No. 12-1447

In the Supreme Court of the United States

ERIC C. RAJALA, Trustee in Bankruptcy for the Estate of Generation Resources Holding Company, LLC,
Petitioner,

v.

LOOKOUT WINDPOWER HOLDING COMPANY, LLC, a Missouri Limited Liability Company,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE

Petitioner identifies the parties to the proceeding as Petitioner Eric C. Rajala, Chapter 7 Trustee for the bankruptcy estate of Generation Resources Holding Company ("GRHC") in the United States Bankruptcy Court for the District of Kansas, and Respondent Lookout WindPower Holding Company, LLC, a Missouri limited liability company ("Respondent").

Petitioner correctly notes that FreeStream Capital, LLC ("FreeStream") was a party to the proceedings before the Tenth Circuit. Petitioner incorrectly states that Robert H. Gardner, Robbin M. Gardner, Gardner Family Investment Company, LLC, William Stevens, Akiko Stevens, Stevens Family Investment Company, LLC, R. James Ansell, Virginia Z. Ansell, WindForce Holdings, Inc., Lookout WindPower Holding Company, LLC, Forward WindPower Holding Company, LLC and Forward WindPower Holding Company, LLC (MO) were not movants in such proceedings. Petitioner has abandoned his claims against these parties for purposes of this Petition.

Respondent states that it does not have a parent corporation, and no publicly held corporation owns 10% or more of its membership interests.

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I. INTRODUCTION.

The petition (the "Petition") for writ of certiorari should be denied. The United States District Court for the District of Kansas (the "District Court") granted summary judgment in favor of Respondent on the underlying fraudulent transfer claims on which Petitioner bases his arguments. Thus, the arguments are essentially moot. Further, there is no federal question, material circuit split, or other compelling reason to warrant the review of this Court. The District Court granted Respondent's Motion to Distribute Funds holding that property subject to a fraudulent transfer claim is not property of a bankruptcy estate under 11 U.S.C. § 541, and, therefore, is not subject to the automatic stay of 11 U.S.C. § 362 until it is actually recovered, because prior to that point there is no determination that the transfer of the property was actually fraudulent. Pet. App. 37. The United States Court of Appeals for the Tenth Circuit ("Tenth Circuit") upheld the District Court's determination stating that 11 U.S.C. § 541 "plainly does not include fraudulently transferred property until that property is recovered." Pet. App. 16. Petitioner unsuccessfully attempted on four occasions to obtain injunctive relief under Fed. R. Civ. P. 65 and Fed. R. Bankr. P. 7065. Res. App. 57, 63. The arguments in the Petition are merely an attempt to bypass the requirements of these rules.

II. STATEMENT OF THE CASE.

The Petition seeks review of the Tenth Circuit's decision dated March 12, 2013, affirming the District Court's Memorandum and Order dated April 9, 2012

entered in Case No. 2:09-cv-02482-EFM (the "2009 Case") and Case No. 2:11-cv-02524-EFM (the "2011 Case"), Pet. App. 21, and Nunc Pro Tunc Order dated April 12, 2012, Pet. App. 79 (collectively, the "District Court Order").

Petitioner is the Chapter 7 bankruptcy trustee of GRHC, which is a company with three sophisticated creditors holding claims totaling approximately $5 million. Two of these creditors (the "Foundations") invested in two windpower projects in Pennsylvania, both of which ultimately failed. Black & Veatch provided in-kind services to one windpower project, which ultimately failed.

In December 2008, a lawsuit involving one successful project was filed in federal court in the Western District of Missouri. The Western District of Missouri Court dismissed the case for lack of jurisdiction and suit was filed in federal court the Western District of Pennsylvania ("Pennsylvania Court"). In September 2009, Petitioner filed the 2009 Case asserting a variety of claims, including claims for fraudulent transfer, breach of fiduciary duty and civil conspiracy. Over Petitioner's objections, the Pennsylvania Court entered a Judgment and Memorandum and Order of the Court determining that $8,941,488.46 was owed to Respondent and FreeStream (the "Judgment Funds"). Pet. App. 99-112. The Pennsylvania Court transferred the issue of whether the Judgment Funds were part of the GRHC bankruptcy estate to the United States Bankruptcy Court for the District of Kansas (the "Pennsylvania Order"). Pet. App. 99-112. The District Court withdrew the reference, creating the 2011 Case, and

then consolidated the 2011 Case with the 2009 Case for all purposes (the "Consolidated Cases").

In response to Petitioner's Complaint in the Consolidated Cases and various attempts to amend, Respondent filed a series of motions, including motions for summary judgment and motions seeking distribution of the Judgment Funds. On April 9, 2012, the District Court entered the District Court Order granting, among other things, a Motion to Distribute, a Motion for Summary Judgment on Corporate Opportunity Claims, and, in part, a Motion for Judgment on the Pleadings. Pet. App. 21, 79. In response, Petitioner filed an appeal with the Tenth Circuit. Oral argument was held by the Tenth Circuit on January 17, 2013, and the Tenth Circuit issued its Order affirming the District Court Order on March 12, 2013. Pet. App. 1. Petitioner filed this Petition on June 10, 2013, which was placed on the Court's docket on June 14, 2013.

After the Petition was filed, on July 3, 2013, the District Court entered a Memorandum and Order (the "Summary Judgment Order") granting partial summary judgment in favor of Respondent. Res. App. 1. In the Summary Judgment Order, the District Court granted summary judgment on all counts brought by Petitioner against Respondent.[1] Res. App. 56. Thus, the District Court determined that the

[1] The District Court did not grant summary judgment with respect to one breach of fiduciary duty claim based on salaries taken by certain of the individuals involved in the proceedings below. However, as set forth above, Petitioner abandoned his claims against the individuals for purposes of the Petition.

fraudulent transfer claims that are the basis for Petitioner's argument are without merit.

Petitioner has asserted numerous facts in the Petition and in his Second Amended Complaint, on which he relies, which are disputed by Respondent. Given the Summary Judgment Order holding that Petitioner's fraudulent transfer claims are legally insufficient, Respondent will not individually dispute each fact. At the time of the District Court Order, the 2009 Case had been pending for almost three years. Petitioner filed four motions for temporary restraining orders in the 2009 Case seeking to restrain distribution of the Judgment Funds to Respondent and FreeStream; all parties fully briefed the issues, presented evidence and made arguments. Petitioner did not prevail on any of his four motions for temporary restraining orders – two were withdrawn and two were denied. Res. App. 57, 63. The District Court also entered summary judgment against Petitioner on Petitioner's fraudulent transfer claims. Res. App. 53.

Despite the arguments set forth by Petitioner, the majority of courts agree with *FDIC v. Hirsch (In re Colonial Realty Co.),* 980 F.2d 125 (2d Cir. 1992), in holding that property alleged to have been fraudulently transferred is not property of the estate until recovered by the trustee. The District Court Order was correct, and there is no compelling reason for review by this Court.

III. REASONS FOR DENYING THE WRIT.

A. Petitioner's Fraudulent Transfer Claims Are Without Merit.

As set forth by Petitioner, the question presented in this case is whether property alleged to have been fraudulently transferred is property of the estate under 11 U.S.C. § 541, and, thus, subject to the automatic stay of 11 U.S.C. § 362 prior to completion of an adversary proceeding and actual recovery of the property by a bankruptcy trustee. In appealing the District Court Order to the Tenth Circuit and in the Petition, Petitioner relies on his underlying claims for fraudulent transfer. Shortly after the Petition was filed, the District Court issued the Summary Judgment Order holding that the fraudulent transfer claims were without merit. Res. App. 53. The Tenth Circuit determined that 11 U.S.C. § 541 should not be expanded beyond its plain meaning where other means of asset preservation, including a preliminary injunction or temporary restraining, are available. Pet. App. 18. Thus, Petitioner now seeks to have this Court determine that the Tenth Circuit erred in its determination in a situation where Petitioner was not only unable to show grounds for injunctive relief, but also was ultimately unable to show merit in his fraudulent transfer claims sufficient to withstand summary judgment. This outcome demonstrates why a trustee should be required to show a likelihood of success on the merits in order to obtain injunctive relief, rather than be automatically granted an asset-freezing injunction based on legally insufficient claims.

B. The Statutory Language of 11 U.S.C. § 541 Does Not Support Petitioner's Arguments.

The fundamental issue in this case is whether the statutory language of 11 U.S.C. § 541 defining "property of the estate" includes judgment proceeds which may at some point in the future be recovered by a bankruptcy trustee. Under 11 U.S.C. § 541(a)(1), property of the estate includes "all legal of equitable interests" of a debtor as of the commencement of a bankruptcy case. Under 11 U.S.C. § 541(a)(3), property of the bankruptcy estate also encompasses "[a]ny interest in property that the trustee recovers. . . ."

The argument that "equitable interests" would include property subject to a fraudulent transfer action would render 11 U.S.C. § 541(a)(3) meaningless. *Colonial Realty Co.,* 980 F.2d at 131 (citing *In re Saunders*, 101 B.R. 303, 304–05 (Bankr. N.D. Fla. 1989))("the inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered."). Further, as set forth by the Tenth Circuit, this argument would also violate concepts of equity. Pet. App. 17. Accordingly, the plain language does not extend to property not yet recovered. It certainly does not extend to property which will not be recovered in the future, which, in light of the District Court's determination, in the Summary Judgment Order, that the fraudulent transfer claims are legally insufficient, is Petitioner's situation. Petitioner has not set forth a

sufficient basis for the Court to look beyond the plain meaning of the statute.

C. The Split Asserted by Petitioner Does Not Support The Petition.

Petitioner argues that there is a split in the Circuits which warrants this Court's review. Petitioner bases his arguments on the Court's decision in *American Nat'l Bank v. MortgageAmerica Corp. (In re MortgageAmerica)*, 714 F.2d 1266 (5th Cir. 1983). While facially it may appear that the Circuits are split on this issue, a close review of the facts of these cases demonstrates that they do not support Petitioner's arguments. The result supported by Petitioner was never the intent of the Fifth Circuit in *MortgageAmerica*, which concerned a creditor pursuing actions (including a fraudulent transfer action) which the Fifth Circuit concluded constituted "property of the estate," and as a result, the automatic stay should apply. *MortgageAmerica*, 714 F.2d at 1266. The result propounded by *MortgageAmerica* prevents creditors from rushing to judgment when the claim should be pursued by a bankruptcy trustee for the benefit of all creditors.

In the course of coming to that holding (with which Respondent agrees), the Fifth Circuit said "it makes the most sense to consider the debtor as continuing to have a "legal or equitable interest [ ] in the property fraudulently transferred within the meaning of section 541(a)(1) of the Bankruptcy Code," (with which Respondent does not agree). *MortgageAmerica*, 714 F.2d at 1275. Notwithstanding Respondent's disagreement with this statement, neither the Fifth

Circuit *nor any other court* has extended this narrow holding to the extreme to which Petitioner argues– to permit an asset-freezing injunction that Petitioner was twice unable properly to obtain under Fed. R. Civ. P. 65. Res. App. 57, 63. Indeed, the Sixth Circuit case relied upon by Petitioner also restrained a creditor from pursing fraudulent transfer actions to the detriment of other creditors. *NLRB v. Martin Arsham Sewing Co.*, 873 F.2d 884, 887-88 (6th Cir. 1989); *see also In re Cincom iOutsource, Inc.*, 398 B.R. 223, 234-35 (Bankr. S.D. Ohio 2008)(considering a situation where a trustee sought to avoid transfers arising from the same acts which formed the bases of the claims in lawsuits filed by other creditors).[2]

The Second Circuit in *Colonial* and other courts have simply found a different way to the same result reached in *MortgageAmerica* — that the automatic stay prevents a single creditor from pursuing fraudulent transfer litigation that will benefit all creditors after bankruptcy is filed. *See In re Silver*, 303 B.R. 849, 864 (10th Cir. B.A.P. 2004) (concluding that the automatic stay prevented creditor from pursuing fraudulent transfer when it should be pursued by trustee to benefit all creditors and noting, "[g]iven our disposition herein, we need not decide whether property subject to an avoidance action is property of the estate.").

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[2] Petitioner inexplicably cites to *In re Nat'l Century Fin. Enters., Inc.*, 423 F.3d 567 (6th Cir. 2005) in an attempt to support his argument. This case concerned the enforcement of the automatic stay against a creditor pursuing litigation involving funds held in an account of a debtor's entity. There is no dispute that funds held in an account of a debtor entity are considered property of the estate. This case does not support Petitioner's position.

The District Court correctly noted that the majority of courts addressing the *MortgageAmerica* and *Colonial* "property of the estate" issue do so:

> in the context of third-party fraudulent-transfer litigation. Generally, a creditor brings a fraudulent transfer claim against the debtor (or debtor's principals) alleging that the debtor fraudulently transferred assets. The bankruptcy trustee requests a stay by arguing that fraudulent-transfer claims are part of the bankruptcy estate. When deciding whether the third-party fraudulent litigation should be stayed, courts consider what constitutes estate property.

Pet. App. 42, n.38.

Thus, the argument advanced by Petitioner is far outside the mainstream under either *Colonial* or *MortgageAmerica*. Likewise, Petitioner's arguments are not supported by any other case cited in the Petition and are further undercut by the Summary Judgment Order which concluded that the fraudulent transfer claims are without merit. The "split" asserted by Petitioner is misleading in that it does not relate directly to the arguments asserted in the Petition.

D. The District Court Adopted The "Majority" Rule.[3]

Even to the extent there is a split between the courts following *Colonial* and *MortgageAmerica*, a majority of courts reject Petitioner's improper construction of the statute and follow the Second Circuit's decision in *Colonial*. "The majority view is that of the Second Circuit in *Colonial Realty*, which implemented canons of statutory construction and found that property held by third-party transferees only becomes property of the estate after the transfer has been avoided." 28 AM. BANKR. INST. J. 34, 34 (June 2009); *see also* 106 MICH. L. REV. 1405, 1416, 1421, 1425 (May 2008); Resnick & Sommers, 5 COLLIER ON BANKRUPTCY, ¶ 541.12[4], n.8 (16th ed.) ("The better rule is that fraudulently conveyed property does not become property of the estate until it has been recovered. A contrary rule would permit the use of section 542 to circumvent the requirements of the avoiding powers.").

