No. _____

# 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*

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

The question presented is whether property alleged to have been fraudulently transferred from a debtor is subject to the automatic stay provided by 11 U.S.C. §362(a) before the Trustee completes his fraudulent transfer adversary proceeding and recovers the fraudulently transferred property. This necessitates determining whether such property is "property of the estate" as defined in 11 U.S.C. §541(a).

## PARTIES TO THE PROCEEDING

Petitioner Eric C. Rajala is the court-appointed trustee in bankruptcy for debtor Generation Resources Holding Company, a Kansas Limited Liability Company ("GRHC"), and the appellant in the Court below.

Respondent Lookout Windpower Holding Company, a Missouri Limited Liability Company ("LWHC"), was an appellee in the Court below. This dispute began when LWHC filed a motion to distribute 75% of about $9 million being held in escrow by the Kansas Bankruptcy Clerk which the District Court granted. The issue on appeal is whether that distribution violated 11 U.S.C. §362.

Freestream Capital, LLC, ("Freestream") was the other appellee in the Court below. Freestream filed a motion to distribute the remaining 25% of the $9 million being held by the Bankruptcy Clerk which the District Court likewise granted. The issue below regarding Freestream was whether it was a third party beneficiary such that its distribution could never be subject to 11 U.S.C. §362. The Court below ruled in favor of Freestream. The Trustee is not asking this Court to review that ruling. Therefore, Freestream has no interest in this Petition.

The other defendants were not parties in the Pennsylvania litigation nor movants below but are identified for the sake of completeness:

Robert H. Gardner and Robbin M. Gardner, husband and wife, are individuals who reside in

Leawood, Kansas. Together they owned and controlled a one-third interest in GRHC. Robert Gardner was the Vice President of Development for GRHC and was a lawyer licensed and practicing in Kansas and Missouri.

Gardner Family Investment Company, a Missouri LLC, is an entity to whom the Gardner defendants allegedly transferred some or all of their claimed ownership in Lookout Windpower Holding Company and/or Forward Windpower Holding Company, LLC.

William W. Stevens and Akiko N. Stevens, husband and wife, are individuals who reside in Newton, CT. Together they owned and controlled a one-third interest in GRHC. William Stevens was the Vice President of Finance for GRHC.

Stevens Family Investment Company, a Missouri LLC, is an entity to whom the Stevens defendant allegedly transferred some or all of their claimed ownership in Lookout Windpower Holding Company and/or Forward Windpower Holding Company, LLC

R. James Ansel and Virgina Z. Ansel, husband and wife, are individuals who reside in Tucson, AZ. Together they owned and controlled a one-third interest in GRHC. James Ansel was President of GRHC.

Windforce Holdings, Inc., is an entity to whom the Ansel defendants allegedly transferred some or all of their claimed ownership Lookout Windpower Holding Company and/or Forward Windpower Holding Company, LLC.

Forward Windpower Holding Company, a Missouri LLC, is a shell company created by the GRHC Insiders to receive and distribute payment for the Forward wind farm project.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Eric C. Rajala, Trustee in Bankruptcy for the estate of Generation Resources Holding Company, LLC, (the "Trustee"), respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## OPINIONS BELOW

The opinion of the Tenth Circuit is reported at *Rajala v. Gardner*, 709 F.3d 1031 (10th Cir. 2013), and reproduced in the appendix hereto ("App.") at 1a. The opinions of the U.S. District Court for the District of Kansas are not reported in F. Supp.2d but are available at *Rajala v. Gardner*, 2012 WL 1189773 (D.Kan. April 09, 2012), and 2012 WL 1232298 (D.Kan., April 12, 2012) and reproduced in the Appendix at 21a and 79a respectively.

## JURISDICTION

The judgment of the Tenth Circuit was entered on March 12, 2013. *App. 1a*. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**11 U.S.C. §541(a) provides**:

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such

estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is— (A) under the sole, equal, or joint management and control of the debtor; or (B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329 (b), 363 (n), 543, 550, 553, or 723 of this title.

**11 U.S.C. §362(a) provides**:

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970, operates as a stay, applicable to all entities, of--

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or

other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

* * * * *

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

* * * * *

## STATEMENT OF THE CASE

The Trustee contends that about $6.7 million which the Bankruptcy Clerk distributed to non-debtor Lookout Windpower Holding Company, LLC ("LWHC") which is owned and controlled by debtor's Insiders[1], is property of the bankruptcy estate under 11 U..S.C. §541(a) and, therefore, subject to the protections afforded by 11 U.S.C. §362(a). The question presented is purely one of statutory construction which the court

[1] Three men (attorney Robert Gardner, engineer James Ansell, and financier William Stevens) and their wives formed, owned and managed GRHC. The three men were all employees of GRHC creditor Black & Veatch. These couples and their "investment companies" are all defendants in the Trustee's fraudulent transfer action, D.Kan. Case No. 2:09-cv-02482, and entered their appearance in the GRHC Bankruptcy Case to request withdrawal of the reference pertaining to the property-of-the-estate issue. They fit the definition of "Insider" in 11 U.S.C. §101 (31) and K.S.A. §33-201(g) and are collectively referred to as the "GRHC Insiders."

below correctly reviewed *de novo*. The background facts relied on were taken from the Trustee's Second Amended Complaint and are stated in the Tenth Circuit opinion, 709 F.3d at 1032-34. A summary of those facts follows.

Generation Resources Holding Company, LLC ("GRHC"), was formed in 2002 to develop wind farm projects in Western Pennsylvania. GRHC incurred about $5 million in debt to develop three wind farms which became known as the Stoneycreek, Forward and Lookout projects. The Stoneycreek project failed. The Forward and Lookout projects were sold to a third party, Edison Mission Energy. GRHC was not paid the purchase price, however. Instead, the GRHC Insiders formed shell companies and transferred the payment rights to those entities. The Trustee alleges those transfers were fraudulent.

Full payment for the Forward project and the first installment for the Lookout project was made to FWHC and LWHC[2] while the Insiders controlled GRHC. However, the second and final payment for the Lookout project - about $9 million - did not mature until after GRHC was forced into bankruptcy.

There was a dispute over the amount of the final installment and so the GRHC Insiders caused LWHC to sue Edison Mission Energy in the U.S. District Court

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[2] The shell company for the Forward project was Forward Windpower Holding Company, LLC ("FWHC"). The shell company for the Lookout Project was Lookout Windpower Holding Company, LLC ("LWHC"). Their sole purpose was to receive payment of the purchase price for their respective project.

in Pennsylvania. The sole issue was the amount due for the second and final installment for the Lookout project. Shortly before trial the Trustee filed a Motion to Stay and Transfer the Pennsylvania lawsuit arguing the Lookout purchase price was property of the GRHC bankruptcy estate. The Pennsylvania District Court conducted a half-day bench trial and then ruled the Trustee's Motion to Stay and Transfer. In so doing the Pennsylvania District Court held:

> Therefore, this Court finds that the above-referenced monetary judgment entered as a result of the May 27, 2011 bench trial will be transferred to the District of Kansas Bankruptcy Court . . . where related action No. 08-20957 is in progress, and held subject to a determination by the Kansas Bankruptcy Court as to whether or not these funds are rightfully part of the bankruptcy estate.
>
> IT IS FURTHER ORDERED that any amounts paid by or on behalf of Defendant Lookout Windpower, LLC in satisfaction of the judgment entered in this case are to be placed in escrow pursuant to directive by the Kansas Bankruptcy Court, pending resolution by that Court of the issue of potential ownership of these funds on the part of the Bankruptcy Estate (Case No. 08-20957).

*Pennsylvania Judgment, filed 7/12/11, App. 103, 108 and 111.*

Edison filed an uncontested Motion to Deposit the $9 million in the GRHC Bankruptcy Case pursuant to

the Pennsylvania Judgment. The GRHC Bankruptcy Judge granted that Motion ordering Edison to deposit the funds within two days which Edison did. On July 1, 2011, the GRHC Insiders and their shell companies including LWHC entered their appearance in GRHC's Kansas Bankruptcy Case and filed a motion to withdraw the "property-of-the-estate" issue framed by the Pennsylvania Court from the Kansas Bankruptcy Court. The Kansas District Court granted the motion after which LWHC filed its Motion to Determine that Judgment Funds are Not Estate Property and for Distribution of Such Funds arguing that because the Trustee had not yet been able to resolve his fraudulent transfer claim, the money was not yet property of the estate and should be distributed.

On April 9, 2012, the District Court ordered the Bankruptcy Clerk to distribute the $9 million being held in escrow, 75% to LWHC and 25% to Freestream Capital.[3] The basis for the order was that "fraudulently-transferred property is not part of the bankruptcy estate until it is recovered because there has been no determination that the underlying property was in fact fraudulently transferred." App. 37a. The District Court stated that "If the Trustee prevails on his fraudulent transfer claims, he then has the remedy of avoiding the fraudulent transfer and bringing it into GRHC's bankruptcy estate." App. 38a.

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[3] The Trustee argued below that the 25% distributed to GRHC's financial advisor, Freestream Capital, was earmarking. However, the Court of Appeals ruled it was merely payment as a third party beneficiary. The Trustee is not asking for review of that ruling.

The Trustee filed a motion to enjoin dissipation of the distributed funds arguing they would be alienated if not frozen. The District Court agreed but, nevertheless, denied the injunction opining "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."[4]

The Trustee contends, and the Fifth and Sixth Circuits have squarely held, that property alleged to have been fraudulently transferred is property of the estate under 11 U.S.C. §541(a) and, therefore, subject to being preserved during bankruptcy by 11 U.S.C. §362(a).

## REASONS FOR GRANTING WRIT OF CERTIORARI

### I. THE CIRCUITS ARE SPLIT OVER A FEDERAL STATUTE

#### A. The *MortgageAmerica* Rationale

In 1983 the Fifth Circuit interpreted 11 U.S.C. §541(a) to mean that "property of the estate" of a bankrupt debtor includes property that is alleged to have been fraudulently transferred by the debtor to a third party, because §541(a)(1) includes "all legal or equitable interests of the debtor in property." *In re*

[4] Doc. 249, Order, filed 06/14/12 at 4-5, D.Kan. Case 2:09-cv-02482.

*MortgageAmerica*, 714 F.2d 1266, 1275 (5th Cir. 1983) ("it makes most sense to consider the debtor as continuing to have 'legal or equitable interest' in the property fraudulently transferred within the meaning of §541 of the Bankruptcy Code."). The *MortgageAmerica* Court concluded that: "when a soon-to-be bankrupt debtor fraudulently transfers property to shield it from his creditors, that debtor/transferor should be considered to have retained an *equitable* interest in the property so that it will continue to be considered 'property of the estate.'" 714 F.2d at 1275. This interpretation triggered 11 U.S.C. §362(a)(3) such that any attempt by a transferee to alienate the property would be stayed and voidable. This allowed the Trustee to preserve property until any dispute over ownership and/or distribution was resolved.

The Sixth Circuit followed the Fifth Circuit in *N.L.R.B. v. Martin Arsham Sewing Co.*, 873 F.2d 884, 887 (6th Cir.1989) ("Any effort to recover this [fraudulently transferred] property is essentially an action to recover property that belongs to the debtor."); *see also*, *In re Cincom iOutsource, Inc.*, 398 B.R. 223 n.11 (Bkrtcy S.D. Ohio 2008) ("That said, our reading of *Arsham,* and the court's reasoning behind it, leads us to conclude that the Sixth Circuit favors the

*MortgageAmerica* court's approach.").[5] *Arsham* remains controlling in the Sixth Circuit.

### B. The *Colonial Realty* Split

In *In re Colonial Realty Co.,* 980 F.2d 125 (2nd Cir.1992), the Second Circuit acknowledged that it previously agreed with the Fifth Circuit but was now splitting from its prior decisions and the *MortgageAmerica* rationale:

> As the Trustee notes, we have cited *MortgageAmerica* with approval in a number of cases [citations omitted]. We are now persuaded, however, by *In re Saunders,* 101 B.R. 303, 304–06 (Bankr.N.D.Fla.1989), that the correct result was reached in *MortgageAmerica,* but a different statutory analysis is appropriate.

*In re Colonial Realty Co.,* 980 F.2d 125, 131 (2nd Cir.1992)

The Second Circuit rejected *MortgageAmerica* and ruled 11 U.S.C. §541(a) now *excludes* rather than *includes* property alleged to have been fraudulently

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[5] *See also In re Nat. Century Financial Enterprises, Inc.*, 423 F.3d 567 (6th Cir. 2005) ($7.3 million in accounts receivable were "property of the estate" even though they were excluded from sale agreement and being held in trust: "Because the Louisiana action seeks to obtain the accounts receivable held in a JP Morgan account in the name of NPF VI, and because the accounts receivable likely constitute property of the bankruptcy estate, the bankruptcy court properly enforced the automatic stay under 11 U.S.C. § 362(a)(3).")

transferred by the debtor. The Second Circuit adopted its reasoning from the Florida District Court which the Second Circuit quoted in explaining "If property that has been fraudulently transferred is included in the §541(a)(1) definition of property of the estate, then § 541(a)(3)[6] is rendered meaningless with respect to property recovered pursuant to fraudulent transfer actions." *Colonial Realty*, 980 F.2d at 131.

Despite its rejection of *MortgageAmerica*, the Second Circuit still applied 11 U.S.C. §362(a) to protect and preserve the property. However, it based its ruling on §362(a)(1) (stays claims against the debtor) instead of §362(a)(3) (stays any act to control property of the estate). The Second Circuit concluded "[T]hat although the [creditor's fraudulent transfer lawsuit] is not an 'act to obtain possession of property of the estate' within the meaning of § 362(a)(3) or an 'action ... against the debtor' within the meaning of § 362(a)(1), it is an 'action ... to recover a claim against the debtor' within the meaning of § 362(a)(1)." *In re Colonial Realty Co.,* 980 F.2d 125, 132 (2nd Cir.1992).

The flaw of *Colonial Realty* exposed by the case *sub judice* is that the "action ... to recover a claim against the debtor" interpretation of § 362(a)(1) does not apply when the Trustee is the party seeking to avoid the fraudulent transfer. And, although creditors frequently attempt to satisfy debts by pursuing transferees

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[6] 11 U.S.C. §541(a)(1) defines property of the estate as including "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(3) includes "Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title."

themselves, when a trustee is appointed he is the correct party to make such claims. Although the *Colonial Realty* two-step rationale achieved the asset preservation goals of Title 11, its reasoning is incorrect, creates an enormous loophole in Title 11, and is being used as a tool to undermine the asset preservation policy of Title 11.[7]

## II. MOST CASES WHICH DISCUSS THE SPLIT FOLLOW *MORTGAGEAMERICA* BUT THE TENTH CIRCUIT DID NOT

The Second Circuit has not confronted this issue since its 1992 decision in *Colonial Realty*.[8] However,

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[7] The automatic stay created by 11 U.S.C. §362 "is the central provision of the Bankruptcy Code. When a debtor files for bankruptcy, section 362 prevents creditors from taking further action against him except through the bankruptcy court. The stay protects debtors from harassment and also ensures that the debtor's assets can be distributed in an orderly fashion, thus preserving the interests of the creditors as a group." *In re Johnson*, 575 F.3d 1079, 1083 (10th Cir.2009) (quoting *Price v. Rochford,* 947 F.2d 829, 831 (7th Cir.1991)). The scope of the stay is broad, encompassing "almost any type of formal or informal action taken against the debtor or the property of the [bankruptcy] estate." 3 Collier on Bankruptcy ¶ 362.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2010).

[8] In *U.S. v. Sabbeth*, 262 F.3d 207 (2nd Cir. 2001), Sabbeth caused property owned by his soon-to-be-bankrupt company to Sabbeth's wife and then to secret entities. Sabbeth was prosecuted for bankruptcy fraud. Citing *Colonial Realty* in defense, Sabbeth argued the money transferred to secret companies was not property of the debtor because it was not in debtor's possession and had not yet been determined to have been fraudulently transferred. The Second Circuit rejected application of *Colonial*

the Fifth Circuit has. In *Cullen Ctr. Bank & Trust v. Hensley (In re Criswell)*, 102 F.3d 1411, 1417 (5th Cir. 1997), debtor Criswell transferred oil and gas leases to his children. The Fifth Circuit ruled those leases were property of the estate: "In other words, what we recognized in *MortgageAmerica* is that when a soon-to-be-bankrupt debtor (like Criswell) fraudulently transfers property to shield it from his creditors, that debtor/transferor should be considered to have retained an *equitable* interest in the property so that it will continue to be considered 'property of the estate.'" *Id*. at 1417. The Fifth Circuit rejected the *Colonial Realty* rationale: "Even though a Second Circuit decision, *In re Colonial Realty Co.,* 980 F.2d 125, 131 (2nd Cir.1992), has criticized part of our reasoning, the *MortgageAmerica* decision remains binding precedent in this circuit." *In re Criswell*, 102 F.3d at n. 27; *see also In re Moore*, 608 F.3d 253, 261 (5th Cir. 2010) ("Because [creditor's pre-bankruptcy fraudulent transfer] claims sought to recover estate property, the automatic-stay provisions of § 362(a)(3) barred [creditor] from pursuing the fraudulent-transfer claims individually once the petition was filed." *citing MortgageAmerica*, 714 F.2d at 1275) and *In re Chestnut*, 422 F.3d 298, 303 (5th Cir. 2005) (automatic stay extends to "arguable" property).[9]

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*Realty* definition in that circumstance.

[9] The Fourth Circuit applied similar reasoning to reach a similar result under 11 U.S.C. §548, the Fourth Circuit held:

> By incorporating the language of §541 to define what property a trustee may recover under his avoidance powers, §548 plainly allows a trustee to avoid any transfer

Although not a Circuit case like *MortgageAmerica, Criswell, Moore, Arsham or French*, the District Court in *In re Swallen's, Inc*., 205 B.R. 879 (Bkrtcy.S.D.Ohio 1997), gave a good explanation why *MortgageAmerica* is better policy than *Colonial Realty*, to wit:

> We are aware that *In re Colonial Realty Co.,* 980 F.2d 125 (2nd Cir.1992) questions the validity of *MortgageAmerica,* but we nevertheless follow *MortgageAmerica.* We do so in view of the following considerations. Despite *Colonial Realty,* the Fifth Circuit continues to adhere to *MortgageAmerica. See In re Criswell,* 102 F.3d 1411 (5th Cir.1997). Further, the court in *In re Ciccone,* 171 B.R. 4, 5 (Bankr.D.R.I.1994) could find "no acceptable rationale for departing from the *MortgageAmerica* holding," despite *Colonial Realty.* It is further to be noted that in *Colonial Realty* the Second Circuit questioned only the rationale upon which *MortgageAmerica* was based; it agreed with the outcome in that case and reached the same outcome as *MortgageAmerica,* that the automatic stay of § 362 did apply. It reached that conclusion by finding § 362(a)(1) applicable, accepting the analysis that a fraudulent transfer claim,

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> of property that *would have been* 'property of the estate' prior to the transfer in question- as defined by §541 - even if that property is not 'property of the estate *now*.'"

*In re French*, 440 F.3d 145, 151 (4th Cir. 2006) *accord Bergier v. IRS*, 496 U.S.53, 58, 59 (1990) (reaching the same conclusion about another avoidance provision, §547, of the Bankruptcy Code.).

> though asserted against a third party, must also be interpreted as a claim against the debtor.

*In re Swallen's, Inc.*, 205 B.R. 879 n.2 (Bkrtcy.S.D.Ohio 1997); *see also*, *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.),* 817 F.2d 1142, 1150 n. 9 (5th Cir.1987) (stating "[o]ur decision and analysis in [*MortgageAmerica* ] has been cited with approval by several courts and represents the accepted interpretation of the scope of section 362(a)(3) stays") (citing *Cumberland Oil Corp. v. Thropp,* 791 F.2d 1037, 1042 (2nd Cir.), *cert. denied,* 479 U.S. 950, 107 S.Ct. 436, 93 L.Ed.2d 385 (1986); *Delgado Oil Co., Inc. v. Torres,* 785 F.2d 857, 861 (10th Cir.1986); and *In re Central Heating & Air Conditioning, Inc.,* 64 B.R. 733, 735–37 (N.D.Ohio 1986); *In re Ciccone,* 171 B.R. 4, 5 n. 2 (Bankr.D.R.I.1994) (noting "[w]e agree with the holding of *Colonial* on this issue, but do not follow that case in its abandonment of *MortgageAmerica* as to the estate property issue. We find no acceptable reason for departing from the *MortgageAmerica* holding").

