**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF DELAWARE**

**IN RE**

**REVSTONE INDUSTRIES, LLC, ET AL.** **CASE NO. 12-13262**

**DEBTORS** **(JOINTLY ADMINISTERED)**

**UNITED STATES BANKRUPTCY COURT**
**EASTERN DISTRICT OF KENTUCKY**
**LEXINGTON DIVISION**

**FRED C. CARUSO, SOLELY IN HIS CAPACITY AS THE REVSTONE/SPARA LITIGATION TRUSTEE OF THE REVSTONE/SPARA LITIGATION TRUST** **PLAINTIFF**

**V.** **ADV. NO. 15-5123**

**KEENELAND ASSOCIATION, INC. AND NELSON CLEMMENS** **DEFENDANTS**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter is before the Court on cross-motions for summary judgment filed by the Plaintiff Fred C. Caruso in his capacity as the Revstone/Spara Litigation Trustee of the Revstone/Spara Litigation Trust (the "Trustee") [ECF No. 98] and the Defendant Nelson Clemmens [ECF No. 97]. The Trustee seeks summary judgment against Clemmens based on a constructively fraudulent transfer pursuant to 11 U.S.C. §§ 544 and 550 and § 1305 of the Delaware Uniform Fraudulent Transfer Act, DEL. CODE. ANN. tit. 6, §§ 1301-12 (the

"DUFTA").[1] Clemmens seeks summary judgment asserting the Trustee cannot prove Clemmens was the initial transferee or received a benefit from the transfer pursuant to § 550(a)(1). For the reasons stated herein, the Trustee's Motion for Summary Judgment is granted and Clemmens' Motion for Summary Judgment is denied.

## I. FINDINGS OF FACT.

The parties jointly stipulate to the following facts. [*See generally* Joint Stipulations, ECF No. 116.]

### A. The Creation of Revstone Industries, LLC.

Revstone Industries, LLC ("Revstone") was founded on December 2, 2008, as a Delaware limited liability company, by and among three irrevocable trusts (together, the "Children's Trusts"). The Children's Trusts were established for the benefit of the children of Revstone's manager, George S. Hofmeister. On or about July 1, 2011, the Children's Trusts assigned all of their membership interests in Revstone to Ascalon Enterprises, LLC ("Ascalon"). Thereafter, Ascalon owned 100% of the membership interests in Revstone.

At all relevant times, Hofmeister was the chairman and sole member of Ascalon's board of managers. Hofmeister was also the chairman and sole member of Revstone's board of managers. In this capacity, Hofmeister controlled Revstone.

Revstone, through its subsidiary operating companies, designed and manufactured engineered components for the automotive industry and other industrial sectors. It is or was the direct or indirect parent of approximately 32 subsidiaries.

[1] Unless otherwise indicated, all chapter and section references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1532. References to the Federal Rules of Civil Procedure will appear as "Civil Rule ___," and references to the Federal Rules of Bankruptcy Procedure will appear as "Bankruptcy Rule ____."

**B. Clemmens' Relationship with Hofmeister.**

Clemmens and Hofmeister met in 1986. Hofmeister selected Clemmens to serve as the trustee of the George S. Hofmeister Family Trust (the "Family Trust"). Clemmens served as trustee for the Family Trust beginning in March 2007 until he resigned at some later date.

**C. The Keeneland Transfer.**

In 2009, Clemmens had a personal account (the "Clemmens Account") with Keeneland Association, Inc. ("Keeneland"). The Clemmens Account allowed Clemmens to bid on and purchase horses at auctions conducted by Keeneland.

Clemmens authorized Hofmeister to use the Clemmens Account to purchase thoroughbred race horses. On or around November 12, 2009, Peter Kirwan, a delegate for Hofmeister, used the Clemmens Account to purchase 12 thoroughbred horses for the aggregate amount of $268,765.00.

A Keeneland Acknowledgement of Purchase and Security Agreement (the "Keeneland Agreements") for each horse[2] shows that Peter Kirwan signed for Nelson Clemmens, who is listed as the purchaser or agent. [Joint Stipulations, Exh. A, ECF No. 116-1.] The Keeneland Agreements provide that the purchaser is responsible for payment according to the terms therein and failure to pay is a default. [*Id.*]

The horses were purchased for Hofmeister, not Revstone or Clemmens. Following their purchase, they were shipped directly to a farm owned by Hofmeister. On November 23, 2009, and December 10, 2009, Keeneland sent a "Buyer Statement" to Clemmens seeking payment for the horses in the amount of $268,765.00. [Joint Stipulations, Exhs. B and C, ECF Nos. 116-2

[2] One of the agreements is slightly different from the others. Agreement No. 17761 is titled "Notice of Sale by Consignor to Buyer for RNA Horse." This Agreement is consistent for all relevant terms, so it is also included in the reference to the Keeneland Agreements.

and 116-3, respectively.] Clemmens then sent the November and December Buyer Statements to Hofmeister to seek payment for the debt.

