UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO
Bankruptcy Judge Joseph G. Rosania, Jr.

In re: ATNA RESOURCES, INC., *et al*. Debtors.[1]	Case No. 15-22848-JGR **Jointly Administered Under Case No. 15-22848-JGR** Chapter 11
ATNA LIQUIDATING TRUST, KELSEY JAMIE BUECHLER, LIQUIDATING TRUSTEE Plaintiff, v. AFCO PREMIUM CREDIT, LLC, Defendant.	Adv. Pro. No. 17-01558-JGR

ORDER DISMISSING ADVERSARY PROCEEDING

This case illustrates the pitfalls created when a single trustee of a liquidating trust administers seven separate debtor estates, where a centralized cash management system existed pre-petition. Conflicts were bound to arise.

The matters before the Court include:

- Defendant AFCO Premium Credit, LLC's Motion for Summary Judgment and Memorandum in Support (Doc. 34);
- Plaintiff Trustee's Objection to Defendant AFCO Premium Credit, LLC's Motion for Summary Judgment on Amended Complaint and Plaintiff Trustee's Cross Motion for Summary Judgement on all Claims for Relief (Doc. 36);

[1] The Debtors as defined herein refers collectively to the debtors and debtors-in-possession in their respective case numbers are as follows: Atna Resources Inc., (15-22848), Canyon Resources Corporation (15-22849), CR Briggs Corporation (15-22850), CR Montana Corporation (15-22851), CR Kendall Corporation (15-22852), Atna Resources Ltd. (15-22853), and Horizon Wyoming Uranium, Inc. (15-22854).

- Defendant AFCO Premium Credit, LLC's Motion to Strike Plaintiff Trustee's Supplemental Expert Report and Objection and Cross Motion for Summary Judgment and Alternative Request for Relief Under Rule 56(d) (Doc. 38);

- Plaintiff Trustee's Response to Defendant AFCO Premium Credit, LLC's Motion to Strike Plaintiff Trustee's Supplemental Expert Report and Objection and Cross Motion for Summary Judgment and Alternative Request for Relief Under Rule 56(d) (Doc. 42); and

- Defendant AFCO Premium Credit, LLC's Reply in Support of its Motion to Strike Plaintiff Trustee's Supplemental Expert Report and Objection and Cross Motion for Summary Judgment and Alternative Request for Relief Under Rule 56(d) (Doc. 43).

In addition, prior to the entry of an Order holding this Adversary Proceeding in abeyance, the Trustee filed a Motion to Strike Defendant's Untimely Filed Expert Rebuttal Report and to Exclude Expert Testimony (Doc. 22) which was timely opposed by the Defendant AFCO Premium Credit, LLC (Doc. 26).

For the reasons set forth below, the within Adversary Proceeding is hereby dismissed.

BACKGROUND

Atna Resources, Inc., and six related companies, filed for relief under Chapter 11 of the Bankruptcy Code on November 18, 2015. On November 20, 2015, an order entered authorizing the joint administration of the affiliated cases.

The Debtors were engaged in mineral exploration and mining operations under the umbrella of a publicly-traded Canadian company, Atna Resources, Ltd. ("Atna"). Atna operated its United States-based companies through a wholly-owned Delaware corporation, Canyon Resources Corporation ("Canyon"), headquartered in Golden, Colorado.

Canyon was the sole owner of three Colorado corporations: CR Briggs Corporation ("Briggs"), CR Montana Corporation, and CR Kendall Corporation. Canyon was also the sole owner of Atna Resources, Inc., a Nevada corporation operating the Pinson Mine ("Pinson"), and Horizon Wyoming Uranium, Inc., a Wyoming corporation.[2]

Canyon served as the administrative arm of the affiliated companies and maintained a centralized cash account ("CCA"). The CCA was the central component of an integrated cash management system which allowed the companies to effectively monitor revenues, expenses, and ensure funds were available as required. The utilization of a cash management system for affiliated companies is commonplace. Prior to the bankruptcy filings, substantially all of the revenues funding the CCA were provided by Pinson through the operation of the Pinson Mine, and by Briggs through the operation of

[2] The organizational chart of the entities is attached.

the Briggs Mine. Additional funds were contributed by Atna, the Canadian parent company. The other companies did not generate significant revenues. Canyon would make transfers from the commingled funds in the CCA to the separate bank accounts of Pinson and Briggs so those operating companies could pay their expenses.

The Trustee's Amended Complaint seeks to avoid the payments made to AFCO Premium Credit, LLC ("AFCO") by Canyon as constructively fraudulent. The theory being advanced is the comprehensive insurance covered all the affiliated companies, while only Pinson and Briggs were generating revenues to fund the CCA. Funds in the CCA paid to AFCO that did not directly Pinson or Briggs can be recovered as constructively fraudulent.

On November 29, 2016, this Court entered Findings of Fact, Conclusions of Law, and Order Under Section 1129 of the Bankruptcy Code and Bankruptcy Rule 3020 Confirming Debtors' Joint Chapter 11 Plan of Liquidation ("Plan") (15-22848, Doc. 740).

The Plan created three classes of unimpaired claims: Priority Non-Tax Claims, Waterton Secured Claims, and Secured Claims. The Plan created six classes of impaired unsecured claims: a separate class for all of the unsecured creditors of each respective Debtor, with the exception of Horizon Wyoming Uranium, Inc., which had no creditors. Equity Interests were canceled under the Plan.

The Plan provided for the formation of a Liquidating Trust for the purposes of administering the assets transferred to the Liquidating Trust, resolving disputed claims, pursuing the retained causes of action, and making distributions to the beneficiaries provided for under the plan. By its simplest terms, assets belonging to each respective Debtor estate were to be transferred to the Liquidating Trust, then disbursed to the creditors of the same respective Debtor estate.

Ms. Kelsey Jamie Buechler serves as the Trustee for the Liquidating Trust ("Trustee"). The Trustee employed counsel who formerly represented the Official Committee of Unsecured Creditors and is currently a member of the Trustee's law firm. The Liquidating Trust was created for the benefit of all the related Debtor estates, and the Trustee owes fiduciary duties to each of the respective Debtor estates.[3]

THE ADVERSARY PROCEEDINGS

The Trustee filed twenty-nine adversary proceedings seeking to recover various pre-petition transfers.

On March 10, 2017, the Trustee filed ten Adversary Proceedings seeking recovery of alleged preferential transfers within the meaning of 11 U.S.C. § 547. Settlements were reached in all ten Adversary Proceedings.

[3] The Liquidating Trust Agreement (15-22828-JGR, Doc. 704, Ex. I) provided for a liquidating trust committee to supervise the trustee. None was ever formed. It also had a mechanism to resolve conflicts of interest of the trustee. That provision was never used.

On April 25, 2017, nine additional Adversary Proceedings were filed seeking recovery of alleged preferential transfers. Settlements were reached in five of the nine Adversary Proceedings. Default judgment was entered in one, and in Adv. Pro. No. 17-01556-JGR, *Atna Liquidating Trust v. Black Diamond Blade Company, d/b/a Cutting Edge Supply*, summary judgment was entered in favor of the Trustee. Amended complaints were filed in the remaining two Adversary Proceedings: 17-01160-JGR, *Atna Liquidating Trust v. Elwood Staffing Services, Inc.* ("ESS"), and 17-01163-JGR, *Atna Liquidating Trust v. Cyanco Company, LLC.* The amended complaints **added** claims for relief under 11 U.S.C. §§ 544 and 548 for recovery of alleged fraudulent transfers. A settlement was eventually reached in the action against Cyanco Company, LLC. The resolution of the ESS Adversary Proceeding is discussed at length below.

