s/ Geoffrey A. Heaton (206990)

10 Geoffrey A. Heaton  
11 Attorneys for Plaintiff and Liquidating  
12 Trustee, MICHAEL G. KASOLAS  
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