On January 5, 2010 (the "Transfer Date"), Revstone issued a check to Keeneland in the amount of $269,021.21 (the "Transfer"). [Joint Stipulation, Exh. D, ECF No. 116-4.] Clemmens never received or controlled these funds; Revstone made the payment directly to Keeneland.

**D. The Bankruptcy and Adversary Proceeding.**

On December 3, 2012, Revstone and its affiliates filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Delaware Court"). On June 12, 2014, Revstone filed a complaint in the Delaware Court seeking to avoid and recover as fraudulent transfers certain transfers made to Keeneland, among others, for the personal benefit of Clemmens pursuant to § 544(b), § 550 and the DUFTA. [Complaint, ECF No. 1-1.] The counts against Clemmens and Keeneland were ultimately severed from those raised against other parties and an Amended Complaint was filed on August 1, 2014. [Amended Complaint, ECF No. 1-2.] Keeneland later asserted a cross-claim against Clemmens. [Keeneland Answer and Cross-Claim, ECF No. 1-4.]

On March 23, 2015, the Delaware Court confirmed a Joint Chapter 11 Plan of Reorganization. [*See* Delaware Main Case No. 12-13262, Order Confirming the Debtors' Joint Chapter 11 Plan of Reorganization, ECF No. 2067.] The Chapter 11 Plan provided the corporate authority for the Debtors to enter into the Revstone/Spara Litigation Trust Agreement. [*Id.*, ECF No. 1994-3.] The Revstone/Spara Litigation Trust was created to pursue certain causes of action for the benefit of the Debtors' creditors. Accordingly, the Trustee was designated and substituted for Revstone as the plaintiff in this adversary proceeding. The Delaware Court later entered an order transferring this adversary proceeding to this Court on December 16, 2015, and

the case was filed as Adv. No. 15-5123. [Kentucky Adv. No. 15-5123, Memorandum Order, ECF No. 1.]

On January 30, 2017, all claims against Keeneland were dismissed based on a settlement reached between the Trustee and Keeneland. [Order Approving Stipulation of Dismissal, ECF No. 62.] Subject to the terms of that settlement, Keeneland agreed to pay the Trustee $160,000.00, thereby reducing Clemmens' potential aggregate liability to the Trustee in this proceeding to $109,026.21. On March 10, 2017, Keeneland's cross-claim against Clemmens was dismissed pursuant to a settlement between them. [Agreed Order Dismissing Cross-Claim, ECF No. 83.]

The remaining issue is whether the Transfer by Revstone to Keeneland is a constructively fraudulent transfer pursuant to § 544(b) and the DUFTA that is recoverable from Clemmens as the person for whose benefit the transfer was made pursuant to § 550(a).

## II. JURISDICTION.

The Court has jurisdiction pursuant to 28 U.S.C. § 1334 and venue is proper pursuant to 28 U.S.C. § 1409.

The parties dispute whether this adversary proceeding is core pursuant to 28 U.S.C. § 157(b). Clemmens does not consent to entry of final orders by this Court and argues by separate motion that the matter is statutorily core, but constitutionally non-core pursuant to *Stern v. Marshall*, 564 U.S. 462, 131 S. Ct. 2594, 180 L.Ed.2d 475 (2011). [*See* Motion to Determine Adversary Proceeding is Non-Core, ECF No. 96.] The Court orally deferred a ruling on this issue at the hearing held on June 6, 2017, pending the resolution of the cross-motions for summary judgment.

As discussed in a separate order, the Trustee's claim, though statutorily core pursuant to §157(b), is constitutionally non-core. *See Exec. Benefits Ins. Agency v. Arkison*, 134 S. Ct. 2165, 2172-2173, 189 L.Ed.2d 83 (2014). As such, this Court only has authority to submit proposed findings of fact and conclusion of law. *See* 28 U.S.C. § 157(c)(1). Accordingly, the foregoing facts shall be deemed proposed findings of fact and the following conclusions of law shall be deemed proposed conclusions of law pursuant to 28 U.S.C. §157(c)(1) and FED. R. BANKR. P. 9033.