A third round of five Adversary Proceedings was filed on September 25, 2017. Each of the Adversary Proceedings sought recovery of preferential transfers. Settlements were reached in four of the actions, and a default judgment was entered in the remaining Adversary Proceeding.

Finally, on November 17, 2017, the eve of the expiration of the avoidance action bar date established under 11 U.S.C. § 546(a)(1), the Trustee filed five more Adversary Proceedings. These actions did not seek recovery of alleged preferential transfers. Rather, the complaints only raised claims for the recovery of alleged fraudulent transfers under 11 U.S.C. §§ 544 and 548 and for unjust enrichment. Four of the five actions settled, leaving this Adversary Proceeding as the lone pending action.

THE ESS ADVERSARY PROCEEDING

An understanding of the ESS ruling is central to understanding the conclusion that this Adversary Proceeding must be dismissed.

The Trustee filed a complaint against ESS on April 25, 2017. Initially, the complaint sought recovery of alleged preferential transfers in the amount of $76,195.26. On August 24, 2017, the Trustee amended the complaint to add claims for the recovery of fraudulent transfers in the amount of $49,881.81. The theory of the new claims was that one of the Debtors, Briggs, contributed funds to Canyon, which later disbursed monies to ESS, which provided services to Pinson. According to the Trustee, Briggs did not receive reasonably equivalent value in exchange for the funds transferred to Canyon, because Canyon paid an account payable on behalf of Pinson.

The amended complaint was met with ESS's Fed.R.Civ.P. 12(b)(6) and (7) (as incorporated by Fed.R.Bankr.P. 7012) motion to dismiss the fraudulent transfer claims and a motion to withdraw the reference to the United States District Court for the District for Colorado, accompanied by a demand for a trial by jury on the newly asserted fraudulent transfer claims.

On April 9, 2018, United States District Court Judge Robert E. Blackburn ("Judge Blackburn") entered an Order granting ESS's Motion for Withdrawal of Reference and Demand for Jury Trial. The Order referred the matter to this Court for all pretrial matters, including the consideration and resolution of dispositive motions.

On December 14, 2018, this Court entered an Order Granting Defendant's Motion to Dismiss Third and Fourth Claims of Amended Complaint. *In re Atna Res.*, Nos. 15-22848-JGR, 17-01160-JGR, 2018 Bankr. LEXIS 4223 (Bankr. D. Colo. Dec. 14, 2018).

First, this Court determined the fraudulent transfer claims asserted by the Trustee were barred by controlling Tenth Circuit precedent set forth in *In re Slack-Horner Foundries Co.*, 971 F.2d 577 (10th Cir. 1992), which requires the Trustee to avoid an initial transfer before the Trustee can recover from a subsequent transferee. *Id*. at *13.

Second, this Court held the fraudulent transfers were not adequately reserved. In the ESS decision, the Court observed:

> Sometime between March 2017 and August 2017, the Trustee drastically expanded the reach of the avoidance actions to sue Briggs and Atna [Inc.] creditors for constructive fraudulent transfers for payments made from the CCA. This litigation tactic expanded the recoverable damages of the preference actions to recover legitimate trade payments made within ninety days of bankruptcy under the preferential transfer theory to recover payments made within two years of bankruptcy under the constructive fraudulent transfer theory.
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> The Court would never have approved one trustee presiding over one trust that includes seven debtor estates if it was aware that the single trustee would be pursuing competing debtor estate claims in the same lawsuit. The Court had to sift through the files to determine on behalf of which estate the Trustee was suing. Here, the Trustee is suing on behalf of the Atna [Inc.] estate for the preference claims and the Briggs estate for the constructive fraudulent transfer claims, an inherent conflict. To which estate does the Trustee's fiduciary duty lie: Atna [Inc.], Briggs, or Canyon? All three have separate creditors because the Joint Chapter 11 Plan specifically provided that there was no substantive consolidation. How can the Trustee allocate settlement or judgment proceeds?

Id. at *27-28.

This Court went on to find:

> Here, the Joint Chapter 11 Plan broadly defines causes of action, specifically reserves avoidance claims under the Bankruptcy Code, and informs parties that if they dealt with a debtor and received payment for goods and/or services pre-petition, such creditor might be the recipient of an avoidance action. However, after balancing the factors and following the logic of Mercury Companies, the Court finds that the type of avoidance claims premised on state and federal constructive

> fraudulent transfer laws arising out of the CCA were not reserved or foreseeable by the creditors.
>
> The Court recognizes that the use of one debtor's funds to pay the debts of another debtor may be the proper subject of constructive fraudulent transfer claims and unjust enrichment claims in the appropriate case. *In re TOUSA, Inc.*, 422 B.R. 783 (Bankr. S.D. Fla. 2009), *quashed in part*, 444 B.R. 613 (S.D. Fla. 2011), *aff'd in part, rev'd in part*, 680 F.3d 1298 (11th Cir. 2012), and aff'd, No. 10-CV-62035-KMM, 2017 WL 8785510 (S.D. Fla. Mar. 8, 2017); *In re FAH Liquidating Corp.*, 572 B.R. 117 (Bankr. D. Del. 2017), *leave to appeal denied*, No. AP 15-51898 (KG), 2018 U.S. Dist. LEXIS 97196, 2018 WL 2793944 (D. Del. June 11, 2018); Luke A. Barefoot and Matthew J. Livingston, *Unjust Enrichment or Fraudulent Transfer? Try Both*, XXXVI ABI Journal 9, 26-27, 71-72, September 2017. This is not such a case.

Id. at *36-37.

The Trustee sought clarification from Judge Blackburn on December 17, 2018, as to whether the dismissal of the fraudulent transfer claims could be directly appealed or whether the ruling would be treated as proposed findings of fact and conclusions of law.

On December 21, 2018, Judge Blackburn entered an Order on Motion for Clarification, holding that the ruling would be treated as proposed findings of fact and conclusions of law, subject to objections and *de novo* review under 28 U.S.C. § 157(c)(1).

Thereafter, on January 3, 2019, this Court entered an Order Holding Adversary Proceeding in Abeyance (Doc. 27) pending resolution of the EES appeal, finding:

> The reasoning of the December 14, 2018 Order directly applies to the fraudulent transfer claims asserted in the instant Adversary Proceeding. The Court understands that the plaintiff intends to seek review of the Order. To avoid uncertainty and the potential for inconsistent outcomes,
>
> IT IS ORDERED that this Adversary Proceeding shall be held in abeyance pending the entry of a final non-appealable order on the dismissal of the fraudulent transfer claims in Adv. Pro. No. 17-01160-JGR.

The same order was entered in two other pending Adversary Proceedings filed by the Trustee asserting fraudulent claims.

On August 6, 2019, Judge Blackburn ordered as follows:

> 1. That on the issues addressed in this order, I approve and adopt the analysis and conclusions of the bankruptcy court in its Order Granting Defendant's Motion To Dismiss Third and Fourth Claims of Amended Complaint [#46 - Adv. Pro. No 17-01160-JGR];
>
> 2. That the Defendant's Motion for Partial Dismissal of Complaint [#21 - Adv. Pro. No 17-01160-JGR] is granted;
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> 3. That claims three and four as alleged in the Amended Complaint To Avoid Preferential Transfers, for Judgment for Liability for Such Transfers, for Recovery of Fraudulent Transfers and Money Damages, and for Disallowance of Claim [#20 - Adv. Proceeding No. 17-01160-JGR] are dismissed with prejudice;
>
> 4. That under Fed. R. Civ. P. 54(b), the court declines to enter judgment based on this order because this order adjudicates fewer than all of the claims at issue in the Complaint [#20 - Adv. Proceeding No. 17-01160-JGR];
>
> 5. That the clerk shall arrange for this order to be docketed in the underlying adversary proceeding in the United States Bankruptcy Court for the District of Colorado where it is pending under the case numbers shown in the caption of this order; and
>
> 6. That when all claims in the Complaint [#20 - Adv. Proceeding No. 17-01160-JGR] are resolved, judgment shall enter dismissing the third and fourth claims in the Complaint [#20 - Adv. Proceeding No. 17-01160-JGR] with prejudice.