*In re Villarreal*, 2007 WL 470507 (Bkrtcy.S.D.Tex. 2007), followed *MortgaeAmerica* holding that property of the estate included property which was the subject of the trustee's fraudulent transfer claim. That Court characterized the property as "arguable" property (the transfer might or might not be avoided) but followed *In re Chestnut*, 422 F.3d 298, 303 (5th Cir.2005),[10] in

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[10] "Of course, the trustee has not yet litigated his fraudulent conveyance lawsuit. The question of whether the transfer of the 110 acres may be avoided has not yet been decided. What is the

applying 11 U.S.C. §362 for the benefit of the estate: "This breadth [of §362] suggests Congressional intent that, in the face of uncertainty or ambiguity, courts should presume protection of arguable property." *Id*.

## III. THE COURT WHERE THE SPLIT BEGAN HAS REVERTED TO *MORTGAGEAMERICA*

The *Colonial Realty* Court adopted nearly *verbatim* the rationale of *In re Saunders,* 101 B.R. 303, 305 (Bankr.N.D.Fla.1989), which is the first case rejecting the rationale in *MortgageAmerica*. Ironically, the Florida District Court now follows *MortgageAmerica* because: "the Court concludes that the better, well-reasoned approach is to conclude that such claims are property of the estate as of the petition date [rejecting date transfer is avoided]." *In re Zwirn*, 362 B.R. 536, 539 (Bkrtcy S.D. Fla. 2007) ("From a pure policy standpoint, this rule makes sense.").

## IV. THE IMPACT OF EXCLUDING TRANSFERRED PROPERTY FROM THE PROTECTION OF §362(a) CHILLS THE ASSET PRESERVATION POLICY OF TITLE 11

The Tenth Circuit followed *Colonial Realty* in ruling that §541(a) did not apply to the Lookout purchase

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effect of the automatic stay when the trustee has sued to recover the transfer but has not yet prevailed? The Fifth Circuit recently answered this question. When property is only *arguably* property of the estate, the automatic stay applies." *In re Villarreal*, 2007 WL 470507 (Bkrtcy.S.D.Tex. 2007), *citing In re Chestnut*, 422 F.3d 298, 303 (5th Cir.2005).

price being held by the bankruptcy clerk. However, unlike the Second Circuit, the Tenth Circuit did not apply §362(a) at all, so the funds held by the Bankruptcy Clerk were distributed to LWHC despite the presumption of alienation. This departs from prior court decisions which, regardless of which split interpretation was applied, invoked either §362(a)(1) (stays claims against the debtor) or §362(a)(3) (stays any act to control property of the estate) to preserve the property. To this extent, the Tenth Circuit opinion represents a third and even more extreme line of reasoning further highlighting the need for this Court to grant the Trustee's Petition for Writ of Certiorari.

Under the Tenth Circuit rationale, a debtor may transfer funds to a friend, relative or, as here, shell company he created, and then consume those funds while the Trustee deciphers and pursues an avoidance claim. If the Trustee wins his claim, the Trustee and Bankruptcy Court will face protracted and expensive litigation to trace and recover alienated funds. The challenge of multiple recovery actions against numerous transferees, some who may be bona fide purchasers, will chill the willingness of a trustee or his counsel to pursue the fraudulent transfers in the first place.

An unscrupulous debtor who knows he can chill pursuit of fraudulent transfer claims by pre-bankruptcy planning will be motivated to transfer property pre-bankruptcy. Such a debtor's need and/or desire to use and consume property which would otherwise be frozen by 11 U.S.C. 362(a) is likewise an incentive for a debtor to make pre-bankruptcy transfers.

## V. REPLACING §362 WITH AN INJUNCTION IS AN ILLUSORY REMEDY

The Tenth Circuit suggested that a Trustee could file a Rule 65 injunction motion instead of relying on 11 U.S.C. §362(a). The Trustee did that but it was denied because the funds were not an asset of GRHC's bankruptcy estate under §541(a). Because this putative remedy would only be needed if §541(a) does not apply, and because this putative remedy will only be granted if §541(a) applies in the first place, it is an illusory remedy. Additionally, presenting an inunction is a time-consuming task for a Trustee, especially in complex cases where corporate insiders conceal facts or obstruct investigation.

## VI. OBTAINING RELIEF FROM THE AUTOMATIC STAY IS NOT AN UNDUE BURDEN ON A TRANSFEREE

The Tenth Circuit ultimately held "In the end, we need not pass upon the constitutionality of such a broad reading [referring to MortgaeAmerica]." *Rajala v. Gardner*, 709 F.3d 1031, 1039 (10th Cir 2013). However, before so concluding it noted "that a broad reading could potentially violate the Due Process Clause by allowing a trustee to enjoin another party's property rights based only on the allegation of fraud." *Id*.

The automatic stay applies automatically. *11 U.S.C. §362(a)*. However, if a transferee in possession of allegedly fraudulent transferred property disputes that the property was fraudulently transferred or that the stay should apply, he may file for relief from the stay.

*11 U.S.C. §362(d)*. Such a person is automatically released from the stay within 30 days unless the bankruptcy court convenes a hearing and rules otherwise. *11 U.S.C. §362(e)*.

The alleged harm in applying §541(a) and §362(a) is that a court-appointed, impartial trustee would allege frivolous fraudulent transfer claims and the transferee would be forced to seek relief from the §362 stay. The harm in rejecting this application is that a debtor will transfer assets pre-bankruptcy so he can alienate property while the bankruptcy is pending and generally chill pursuit of such property. The balance of harms analysis favors application of §541(a) and §362(a).

Although the Trustee does not believe any constitutional issues apply, their potential creates another reason for this Petition to be granted.

## CONCLUSION

The Tenth Circuit's interpretation of §541(a) cannot be reconciled with century-old Bankruptcy policy. The split created by the Second Circuit in *Colonial Realty* needs to be resolved so the policy undergirding Title 11 can be interpreted and applied as Congress intended. Wherefore, the Trustee requests that this Court grant his Petition for a Writ of Certiorari.

Respectfully Submitted,

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# APPENDIX

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**APPENDIX A**

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**PUBLISH**

**UNITED STATES COURT OF APPEALS**
**TENTH CIRCUIT**

**No. 12-3113**

**[Filed March 12, 2013]**

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| ERIC C. RAJALA, Trustee in Bankruptcy for the Estate of Generation Resources Holding Company, LLC, | ) |
| Plaintiff - Appellant, | ) |
| v. | ) |
| ROBERT H. GARDNER; ROBBIN M. GARDNER; R. JAMES ANSEL; VIRGINIA Z. ANSEL; WILLIAM W. STEVENS; AKIKO N. STEVENS; LOOKOUT WINDPOWER HOLDING COMPANY, LLC, a Missouri Limited Liability Company; FORWARD WINDPOWER HOLDING COMPANY, LLC, a Missouri Limited Liability Company; LOOKOUT WINDPOWER HOLDING COMPANY, LLC (MO); FORWARD | ) |

WINDPOWER HOLDING COMPANY, LLC (MO); STEVENS FAMILY INVESTMENT COMPANY, LLC, a Missouri LLC,

Defendants - Appellees,

and

FREESTREAM CAPITAL, LLC; GARDNER FAMILY INVESTMENT COMPANY, LLC, a Missouri LLC; WINDFORCE HOLDINGS, INC.;

Consol Defendants - Appellees,

and

EDISON MISSION ENERGY, a California corporation; MISSION WIND PENNSYLVANIA, INC., a Delaware corporation; MISSION WIND PA TWO, INC., a Delaware Corporation; MISSION WIND PA THREE, INC., a Delaware corporation; LOOKOUT WIND POWER, LLC, a Delaware Limited Liability Corporation; FORWARD WIND POWER, LLC, a Delaware Limited Liability Company,

Defendants.

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**APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. No. 2:09-CV-02482-EFM-KMH and 2:11-CV-02524-EFM-KMH)**

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Michael P. Healy (and Michael J. Fleming of The Healy Law Firm, L.L.C., on the briefs), Lee's Summit, Missouri, for Plaintiff - Appellant.

Scott J. Goldstein (Douglas M. Weems and Barry L. Pickens of Spencer, Fane, Britt & Browne, L.L.P, with him on the brief), Kansas City, Missouri, for Defendants - Appellees.

Tyler W. Hudson and Adam S. Davis of Wagstaff & Cartmell, L.L.P., Kansas City, Missouri, for Consol Defendant -Appellee

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Before **KELLY**, **MURPHY**, and **TYMKOVICH**, Circuit Judges.

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**KELLY**, Circuit Judge.

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Plaintiff-Appellant Eric Rajala, Trustee of the bankruptcy estate of Generation Resources Holding Company, LLC (GRHC), appeals from the district court's order granting motions to distribute (by Defendants-Appellees FreeStream Capital, LLC

(FreeStream) and Lookout Windpower Holding Co., LLC (LWHC)) approximately $9 million held in escrow. This amount represents part of the purchase price of a wind power project allegedly developed by GRHC. In a nutshell, the Trustee claims that the Debtor, GRHC, has been left with $5 million in debt while the individual Defendants-Appellees and their affiliated entities received some $13 million in proceeds from the sale of several wind power projects, unburdened by the debt.

At issue is what constitutes property of the bankruptcy estate and whether allegedly fraudulently transferred property is subject to the Bankruptcy Code's automatic stay *before* a trustee recovers the property through an avoidance action. See 11 U.S.C. §§ 362, 541(a). The district court held that allegedly fraudulently transferred property is not part of the bankruptcy estate until recovered and therefore is beyond the reach of the automatic stay. Exercising our jurisdiction under 28 U.S.C. § 1291, we affirm.

## Background

GRHC was formed in 2002 for the purpose of developing wind-generated power projects. Aplt. App. 69–70. As part of its development strategy, GRHC employed FreeStream to provide advisory services. Id. at 79. In June 2005, GRHC entered into a Memorandum of Understanding (MOU) with Edison Capital (Edison). Id. at 75–77. The MOU detailed Edison's contemplated purchase of three GRHC wind power projects, including the "Lookout" project. Id. Based on the MOU, development agreements were also drafted. Id. at 79.

Later that year, several GRHC insiders formed LWHC.[1] Id. at 80. On February 3, 2006, LWHC closed a deal with Edison for the sale of the wind power projects. Id. at 83. According to the second amended complaint, the GRHC insiders caused a switch in the identity of the projects' developer from GRHC to LWHC. Id.

On March 28, 2007, LWHC entered into a contract, the Lookout Redemption Agreement (LRA), with an Edison subsidiary. Id. at 96–97, 319–24. The LRA provided that once Lookout achieved commercial operation (at which point it would be fully owned by Edison), it would pay "25% of the Final Installment to FreeStream [] , as full satisfaction of all amounts that may be due to FreeStream [] from Lookout, Developer Member and/or Investor Member, and (ii) 75% of the Final Installment to Developer Member." Id. at 320. The LRA identified LWHC as the "Developer Member." Id. at 319.

*The Fraudulent Transfer Claims*

In September 2009, the Trustee filed suit in Kansas federal district court against six individual defendants and numerous companies. Id. at 20, 58–67. The Trustee refers to several of the Defendants as "insiders," based on their ownership and control of GRHC. Id. at 59. The second amended complaint contains numerous claims, including fraudulent

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[1] LWHC was first established as a Pennsylvania company (LWHC-PA), but LWHC-PA then transferred its interests to a newly-created Missouri company, LWHC-MO. Id. at 91.

transfer claims. Id. at 56–156. The Trustee alleges the insiders fraudulently transferred GRHC's development and redemption opportunities to insider-owned companies. Id. at 108–37.

*The Pennsylvania Case*

In April 2009, LWHC and FreeStream sued Edison in federal district court in the Western District of Pennsylvania, seeking the final installment due under the LRA Id. at 166. In an effort to suspend LWHC and FreeStream's suit, the Trustee requested that the Kansas federal district court stay the Pennsylvania case or hold that any judgment obtained could not result in collateral estoppel in the Kansas case. Id. at 157–58, 200–01. The Trustee contended that any proceeds would be property of GRHC's bankruptcy estate—thus related to the action in Kansas federal district court. Id. The Kansas federal district court denied the Trustee's motion, and the Pennsylvania case proceeded. Id.

Shortly before the Pennsylvania case went to trial, the Trustee filed a notice of bankruptcy with the Pennsylvania court, followed by a motion to stay the case or, alternatively, transfer it to Kansas. Id. at 188, 193–94, 199–214. The Trustee argued that Lookout's sale price was property of GRHC's bankruptcy estate and, therefore, subject to the automatic stay. Id. at 202–03.

On May 31, 2011, the Pennsylvania federal district court declined the Trustee's motion to stay or transfer, and proceeded to enter judgment in favor LWHC and FreeStream for approximately $9 million (75% to

LWHC; 25% to FreeStream). Id. at 187, 197–98. However, the court transferred the issue of whether the judgment was part of GRHC's bankruptcy estate to the Kansas bankruptcy court. Id. at 195–96, 198. The Pennsylvania court also ordered that the judgment funds be deposited with the Kansas bankruptcy court. Id. 160–61, 198.

Once in Kansas bankruptcy court, LWHC and FreeStream successfully moved to withdraw the case to Kansas federal district court. Id. at 363. The court also consolidated the Pennsylvania case with the Trustee's pending claims. Id. at 227, 352–54.

*The Distribution*

Both LWHC and FreeStream filed motions to distribute the Pennsylvania judgment, arguing that the funds were not property of GRHC's bankruptcy estate. Id. at 181–86, 335–43. On April 9, 2012, the Kansas federal district court granted their motions. See Rajala v. Gardner, No. 09-2482-EFM, 2012 WL 1189773 (D. Kan. Apr. 9, 2012). The court held that the bankruptcy estate does not include fraudulently transferred property until recovered through a fraudulent transfer suit. Id. at *7. The court also held that because the LRA provided for FreeStream to be paid directly by Lookout, FreeStream's contingency fee could never be considered part of the bankruptcy estate. Id. at *5–6.

On April 12, the district court issued a clarifying nunc pro tunc order directing the bankruptcy court to distribute the Pennsylvania judgment. Aplt. App. 398–99. The Trustee followed with a motion to certify

that order for appellate review, Fed. R. Civ. P. 54(b), which the district court denied. Id. at 402–13. The court held that the Trustee's motion to certify the April 12 order was procedurally improper. Id. at 409. The court also indicated it would decline to grant any Rule 54(b) motion to certify its April 9 substantive order, reasoning that the order was non-final as to the fraudulent transfer claims . Id. at 409–13.

## Discussion

### A. Does this Court Have Appellate Jurisdiction?

Contrary to the arguments of the various Defendants, the Kansas federal district court did rule on the applicability of the automatic stay in granting the motions to distribute. Specifically, the court found that the Pennsylvania judgment was not property of GRHC's estate and, therefore, not subject to the automatic stay. Thus, the district court's order, which deemed § 362 inapplicable to the judgment proceeds, was essentially an order granting relief from the automatic stay. See Quigley Co., Inc. v. Law Offices of Peter G. Angelos (In re Quigley Co.), 676 F.3d 45, 51 (2d Cir. 2012) (holding that a decision on § 362's applicability is "the equivalent of a decision . . . on a motion seeking relief from a stay"); see also Eddleman v. U.S. Dep't of Labor, 923 F.2d 782, 785 (10th Cir. 1991), overruled in part on other grounds by Temex Energy, Inc. v. Underwood, Wilson, Berry, Stein & Johnson, 968 F.2d 1003, 1005 n.3 (10th Cir. 1992).

The grant or denial of relief from an automatic stay is generally an appealable final order. Franklin Sav. Ass'n v. Office of Thrift Supervision, 31 F.3d 1020, 1022

n.3 (10th Cir. 1994); see 3 Collier on Bankruptcy ¶ 362.13 (collecting cases). We have explained that an immediate appeal "is necessary to effectuate Congress' intent to settle these matters quickly." Eddleman, 923 F.2d at 785.

Defendants do not contest the general rule. Rather, they argue that 28 U.S.C. § 158(d) circumscribes our jurisdiction. Accordingly, we may only review a decision granting relief from a stay where the order is entered by a bankruptcy court and affirmed by a district court. But this view of our jurisdiction is too limited. When a district court exercises its jurisdiction and grants relief from an automatic stay, that decision is considered an "appealable final order" under 28 U.S.C. § 1291. See Franklin Sav. Ass'n, 31 F.3d at 1022 n.3; see also Safety-Kleen, Inc. v. Wyche, 274 F.3d 846, 864 n.4 (4th Cir. 2001); United States v. Pelullo, 178 F.3d 196, 200–01 (3d Cir. 1999); Lentino v. Cage (In re Lentino), ---F.3d ----, 1999 WL 77140, at *1–2 (5th Cir. 1999) (summary calendar); Sonnax Indus., Inc. v. Tri Component Prods. Corp. (In re Sonnax), 907 F.2d 1280, 1283 (2d Cir. 1990); Tringali v. Hathaway Mach. Co., Inc., 796 F.2d 553, 557–58 (1st Cir. 1986); Packerland Packing Co. v. Griffith Brokerage Co. (In re Kemble), 776 F.2d 802, 805 (9th Cir. 1985).[2]

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[2] Additionally, some courts and commentators have relied upon 28 U.S.C. § 1292(a)(1) as a basis for jurisdiction over orders denying or granting relief from § 362. See In re Nat'l Cattle Cong., Inc., 91 F.3d 1113, 1114 (8th Cir. 1996); see also Wright, Miller, & Cooper, Federal Practice & Procedure § 3926.1, at 290–91 (2012). But for purposes of this appeal, we need only consider § 1291 as the basis for our jurisdiction.

We recognize that in Trinity Broad. Corp. v. Eller, we weighed in on one side of a circuit split in holding "that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291." 827 F.2d 673, 675 (10th Cir. 1987). However, this rule is necessarily more flexible in the bankruptcy context, where the concept of finality requires consideration of a particular adversary proceeding or a discrete controversy rather than the broader litigation. See Healthtrio, Inc., v. Centennial River Corp. (In re HealthTrio, Inc.), 653 F.3d 1154, 1159–60 (10th Cir. 2011); see also Keyesr v. Wasacht Towers Condo. Owners Ass'n, Inc., No. 12-4114, 2012 WL 5909210, at *2 (10th Cir. Nov. 27, 2012). For practical purposes, the finality of a decision granting or denying relief from an automatic stay is the same whether the order is issued by a bankruptcy court or a district court. See, e.g., Official Comm. of Unsecured Creditors v. Cajun Elec. Power Co-op, Inc., (In re Cajun Elec. Power Co-op., Inc.), 119 F.3d 349, 353–54 (5th Cir. 1997); Jove Eng'g, Inc. v. I.R.S., 92 F.3d 1539, 1547–48 (11th Cir. 1996); In re Sonnax, 907 F.2d at 1283; United States v. Nicolet, Inc., 857 F.2d 202, 205 (3d Cir. 1988); see also 16 Wright, Miller, & Cooper, Federal Practice and Procedure § 3926.1, at 286–88 (2012).

Defendants seek to distinguish Franklin Sav. Ass'n. They argue that unlike Franklin Sav. Ass'n, the underlying litigation in this case is ongoing. This argument is unpersuasive. First, the Trustee has not asserted any fraudulent transfer claims against FreeStream. Second, the pending fraudulent transfer claims against LWHC do not preclude us from treating the district court's decision as a final, appealable order.

Simply put, the scope of the automatic stay constitutes a discrete dispute. See Howard Delivery Serv., Inc. v. Zurich Am . Ins. Co., 547 U.S. 651, 657 n.3 (2006) ("[O]rders in bankruptcy cases may be immediately appealed if they finally dispose of *discrete issues within the larger case* . . . ." (quotation omitted)). The narrow legal issue presented on appeal does not depend on the merits of the underlying fraudulent transfer claims. In fact, resolution of the fraudulent transfer claims would render the court's decision on the automatic stay "virtually unreviewable." See Eddleman, 923 F.2d at 785. Accordingly, we have jurisdiction to review the district court's decision on this point of law.[3]

Defendants raise another challenge to our jurisdiction. They argue the appeal is moot because we cannot grant the Trustee an effective remedy. See Aplee. Br. (FreeStream) 17–18. It is true that a lawsuit is moot where the court cannot possibly grant relief. See Calderon v. Moore, 518 U.S. 149, 150 (1996) (per curiam). But Defendants bear the heavy burden of proving there is no longer a live case. See In re Paige, 584 F.3d 1327, 1336 (10th Cir. 2009); see also Cnty. of LRA v. Davis, 440 U.S. 625, 631 (1979). And even "a partial remedy is sufficient to prevent a case from being moot." Calderon, 518 U.S. at 150 (quotation omitted).

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[3] Though it appears the district court concluded that its April 9 order was not final, we disagree. As the Court has stated, "Rule 54(b) . . . . does not supersede any statute controlling appellate jurisdiction." Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 438 (1956).