In *Dunes Hotel Assoc. v. Hyatt Corp.*, 245 B.R. 492, 504 (D.S.C. 2000), the Court recounted the relevant precedent in detail, and followed the *Colonial* rule:

> Hyatt argues that Dunes must use the recovery provisions of § 550(a) in order to bring the hotel into the bankruptcy estate. *See In re Saunders*,

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[3] As set forth in Section III.C., Respondent contends that the decisions giving rise to an alleged split can be reconciled, and, thus, there is no material split and no true "majority" rule. However, to the extent that the circuits are split, the majority of courts have followed *Colonial*.

> 101 B.R. at 304–05; *see also Federal Deposit Ins. Corp. v. Hirsch (In re Colonial Realty Co.)*, 980 F.2d at 131 (2d Cir. 1992) (adopting the analysis of the Court in *In re Saunders*); *Klingman v. Levinson*, 158 B.R. 109, 112 (N.D. Ill. 1993) (adopting the position taken by the Court in *In re Saunders* and holding that an avoided fraudulent transfer "does not become property of the estate until it is recovered by the trustee"). In *In re Saunders*, the Bankruptcy Court for the Northern District of Florida properly rejected the Fifth Circuit's view that fraudulently conveyed property was still property of the estate under § 541(a)(1), even in the hands of a third party . . . ."

Similarly, in *Klingman*, the Court adopted "the analysis of *Colonial* and *Saunders* and [held] that fraudulently transferred property does not become property of the bankruptcy estate until there has been a judicial determination that the property was fraudulently transferred." 158 B.R. at 113.

More recently, the Court in *In re Midland Euro Exch. Inc.* concluded that despite "a split among circuits on whether 'property of the estate' includes property that could be, but has not yet been, recovered as the object of a fraudulent transfer," it would follow the "majority of the courts" which have "concluded that property held by third-party transferees only becomes "property of the estate" after the transfer has been avoided" because "the reasoning of the majority" is "more logical and defensible." 347 B.R. 708, 717-18

(Bankr. C.D. Cal. 2006).[4] Numerous unpublished decisions have also applied this majority rule. *E.g.*, *Bonar v. Ray*, No. 09-cv-1185, 2011 WL 1100467, at *6 (D.C.D. Ill. Mar. 22, 2011); *Allnutt v. Friedman*, No. 1:95-cv-00011, 1995 WL 222067, at *4 (D. Md. Apr. 10, 1995) ("Property that the debtor allegedly fraudulently

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[4] *See also In re Gronczewski*, 444 B.R. 526, 532 (Bankr. E.D. Pa. 2011); *In re Fehrs*, 391 B.R. 53, 70-72 (Bankr. D. Idaho 2008) (rejecting *MortgageAmerica* and concluding that *Colonial* is more persuasive); *In re Feringa*, 376 B.R. 614, 624 (Bankr. W.D. Mich. 2007) ("Section 541 is quite clear that it is only the property that is actually recovered or preserved as a consequence of a successful avoidance action that in fact becomes property of the estate"); *In re Wagner,* 353 B.R. 106, 112-13 (Bankr. W.D. Pa. 2006) (holding transferred property subject to recovery in an avoidance action is not property of the estate until actually recovered by trustee); *In re ABC-NACO*, 331 B.R. 773, 781 (Bankr. N.D. Ill. 2005) ("A bankruptcy estate does not possess a property interest in transferred property, even though the transfer is subject to avoidance, until the estate obtains a judgment actually avoiding the transfer. Until that time, the estate holds only an unvested interest in a cause of action."); *In re Murray*, 214 B.R. 271, 278-79 (Bankr. D. Mass. 1997) ("I find the reasoning of *MortgageAmerica* unconvincing. . . . . [T]he inclusion of property recovered by the trustee pursuant to his avoidance powers in a separate definitional subparagraph clearly reflects the congressional intent that such property is not to be considered property of the estate until it is recovered." *In re McDonald Bros. Const., Inc.*, 114 B.R. 989, 997 (Bankr. N.D. Ill. 1990) ("It is the recovery of the funds involved in an 'avoided' transfer, not the potential for recovery, that causes the funds to be considered part of the estate; 11 U.S.C. § 541(a)(3)"); *Saunders*, 101 B.R. at 304 (concluding that because 11 U.S.C. § 541(a)(3) includes property "that the trustee recovers" as property of the estate, if property subject to a fraudulent transfer claim were automatically considered property of the estate under 11 U.S.C. § 541(a)(1), 11 U.S.C. § 541(a)(3) would be rendered meaningless).

transferred constitutes property of the debtor's bankruptcy estate only after a judicial determination has been reached.").

A case decided shortly before the District Court Order on the "property of the estate" issue is *In re Allen*, No. 11-37671, 2012 WL 693461, at *8-*10 (Bankr. D.N.J. Mar. 2, 2012). In *Allen*, the issue was whether property fraudulently transferred was "property of the estate." The Bankruptcy Court analyzed both *MortgageAmerica* and *Colonial*, noting that the *MortgageAmerica* analysis is inconsistent with the express terms of 11 U.S.C. § 541(a)(3), which describes "property of the estate" as property recovered — not which may be recovered in the future. The Court concluded:

> This Court adopts the analysis outlined in *Colonial* and other courts in this Circuit adopting its reasoning, and will hold that the constructively fraudulent transferred property does not become property of ATN's bankruptcy estate until recovered under § 550 by ATN. The reasoning of *Colonial* has not only been regarded as the majority position on this subject, but also has been cited approvingly by Bankruptcy Courts within this Circuit.

See also In re Loeffler, No. 10-39898, 2011 WL 6736066, at *3 (Bankr. D. Colo. Dec. 21, 2011) ("Simply put, no matter how compelling the case appears, a transfer is not a fraudulent conveyance until it is adjudicated as such. Proceeds of such avoidance actions do not

become estate property until actually recovered by the trustee.").[5]

In addition to cases decided prior to the District Court Order, decisions after that time also support this majority position. The District Court Order has been cited with approval as the majority view. *Gonzales v. Wagner (In re Vaughn)*, Case No. 12-cv-411, 2013 WL 2476375, at *4 (D.N.M. Jan. 22, 2013). Additionally, the Tenth Circuit's decision in this case has been cited as the "clear majority rule." *Covey v. Peoria Speakeasy, Inc. (In re Duckworth)*, Case No. 10-83603, 2013 WL 1397456, at *7 (Bankr. C.D. Ill. Apr. 5, 2013)("The theory that a debtor holds an 'equitable' interest in fraudulently transferred property for purposes of section 541 has been thoroughly debunked"). Thus, the District Court and the Tenth Circuit were correct in following the majority rule set forth in *Colonial*.

As noted by the District Court, the cases that follow *MortgageAmerica* analyze whether certain claims are property of the estate to be pursued by creditors and whether the automatic stay prevents a single creditor

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[5] In addition, in *In re Yellow Cab Coop. Ass'n*, 178 B.R. 265 (Bankr. D. Colo. 1995), the Bankruptcy Court concluded that:

> *unlike assets recovered for an estate pursuant to a trustee's avoidance powers*, assets held by the state court Receiver prior to turnover to the Debtor are deemed property of the Debtor's estate pursuant to 11 U.S.C. §§ 541 and 543. . . . *Unlike assets recovered by a debtor through its avoidance powers*, property in the hands of a receiver is property of the bankruptcy estate at the onset of the case."
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> *Id.* at 266 and 269 (emphasis added).

from pursuing claims rather than the trustee. Respondent argues that numerous cases in the Fourth, Fifth and Sixth Circuits, and several Bankruptcy Court decisions support his argument as the majority position. A close look reveals they do not.

Petitioner cites the Fourth Circuit case of *In re French,* 440 F.3d 145 (4th Cir. 2006) as supporting *MortgageAmerica*. *French* dealt with whether a bankruptcy court could avoid a fraudulent transfer of foreign real property. The Fourth Circuit held that property that would have been property of the estate before bankruptcy was subject to an action under 11 U.S.C. § 548. As to *MortgageAmerica* and *Colonial,* the Fourth Circuit said, "[b]ecause we hold that § 548 applies to the transfer in this case even assuming that § 541's definition of 'property of the estate' does not by itself extend to the Bahamian property, we need not join this dispute." *French,* 440 F.3d at 152, n.2. Thus, the Fourth Circuit has not ruled on this issue.

The District Court noted that the Bankruptcy Court for the Western District of Michigan in *In re Teleservices Group, Inc.,* 463 B.R. 28, 34, n.18 (Bankr. W.D. Mich. 2012) questioned whether the Sixth Circuit really followed *MortgageAmerica:*

> It is not altogether clear which of these two theories the Sixth Circuit embraces. On the one hand, the Sixth Circuit has cited with approval *In re MortgageAmerica. See N.L.R.B. v. Martin Arsham Sewing Co.,* 873 F.2d 884, 887 (6th Cir. 1989). However, its approval seemed hesitant. "Any effort to recover this [fraudulently transferred] property is essentially an action to

> recover property that belongs to the debtor." *Id.* (emphasis added). This equivocation at the very least suggests that the panel in *Martin Arsham Sewing* might have been persuaded by *Colonial Realty's* and *Saunders'* reasoning had those decisions been published earlier.

Teleservices, 463 B.R. at 34; *see also Nat'l Century Fin. Enters., Inc.,* 423 F.3d at 567. As pointed out by the District Court, the Sixth Circuit's approval of *MortgageAmerica* is questionable.

The Fifth Circuit has a number of cases that follow *MortgageAmerica,* several of which are cited by Petitioner, but which have little to do with the position he advocates. *See Cullen Ctr. Bank & Trust v. Hensley (In re Criswell),* 102 F.3d 1411 (5th Cir. 1997) (construing section 547(b) of the Bankruptcy Code); *In re Moore,* 608 F.3d 253 (5th Cir. 2010) (dealing with trustee's sale of claims belonging to estate – and whether such claims were estate property); *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.),* 817 F.2d 1142 (5th Cir. 1987) (whether alter-ego claim under state law is estate asset and whether creditor's pursuit of same violates the automatic stay). While these cases discuss *MortgageAmerica,* they do not stand for the position advocated by Petitioner that property can be the subject of an asset-freezing injunction solely because Petitioner has alleged it was fraudulently transferred without meeting the requirements of Fed. R. Civ. P. 65, which he was unable to do. Of course, given the Summary Judgment Order which ruled that Petitioner's fraudulent transfer claims are legally

insufficient, Petitioner's argument is even more remarkable.

The remaining cases cited by Petitioner likewise do not support his position.[6] *See In re Ciccone,* 171 B.R. 4, 5 (Bankr. D.R.I. 1994) (in connection with a holding that the automatic stay prevented a creditor from pursuing property that was the subject of a fraudulent transfer claim, stating, "[w]hile we are not comfortable to state as emphatically as the *MortgageAmerica* court that property which is the subject of a pending fraudulent conveyance action is actually property of the estate, we do hold that the cause of action itself constitutes an interest in property of the estate, and that the Trustee should at least be allowed the opportunity to recover the equity for creditors."); *In re Zwirn,* 362 B.R. 536, 539 (Bankr. S.D. Fla. 2007) (claims are property of the estate as of the petition date and solely within the power of a trustee to pursue); *In re Swallen's, Inc.,* 205 B.R. 879, 882 (Bankr. S.D. Ohio 1997) (citing both *Mortgage America* and *Colonial* with approval regarding applicability of automatic stay to litigation by creditors). None of these cases support

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[6] Petitioner cites to several additional cases in a footnote. These cases are not relevant to the central issue in this case and do not support Petitioner's arguments. *In re Johnson*, 575 F.3d 1079 (10th Cir. 2009) (generally discussing the automatic stay of 11 U.S.C. § 362); *Price v. Rocheford*, 947 F.2d 829 (7th Cir. 1991) (also discussing the automatic stay of 11 U.S.C. § 362); *U.S. v. Sabbeth*, 262 F.3d 207 (2d Cir. 2001) (rejecting Defendant's use of *Colonial* in his defense to prosecution for conspiracy to commit bankruptcy fraud).

Petitioner's position.[7] Accordingly, the District Court Order and the Tenth Circuit were correct.

E. Petitioner Erroneously Suggests That The Court Where The Alleged Split Began Has Reverted To The *MortgageAmerica* Approach.

Petitioner argues that the alleged split in the Circuits stems from *Saunders*, 101 B.R. at 303, a decision from the Bankruptcy Court for the Northern District of Florida, because *Colonial* closely followed its reasoning. Petitioner further asserts that the "Florida District Court" now follows *MortgageAmerica,* citing to *Zwirn*, 362 B.R. at 536, a decision from the Bankruptcy Court for the Southern District of Florida. This statement is simply incorrect.

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[7] Petitioner also suggests that the Court should adopt a position that property that is only "arguably" property of the estate should be protected by the automatic stay. Yet, the cases cited by Petitioner either have nothing to do with the case before this Court, or recognized entitlement to property is only available through successful litigation. *See In re Villarreal*, No. 06-7028, 2007 WL 470507, at *3 (Bankr. S.D. Tex. Feb. 8, 2007) ("The trustee seeks turnover of the cash. Turnover under 11 U.S.C. § 542 is a remedy available to debtors to obtain what is acknowledged to be property of the bankruptcy estate. It is not a remedy available to recover claimed debts which remain unliquidated and/or in dispute." (citation omitted)). Section 542 is not available as a shortcut to the normal litigation process that requires the chapter 7 trustee to establish that he owns the funds."); *In re Chesnut*, 422 F.3d 298, 302 (5th Cir. 2005) (automatic stay protects bankrupt spouse's potential interest in marital property being foreclosed on by creditor of other spouse).

As admitted by Petitioner, the *Zwirn* Court simply held that fraudulent transfer claims are property of the estate. *Zwirn* did not hold that property subject to a fraudulent transfer claim is property of the estate. *Id*. at 539. Indeed, the Northern District of Florida has recognized that courts often blur the distinction between the fraudulently transferred asset and the cause of action for recovery of that asset. *In re C.D. Jones & Co., Inc*., 482 B.R. 449, 456-57 (N.D. Fla. 2012). However, the *C.D. Jones* Court explicitly indicated that *Zwirn* was concerned with the cause of action for recovery of the allegedly fraudulently transferred asset. Thus, there is no basis for Petitioner's argument.