## III. CONCLUSIONS OF LAW.

### A. The Summary Judgment Standard.

On a motion for summary judgment, the movant has the burden of showing that there are no genuine issues of material fact in dispute. The evidence, together with all permissible inferences, are construed in the light most favorable to the party opposing the motion. FED. R. BANKR. P. 7056 (incorporating FED. R. CIV. P. 56); s*ee Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Provenzano v. LCI Holdings, Inc*., 663 F.3d 806, 811 (6th Cir. 2011). Once the moving party has made this initial showing, the nonmoving party must come forward with specific facts that show there is a genuine issue for trial. This requires more than a simple showing of metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co., Ltd,* 475 U.S. at 1356.

The movant may support a motion for summary judgment with affidavits or other proof or by exposing the lack of evidence on an issue for which the nonmoving party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–24, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In response to a summary judgment motion, the nonmoving party must go beyond the allegations and denials in the pleadings and "present affirmative evidence in order to

defeat a properly supported motion for summary judgment." *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 257, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The Court's task is not "to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Liberty Lobby*, 477 U.S. at 249. A genuine issue for trial exists when there is sufficient "evidence on which the jury could reasonably find" for the nonmovant. *Id.* at 252.

**B. The Burden of Proof.**

The Trustee seeks to recover pursuant to § 544[3] and the DUFTA,[4] which is substantially the same as § 548 of the Bankruptcy Code. *PHP Liquidating, LLC v. Robbins (In re PHP Healthcare Corp.)*, 128 Fed. Appx. 839, 847 (3d Cir. 2005). There are no issues regarding application of § 544. The report of the Trustee's solvency expert, James M. Lukenda, confirms at least two creditors existed at the time of the Transfer [Trustee's Motion for Summary Judgment, Exh. A, ECF No. 98-1 (hereinafter "Lukenda Report")], and Clemmens confirmed at oral argument that he concedes this point.

To prevail on the DUFTA cause of action, the Trustee must prove by a preponderance of the evidence that: (1) Revstone made a transfer for less than reasonably equivalent value; and (2)

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[3] (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

11 U.S.C § 544.

[4] (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

DEL. CODE ANN. tit. 6, § 1305.

Revstone was: (a) insolvent or became insolvent as a result of the transfer; (b) engaged or about to engage in a business or transaction for which its remaining assets were unreasonably small in relation to the business or transaction; or (c) intended to incur, or believed or reasonably should have believed that it would incur, debts beyond its ability to pay as they became due. *See Miller v. Greenwich Capital Fin. Prods., Inc. (In re Am. Bus. Fin. Servs., Inc.),* 471 B.R. 354, 378 n.17 (Bankr. D. Del. 2012); *In re Plassein Int'l Corp*., 428 B.R. 64, 67 (D. Del. 2010). The Trustee also must prove Clemmens is the person "for whose benefit such transfer was made" to recover from Clemmens. 11 U.S.C. § 550(a).[5]

**C. The Trustee is Entitled to Summary Judgment.**

**1. Revstone Made a Transfer for Less than Reasonably Equivalent Value.**

Revstone and its subsidiaries were part of the automotive industry, with no interest in thoroughbred horses or racing. The stipulated facts show Revstone paid Keeneland $269,021.21 for horses that Hofmeister purchased and retained. Therefore, there is no genuine issue of material fact that Revstone made the Transfer for less than reasonably equivalent value.

**2. Revstone Made the Transfer While Insolvent.**

There is no genuine issue of material fact regarding the Debtor's insolvency at the time of the Transfer despite Clemmens' arguments to the contrary. The Trustee relies on the expert report and opinion of James M. Lukenda to prove the Debtor was insolvent when the Transfer

[5] (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from--

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
(2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550.

was made. [*See generally* Lukenda Report at p. 5.] Lukenda concludes that Revstone was balance sheet insolvent and without adequate capital to pay debts from its formation in 2008. [*Id.*]

The Lukenda Report is sufficient to carry the Trustee's initial burden to prove insolvency by a preponderance of the evidence, so the burden of persuasion shifts to Clemmens to show specific facts that create a genuine issue about the Debtor's solvency. *See Estate of Thomas v. Fayette County*, 194 F. Supp. 3d 358, 368-89 (W.D. Pa. 2016) (discussing the moving and non-moving parties' burdens with regard to expert testimony at the summary judgment stage). Clemmens does not contest Lukenda's qualifications as an expert on solvency. Rather, Clemmens argues Lukenda's analysis has faults that raise sufficient questions to call his conclusions into doubt. In addition to his arguments in opposition to summary judgment, Clemmens also has objected to the introduction of the Lukenda Report at trial contending it fails to comply with Civil Rule 26 of the Federal Rules of Civil Procedure[6] and Civil Rule 702 of the

[6] (2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report--prepared and signed by the witness--if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

> (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
> (ii) the facts or data considered by the witness in forming them;
> (iii) any exhibits that will be used to summarize or support them;
> (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
> (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
> (vi) a statement of the compensation to be paid for the study and testimony in the case.