Buechler v. Elwood Staffing Servs. (In re ATNA Res., Inc.), Civil Action No. 17-cv-02363-REB, 2019 U.S. Dist. LEXIS 131484, at *22-23 (D. Colo. Aug. 6, 2019).

Specifically, Judge Blackburn held: "Taking the allegations in the Complaint as true and applying the holding of *Slack-Horner*, the allegations of the Complaint in support of claims three and four do not state claims on which relief can be granted in the form of avoidance of allegedly fraudulent transfers from Pinson to Elwood. To recover from Elwood, a subsequent transferee of the funds in question, 'the trustee must first have the transfer of the debtor's interest to the initial transferee avoided under § 548.' *Slack-Horner*, 971 F.2d at 580." *Id*. at *14.

Judge Blackburn then opined: "I agree that it likely is improper for one trustee to represent a group of bankruptcy estates and then pursue competing debtor estate claims between and among the represented bankruptcy estates." *Id.* at *21

THE ESS DISMISSAL

After Judge Blackburn entered the order dismissing the fraudulent transfer claims and remanding the matter for resolution of the remaining preference claims in the ESS Adversary Proceeding, the Trustee moved this Court to conduct a status and scheduling conference for the four remaining Adversary Proceedings: the ESS matter, and three Adversary Proceedings asserting fraudulent transfer claims.

At the hearing, the Trustee argued that the complaints filed in the three remaining fraudulent transfer adversary proceedings were distinguishable from the complaint filed in the ESS Adversary Proceeding that was subject to the Order dismissing the fraudulent transfer claims. The parties agreed that standing was a common issue in the remaining adversary proceeding and subject to summary disposition.

The Trustee also advised this Court that further prosecution of the ESS Adversary Proceeding was being re-evaluated because only the preferential transfer claim remained. A curious position, given that only five of the twenty-four preference complaints filed by the Trustee involved an amount in excess of the $76,195.36 at stake in the ESS action. Moreover, the ESS preference claim was significantly higher than the average of $48,881.92 alleged in the twenty-four preference lawsuits.

The ESS Adversary was voluntarily dismissed by the Trustee on October 4, 2019. In the Notice of Dismissal, the Trustee stated:

> While the Plaintiff disagrees with the ruling(s) of the District Court, in the view of the Trustee the remaining preference claim is not of sufficient dollar amount to warrant the further prosecution of this matter against this Defendant, especially in light of the request for a jury trial and the defenses raised. The Trustee has determined it is in the best interest of the beneficiaries of the Trust, and in [the Trustee's] business judgment, prudent to dismiss this matter, with prejudice.

(17-01160-JGR, Doc. 67).[4]

Not surprisingly, in the Trustee's response to the motion for summary judgment, the Trustee advances the argument that, because "[t]here is no final order on standing, this court should revisit its position on standing" (Doc. 39, p. 29).

> With all due respect to this Court, the Trustee vehemently disagrees with this Court's view of the Trustee's standing to pursue constructive fraudulent conveyance claims under Section 548(a)(1)(B) or Section 544(b) as expressed in its proposed findings of facts and conclusions of law in the now dismissed Elwood matter dated December 14, 2018 where this court entered its Order Granting Defendant's Motion To

[4] Preference claims under 11 U.S.C. § 547 are not subject to a trial by jury.

> Dismiss Third and Fourth Claims of Amended Complaint [Doc. No.6 - Adv. Pro. No 17-01160-JGR] and which was not adopted in total by the Honorable Judge Robert Blackburn of the United States District Court in his opinion dated August 6, 2019, [Doc. No. 22].
>
> …
>
> Moreover, the Elwood District Court Order, which is the only operative order, never became a final order as it was remanded by the District Court back to the Bankruptcy Court for trial on the First and Second Claims for relief, which were not dismissed. The Elwood adversary is now fully dismissed without any trial on the remaining claims for relief. This Court has no obstacles to a new review of the standing issue.

(Doc. 36, P. 30).

The gamesmanship is disturbing. Fundamentally, the Trustee's litigation posture illustrates the inherent conflict of interest underlying the ESS ruling.

Presumably, the Trustee investigated and determined that valid preference claims warranted pursuit against ESS. However, when the added fraudulent transfer claims were dismissed, the Trustee was willing to throw out the baby with the bathwater to preserve potentially higher dollar fraudulent transfer claims in the AFCO Adversary Proceeding in exchange for dismissing the significant remaining ESS preference claims.

Specifically, The Trustee opted to dismiss the preference claims against ESS being pursued on behalf of the Pinson creditors in the alleged amount of $76,195.36, to preserve an argument that dismissal of the fraudulent transfer claims in the ESS Adversary Proceeding would not have preclusive effect with respect to the fraudulent transfer claims advanced in this Adversary Proceeding (alleged to be in the approximate amounts of $143,000 recoverable by the Briggs estate and $330,000 recoverable by the Pinson estate).

To the Trustee's credit, after the dismissal of the ESS Adversary Proceeding, two of the three remaining Adversary Proceedings were settled, leaving only AFCO. Nevertheless, the abandonment of the ESS Adversary Proceeding to preserve an argument that the ESS District Court ruling is not preclusive illustrates the underlying conflict of interest faced by the Trustee's attempt to bring cross-debtor estate claims.

PROCEDURAL HISTORY

The Trustee filed the within Adversary Proceeding against AFCO on November 17, 2017. AFCO filed its answer on March 21, 2018.

On March 22, 2018, the Court entered an Order for Compliance with Fed.R.Bankr.P. 7026 (Fed.R.Civ.P. 26(a) and (f)), requiring the parties to make initial disclosures and submit a proposed discovery schedule.

On May 30, 2018, the Court entered an Order and Notice of Trial Related Deadlines Pursuant to Fed.R.Bankr.P. 7016 (Fed.R.Civ.P. 16(b)), adopting the parties' proposed discovery schedule. The order established a deadline for disclosures and written reports required by Fed.R.Civ.P. 26(a)(2) of August 1, 2018, and an expert witness discovery deadline of November 30, 2018. The Order further provided that, "unless a party requests amendments to this Order on or before June 19, 2018, no modifications will be entertained by the Court" (Doc. 12).

Nevertheless, on July 25, 2018, the parties filed a joint motion to modify the scheduling order to extend the expert witness disclosure deadline for the Trustee until August 15, 2018, allow AFCO to file a rebuttal report by September 15, 2018, and allow the Trustee to reply by September 30, 2018 (Doc. 14). The motion was granted by an order entered July 26, 2018 (Doc. 15).

On December 7, 2018, the Trustee filed Plaintiff Trustee's Motion to Strike Defendant's Untimely Expert Rebuttal Report and Exclude Expert Testimony (Doc. 22). In the motion, the Trustee argued:

> Rule 26 establishes the deadlines for disclosing experts and their reports. Expert disclosures must be made at the times and in the sequence ordered by the court, see Fed. R. Civ. P. 26(a)(2)(D). Absent a stipulation or court order, the default disclosure deadline is at least 90 days before the date set for trial. Id. Here, the court has entered its own orders that control the duty to supplement extends to expert reports and depositions, so that the disclosing party is obligated to supplement expert disclosures with any additional or changed information and opinions Supplements made after the disclosure deadline are limited to corrections for inaccuracies or to add information not available at the time of the initial report; supplementation is not available to strengthen an opinion that was inadequately prepared. *In re Asbestos Prods. Liab. Litig.*, 289 F.R.D. 424, 425 (E.D. Pa. 2013).
>
> The sanction for failing to comply with these rules is severe. Rule 37(c) provides that the party failing to make timely disclosures "is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless." The committee notes characterize this provision as an "automatic sanction," and courts have interpreted it as requiring mandatory exclusion.