F. Petitioner's Arguments Regarding Bankruptcy Policy Are Flawed.[8]

Petitioner makes a series of arguments based on the notion that the Tenth Circuit has undercut the policy of the Bankruptcy Code. All of Petitioner's arguments are a transparent effort to use a holding by the Fifth Circuit to circumvent the explicit language of the Bankruptcy Code, the requirements of Fed. R. Civ. P. 65 and its companion, Rule 7065 of the Federal Rules of Bankruptcy Procedure.[9] His argument, if successful,

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[8] Federal Rule of Bankruptcy Procedure 7065, applicable in adversary proceedings in the Bankruptcy Court, has the added benefit that it does not require a debtor, trustee or debtor-in-possession to comply with Rule 65(c) dealing with security. Petitioner, however, chose to file this case in District Court.

[9] Petitioner's proposed rule, taken to its logical extreme, would not even require the filing of a lawsuit. If a debtor or trustee merely

would serve to create an asset-freezing injunction each time a debtor-in-possession in a chapter 11 case or a bankruptcy trustee files a fraudulent transfer action to recover property — because that property would be regarded as "property of the estate," under 11 U.S.C. § 541 and subject to the automatic stay provisions of 11 U.S.C. § 362 — without regard to the requirements of both rules. The District Court's determination that Petitioner's fraudulent transfer claims are without

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made a demand on parties alleged to have received a fraudulent transfer, or a potential fraudulent transfer was disclosed in bankruptcy schedules, Petitioner's suggested rule would trigger an asset-freezing injunction. Such a result would be impossible to administer. It would also wreak havoc on the bankruptcy system since property alleged to have been fraudulently transferred that is not in a debtor-in-possession's or trustee's possession would need to be "administered," when it is unknown if litigation to recover the same would ever ensue, or even be successful. *See Purportedly Fraudulently – Transferred Property as Property of Estate before Judicial Determination*, 28 AM. BANKR. INST. J. 34, 34 (June 2009); *Categorizing Categories*: *Property of the Estate and Fraudulent Transfers in Bankruptcy*, 106 MICH. L. REV. 1405, 1416, 1421, 1425 (May 2008) ("A plain reading of § 541(a)(1) demonstrates that purportedly fraudulently transferred property does not constitute an "equitable interest" that belongs to the estate . . . . Allowing a trustee to exercise authority over property that has not been recovered, however, conflicts with the main purposes of the Bankruptcy Act and creates administrative problems for both the trustee and the creditors . . . . Courts should adopt the Second Circuit's approach to "property of the estate" and hold that § 541 does not include fraudulently transferred property that the trustee has yet to recover from a third party."). Here, of course, the District Court has determined that Petitioner cannot establish a fraudulent transfer claim. Presumably, even Petitioner's proposed rule should no longer have any applicability after summary judgment has been granted.

merit in the Summary Judgment Order further demonstrates why such a result is unwarranted.

Despite Petitioner's argument that an injunction is an "illusory remedy," there is a long-standing body of case law that has developed around Federal Rule of Bankruptcy Procedure 7065 which gives a trustee, debtor or debtor-in-possession the right to obtain an asset-freezing injunction, subject to the protections of the other parties in the litigation. It is this right to protection that Petitioner seeks to dispense with by his strained extension of *MortgageAmerica*. *See* 10 COLLIER ON BANKRUPTCY ¶ 7065.01 at 7065-5 and 6, nn.21-23:

> Trustees and other estate representatives frequently commence litigation to recover assets for the estate. While such litigation most commonly involves claims under chapter 5 of the Code to recover avoidable transfers, litigation by or on behalf of bankruptcy estates against debtors' former management — for waste, self-dealing or other breaches of fiduciary duty — has also become increasingly common. Such claims have been for both damages and equitable relief, such as the imposition of a constructive trust over assets alleged to have once been property of the debtor. Because the determination of such claims typically takes considerable time, estate representatives have not uncommonly sought "asset-freezing" injunctions, to prevent the dissipation of one or more of the defendants' assets while the litigation is ongoing.

See also In re Focus Media Inc., 387 F.3d 1077, 1079 (9th Cir. 2004) (when a party in an adversary proceeding alleges fraudulent conveyance or other equitable causes of action, an asset-freezing injunction may issue so long as the requirements for obtaining an injunction have been met). Thus, injunctive relief under Federal Rule of Bankruptcy Procedure 7065 is not illusory. Instead, it is the primary form of relief in circumstances where a bankruptcy trustee believes he or she has grounds to assert that assets are in danger of dissipation.

Contrary to Petitioner's argument, the approach endorsed by the Tenth Circuit does not chill Bankruptcy policy. Rather, in situations where a bankruptcy trustee has a reasonable likelihood of establishing that a debtor has fraudulently transferred property to a friend, relative, or shell company, a trustee has a legitimate basis for injunctive relief, and a court may freeze such property. Petitioner, on the other hand, has unsuccessfully attempted on four occasions to obtain injunctive relief. Res. App. 57, 63. Petitioner was unable to obtain such relief, in part, because he "fail[ed] to articulate reasons as to why he is likely to prevail on his fraudulent transfer claims." Res. App. 61. In short, having failed to demonstrate an ability to obtain a traditional injunction, Petitioner now seeks to extend *MortgageAmerica* to obtain that result without any of the traditional protections to Respondent, in a case where he was unable to show the District Court a likelihood of success on the merits and where ultimately his claims were deemed legally deficient. Such an extension of *MortgageAmerica* is dangerous and unnecessary, especially in a situation where the underlying fraudulent transfer claims were

not even sufficient to survive a summary judgment motion. Res. App. 53.

Petitioner's argument that transferees of property from a debtor should be required to seek relief from the automatic stay of 11 U.S.C. § 362 is simply unworkable. Taken to its extreme, the argument could impose the automatic stay against all property transferred by the debtor during the years preceding the bankruptcy filing. Further, it is unclear why Petitioner takes the position that it is an undue burden on a trustee, the party with the burden of proof on fraudulent transfer issues, to seek an injunction, yet, it is not an undue burden on a transferee, the party without the burden of proof on fraudulent transfer claims, to seek relief from the automatic stay.

IV. CONCLUSION.

For the reasons stated herein, Respondent requests that this Court deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 09-2482

[Filed July 3, 2013]

ERIC C. RAJALA,	)
	)
Plaintiff,	)
	)
vs.	)
	)
ROBERT H. GARDNER, *et al.*,	)
	)
Defendants.	)
	)

MEMORANDUM AND ORDER

Plaintiff Eric C. Rajala, the Trustee for the bankruptcy estate of Generation Resources Holding Company, LLC ("GRHC"), brought this suit against six individual defendants and numerous corporate entities. The case has been proceeding for several years, and the parties have been before the Court numerous times on numerous issues. Several parties are again before this

Court. The remaining Defendants[1] seek summary judgment on the claims remaining against them. Plaintiff also filed a motion for partial summary judgment under 11 U.S.C. § 544. In addition, Plaintiff filed a Motion to Enforce Rule 26(e). The Court will address each motion.

I. Factual and Procedural Background

A. Local Rules for Summary Judgment

The Court must initially set forth the required rules for summary judgment motions in the District of Kansas. They are articulated in D. Kan. Rule 56.1. Under that rule, "[a]ll material facts set forth in the statement of the movant will be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of the opposing party."[2] D. Kan. Rule 56.1(b) addresses a party's responsibility in opposing a motion for summary judgment.

> (1) A memorandum in opposition to a motion for summary judgment must begin with a section containing a concise statement of material facts

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[1] These Defendants include: Robert H. Gardner; Robbin M. Gardner; Gardner Family Investment Company, LLC; William Stevens; Akiko Stevens; Stevens Family Investment Company, LLC; R. James Ansell; Virginia Z. Ansell; Windforce Holdings, Inc.; Lookout WindPower Holding Company, LLC; Lookout Windpower Holding Company, LLC (MO); Forward WindPower Holding Company, LLC; and Forward WindPower Holding Company, LLC (MO).

[2] D. Kan. Rule 56.1(a).

> as to which the party contends a genuine issue exists. Each fact in dispute must be numbered by paragraph, refer with particularity to those portions of the record upon which the opposing party relies, and, if applicable, state the number of movant's fact that is disputed.
>
> (2) If the party opposing summary judgment relies on any facts not contained in movant's memorandum, that party must set forth each additional fact in a separately numbered paragraph, supported by references to the record, in the manner required by subsection (a), above. All material facts set forth in this statement of the non-moving party will be deemed admitted for the purpose of summary judgment unless specifically controverted by the reply of the moving party.

"[I]t is the duty of the parties contesting a motion for summary judgment to direct the court to those places in the record where evidence exists to support their positions."[3] The Court will not sift through the record in an attempt to find a genuine issue of material fact or locate arguments for the parties.[4] In addition, it is the party's responsibility to tie the facts to its legal

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[3] *Boldridge v. Tyson Foods, Inc.*, 2007 WL 1299197, at *2 (D. Kan. May 2, 2007) (citing *Caffree v. Lundahl*, 143 F. App'x 102, 106 (10th Cir. 2005) and *SIL-FLO, Inc. v. SFHC, Inc.*, 917 F.2d 1507, 1513-14 (10th Cir. 1990)).

[4] *Boldridge*, 2007 WL 1299197, at *2. *See also Cross v. The Home Depot*, 390 F.3d 1281, 1291 (10th Cir. 2004).

contention.[5] "Without a specific reference, 'we will not search the record in an effort to determine whether there exists dormant evidence which might require submission of the case to a jury.' "[6]

In this case, Defendants set forth 180 facts in support of their Motion for Summary Judgment. The Trustee disputes, or "objects" to, 115 of these facts. In most cases, however, the Trustee fails to cite to the record or to provide any evidence when disputing or objecting to Defendants' proposed facts. In addition, when the Trustee does cite to evidence in an attempt to controvert a fact, he does not "refer with particularity" to the record for his proposition. Instead, in one instance, he refers the Court to a 151-page deposition. As noted above, the Court will not search the record to determine if the evidence does indeed exist to support his contention. Thus, despite the Trustee's objections, the Court deems admitted most of Defendants' facts and will set forth those facts below. At times, however, Defendants do not adequately support their facts by the record. The Court will disregard those facts.

With respect to the Trustee's Partial Motion for Summary Judgment, the Trustee frequently fails to cite to the record or direct the Court to the evidence that would allegedly support his contention. In addition, when the Trustee does cite to the record, the evidence does not support his contention. Finally, in

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[5] *Boldridge*, 2007 WL 1299197, at *2 (citation omitted).

[6] *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995) (citations omitted).

certain instances, the Trustee fails to provide the Court with the document or evidence supporting his alleged fact. With the above rules in mind, the Court will set forth the uncontroverted facts.

B. Facts

Individual Defendants James Ansell and William Stevens have been involved in wind energy projects for a number of years. From 2000 through 2005, Ansell chaired the General Public Utilities for the Commonwealth of Pennsylvania Sustainable Energy Fund advisory board ("GPU Board"), which was comprised of seven individuals who reviewed sustainable energy projects or opportunities that were recommended by the executive directors of the Foundations.[7]

In 1999, Black & Veatch hired Stevens to work in its treasury department. In 2000, Black & Veatch hired Ansell as Director of Strategic Initiatives for its energy services division ("B&V Energy Services Division"). Stevens eventually worked with Ansell to evaluate internal Black & Veatch projects for the B&V Energy Services Division. Also, in 2000, Black & Veatch hired individual Defendant Robert Gardner as a senior attorney, and he worked with B&V Energy Services Division.

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[7] The "Foundations" encompasses both the Berks County Community Foundation and the Community Foundation of the Alleghenies.

In early 2002, Ansell, Stevens, and Gardner presented Black & Veatch with the opportunity to develop wind farm projects in Pennsylvania, which Black & Veatch declined. Although Black & Veatch declined to develop wind farm projects, the B&V Energy Services Division agreed to expend a certain amount of money and resources in the form of engineering services to allow Ansell, Stevens, and Gardner to develop wind farm projects in Pennsylvania.

On February 2, 2002, the individual Defendants[8] formed GRHC as a Delaware limited liability company, to develop, own, and/or operate renewable resource generation assets in the event Black & Veatch decided not to develop wind farms.

The First Windpower Project - Stonycreek

On March 18, 2002, the individual Defendants formed SW[9] to enter into leases with respect to a project, entitled the Stonycreek Project, and to be the project company for the Stonycreek Project. At the time of SW's formation, GRHC held a ninety-seven percent interest in SW and the individual Defendants held a one percent interest per couple. Prior to entering into

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[8] The individual Defendants are Mr. Ansell and his wife, Mr. Stevens and his wife, and Mr. Gardner and his wife. It appears that only Mr. Ansell, Mr. Stevens, and Mr. Gardner were involved in the business.

[9] The Court presumes that SW stands for Stonycreek Windpower; however, Defendants do not specifically state this proposition.

the Edison Definitive Agreements,[10] GRHC became the sole member of SW. SW was and always has been a subsidiary of GRHC.

In February 2002, GRHC applied to the Foundations[11] for a $1 million loan to build a wind farm project. Defendants designate this project as the "Stonycreek Project." The application and loan documents do not designate a specific name for the project. GRHC's application to the Berks County Community Foundation defines the "Opportunity Description" as "Provide $1,000,000.00 ($500,000 from each fund) for the on-going development of economically viable projects in Eastern and Western Pennsylvania . . . ." It also states in the "Project Description" section that "the activity or 'project' to be undertaken by GRH[C] for the purpose of this application is the development of one or more renewable energy projects within the Commonwealth of Pennsylvania." GRHC's application states that "these funds will be used to finance, on an 'at-risk' basis, GRH[C]'s development activities. The loaned funds to GRH[C] will be repaid upon securing construction financing of the first project."

When the Foundations presented GRHC's request to the GPU Board, Ansell recused himself from any discussion or vote. The Foundations agreed to loan

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[10] The Edison Definitive Agreements, entered into on February 3, 2006, will be discussed in more detail below.

[11] Again, the "Foundations" encompasses both the Berks County Community Foundation and the Community Foundation of the Alleghenies.

GRHC the sum of $1 million, on an unsecured basis. On April 19, 2002, the parties entered into a Commitment Letter and Promissory Note.