FED. R. CIV. P. 26.

Federal Rules of Evidence.[7] [Clemmens' Objection to Exh. 1, ECF No. 119 (hereinafter "Clemmens' Objection").][8]

Clemmens raises similar arguments in his Response to the Trustee's Motion for Summary Judgment and Clemmens' Objection. Collectively, Clemmens argues the Lukenda Report:

- fails to consider a hypothetical willing buyer and willing seller to determine the debtor's going concern value;
- fails to follow valuation standards;
- is methodologically unsound and inconsistent;
- misrepresents the pension liability;
- fails to address or explain inconsistent information; and
- fails to perform any analysis of guaranty liability.

[*See generally* Clemmens' Response to Trustee's Motion for Summary Judgment, ECF No. 110 (hereinafter "Clemmens Response"); Clemmens' Objection.]

None of these arguments satisfy Clemmens' burden of persuasion. It is insufficient to dispute Lukenda's reasoned conclusions with only general argument and speculation. The issues Clemmens raised are mostly just abstract concepts he fails to support with independent evidence. *Estate of Thomas,* 194 F. Supp. 3d at 358 (requiring the "nonmoving party to come forward with specific record evidence to show why a trial is necessary" to rebut an expert report that satisfies the moving party's initial burden).

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[7] A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

FED. R. EVID. 702.

[8] Clemmens' Objection was filed after the parties completed briefing on the Motions for Summary Judgment. It has not been set for hearing and the Trustee has not filed a response.

**i. Lukenda Appropriately Measures "Fair Value."**

Clemmens argues that Lukenda fails to consider a hypothetical willing buyer and willing seller in determining "fair value" for Revstone as a going concern. Under the DUFTA, "a debtor is insolvent if the sum of the debtor's debts is greater than all of the debtor's assets, at a fair valuation." DEL. CODE ANN. tit. 6, § 1302(a). Clemmens argues that as "a matter of black letter law and basic valuation standards," the fair valuation for a business as a going concern is determined "based on a hypothetical purchase and sell [*sic*] transaction between two hypothetical, fully informed parties under no compulsion to buy or sell and having a reasonable amount of time to sell the property." [Clemmens' Objection at p. 4.] Clemmens concludes that the Court should exclude the Lukenda Report because he fails to evaluate fair value in this particular way.

An insolvency analysis must first consider whether a going concern or liquidation valuation is required. *EBC I, Inc. v. America Online, Inc.* (*In re EBC I, Inc.*), 380 B.R. 348, 355 (Bankr. D. Del. 2008). A "going concern" is a company that is expected to continue its day-to-day operations after a sale. Fair value for a going concern considers a sale on prudent terms between a willing buyer and willing seller within a reasonable period of time. *Iridium Roaming, LLC v. Statutory Committee of Unsecured Creditors on behalf of Iridium Operating, LLC (In re Iridium Operating, LLC)*, 373 B.R. 283, 344 (Bankr. S.D. N.Y. 2007).

But going concern value is not the only way to determine fair value. Courts are instructed to take a flexible approach to insolvency and consider the totality of the circumstances. *Id. See also Lawson v. Ford Motor Co. (In re Roblin Indus. Inc.)*, 78 F.3d 30, 38 (2d Cir. 1996) (citing *Porter v. Yukon Nat'l Bank*, 866 F.2d 355, 357 (10th Cir. 1989) for the proposition that flexibility is required and fair value is defined by the most appropriate means);

*Europlast, Ltd. v. Oak Switch Systems, Inc.*, 10 F.3d 1266, 1271 (7th Cir. 1993) (same). If a company is on its "deathbed" or "nominally in existence," the application of the going concern value is inappropriate. *Fryman v. Century Factors* (*In re Art Shirt, Ltd, Inc*.), 93 B.R. 333, 341 (E.D. Pa. 1988). In such circumstances, a going concern value would mislead the trier of fact and fictionalize the company's true financial condition, particularly in an unstable market. *Id.*

Consistent with these precedents, Lukenda recognized that there are multiple ways to approach an insolvency analysis, including "projections based on projected cash flows, comparable market multiple analysis, and comparative market transactions." [Lukenda Report at p. 8.] Lukenda did not calculate a going concern value or adopt the comparable sales method. Lukenda's decision was influenced in part by the significant turmoil in the automotive supplier markets, bankruptcies of large companies like General Motors and Chrysler, and frozen credit markets. [*Id*.]