(Doc. 22, pp 6-7).

AFCO filed its Response in opposition to the motion on December 21, 2018 (Doc. 26).

As a result of this Court's Order Holding Adversary Proceeding in Abeyance entered on January 3, 2019, this matter remained unresolved. On October 1, 2019, after Judge Blackburn's ESS ruling, this Court conducted a Status and Scheduling Conference in the within Adversary Proceeding and established a schedule for filing dispositive motions.

AFCO filed its 199-page Motion for Summary Judgment on November 15, 2019. The Trustee's 1,274-page Response and Cross Motion for Summary Judgment was filed on December 16, 2019.

AFCO then moved the Court for an order striking the Supplement to Disclosure of Plaintiff's Expert Report (Doc. 35) and the Cross Motion for Summary Judgment (Doc. 36) and, in the alternative, for relief under Rule 56(d) and Bankruptcy Court Rule 7056.

On January 7, 2020, the Trustee filed a Response to AFCO's Motion to Strike (Doc. 42) and AFCO filed a Reply on January 14, 2020 (Doc. 43).

The Court entered an Order allowing the Trustee to respond to the motion to strike and granted leave for AFCO to respond to the Trustee's Cross Motion for Summary Judgment, if necessary, after resolution of the motion to strike.

THE AFCO FINANCING ARRANGEMENT

The sworn declaration of Rodney D. Gloss, Vice President and Chief Financial Officer of Atna, and Vice President of Canyon, Briggs, Pinson, and other affiliated companies described the AFCO Arrangement as follows:

> In the ordinary course of their business, the Debtors maintain a comprehensive insurance program that provides coverage related to, inter alia, general liability, business automobile liability, statutory worker's compensation and employer's liability (in California, Colorado, Nevada, and Montana), property/mobile equipment and business interruption liability, directors' and officers' liability, excess directors' and officers' liability, directors' and officers' side-A excess liability, employment practices liability, fiduciary liability, special crime liability, and fidelity and crime liability, as well as an umbrella insurance policy (collectively, the "Insurance Coverage")….
>
> The premiums for the Debtors' Insurance Policies (the "Insurance Premiums"), are financed under two premium financing agreements with AFCO Premium Credit LLC (the "Insurance Lender"), one with an initial installment payment that was due on July 1, 2015 (the "July PFA"),and a second with an initial installment payment that was due on October 1,

> 2015 (the "October PFA"; collectively, with the July PFA, the "PFAs").
>
> By spreading the cost of the Insurance Premiums over a period of time, the Debtors are able to avoid substantial upfront payments and preserve cash flow. In July 2015, the Debtors made a down payment of $77,394.00 on the July PFA. The Debtors then made the following installment payments on the July PFA: $77,369.50 on each of July 1 and August 1, 2015; and $52,357.49 on each of September 1, October 1, and November 1, 2015. The Debtors are now obligated to pay $52,357.49 on the first day of each month through the month of March 2016 pursuant to the terms of the July PFA. In October 2015, the Debtors made a down payment of $75,000.00 on the October PFA. The Debtors then made the following installment payments on the October PFA: $50,389.05 on October 1 and November 1, 2015. The Debtors are now obligated to pay $50,389.05 on the first day of each month through September 2016 pursuant to the terms of the October PFA.
>
> Lenders are generally unwilling to finance insurance premiums on an unsecured basis. As a result, the Debtors provided the Insurance Lender "as security for the total amount payable in [the PFAs], any and all unearned premiums and dividends which may become payable under the insurance policies for whatever reason and loss payments which reduce the unearned premiums subject to any mortgagee or loss payee interests." The payments accrue interest at an interest rate of 3.287% for the July PFA and 3.710% for the October PFA.

Declaration of Rodney D. Gloss in Support of Chapter 11 Petitions and Various First Day Applications and Motions (15-22848-JGR, Doc. 12-2, dated November 19, 2015, pp. 55-57).

The Trustee's expert witness, Robert E. Kleeman, Jr. ("Kleeman"), does not contest that AFCO provided financing for the purchase of insurance utilized by the Debtor companies:

> <u>Agreed Facts</u>
>
> AFCO Premium Credit L.L.C. provided Atna Resources Ltd, and its Subsidiaries with financing for multi-line insurance coverage contracted between the Company and Marsh USA.

Kleeman Expert Report (Doc. 36-3, p. 10).

Kleeman's report also concludes:

> It appears that the clear majority of the coverages was workman's compensation and property/casualty insurance covering the operations of the Atna/Pinson mine, the Briggs mine, the CR Kendall mine, and the administrative offices of Canyon Resources located in Golden, Colorado.
>
> All checks sent to AFCO as payments relating to the financing agreements were issued by Canyon Resources Corporation.
>
> Canyon Resources Corporation's main banking account was a Cash-Management account. As such, all receipts from sales of ore from the Pinson and Briggs mines were deposited in the Canyon account, rather than being deposited in the Bank Accounts owned and maintained by Briggs and Pinson.
>
> Canyon's only other material source of cash deposits were transfers of cash from the Canadian parent entity.

(Doc. 36-3, pp 3-4).

THE TRUSTEE'S CLAIMS

The Trustee's Amended Complaint for Judgment and Recovery of Fraudulent Transfers and Money Damages, and for Disallowance of Claims (Doc. 3; the "Amended Complaint") raised three claims for relief: Avoidance of alleged fraudulent transfers under 11 U.S.C. § 544(b) and applicable state fraudulent transfer law; avoidance of constructive fraudulent transfers under 11 U.S.C. § 548(a)(1)(b); and unjust enrichment.

The specific allegations included:

- "The Trustee has identified certain pre-petition payments made to AFCO that were not the funds or property of Atna Resources Ltd., but were in fact the earnings, property and funds of Debtors Atna Resources Inc., the operator and owner of the Pinson mine in Nevada, Briggs the owner and operator of the Briggs mine in California, and Canyon Resources Inc" (Doc. 3, p. 6).

- "The funds in the Debtor Canyon Resources Corporation's CCA account were then used to pay the separate obligations of Debtor Atna Resources Ltd., to the Defendant, who was paid with funds directly out of the CCA account. During the time period relevant herein Canyon Resources Corporation had no earnings or income of its own" (Doc. 3, p. 7).

- "The property and assets of Debtors Canyon, Briggs and Atna Resources Inc., were ultimately transferred to the Defendant for an obligation owed to it solely by Atna Resources Ltd." (Doc. 3, p. 7).

- "The exact amount of the earnings, property and cash funds of Debtor Atna Resources Inc., CR Briggs, and or Canyon Resources Corporation, that were improperly and fraudulently transferred to the Defendant is a matter of damages to be proven at the trial of this matter. The Plaintiff has retained an expert to determine the measure and amount of damages sustained" (Doc 3, p. 10).

There are no allegations in the Amended Complaint which suggest that the funds advanced by AFCO were used for any purpose other than the procurement of insurance coverage for the related companies, or that any insurance coverage was not necessary.

The Trustee, in required initial disclosures, asserted: "Damages for 544 and 548 claims are to be proven at Trial but are estimated to be $390,000.00, plus interest fees and costs; and Pre-judgment and post-judgment interest as may be allowed" (Doc. 9, p. 3).