The Commitment Letter states

> The Loan will be used at the reasonable discretion of the Borrower to pay the associated costs and expenses of pursuing and developing financially viable wind-generated power projects in the Commonwealth of Pennsylvania (the "Project"). The Project is more particularly described in the Borrower's written application to [Berks County Community Foundation.]

The maturity date of this loan was April 18, 2004.

The Second Windpower Project - Forward

In July 2002, GRHC applied to the Foundations for a second $1 million loan. Defendants designate this project as the "Forward 1 Project."[12] GRHC's

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[12] Defendants contend that there was a "Forward 1 Project" and a "Forward 2 Project," and that this loan request was for the Forward 1 Project. The Trustee contends that there is only one Forward Project. There are numerous questions surrounding the Forward Project because the evidence is not clear.

The Court notes several inconsistencies with Defendants' assertions with respect to the Forward Project. All of the documents relating to Forward only reference the "Forward Project." There is never a designation relating to Forward 1 or Forward 2 Project. Defendant Stevens claims that GRHC abandoned the "Forward 1 Project" in early 2004 because GRHC determined that there was not a viable wind resource in that location, and GRHC then moved on to the "Forward 2 Project." The

application defines the "Opportunity Description" as "funding for the on-going development of economically viable renewable energy projects in the Commonwealth of Pennsylvania . . . ." The "project description" states that the purpose of this application is "the development of up to a 45 megawatt ("MW") renewable energy project located between Hooversville and Central City, in Somerset County, PA. Preliminary turbine placements are being sited along ridgelines with interconnecting lines following local roads surrounding the village of Forward." It also provides that GRHC is seeking funds for the Forward Project.

The Foundations agreed to loan GRHC the sum of $1 million, on an unsecured basis. On October 17, 2002, the parties entered into a Commitment Letter and Promissory Note. The Commitment Letter states that the loan will be used to pay the costs of the "Project," as described in the application to the Foundations. The terms of this second loan were identical to the terms of

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Court notes that Defendants received their first loan extension for the "Forward 1 Project" in April 2004—around the same time GRHC apparently determined that the project was not viable and moved on to the "Forward 2 Project." Furthermore, GRHC requested a second loan extension from the Foundations in September 2005. This loan extension related to the previous two $1 million loans (one loan allegedly for Stonycreek, and one loan allegedly for the Forward 1 Project). If GRHC believed that the "Forward 1 Project" was not viable in 2004 (and was unrelated to the "Forward 2 Project"), the Court questions why Defendants requested a loan extension (and made representations that they were still planning on repaying the $1 million loan) for the "Forward 1 Project" more than a year after determining that the "Forward 1 Project" was not viable. Thus, the Court will refer to the project as the Forward Project.

the first loan, except that the maturity date for the second loan was October 17, 2004.

The First Extension of the Foundations' $1 Million Loans

In October or November 2003, in anticipation of the upcoming maturity dates for the two $1 million dollar Foundations loans,[13] GRHC requested an approximate one-year extension of the maturity dates. On November 20, 2003, Michael Kane, President of the Community Foundations for the Alleghenies, requested a current statement of GRHC's financial condition, including a balance sheet and income statement prior to December 3, 2003. GRHC provided the Foundations with its compiled financial statement as of December 31, 2002, which was prepared by its accountant, Gary Hawkins. The income statement contained a "salaries expense" of $321,000 listed under "expenses."[14]

On April 8, 2004, the Foundations extended the maturity date of the first loan from April 18, 2004 to December 18, 2005. The Foundations also extended the maturity date of the second loan from October 17, 2004 to December 17, 2005. All other terms of these loans remained the same.

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[13] The maturity dates were April 18, 2004 and October 17, 2004.

[14] This financial statement indicated that GRHC's "Net Income" was ($395,966.80).

Ansell's, Stevens's, and Gardner's Salaries

After the Foundations made the two $1 million dollar loans in 2002, Ansell, Stevens, and Gardner discussed how to keep the projects going and how to pay back the Foundations' loans in the event one of them died or became incapacitated. GRHC decided to purchase $2 million of "key man" life insurance. Ansell, Stevens, and Gardner were told they did not meet income requirements to purchase this life insurance. Stevens, the lowest paid individual, needed to be paid an additional $100,000 per year to qualify for the "key man" life insurance. Ansell, Stevens, and Gardner decided that because each of them and their wives had a one-third interest in GRHC, and each of them was equally working on developing the projects, GRHC would pay Ansell, Stevens, and Gardner approximately $100,000 per year.

In or around October 2002, GRHC paid Ansell, Stevens, and Gardner salary in the amount of $107,000 per person, totaling $321,000. In or around October 2003, GRHC paid Ansell, Stevens, and Gardner salary in the same amount per person. In or around February 2004, GRHC paid Ansell, Stevens, and Gardner salary in the amount of $115,000 per person, totaling $345,000.[15]

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[15] The Trustee contends that the approximate $1 million in salary (over three years) came from the money GRHC received from the Foundations. Defendants contend that this contention is unsupported. But, Stevens and Gardner both appear to testify in their depositions that GRHC used some of the Foundations' loan proceeds for their salary expenses.

The $330,000 Loan from Berks County Community Foundation (Third Loan)

On August 26, 2004, the individual Defendants formed Forward Windpower, LLC ("FW"), a Delaware limited liability company.[16] Defendants applied for additional funding from the Foundations.[17] The Community Foundation for the Alleghenies declined FW's request. Berks County Community Foundation agreed to lend FW $330,000 on November 11, 2004.[18] Although the Foundations' Loans made to GRHC in April and October 2002 are cross-defaulted with each other, the Berks County Community Foundation loan of November 11, 2004 is not cross-defaulted with the previous two loans.

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[16] Defendants contend that they formed this company to develop the "Forward 2 Project," which was located on the same ridge line as the "Forward 1 Project," but about two miles to the south. As noted above, there are numerous questions surrounding the Forward Project.

[17] Defendants contend that this additional funding was in relation to the "Forward 2 Project." In requesting this additional funding, however, Defendants used an application that they had previously filled out which related to the "Forward 1 Project." In addition, Richard Mappin, Vice-President for Grant Making for the Berks County Community Foundation, testified that the $330,000 was additional funding for the Forward Project.

[18] This Promissory Note states that the maturity date for this loan was December 17, 2005. Neither party gives specific facts with respect to the extension of this loan. However, a letter from the Foundations, dated January 6, 2006, indicates that the Foundations extended the maturity date for this loan when they granted a second extension for the maturity dates of the first two $1 million loans.

The Third Windpower Project - Lookout

Between June and December 2004, Reed Miller, a property owner near the town of Berlin, Pennsylvania, approached Ansell about whether Ansell, Stevens, and Gardner would be interested in developing a wind farm project on his property. Miller also mentioned that his neighbors might be interested. On December 15, 2004, Lookout Windpower, LLC ("LW")[19]entered into three leases to develop the "Lookout Project" with Miller's neighbors. LW entered into a lease with Miller on January 5, 2005.

LW waited to file its formal organization papers until it determined whether the Lookout Project was viable. On April 28, 2005, the individual Defendants formed LW, a Delaware limited liability company. Subsequent to LW's formation, it entered into five more leases. LW borrowed money from FW to fund the development of the Lookout Project prior to February 3, 2006. GRHC had previously purchased met towers and anemometry equipment to collect wind data for their prior projects, and two of those met towers were moved to the Lookout Project to collect wind data after being refitted with all new anemometry equipment purchased by LW.

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[19] LW was not formally registered as a limited liability company until April 2005.

The Edison Transaction and the Second Extension of the Foundations' $ 1 Million Loans

FreeStream Capital, LLC ("FreeStream") provides advisory services for, among other things, wind development projects. Lee Garner is an owner of FreeStream. In 2004-2005, GRHC began looking for investors for the Stonycreek Project, but was unsuccessful.

During this same time period, Stevens and Garner began discussions about how FreeStream and GRHC might be able to do business together with regard to the Stonycreek Project. On February 28, 2005, FreeStream and GRHC entered into a financial advisory services agreement with respect to the Stonycreek Project. At this time, the Stonycreek Project was the only project capable of being sold and built.

Once the financial advisory services agreement was fully executed, Garner informed GRHC that Edison was a potential buyer for the Stonycreek Project. GRHC had previously tried to engage Edison for the Stonycreek Project, but those efforts were unsuccessful. In their discussions with Edison, FreeStream, as well as Ansell, Stevens, and Gardner, learned that Edison was interested in potential transactions related to their other projects.[20]

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[20] Defendants designate these projects as the Forward 2 Project and the Lookout Project. As noted above, the evidence as to whether there were two Forward projects is unclear.

On February 28, 2005, FreeStream and FW entered into a financial advisory services agreement. On April 15, 2005, FreeStream and LW entered into a financial advisory services agreement.[21]

In June 2005, GRHC kept the Foundations apprised of their negotiations with Edison regarding the sale of the windpower projects and sent the Foundations their "'near final' term sheet with Edison Capital." In a June 2005 email from Stevens to an individual with the Foundations, he stated that

> [O]nly one of the $1M loans was technically borrowed for Stonycreek (the other for Forward). But we still intend to repay the other $1M loan (plus P&I) from additional funds (= profit) not designated as 'sunk costs' in this term sheet. . . . If there is insufficient profit from Stonycreek to fully repay the second $1M SEF loan, which we are endeavouring not to let happen, it will be fully repaid from construction financing from Forward (under similar terms and conditions in this term sheet).

Edison, FreeStream, GRHC, FW, and LW negotiated a memorandum of understanding (the "MOU") to facilitate a transaction for the Stonycreek Project, the Lookout Project, and the Forward Project. In the draft MOU, GRHC was identified as "Developer." SW, FW, and LW were identified as

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[21] The Court notes that LW was not formally organized until April 28, 2005.

affiliates of Developers, and the Stonycreek, Forward,[22] and Lookout Projects were specifically identified. At the time of the MOU, Edison was more enthusiastic about the Stonycreek Project than the other projects.

On June 22, 2005, Stevens provided the Foundations with a copy of the draft MOU, which the Foundations forwarded on to their attorneys. On June 29, 2005, the Foundations sent a letter to Randy Mann in which Edison stated their approval of the draft MOU they had received on June 22, 2005. On July 18, 2005, GRHC and Edison Capital signed the MOU. The parties involved in negotiating the MOU believed that it was a non-binding preliminary document.

On September 29, 2005,[23] GRHC sent a letter to the Foundations requesting that the maturity dates of the Foundations' Loans be extended to December 18, 2006. The letter references the Stonycreek and Forward Projects.[24] In this letter, Stevens (on behalf of GRHC, SW, and FW) made the representation that the Foundations' loans would be paid from the Forward

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[22] There was no designation of a Forward 1 Project or Forward 2 Project; instead, the designation was to the Forward Project.

[23] The Court notes that according to Defendants' facts, the Forward 1 Project had been abandoned at the time they requested a loan extension for the Forward 1 Project.

[24] The Court notes that this letter only references the Foundations' first two $1 million loans. This letter states that it would like to express its thanks to the Foundations for their continued support of both the Stonycreek WindPower and Forward WindPower Projects. There is no distinction between a Forward 1 Project or Forward 2 Project in this letter.

Project if there were insufficient proceeds from the Stonycreek Project. The letter also stated that the Foundations' loans would be repaid prior to any profits being retained by GRHC's shareholders. There is no reference to the Lookout Project in this letter.

On October 27, 2005, Stevens provided a copy of the signed MOU to the Foundations' attorney, Anthony DiSandro. On November 18, 2005, DiSandro sent a letter to Stevens stating that the Foundations did not have enough information to extend the terms of the Foundations Loans.

Before GRHC spoke with DiSandro again, the individual Defendants formed several different entities. On November 28, 2005, the individual Defendants formed Forward WindPower Holding Company, LLC ("FWHC"),[25] to which the individual Defendants transferred their respective ownership interests in FW. On this same date, the individual Defendants formed Lookout WindPower Holding Company, LLC ("LWHC"),[26] to which the individual Defendants transferred their respective ownership interests in LW. On November 29, 2005, both FWHC and LWHC passed resolutions to approve the execution, delivery, and performance by FW and LW of the drafts of the Edison

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[25] This entity was formed in Pennsylvania. The individual Defendants also formed FWHC in Missouri

[26] This entity was formed in Pennsylvania. The individual Defendants also formed LWHC in Missouri.

Definitive Documents.[27] Sometime after November 28, 2005, the Gardners transferred their individual ownership in FWHC and LWHC to Gardner Family Investment Company, LLC; the Stevens transferred their individual ownership in FWHC and LWHC to Stevens Family Investment Company, LLC; and the Ansells transferred their individual ownership in FWHC and LWHC to WindForce Holdings, LLC.

On December 5, 2005, Stevens sent an email to DiSandro attaching drafts of the Edison Definitive Documents, indicating in his email that the documents primarily related to the Stonycreek Project. These documents included a Development Loan Agreement,[28] which identified the Borrower as Stonycreek WindPower, LLC, Forward WindPower, LLC, and Lookout WindPower, LLC, all as affiliates of GRHC. The Development Loan Agreement also identifies the leases for Stonycreek Project, Forward Project, and Lookout Project.

On December 12, 2005, DiSandro emailed Stevens indicating that he had reviewed the documents emailed to him and asked about the status of the final

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[27] The Court notes that Defendants never fully define for the Court all of the documents that allegedly constitute the Edison Definitive Documents.

[28] Defendants only provide the Court with a copy of the Development Loan Agreement. The Court is unclear as to whether this is the only document that Defendants provided to DiSandro.

documents.[29] On December 16, 2005, Stevens emailed DiSandro revised drafts of the Edison Definitive Documents, including the Forward Development Agreement. In the redline version of the Forward Development Agreement, GRHC was removed as the "Developer" and was replaced with FWHC. FW's Amended and Restated Operating Agreement also named FWHC as the Developer, instead of GRHC.

On December 30, 2005, DiSandro sent Stevens a letter outlining the terms under which the Foundations would extend the maturity dates of the Foundations' loans, which included GRHC, SW, FW, and FWHC signing cross-guaranties, plus giving the Foundations a second-priority security interest in all of the assets of the same. In this letter, the Foundations do not reference LW or LWHC.