Lukenda ultimately decided to place his "greatest reliance on the actual fair market transaction values paid by Hofmeister for the acquisitions that comprised Revstone over the Relevant Period" and therefore "utilized the financial statements reported upon by the independent auditors" as a starting point for his analysis. [*Id*.] The historical purchase price used in the GAAP financial statements presented an accurate starting point because Revstone was a new entity that purchased distressed assets at market prices. [*Id*.] Also, Hofmeister did not adequately capitalize these assets, so no significant change in value was expected. [*Id*.]

Therefore, Lukenda's calculation of fair value begins with the Debtor's investments in its subsidiaries that had positive equity. [*Id*. at pp. 10-11.] He then made several adjustments to eliminate any gross-up for intercompany assets and liabilities. [*Id*. at pp. 8-9.] He also made

adjustments for pension plan liabilities. [*Id*. at pp. 11-12.] The validity of these adjustments is addressed in Sections III.C.2.ii and iii, *infra*.

Lukenda's justification for the methodology used is reasonable on its face. Nothing patently suggests the valuation is inherently wrong. It is possible another expert might promote a hypothetical sale value, but Clemmens has offered no expert analysis to contradict Lukenda's conclusions.

Clemmens instead argues that Lukenda's opinion of fair value is still unreliable and inadmissible because he disregards published valuation standards, fails to account for information that either contradicts or informs his analysis, and does not explain his conclusions. [Clemmens' Objection at p. 11.] These arguments are not persuasive either. Clemmens does not cite to any published valuation standards that he believes Lukenda should have considered. Also, as the subsequent discussion confirms, Lukenda considered contradictory information and reasonably disregarded it. *See infra* Section III.C.2.iv.

Lukenda's opinions and conclusions are adequately explained; Clemmens just disagrees with them. A mere disagreement, without support, is insufficient to overcome his burden in response to a summary judgment motion.

**ii. The Mathematical Inconsistencies Do Not Affect the Conclusion of Insolvency.**

Clemmens points out certain adjustments in Lukenda's insolvency calculation that could affect the end result. These mathematical inconsistencies would change the conclusion on solvency if the pension liabilities are excluded from the calculation. *See infra* at Section III.B.2.iii.

Clemmens asserts the Lukenda Report is methodologically unsound because Lukenda said he would not, and then effectively did, reduce the equity balances below their value. An example of the problem involves the equity and adjustments for Revstone Towing, LLC[9] in 2010. The insolvency analysis values the beginning equity balance in RPM-Tec, LLC at $5,992,826 in 2010. [Lukenda Report at p. 10.] Lukenda then adjusted the equity to remove any bargain purchase price. [*Id*. at pp. 12-13.] But Clemmens argues any deduction should not exceed the equity assigned to RPM-Tec, LLC, so the $11,033,312 bargain purchase price adjustment for Revstone Towing, LLC, a subsidiary of RPM-Tec, LLC, was too high. Clemmens also argues the adjustment is too high because the 2010 audited financial statements only assigned a value for RPM-Tec, LLC of $5,380,811. [*Id.*]

Clemmens cites other similar inconsistencies in 2009 and 2010. The impact of the required changes on the insolvency analysis is reflected on the top portion of Appendix A to this Opinion. The Trustee attempts to pass off these discrepancies as an alternative methodology suggested by Clemmens. [*See* Reply In Support of Trustee's Motion for Summary Judgment, ECF No. 113, at p. 13.] That characterization is perhaps too dismissive, but the Trustee has shown that the Debtor remained insolvent from inception even if the corrections are made. [*Id.*, Exh. D, ECF No. 113-4 (hereinafter the "Lukenda Supplemental Declaration"); *see also* Appendix A.] Therefore, these issues alone are not enough to call into question the conclusions in Lukenda's Report.

Consideration of the overall effect of these adjustments on the credibility of the entire report was considered, but rejected. Clemmens cites no other errors of this nature that would

[9] Clemmens points out, and the Trustee does not dispute, that "Revstone Towing, LLC" did not exist. Clemmens therefore assumes, and it is accepted, that Lukenda is actually referring to RPM Towing, LLC, a subsidiary of RPM-Tech, LLC. [Clemmens' Response, at p. 6 n.2.]

suggest additional mathematical corrections are required or Lukenda's revised calculations are wrong. Therefore, these problems do not contradict Lukenda's conclusion of insolvency during the relevant time period.