This estimate was supported by Kleeman's expert witness report. Kleeman was engaged "to determine the amount (if any) of payments made to AFCO on behalf of Pinson and Briggs that exceeded the cash available to either of those two entities (on a stand-alone basis) over the two-year period prior to the filing of the Bankruptcy petitions" (Doc. 36-3, p. 9).

Kleeman tracked all the payments made to AFCO during the relevant two-year pre-petition period, and then divided the payments into "General Corporate Insurance" and "Operating Entity Insurance." **The General Corporate Insurance that was attributable to Canyon was not included in calculations of avoidable transfers**. The Operating Entity Insurance costs were allocated between the Debtors, and the report concluded:

> In our opinion, the Trustee is entitled to recover the amount of $143,184.00 related to payments made to AFCO on behalf of Briggs.
>
> In our opinion, the Trustee is entitled to recover the amount of $330,642.00 related to payments made to AFCO on behalf of Pinson.

(Doc 36-3, pp. 23-24).

The report additionally concluded: "Canyon was physically located in an office building in Golden, Colorado. Canyon was the administrative arm of the operations. Canyon physically processed all payments for all the consolidated entities to include Briggs and Pinson. Canyon had no independent income from its own sources. It appears that the only income reported on the Canyon bank accounts were the receipts for ore sales from Pinson & Briggs, Transfers from Atna Resources, Ltd., the Canadian parent of Atna, and some miscellaneous amounts which were considered immaterial to our investigation and were not tracked as to sources" (Doc. 36-3, p. 14).

Again, the Trustee's expert witness determined there were three material sources of income deposited into the Canyon centralized cash account: income generated though

Pinson, income generated through Briggs, and transfers of cash from the Canadian parent entity, Atna.

In reaching the decision in the ESS Adversary Proceeding, this Court examined the cash management system utilized by the affiliated Debtors:

> On November 19, 2015, the Debtors filed several "first day" motions. One such motion sought to authorize the Debtors to maintain their existing bank accounts, cash management system, and business forms (the "Cash Management Motion"). In the Cash Management Motion, the Debtors described their integrated cash management system which they used to facilitate the efficient transfer of funds, enabling the companies to control and monitor cash and ensure sufficient cash availability on a weekly basis. The cash management system utilized sixteen bank accounts. All receipts were swept to Canyon's Wells Fargo bank account, and all the Debtors' disbursements were made from this account to the bank account of each Debtor. The Debtors asserted that they should be able to maintain the existing bank accounts, cash management system, and business forms in the ordinary course of business because the cash management system was efficient, minimized expenses, and they would otherwise suffer a disruption of the businesses. The Court granted the Cash Management Motion on November 23, 2015.

2018 Bankr. LEXIS 4223, at *3-4.

The crux of the Trustee's Amended Complaint is that if the affiliated Debtors are segregated into discrete units, only two of which were operating and generating income, obligations paid through the CCA can constitute fraudulent transfers or unjust enrichment. If an obligation was paid through the CCA that was not directly attributable to the income producing entity, it could be set aside.

In another words, if money generated by company A is transferred to company B, and company B pays an obligation of company C, creditors of company A have a claim against company C, because no reasonably equivalent value was received by company A when the debt of company C was paid.

Under the binding Tenth Circuit authority expressed in *Slack-Horner*,[5] the Trustee, acting on behalf of creditors, cannot recover against company A on behalf of company C, without first avoiding the transfer from company A to company B.

[5] In footnote 4 of the Objection and Cross Motion for Summary Judgment (Doc. 36, p. 36), the Trustee argues that *Slack-Horner* was wrongly decided.

The *Slack-Horner* analysis mandated the dismissal of the same alleged fraudulent transfer claims asserted against ESS. That conclusion of law was adopted by the District Court.

THE TRUSTEE'S PIVOT

In an attempt to distinguish the ESS ruling and binding Tenth Circuit precedent, the Trustee alleged in the complaint that Canyon is a mere conduit, exercising no control over funds in its possession. "It is unknown at this time whether the funds in the CCA account and later transferred to Briggs for payment to the Defendant were held by Canyon Resources Corporation as a mere conduit or in trust" (Doc 3 p. 7). If monies swept into the Canyon-controlled CCA, generated by Pinson or Briggs, remained discrete property of the respective entity, to the extent funds were used to pay an obligation of a different entity, the payment could be avoided as constructively fraudulent.

In the Tenth Circuit, there is a presumption that "deposits in a bank to the credit of a bankruptcy debtor belong to the entity in whose name the account is established." *Amdura Nat'l Dist. Co. v. Amdura Corp., Inc. (In re Amdura Corp.)*, 75 F.3d 1447 (10th Cir. 1996) (citing 4 Collier on Bankruptcy ¶ 541.11, at 541–75 (15th ed. 1995)). However, if Canyon acted as a mere conduit, the alleged fraudulent transfers, calculated to be $143,184 on behalf of Briggs and $330,642 on behalf Atna, Inc., would be recoverable without avoiding the first transfer to Canyon.

The Trustee's Cross Motion for Summary Judgment abandons the mere conduit argument, **and for the first time**, the Trustee pivots to a new theory for recovery: Canyon's payments to AFCO can be avoided as constructively fraudulent. "As the Trust seeks to recover payments made directly by Canyon from its own account to AFCO for payments that Canyon was not obligated to make, there are no prior transfers that must be avoided. *In re Slack-Horner Foundries Co.*, 971 F.2d 577, 578 (10th Cir. 1992) is not a bar to prosecution of the three claims for relief asserted by the Trustee against AFCO" (Doc. 36, p. 35).

In the Cross Motion for Summary Judgment, endorsing a new "Supplemental Report," the Trustee argues: "The Trustee's expert breaks the recoverable transfers received and recoverable of $2,188,904 from Defendant AFCO for payments made by Canyon on behalf of the liability of ATNA Resources, Ltd. (Canada). Of this $2,188,904 recovery, Canyon would owe the amount of $143,184 to Briggs, and would owe the amount of $330,642 to Pinson. Those amounts would then be available for payments to the creditors of those two entities. The remaining balance in the recovery ($1,715,078) would be for the benefit of creditors of Canyon, or its subsidiary companies to the extent excess funds existed" (Doc 36, p. 27).

The Court is perplexed. The Trustee now argues that **all** payments made by Canyon to AFCO were fraudulent? This new argument is directly contrary to the Trustee's own expert witness opinion, finding payments for general corporate insurance were directly attributable to Canyon and therefore not included in calculations of avoidable transfers.

Canyon was merely the administrative arm of the operational Debtors. Under the Trustee's "new" theory, almost every payment made by Canyon would be subject to avoidance as constructively fraudulent—an absurd result.

In any event, the Trustee's Cross Motion for Summary must be denied. The court shall grant summary judgment only if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed.R.Bankr.P. 7056 (incorporating Fed.R.Civ.P. 56). With respect to Cross Motion for Summary Judgment, the Trustee bears the initial burden of making a *prima facie* showing of an absence of genuine issues of material fact and entitlement to judgment as a matter of law. *Whitesel v. Segenberger*, 222 F.3d 861, 867 (10th Cir. 2000). In applying the summary judgment standard, the Court must "examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing the motion." *Lopez v. LeMaster*, 172 F.3d 756, 759 (10th Cir. Okla. 1999).

With respect to the claims under 11 U.S.C. § 548(a)(1)(B) and applicable state law, to prevail, the Trustee must establish that the debtor was insolvent at the time the transfer was made.