Here, the Trustee simply requests that we reverse the district court by holding that the $9 million is GRHC property and should be returned to the bankruptcy court pursuant to § 362(a)(3). Aplt. Br. 52. This is not a case where real property has been sold to a third party, or where reversal would require untangling a complex web of transactions. See In re Arnold & Baker Farms, 85 F.3d 1415, 1419–20 (9th Cir. 1996) ("Fashioning effective judicial relief would hardly require putting Humpty Dumpty together again." (quotation omitted)). Rather, the Trustee seeks to reimpose the stay on the amount disbursed. See In re C.W. Mining Co., 641 F.3d 1235, 1239 (10th Cir. 2011) (case not moot where monetary relief was possible); Raymark Indus., Inc. v. Lai, 973 F.2d 1125, 1129 (3d Cir. 1992); see also Am. Atheists, Inc., v. Detroit Downtown Dev. Auth., 567 F.3d 278, 287–88 (6th Cir. 2009); Burbank Anti-Noise Grp. v. Goldschmidt, 623 F.2d 115, 116 (9th Cir. 1980).

We recognize the possibility that various Defendants have dissipated all or part of the funds. But money is fungible and we have no reason to think that $9 million could not be returned. Further, the Trustee is not required to demonstrate that he will obtain complete relief; it is likely that some measure of effective relief could be fashioned, hence, the case is not moot. See In re Paige, 584 F.3d at 1336–37.

B. Does Freestream's 25% Contingency Fee Constitute Property of the Bankruptcy Estate Under § 541?

Whether the contingency fee constitutes property of the estate is a question of law reviewed de novo. In re Cranmer, 697 F.3d 1314, 1316 (10th Cir. 2012). The

district court concluded that FreeStream's contingency fee could "never be" property of the estate. The court based its decision on the LRA, which required Lookout to pay "25% of the Final Installment to FreeStream [], as full satisfaction of all amount that may be due . . . from Lookout, Developer Member and/or Investor Member." According to the district court, it is "clear that FreeStream's portion [came] directly from Lookout" and did "not pass through the Developer Member." Rajala, 2012 WL 1189773, at *5.

The Trustee argues that the district court focused on the physical path of the funds, rather than the legal path required by the documents. Aplt. Br. 29–31. He argues that the purchase price is based upon the value of the projects, and any money FreeStream received is part of the purchase price, as allocated by the Developer Member. Id. at 30. Merely because the ultimate amount is based upon the value of the project or is part of the purchase price does not allow us to disregard the language of the agreements or the Pennsylvania judgment. Aplt. App. 197–98.

The district court was correct—the plain language of the LRA clearly required FreeStream's payment to come directly from Lookout (owned by Edison). Further, as both the Pennsylvania and Kansas courts found, FreeStream was the intended third-party beneficiary of the LRA As such, FreeStream had a right to enforce the LRA, and FreeStream had its own right to payment. See John Julian Const. Co. v. Monarch Builders, Inc., 306 A.2d 29, 34 (Del. Super. Ct. 1973) (The LRA provided that it was to be governed by Delaware law.). Therefore, the district court correctly

held that FreeStream's fee could not be considered property of GRHC's bankruptcy estate.

C. Does an Automatic Stay Apply to Unrecovered Property that Is the Subject of a Fraudulent Transfer Claim?

The underlying issue we must decide is whether a bankruptcy estate includes fraudulently transferred property that the Trustee has not yet recovered. Because the appeal presents a question of statutory interpretation, our review is de novo. In re HealthTrio, 653 F.3d at 1161.

1. The Split

Under 11 U.S.C. § 362(a)(3), the filing of a Chapter 7 bankruptcy petition automatically stays "any act to obtain possession of property of the estate . . . or to exercise control over property of the estate." Section 541(a)(1) defines property of the estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case," and § 541(a)(3) also includes in the estate "[a]ny interest in property that the trustee recovers under section . . . 550." Under § 550, a trustee may recover transferred property, "to the extent that a transfer is avoided under section . . . 548." In turn, § 548 enables the trustee to avoid fraudulent transfers.

The Fifth Circuit has held that fraudulently transferred property belongs to the estate under § 541(a)(1), and is therefore subject to § 362's stay even before it is recovered. Am. Nat'l Bank of Austin v. MortgageAmerica Corp. (In re MortgageAmerica

Corp.), 714 F.2d 1266 (5th Cir. 1983). The court explained that "it makes the most sense to consider the debtor as continuing to have a 'legal or equitable interest' in the property fraudulently transferred." Id. at 1275; see also Barber v. McCord Auto Supply, Inc. (In re Pearson Indus., Inc.), 178 B.R. 753, 764 (Bankr. C.D. Ill. 1995) ("The transferee merely h[olds] voidable title . . . ."). Thus, even before fraudulently transferred property comes into the estate by operation of § 541(a)(3), the property is considered part of the estate under § 541(a)(1).

In contrast, the Second Circuit rejected In re MortgageAmerica's analysis in favor of a narrower reading.[4] See Fed. Deposit Ins. Corp. v. Hirsh (In re Colonial Realty Co.), 980 F.2d 125 (2d Cir. 1992). The court held that § 541(a)(3), rather than § 541(a)(1), governs § 362's stay as applied to fraudulently transferred property. Therefore, such property does not become part of the estate *until it is recovered*. Id. at 131. In other words, pursuant to § 541(a)(3), the automatic stay does not apply to fraudulently

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[4] Outside the Fifth and Second Circuits, courts are divided between the two approaches. The Trustee cites N.L.R.B. v. Martin Arsham Sewing Co., 873 F.2d 884 (6th Cir. 1989), as adopting the In re MortgageAmerica rationale. There, the Sixth Circuit concluded that "property fraudulently conveyed and recoverable under [the Code] remains property of the estate and, if recovered, should be subject to equitable distribution under the Code." Id. at 887. But as Defendants note, courts within the Sixth Circuit have interpreted Arsham differently. Compare Teleservices Grp., Inc. v. Huntington Nat'l Bank (In re Teleservices Grp., Inc.), 463 B.R. 28, 34 n.18 (Bankr. W.D. Mich. 2012), with In re Cincom iOutsource, Inc., 398 B.R. 223, 235 (Bankr. S.D. Ohio 2008).

transferred property until the transfer is avoided under § 548, and the property is recovered under § 550.

2. Which Interpretation?

In general, "[t]he plain meaning of [a statute] should be conclusive, except in the rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." United States v. Ron Pair Enters., Inc., 489 U.S. 235, 242 (1989). Here, although § 541 is very broad, see Parks v. Dittmar (In re Dittmar), 618 F.3d 1199, 1207–10 (10th Cir. 2010), it plainly does not include fraudulently transferred property until that property is recovered. Therefore, because the statute's plain meaning is not demonstrably at odds with Congress's intent, it should control.

Section 541(a)(1) defines the bankruptcy estate as including "all legal or equitable interests" the debtor holds "as of the commencement of the case." The Trustee alleges that GRHC's insiders fraudulently transferred the Lookout purchase price to Defendants. Accordingly, the Trustee urges us to adopt the In re MortgageAmerica rationale, under which the Debtor retains an "equitable interest" in fraudulently transferred property. See 714 F.2d at 1275; Aplt. Br. 41–44.

An equitable interest is "[a]n interest held by virtue of an equitable title or claimed on equitable grounds, such as the interest held by a trust beneficiary." Black's Law Dictionary (9th ed. 2009). "Equitable title" is defined as "a beneficial interest in property [which] gives the holder the right to acquire formal legal title."

Id. Reading "equitable title" to include any property a trustee merely alleges to have been fraudulently transferred would violate the concept of equity. See Michael R. Cedillos, Note, Categorizing Categories: Property of the Estate and Fraudulent Transfers in Bankruptcy, 106 Mich. L. Rev. 1405, 1416–17 (2008). "[O]ne of the fundamental principles [of] equity jurisprudence is . . . that before a complainant can have [] standing in court he must first show that . . . [he has] a good and meritorious cause of action . . . ." Keystone Driller Co. v. Gen. Excavator Co., 290 U.S. 240, 244 (1933). It follows that a mere allegation, without any showing of merit, cannot create "equitable title."

Further, "[i]t is a cardinal principle of statutory construction that . . . if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001). Here, § 541(a)(3) provides that the estate includes "[a]ny interest in property that the trustee recovers" pursuant to his avoidance powers. As the Second Circuit explained, interpreting § 541(a)(1) to include fraudulently transferred property would render § 541(a)(3) meaningless with respect to property recovered in a fraudulent transfer action. In re Colonial, 980 F.2d at 131.

In response, the Trustee argues that § 541(a)(3) is "a belt and suspenders," designed to ensure that assets will be available to satisfy creditor interests. See Aplt. Br. 35. The Trustee argues that inclusion of such property acts as a deterrent to fraudulent transfers and furthers the bankruptcy objectives of asset preservation and equitable distribution. However, there are already several mechanisms for safeguarding

debtor assets. Even before property is recovered and brought into the estate under § 541(a)(3), a trustee may seek a preliminary injunction or temporary restraining order pending resolution of a fraudulent transfer claim.[5] See Fed. R. Civ. P. 65; Fed. R. Bankr. P. 7065. In other words, we are wary of expanding § 541(a)(1) beyond its plain meaning on policy grounds where other avenues of asset preservation are readily available.

Moreover, this is not one of the "rare cases" where the plain meaning of the statute leads to an absurd result. Both sides present plausible arguments regarding Congress's intent. Compare In re Mortgage America 714 F.2d at 1275 (citing H.R. Rep. No. 595 (1978)), with In re Colonial, 980 F.2d at 131 (citing structure of statute as evidence of legislative intent). Therefore, the plain meaning of the statutory language should control.

Finally, we are mindful that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the [courts should] construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs, 531 U.S. 159, 173 (2001)

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[5] In fact, the Trustee attempted to use Rule 65 by filing a motion for a temporary restraining order or preliminary injunction. See Aplt. App. 414–15. However, the district court denied the motion based on the Trustee's failure to show a likelihood of success on the merits, and the court's conclusion that a preliminary injunction would be adverse to the public interest. See id. at 417–21. Notably, the Trustee did not appeal.

(quotation omitted). Although neither party addressed the issue, we note that a broad reading could potentially violate the Due Process Clause by allowing a trustee to enjoin another party's property rights based only on the allegation of fraud. See Connecticut v. Doehr, 501 U.S. 1, 10 (1991).

Both parties agree that fraudulent transfer claims are included in the bankruptcy estate. But according to the Trustee, § 541(a)(1) also includes property that is the subject of a fraudulent transfer claim—even if the property has been sold to a bona fide purchaser. See Oral Argument (12:15). This reading of the statute is particularly troublesome given that § 362's stay is automatic. Mere filing of a fraudulent transfer claim could deprive a bona fide purchaser of his property without judicial supervision, a finding of probable cause, the posting of a bond, or a showing of exigent circumstances—let alone a pre-deprivation opportunity to be heard. See N. Ga. Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 607 (1975); see also Doehr, 501 U.S. at 10, 17–18. Therefore, because "we assume that Congress legislates with constitutional limitations in mind," see U.S. W., Inc., v. F.C.C., 182 F.3d 1224, 1231 (10th Cir. 1999), we would be reluctant to adopt the Trustee's sweeping interpretation of the statute.

In the end, we need not pass upon the constitutionality of such a broad reading. Instead, we adopt the statute's plain meaning and hold that fraudulently transferred property is not part of the bankruptcy estate *until recovered*. This interpretation gives Congress's chosen language its ordinary meaning, and abides by the rule against surplusage. Further, our reading does not undermine the Bankruptcy Code's

goal of equitable distribution, as there exist alternative means of protecting estate assets.

AFFIRMED. All pending motions are denied.

## APPENDIX B

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF KANSAS**

**Case No. 09-2482-EFM**

**[Filed April 9, 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 bankruptcy estate of Generation Resources Holding Company, LLC (GRHC), brought this suit against six individual defendants and numerous corporate entities. The individual defendants, officers of GRHC, formed GRHC for the purpose of developing wind farm projects in Pennsylvania. On April 28, 2008, GRHC filed a

voluntary petition for bankruptcy under Chapter 7 of the Bankruptcy Code. GRHC has over $6,000,000 dollars in unpaid debts. Plaintiff asserts eighteen claims alleging that the individual Defendants formed numerous other companies in an attempt to leave GRHC with $6 million in debt while the individual Defendants and their newly created companies kept over $10 million in proceeds from the sale of the wind farm projects.

## I. **Factual and Procedural Background**[1]

### ***Parties to the Lawsuit***

Plaintiff Eric Rajala, the Trustee in Bankruptcy, represents GRHC, a Delaware limited liability company, with its principal place of business in Leawood, Kansas.

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[1] The Court provides this background to give context to the current motions and the current disputes. A breach of contract action occurred in the Western District of Pennsylvania, and this Court incorporates some of the facts contained in the United States District Court for the Western District of Pennsylvania's "Findings of Fact and Conclusions of Law" and "Judgment and Memorandum and Order of Court." *See* Doc. 4-3 in Case No. 11-2524, The United States District Court for the Western District of Pennsylvania's Findings of Fact and Conclusions of Law [hereinafter *Findings of Fact*] and Doc. 4-1 in Case No. 11-2524, The United States District Court for the Western District of Pennsylvania's Judgment and Memorandum and Order of Court [hereinafter *Judgment and Memorandum*]. The specific facts that the Court relies upon in deciding each motion will also be set forth in the section addressing that motion.

Defendants include: Robert Gardner and Robbin Gardner, husband and wife; William Stevens and Akiko Stevens, husband and wife; James and Virginia Ansel, husband and wife ("individual Defendants"). Each couple owned and controlled a one-third interest of GRHC. These individual defendants formed the following companies which are also Defendants in this lawsuit: StonyCreek Windpower; Forward Windpower, LLC; Forward Windpower Holding Company (PA and MO); Lookout Windpower, LLC; Lookout Windpower Holding Company (PA and MO); Gardner Family Investment Company, LLC; Stevens Family Investment Company, LLC; and Windforce Holdings, Inc.

Other Defendants include: Edison Mission Energy; Mission Wind Pennsylvania, Inc.; Mission Wind Pennsylvania Two, Inc; and Mission Wind Pennsylvania Three, Inc. Edison Mission Energy owns and controls the Mission Wind entities. Edison also owns Defendants Lookout Windpower, LLC and Forward Windpower, LLC now. All of these Defendant companies will be referred to as "Edison."[2]

Finally, FreeStream Capital, LLC ("FreeStream"), a financial advisor to GRHC, is a Defendant.

***Timeline of Events***

In February 2002, the individual Defendants formed GRHC for the purpose of developing wind farm

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[2] These Defendants currently do not have any motions pending before the Court.

projects. In early 2002, two Pennsylvania-based foundations ("Foundations") approved GRHC for a $1,000,000 loan for the purpose of developing wind power projects in Pennsylvania. The Foundations approved an additional $1,000,000 loan to GRHC in October 2002.

In early 2004, GRHC principals began discussions with Edison Capital[3] about how to further develop the wind projects and ultimately sell them to Edison Capital.

On February 28, 2005, GRHC and FreeStream entered into an Advisory Services Agreement in which FreeStream agreed to provide advisory and consultancy services with respect to a possible third-party sale of a wind energy project, entitled StonyCreek.

On July 18, 2005, GRHC and Edison Capital entered into a seventeen-page Memorandum of Understanding (MOU) in which they contemplated Edison Capital purchasing from GRHC, as the developer, three wind power projects: Stonycreek Windpower; Forward Windpower; and Lookout Windpower. The MOU contained language that it was intended as an outline only. It also contained language that the agreement would become effective as of July

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[3] The Trustee's Complaint names Edison Capital as the entity involved in the discussions with GRHC and as the party to the Memorandum of Understanding. Edison Capital, however, is not a named Defendant. Furthermore, there is no explanation as to the relationship between Edison Capital and the named Defendants Edison Mission Energy and the Mission Wind entities.

18, 2005, and that it should be construed and enforced in accordance with California law.

The MOU provided certain terms of the contemplated purchase, including such items as sunk costs, development expenses, and loans. It estimated that GRHC had already incurred third-party development costs and expenses with respect to the projects of approximately 4.7 million. These were defined as "sunk costs," and the MOU provided that the applicable project company would reimburse GRHC for the sunk costs applicable to each project. With respect to developer fees, GRHC, as developer, would also be entitled to developer fees which included a COD (commercial operations date) fee for each project as defined in the applicable project agreements.

In addition, the MOU set forth that the project companies would not be liable for financial obligations that GRHC had previously incurred, except with respect to the Stonycreek project where there was $2.5 million in outstanding loans payable to Berks County Community Foundations and with respect to the Forward project where there was an outstanding $230,000 loan payable to Berks County Community Foundation. There was also language addressing a note in favor of Black & Veatch.

The MOU set forth the organization of the project companies, and the parties contemplated that special purpose project companies would be organized to own the development rights for each project. GRHC and Edison Capital would enter into an "Operating Agreement" with respect to each project company. The Operating Agreement would provide that prior to the

closing of construction financing, GRHC and Edison Capital would each own 50% of the project company. After the closing of construction financing, Edison Capital would make all of the capital contributions according to the terms of the Operating Agreement and would own 100% of the project company. The MOU also provided that after its execution, the parties would attempt to negotiate and finalize definitive agreements. Copies of the MOU were given to the Foundations and Black & Veatch.

In November 2005, the individual Defendants formed Lookout Windpower Holding Company (PA) ("LWHC") and Forward Windpower Holding Company (PA) ("FWHC"). On February 3, 2006, LWHC entered into an amended and restated operating agreement ("Lookout Operating Agreement") with Mission Wind, Pennsylvania, a subsidiary of Edison. This document provided that LWHC was the developer member of the Lookout Windpower project.[4]

The Lookout Operating Agreement related to the company, Lookout Windpower, LLC. This agreement set forth the basis in which Edison would become the 100% owner of Lookout Windpower. At the time the Lookout Operating Agreement was executed, Edison became 50% owner. Upon the commencement of construction, Edison would be entitled to the remaining 50% and become 100% owner of Lookout Windpower.[5]

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[4] FWHC also entered into an amended and restated operating agreement which provided that FWHC was the developer member of the Forward Windpower project.

[5] FWHC's operating agreement was similar.

On March 28, 2007, LWHC entered into a redemption agreement ("Lookout Redemption Agreement") with Edison. This document also provided that LWHC was the developer of the Lookout Windpower project. The Lookout Redemption Agreement provided that on or before March 30, 2007, payments should be made in the amount of $750,000 to LWHC, the developer member, and $250,000 to FreeStream Capital.[6] It also provided that once the project achieved commercial operation, Lookout Windpower (which would then be fully owned by Edison) would pay 25% of the final installment to FreeStream as full satisfaction of all amounts that may be due to FreeStream from LWHC and/or Edison, and Lookout Windpower would pay 75% of the final installment to LWHC.

### *GRHC's Bankruptcy and the Litigation Surrounding the Windpower Projects*

On April 28, 2008, GRHC filed for bankruptcy in Kansas.

The Lookout Windpower project became operational on October 20, 2008.[7] Edison disputed the amount due under the Lookout Redemption Agreement and did not pay. On December 17, 2008, LWHC and FreeStream filed suit in the Western District of Missouri against Edison and its affiliates, including Mission Wind and

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[6] Those amounts were paid on March 30, 2007. *Findings of Fact*, *supra* note 1, at ¶ 18.

[7] *Id.* at ¶ 34.

Lookout Windpower asserting that Edison breached its contract. On April 17, 2009, the Western District of Missouri dismissed the case for lack of jurisdiction. LWHC and FreeStream then filed suit in Western District of Pennsylvania asserting the same claims against Edison.

On September 11, 2009, Eric Rajala, the Bankruptcy Trustee for GRHC, filed this lawsuit in the District of Kansas. The Trustee filed his Second Amended Complaint on October 12, 2010, asserting numerous claims.[8] Broadly stated, the Complaint includes fraud, fraudulent concealment, and negligent misrepresentation claims on the basis that the individual Defendants falsely represented that GRHC was the sole developer of three Pennsylvania windpower projects and that GRHC would be paid from the sale of those windpower projects. The Trustee also alleges fraudulent transfer claims, contending that (1) GRHC's members, the individual Defendants, used GRHC's resources to identify the Lookout and Forward development opportunities and began development of those projects; (2) then GRHC's members transferred the development and redemption opportunities to other companies owned by the members; (3) which caused GRHC to default on its loans to creditors and declare bankruptcy while GRHC's members kept the proceeds of the Forward and Lookout development projects for themselves. In addition, the Trustee alleges a breach of fiduciary duty claim against the individual Defendants and against FreeStream. With respect to the individual

[8] Defendants previously moved to dismiss the case which the Court granted in part and denied in part. *See* Doc.