### iii. Clemmens Has Not Satisfied His Burden to Show the Pension Liabilities Were Improperly Included in the Insolvency Calculation.

The Lukenda Report relies heavily on certain pension liabilities to determine Revstone was insolvent from inception. Exclusion of the pension liabilities would result in a conclusion of solvency in all but 2012, as shown on Appendix A. Therefore, consideration of the basis for inclusion of these liabilities in the calculation is required.

Lukenda assessed certain controlled group[10] pension obligations as liabilities on the Debtor's balance sheet. [Lukenda Report at pp. 11-12.] Regarding the Hillsdale Pension Plan, Lukenda explained that he treated the accumulated liability from the 2008 purchase date as a reduction to equity because the Debtor immediately siphoned off the cash contribution from the seller and left the entity insolvent. This is logical and supported by sound reasoning.

Clemmens argues, however, that the liability does not arise until the pension plan was terminated after the petition date pursuant to the Employee Retirement Income Security Act ("ERISA"). *See* 29 U.S.C. § 1362. But Clemmens did not cite any case or other law that indicates Lukenda should not have used this contingent liability in his insolvency analysis. The ERISA statute cited only addresses liability under ERISA, not valuation or accounting principles

[10] A controlled group involves two or more related entities (e.g., parent/subsidiary or brother/sister) that are treated as one. 29 U.S.C. § 1301(a)(14)(A) and (B); *In re Longview Aluminum, L.L.C.*, No. 03 B 12184, 2005 WL 3021173, at *9 (Bankr. N.D. Ill. July 14, 2005), *aff'd sub nom. In re McCook Metals, L.L.C.*, No. 05C2990, 2007 WL 4287507 (N.D. Ill. Dec. 4, 2007), *aff'd sub nom. Baldi v. Samuel Son & Co.*, 548 F.3d 579 (7th Cir. 2008). Application of controlled group liability protects employees from any effort by a plan proponent to segregate employees in one entity and funds or assets in a related party that is not part of the pension plan. *See Mason and Dixon Tank Lines, Inc. v. Central States, Southeast and Southwest Areas Pension Fund*, 852 F.2d 156, 159 (6th Cir. 1988) ("[T]he primary purpose of the common control provision is to ensure that employers will not circumvent their ERISA and MPPAA obligations by operating through separate entities.").

used to determine insolvency. Further, there is case law that suggests inclusion of the controlled group pension liability is appropriate under these circumstances. *See, e.g., Richardson v. Checker Acquisition Corp. (In the Matter of Checker Motors Corp.)*, 495 B.R. 355 (Bankr. W.D. Mich. 2013) (holding estimated pension withdrawal liability could be included in the calculation of debtor's insolvency for constructively fraudulent transfer claims under the strong-arm statute and Michigan's Uniform Fraudulent Transfer Act).

Clemmens further argues Revstone never admitted liability for the pension plan obligations, despite a $95 million settlement with the Pension Benefit Guaranty Corporation ("PGBC Settlement") in the bankruptcy case. [Clemmens' Response, Exh. A, ECF No. 110-1.] Lukenda does not, however, rely on the settlement to justify inclusion of the contingent pension liabilities. He affirmatively states that Revstone is part of the controlled group and thus liable [Lukenda Report, at p. 11], a fact Clemmens only disputed in relation to the Fairfield Pension Plan. Fairfield was a subsidiary of Spara, an affiliate of Revstone. But Clemmens never explained why controlled group liability would not still catch Revstone in relation to this pension plan.

Further, Lukenda does not rely on the PBGC Settlement for the amount of the controlled group liability in his insolvency calculation. Lukenda used the plan assets as reported on the relevant financial statements less the accumulated benefit obligations. [*Id*.] Still, payment of $95 million as part of a settlement gives some indication an obligation is due. Also, as Lukenda pointed out, his estimate of liability is conservative because it is approximately $30 million less than the settlement payment. [*Id*. at p. 12.]

The other pension liability Lukenda assessed involved his adjustment for prohibited loans to Revstone or related entities. Lukenda explained: "The adjustment for Hillsdale Pension Plan

Liability Prohibited Loans adds to Revstone's controlled group liability for the unfunded pension obligations not recognized in the financial statements because of the overstatement of the value of the prohibited transactions." [*Id*.] He goes on to explain that pension plan transactions beginning in 2009 were booked as loans to other related parties, which was a violation of ERISA rules. [*Id.*] Also, the assets were never discounted based on collectability. [*Id.*]

Like the controlled group pension obligations, Lukenda's basis for including the liability for the prohibited loans appears sound and has no inherent problems. Also, once again, the only evidence in the record is the Lukenda Report (including Lukenda's initial declaration), as well as the Lukenda Supplemental Declaration. Clemmens brings no contrary expert testimony to call Lukenda's opinion or Report into question. Based on this review, Clemmens has not presented any affirmative evidence (as opposed to argument and speculation) that would create a genuine issue of fact regarding the insolvency analysis.