The Bankruptcy Code defines "insolvent" as a "financial condition such that the sum of such entity's debts is greater than all of such entity's property, at fair valuation[.]" 11 U.S.C. § 101(32). For purposes of 11 U.S.C. § 548(a)(1)(B)(ii)(I), insolvency is determined using a "balance sheet test," meaning the debtor's liabilities exceed its assets at fair valuation. *Weinman v. Walker (In re Adam Aircraft Indus., Inc.)*, 510 B.R. 342, 352-53 (B.A.P. 10th Cir. 2014). Cash flow, which reflects a change in cash position over time, is irrelevant to whether a debtor is "insolvent." *Id.* at 353.

However, the Trustee's expert witness concluded:

> We are unable to make a determination on a month to month basis as to whether Briggs and/or Pinson were insolvent on a balance sheet test basis. However, based on the financial information that we reviewed, there was significant impairment of many of the assets of the entities, the intercompany accounts may or may not have accurately reflected actual cash due to/ from other related entities, and that on a stand-alone basis, accounts payable may not have been appropriately calculated.

(Doc. 36-3, p. 24).

Moreover, in the Supplemental Report, the Trustee's expert witness admits: "We did not prepare specific balance sheet solvency tests for Canyon and Atna Resources Ltd., (Canada)" (Doc. 36-3, p. 93).

Clearly, whether the Debtors were insolvent at the time of the transfers under the required balance sheet analysis is a disputed material fact.

All three claims for relief asserted by the Trustee require the absence of reasonably equivalent value in connection with the transfer or, with respect to the unjust enrichment claim, a benefit without payment or return of property.

To reiterate, no claims are asserted that the funds advanced by AFCO under the financing contract were made for any other purpose than establishing the comprehensive insurance program—a program that benefitted all of the Debtors and creditors. "In general, the mining industry is cash intensive and can be considered a high-risk business" (Doc 36-3, p. 10).

The Trustee avers: "To the extent any benefit was received by Canyon's creditors from the independent third party insurance that the AFCO credit financed, AFCO has been given appropriate credit by the Trustee's expert in both his August 15, 2018 Report, as well as the Kleeman Affidavit" (Doc. 36, p. 46).

While this may have been true with respect to conclusions set forth in the initial report, it is squarely at odds with the Trustee's new theory that **all** payments made by Canyon to AFCO are constructively fraudulent.

To the extent the Debtors received reasonably equivalent value, and whether AFCO received a benefit without conferring any value in exchange, are material facts in dispute which preclude the entry of summary judgment on the Trustee's Cross Motion.

AFCO'S MOTION FOR SUMMARY JUDGMENT

AFCO's Motion for Summary Judgment is multi-tiered and includes the following arguments:

- The Trustee lacks standing to pursue fraudulent transfer and unjust enrichment claims;
- The transfers sought to be avoided are essentially the same payments as the "essential" insurance financing payments the Court authorized to continue post-petition in approving various "first day motions" filed by the Debtors;
- The initial transfers to Canyon were not set aside, invoking the *Slack-Horner* bar;
- The Canadian parent, Atna, made cash injections of $10 million to Canyon, precluding any claim that the payment of Atna obligations could be constructively fraudulent;
- Canyon was solvent at the time the transfers were made;
- The Trustee's insolvency analysis is flawed; and
- Reasonably equivalent value was provided.

I. Undisputed Facts

The Court reviewed various pleadings, documents, and other materials in reaching its findings of facts, including:

- Defendant AFCO's Motion for Summary Judgment and Memorandum in Support (Doc. 34), and the exhibits attached thereto, including, but not limited, to the Expert Report of Robert E. Kleeman, Jr.; Deposition excerpts of Robert E. Kleeman, Jr.; and Deposition excerpts of Rodney D. Gloss.

- Plaintiff Trustee's Objection To Defendant AFCO's Motion for Summary Judgment on Amended Complaint and Plaintiff Trustee's Cross Motion for Summary Judgement on all Claims for Relief (Doc. 36), and the multiple exhibits attached thereto, including, but not limited to, the Supplemental Expert Report of Robert E. Kleeman, Jr. and the Affidavits of K. Jamie Buechler and Robert Kleeman.

- Defendant AFCO's Motion to Strike Plaintiff Trustee's Supplemental Expert Report and Objection and Cross Motion for Summary Judgment and Alternative Request for Relief Under Rule 56(d) (Doc. 38).

- Plaintiff Trustee's Response to Defendant AFCO's Motion to Strike Plaintiff Trustee's Supplemental Expert Report and Objection and Cross Motion for Summary Judgment and Alternative Request for Relief Under Rule 56(d) (Doc. 42), and the exhibits attached thereto.

- Defendant AFCO's Reply in Support of its Motion to Strike Plaintiff Trustee's Supplemental Expert Report and Objection and Cross Motion for Summary Judgment and Alternative Request for Relief Under Rule 56(d) (Doc. 43).

- Declaration of Rodney D. Gloss in Support of Chapter 11 Petitions and Various First Day Applications and Motions (15-22848-JGR, Doc. 12-2, dated November 19, 2015).

The Court finds that the following material facts are not disputed:

1. Prior to and during the bankruptcy, AFCO financed the acquisition of an insurance portfolio through Marsh USA, which provided coverage for all Atna companies, including Debtor entities Canyon, Briggs, and Pinson.

2. Applicable insurance coverage consisted of general liability, business automobile liability, statutory worker's compensation and employer's liability, property/mobile equipment and business interruption liability, directors' and officers' liability, excess directors' and officers' liability, directors' and officers' side-a excess liability, employment practices liability, fiduciary liability, special crime liability, and fidelity and crime liability, as well as umbrella insurance liability insurance coverage.

3. AFCO provided insurance premium financing services to Atna which was used to obtain the comprehensive insurance coverage for all of the Debtors.

4. AFCO and Atna executed four Premium Finance Agreements ("PFAs"), dated: June 10, 2014, September 22, 2014, June 10, 2015, and September 18, 2015.

5. The payments made on the PFAs were made from the Canyon CCA.

6. The Debtors, in the first day Insurance Motion, and supported by the Sworn Declaration of Rodney D. Gloss, claimed: "It is therefore in the best interests of the estates to continue to maintain the Insurance Policies and the PFAs and to pay to the [AFCO] the amounts owed to finance the Insurance Premiums …."

7. Debtor companies operated at the direction of one set of directors and officers and formalized relationships among one another through intercompany agreements.

8. Prior to and during the bankruptcy, Debtors handled their finances on a consolidated basis, using a centralized Cash Management System and Centralized Cash Account.

9. The Debtors' "treasury function" was centralized in their Golden, Colorado headquarters through the CCA. Receipts from the affiliated Debtors were swept, automatically or manually, to Canyon's CCA, and disbursements to creditors were made directly from the account or, alternatively, transferred back to Briggs and Pinson to meet those entities' obligations.

10. Canyon operated as the tax-paying entity and owned 100% of Briggs and Pinson. Canyon was not otherwise operational; its main purpose was to receive the companies' revenue and pay certain bills. Canyon was responsible for "overall management" of the Debtors, exercising control of the Debtors' finances.

11. Briggs was an operational open-pit mine located in California.

12. Pinson was an operational underground mine located in Nevada.

13. In January 2014, Atna Resources Ltd. entered into a $22 million credit facility with Waterton Precious Metal Fund Cayman, L.P.

14. There were three significant cash transactions that were deposited either in the Atna bank account and/or the Canyon bank account. The first deposit (January 31, 2014) in the amount of $4,667,335 was the net proceeds from the refinancing of the Sprott loan with the Waterton entities. The second deposit (August 25, 2014) in the amount of $1,689,975 was the proceeds from a private placement of Atna stock. The final significant deposit (November 26, 2014) in the amount of $5,000,000 was the proceeds from Canyon's sales of the Reward and Clover entities to a subsidiary of Waterton.

15. In 2014, approximately $10 million was deposited in the Canyon account, none of which was attributable to Pinson or Briggs.