The Foundations sent another letter (the "Letter Agreement") on January 5, 2006.[30] The Letter Agreement no longer required security interests and cross-guaranties. DiSandro, Stevens, and Gardner exchanged several additional emails in an attempt to

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[29] Defendants assert that DiSandro's December 12, 2005 email did not ask any questions about the Forward Project, but he requested copies of the agreements for the other project companies (which would include Forward and Lookout). On December 16, 2005, Stevens provided him with copies of documents related to the Forward Project, including a copy of the Forward Operating and Development Agreement.

[30] Defendants contend that the Foundations sent this letter because Defendants refused to consent to the terms outlined in the Foundations' December 30, 2005, letter.

finalize the extension of the Foundation Loans.[31] Stevens also sent an email with a loan extension confirmation acceptable to Edison. The next day, January 6, 2006, DiSandro sent an email to Stevens, Gardner, and Ansell returning the fully-executed loan extension confirmation. The loan extension confirmation stated that GRHC and FW represented to the Foundations that they would not be able to repay their loans unless they entered into an arrangement with Edison in which Edison may provide certain financing for the further development of the projects. Those projects were defined as the Stonycreek Project and the Forward Project. The Foundations agreed to extend the maturity dates of the Foundations' loans, in the principal amount of $2,330,000,[32] to December 31, 2007.

On February 3, 2006, the Edison Definitive Documents were signed by the parties.[33] Upon closing,

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[31] In reviewing these emails, it appears that Gardner and Stevens would not agree to the Foundations' terms for extension of the loans. In addition, a January 5, 2006, email from Gardner to DiSandro indicated that Gardner needed to provide Edison with proof (that day) that the Foundations would extend the loans in order to enter the transaction with Edison.

[32] As noted above, neither party specifically discusses the extension of the maturity date of Berks County Community Foundation's $330,000 loan (the third loan). This "extension" document, however, indicates that Berks County Community Foundation extended the maturity date of this loan.

[33] Again, Defendants do not define for the Court all the documents that allegedly constitute the Edison Definitive Documents. The documents that Defendants rely upon for this fact include SW's,

Edison was 50 percent owner of LW and FW, with the remaining 50 percent owned by LWHC and FWHC, respectively.[34] The SW, FW, and LW Development agreements contained the following integration clause:

> The Agreement constitutes the entire agreement between the parties relating to the transaction described herein and supersedes any and all prior oral or written understandings, including the Memorandum of Understanding dated as of July 18, 2005.

On March 28, 2007, Mission Wind Pennsylvania, an Edison entity, and FWHC entered into a Redemption Agreement with respect to the Forward project.[35] Pursuant to this Agreement, the parties agreed to a redemption price of $1,493,000. In addition, pursuant to this Agreement, FWHC withdrew as a member of FW.[36] On March 30, 2007, the redemption price was paid as follows: $396,737 to FWHC, $242,000 to Berks

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FW's, and LW's Development Agreements.

[34] No information is given on the ownership of SW.

[35] Defendants attempt to designate the project as "Forward 2." There is no designation in the documents as to Forward 2 Project, and it only states the Forward WindPower project.

[36] Prior to the Redemption Agreement, FWHC and Mission Wind Pennsylvania were the members of FW.

County Community Foundation,[37] and $854,263 to FreeStream.

On March 28, 2007, Mission Wind Pennsylvania and LWHC entered into a Redemption Agreement with respect to the Lookout project. Pursuant to this Agreement, the parties agreed to a redemption price not to exceed $11,507,000. LWHC also withdrew as a member of LW, pursuant to this Agreement.[38] On March 30, 2007, a portion of the Lookout redemption price was paid as follows: $750,000 to LWHC and $250,000 to FreeStream. The balance of the Lookout redemption price was to be paid within five business days of when the Lookout Project achieved commercial operation, as defined in the Lookout Redemption Agreement.[39]

GRHC's Bankruptcy and the Litigation Surrounding the Windpower Projects

On April 28, 2008, GRHC filed its voluntary petition under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District

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[37] Defendants assert that this amount paid the "Forward 2" loan in full, but Defendants previously asserted that the "Forward 2" loan was in the amount of $330,000.

[38] Prior to the Redemption Agreement, LWHC and Mission Wind Pennsylvania were the members of LW.

[39] Defendants contend that Edison was still pursuing the Stonycreek Project after March 28, 2007, the date of the Forward and Lookout Redemption Agreements. This fact, however, is not supported with competent evidence.

of Kansas.[40] On August 13, 2008, Black & Veatch filed the Black & Veatch claim in the bankruptcy case in the amount of $2,200,000.[41] On September 15, 2009, the Foundations filed the Foundations Claim in the bankruptcy case in the amount of $2,827,054.94. No other creditors filed proofs of claim in the bankruptcy case.

On December 18, 2008, LWHC and FreeStream filed a complaint in the United States District Court for the Western District of Missouri seeking the balance of the Lookout redemption price, among other relief. On April 17, 2009, the Western District of Missouri dismissed the case for lack of jurisdiction. On the same date, LWHC and FreeStream filed a complaint in the United States District Court for the District of Pennsylvania (the "Pennsylvania Court") seeking the balance of the Lookout redemption price, among other relief. GRHC was not a party to either case.

On September 11, 2009, Eric Rajala, the Trustee of the bankruptcy estate of GRHC, filed this case in the District of Kansas against numerous Defendants. The Trustee filed his Second Amended Complaint on October 12, 2010, asserting eighteen claims, including fraud, fraudulent transfer, and breach of fiduciary duty claims.[42] Over the past several years, the parties have been before the Court on numerous issues. The Court will only briefly outline a few of those occasions.

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[40] This case is designated as Case No. 08-20957.

[41] This amount apparently relates to in-kind engineering services.

[42] Doc. 100.

In early May 2011, the Trustee filed a Motion for a Temporary Restraining Order, for a Preliminary Injunction, or alternatively, Order that Collateral Estoppel Does Not Apply in this Court. The Trustee requested that this Court stop a scheduled May 27, 2011, bench trial between LWHC, FreeStream, and Edison in the Pennsylvania Court. This Court denied the Trustee's motion.[43]

The Pennsylvania Court held its bench trial on May 27, 2011. On May 31, 2011, the Pennsylvania Court entered its Findings of Fact and Conclusions of Law and Judgment and its Memorandum and Order. The Pennsylvania Court entered judgment in favor of LWHC and FreeStream against Edison Mission Energy, in the amount of $8,991,448.46 (the "Pennsylvania Judgment"), with 75 percent of the judgment award in favor of LWHC and 25 percent in favor of FreeStream. The Pennsylvania Court transferred the issue of whether the Pennsylvania Judgment was property of GRHC's bankruptcy estate to the United States Bankruptcy Court for the District of Kansas.

On June 30, 2011, Edison deposited the Pennsylvania Judgment in the registry for the bankruptcy court. LWHC then filed a Motion to Withdraw the Reference from the bankruptcy court to this Court on the issue relating to the Pennsylvania Judgment funds, which created a miscellaneous case.[44]

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[43] Doc. 129.

[44] Case No. 11-MC-226.

The bankruptcy court recommended that this Court withdraw the reference from the bankruptcy court. The Court adopted the bankruptcy court's recommendation,[45] and the miscellaneous case was converted to a civil case (Case No. 11-2524) and consolidated with the instant case.[46]

From July 2011 through December 2011, the parties filed numerous motions. LWHC and FreeStream filed motions seeking the Court's determination that the Pennsylvania Judgment Funds were not part of GRHC's estate property, and they sought distribution of those funds. This Court granted their motions finding that allegedly fraudulently transferred property is not part of the bankruptcy estate until it is recovered.[47] On May 9, 2012, the funds were released and distributed to LWHC and FreeStream. The Trustee appealed this Court's order to the Tenth Circuit Court of Appeals. The Tenth Circuit recently affirmed this Court's determination.[48]

The Court has dismissed or granted summary judgment on numerous claims.[49] In addition, several

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[45] Doc. 5 in Case No. 11-2524.

[46] Doc. 37 in Case No. 11-2524 and Doc. 193 in Case No. 09-2482.

[47] Doc. 217.

[48] *See Rajala v. Gardner*, 709 F.3d 1031 (10th Cir. 2013) (finding that allegedly fraudulently transferred property is not part of the bankruptcy estate until it is recovered).

[49] *See* Docs. 109, 217.

Defendants are no longer part of the case due to either the Court's previous summary judgment orders or because the Trustee filed a voluntary dismissal.[50] Essentially, three claims remain: (1) a breach of fiduciary duty claim against the individual Defendants, part of count 1;[51] (2) fraudulent transfer claims, counts 5 through 10; and (3) a civil conspiracy claim against the individual Defendants, count 12.[52] The remaining Defendants move for summary judgment on all of these claims (Doc. 255). Plaintiff also moves for partial summary judgment on and under 11 U.S.C. § 544 (Doc. 256) asserting that the Court should avoid the transfer of GRHC's interest in the Forward Windpower and Lookout Windpower projects and require Defendants to disgorge and return the Forward Windpower and Lookout Windpower sales price for a fair distribution under the Bankruptcy Code. Plaintiff also has a Motion to Enforce Rule 26(e) (Doc. 274).

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[50] *See* Doc. 217 (granting summary judgment in favor of Defendant FreeStream on all claims asserted against it). *See also* Doc. 243 (Plaintiff's voluntary dismissal of six Defendants (Edison Mission Energy, Mission Wind Pennsylvania, Inc., Mission Wind Pennsylvania Two, Inc., Mission Wind Pennsylvania Three, Inc., Lookout Windpower, LLC, and Forward Windpower, LLC)). Thirteen Defendants remain in the case, and they were set forth above in footnote 1.

[51] The Court previously dismissed part of the Trustee's breach of fiduciary duty claim based on the usurping of a corporate opportunity. *See* Doc. 217.

[52] *See* Pretrial Order, Doc. 253, p. 2.

II. Summary Judgment Motions

Summary judgment is appropriate if the moving party demonstrates that there is no genuine issue as to any material fact, and the movant is entitled to judgment as a matter of law.[53]A fact is "material" when it is essential to the claim, and issues of fact are "genuine" if the proffered evidence permits a reasonable jury to decide the issue in either party's favor.[54] The movant bears the initial burden of proof, and must show the lack of evidence on an essential element of the claim.[55] The nonmovant must then bring forth specific facts showing a genuine issue for trial.[56] These facts must be clearly identified through affidavits, deposition transcripts, or incorporated exhibits—conclusory allegations alone cannot survive a motion for summary judgment.[57] The Court views all evidence and reasonable inferences in the light most favorable to the party opposing summary judgment.[58]

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[53] Fed. R. Civ. P. 56(a).

[54] *Haynes v. Level 3 Commc'ns, LLC*, 456 F.3d 1215, 1219 (10th Cir. 2006).

[55] *Thom v. Bristol-Myers Squibb Co.*, 353 F.3d 848, 851 (10th Cir. 2003) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986)).

[56] *Garrison v. Gambro, Inc.*, 428 F.3d 933, 935 (10th Cir. 2005).

[57] *Mitchell v. City of Moore, Okla.*, 218 F.3d 1190, 1197 (10th Cir. 2000) (citing *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir. 1998)).

[58] *LifeWise Master Funding v. Telebank*, 374 F.3d 917, 927 (10th Cir. 2004).

Though the parties in this case have filed cross-motions for summary judgment, the legal standard remains the same.[59] Each party retains the burden of establishing the lack of a genuine issue of material fact and entitlement to judgment as a matter of law.[60] Each motion will be considered separately.[61] "To the extent the cross-motions overlap, however, the court may address the legal arguments together."[62]

A. Defendants' Motion for Summary Judgment (Doc. 255)

1. Fraudulent Transfer Claims (Counts 5 through 10)

The Trustee brings fraudulent transfer claims pursuant to K.S.A. § 33-201 *et seq*, the Kansas Uniform Fraudulent Transfer Act ("KUFTA"). As noted in a previous Order, the Trustee's fraudulent transfer claims are brought pursuant to the KUFTA, and he

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[59] *City of Shawnee v. Argonaut Ins. Co.*, 546 F. Supp. 2d 1163, 1172 (D. Kan. 2008).

[60] *United Wats, Inc. v. Cincinnati Ins. Co.*, 971 F. Supp. 1375, 1381-82 (D. Kan. 1997) (citing *Houghton v. Foremost Fin. Servs. Corp.*, 724 F.2d 112, 114 (10th Cir.1983)).

[61] *Atl. Richfield Co. v. Farm Credit Bank of Wichita*, 226 F.3d 1138, 1148 (10th Cir. 2000).

[62] *Berges v. Standard Ins. Co.*, 704 F. Supp. 2d 1149, 1155 (D. Kan. 2010).

does not bring his claims pursuant to the Bankruptcy Code's fraudulent transfer provisions.[63]

a. Standing

Defendants first contend that the Trustee does not have standing to pursue the fraudulent transfer claims. A trustee in bankruptcy "must draw his authority to assert a particular cause of action from some provision within the [Bankruptcy Code.]"[64] "Causes of action commenced by a trustee on behalf of a debtor estate fall into two broad categories: (1) actions brought by the trustee as successor to the debtor's interests included as property of the estate under 11 U.S.C. § 541, and (2) actions brought under one of the trustee's avoidance powers [contained in 11 U.S.C. § 544]."[65] There is a distinct difference when bringing a claim under either § 541 or § 544 of the Bankruptcy Code. Under § 544, the cause of action belongs to the creditor, and the Trustee steps into the creditor's shoes.[66] In contrast,

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[63] Doc. 217. The Court noted that neither party discussed the distinction between the KUFTA and the Bankruptcy Code in their previous briefing to the Court. Doc. 217, p. 31, n. 93.

[64] *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996).

[65] *Id.* at 1304 (citing 2 Collier on Bankruptcy ¶ 323.02 [4], at 323-10). "Because § 544 gives a trustee certain avoidance powers, actions brought under the section fall within the second category of types of trustee actions." *Id.*

[66] *Id.* at 1304-05.

under § 541, the cause of action belongs to the debtor, and the Trustee steps into the debtor's shoes.[67]

In this case, the source of the Trustee's standing is not clear. In response to Defendants' Motion for Summary Judgment, the Trustee contends that he is proceeding under either 11 U.S.C. § 544(a) or (b) with respect to his fraudulent transfer claims. The Trustee has never previously relied upon § 544 as the basis for his authority to bring his claims. In his Second Amended Complaint, the Trustee does not cite to § 544, but he does cite to § 541 once.[68] He does not, however, cite to §541 as the basis for his standing now. Because the Trustee only discusses § 544, and does not reference § 541,[69] the Court will only address § 544

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[67] *Id.* at 1305, n. 5 ("In this respect, sections 541 and 544(b) of the Bankruptcy Code are mirror images of one another. When the trustee proceeds on a state claim under the former, the cause of action must belong to the debtor itself, but under the latter, the cause of action must belong to an actual creditor of the debtor.").