**iv. Lukenda Did Not Fail to Consider Required Information.**

Clemmens complains that Lukenda failed to address the Preliminary Report Regarding Solvency at December 31, 2010, other than to note it was a document relevant to his decision. [Clemmens' Response, Exh. C, ECF No. 110-3 (hereinafter "Preliminary Report"), at p. 8; *see also id.* at Exh. C.] In response, Lukenda testified in the Lukenda Supplemental Declaration that he reviewed the Preliminary Report, but discounted it because it was preliminary, made for settlement purposes, and had a number of flaws. [Lukenda Supplemental Declaration at ¶ 3.]

Clemmens again fails to offer any rebuttal evidence that would suggest Lukenda should have given the Preliminary Report more weight. Further, the fact that Lukenda's conclusions are not the same as the results in the Preliminary Report does not mean that the Lukenda Report is unreliable. Clemmens' complaint about Lukenda's lack of discussion of the Preliminary Report

does not rise to the level of affirmative evidence sufficient to create a question of fact to overcome summary judgment.

Clemmens also suggests the Lukenda Report is unreliable because it omitted discussion of any due diligence conducted by Boston Finance Group, LLC ("Boston Finance") when it extended $23 million in loans to Revstone and its subsidiaries. [Clemmens' Response at p. 6.] But Lukenda states in his report that he examined Revstone's books and records, which includes the loans extended by Boston Finance. The Lukenda Report also casts doubts on the relevancy of any third-party due diligence during the period addressed by the insolvency report. [*See generally* Lukenda Report.]

It is mere speculation to suggest that Lukenda's failure to discuss the loans makes his Report or his opinion unreliable. Like Clemmens' other assertions, he merely attempts to create metaphysical doubt without proving the insolvency analysis is wrong or there is a better method for the calculation. These alleged omissions do not make the Lukenda Report unreliable.

**v. Failure to Fully Analyze Guaranty Liability Does Not Undermine Lukenda's Insolvency Analysis.**

Clemmens argues without support that the Lukenda Report failed to properly account for any liability of Revstone on its guaranties of other parties' debts. [Clemmens' Objection at p. 10.] Lukenda explained that adding the guaranties in the mathematical calculations only "pushed the company even deeper into insolvency." [Lukenda Report at ¶ 16 of Declaration.] Therefore, it is reasonable to exclude a detailed analysis in the Lukenda Report.

**vi. There Is No Basis to Find Fault with Lukenda's Methodology.**

This discussion shows Clemmens' burden is difficult to satisfy in this case because he has not designated his own expert to explain why the methodology and liabilities used in Lukenda's

calculation are unreasonable.[11] Failure to rebut expert testimony with the opinion of another expert is not always fatal to a defense because FED. R. EVID. P. 702 does not make the uncontradicted testimony of an expert conclusive as to the issue for which it is offered. *See, e.g., In re Opelika Mfg. Corp.*, 66 B.R. 444 (Bankr. N.D. Ill. 1986). The fact finder is free to accept or reject an expert's testimony. *Harris v. Gen. Motors Corp.*, 201 F.3d 800, 804 (6th Cir. 2000) (declining to conclude on summary judgment that uncontradicted experts' affidavits were sufficiently unassailable to take issue of credibility from fact finder); *see also Powers v. Bayliner Marine Corp.*, 83 F.3d 789, 797 (6th Cir. 1996); *Adkins v. Excel Mining, LLC*, 214 F. Supp. 3d 617, 623 (E.D. Ky. 2016).

In this case, the information in the Lukenda Report is reasonable and it is the only evidence offered on the issue of insolvency. Clemmens must go beyond argument and produce real evidence to rebut the information and conclusions in the report. Clemmens criticisms are hollow because nothing shows he has the expertise to criticize Lukenda's decisions or provide his own insolvency calculation. Therefore, there is no basis to ignore the purpose of summary judgment: avoiding the time and expense of a trial on facts and issues that are not reasonably in dispute. *Wood County Dept. of Human Services v. Oberley (In re Oberley)*, 153 B.R. 179, 181 (Bankr. N.D. Ohio 1993).