Defendants, the Trustee contends that Defendants breached their fiduciary duties to GRHC in numerous ways, including usurping corporate opportunities from GRHC. As to FreeStream, the Trustee alleges that FreeStream breached its fiduciary duty to GRHC by allowing the windpower project to go forward in LWHC's name instead of GRHC's name. Finally, the Trustee's equitable reformation/rescission claim against all Defendants seeks to reform the Lookout Operating and Redemption Agreements by substituting GRHC's name as the developer in those agreements instead of LWHC's name as the developer.

In early May 2011, the Trustee filed a motion in this Court seeking to stop the Pennsylvania bench trial between LWHC, FreeStream, and Edison, scheduled for May 27, 2011. The Trustee argued that the money sought in the Pennsylvania action was property of the GRHC bankruptcy estate. This Court denied the Trustee's motion finding that it did not have jurisdiction to stay the case in the Western District of Pennsylvania.[9]

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 its Judgment and Memorandum and Order of Court. It determined that Edison had breached the Lookout Redemption Agreement by failing to pay LWHC and FreeStream and owed $8,941,448.46, inclusive of prejudgment interest. The Pennsylvania court found that LWHC was due 75% of the judgment

[9] Doc. 129.

and FreeStream was due 25% of the judgment. In addition, the Pennsylvania court transferred the issue of whether the monetary judgment was part of the bankruptcy estate to the Bankruptcy Court in the District of Kansas.

Edison deposited the money into the Bankruptcy Court's Registry. 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.[10] The Trustee did not respond to LWHC's motion, and the Bankruptcy Court recommended that this Court withdraw the reference.[11] Accordingly, this Court granted the bankruptcy withdrawal, and the case was converted to a civil case and designated the case number of 11-2524.

From July 2011 through December 2011, the parties filed numerous motions in both Case No. 09-2482, the case filed with this Court, and in Case No. 11-2524, the converted civil case that was withdrawn from the Bankruptcy Court. In December 2011, these two cases were consolidated.[12]

This Order addresses: FreeStream's Motion to Distribute (Doc. 4 in Member Case 11-2524); Lookout Holding's Motion to Distribute (Doc. 9 in Member Case 11-2524); Individual/LWHC's Motion for Judgment on Pleadings (Doc. 144); Individual Defendants' Motion for

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[10] FreeStream joined in the motion.

[11] *See* Doc. 1-2 in Case No. 11-mc-00226-EFM.

[12] Doc. 193 in Case No. 09-2482.

Summary Judgment (Doc. 147); FreeStream's Motion for Summary Judgment on Count 18 (Doc. 183); and FreeStream's Motion for Summary Judgment on Count 11 (Doc. 195). All motions are fully briefed. The Court will address each motion in turn.

## II. Motions for Distribution of Funds

The Court will briefly set forth the background of the judgment funds pertinent to these motions.[13] On May 27, 2011, the District Court for the Western District of Pennsylvania heard LWHC's and FreeStream's breach of contract action against Edison. In that case, the contracts at issue were the Lookout Operating and Redemption Agreements between LWHC and Edison, and the court made its decision by looking at and interpreting those agreements.[14] On May 31, 2011, the District Court for the Western District of Pennsylvania found that Edison breached its

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[13] With respect to FreeStream's motion and the Trustee's response to FreeStream's motion, the parties attached the documents that they relied upon. That is, they attached the Western District of Pennsylvania's Findings of Fact and Conclusions of Law; the Western District of Pennsylvania's Judgment and Memorandum and Order; the MOU, the Lookout Amended Operating Agreement; and the Lookout Redemption Agreement.

With respect to LWHC's Motion to Distribute, LWHC failed to attach the Western District of Pennsylvania's Judgment and Memorandum and Order although it indicated that it was attached as Exhibit A. The Court has a copy of this exhibit because FreeStream attached it to its motion, and the Pennsylvania court sent a courtesy copy to this Court when it entered its Judgment.

[14] *Findings of Fact*, *supra* note 1, at ¶ 56.

contract with LWHC and FreeStream when it failed to timely pay the final installment.

After making deductions contained in the Redemption Agreement, the Pennsylvania court determined that the final installment due from Edison to LWHC and FreeStream was $7,610,098.26.[15] With prejudgment interest of $1,331,350.20, the total damages equaled $8,941,448.46 with 75% of the judgment award in favor of LWHC and 25% of it in favor of FreeStream.[16] The court found that FreeStream was entitled to enforce the Redemption Agreement as a third party beneficiary.[17] Edison deposited the money in the Bankruptcy Court's Registry pursuant to the Pennsylvania court's direction that the Kansas Bankruptcy Court determine whether the monetary judgment was part of GRHC's estate.

In the case filed with this Court,[18] the Trustee alleges that the individual Defendants engaged in fraudulent transfers. Very broadly, the Trustee alleges that GRHC's members used GRHC's resources to identify windpower development opportunities and then GRHC's members transferred those opportunities to other companies owned by the members which caused GRHC to default on its loans and declare bankruptcy. More specifically, the Trustee contends

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[15] *Id.* at ¶ 60.

[16] *Id.* at ¶¶ 63-64.

[17] *Id.* at ¶ 55.

[18] *See* Doc. 100 in Case No. 09-2482.

that GRHC's members entered into a MOU with Edison Capital, and the MOU specified that GRHC was the developer of all three windpower projects. The subsequent documents, including the Lookout Operating and Redemption Agreements, named LWHC as the developer of the Lookout windpower project. The Trustee asserts that GRHC should have been named the developer in those subsequent agreements, instead of LWHC, and that GRHC is the real party entitled to the payment from Edison under the agreements. Because LWHC was named as the developer, the Trustee contends that the individual Defendants fraudulently transferred the windpower project away from GRHC to LWHC.

Both FreeStream and LWHC now request this Court to distribute their portion of the Pennsylvania monetary judgment being held in the Bankruptcy Court. Both parties argue that the judgment funds are not property of GRHC's bankruptcy estate. The Court will first address FreeStream's Motion to Distribute and then address LWHC's Motion to Distribute.

**A. FreeStream's Motion to Distribute (Doc. 4 in Case No. 11-2524)**

FreeStream argues that the Court should distribute its portion (25%) of the money currently held in the bankruptcy court registry because it is not property of the GRHC bankruptcy estate, and GRHC will never be entitled to it.

The Trustee contends that the money is bankruptcy estate property and should not be distributed because FreeStream's portion of the judgment is part of the

"purchase price" of the wind farm projects. The Trustee argues that the true developer of the wind farm projects is GRHC. He argues that Edison pays GRHC under the MOU, the Lookout Operating Agreement, and the Lookout Redemption Agreement. Then, the Trustee contends that GRHC pays FreeStream pursuant to an Advisory Services Agreement between GRHC and FreeStream.[19]

The Trustee's argument is unsupported and directly contrary to the written agreements and the Pennsylvania court's findings. FreeStream's payment, as the Western District of Pennsylvania noted, is pursuant to the Lookout Redemption Agreement.[20] There is no indication that the Pennsylvania court ever considered the terms of the MOU or the Advisory Services Agreement when it determined that Edison breached the Lookout Operating and Redemption Agreements. The payment structure in the Lookout Redemption Agreement provides:

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[19] Although copies of the MOU, Lookout Amended Operating Agreement, and Lookout Redemption Agreement were provided with the briefing related to FreeStream's motion, no party provided a copy of the Advisory Services Agreement. Therefore, the Trustee's assertion as to FreeStream's payment under the Advisory Services Agreement is unsupported.

[20] The specific parties to the Lookout Redemption Agreement are Mission Wind Pennsylvania as the Investor Member, and LWHC, as the Developer Member. Mission Wind Pennsylvania and LWHC are the sole members of Lookout Windpower, LLC. For simplicity, the Court will refer to "Mission Wind Pennsylvania" as Edison because it is fully owned by Edison. Furthermore, the Court will refer to "Lookout Windpower" as Edison because Edison is now the sole owner of the Lookout Windpower entity.

> Lookout shall pay, subject to adjustment as provided below, $10,507,000 (the "Final Installment") as follows: (i) 25% of the Final Installment to FreeStream Capital LLC, as full satisfaction of all amounts that may be due to FreeStream Capital LLC from Lookout, Developer Member and/or Investor Member, and (ii) 75% of the Final Installment to Developer Member.[21]

This language makes clear that FreeStream's portion comes directly from Lookout. Lookout is now a fully owned Edison entity; thus, FreeStream's payment comes from Edison and does not pass through the Developer Member. To accept the Trustee's argument that FreeStream's portion comes from GRHC would mean that the Court would have to change the Developer Member to GRHC even though the Lookout Redemption Agreement states that LWHC is the Developer Member. The Court would also have to re-write the payment structure to provide 100% of the Final Installment to go to GRHC. This interpretation is contrary to the documents and to the Pennsylvania court's findings of fact. FreeStream's 25% of the final installment comes directly from an Edison entity and does not come from or pass through the Developer Member, whether it be LWHC or GRHC. Thus, FreeStream's 25% of the final installment cannot be part of GRHC's estate because GRHC would never be entitled to the installment.

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[21] Doc. 8-6 in Case No. 11-2524, Lookout Redemption Agreement, p. 2.

Furthermore, even though the Trustee alleges fraudulent-transfer claims against LWHC, the Trustee does not assert any fraudulent transfer claims against FreeStream. FreeStream, therefore, could not have participated in any alleged fraudulent transfers. Consequently, the analysis of whether a fraudulent transfer claim is part of the bankruptcy estate does not affect FreeStream.[22]

The Trustee provides no factual or legal basis as to why FreeStream's portion of the monetary judgment should not be distributed.[23] Because the Trustee cannot establish that FreeStream's portion of the monetary judgment is property of GRHC's bankruptcy estate, the Court grants FreeStream's Motion to Distribute.

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[22] The Court will discuss whether a fraudulent transfer claim, and the subject of the fraudulent transfer claim, is part of the bankruptcy estate in detail with respect to LWHC's motion. *See infra* Section II(B)(2)(a).

[23] Presumably, the Trustee contends that the monetary judgment is part of the bankruptcy estate pursuant to 11 U.S.C. § 541 as property of the estate, and that the bankruptcy code's automatic stay provision, 11 U.S.C. § 362, applies to stop the distribution of the money. The Trustee, however, failed to cite to either of these provisions in his response to FreeStream's motion for distribution. The Court makes this assumption that the Trustee relies on these bankruptcy provisions because the parties were before this Court on a similar matter when the Trustee sought to stay the Pennsylvania action by arguing that the breach of contract suit between LWHC, FreeStream, and Edison involved estate property pursuant to 11 U.S.C. § 541(a), and the bench trial should be stayed pursuant to 11 U.S.C. § 362(a). *See* Docs. 119, 120, 126, 127, 128, and 129 in Case No. 09-2482.

## B. LWHC's Motion for Distribution (Doc. 8 in Case No. 11-2524)

### *1. Procedural Arguments*

Before addressing the substantive issues of LWHC's Motion to Distribute, the Court will address several of the Trustee's procedural arguments.[24] The Trustee first argues that any party seeking the Bankruptcy Court's determination of property of the estate must file an adversary proceeding under Bankruptcy Rule 7001. This case is in a unique procedural position, in part because the Trustee chose to file his Second Amended Complaint containing the fraudulent transfer claims in this Court rather than in the Bankruptcy Court. In addition, the bankruptcy reference was withdrawn with regard to whether the Pennsylvania judgment was property of the bankruptcy estate. Although this Court will need to consider bankruptcy law with respect to this motion, bankruptcy procedural rules are inapplicable.

Next, the Trustee attached a proposed Amended Complaint with his response, asserting that he needed a framework in which to analyze the legal issues for the motion. The Court, however, denied the Trustee's Motion for Leave to File the Amended Complaint.[25] Therefore, the Trustee's reliance on allegations in the proposed Amended Complaint is improper. The Court

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[24] The Trustee did not assert these procedural arguments with respect to FreeStream's Motion to Distribute.

[25] Doc. 191.

will look to the allegations in the Second Amended Complaint in Case No. 09-2482 when deciding LWHC's Motion to Distribute.[26]

Finally, the Trustee categorizes LWHC's motion to distribute as a motion to dismiss and applies Bankruptcy Rule 7012(b). Again, district court rules apply here. Furthermore, the Court disagrees with the Trustee's categorization of LWHC's motion because a decision to distribute the funds will not dispose of Trustee's claims. Accordingly, LWHC's motion to distribute cannot be categorized as a motion to dismiss.

### *2. Substantive Arguments*

Turning to the substantive arguments, LWHC contends that its portion of the Pennsylvania judgment funds currently held in the Bankruptcy Court's Registry should be distributed. The Trustee asserts two arguments as to why the Pennsylvania monetary judgment is estate property under 11 U.S.C. § 541 and should not be distributed: (1) the judgment funds are the result of a fraudulent transfer, and (2) GRHC has a vested legal interest in those judgment funds. The Court will address each argument in turn.

#### *a. Fraudulent Transfer*

First, the Trustee asserts fraudulent transfer claims in his Second Amended Complaint against the

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[26] Doc. 100 in Case No. 09-2482. As noted above, the Court consolidated Case No. 09-2482 and Case No. 11-2524.

individual Defendants and their related companies.[27] As noted above, the Trustee contends that the individual Defendants transferred the Lookout development and redemption opportunities to other companies owned by the individual Defendants. Thus, the Trustee contends that the individual Defendants engaged in a fraudulent transfer. The Trustee then contends that property subject to a fraudulent-transfer claim is property of the bankruptcy estate. LWHC disagrees and contends that even if the Pennsylvania judgment funds are the result of a fraudulent transfer from GRHC to LWHC, the judgment funds are not property of GRHC's estate unless and until the Trustee successfully prevails on his alleged fraudulent transfer claims.

The parties do not dispute that a fraudulent-transfer cause of action is considered property of a bankruptcy estate.[28] They disagree as to whether the property of a fraudulent-transfer cause of action is property of the bankruptcy estate prior to an adjudication being made on whether a fraudulent-transfer occurred. Courts are divided on this issue, and

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[27] LWHC also has a Motion for Judgment on the Pleadings in which it asserts that the Trustee fails to state a fraudulent transfer claim. That motion will be addressed elsewhere in this Order. *See infra* Section III(C)(3).

[28] *See Sender v. Buchanan* (*In re Hedged-Investment Assocs. Inc.*), 84 F.3d 1281, 1285 (10th Cir. 1996) ("Causes of action belonging to the debtor fall within [the definition of § 541].")

neither the Tenth Circuit nor the Tenth Circuit Bankruptcy Appellate Panel have issued an opinion.[29]

Pursuant to 11 U.S.C. § 541(a)(1), a bankruptcy estate consists of all of the debtor's legal or equitable property interests that existed as of the commencement of the bankruptcy case, subject to a few exceptions. The scope of section 541 is broad and construed generously.[30]

In *American National Bank of Austin v. MortgageAmerica Corp.* (*In re MortgageAmerica Corp.*),[31] the Fifth Circuit read section 541(a)(1) expansively and determined that a debtor retained a continuing equitable interest in the property that was fraudulently transferred.[32] Thus, the Fifth Circuit found that the equitable interest in the fraudulently-transferred property was property of the estate, and the automatic stay provision under section 362(a) of the Bankruptcy Code was applicable preventing a third party from pursuing a fraudulent transfer action.[33]

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[29] *See, e.g., In re Silver*, 303 B.R. 849, 864, n.62 (10th Cir. B.A.P. 2004) ("[W]e need not decide whether property subject to an avoidance action is property of the estate.").

[30] *See Parks v. Dittmar* (*In re Dittmar*), 618 F.3d 1199, 1207 (10th Cir. 2010).

[31] 714 F.2d 1266 (5th Cir. 1983).

[32] *Id*. at 1275.

[33] *Id.* The Sixth Circuit relied on *MortgageAmerica* when it later stated that "property fraudulently conveyed and recoverable under Bankruptcy Code provisions remains property of the estate and, if

The Second Circuit, however, in *FDIC v. Hirsch* (*In re Colonial Realty Co.*,)[34] rejected *MortgageAmerica's* holding. The Second Circuit reasoned that to allow alleged fraudulently-transferred property to be part of the estate under section 541(a)(1) *prior to its recovery* would conflict with section 541(a)(3), which provides that property of the bankruptcy estate includes any interest in property that the trustee *recovers*.[35] Accordingly, the Second Circuit found that alleged fraudulently-transferred property was not property of the bankruptcy estate under section 541(a)(1).[36] Several

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recovered, should be subject to equitable distribution under the Code." *Nat'l Labor Relations Bd. v. Martin Arsham Sewing Co*., 873 F.2d 884, 887 (6th Cir. 1989). The Bankruptcy Court in the Western District of Michigan, however, questioned whether the Sixth Circuit actually followed *MortgageAmerica* because it found the Sixth Circuit's language in *Martin Arsham Sewing Co.* equivocal. *In re Teleservices Group, Inc*., 463 B.R. 28, 34 n.18 (Bankr. W.D. Mich. 2012).

[34] 980 F.2d 125 (2d Cir. 1992).

[35] *Id.* at 131 (citing *In re Saunders*, 101 B.R. 303, 305 (Bankr. N.D. Fla. 1989)).

[36] *Id*. The Second Circuit still stayed the third-party fraudulent transfer litigation, but it did so under a different Bankruptcy Code provision, section 362(a)(1). *Id.* at 132. That provision is not relevant to this case.

The Fourth Circuit noted the divide in the circuits, but did not definitely adopt either the Fifth or Second Circuit's position. *See French v. Liebmann (In re French)*, 440 F.3d 145, 152 n. 2 (4th Cir. 2006).

bankruptcy courts have adopted the Second Circuit's rationale as the better approach.[37]

Although these cases do not fit the facts of our case,[38] they are instructive. This Court finds more persuasive the Second Circuit's reasoning that fraudulently-transferred property is not part of the bankruptcy estate until it is recovered because there has been no determination that the underlying property was in fact fraudulently transferred. The Court recognizes that the scope of property under § 541(a)(1) is broad and that the Trustee retains the fraudulent-transfer causes of action as property of the estate. But as one court noted: "Until a judicial determination has been made that the property was, in

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[37] *See In re Loeffler*, 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 as adjudicated as such. Proceeds of such avoidance actions do not become estate property until actually recovered by the trustee."); *In re Fehrs*, 391 B.R. 53, 70-72 (Bankr. D. Idaho 2008) (finding that the Second Circuit's approach was preferable to *MortgageAmerica*); *Klingman v. Levinson*, 158 B.R. 109, 112-13 (N.D. Ill. 1993) (finding the Second Circuit's rationale more persuasive than *MortgageAmerica's* rationale).

[38] The majority of the courts addressing the 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 transfer litigation should be stayed, courts consider what constitutes estate property.

fact, fraudulently transferred, it is not property of the estate."[39]

In this case, a complicated path remains to the determination that the judgment funds are the subject of a alleged fraudulent transfer. The funds are being held in the Kansas Bankruptcy Court pursuant to the Western District of Pennsylvania Court's judgment. The Pennsylvania court determined that Edison breached the Lookout Operating and Redemption Agreement with LWHC and FreeStream. No party brought a fraudulent transfer cause of action in the Western District of Pennsylvania. Instead, it was a breach of contract action between LWHC and FreeStream against Edison, all of whom are non-debtors. Furthermore, GRHC was not a party to either the Lookout Operating or Redemption Agreements between Edison and LWHC. And the Trustee will have to demonstrate that the principals of GRHC fraudulently transferred its interest to LWHC. If the Trustee prevails on his fraudulent transfer claims, he then has the remedy of avoiding the fraudulent transfer and bringing it into GRHC's bankruptcy estate. Until there is an adjudication that a fraudulent transfer occurred, however, the Trustee has no basis to assert that LWHC's judgment funds pursuant to its contract with Edison are property of GRHC's bankruptcy estate. Accordingly, the judgment funds are not estate property pursuant to section 541(a)(1) until the Trustee demonstrates that a fraudulent transfer occurred that would encompass those judgment funds.

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[39] *In re Saunders*, 101 B.R. at 305.