[68] With respect to his reference to § 541, it is contained in paragraph 39 of his Second Amended Complaint, in which the Trustee alleges that "[t]his Complaint arises out of, arises under, and relates to the Chapter 7 bankruptcy proceedings of GRHC now pending in the United States Bankruptcy Court for the District of Kansas, and is property of the bankruptcy estate under 11 U.S.C. § 541, and this Court has subject matter jurisdiction over this proceeding under 28 U.S.C. § 1334(b) and (d)."

[69] The Trustee does state that a fraudulent-transfer cause of action is considered property of the estate (which implicitly refers to § 541), but he never references or discusses his alleged authority to bring suit under § 541. As noted above, the distinction between § 541 and §544 is important as it determines whether the Trustee steps into the shoes of the creditors or the debtor entity.

when determining whether the Trustee has standing to pursue these fraudulent transfer claims.[70]

Section 544 contains two subsections: 544(a) and 544(b). The Trustee attempts to invoke both provisions. "Section 544(a) gives the trustee the power, as of the commencement of the bankruptcy case, to avoid transfers and obligations of the debtor to the same extent as certain hypothetical ideal creditors."[71] These hypothetical creditors include (1) a judicial lien creditor, (2) a creditor holding an execution returned unsatisfied, and (3) a bona fide purchaser of real property.[72] Although the Trustee attempts to invoke this provision, he does not assert that any hypothetical creditor was injured. Instead, he simply states that a hypothetical creditor is enough. The Court finds that § 544(a) is inapplicable to the facts in this case because the Trustee fails to articulate or demonstrate its applicability.

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[70] The Court notes that it is unclear whether the Trustee must specifically reference his capacity to bring state law claims, under either § 541 or § 544, in the complaint. *See Sender*, 84 F.3d at 1305 (addressing the trustee's standing and capacity to bring state law claims even though the complaint did not address the trustee's capacity).

[71] *Sender*, 84 F.3d at 1304.

[72] *See* 11 U.S.C. § 544(a)(1)-(3). "The purpose of the strong arm clause is to cut off unperfected security interests, secret liens and undisclosed prepetition claims against the debtor's property as of the commencement of the estate." 5 Collier on Bankruptcy, § 544.02[2], at 544-6.

With respect to § 544(b), this provision allows the Trustee to pursue fraudulent transfer claims under state law.[73] "Subsection (b) [of § 544] contains no substantive provisions indicating what transfers or obligations are avoidable. The Trustee's powers under the section are predicated on the non-bankruptcy law, usually state law, applicable to the transaction sought to be avoided."[74] Thus, the Court concludes that § 544(b) is the avenue that gives the Trustee the capacity to pursue his state fraudulent transfer claims.[75]

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[73] Section 544(b) provides that "the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim . . . ." *See also* 5 Collier on Bankruptcy, 548.01(2)(a). *See In re Hedged-Investment Assoc's, Inc.*, 84 F.3d 1281, 1285 n.6 (10th Cir. 1996) ("A trustee is empowered under 11 U.S.C. § 544(b) to 'avoid any transfer of an interest of the debtor in property . . . that is voidable under applicable law by a creditor holding an unsecured claim.' This provision is typically invoked by trustees to pursue state law fraudulent transfer or conveyance claims.")).

[74] *Sender v. Simon*, 84 F.3d 1299, 1304 (10th Cir. 1996). *See also In Re IFS Financial Corp*., 417 B.R. 419, 432-33 (Bankr. S.D. Tex 2009) ("Section 544(b)(1) allows a trustee to avoid transfers that a creditor could avoid under applicable state law.") (citations omitted).

[75] Although the Court finds that § 544(b) gives the Trustee the capacity to bring the KUFTA claims (without the Trustee specifically designating so in his Complaint), the Trustee did not bring a § 544(b) claim in the Complaint or Pretrial Order. Thus, the Trustee must rely upon KUFTA and its provisions to avoid any alleged fraudulent transfers (within the parameters of the Bankruptcy Code).

When using § 544(b) as the provision to demonstrate standing, the burden is on the Trustee "to demonstrate the existence of an actual creditor with a viable cause of action against the debtor that is not time barred or otherwise invalid."[76] The parties appear to agree that there are three creditors that have filed proofs of claim in the bankruptcy case: Black & Veatch and the Foundations (which includes Berks County Community Foundation and the Community Foundation of the Alleghenies).[77] Defendants, however, argue that the uncontroverted facts demonstrate that these three creditors agreed to limit their recovery to the Stonycreek and Forward 1 Projects. Thus, Defendants contend that because the Trustee stands in the shoes of the creditors, and the creditors agreed to limit their recovery to these projects, the Trustee does not have standing to seek monetary recovery from FWHC (and the Forward 2 Project) or LWHC (and the Lookout Project).

The Court disagrees with Defendants' contention that these facts are uncontroverted. With respect to the Foundations' claim, Defendants argue that the Foundations knew that their loans were used for the development of the Stonycreek and "Forward 1" Projects. There are numerous questions of fact surrounding the Forward Project. One of those

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[76] *See* 5 Collier on Bankruptcy, 544.06.

[77] The Court notes that the existence of creditors is only briefly mentioned in the Complaint, and the parties only identify and discuss the creditors for the first time with respect to this Motion for Summary Judgment. These creditors' claims total $5,027,054.94.

questions is whether there were in fact two Forward projects. Because it is unclear whether there were two Forward projects, the Court cannot conclusively determine that the Foundations limited their recovery to the Forward 1 Project. Thus, the Court cannot determine as a matter of law that the creditors lack standing to pursue these fraudulent transfer claims.

b. Fraudulent Transfer Prima Facie Case

Even though there are questions surrounding the Trustee's standing, the Court will address the Trustee's fraudulent transfer claims. Defendants argue that the Trustee cannot establish a fraudulent-transfer prima facie case because (1) the Trustee cannot establish that there was a transfer of GRHC's property, (2) there is no evidence of the value of the property alleged to have been fraudulent transferred as of the time of the alleged transfers, (3) there is no evidence of insolvency at the time of the alleged transfers, and (4) there is insufficient evidence of an actual intent to hinder, delay or defraud creditors. The Court will only address Defendants' first and second contentions as they are dispositive to the issue.

1. The Trustee Cannot Establish a Transfer of Property

To determine whether a transfer of GRHC's property occurred, the Court must consider Kansas's fraudulent transfer law. K.S.A. § 33-206(d) provides that "a transfer is not made until the debtor has acquired rights in the asset transferred." K.S.A. § 33-201(b) defines an "asset" as "property of a debtor." Defendants contend that the Trustee cannot establish

a transfer of GRHC's property because GRHC never had or acquired the rights in the property that the Trustee contends was fraudulently transferred. The Trustee asserts that GRHC had an interest in the purchase price of the Forward and Lookout Projects. The Trustee puts forth three theories in an attempt to demonstrate that GRHC held a legal interest in these two projects.

a. The MOU did not vest GRHC with an interest in the purchase price of the Forward and Lookout Projects

The Trustee's first theory is based upon the July 18, 2005, MOU between GRHC and Edison, which states that GRHC is the developer of three windpower projects (Stonycreek, Forward, and Lookout). The Trustee claims that the MOU is a binding agreement and gives GRHC the right to be paid the purchase price of the Forward and Lookout Projects. The Trustee relies upon several provisions in the MOU, including one that provides that "[t]he Definitive Agreements shall reflect the terms of this Memorandum and shall otherwise be in form and substance acceptable to [Edison] and Developer." Another clause states that the MOU "shall be construed under, governed by, and enforced in accordance with the laws of the State of California."[78]

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[78] Although the Trustee contends that this provision demonstrates that the MOU is an enforceable, binding agreement, the Trustee never addresses that this provision states that the document should be enforced under California law.

The Trustee relies upon a Tenth Circuit case, *Parks v. Dittmar (In re Dittmar)*,[79] for support that the MOU was sufficiently certain to create GRHC's interest in the right to be paid the purchase price. The Trustee previously made this argument to the Court.[80] And as this Court previously determined, *Parks* is inapplicable to the facts of this case.[81]

Furthermore, the Court finds that the MOU is merely an agreement to agree. The MOU does not contain all the material terms and conditions that were to be set forth in the definitive agreements. Indeed, the MOU specifically states "[t]his Memorandum is intended as an outline only and does not address all of the terms, conditions, covenants, representations, warranties and other provisions which would be contained in definitive documentation referenced herein." It also provides that it "does not commit either Party to enter into the Definitive Agreements or to develop the Projects and the obligations of the Parties are subject to, among other things, the matters set forth under the heading 'Conditions Precedent' below." One of those "Conditions Precedent" was the

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[79] 618 F.3d 1199 (10th Cir. 2010).

[80] The Trustee made this argument in his Response to Defendants' Motion to Declare Judgment Funds are Not Estate Property and to Disburse those Funds.

[81] *See* Doc. 217, pp. 18-19 (noting that a MOU and a collective bargaining agreement are vastly different documents and that because the definitive documents in this case were all executed prior to GRHC's bankruptcy, rather than some documents executed post-bankruptcy, distinguished the facts from the *Parks* case).

"[p]reparation and due execution and delivery of definitive and mutually satisfactory legal documentation for the Transaction, including an Acquisition Agreement, Development Agreement, and Development Expense Loan acceptable to each of the Parties." Furthermore, the MOU states that "[u]pon termination of this Memorandum, neither party shall have any further obligations to the other party under this Memorandum." Thus, the MOU does not require Edison to enter into definitive agreements with GRHC nor give GRHC the right to the Forward and Lookout Project's purchase price.

On February 3, 2006, definitive agreements were entered into by GRHC, FWHC, LWHC, and Edison. The Stonycreek Development Agreement named GRHC as the Developer. The Forward Development Agreement named FWHC as the Developer, and the Lookout Development Agreement named LWHC as the Developer. Each agreement contained an integration clause which provided: "The agreement constitutes the entire agreement between the parties relating to the transaction described herein and supersedes any and all prior oral or written understandings, including the Memorandum of Understanding dated as of July 18, 2005." The Court recognizes that the Trustee contends that these documents transferred the interest away from GRHC in the Forward and Lookout Projects. But GRHC's alleged interest in the purchase price of the Forward and Lookout projects was not so sufficiently certain in the MOU to override the subsequent documents that stated that the MOU ceased to exist. Accordingly, the Court cannot find that the MOU created a property interest with GRHC in the purchase price of the Forward and Lookout windpower projects.

Thus, the Trustee cannot establish a legal interest of GRHC's property through the MOU.

b. Earning an interest does not constitute property of the debtor

Next, the Trustee argues that GRHC earned the interest by identifying, developing, and then negotiating the sale of the projects. The Trustee does not provide the Court with any authority that earning an interest constitutes "property of the debtor." In addition, the Trustee fails to demonstrate to the Court when this interest was allegedly fraudulently transferred away from GRHC. Accordingly, the Trustee's second theory fails.

c. GRHC's alleged admission that it was the developer of the Forward and Lookout Projects does not constitute a property interest

Finally, the Trustee asserts that the individual Defendants represented and admitted that GRHC was the developer of the Forward and Lookout Projects. Again, the Trustee does not provide the Court with any authority that admitting to developing a project establishes that these projects were GRHC's "property." Even if GRHC was the developer of the projects, the mere fact that GRHC admitted that it was the developer does not establish a property interest in the purchase price of the Forward and Lookout

projects.[82] As noted above, K.S.A. § 33-201(b) defines "asset" as "property of debtor," and K.S.A. §33-206(d) provides that "a transfer is not made until the debtor has acquired rights in the asset transferred." The Trustee fails to direct the Court to evidence that there is a genuine issue of fact as to whether GRHC had acquired rights in the purchase price or established a property interest.

2. The Trustee provides no evidence of the value of the property at the time of the transfer

Even if the Trustee could establish a property interest in Forward's and Lookout Project's purchase price, Defendants contend that the Trustee cannot establish the value of that property at the time of the alleged transfer. Defendants direct the Court to several cases requiring that a trustee must demonstrate the value of the specific property as of the date of the transfer.[83] The Fourth Circuit Court of Appeals noted that

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[82] It appears as though the Trustee would have to rely on the MOU to demonstrate that GRHC would be entitled to the purchase price of the Forward and Lookout projects. As the Court has previously determined, this document is not sufficiently certain to provide GRHC with a property right in these two projects.

[83] Although these cases are not from Kansas, they address the Uniform Fraudulent Transfer Act enacted in other states or the fraudulent transfer provision, 11 U.S.C. § 548, of the Bankruptcy Code.

> The critical time is when the transfer is "made." Neither subsequent depreciation in nor appreciation in value of the consideration affects the value question whether reasonable equivalent value was given. The burden of establishing that the transfer was not made for fair equivalent value on the critical date . . . rested on the Trustee.[84]

The Trustee fails to address Defendants' argument and case law. Instead, he simply states that no test is necessary, and that by comparing the MOU with the definitive documents, it demonstrates that GRHC did not receive any value for transferring its interest in the Forward and Lookout Projects. Comparing the MOU with the definitive documents does not demonstrate anything.

The Trustee provides the Court with one date—February 3, 2006—as to when the alleged fraudulent transfer occurred. And he does not direct the Court to any evidence of the value of the Forward or Lookout project purchase price as of that date. Instead, he claims that the first installment for the purchase price was on March 28, 2007.[85] The Court is

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[84] *In re Morris Commc'ns NC., Inc*., 914 F.2d 458, 466 (4th Cir. 1990) (citing *In re Hulm*, 45 B.R. 523, 526 (Bankr. N.D. 1984)).