Clemmens chose not to depose Lukenda, but this calculated risk works against him. He could have explored these arguments during discovery to uncover actual evidence that would undermine the Lukenda Report. Instead, he merely suggests the possibility of such evidence, which is not enough. Summary judgment is the time to present such evidence, not a time to

[11] The deadline to complete discovery passed on April 30, 2017. [Order for Pretrial Conference, ECF No. 77.] Clemmens moved for additional time to complete discovery [ECF No. 84], but withdrew his request at the hearing on April 6, 2017, following the Court's oral ruling, later memorialized in an order [ECF No. 92], granting the Motion of Non-Party Boston Finance Group, LLC for Protective Order.

hypothesize about potential weaknesses in the Lukenda Report. *See Cox v. Ky. Dep't of Transp.*, 53 F.3d 146, 149 (6th Cir. 1995) (citing *Street v. J.C. Bradford & Co.*, 886 F.2sd 1472, 1477 (6th Cir. 1986) ("Essentially, a motion for summary judgment is a means by which to 'challenge the opposing party to 'put up or shut up' on a critical issue.").

Clemmens' disagreement with Lukenda's conclusion is not enough to defeat summary judgment. There being no genuine issue of material fact, the Trustee is entitled to summary judgment on the issue of insolvency.

**3. The Transfer was Made for Clemmens' Benefit.**

Finally, there is no genuine issue of material fact that the Transfer was made for Clemmens' benefit pursuant to § 550(a). The Keeneland Agreements prove that Clemmens was liable to Keeneland for the purchases made by Kirwan on Hofmeister's behalf. [Joint Stipulations, Exh. A, ECF No. 116-1.] The invoices issued to Clemmens underscore this point. [*Id*., Exh. C and D, ECF No. 116-3 and 116-4, respectively.]

Clemmens' own testimony also confirms the Transfer satisfied his liability to Keeneland. [Trustee's Motion for Summary Judgment, Exh. 3, ECF No. 98-2.] Clemmens argues, however, that recovery under § 550(a) requires proof that Revstone intended to benefit him when it made the Transfer. *See Spradlin v. Pryor Cashman LLP (In re Licking River Mining, LLC)*, 565 B.R. 794, 806 (Bankr. E.D. Ky. 2017); *Danning v. Miller (In re Bullion Reserve of North America)*, 922 F.2d 544, 547 (9th Cir. 1991). Clemmens submits that Revstone only intended to benefit Hofmeister when it made the payment to Keeneland.

This distinction is without merit. Payment of a debt of a third party is a classic example of a transaction that fits under § 550(a)(1). *See* 5 COLLIER ON BANKRUPTCY § 550.2[04] (Resnick & Sommer eds., 16th ed. 2017). The purpose of § 550(a)(1) is to allow recovery from

the initial transferee, a subsequent transferee, or a beneficiary of a transfer. *Id.* An analysis of "intent" in § 550(a)(1) requires consideration of "the particular facts of each case to determine whether a third party should be liable for recovery of an avoided transfer as an entity for whose benefit the transfer was made." *Id.*

The law cited by Clemmens is consistent with this discussion and distinguishable. The case law involves allegations of actual fraud, where intent is a key element, not the constructive fraud alleged in this proceeding. The cases also explain how § 550(a)(1), which relates to initial transferees, fits with § 550(a)(2), which discusses immediate or mediate transferees who are protected under the safe harbor provision of § 550(b). This connection between subsections is not an issue in this proceeding.

Further, the undisputed evidence proves Revstone intended to benefit Clemmens by paying off Clemmens' debt. Hofmeister used the Clemmens Account and Clemmens delivered the invoices to Hofmeister. The record shows, and the parties jointly stipulated, that Hofmeister controlled Revstone. Thus there is no question that Revstone, through Hofmeister, intended to benefit Clemmens by paying a liability Clemmens owed to Keeneland.

## IV. CONCLUSION.

Based on the foregoing, the Trustee has met his burden of proof to show that Revstone made a transfer for less than reasonably equivalent value at a time when Revstone was insolvent pursuant to § 544 and the DUFTA and Clemmens was the beneficiary of that Transfer pursuant to § 550. Clemmens has failed to produce any evidence that would create a genuine issue of material fact. For this reason, the Trustee's Motion for Summary Judgment [ECF No. 98] is GRANTED and Clemmens' Motion for Summary Judgment [ECF No. 97] is DENIED.

Pursuant to Bankruptcy Rule 9033, the Court hereby recommends that the District Court adopt the proposed findings of fact and conclusions of law set forth herein and enter judgment in favor of the Trustee.



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**The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.**

**Signed By:**
***Gregory R. Schaaf***
**Bankruptcy Judge**
**Dated: Thursday, July 06, 2017**
**(grs)**