***b. Rights under the MOU***

The Trustee next argues that the judgment funds are bankruptcy estate property because the MOU, between GRHC and Edison Capital vested GRHC with a property interest under section 541(a)(1). As noted above, the Trustee argues that the MOU between GRHC and Edison Capital governs the subsequent Lookout Operating and Redemption Agreements between LWHC and Edison and that GRHC should be named as the developer member in those agreements. Thus, the Trustee contends that GRHC's property interest includes the right to be paid the developer's fee described in the Lookout Redemption Agreement.[40]

The Trustee relies on a recent Tenth Circuit case, *Parks v. Dittmar* (*In re Dittmar*)[41] for support that GRHC had a legal or equitable interest in the right to be paid the developer's fee. The *Parks* holding, however, appears inapplicable to the facts of this case because the documents in this case do not appear similar to the documents in *Parks*.[42] In *Parks*, there

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[40] This is completely apart from the Trustee's fraudulent-transfer theory.

[41] 618 F.3d 1199 (10th Cir. 2010).

[42] *Id.* at 1203. Although the parties make comparisons between the MOU in this case and the Collective Bargaining Agreement in *Parks*, neither party attached the documents to their briefs. The Court, however, looked to the allegations contained in the Second Amended Complaint as to whom the parties to the agreements are in the MOU, Lookout Operating Agreement, and Lookout Redemption Agreement. The Court also considered the timing of these agreements.

was only a collective bargaining agreement, executed prior to bankruptcy, that gave the debtors a contingent interest in subsequent stock appreciation rights. The documents memorializing the stock appreciation rights, however, were not executed prior to bankruptcy.[43] In addition, the payment event that entitled the debtors to the stock appreciation rights did not occur prior to bankruptcy.[44] Subsequent to the debtors' bankruptcies, the documents were memorialized and the payment event occurred entitling the debtors to the stock appreciation rights.[45] The Tenth Circuit found that the debtors had a contingent interest, based on the collective bargaining agreement, to the stock appreciation rights.[46] Thus, the stock appreciation rights were considered estate property.[47]

In this case, there was a Memorandum of Understanding executed pre-bankruptcy. A MOU and a collective bargaining agreement are vastly different. However, even if the MOU could be akin to a collective bargaining agreement, other definitive documents were executed in this case prior to GRHC's bankruptcy, unlike in *Parks*. The Lookout Operating and Redemption Agreements were executed almost two years prior to GRHC's bankruptcy, and these

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[43] *Id.*

[44] *Id*.

[45] *Id*.

[46] *Id.* at 1209.

[47] *Id.* at 1209-10.

documents named LWHC as the developer. GRHC was not a party to the Lookout Operating and Redemption Agreements. For that reason, it does not appear that GRHC could hold a contingent interest in the payment under the Lookout Operating and Redemption Agreements, which supersede the MOU. Accordingly, the Trustee fails to demonstrate that GRHC had a legal or equitable interest in the developer's fee.[48]

The Trustee has not provided a legal basis to stay the distribution of the judgment funds. Thus, the Court grants LWHC's Motion to Distribute.

## III. Certain Defendants' Motion for Judgment on the Pleadings (Doc. 144)

### *A. Factual Background*

In the Second Amended Complaint, the Trustee asserts numerous claims against the individual Defendants and their respective business entities. The Trustee alleges that the individual Defendants engaged

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[48] Again, presumably, the Trustee intended to invoke the automatic stay provision of the bankruptcy code, 11 U.S.C. § 362, to stay the distribution of the judgment funds if those funds were considered estate property. However, he never cited to this provision but simply argued that the money was property of the estate and opposed the distribution. Even in the previous briefing to this Court relating to staying the Pennsylvania bench trial, the Trustee never cited to the specific provision of section 362(a) that he deemed applicable. Presumably, because he repeatedly argues that the money is *property* of the estate, he relies on section 362(a)(3) which stays "any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate."

in fraud, fraudulent concealment, and negligent misrepresentation. With respect to these three claims, the Trustee contends that the individual Defendants falsely represented that GRHC was the sole developer of the three Pennsylvania windpower projects and that the outstanding loans to GRHC would be paid from the sale of these windpower projects. Subsequent to these representations, GRHC's members created several other companies, including LWHC. Edison entered into the Lookout Operating and Redemption Agreements with LWHC as the named developer of the Lookout windpower project. These agreements entitled LWHC to the proceeds of the sale of the Lookout windpower project. The Trustee contends that GRHC is entitled to this money because GRHC was the true developer of the project.

As to the Trustee's fraudulent transfer claims, he alleges that (1) GRHC's members, the individual Defendants, used GRHC's resources to identify the Lookout and Forward development opportunities and began development of those projects; (2) then GRHC's members transferred the development and redemption opportunities to other companies owned by the members; (3) which caused GRHC to default on its loans to creditors and declare bankruptcy while GRHC's members kept the proceeds of the Forward and Lookout development projects for themselves. The Trustee's equitable reformation claim seeks to reform the Lookout Operating and Redemption Agreements by substituting GRHC as the developer instead of LWHC.

The individual Defendants and their respective business entities filed a Motion for Judgment on the Pleadings on the above listed counts that were alleged

against them. They argue that Defendants are entitled to judgment as a matter of law on the fraud claims (Counts 2, 3, and 4)[49] because (1) the Trustee does not have standing to pursue the fraud claims on behalf of the creditors, and (2) GRHC, as debtor, cannot bring a fraud claim because the individual Defendants, as sole members of GRHC, cannot have defrauded themselves. Defendants also assert if Counts 2, 3, and 4 fail, Count 11 must be dismissed because it is based on the alleged underlying fraud. Finally, Defendants contend that they are entitled to judgment as a matter of law on the fraudulent transfer claims (counts 5 through 10) because the Trustee only alleged a usurpation of a corporate opportunity and a usurpation of a corporate opportunity does not constitute a fraudulent transfer. The Court will address each contention.

### *B. Judgment on the Pleadings Standard*

Responsive pleadings have already been filed, and Defendants' motion is brought pursuant to Fed. R. Civ. P. 12(c) rather than Fed. R. Civ. P. 12(b)(6).[50] To survive a motion to dismiss for failure to state a claim upon which relief can be granted, a complaint must present factual allegations, assumed to be true, that "raise a right to relief above the speculative level," and must contain "enough facts to state a claim to relief

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[49] Count 2 is a negligent misrepresentation claim; count 3 is a fraud claim; and count 4 is a fraudulent concealment claim. These claims were only brought against the individual Defendants.

[50] This is a distinction without a difference as the standard is the same under Rule 12(c) and Rule (12)(b)(6). *Ward v. Utah*, 321 F.3d 1263, 1266 (10th Cir. 2003).

that is plausible on its face."[51] Under this standard, "the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims."[52]

### *C. Analysis*

#### *1. Fraud Claims (Counts 2, 3, and 4)*

First, Defendants argues that the Trustee lacks standing to bring these claims because he cannot bring fraud claims on behalf of the creditors and GRHC cannot defraud itself. A trustee in bankruptcy draws his authority to assert a particular cause of action from the provisions of the Bankruptcy Code.[53] "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."[54] Here, the Trustee asserts that he is pursuing estate property under section 541. "[T]o satisfy the requirements of § 541, the cause of action

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[51] *Bell Atl. Corp v. Twombly*, 550 U.S. 544, 555 (2007).

[52] *Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007).

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

[54] *Id.*

asserted by the trustee must belong to the debtor entity itself, not the debtor's creditors individually."[55] "State law provides the guidelines for determining whether a cause of action belongs to the debtor and therefore becomes property of the estate."[56] When the Trustee asserts claims under the authority of section 541, the trustee takes no greater rights than the debtor itself had because the trustee "stands in the shoes of the debtor."[57] And the Trustee is "subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor."[58]

***a. General versus Personal Claims***

Generally, a trustee lacks standing to pursue personal claims of creditors.[59] Several courts, in discussing whether a trustee has standing to pursue an alter ego action, have determined that a trustee can sometimes bring a claim on behalf of the debtor corporation if it is a general claim applicable to all creditors, and state law allows the claim.[60] To

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[55] *Id.* at 1305 (citations omitted).

[56] *Id.* (citations omitted).

[57] *Id.* (quotation and citation omitted).

[58] *Id.* (quotation and citation omitted).

[59] *See Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434 (1972).

[60] *See, e.g.*, *In re Icarus Holding, LLC*, 391 F.3d 1315, 1319-20 (11th Cir. 2004) (considering whether a bankruptcy trustee could bring an alter ego action by determining whether the alter ego

determine whether the cause of action is applicable to all creditors, these courts consider whether it is a general or personal claim. "A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause."[61] However, "[i]f the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors, it is a general claim."[62] A court will look to the injury for which relief is sought to determine whether the action is personal to the party alleging the cause of action or whether it is an action common to the corporation and creditors.[63] "If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate."[64]

Although there are no alter ego claims in this case, both parties cite to the above case law for the proposition that the Court must consider whether the

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action was a personal action of the creditors or a general one to creditors); *see also Koch Ref. v. Farmers Union Cent. Exch., Inc.*, 831 F.2d 1339, 1348-49 (7th Cir. 1987) (determining whether creditors could bring an alter ego action by considering whether the claim was a general or personal claim).

[61] *Koch Ref*, 831 F.2d at 1348.

[62] *Id.* at 1349.

[63] *Id.* at 1349.

[64] *In re Educators Group Health Trust*, 25 F.3d 1281, 1284 (5th Cir. 1994).

Trustee's fraud claims are general to all creditors or whether they are personal claims of a creditor to decide whether the Trustee has standing to bring these claims.[65] Because the parties agree upon this approach, and because the Court finds that this approach is helpful in determining the issue ,the Court will adopt this approach in evaluating the fraud claims in this case.

The parties, however, disagree as to the outcome of whether the claims are general to all creditors or personal to specific creditors with both parties employing different reasoning to reach their result. Defendants contend that the fraud claims are personal tort claims, citing to several cases which provide that fraud claims are non-assignable in Kansas.[66] The Trustee primarily focuses on the damages claimed in the Second Amended Complaint.[67] This is of little assistance as the total damages alleged will presumably always benefit all creditors, and the total damages do not demonstrate whether the actual claims are specific or personal to the creditors of GRHC. Irrespective of the alleged total damages, the Court must consider the scope of the Trustee's fraud allegations and the injury resulting from the allegations of fraud.

Adopting the principles from the above cited cases to the fraud claims alleged in this case, the Court will

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[65] *See* Doc. 145, p. 6; Doc. 172, pp. 9-10; Doc. 175, p. 4.

[66] *See* Doc 145, p.6-7 ; Doc. 175, p. 11.

[67] The Trustee's arguments are difficult to follow.

consider whether the underlying claim is a general claim that would benefit all creditors or a claim that seeks redress of a specific injury to a particular creditor and whether Kansas would allow the claim. The alleged injury from the negligent misrepresentation, fraud, or fraudulent concealment is that GRHC did not receive any of the $10.5 million Redemption payment. This alleged injury is not specific to any one creditor, nor specific to any misrepresentation to any creditor. As the Trustee noted at oral argument, the fraud allegations relate to the individual Defendants fraudulently switching the identity of the developer in the agreements which would not be a claim that a specific creditor could assert.[68] Although the injury appears to be general to creditors, the Court must go on to consider whether Kansas law would allow the Trustee to bring it on behalf of creditors.

As noted above, tort claims are not assignable in Kansas.[69] Moreover, the Court notes that fraud requires an untrue statement upon which another party justifiably relies upon and acts to his detriment.[70] This requirement is necessarily personal to the specific individual to whom the false statement was made.

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[68] The creditors' claims would be specific to the amount they claim due to them and the specific misrepresentations made to defraud them.

[69] *See Snider v. MidFirst Bank*, 42 Kan. App. 2d 265, 271, 211 P.3d 179, 184 (2009); *see also Wade v. EMCASCO Ins. Co.*, 483 F.3d 657, 675 (10th Cir. 2007).

[70] *See Alires v. McGehee*, 277 Kan. 398, 403, 85 P.3d 1191, 1195 (2004).

Here, with respect to the fraud and negligent misrepresentation claims, the Trustee alleged that the individual Defendants made certain misrepresentations intending GRHC and "others" to rely upon on those misrepresentations. The Trustee also alleged that GRHC and "others" relied upon those misrepresentations. But the "others" are never specifically identified in the Second Amended Complaint as creditors of GRHC.[71] Nor are the specific misrepresentations to specific creditors identified in the Second Amended Complaint. Because specific misrepresentations and specific creditors are not identified in the Second Amended Complaint, it does not appear that these claims encompass specific creditors. Instead, the Trustee's claims appear to be specific to GRHC itself. Accordingly, the Court concludes that although the recovery may benefit all creditors, these fraud claims are not general claims that GRHC could assert on behalf of creditors. Instead, the fraud claims are specific to GRHC, and only GRHC itself can assert the fraud claims against the individual Defendants.

***b. In Pari Delicto***

Because the Court concludes that the fraud claims are brought on behalf of GRHC and are not specific and personal claims of any creditor of GRHC, the Court must address whether the Trustee can bring these

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[71] The Court notes that with respect to the fraudulent-concealment claim, the Trustee asserts that GRHC and "its creditors" relied upon the individual defendants to communicate material facts. The creditors are not identified.

claims on behalf of GRHC against the individual Defendants. The Trustee stands in the shoes of GRHC and is therefore subject to the same defenses as if GRHC itself had asserted the cause of action.[72] Defendants contend that the Trustee cannot bring these fraud claims against the individual Defendants because the Individual Defendants, as sole members of GRHC, could not have defrauded themselves. As a practical matter, this argument makes sense because the individual Defendants could not have made false statements or misrepresentations to themselves and relied upon those false statements because they would have known that they were false statements. Accordingly, the individual Defendants could not have defrauded themselves because they could not have reasonably relied on any false statements made to themselves.

The Trustee does not address Defendants' contention that the individual Defendants could not have made misrepresentations to themselves but instead argues that Defendants are attempting to invoke the defense of *in pari delicto*. The Trustee contends that an exception to the *in pari doctrine* is applicable to the facts of this case. Defendants respond by asserting an exception to the exception.

The doctrine of *in pari delicto* provides that "[i]n a case of equal or mutual fault . . . the position of the

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[72] *Sender*, 84 F.3d 1305.

[defending] party . . . is the better one."[73] Generally, the doctrine of *in pari delicto* bars a plaintiff who participated in the wrongdoing from recovering damages resulting from the wrongdoing.[74] "When that wrongful conduct is perpetrated by a debtor who subsequently files for bankruptcy, courts have held that the defense of *in pari delicto* is available in an action by a bankruptcy trustee against another party pursuant to 11 U.S.C. § 541(a)(1) if the defense could have been raised against the debtor."[75] Thus, *in pari delicto* bars a trustee from bringing suit on behalf of the corporation against the third party because the debtor corporation's officers engaged in the fraud with that third party. This is so because the trustee stands in the shoes of the debtor and takes no greater rights than the debtor itself. In this case, it would bar the Trustee, standing in the shoes of GRHC, from recovering from a wrong that GRHC itself took part of. The facts are slightly different, however, because GRHC as the debtor corporation asserts claims against GRHC's officers for fraud against GRHC.

As an initial matter, the Trustee argues in a footnote that the *in pari delicto* doctrine is an affirmative defense that the Defendants did not plead, and it is not at issue right now. Defendants contend that although *in pari delicto* is generally an affirmative

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[73] *Mosier v. Callister, Nebeker & McCullough*, 546 F.3d 1271, 1275 (10th Cir. 2008) (citation and quotation omitted).

[74] *Id.* at 1275. In this opinion, the Tenth Circuit discussed the *in pari delicto* doctrine in the context of a defense.

[75] *Id.* (internal quotations and citations omitted).

defense under state law, in the bankruptcy context, some federal courts have considered it in conjunction with standing. Suffice it to say, there is not uniformity by courts in approaching standing and the doctrine of *in pari delicto*.[76]

The Second Circuit considers the *in pari delicto* doctrine a component of standing.[77] Other circuits, however, find that *in pari delicto* is an equitable defense apart from whether the trustee has standing to bring the claim.[78] The conclusions from both approaches, however, are the same in that *in pari delicto* bars the trustee from asserting a claim against a third party because the trustee cannot assert a claim on behalf of a corporation when that corporation's members engaged in the fraud.

In *In re Hedged-Investments Assocs.*,[79] the Tenth Circuit addressed whether the *in pari delicto* doctrine precluded a bankruptcy trustee from asserting certain claims against third parties. The trustee argued that he was immune to the defense because of his status of

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[76] *See* John T. Gregg, *The Doctrine of In Pari Delicto: Recent Developments,* 2006 Norton Annual Survey of Bankruptcy Law Part I § 5.

[77] *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F. 2d 114, 118-19 (2nd Cir. 1991).

[78] *See Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1152-53 (11th Cir. 2006); *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346-47 (3d Cir. 2001).

[79] 84 F.3d at 1281.

trustee.[80] The circuit rejected this argument and noted that the trustee's standing was based on 11 U.S.C. § 541, and section 541 placed "both temporal and qualitative limitations on the reach of the bankruptcy estate."[81] Because the trustee's standing arose from section 541 and he stepped into the shoes of the debtor, he could not "use his status as trustee to insulate the [debtor corporation] from the wrongdoing."[82] It is unclear from this decision whether the Circuit considers *in pari delicto* a component of standing or an affirmative defense.

The Court concludes that Defendants can raise the *in pari delicto* doctrine at this time. As noted above, the *in pari delicto* doctrine can be a component of standing. It is unsettled whether *in pari delicto* is solely an affirmative defense and therefore must be pled as such.[83] Furthermore, the result is the same whether *in pari delicto* is a defense or a component of standing.

As noted above, the *in pari delicto* doctrine precludes a trustee from bringing suit on behalf of a debtor corporation against a third party if the debtor corporation's officers engaged in the fraud with that

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[80] *Id.* at 1284.

[81] *Id*. at 1285.

[82] *Id.*

[83] Because standing could encompass the *in pari delicto* doctrine, and Defendants raised standing as affirmative defense in their Answer, the Court concludes that it can address the doctrine on a Motion for Judgment on the Pleadings.

third party. There are, however, exceptions to the *in pari delicto* doctrine. First, the adverse interest exception to the *in pari delicto* doctrine provides that fraudulent conduct will not be imputed to the corporation if the officer's interests were adverse to the corporation and not for the benefit for the corporation.[84] As noted above, in the Second Amended Complaint, the Trustee alleges that the individual Defendants made misrepresentations and concealed facts from GRHC and others. The Trustee relies on the adverse interest exception and argues that the individual Defendants' fraud should not be imputed to GRHC because the individual Defendants' conduct was adverse to GRHC.

Second, there is the sole actor exception, which provides that if an agent is the sole representative of a principal, then that agent's fraudulent conduct will be imputed to the principal regardless of whether the agent's conduct was adverse to the principal's interest.[85] "The rationale for this rule is that the sole agent has no one to whom he can impart his knowledge, or from whom he can conceal it, and that the corporation must bear the responsibility for allowing an agent to act without accountability."[86] Thus, the individual Defendants, as the sole representatives of GRHC, contend that their allegedly fraudulent conduct should be imputed to GRHC because the individual Defendants were the sole members of GRHC.

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[84] *Thabault v. Chait*, 541 F.3d 512, 527 (3rd Cir. 2008).

[85] *Id.*

[86] *Lafferty*, 267 F.3d at 359.

Taking the Second Amended Complaint as true, we can assume the individual Defendants engaged in wrongful conduct. Notwithstanding that the individual Defendants could not have defrauded themselves, the Trustee stands in the shoes of the debtor and can take no greater rights than GRHC. A bankruptcy trustee is not immune to the doctrine of *in pari delicto*. Thus, the individual Defendants' fraud is imputed to GRHC because they were the sole members of GRHC.[87] As a result, the Trustee, standing in the shoes of GRHC, cannot bring the fraud claims against the individual Defendants. Accordingly, the Court grants Defendants' Motion for Judgment on the Pleadings on Counts 2, 3, and 4.

### *2. Equitable Reformation Claim (Count 11)*

The Trustee's equitable reformation claim seeks to reform the Lookout Windpower Amended and Restated Operating agreement, the Lookout Windpower Development agreement, and the Lookout Windpower Redemption agreement. The Trustee alleges that these

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[87] The irony is not lost that the *in pari delicto* doctrine is based on equitable principals, and the individual Defendants are imputing their fraud onto their corporation to prevent the corporation from bringing fraud claims against them. However, "a trustee in bankruptcy is [not] immune to *in pari delicto* and other defenses based on the debtor's misconduct." *Mosier*, 546 F.3d at 1277. *See also In re Hedged-Investments Assocs.*, 84 F.3d at 1285-86 ("To be sure, [the Trustee] articulates sound reasons why it might be wise to allow an exception to this rule in cases, such as this one, where the trustee's efforts stand to benefit hundreds of innocent investors. However, to paraphrase the Supreme Court, the issue is not whether such an exception would make good policy but whether the exception can be found in the Bankruptcy Code.")

documents should be reformed to name GRHC as the developer instead of LWHC. Defendants contend that if the fraud claims are dismissed, the Trustee's equitable reformation claim must be dismissed as well because equitable reformation is only available in cases based on fraud.[88]

Generally, "[c]ontract reformation is an equitable remedy available to correct mutual mistakes of fact or fraud."[89] "Reformation is an ancient remedy used to reframe written contracts to reflect accurately the real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by the other party, the writing does not embody the contract as actually made."[90] Courts exercise reformation with great caution because it is such an extraordinary remedy.[91]

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[88] When the Trustee filed his Motion for Leave to Amend Complaint, he sought to remove his equitable reformation/ rescission claim. Doc. 175. The Court denied this motion, and the Trustee apparently intends to continue pursuing the claim. Although the Trustee includes rescission as a remedy in the Complaint, the Trustee does not argue for rescission of the documents but instead only argues for reformation. Accordingly, the Court will proceed on that basis.