16. In the two years preceding the Petition Date, payments were made to AFCO through the Canyon CCA, for insurance coverage financing, amounting to $2,188,904.

17. The funds advanced by AFCO were used for the purpose of obtaining comprehensive insurance coverage for the Debtors.

18. The Operating Guidelines and Reporting Requirements of the United States Trustee for operating in Ch. 11 require the debtor to maintain adequate insurance. Operating Guidelines Section B(1) states that "the debtor must maintain without interruption, and in adequate amounts, all insurance customarily carried in the debtor's line of business or required by law or regulation. The debtor(s) must make all insurance premium payments when due." Section B(3) lists the types of insurance that the debtor is required to maintain including casualty/general liability, property insurance, workman's compensation and unemployment insurance, professional (malpractice) liability insurance, product liability insurance, automotive liability insurance and finally, any other insurance coverage that is customary in the business or situation of the debtor(s).

19. The comprehensive insurance coverage was essential to the preservation of value of the Debtors' businesses and assets, and portions of the coverage were required by the various regulations, laws, and contracts that govern the Debtors' commercial activities.

II. Legal Analysis

AFCO advances several theories upon which it claims it is entitled to judgment as a matter of law. AFCO argues no unjust enrichment can be found when it performed all of its obligations under the insurance financing agreements. AFCO argues the fraudulent transfer claims fail because, as a result of the cash infusions made to Canyon by Atna, the Trustee cannot prove the funds paid to AFCO were not attributable to Atna. AFCO also argues that the Trustee's expert insolvency analysis is flawed.

The main thrust of AFCO's arguments, however, is that the claims asserted against AFCO are precluded by the holding reached in the ESS Adversary Proceeding.

The Trustee counters with the argument that because the Trustee voluntarily dismissed the Adversary Proceeding, the ESS order never became final and therefore cannot be given preclusive effect. Without addressing whether such action arguably compromised fiduciary duties owed to the creditors of Briggs by abandoning the preference claims against ESS, the ESS ruling, despite not being final, requires dismissal of the within Adversary Proceeding under the law of the case doctrine.

The law of the case "doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (citation omitted). The Tenth Circuit recognizes the doctrine as a restriction self-imposed by the courts in the interests of judicial efficiency, based on sound public policy that litigation should come to an end and is designed to bring about a quick resolution of disputes by preventing continued re-argument of issues already decided. *Id.* at 116.

A court holds the discretion to adhere to a prior ruling made earlier in the same case. Likewise, "[a] court may exercise judicial discretion *not* to apply the law of the case doctrine under the following circumstances: '(1) new and different evidence; (2)

intervening controlling authority; or (3) a clearly erroneous prior decision which would work manifest injustice.'" *The Vaughan Co., Realtors v. Lankford (In re The Vaughan Co., Realtors)*, Nos. 10-10759-j11, 12-1139-j, 2017 Bankr. LEXIS 1573, at *11 (Bankr. D.N.M. June 7, 2017) (citing *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1251 (10th Cir. 2011)).

Although procedurally distinguishable, the *Lankford* case discusses the application of the doctrine of the law of the case. The Lankfords invested in a fraudulent Ponzi scheme. The company running the scheme filed a voluntary Chapter 11 petition and, sometime thereafter, a Chapter 11 Trustee was appointed. The Chapter 11 Trustee filed an adversary proceeding against the Lankfords seeking to recover funds repaid to them in excess of amounts they invested in the company. Despite their protests that the amount of the recoverable funds was in dispute, the Bankruptcy Court entered summary judgment in favor of the Chapter 11 Trustee. The Lankfords did not timely appeal the entry of summary judgment but later moved to vacate the judgment. The Bankruptcy Court's denial of the motion to vacate the judgment was appealed and affirmed. However, the appeal was limited in scope to the denial of the motion. The Lankfords then sought to reopen the adversary proceeding to revisit the amount of the judgment. In denying the motion to reopen, the Bankruptcy Court invoked the law of the case doctrine to prevent the re-litigation of previously decided issues. "This Court, and the United States District Court, have already addressed and rejected the same arguments the Lankfords raise again in their Motion to Reopen." *Id.* at *12.

In ESS, this Court concluded that *Slack-Horner* barred the Trustee's claims for recovery of the alleged constructive fraudulent transfers, and thus the claims were not premised on a viable legal theory. Moreover, the Amended Complaint does not include claims to avoid any transfers between the Debtor entities, and, under the binding precedent set forth in *Slack-Horner*, the Trustee cannot recover the transfers without first avoiding the initial transfers from Briggs to Canyon and from Canyon to Atna. 2018 Bankr. LEXIS 4223, at *21.

The dismissal of the constructive fraudulent transfer claims was adopted by Judge Blackburn:

> Taking the allegations in the Complaint as true and applying the holding of *Slack-Horner*, the allegations of the Complaint in support of claims three and four do not state claims on which relief can be granted in the form of avoidance of allegedly fraudulent transfers from Atna, Inc. to Elwood. To recover from Elwood, a subsequent transferee of the funds in question, "the trustee must first have the transfer of the debtor's interest to the initial transferee avoided under § 548." Slack-Horner, 971 F.2d at 580. The Trustee has made no effort to avoid the relevant initial transfers from CR Briggs to the Canyon CCA or from Atna, Inc. to the Canyon CCA. Further, the Trustee has made no effort to avoid the relevant subsequent transfers ("immediate or mediate" transfers, to use the language of § 550) from the Canyon CCA to Atna, Inc. Under *Slack-Horner*, the fact that these prior transfers have not been avoided dooms any effort to avoid the subsequent

> transfers from Atna, Inc. to Elwood. Correctly, the bankruptcy court concluded that "the Trustee cannot recover the transfers [from Atna, Inc. To Elwood] without first avoiding the initial transfers from CR Briggs to Canyon and from Canyon to Atna." Order [#46 - Adv. Pro. No 17-01160-JGR], p. 10.

2019 U.S. Dist. LEXIS 131484, *14-15.

The constructive fraudulent transfer claims asserted against AFCO are not materially distinguishable. Monies were transferred to Canyon. Canyon, utilizing the CCA, paid debts alleged to be owed by a separate Debtor entity. The Trustee now seeks to avoid those payments on behalf of yet other Debtor entities that contributed the funds to the CCA.

More importantly, this Court concluded that the Trustee lacked standing to pursue the constructive fraudulent claims because they were not adequately reserved:

> Here, the creditors did not receive adequate notice of the crossover of such claims. From a review of the pleadings in this case, and in the Komatsu, Wells Fargo, and AFCO cases, no creditor of Atna or CR Briggs ever anticipated being sued by the same trustee in the same action asserting claims on behalf of two separate estates, and no creditor was aware it would be sued for a constructive fraudulent transfer arising out of the CCA. The new avoidance claims are substantial and based on state law. If the creditors were aware of these facts, they might have voted against the Joint Chapter 11 Plan or objected to a single trustee representing seven liquidating trusts. The creditors relied upon the representations contained in the Cash Management Motion and the good faith Joint Chapter 11 Plan in describing the reserved claims and interests.
>
> Moreover, while the Joint Chapter 11 Plan indicated that the retained causes of action would be transferred to the Trustee to pursue and it would be reasonable to assume that an Atna or CR Briggs creditor might receive a preferential transfer complaint, it would not be reasonable to assume that an Atna or CR Briggs creditor would receive a fraudulent transfer complaint to recover transfers going back two years due to the legal fiction that the use of the CCA created any kind of fraud or fraudulent transfer, actual or constructive.

2018 Bankr. LEXIS 4223, at *37-38.

Again, Judge Blackburn adopted the conclusion:

> The bankruptcy court concluded that the Trustee "lacks standing to bring the constructive fraudulent transfer claims"

> asserted in claims three and four. Order [#46 - Adv. Pro. No 17-01160-JGR], p. 17. This is true, the bankruptcy court found, because "the type of avoidance claims premised on state and federal constructive fraudulent transfer laws arising out of the CCA were not reserved [in the Chapter 11 plan] or foreseeable by the creditors." Id., p. 16. The bankruptcy court made a detailed analysis of this issue. I agree with that analysis and the conclusion of the bankruptcy court that the Trustee lacks standing to bring avoidance claims premised on state and federal constructive fraudulent transfer laws against Elwood. On this basis, I find and conclude that it would be futile for the Trustee to attempt to amend the complaint to state potentially viable claims to avoid, as fraudulent conveyances, the subsequent transfers from Atna, Inc. to Elwood.

2019 U.S. Dist. LEXIS 131484, at *16-17.

The conclusion that the Trustee lacked standing to pursue the constructive fraudulent claims was reached by examining the Joint Chapter 11 Plan in the Chapter 11 bankruptcy cases and determining the avoidance claims premised on state and federal constructive fraudulent transfer laws arising out of the CCA were not adequately reserved. That conclusion applies to all causes of action brought by the Trustee on behalf of the beneficiaries of the Liquidating Trust and prevents inconsistency and reconsideration of matters previously decided in the case. The three alternate grounds to depart from the application of the doctrine do not apply here: (1) there is no new evidence that is substantially different; (2) controlling authority has not changed; and (3) the conclusions of law proposed by this Court and adopted by the District Court in ESS Adversary Proceeding are not clearly erroneous and do not work a manifest injustice.

CONCLUSION

AFCO is entitled to rely on the previous rulings in this bankruptcy case. The funds advanced under the insurance premium financing agreements conferred essential benefits to the Debtors through the comprehensive insurance plan. AFCO advanced funds to Atna. Atna was the parent company of several mining operations which conducted business in separate corporate units. Atna, as the parent company, obtained insurance coverage for the whole of the operations. The insurance coverage was financed. The financed insurance coverage was repaid. Nothing in this scenario strikes the Court as fraudulent or subject to a claim of unjust enrichment.

In accordance with the above findings of facts and conclusions of law, it is ORDERED:

1. The Plaintiff Trustee's Cross Motion for Summary Judgment (Doc. 36) is DENIED.

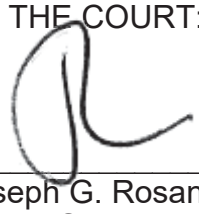
2. Defendant AFCO's Motion for Summary Judgement (Doc. 34) is GRANTED. The within Adversary Proceeding is dismissed with prejudice, and each party is responsible for its own costs and fees.

3. Defendant AFCO's Motion to Strike Plaintiff Trustee's Supplemental Expert Report and Objection and Cross Motion for Summary Judgment and Alternative Request for Relief Under Rule 56(d) (Doc. 38) is DENIED as moot.

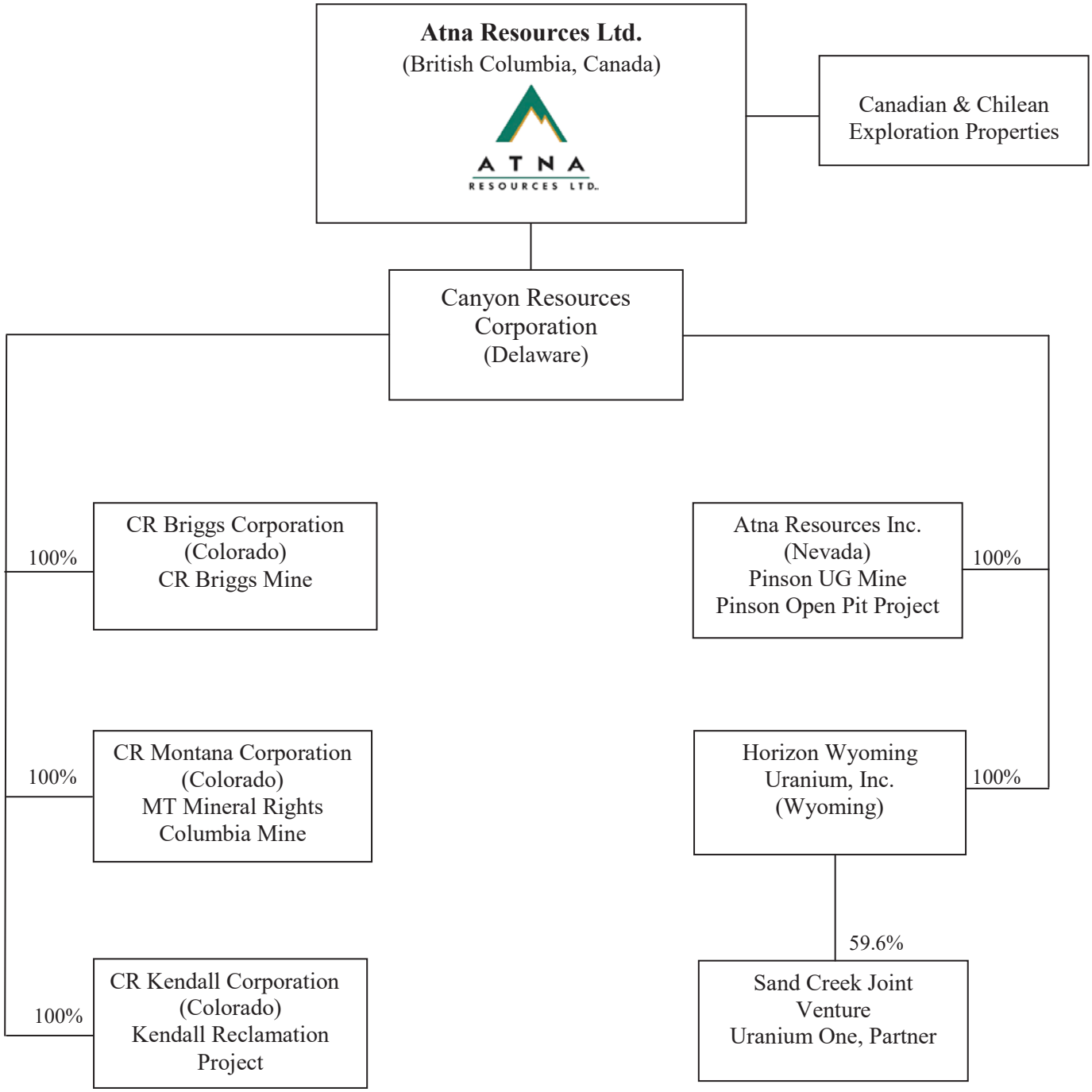
4. Plaintiff Trustee's Motion to Strike Defendant AFCO's Untimely Filed Expert Rebuttal Report and to Exclude Expert Testimony (Doc. 22) is DENIED as moot.

Dated this 10th day of July, 2020.

BY THE COURT:



Joseph G. Rosania, Jr.
United States Bankruptcy Judge


Atna Resources Ltd.
(British Columbia, Canada)
ATNA
RESOURCES LTD.
Canadian & Chilean Exploration Properties
Canyon Resources Corporation (Delaware)
100%
CR Briggs Corporation (Colorado) CR Briggs Mine
Atna Resources Inc. (Nevada) Pinson UG Mine Pinson Open Pit Project
100%
100%
CR Montana Corporation (Colorado) MT Mineral Rights Columbia Mine
Horizon Wyoming Uranium, Inc. (Wyoming)
100%
59.6%
100%
CR Kendall Corporation (Colorado) Kendall Reclamation Project
Sand Creek Joint Venture Uranium One, Partner