[85] The Trustee does not state whether this installment relates to the Forward or the Lookout Project. Presumably, however, the Trustee is referencing the Lookout Project because he then references that the second installment occurred when the Clerk of the Kansas Bankruptcy Court paid money from its registry to LWHC and FreeStream.

unclear as to whether the Trustee is relying upon the first installment as an attempt to establish value for the purchase price. To the extent that the Trustee is doing so, his attempt fails because it is not as of the date of the alleged fraudulent transfer—February 3, 2006. The Trustee simply does not provide evidence that there was value in the alleged property on the critical date.

In sum, the Trustee does not direct the Court to any evidence indicating that GRHC had a property interest in the purchase price of the Forward and Lookout Projects or to any evidence of the value of those Projects on the date of the alleged fraudulent transfer. Accordingly, Defendants are entitled to summary judgment on the Trustee's fraudulent transfer claims.

2. Breach of Fiduciary Duty Claim

The Trustee alleges that the individual Defendants[86] breached their fiduciary duties to GRHC. The majority of the Trustee's breach of fiduciary duty allegations are premised on the fact that individual Defendants took advantage of the Forward Windpower and Lookout Windpower opportunities, which usurped these opportunities away from GRHC leaving GRHC bankrupt with no material assets from which to pay its creditors. This Court previously determined that GRHC's Operating Agreement specifically allowed the

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[86] The individual Defendants include the Gardners, Stevens, and Ansells. Most, if not all, of the Trustee's allegations only relate to Mr. Gardner, Mr. Stevens, and Mr. Ansell. There are no specific facts set forth as to their wives' involvement.

individual members of GRHC to take the Forward Windpower and Lookout Windpower opportunities for their own benefit.[87] Thus, to the extent that the Trustee's breach of fiduciary duty claims are premised on these facts, the Trustee's claims fail. To the extent that the Trustee bases his breach of fiduciary duty claim on other facts, the Court will address these contentions.

a. Choice of Law

As an initial matter, Defendants contend that the Court must determine whether Kansas or Delaware law applies to the remainder of the Trustee's breach of fiduciary duty claim. The Trustee argues that the Court previously decided that Kansas law controls. The Court previously considered the issue when deciding whether a contractual provision in GRHC's Operating Agreement allowed the individual Defendants to take other opportunities for themselves—and whether the taking of these opportunities demonstrated that the individual Defendants breached a fiduciary duty to GRHC. In making that decision, the Court looked to Kansas law because the Court was considering a contractual provision in GRHC's Operating Agreement, and the Operating Agreement provided that it was governed by Kansas law.

The remainder of the Trustee's claim relies on the duties and relationships defined in corporate law, and there are no provisions in GRHC's Operating Agreement expanding or restricting those duties

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[87] *See* Doc. 217, pp. 34-38.

requiring the interpretation of the Operating Agreement and Kansas law. In Kansas, "[t]he generally accepted rule is that a corporation's charter and the laws of its domicile govern with respect to . . . the rights and liabilities of its officers, stockholders, and directors."[88] Thus, because GRHC is a Delaware corporation, the Court will apply Delaware law when adjudicating the remainder of the Trustee's breach of fiduciary duty claim.[89] The Court notes, however, that the choice of law issue is largely irrelevant as Kansas and Delaware law are similar.[90]

b. Breach of Fiduciary Duty Law

Officers and directors of a corporation owe a fiduciary duty to the corporation. Generally, a breach of fiduciary duty is categorized as either a breach of the duty of care or a breach of the duty of loyalty. The parties do not disagree that the individual Defendants owed a fiduciary duty to GRHC. The parties disagree as to whether the individual Defendants breached any fiduciary duty. Defendants assert several arguments as

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[88] *Consol. Beef Indus., Inc. v. Schuyler*, 233 Kan. 38, 40, 716 P.2d 544, 547 (Kan. 1986).

[89] *See Waddell & Reed, Fin., Inc. v. Torchmark Corp.*, 337 F. Supp. 2d 1243, 1250 (D. Kan. 2004) ("Because Torchmark and W & R Financial are Delaware corporations, the Court applies Delaware law.").

[90] The Court noted in its previous Order that the choice of law issue was largely irrelevant as Kansas and Delaware law are similar. *See* Doc. 217, p. 36. *Westar Energy, Inc. v. Wittig*, 44 Kan. App. 2d 182, 189, 235 P.3d 515, 521 (2010) (stating that "Delaware is the wellspring of Kansas corporate law.").

to why the Trustee's breach of fiduciary duty claim should fail. The Court will address each contention.

1. The Trustee has Standing

Defendants first raise a standing argument with respect to the Trustee's breach of fiduciary duty claim. Defendants contend that because the Trustee is pursuing damages for the benefit of the creditors, the claims derive from the creditors, and the Trustee must stand in the shoes of the creditors.[91] Under Delaware law, creditors only have standing to pursue breach of fiduciary duty claims upon the insolvency of the entity.[92] Defendants assert that the Trustee cannot prove that GRHC was insolvent at the time of the alleged breach of fiduciary duty and therefore does not have standing to bring a fiduciary duty claim.

The Trustee, however, contends that he is bringing the claim on behalf of GRHC.[93] Indeed, the allegations relate to the duties that the individual Defendants owed GRHC and how Defendants breached those duties. Although recovery would ultimately benefit the creditors, the Court concludes that the Trustee is proceeding on behalf of GRHC with respect to this

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[91] The Court notes that Defendants do not direct the Court to any authority for this proposition.

[92] *See North Am. Catholic Educ. Programming Found., Inc. v. Gheewalla*, 930 A.2d 92, 99 (Del. 2007).

[93] In contrast, with respect to the fraudulent transfer claims, the Trustee asserts that he is bringing those claims on behalf of the creditors.

claim. Thus, the Trustee is not standing in the shoes of the creditors.

Defendants also contend that the fact that the individual Defendants owed fiduciary duties to GRHC does not negate the need for the Trustee to demonstrate insolvency. Yet, Defendants do not direct the Court to any authority for this position. Because Defendants do not provide the Court with any authority for this position, and because the Court concludes that the Trustee is not standing in the shoes of the creditors, the Trustee need not demonstrate insolvency at the time of the alleged breach of fiduciary duty to proceed.

2. There are no allegations of a breach of fiduciary duty of care

Directors owe a fiduciary duty to "use that amount of care which ordinarily careful and prudent men would use in similar circumstances, and consider all material information reasonably available in making business decisions, and that deficiencies in the directors' process are actionable only if the directors' actions are grossly negligent."[94] Defendants contend that the Trustee does not allege any facts to support a claim for breach of duty of care. With respect to this argument, the Trustee simply states that the Second Amended Complaint alleges numerous acts that violate

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[94] *In re Walt Disney Co. Derivative Litigation*, 907 A.2d 693, 749 (Del. Ch. 2005) (internal quotation marks and citations omitted).

the individual Defendants' fiduciary duty of care.[95] Yet, the Trustee fails to direct the Court to which of these allegations supports a claim for breach of duty of care. Nor does the Trustee provide or cite to any evidence that indicates a genuine issue of material fact exists as to whether the individual Defendants breached a fiduciary duty of care. Thus, to the extent that any of these allegations relate to an alleged breach of fiduciary duty of care, the Court grants Defendants summary judgment.

3. There are questions of fact as to whether the individual Defendants breached their fiduciary duty of loyalty to GRHC

The fiduciary duty of loyalty requires that "the best interest of the corporation and its shareholders takes precedence over any interest possessed by a director, officer or controlling shareholder . . . ."[96] "Corporate officers and directors are not permitted to use their position oftrust and confidence to further their private interests. . . . The rule that requires an undivided and unselfish loyalty to the corporation demands that there be no conflict between duty and self-interest."[97]

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[95] The Trustee's arguments are often confusing and difficult to follow. Although the Trustee cites to numerous cases, they have little to no application to the facts in this case.

[96] *Cede & Co v. Technicolor, Inc*., 634 A.2d 345, 361 (Del. 1993).

[97] *Id.* (citing *Guth v. Loft*, 5 A.2d 503, 510 (Del. 1939)).

There is only one remaining allegation related to the Trustee's breach of fiduciary duty of loyalty claim. This allegation provides that the individual Defendants "paid themselves large sums of money after they knew of [sic] should of [sic] known that GRHC was insolvent, or would become insolvent if the LW and/or FW projects were stripped from GRHC."[98]

Defendants state that the evidence demonstrates that the individual Defendants took the last salary payment from GRHC in February 2004. Defendants assert that months after receiving the last salary payment, they received information as to the Lookout Project. They contend that because the Lookout Project did not exist until after the last salary payment, there is no possibility that the individual Defendants knew that "stripping" the Lookout Project would render GRHC insolvent. Thus, they contend that there is no evidence that they breached their fiduciary duty to GRHC.

Yet, Defendants' argument is incomplete and fails to address the Forward Project and fails to address what impact their salaries may have had on GRHC. The evidence shows that the Forward Project began in 2002—around the same time that the individual Defendants began receiving their salaries from GRHC. The facts demonstrate that the individual Defendants received almost $1 million in compensation from GRHC

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[98] *See* Doc. 253, Pretrial Order, p. 8, ¶ 6(b)(1)(j). This allegation only relates to Mr. Ansell, Mr. Gardner, and Mr. Stevens. There are no allegations that their wives received any salary from GRHC.

over three years (2002-2004). In late 2003, the individual Defendants requested that the Foundations extend the maturity date of GRHC's two $1 million loans—one of which was related to the Forward Project.[99] In early 2004, the Foundations extended the maturity dates of their loans while at the same time the individual Defendants paid themselves a salary of $115,000 per person.[100] Ultimately, GRHC went bankrupt and did not have the means to pay the Foundations back for the $1 million Forward loan. The Court concludes that there are questions of fact as to whether the three individual Defendants engaged in self-dealing and breached their fiduciary duty of loyalty to GRHC with respect to this specific issue. Thus, the Court denies Defendants' Motion for Summary Judgment on this issue.[101]

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[99] As previously noted, there are numerous questions surrounding the Forward Project.

[100] The Court notes that Defendants also state that they knew that the Forward 1 Project was not viable at this time and abandoned the Forward 1 Project. If the Forward 1 Project was not viable, there are questions as to why GRHC paid the individual Defendants salary and requested an extension of time to repay the $1 million loan related to that particular project.

[101] The Court also rejects Defendants' statute of limitations argument. Defendants contend that because the Trustee steps into the shoes of the creditors, the breach of fiduciary duty claim is untimely as it was filed more than two years after the creditors knew of the harm in 2003 or 2004. *See* K.S.A. § 60-513(a)(4) (requiring that an action for injury to the rights of another, and not arising on contract, be brought within two years). Because the Court finds that the Trustee is not stepping into the shoes of the creditors, but is instead pursuing the claim on behalf of GRHC, the Court looks to when the injury became reasonably ascertainable to

4. The statute of limitations does not bar the Trustee's claim

Defendants also contend that because the Trustee steps into the shoes of the creditors, the breach of fiduciary duty claim is untimely as it was filed more than two years after the creditors knew of the harm in 2003 or 2004.[102] K.S.A. § 60-513(a)(4) requires that an

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GRHC. *See* K.S.A. § 60-513(b) (stating that "[e]xcept as provided in subsections (c) and (d), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of the injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action."). *See also* Doc. 109 (discussing K.S.A. § 60-513(b) and the adverse domination doctrine and its applicability to this case). Arguably, K.S.A. § 60-513(d) may also be applicable. *See* K.S.A. § 60-513(d) (stating that in "[a]ll other causes of action by a corporation or association against an officer or director of the corporation or association shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury and there exists a disinterested majority of nonculpable directors of the corporation or association, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of the injury becomes reasonably ascertainable and there exists a disinterested majority of nonculpable directors of the corporation or association, but in no event shall such an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action."). Thus, the Trustee's breach of fiduciary duty claim is not barred by the statute of limitations.

[102] *See* K.S.A. § 60-513(a)(4) (requiring that an action for injury to the rights of another, and not arising on contract, be brought

action for injury to the rights of another, and not arising on contract, must be brought within two years. But K.S.A. § 60-513(b) provides

> Except as provided in subsections (c) and (d), the causes of action listed in subsection (a) shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury, or, if the fact of the injury is not reasonably ascertainable until some time after the initial act, then the period of limitation shall not commence until the fact of injury becomes reasonably ascertainable to the injured party, but in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.

Because the Court finds that the Trustee is not stepping into the shoes of the creditors, but is instead pursuing the claim on behalf of GRHC, the Court looks to when the injury became reasonably ascertainable to GRHC—which is when a disinterested majority of non-culpable directors existed.[103] The injury became

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within two years).

[103] *See also* Doc. 109 (discussing K.S.A. § 60-513(b) and the adverse domination doctrine and its applicability to this case). Arguably, K.S.A. § 60-513(d) may also be applicable. *See* K.S.A. § 60-513(d) (stating that in "[a]ll other causes of action by a corporation or association against an officer or director of the corporation or association shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury and there exists a disinterested majority of nonculpable directors of the corporation or association, or, if the fact of injury is not reasonably ascertainable until some time after the initial act, then the period

reasonably ascertainable to GRHC when GRHC filed for bankruptcy and the Trustee was appointed to GRHC's bankruptcy estate. Thus, the Trustee's breach of fiduciary duty claim is not barred by the statute of limitations.

3. Conspiracy Claim

Defendants contend that because the Trustee's breach of fiduciary duty claim fails, his conspiracy claim must fail because it is not based on a valid underlying tort. In addition, Defendants argue that the Trustee cannot meet the prima facie requirements of a civil conspiracy claim. The Trustee fails to address Defendants' second argument and instead simply asserts that because his breach of fiduciary duty claim remains viable, the claim for conspiracy also remains viable. The Court disagrees.

To demonstrate a civil conspiracy, the Trustee must show "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds in the object or the course of action; (4) one or more unlawful overt acts; and (5) damages as the proximate result thereof."[104] Individuals acting in their corporate

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of limitation shall not commence until the fact of the injury becomes reasonably ascertainable and there exists a disinterested majority of nonculpable directors of the corporation or association, but in no event shall such an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action.").