[89] *Liggatt v. Employers Mut. Cas. Co.*, 273 Kan. 915, 926, 46 P.3d 1120, 1128 (2002).

[90] *Mutual of Omaha Ins. Co. v. Russell*, 402 F.2d 339, 344 (10th Cir. 1968) (citations omitted).

[91] *Id.*

The fraud claims no longer remain in this case, so there is no fraudulent conduct for the Trustee to rely upon to reform the documents. Furthermore, although the Trustee argues that reformation is available in the case of unilateral mistake, there are no allegations of mistake in the Second Amended Complaint. Finally, GRHC is not a party to the documents that the Trustee seeks to reform. Instead, the agreements are between LWHC and Edison. The Trustee, standing in the shoes of GRHC, has no basis to reform the documents. As such, the Court grants Defendants' Motion for Judgment on the Pleadings on Count 11.

### *3. Fraudulent Transfer Claims (Counts 5 - 10)*[92]

The Trustee brings fraudulent transfer claims pursuant to K.S.A. § 33-201, *et. seq*, Kansas's Uniform Fraudulent Transfer Act.[93] As noted above, the Trustee alleges that GRHC's members used GRHC's resources to identify the Lookout and Forward development opportunities and began development of those projects. The Trustee then contends that GRHC's members

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[92] These claims are: (5) fraudulent transfer of the Lookout Development opportunity; (6) fraudulent transfer of the Lookout Redemption opportunity to LWHC-PA; (7) fraudulent transfer of the Lookout Redemption opportunity to LWHC-MO; (8) fraudulent transfer of the Forward Development opportunity; (9) fraudulent transfer of the [Forward] Redemption opportunity to FWHC-PA; and (10) fraudulent transfer of the Forward Redemption opportunity to FWHCMO.

[93] 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.

fraudulently transferred those development and redemption opportunities to other companies owned by the members.

Defendants argue that there are no allegations that GRHC was the owner of any interest in the Forward or Lookout Windpower opportunities. Thus, Defendants assert that because there are no allegations that GRHC owned an interest in those opportunities, there is an absence of any transaction that could constitute a fraudulent transfer. Defendants contend that the Trustee has merely pled that the individual Defendants usurped from GRHC the Forward and Lookout windpower opportunities rather than pled that the individual Defendants fraudulently transferred the opportunity away from GRHC. Accordingly, they argue that the Trustee's fraudulent-transfer claims should be dismissed because they are not fraudulent transfer claims.[94]

On a motion for judgment on the pleadings, the Court must take the factual allegations as true. And the Trustee alleges that GRHC began development of the Lookout and Forward windpower projects and that GRHC identified those windpower projects as GRHC's projects to the public. After identifying the development opportunities as their own, the Trustee alleges that GRHC's members then transferred these opportunities to other companies owned by the

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[94] In a separate motion, Defendants contend that GRHC's Operating Agreement allowed for the Defendants to usurp these corporate opportunities. The Court addresses this motion elsewhere in this Order *See infra* Section IV.

members of GRHC. Specifically, the Trustee alleges, in at least one instance, that the "Insiders transfer[red], dispose[d], or otherwise cause[d] GRHC to part with GRHC's interest, investment, expectation and opportunity to complete development of the LW project [and FW project] and receive payment therefore."[95] This allegation fits with K.S.A. § 33-201 which defines a transfer as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease, and creation of a lien or other encumbrance."[96]

Defendants chose to bring their motion as one on the pleading, and the Court must consider the allegations in the Second Amended Complaint. The Court finds that there are enough facts in the 100-page Second Amended Complaint to plausibly state fraudulent-transfer claims. Accordingly, the Court denies Defendants' Motion for Judgment on the Pleadings with respect to Counts 5 through 10, the fraudulent-transfer claims.

In sum, the Court grants in part and denies in part Defendants' Motion for Judgment on the Pleadings. The Court grants the Motion with respect to Counts, 2, 3,4 and 11. The Court denies the Motion with respect to Counts 5 through 10.

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[95] *See* Second Amended Complaint, ¶ 211. Arguably, this is merely a legal conclusion. However, the Court finds that there are sufficient facts to support this allegation.

[96] K.S.A. § 33-204 provides the framework to determine whether the transfer was fraudulent.

## IV. Individual Defendants' Motion for Summary Judgment on Corporate Opportunity Claims in Count I (Doc. 147)

### *A. Factual Background*

GRHC is a Delaware limited liability company formed on February 8, 2002. GRHC's Operating Agreement governs GRHC. Specific provisions in GRHC's Operating Agreement will be discussed in more detail in the analysis section.

The Trustee's first count in the Complaint against the individual Defendants, members of GRHC, is a breach of fiduciary duty claim. The Trustee alleges that the individual Defendants breached their duty to GRHC in numerous ways, including depriving and usurping GRHC's opportunity to develop the Lookout Windpower and Forward Windpower projects. The Individual Defendants seek partial summary judgment on this claim.[97]

### *B. Summary Judgment Standard*

Summary judgment is appropriate if the moving party demonstrates that "there is no genuine dispute as to any material fact" and that it is "entitled to judgment as a matter of law."[98] The court must view the evidence and all reasonable inferences in the light

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[97] Defendants assert that they only seek dismissal of the corporate opportunity claims, and not the other claims, if any, which may remain in Count 1.

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

most favorable to the nonmoving party.[99] The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact.[100] In attempting to meet this standard, the moving party need not disprove the nonmoving party's claim; rather, the movant must simply point out the lack of evidence on an essential element of the nonmoving party's claim.[101]

If the moving party carries its initial burden, the party opposing summary judgment cannot rest on the pleadings but must bring forth "specific facts showing a genuine issue for trial."[102] The opposing party must "set forth specific facts that would be admissible in evidence in the event of trial from which a rational trier of fact could find for the nonmovant."[103] "To accomplish this, the facts must be identified by reference to affidavits, deposition transcripts, or specific exhibits incorporated therein."[104] Conclusory

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

[100] *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)).

[101] *Id.* (citing *Celotex*, 477 U.S. at 325).

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

[103] *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)).

[104] *Adler*, 144 F.3d at 671.

allegations alone cannot defeat a properly supported motion for summary judgment.[105]

### *C. Analysis*

The individual Defendants argue that the Trustee, standing in the shoes of GRHC, can only assert breach of fiduciary duty claims as GRHC might, subject to GRHC's Operating Agreement. GRHC's Operating Agreement contains a provision allowing for the members of GRHC to take, for its own, opportunities without presenting them to GRHC. As such, the individual Defendants contend that the Operating Agreement precludes GRHC's breach of fiduciary duty claim based on the taking of the Lookout Windpower or Forward Windpower opportunities.

Initially, the parties disagree about which state's law applies. The Operating Agreement provides that the Agreement "shall be governed by the laws of the State of Kansas."[106] The Trustee argues that this provision should be enforced. Defendants, however, argue that Delaware law applies because by the election of Kansas law in the Operating Agreement, the entire body of law controlling within Kansas applies. And K.S.A. § 17-76,120 provides that the law of the state under which a LLC is organized controls liability of members and managers. Because GRHC was organized in Delaware, Defendants contend that Delaware law applies to their internal affairs.

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[105] *White v. York Int'l Corp*., 45 F.3d 357, 363 (10th Cir. 1995).

[106] Doc. 148-1, GRHC's Operating Agreement, § 10.9.

Kansas courts generally give effect to contractual choice of law provisions.[107] Because the Agreement designates Kansas as the choice of law state, the Court will apply Kansas law. Defendants seek the Court's interpretation of a contractual provision in the Operating Agreement and how it relates to the governing law. The Court notes, however, that the choice of law issue is largely irrelevant as Kansas and Delaware law are similar with respect to this issue.

Kansas law provides that a limited liability company's operating agreement may expand, restrict, or eliminate a member or manager's duties, including fiduciary duties.[108] Specifically, K.S.A. § 17-76,134(b) provides that Kansas law will give maximum effect to the freedom of contract and the enforceability of operating agreements. Furthermore, a member acting under an operating agreement will not be liable to the company for his "good faith reliance on the provisions of the operating agreement."[109]

GRHC's Operating Agreement, Section 5.3 provides:

> Any member may engage in or possess an interest in other business ventures of every nature and description, independently or with others, whether or not similar to or in competition with the business of the Company,

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[107] *Brenner v. Oppenheimer & Co., Inc.*, 273 Kan. 525, 539, 44 P.3d 364, 375 (2002).

[108] *See* K.S.A. § 17-76,134.

[109] *Id*. at § 17-76,134(c)(1).

> and neither the Company nor the Members shall have, by virtue of this Agreement or any law, any right in or to such other business ventures or to any ownership or other interest in or the income or profits derived therefrom. No Member shall be obligated to present any particular investment or business opportunity to the Company even if such opportunity is of a character which, if present to the Company, could be taken by the Company, and each Member shall have the right to take for its own account and with others or to recommend to others any such opportunity.

Defendants contend that GRHC's Operating Agreement is valid under either Kansas or Delaware law, and because of this provision, the individual Defendants were under no obligation to present any corporate opportunity to GRHC and could take the Lookout Windpower and Forward Windpower opportunities for their own benefit. Accordingly, Defendants argue that the Trustee's breach of fiduciary duty claim against them based on a usurpation of a corporate opportunity must fail.

The Trustee argues that Section 5.3 is invalid. However, the Trustee's argument that Kansas's overriding fairness concept would not allow fiduciaries to benefit from restrictions in an operating agreement is contrary to Kansas law. Kansas Statute Annotated § 17-76,134(c)(2) specifically allows members of a limited liability company to restrict their duties in an operating agreement. In this case, the Operating Agreement did just that and provided that its members

could take opportunities for their own that could be taken by GRHC.

Next, the Trustee argues that section 5.3 is irreconcilable with section 6.1 of the Operating Agreement. Section 6.1 provides:

> To the extent permitted by law, a Member and/or a Member's officers, directors, partners, members, employees and agents shall not be liable for damages or otherwise to the Company for any act, omission or error in judgment performed, omitted or made by it or them in good faith and in a manner reasonably believed by it or them to be within the scope of authority granted to it or them by this Agreement and in the best interests of the Company, provided that such act, omission or error in judgment does not constitute fraud, gross negligence, willful misconduct or breach of fiduciary duty.

The Trustee contends that if Defendants truly intended to restrict their liability so that they could abstain from their fiduciary duties to GRHC, they would not have included the final sentence of section 6.1. Defendants disagree and contend that it is not uncommon to renounce a corporate opportunity yet still retain a general obligation not to breach fiduciary duties.

The Court agrees with Defendant that these provisions are not in conflict, and the members retained a general obligation to not breach a fiduciary duty. The provision in GRHC's Operating Agreement allowing the members to take an investment or business opportunity, even if the opportunity is one

which would have been of the character that could be taken by GRHC, was not in violation of Kansas law because Kansas allows members of a limited liability company to restrict or expand their duties. Section 5.3 delineated that the members could take opportunities as their own. Consequently, because GRHC's Operating Agreement allowed for the individual members to take opportunities for themselves, the individual Defendants could not have breached a fiduciary duty to GRHC if they took such opportunities. Therefore, the Trustee's claim for breach of fiduciary duty against the individual Defendants for usurping of a corporate opportunity fails. Accordingly, the Court grants the Individual Defendants' motion for partial summary judgment on Count 1.[110]

## V. FreeStream's Motion for Summary Judgment (Doc. 183)

### *A. Factual Background*

FreeStream and GRHC entered into an Advisory Services Agreement in February of 2005.[111] In this Agreement, GRHC hired FreeStream to provide advice and prepare an investment memorandum that was to be used to sell the StonyCreek wind farm project. FreeStream agreed to "review and provide

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[110] The Court notes that a portion of Count 1 remains because Defendants only sought dismissal of the corporate opportunity claims in Count 1. Accordingly, the Court only dismisses the breach of fiduciary claims based on the usurpation of a corporate opportunity.

[111] *See* Doc. 184-1, Advisory Services Agreement.

recommendations and comments to [GRHC][112] regarding all material agreements related to the development and construction of the project and ownership of the project company."[113] If requested by [GRHC], FreeStream agreed to provide such assistance "beyond merely reviewing and commenting on such documents," and it "would include active involvement in efforts to complete a final agreement . . . ."[114] The Advisory Services Agreement expressly provided that "FreeStream's role herein is that of an independent contractor; nothing is intended to create or shall be construed as creating a fiduciary relationship between [GRHC] and FreeStream."[115]

In the Second Amended Complaint, the Trustee asserts that FreeStream breached its fiduciary duty to GRHC by permitting the Stonycreek deal to go through with the "switched" Developer name, i.e., by allowing LWHC to be named as the developer in the subsequent agreements instead of naming GRHC as the developer. The Trustee alleges that FreeStream knew that GRHC was the developer of the projects, but it participated in the plan to switch the developer's identity and keep the

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[112] The Advisory Services Agreement provided that the "Client" was GRHC and Stonycreek Windpower, LLC. The Court inserts GRHC in brackets to indicate that the original language provided "Client."

[113] Doc. 184-1, Advisory Services Agreement, § 1.2.

[114] *Id*.

[115] *Id*. at § 9.

profits from the windpower projects for themselves. FreeStream seeks summary judgment on this claim.

### *B. Analysis*

FreeStream contends that the Trustee cannot establish that a fiduciary relationship existed between FreeStream and GRHC because the Advisory Services Agreement expressly disavows such a relationship. The Trustee summarily argues that although the parties had a written agreement disavowing a fiduciary relationship, the facts demonstrate that FreeStream consciously assumed a duty because (1) GRHC sought FreeStream's advice, (2) GRHC had discussions with FreeStream concerning the agreements, and (3) FreeStream served as GRHC's financial advisor.[116]

"A 'fiduciary relationship' is any relationship of blood, business, friendship, or association in which one of the parties reposes special trust and confidence in the other who is in a position to have and exercise influence over the first party."[117] Generally, Kansas law will recognize an implied-in-law fiduciary relationship if the surrounding circumstances support one.[118] However, a party "may not abandon all caution and responsibility for his own protection and unilaterally

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[116] Many of the facts asserted by the Trustee in support for this position were irrelevant.

[117] *Edwards & Assocs., Inc. v. Black & Veatch, L.L.P.*, 84 F. Supp. 2d 1182, 1198 (D. Kan. 2000) (citing *Brown v. Foulks*, 232 Kan. 424, 430-31, 657 P.2d 501 (1983)).

[118] *Id.*

impose a fiduciary relationship on another without a conscious assumption of such duties by the one sought to be held liable as a fiduciary."[119] The "conscious assumption of the alleged fiduciary duty is a mandatory element under Kansas law."[120]

In this case, there is no evidence that FreeStream consciously or deliberately assumed the responsibility of a fiduciary. Rather, the Advisory Services Agreement explicitly disavows a fiduciary relationship because it states that "nothing is intended to create or shall be construed as creating a fiduciary relationship between

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[119] *Denison State Bank v. Madeira*, 230 Kan. 684, 696, 640 P.2d 1235, 1243-44 (1982).

[120] *Rajala v. Allied Corp.*, 919 F.2d 610, 615 (10th Cir. 1990). Both parties proceed under Kansas law. The Advisory Services Agreement, however, has a choice of law provision designating New York. *See* Doc. 184-1, Advisory Services Agreement, § 8. Although neither party presents an argument under New York law, the Court will briefly dispose of the issue. "Under New York law, parties to a commercial contract do not ordinarily bear a fiduciary relationship to one another unless they specifically so agree." *Calvin Klein Trademark Trust v. Wachner*, 123 F. Supp. 2d 731, 733-34 (S.D.N.Y. 2004). "In certain limited and unusual circumstances there may be special factors that create fiduciary relationships between contracting commercial parties, such as, for example, when one party's superior position or superior access to confidential information is so great as virtually to require the other party to repose trust and confidence in the first party." *Id.* at 734. In addition, New York recognizes agreements that explicitly disclaim a fiduciary duty relationship, and a fiduciary duty cannot arise if it is specifically disclaimed. *See Seippel v. Jenkens & Gilchrist, P.C.*, 341 F. Supp. 2d 363, 381-82 (S.D.N.Y. 2004). The factual circumstances, as stated above, do not support a fiduciary relationship under New York law either.

[GRHC] and FreeStream." The Trustee simply does not come forward with any evidence demonstrating FreeStream's conscious assumption of a duty.

Furthermore, a fiduciary relationship requires a party to be in the "position to have and exercise influence over the first party."[121] There is no evidence that FreeStream was in the position to have and exercise influence over GRHC as required for a fiduciary relationship. The Trustee fails to demonstrate that a genuine issue of material facts exists as to whether a fiduciary relationship existed between the parties. Consequently, the Court grants FreeStream's motion for summary judgment on this claim.

## VI. FreeStream's Motion for Summary Judgment on Count 11 (Doc. 195)

FreeStream also filed a motion for summary judgment on Count 11, the Trustee's equitable reformation/rescission claim. As noted above with respect to LWHC's Motion for Judgment on the Pleadings on Count 11, the Trustee seeks to reform three agreements to name GRHC as the developer in those agreements instead of LWHC.[122] FreeStream is not a party to those documents.

As noted above with respect to LWHC's motion: "Reformation is an ancient remedy used to reframe

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[121] *See Edwards & Associates*, 84 F. Supp. 2d at 1198 (citing *Brown*, 232 Kan. at 430-31).

[122] *See supra* Section III(C)(2).

written contracts to reflect accurately the real agreement between contracting parties when, either through mutual mistake or unilateral mistake coupled with actual or equitable fraud by the other party, the writing does not embody the contract as actually made."[123]

The Trustee provides no evidence that FreeStream participated in fraudulent conduct nor does he even allege in the Second Amended Complaint fraud claims against FreeStream.[124] Furthermore, GRHC is not a party to any of the documents the Trustee seeks to reform. Instead, the agreements are between LWHC and Edison. The Trustee has no basis to reform the documents between LWHC and Edison, and equitable reformation is unavailable.[125] Accordingly, the Court grants FreeStream's Motion for Summary Judgment on this claim.

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[123] *Russell*, 402 F.2d at 344 (citations omitted).

[124] The Trustee asserts fraud allegations specific to FreeStream for the first time in his response to FreeStream's Motion for Summary Judgment. The Court will not address these allegations because the Trustee did not assert fraud claims against FreeStream in the Second Amended Complaint and because the Court denied his Motion to File an Amended Complaint to include fraud claims against FreeStream.

[125] Equitable reformation of the documents would also have no material effect on FreeStream. Even if the Court reformed the agreements to replace GRHC as the developer, instead of LWHC, the Redemption Agreement provides for a direct payment from Edison to FreeStream. *See supra* Section II(A).

**IT IS ACCORDINGLY ORDERED** that FreeStream's Motion to Distribute (Doc. 4 in Member Case No. 11-2524) is **GRANTED**. Intrust Bank should wire transfer to FreeStream its amount of the judgment: $2,235,362.11.

**IT IS FURTHER ORDERED** that LWHC's Motion to Distribute (Doc. 9 in Member Case No. 11-2524) is **GRANTED**.

**IT IS FURTHER ORDERED** that certain Defendants' Motion for Judgment on the Pleadings (Doc. 144) is **GRANTED IN PART** and **DENIED IN PART**. It is granted with respect to Counts 2, 3, 4, and 11. It is denied with respect to Counts 5 through 10.

**IT IS FURTHER ORDERED** that the individual Defendants' Motion for Summary Judgment on Corporate Opportunity Claims (Doc. 147) is **GRANTED**.

**IT IS FURTHER ORDERED** that FreeStream's Motion for Summary Judgment on Count 18 (Doc. 183) is **GRANTED**.

**IT IS FURTHER ORDERED** that FreeStream's Motion for Summary Judgment on Count 11 (Doc. 195) is **GRANTED**.

**IT IS SO ORDERED**.

Dated this 9th day of April, 2012.

/s/ Eric F. Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

## APPENDIX C

**IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS**

**Case No. 09-2482-EFM**

**[Filed April 12, 2012]**

| | |
|---|---|
| ERIC C. RAJALA, Trustee in Bankruptcy for the Estate of Generation Resources Holding Company, LLC | ) |
| *Plaintiff*, | ) |
| vs. | ) |
| ROBERT H. GARDNER, et al. | ) |
| *Defendants*. | ) |

**NUNC PRO TUNC ORDER**

On April 9, 2012, the Court issued its Memorandum and Order granting FreeStream's Motion to Distribute and LWHC's Motion to Distribute. (Doc. 217 in Case No. 09-2482; Doc. 39 in Case No. 11-2524). The Order directing Intrust Bank to transfer money was in error as the Court must first direct the Clerk of the Bankruptcy Court to direct its depository, Intrust

Bank, to wire transfer the money subject to any administrative fees. The Order also did not address distributing the funds to LWHC. Consequently, the Order is amended to read as follows.

**IT IS ACCORDINGLY ORDERED** that FreeStream's Motion to Distribute (Doc. 4 in Member Case No. 11-2524) is **GRANTED**. The Clerk of the Bankruptcy Court shall direct its depository, Intrust Bank, to wire transfer to FreeStream its amount of the judgment: $2,235,362.11, subject to any administrative fees to be withheld.

**IT IS FURTHER ORDERED** that LWHC's Motion to Distribute (Doc. 9 in Member Case No. 11-2524) is **GRANTED**. The Clerk of the Bankruptcy Court shall direct its depository, Intrust Bank, to wire transfer to LWHC its amount of the judgment, $6,706,086.35, subject to any administrative fees to be withheld. The Court is aware that on January 26, 2012, a Notice of Attorney's Lien was filed by Husch Blackwell, LLP against LWCH'S funds in the amount of $1,865,000. (Doc. 205 in Case No. 2482).[1] The Court however, was not advised that the lien was uncontested by the relevant parties nor has the Court been asked to pass on the validity of the lien. Accordingly, this Order does not address the attorney's lien.

**IT IS SO ORDERED**.

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[1] LWHC also stated in its Motion to Distribute that Husch Blackwell asserted an attorney's lien to $1,875,000 of LWHC's judgment. *See* Doc. 9 in Case No. 11-2524, p. 4 n. 3.

Dated this 12th day of April, 2012.

/s/Eric F. Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

## APPENDIX D

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**CIVIL ACTION NO. 3:09-104**
**JUDGE KIM R. GIBSON**

**[Filed May 31, 2011]**

LOOKOUT WINDPOWER HOLDING COMPANY, LLC, *a Missouri limited liability corporation,* FREESTREAM CAPITAL, LLC, *a Delaware limited liability corporation,*

Plaintiffs,

v.

EDISON MISSION ENERGY, *a California corporation,* MISSION WIND PENNSYLVANIA, INC., *a Delaware corporation,* MISSION WIND PA TWO, INC., *a Delaware Corporation,* MISSION WIND PA THREE, INC., *a Delaware corporation,* LOOKOUT WINDPOWER, LLC, *a Delaware limited liability corporation,*

Defendants and Counterclaimants,

v.

| | |
|---|---|
| LOOKOUT WINDPOWER HOLDING COMPANY, LLC, *a Missouri limited liability corporation,* FREESTREAM CAPITAL, LLC, *a Delaware limited liability corporation,* | ) |
| Counter Defendants. | ) |

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**GIBSON, J.**

This cause came before the Court on May 27, 2011 for a bench trial. During trial, Plaintiffs dismissed Count III, and the remaining open issues under Counts V and VI of their First Amended Complaint (Doc. 71), fraudulent or negligent misrepresentation with regards to the parties' negotiations over blade price, with prejudice.[1] Defendants dismissed their Counterclaim for Declaratory Judgment and Injunctive Relief (Doc. 102) without prejudice. The parties then tried Plaintiffs' breach-of-contract claims, Counts I and II of Plaintiffs' First Amended Complaint. After consideration of the evidence presented, the Court makes the following findings of fact and conclusions of law:

[1] Before trial, the Court disposed of Count IV, part of Counts V and VI, and Count VII through its Memorandum and Order of Court dated May 20, 2011, (the "May 20, 2011 Order") in which the Court considered the parties' various dispositive motions (for summary judgment and/or dismissal of certain counts of the First Amended Complaint) (Doc. 212).

1. On February 12, 2002, Robert and Robbin Gardner, R. James and Virginia Ansell and William and Akiko Stevens (collectively, the "Members") formed Generation Resources Holding Company LLC ("GRHC") for the stated purpose of developing wind power projects.

2. Lookout Windpower LLC ("Lookout Windpower") was one corporate entity (incorporated by the Members with ownership in their names) for the purposes of developing a wind power plant near Berlin, Pennsylvania (the "Lookout Project").

3. Lookout Windpower contracted with Freestream Capital LLC ("Freestream") to assist Lookout Windpower in procuring funding[2] and in ultimately selling the Lookout Project. Freestream identified Edison Mission Energy ("Edison") as a potential source of funding for the Lookout Project.

4. On November 28, 2005, the Members formed Lookout Windpower Holding Company, LLC ("Lookout Holding"), which was incorporated in Pennsylvania at the time of its formation,[3] and transferred all of their

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[2] It is unclear whether the funding sought was in addition to amounts that GRHC or other related entities had already paid into the project – this issue will be transferred to the U.S. Bankruptcy Court, District of Kansas.

[3] In these findings of fact and conclusions of law, the Court uses "Lookout Holding" to refer both to Lookout Windpower Holding Company, LLC, a Pennsylvania limited liability company ("Lookout Holding PA"), and to plaintiff Lookout Windpower

ownership interest in Lookout Windpower to Lookout Holding.

5. On February 3, 2006, Defendant Mission Wind Pennsylvania, Inc. ("Mission Wind PA") and Plaintiff Lookout Holding entered into the Amended and Restated Limited Liability Operating Agreement of Lookout Windpower, LLC (the "Operating Agreement") under which Lookout Holding sold 50% of the total ownership interest[4] in the Lookout Project to Mission Wind PA, an affiliate of Edison. See Doc. 71. In return, EHI Development Fund (another Edison affiliate) agreed to finance the ongoing development of the Lookout Project by providing loans to the Lookout Project.

6. As signed, the Operating Agreement provided that Lookout Windpower would buy out Lookout

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Holding Company, LLC, a Missouri limited liability company ("Lookout Holding MO").

Earlier in this litigation, the parties disputed whether plaintiff Lookout Holding MO was party to the Redemption Agreement. The Court finds it unnecessary to determine which entity executed the contract because the parties assert that Lookout Holding PA and Lookout Holding MO merged in August 2010, and Lookout Holding MO is the surviving entity. The Pennsylvania-Missouri issue has therefore been resolved, and Lookout Holding MO is a proper plaintiff.

[4] Whether this transfer/sale was proper or fraudulent for bankruptcy purposes is an issue on which this Court will decline to rule, see corresponding "Judgment and Memorandum and Order of Court". However, for purposes of the case *sub judice* as between the parties in this case the transaction is binding and enforceable.

Holding's remaining 50% interest in the company upon the "Commencement of Construction" of the Lookout Project, wherein Mission Wind would become the 100% owner of the Lookout Project, and provided a formula for calculating the "Redemption Price" for Lookout Holding's interest.[5]

7. On December 1, 2006, Lookout Holding MO was formed for tax planning purposes. Lookout Holding MO executed the letter agreement of March 28, 2007 (the "Redemption Agreement") that is the subject of Plaintiffs' breach-of-contract claims.

8. During the Fall of 2006 through March 2007, representatives of Lookout Holding and Mission Wind discussed the figures that would be used to calculate the Redemption Price and circulated numerous versions of a financial model that included these figures.

9. The Lookout Project financial model contained assumptions regarding the Project, including the capital expenditures that were expected for the purchase of wind turbines and for the construction of the Project, the projected operating expenses, and the

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[5] This Court makes no finding as to whether or not for bankruptcy purposes the parties were free to dispose of the Lookout Windpower assets in this way, or whether the transfers of assets described herein were fraudulent for bankruptcy purposes, as claimed by the bankruptcy trustee of GRHC in U.S. Bankruptcy, District of Kansas, case no. 08-20957. This issue will be transferred to the U.S. Bankruptcy Court, District of Kansas, for resolution. However, for purposes of the case *sub judice* as between the parties in this case the transaction is binding and enforceable.

projected revenues, and "Other Costs", one of which was repayment of the development loans made by EHI.

10. The cost assumptions used in the model and the Redemption Price were inversely related: if the costs to construct the Lookout Project increased, the payment to Lookout Holding decreased.

11. The Lookout Project required an eight-mile long transmission line to get the power generated by the wind turbines to the substations.

12. Lookout Holding wanted to use the Somerset Rural Electric Cooperative, Inc. ("SREC") to construct the transmission line because it was the least expensive option—not only could Lookout Windpower use the SREC's right-of-way, the SREC would charge less than a for-profit contractor. Although Edison had some concerns, it ultimately agreed to use the SREC.

13. On December 10, 2006, Edison's Randy Mann proposed to Lookout Holding's Bob Gardner that Lookout Holding procure a binding commitment from the SREC for a construction price for the transmission line not to exceed $1 million, and stated that if the final SREC commitment exceeded that amount, the Redemption Price would be reduced on a dollar-for-dollar basis.

14. On March 28, 2007, Mission Wind, Lookout Holding and Lookout Windpower entered into the Redemption Agreement. Under the Redemption Agreement, the Redemption Price for the Lookout Project was "a fixed amount not to exceed $11,507,000." Redemption Agreement ¶ 2.

15. This amount of "not to exceed $11,507,000" was determined using the final version of the financial model described above. The model was attached to the Redemption Agreement as Exhibit A.

16. The Redemption Agreement required two payments: (1) an initial $1 million redemption payment, and (2) a "Final Installment" of $10,507,000, due after the Lookout Project reached Commercial Operation, which was subject to reduction for a number of reasons. Redemption Agreement ¶ 3.

17. Lookout Holding owed money to Freestream for its assistance in locating Edison to purchase the Lookout Project, and to satisfy that obligation, the Redemption Agreement required Lookout Windpower to pay 25% of both payments identified supra in paragraph 16 to Freestream. Redemption Agreement ¶ 3.

18. On March 30, 2007, Lookout Windpower made the initial $1 million payment under the Redemption Agreement—$750,000 was paid to Lookout Holding and $250,000 was paid to Freestream.

19. The Redemption Agreement provides: "The Final Installment shall be reduced to the extent Developer Member is primarily responsible for the Project not being completed in accordance with the construction schedule, specifications, and construction costs set forth in Exhibit A." Redemption Agreement ¶ 3(b).

20. The Redemption Agreement also requires reductions in the Final Installment if other "issues are

not resolved within the budget and schedule parameters set forth in Exhibit A," including the "need for additional land for Lookout Project substation" and the "establishment of the final price or cost under the Somerset Rural Electric Cooperative, Inc. Agreement [("SREC Agreement")]." Redemption Agreement ¶ 3(b).

21. The Redemption Agreement states that it "shall be governed by the laws of the State of Delaware, without reference to its principles of conflicts of laws." Redemption Agreement ¶ 10(a).

22. Although Lookout Holding prepared the original draft of the SREC Agreement, it was not primarily responsible for the contract. Representatives of Edison provided comments, drafted additional language and revised the SREC Agreement.

23. The SREC Agreement, under which the SREC was to construct the transmission line for Lookout Windpower, stated that "[t]he total cost of the work shall be $1,040,000.00 as presently estimated, subject to adjustment based on actual costs and expenses." The parties included the $1.04 million figure on line 37 of Exhibit A to the Redemption Agreement.

24. The SREC Agreement stated that "[a]ssuming a March 19, 2007, work commencement authorization by the parties, the work shall be fully completed by December 31, 2007." The schedule set forth in Exhibit A to the Redemption Agreement assumed that the Lookout Project would be operational starting on December 31, 2007.

25. On March 29, 2007, Lookout Windpower made an initial payment of $520,000 to the SREC for the transmission line work.

26. The SREC hired a subcontractor, Bottenfield Power Line Construction, Inc. ("Bottenfield"), to construct the transmission line. Bottenfield did not start working on the transmission line until December 2007.

27. 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 of Kansas, Case No. 08-20957 (the "Bankruptcy Case").

28. While there were other delays in the construction of the Lookout Project, in June 2008, the only major thing left to complete was the transmission line: four miles of the eight-mile transmission line were incomplete.

29. To expedite the completion of the transmission line, the SREC agreed that Lookout Windpower could bring in additional help.

30. The SREC and Lookout Windpower memorialized their agreement in an amendment to the SREC Agreement on June 6, 2008 (the "Amendment"). The Amendment required Lookout Windpower to construct certain portions of the transmission line.

31. To perform its additional construction obligations, Lookout Windpower hired Power Engineers, Inc. ("Power Engineers"). Power Engineers

subcontracted this transmission-line work to Michels Power.

32. The transmission line was finally completed on August 23, 2008.

33. On September 22, 2008, Lookout Holding demanded payment of $10,507,000 from Mission Wind. Lookout Windpower responded on September 25, 2008 and informed Lookout Holding that the Lookout Project had not reached Commercial Operation.

34. The wind turbines for the Lookout Project were commissioned on October 20, 2008, and the project reached Commercial Operation as of that date. Under the Redemption Agreement, payment of the Final Installment was due within five business days, or by October 27, 2008.

35. Lookout Windpower did not pay the Final Installment by October 27, 2008.

36. On December 5, 2008, Lookout Windpower sent a letter to Lookout Holding. According to Lookout Windpower, after taking the reductions required by the Redemption Agreement, the amount of the Final Installment equaled $5,688,435.97.

37. Lookout Windpower asserts that it is entitled to three types of reductions: (1) costs incurred for the construction of the transmission line that exceeded the SREC's $1,040,000 estimate; (2) costs incurred to purchase land for the substation; and (3) costs incurred because of the delay in the construction of the transmission line.

38. The final cost for the work performed under the SREC Agreement, including the Amendment, was $3,930,401.74. The SREC received $2,174,169.74, and Power Engineers received $1,756,232.00.

39. This amount exceeds the $1,040,000 included on line 37 of Exhibit A to the Redemption Agreement by $2,890,401.74.

40. Lookout Windpower purchased additional land for the Lookout Project substation at a cost of $6,500.00.

41. The "delay" reductions, which are premised on Lookout Windpower's assertion that the SREC's failure to complete the transmission line on time delayed the completion of the Lookout Project by three months, include $1,400,000 in carrying costs, among other costs.

42. While the transmission line took longer to complete than originally anticipated, Lookout Holding was not primarily responsible for any delay associated with the construction of the transmission line.

43. On December 17, 2008, Lookout Holding and Freestream sued Defendants for breach of contract and other claims in the United States District Court for the Western District of Missouri, Case No. 5:08-cv-06128-GAF.

44. The Western District of Missouri dismissed Plaintiffs' case for lack of personal jurisdiction on April 17, 2009. Lookout Holding and Freestream filed this

case the same day, seeking $10,507,000 in damages on their contract claims.

45. On September 11, 2009, the Trustee filed a lawsuit against a number of individuals and entities, including the Plaintiffs and Defendants in the case *sub judice,* in the United States District Court for the District of Kansas, Case No. 2:09-cv-02482 (the "Kansas Litigation").

46. On August 11, 2010, Defendants in this case filed a motion for preliminary injunction, in which they sought to enjoin Lookout Holding from foreclosing on and selling the membership interests of Lookout Windpower.

47. On August 13, 2010, the Trustee filed a motion for preliminary injunction in the Kansas Litigation seeking to enjoin Plaintiffs from foreclosing on and/or selling any ownership interest in Lookout Windpower, and also requesting that the Members and Plaintiffs be enjoined from attempting to enforce, collect or transfer any rights arising out of the Operating Agreement or the Redemption Agreement until the District of Kansas entered final judgment on the Trustee's complaint.

48. On August 19, 2010, this Court enjoined Lookout Holding from foreclosing on and selling the membership interests of Lookout Windpower. The Trustee then withdrew his request for preliminary injunction in the Kansas Litigation.

49. In April 2011, Defendants filed a motion to join the Trustee in this litigation and served a copy on the Trustee. Docs. 203-205.

50. On May 4, 2011, the Trustee filed a motion in the Kansas Litigation in which he sought to stop the trial of the instant action before this Court. In this motion (which was filed in the Kansas Litigation) for temporary restraining order or, alternatively, order that collateral estoppel does not apply, the Trustee asserted that Plaintiffs were violating the 11 U.S.C. § 362 automatic stay by proceeding with this action.

51. At the hearing on May 19, 2011, the District of Kansas denied all of the relief requested by the Trustee, as reflected by the District of Kansas's Memorandum and Order denying the Trustee's motion for preliminary injunction, on the basis that it had no authority to issue an order to a U.S. District Court in another district.

52. At the time of trial, Lookout Holding and Freestream sought a total of $12,337,376.97: $10,507,000 in damages, and $1,830,376.97 in prejudgment interest.

53. "Under Delaware law, the elements of a breach of contract claim are: (1) a contractual obligation; (2) a breach of that obligation; and (3) resulting damages." *Interim Healthcare, Inc. v. Spherion Corp.,* 884 A.2d 513, 548 (Del. Super. Ct. 2005). *See also VLIW Tech.*, *LLC v. Hewlett Packard Co.*, 840 A.2d 606, 612 (Del. 2003).

54. A person seeking to enforce a contract to which it is not a party must establish three things:

> (i) the contracting parties must have intended that the third party beneficiary benefit from the contract, (ii) the benefit must have been intended as a gift or in satisfaction of a pre-existing obligation to that person, and (iii) the intent to benefit the third party must be a material part of the parties' purpose in entering into the contract.

*Madison Realty Partners* 7, *LLC v. AG ISA, LLC*, No. CIV. A. 18094, 2001 WL 406268, at *5 (Del. Ch. April 17, 2001).

55. Because the parties to the Redemption Agreement intended that Freestream receive 25% of any money due under the contract to satisfy Lookout Holding's obligation to Freestream and because this intent was material to the Redemption Agreement, Freestream is entitled to enforce the Redemption Agreement as a third-party beneficiary.

56. Lookout Holding and Freestream have established that they are entitled to judgment against Lookout Windpower on Counts I and II of Plaintiffs' First Amended Complaint: Lookout Windpower breached its obligation under the Redemption Agreement when it failed to pay the Final Installment of the Redemption Price by October 27, 2008.[6]

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[6] Counts I and II are also directed at Edison and Mission Wind. Because the Redemption Agreement did not require either of these

57. Although Lookout Windpower breached the Redemption Agreement, Lookout Holding and Freestream are not entitled to $10,507,000 in damages. The unambiguous language of the Redemption Agreement requires certain deductions to the Final Installment, including deductions to the extent the final cost under the SREC Agreement exceeds $1,040,000 and to the extent Lookout Windpower had to purchase additional land for the substation.

58. The following are found to be the appropriate deductions from the Final Installment cap of $10,507,000 payable under the Redemption Agreement:

| | |
|---|---|
| Construction- T-Line (per SREC Invoice dated August 1, 2008) | (1,253,418.78) |
| Construction- T -Line (per SREC Invoice dated October 31, 2008) | (512,619.23) |
| Construction- T -Line (per SREC Invoice dated December 23, 2008) | (408,131.73) |
| Construction - T-Line (per three invoices from Powers Engineer) | (1,756, 232.00) |
| Required additional property purchase | (6,500.00) |
| Subtotal deductions | (3,936,901.74) |
| Less original T-Line estimate | + 1,040,000.00 |

entities to pay any money to Plaintiffs, the Court will enter judgment in favor of Edison and Mission Wind on Counts I and II.

| | |
|---|---|
| Total Deductions from Final Installment | (2,896,901.74) |

Thus, the Final Installment is calculated as follows:

$10,507,000- $2,896,901.74 = $7,610,098.26

59. Because Lookout Holding was not primarily responsible for the delay associated with the construction of the transmission line and because the SREC clause in the Redemption Agreement is not broad enough to encompass the "delay" costs asserted by Lookout Windpower, the Court will not deduct those costs from the Final Installment.

60. Lookout Windpower breached the Redemption Agreement when it failed to pay a Final Installment of $7,610,098.26.

61. Under Delaware law, prejudgment interest is calculated at a rate equal to the Federal Reserve discount rate plus 5%. 6 Del. C. § 2301(a).

62. On October 27, 2008, the date that the Final Installment was due, the federal discount rate was 1.75%. Thus, the applicable interest rate is 6.75%.

63. Therefore, prejudgment interest on the above amount is $1,331,350.20.

64. Therefore, the total damages owed by Lookout Windpower to the Plaintiffs are $8,941,448.46.

Seventy-five percent of the judgment award is in favor of Plaintiff Lookout Holding, and twenty-five percent is in favor of Freestream Capital.

A corresponding Judgment and Memorandum and Order of Court, entered this same day, is incorporated by reference herein.

Dated: May 31,2011

**BY THE COURT**:

/s/Kim R. Gibson
**THE HONORABLE KIM R. GIBSON,**
**UNITED STATES DISTRICT JUDGE**

## APPENDIX E

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**CIVIL ACTION NO. 3:09-104**
**JUDGE KIM R. GIBSON**

**[Filed May 31, 2011]**

LOOKOUT WINDPOWER HOLDING COMPANY, LLC, *a Missouri limited liability corporation,* FREESTREAM CAPITAL, LLC, *a Delaware limited liability corporation,*

Plaintiffs,

v.

EDISON MISSION ENERGY, *a California corporation,* MISSION WIND PENNSYLVANIA, INC., *a Delaware corporation,* MISSION WIND PA TWO, INC., *a Delaware Corporation,* MISSION WIND PA THREE, INC., *a Delaware corporation,* LOOKOUT WINDPOWER, LLC, *a Delaware limited liability corporation,*

Defendants and Counterclaimants,

v.

| | |
|---|---|
| LOOKOUT WINDPOWER HOLDING COMPANY, LLC, *a Missouri limited liability corporation,* FREESTREAM CAPITAL, LLC, *a Delaware limited liability corporation,* | ) |
| Counter Defendants. | ) |

**JUDGMENT AND MEMORANDUM AND ORDER OF COURT**

**GIBSON, J.**

In accordance with the Findings of Fact and Conclusions of Law entered in the above-referenced case on 31st of May, 2011, (Doc. 227), judgment will be entered in favor of Plaintiffs against Defendant Lookout Windpower, LLC on the issues of breach of contract and prejudgment interest in the amount of $8,941,448.46.

This judgment disposes of all remaining claims contained m the above-referenced complaint.

Costs of the litigation shall be taxed to the Defendant Lookout Windpower, LLC.

We turn now to the issue of the recent "Notice of Bankruptcy" filed by Mr. Eric Rajala four days ago on May 23, 2011 (Doc. 215), as well as his "Motion to Stay, or, Alternatively, Transfer" (Doc. 218), filed in the afternoon of the day before trial, May 26, 2011.

## I. SYNOPSIS

Bench trial was held in this case on May 27, 2011. The only remaining open claims were Counts I and II, breach of contract claims for "undisputed funds" and "disputed funds", respectively[1]. On May 23, 2011, the Trustee of the bankruptcy estate of Generation Resources Holding Company ("GRHC") filed in this Court a notice of GRHC's pending bankruptcy petition along with an allegation that the bankruptcy's automatic stay was applicable to the instant case. Doc. 215. Based on this Court's reading of the pleadings in the United States Bankruptcy Court, District of Kansas, and a related U.S. District case in Kansas, it is clear that the Trustee asserts that the property of the bankrupt GRHC estate, namely, ownership in several wind power plants, one of which is the subject

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[1] Before trial, the Court disposed of Count IV, part of Counts V and VI, and Count VII through its Memorandum and Order of Court dated May 20, 2011, (the "May 20, 2011 Order") in which the Court considered the parties' various dispositive motions (for summary judgment and/or dismissal of certain counts of the FAC) (Doc. 212). On the day of trial the Plaintiffs dismissed with prejudice Count III and the remaining open issues under Counts V and VI. Also on the day of trial, Defendants dismissed their Counterclaim (Doc. 102) without prejudice. Further, the parties submitted to this Court prior to trial, and later filed on the Docket (Doc. 226-1), "Proposed Findings of Fact and Conclusions of Law", in which the Plaintiffs agreed that the Breach of Contract claims against Edison Mission Energy, Mission Wind Pennsylvania, Inc., Mission Wind PA Two, Inc. and Mission Wind PA Three, Inc. (the "Mission Defendants"), would be voluntarily dismissed with prejudice, because, as Plaintiffs acknowledged, none of the "Mission Wind" Defendants promised to pay money under the Redemption Agreement.

of the instant lawsuit, was fraudulently transferred to the Plaintiff corporations in the case *sub judice* by the same individuals who incorporated GRHC. This fraudulent transaction allegedly took place prior to GRHC filing for bankruptcy. The Trustee's theory is that this fraudulent transfer was made so that the Plaintiff corporations in the case *sub judice* (and by extension the individuals who started those corporations) could retain the benefit of ownership of the wind power plant which is the subject of the instant litigation ("Lookout Windpower") (and which had been determined at the time of asset transfer to be the plant most likely to succeed), and at the same time escape liability for loans extended to GRHC for the building of this and other wind power plants. According to the theory, the Plaintiff corporations in the instant case then entered into an agreement to sell Lookout Windpower to the Defendants, at roughly 50% upon signing of the contract and 50% upon completion of the wind power plant.[2] Thus, the Trustee asserts that any

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[2] For a more complete explanation of the underlying suit in the case *sub judice,* please refer to Doc. No. 212. Plaintiffs further alleged that on January 24, 2006 Plaintiff Lookout Holding sold to Mission Wind PA a 50% ownership interest in Lookout Windpower, LLC ("Lookout Windpower"), which seems to be the corporate embodiment of the wind power plant venture/project which is at the heart of this controversy. Doc. 71. This 50% ownership interest was allegedly given in exchange for an agreement by Mission Wind Pennsylvania, Inc. ("Mission Wind PA") to finance the wind power project by arranging loans. Doc. 71. This January 24, 2006 agreement is named in the First Amended Complaint (the "FAC") as the "Operating Agreement". Doc. 71.

Plaintiffs further alleged that on March 28, 2007 a Redemption Agreement between Lookout Windpower Holding LLC and Mission Wind PA was ratified, whereby the parties agreed on the terms of

amounts owed by Defendants under the contracts in the case *sub judice* are rightfully property of the bankruptcy estate. On May 26, 2011 the Trustee filed a motion requesting that this action be stayed.

## II. JURISDICTION AND VENUE

Plaintiffs invoke this Court's jurisdiction pursuant to 28 U.S.C. § 1332, because there is complete diversity of citizenship among the parties and the amount in controversy exceeds $75,000, exclusive of interests and costs. Venue is appropriate because the alleged occurrences, events, negotiations and representations between the parties, which are the basis of this claim, occurred within the Western District of Pennsylvania.

## III. STANDARD OF REVIEW

Although the instant case has been pending since April 17, 2009, the Trustee in a related bankruptcy case, No. 08-20957, just this week filed a Notice of Bankruptcy with this Court (Doc. 215, filed May 23, 2011) and cited the automatic stay in place in that latter case, pursuant to 11 U.S.C. § 362. This past Thursday afternoon, on the eve of trial and when the various parties and their witnesses were likely in transit for the purpose of appearing before this Court, the Trustee filed another document. In this document

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a previously-contemplated buyout of the remaining interest of Lookout Windpower Holding LLC's interest in Lookout Windpower LLC. Doc. 71. Pursuant to this agreement, a downpayment of $1M was paid, the remaining $10.507 Million to be paid when Lookout Windpower LLC's wind power project reached commercial operation. Doc. 71.

the Trustee moved to apply the automatic stay of the Kansas Bankruptcy Court to the instant litigation, or in the alternative he requests that this matter be transferred to the U.S. District Court in Kansas. Docs. 218, 219. In analyzing these issues we will make reference to and rely upon the automatic stay provision in 11 U.S.C. § 362, and 28 U.S.C. §§ 157, 1404 and 1412, which are provisions governing transfers/changes of venue.

**A. Automatic Stay**

The Trustee argues that the automatic stay of the Bankruptcy Court should apply to the instant action. Although the Trustee does not specify which subsection of 11 U.S.C. § 362 he believes applies, he does indicate that he believes that any monies due in the instant action are rightfully property of the bankruptcy estate.

**B. 28 U.S.C. §§ 1404 and 1412**

Sections 1404 and 1412 allow for a change of venue by district courts generally, at the discretion of the district court, to any other district or division where the action might have been brought originally. In relevant part, they hold:

> § 1404. Change of venue
> (a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.
> . . .

> § 1412. Change of venue
> A district court may transfer a case or proceeding under title 11 [11 USCS §§ 101 et seq.] to a district court for another district, in the interest of justice or for the convenience of the parties.

28 USCS §§ 1404, 1412.

Thus, it is a general principle that where the interests of justice would be served by a transfer of venue, a district court may make such a transfer.

**C. Core and Non-Core Matters in Bankruptcy Proceedings**

However, in analyzing the reach of the automatic stay in bankruptcy cases, or the desirability of the transfer of a matter to a bankruptcy court, a district court must determine how a matter is related to the bankruptcy case, if at all. If the matter is related, it may be classified as either "core" or "non-core". As a sister court within the Third Circuit has summarized, "'[c]ases *under* Title 11, proceedings arising *under* title 11, and proceedings *arising in* a case under title 11 are referred to as 'core' proceedings; whereas proceedings 'related to' a case under title 11 are referred to as 'non-core' proceedings.'" *Tipico Products Co., Inc. v. Dorato Foods, LLC, et al.,* 2007 U.S. Dist. LEXIS 3353 at *11-12 (D.N.J. 2007).

The underlying enabling statute is 28 U.S.C. § 157, which holds in relevant part:

§ 157. Procedures

(a) Each district court may provide that any or all cases under title 11 and any or all proceedings arising under title 11 or arising in or related to a case under title 11 shall be referred to the bankruptcy judges for the district.

(b)

(1) Bankruptcy judges may hear and determine all cases under title 11 and all core proceedings arising under title 11, or arising in a case under title 11, referred under subsection (a) of this section, and may enter appropriate orders and judgments, subject to review under section 158 of this title [28 USCS § 158].

(2) Core proceedings include, but are not limited to--

(A) matters concerning the administration of the estate;

. . .

(E) orders to tum over property of the estate;

. . .

(H) proceedings to determine, avoid, or recover fraudulent conveyances;

. . .

28 USCS § 157.

In summary, a matter is a "core" matter when it does not exist independent of the Bankruptcy Code,

and is "non-core" if it has an independent existence under state law. See *Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship,* 2004 U.S. Dist. LEXIS 8168 (S.D.N.Y. 2004).

A non-core related matter has been explained by the Third Circuit as follows:

> [T]he test for determining whether a civil proceeding *is related* to bankruptcy is whether the outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy . . . Thus, the proceeding need not necessarily be against the debtor or debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.

*Tipico* at* 12; quoting *Belcufine v. Aloe,* 112 F.3d 633, 636 (3d Cir. 1997); in turn quoting *Pacor v. Higgins,* 743 F.2d 984, 994 (3d Cir. 1984).

The following explanation by the Southern District of New York sheds further light on the issues at hand:

> By contrast, a proceeding is non-core if it exists independently under state law and is merely "related to" the bankruptcy case because of a conceivable effect upon the debtor's estate. [*internal citations omitted*]. Only a district court, and not a bankruptcy court, may enter final judgment in a non-core, "related to" proceeding.

> Compare 28 U.S.C. § 157(b)(1) ("bankruptcy judges may hear and determine" all core proceedings, subject only to ordinary appellate review), with 28 U.S.C. § 157(c)(1) (in "a proceeding that is not a core proceeding but that is otherwise related to a case under title 11," final judgment "shall be entered by the district judge" upon de novo review of any findings as to which any party objects).

*Kerusa Co. LLC v. W10Z/515 Real Estate Ltd. P'ship,* 2004 U.S. Dist. LEXIS 8168, *6 (S.D.N.Y. May 6, 2004); citing *In re Green*, 200 B.R. 296, 298 (S.D.N.Y. 1996).

## IV. DISCUSSION

At the outset we observe that the issue of liability under the contracts in the case *sub judice* is *not* a core matter, as it does *not* arise solely under chapter II, but rather involves state law claims of breach of contract. Therefore, this issue is properly litigated in this Court, as explained further below. However, the issue of whether or not any judgment from this case is properly part of the bankruptcy estate *is* a core bankruptcy issue, and it is proper for this Court to transfer this issue to the Bankruptcy Court in the District of Kansas. This Court would come to this conclusion independent of recent filings, but this Court takes note of the Trustee's recently filed position in favor of transfer, and his argument that the judgment in favor of Plaintiffs in this case is rightfully the property of the bankruptcy estate, by virtue of his Motion to Stay or Transfer (Doc. 215).

We have located numerous cases where non-core but related litigation was transferred from a district court to a bankruptcy court in which the bankruptcy was being litigated. Important to the analyses of these courts were considerations of justice, consistency, convenience to the parties, and judicial economy. See, e.g., *In re Knight-Celotex, LLC*, 427 B.R. 697, 709 (Bankr. N.D. Ill. 2010) ("The deciding factor will be which venue would provide the most efficient and economical administration of the case. . . . [T]his factor weighs strongly and clearly in favor of transferring venue. . .."). See also *Tipico,* supra, 2007 U.S. Dist. LEXIS 3353 (D.N.J. 2007) (related non-core action transferred to the U.S. Bankruptcy Court for the Eastern District of Pennsylvania). See also *Hope Partners, Inc. v. BP Oil Supply Company,* 2009 U.S. Dist. LEXIS 126861, *10 ("[I]n every [related] case pending in an Oklahoma district court in which the court has decided a motion to dismiss, transfer or stay filed by [a litigant], the court has transferred the action to the Delaware Bankruptcy Court. [Thus,] in order to promote consistency among the district courts in Oklahoma in their treatment of these cases, the Court finds that transfer of this action to the Delaware Bankruptcy Court is proper pursuant to 28 U.S.C. §§ 1404(a) and 1412.").

As succinctly explained in *Kerusa Co., LLC,* supra, "[u]ltimately, the pursuit of 'equity,' 'justice' and 'comity' involves a thoughtful, complex assessment of what makes good sense in the totality of the circumstances." 2004 U.S. Dist. LEXIS 8168 at *11.

In the case *sub judice,* judicial economy weighs strongly in favor of this Court making a determination

as to liability and damages pursuant to the underlying contracts disputes. The various contracts disputes in the case *sub judice* have been before this Court since April 17, 2009, and the litigation has been contentious, with *considerable* time and energy expended on motions by both sides and by this Court. To reiterate, the Trustee only just filed his Motion to Stay or, Alternatively, to Transfer, on the afternoon of May 26, 2011 (on the eve of trial), when counsel, parties and their witnesses were likely in transit from Pittsburgh, Kansas City, Missouri, Connecticut and various other locales, to attend the bench trial before this Court, which was scheduled for May 27, 2011 at 9:00 a.m.

Therefore, in applying the analysis of judicial resources, convenience to the parties, the interests of justice, and any potential impact on the bankruptcy estate, we conclude as follows: this Court is most familiar with the contract dispute presented in the case *sub judice,* and therefore is in the best position to judge liability and damages under that claim with the least amount of additional expenditure of judicial resources, and without resulting prejudice or disadvantage to any of the parties involved, or to the bankruptcy estate. Therefore, the one-day bench trial scheduled for May 27, 2011 was held, for the purposes of determining whether a contract was breached between the Plaintiffs and Defendant Lookout Windpower, LLC in this case, as well as the amount of damages incurred, if any, as a result of these actions. This Court notes that a transfer of the contract dispute *sub judice* at this juncture would have been a huge waste of resources, including time, thought, money, negotiations and so forth, that have been put into this case since April 17, 2009. Transfer to another court would create a

duplication of effort, and this Court submits that at this point in time it is likely to be the most familiar with the terms of the contracts and disputes at issue between the parties in the instant case.

However, we find that the issue of whether or not the judgment in favor of Plaintiffs and against Defendant Lookout Windpower, LLC is part of the bankruptcy estate is a core matter in the bankruptcy proceeding. Further, not all of the disputants in that issue are before this Court. Therefore, this Court finds that the above-referenced monetary judgment entered as a result of the May 27, 2011 bench trial will be transferred to the District of Kansas Bankruptcy Court for enforcement and that any funds paid by or on behalf of Defendant Lookout Windpower, LLC in satisfaction of that judgment be deposited as instructed by the Kansas Bankruptcy Court, where related action No. 08-20957 is in progress, and held subject to a determination by the Kansas Bankruptcy Court as to whether or not these funds are rightfully part of the bankruptcy estate. We note that the Kansas Bankruptcy Court is more familiar with the specific issues surrounding the formation of GRHC and any alleged successors, as well as general issues of avoidance of debt and fraudulent transfer of assets generally. Therefore, the most economical use of judicial resources and that course of action most likely to lead to a just result for all parties, including the bankruptcy estate, and which is also the most likely not to cause conflicting judgments or an inappropriate exercise of jurisdiction by this Court, is for this Court to issue a judgment on liability and damages in the case *sub judice* only, but to leave the determination of whether the bankruptcy estate has a valid claim to this

judgment to the United States Bankruptcy Court, District of Kansas. We therefore transfer this latter issue to the United States Bankruptcy Court, District of Kansas.

**IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

**CIVIL ACTION NO. 3:09-104**
**JUDGE KIM R. GIBSON**

**[Filed May 31, 2011]**

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LOOKOUT WINDPOWER HOLDING COMPANY, LLC, *a Missouri limited liability corporation,* FREESTREAM CAPITAL, LLC, *a Delaware limited liability corporation,*

Plaintiffs,

v.

EDISON MISSION ENERGY, *a California corporation,* MISSION WIND PENNSYLVANIA, INC., *a Delaware corporation,* MISSION WIND PA TWO, INC., *a Delaware Corporation,* MISSION WIND PA THREE, INC., *a Delaware corporation,* LOOKOUT WINDPOWER, LLC, *a Delaware limited liability corporation,*

Defendants and Counterclaimants,

v.

LOOKOUT WINDPOWER HOLDING COMPANY, LLC, *a Missouri limited liability*

*corporation,* FREESTREAM CAPITAL, LLC, )
*a Delaware limited liability corporation,* )
)
Counter Defendants. )
_____ )

**JUDGMENT AND ORDER**

**AND NOW,** this 31st day of May, 2011, in accordance with the foregoing Memorandum, **IT IS HEREBY ORDERED** that judgment is entered in favor of Plaintiffs against Defendant Lookout Windpower, LLC on the issue of breach of contract and prejudgment interest in the amount of $8,941,448.46 (the "Total Award"), which is comprised of the Final Installment due by Defendant Lookout Windpower, LLC to Plaintiffs under the Redemption Agreement in the amount of $7,610,098.26, and prejudgment interest of $1,331,350.20 (computed by applying the rate of 6.75%). Seventy-five percent of this Total Award, a sum of $6,706,086.35, is allocated to Plaintiff Lookout Windpower Holding Company, LLC, and twenty-five percent of this total award, $2,235,362.11, is allocated to Plaintiff Freestream Capital, LLC. It is further ORDERED that judgment is entered in favor of Edison Mission Energy, Mission Wind Pennsylvania, Inc., Mission Wind PA Two, Inc. and Mission Wind PA Three, Inc. (the "Mission Defendants") and against Plaintiffs as to the Mission Defendants.

This judgment disposes of all remaining claims contained in the complaint referenced in the caption above, as amended.

Costs of the litigation in the amount of $33,988.92, to which amount there is no objection, shall be taxed to the Defendant Lookout Windpower, LLC.

**FURTHER**, upon consideration of the Trustee's Notice of Bankruptcy and related claims (Doc. 215) and Motion to Stay, or, Alternatively Transfer (Doc. 218), **IT IS HEREBY NOTED** that in the interests of justice and judicial economy, trial was held in this Court on May 27, 2011 as to liability and amounts owing for breach of contract in the case *sub judice,* and **IT IS HEREBY ORDERED**, in accordance with the foregoing Memorandum, that the issue of enforcement of the judgment and the issue of whether the judgment, partially or completely, is part of the bankruptcy estate, are transferred to the District of Kansas Bankruptcy Court for decision by that Court; and **IT IS FURTHER ORDERED** that any amounts paid by or on behalf of Defendant Lookout Windpower, LLC in satisfaction of the judgment entered in this case are to be placed in escrow pursuant to directive by the Kansas Bankruptcy Court, pending resolution by that court of the issue of potential ownership of these funds on the part of the Bankruptcy Estate (Case No. 08-20957).

**BY THE COURT**:

/s/Kim R. Gibson
**THE HONORABLE KIM R. GIBSON,**
**UNITED STATES DISTRICT JUDGE**