[104] *Meyer Land & Cattle Co. v. Lincoln County Conservation District*, 29 Kan. App. 2d 746, 753, 31 P.3d 970, 976 (2001).

capacities cannot conspire with themselves because their conduct is attributable to the entity which they represent.[105] In this case, the Trustee does not address Defendants' argument that he did not allege that the individual Defendants were acting outside their official capacities with GRHC. Thus, the individual Defendants' actions would be attributable to GRHC, and GRHC cannot conspire with itself. Accordingly, the Trustee's conspiracy claim fails, and Defendants are entitled to summary judgment on this claim.

4. Conclusion as to Defendants' Motions

In sum, the Court grants Defendants' Motion for Summary Judgment as to the fraudulent transfer claims and conspiracy claim. The Court grants in part and denies in part Defendant's Motion for Summary Judgment on the breach of fiduciary duty claim. Only a small portion of that claim remains. The only portion remaining is the Trustee's alleged breach of fiduciary duty of loyalty with respect to the individual Defendants' salary payments, and this claim only relates to Mr. Ansell, Mr. Stevens, and Mr. Gardner. Finally, the Court denies Defendant's request for oral argument on their motion because the Court finds that the motion was fully briefed and oral argument is unnecessary.

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[105] *Diederich v. Yarnevich*, 40 Kan. App. 2d 801, 811, 196 P.3d 411, 419 (Kan. App. 2008) ("It is difficult to see how a corporate director or officer can be liable for conspiring with other directors and officers to do something on behalf of the corporation those directors and officers are representing.").

B. Plaintiff's Motion for Partial Summary Judgment (Doc. 256)

Plaintiff moves for partial summary judgment on and under 11 U.S.C. § 544 (Doc. 256) asserting that the Court should avoid the transfer of GRHC's alleged interest in the Forward Project and Lookout Project and require Defendants to disgorge and return the Forward and Lookout Project's purchase price for a fair distribution under the Bankruptcy Code.

The Trustee's motion for partial summary judgment and memorandum in support of the motion are deficient in numerous ways. First and foremost, the Trustee contends in his motion that he is proceeding under 11 U.S.C. §§ 541, 544, 548, and 550.[106] In his memorandum, he moves for summary judgment under 11 U.S.C. § 544. As noted above, the Trustee never asserted § 544 in his Complaint. Nor did the Trustee plead an avoidance action under § 548 or recovery under § 550 of the Bankruptcy Code.[107] The Trustee

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[106] The Trustee, however, fails to specifically discuss, or provide any argument, as to three of these provisions (§§ 541, 548, and 550) in his memorandum.

[107] The Trustee contends that this Court previously found that the Trustee plausibly stated a cause of action for fraudulent transfer. Although the Court did previously make this finding, the Court did so in the context of a state fraudulent transfer claim (under KUFTA). As the Court specifically noted, "The Trustee's fraudulent transfer claims are brought pursuant to the Kansas Uniform Fraudulent Transfer Act, and they are not brought pursuant to the Bankruptcy Code. Neither party discusses the distinction." *See* Doc. 217, p. 31, n. 93.

In addition, the Court never previously discussed whether the

asserted fraudulent transfer causes of action under the KUFTA. Thus, he must proceed under the KUFTA.[108]

Furthermore, summary judgment is only appropriate if there are no genuine issues of material fact. The Trustee fails to adequately support the majority of the facts that he set forth. The Trustee also fails to demonstrate how the alleged facts relate to fraudulent transfer law under KUFTA. Thus, he does not present uncontroverted evidence demonstrating that he is entitled to summary judgment. Accordingly, the Court denies the Trustee's Motion for Partial Summary Judgment.

III. Plaintiff's Motion to Enforce Rule 26(e) (Doc. 274)

The Trustee also has a Motion to Enforce Rule 26(e). In previous interrogatories, the Trustee requested that the individual Defendants identify the amount of money they had received from wind farm sales. The Trustee argues that Defendants should supplement their interrogatory response because of the Clerk of the Bankruptcy Court's distribution of 75% of $8,941,448.46 to LWHC on May 8, 2012. The Trustee states that he seeks this information because Defendants claim in their motion for summary

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Trustee adequately pled recovery under § 550 as the Court was never asked to interpret or apply this statute. Nor was the Court aware that the Trustee intended to rely upon this statute because the Trustee only referenced Kansas state law.

[108] The Trustee only sparingly references KUFTA in his memorandum, but addresses it more fully in his reply.

judgment that "there is no proof the investment companies received any money from LWHC (i.e., are not 'mediate transferees' under 11 U.S.C. § 550)."[109] Thus, it appears that the Trustee seeks this information in relation to his fraudulent transfer claim. Because the Court granted Defendants' motion for summary judgment on the Trustee's fraudulent transfer claim, and because the information that the Trustee seeks is irrelevant to his fraudulent transfer claim, the Court denies the Trustee's motion as moot.

IT IS ACCORDINGLY ORDERED this 3rd day of July, 2013, that Defendants' Motion for Summary Judgment (Doc. 255) is hereby **GRANTED IN PART and DENIED IN PART**. The Trustee's only remaining claim is his breach of fiduciary duty claim on the basis that the individual Defendants breached their fiduciary duty of loyalty to GRHC by paying themselves large sums of money when they knew or should have known that GRHC was or would become insolvent. Furthermore, this claim only remains with respect to Mssrs. Ansell, Gardner, and Stevens.

IT IS FURTHER ORDERED that Plaintiff's Motion for Partial Summary Judgment (Doc. 256) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiff's Motion to Enforce Rule 26(e) (Doc. 274) is **DENIED AS MOOT**.

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[109] As noted above, the Trustee never pled 11 U.S.C. § 550, and it is inapplicable in this case.

IT IS SO ORDERED.

/s/ Eric F. Melgren
ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Case No. 09-2482-EFM

[Filed June 14, 2012]

ERIC C. RAJALA, Trustee in Bankruptcy for the Estate of Generation Resources Holding Company, LLC

Plaintiff,

vs.

ROBERT H. GARDNER, et al.

Defendants.

MEMORANDUM AND ORDER

Plaintiff Eric Rajala, the Trustee for the estate of Generation Resources Holding Company ("GRHC"), requests a temporary restraining order and preliminary injunction (Doc. 245). On May 8, 2012, the Court denied the Trustee's Motion for Rule (54)b

Certification to the Tenth Circuit.[1] In this Order, the Court lifted a stay on funds of approximately $9 million that were being held in the Kansas Bankruptcy Court. The Clerk of the Bankruptcy Court distributed those funds to Defendant Lookout Windpower Holding Company ("LWHC") and Defendant FreeStream that same day. On May 22, 2012, the Trustee filed a Motion for Temporary Restraining Order and Preliminary Injunction requesting that the Court prohibit distribution of the funds from the Kansas Bankruptcy Court. Because the funds had already been distributed, the Trustee withdrew his motion. On May 31, the Trustee filed another Motion for Temporary Restraining Order or Preliminary Injunction. In this motion, the Trustee requests that the Court (1) freeze the funds and any assets for which they have been exchanged; (2) require the individual Defendants to account for the funds; and (3) require the individual Defendants to notify any transferee of the Trustee's claims. Defendants oppose the motion.[2] The Court ordered an expedited briefing schedule and held a hearing on the motion on June 13, 2012.

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[1] Doc. 236. The Court will not set forth the background of this case here because it was set forth in several previous Orders. A brief recitation of the factual and procedural background on the funds at issue can be found in Doc. 236. A more detailed recitation of the factual and procedural background can be found in Doc. 217.

[2] The Trustee did not address FreeStream's portion of the distribution of funds, and the Court notes that FreeStream is no longer a Defendant in this case because the Court granted summary judgment on all of the Trustee's claims against FreeStream.

Legal Standard

Granting or denying a temporary restraining order or other preliminary injunction rests within the sound discretion of the trial court.[3] The purpose of a temporary restraining order or preliminary injunction is "to preserve the status quo pending the outcome of the case."[4] The standards which govern the granting of a preliminary injunction are well settled in the Tenth Circuit. The moving party must establish: "(1) it is substantially likely to succeed on the merits; (2) it will suffer irreparable injury if the injunction is denied; (3) its threatened injury outweighs the injury the opposing party will suffer under the injunction; and (4) the injunction would not be adverse to the public interest."[5] A movant has the burden to establish by clear proof its right to a preliminary injunction. Mere allegations are insufficient. A preliminary injunction is an extraordinary remedy that is an exception rather than the rule, and courts do not grant it as a matter of right.[6]

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[3] *Beltronics USA, Inc. v. Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009).

[4] *Tri-State Generation & Transmission Ass'n., Inc. v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986).

[5] *Beltronics*, 562 F.3d at 1070.

[6] *Id.*

Success on the Merits

Although the Trustee has a few remaining claims against Defendants,[7] he affirmatively states that he is only proceeding on the fraudulent transfer claims with respect to this preliminary injunction motion. The Trustee contends that he is likely to be successful on the merits of his fraudulent transfer claims because the Second Amended Complaint alleges sufficient facts to demonstrate fraud under Kansas' Uniform Fraudulent Transfer Act. Defendants assert that the Trustee is not likely to be successful on the fraudulent transfer claims because (1) the Trustee lacks standing to pursue the claims because the creditors were not damaged as a result of the alleged fraudulent transfers, and (2) the Trustee cannot establish a prima facie case because the Trustee cannot identify any interest or right that GRHC owned that was fraudulently transferred.

The Trustee fails to articulate reasons as to why he is likely to prevail on his fraudulent transfer claims. Instead, the Trustee relies on conclusory allegations taken from his Second Amended Complaint and simply asserts that he is likely to prevail. Although the Court agrees that the facts, as stated in the Complaint, are sufficient to state a claim, the Court cannot say that the Trustee is likely to succeed on the merits of those claims. The Trustee provides no support for his factual contentions. Defendants, in contrast, provide the Court with some evidence that their arguments may have merit. The Court cannot say that the Trustee is likely

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[7] The Trustee also has a breach of fiduciary duty claim and a conspiracy claim remaining against Defendants.

to succeed on the merits of these claims. For that reason, this factor does not weigh in the Trustee's favor.

Irreparable Injury

The Trustee contends that if the Court does not freeze the funds, LWHC (an alleged empty shell) and the individual Defendants may dispose of the funds. If Defendants dispose of those funds, and the Trustee later prevails on his fraudulent transfer claims, the Trustee argues that there may be no money left to recover for the bankruptcy estate and he will have a difficult time collecting for GRHC's estate. For purposes of this preliminary injunction motion, the Court is willing to assume that Defendants may dispose of the money and the Trustee will be irreparably harmed. Accordingly, this factor weighs in the Trustee's favor.

Threatened Injury versus Prejudice

The Trustee contends that if the Court does not freeze the funds and LWHC and the individual Defendants disburse all of those funds, the Trustee would have to file a multitude of lawsuits against subsequent transferees. Defendants argue that the Trustee has engaged in tactics to delay the proceedings and that they are prejudiced because they have had to respond to the Trustee's numerous baseless motions on this issue. They assert that the Trustee's concern with filing numerous lawsuits is unwarranted and inconsistent with his prior actions. The balancing of the threatened injury to the Trustee and the prejudice to

Defendants is about equal. For this reason, this factor is neutral.

Public Interest

The Trustee contends that a preliminary injunction is not adverse to the public interest because the bankruptcy code has a policy of preserving assets so that there is a fair and equitable distribution of assets from what are usually limited resources. The Trustee's argument is flawed because the Court previously decided that these funds were not property of the estate. Because the funds are not an asset of GRHC's bankruptcy estate, freezing the funds would not promote the bankruptcy code's policy of preserving assets. Accordingly, this factor does not weigh in the Trustee's favor.

Because the Trustee does not establish by clear proof his right to a preliminary injunction, the Court denies the Trustee's motion.

IT IS ACCORDINGLY ORDERED that Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction (Doc. 245) is **DENIED**.

IT IS SO ORDERED.

Dated this 14th day of June, 2012.

/s/ Eric F. Melgren
ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

[Filed May 20, 2011]

Case No. 09-2482-EFM

ERIC C. RAJALA, Trustee in Bankruptcy for the Estate of Generation Resources Holding Company, LLC

Plaintiff,

vs.

ROBERT H. GARDNER, et al.

Defendants.

Case No. 10-2243-EFM

ERIC C. RAJALA, Trustee in Bankruptcy for the Estate of Generation Resources Holding Company, LLC

Plaintiff,

vs.)
)
LOOKOUT WINDPOWER,)
LLC, et al.,)
)
Defendants.)
_____)

MEMORANDUM AND ORDER

This matter is before the Court on Plaintiff's Motion for a Temporary Restraining Order, for a Preliminary Injunction or, Alternatively an Order that Collateral Estoppel Does Not Apply (Doc. 119). The Court held a hearing on May 19, 2011, and the Court issued its ruling from the bench denying Plaintiff's motion.

Plaintiff Eric Rajala, the Trustee for the bankruptcy estate of Generation Resources Holding Company, LLC (GRHC), seeks a temporary restraining order or preliminary injunction from this Court. In the Western District of Pennsylvania, a trial is scheduled to begin next week involving several of the Defendants in this case.[1] Plaintiff, in essence, requests this Court to stay that proceeding because he believes the proceeds from the contract at issue is property of the bankruptcy estate and relates to the case before the undersigned Judge. Plaintiff also requests, in the alternative to a temporary restraining order or preliminary injunction, a ruling that any judgment obtained in the

[1] The Court will not set forth the facts and how the parties are related in this Order. Suffice to say, it is complicated.

Pennsylvania court cannot collaterally estop any part of Plaintiff's claims in this case.

The Court denied Plaintiff's motion from the bench, and the reasoning for the Court's order is on the record. To summarize the Court's holding, it denied Plaintiff's motion for a temporary restraining order or preliminary injunction because the Court does not believe it has the jurisdiction to stay a proceeding occurring in another federal district court (the Western District of Pennsylvania). Furthermore, the Court does not believe it has the jurisdiction to issue an order that collateral estoppel does not apply to this case because a judgment has not yet been issued in the Pennsylvania case, and to rule that collateral estoppel does not apply would be an advisory opinion.

IT IS ACCORDINGLY ORDERED that Plaintiff's Motion for a Temporary Restraining Order, for a Preliminary Injunction or, Alternatively Order that Collateral Estoppel Does Not Apply (Doc. 119) is **DENIED.**

IT IS SO ORDERED.

Dated this 20th day of May, 2011.

/s/ Eric F. Melgren
ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE