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. 16-5016**

NELSON CLEMMENS **DEFENDANT**

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. 77] and the Defendant Nelson Clemmens [ECF Nos. 75 and 76]. The Trustee seeks recovery of thirteen transfers made by the Debtor Revstone Industries, LLC ("Revstone"), to Clemmens 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 ("DUFTA").[1] The transfers are broken up into three groups for purposes of this summary judgment opinion: (1) the "Horse Transfer" and the "Trustee Transfers"; (2) the "Stone Spire Transfers; and (3) the "Finder's Fees Transfers"."

The "Horse Transfer" refers to a $20,000.00 transfer made on December 22, 2009, by Revstone to Clemmens to pay for horses he purchased with Hofmeister. The "Trustee Transfers" refer to two $5,000 transfers made by Revstone to Clemmens on February 24 and March 3, 2010, respectively, as compensation for Clemmens' role as trustee for several trusts created by Hofmeister. The Trustee seeks and is entitled to judgment as a matter of law on all issues related to the Horse Transfer and the Trustee Transfers.

The "Stone Spire Transfers" refer to two transfers made by Revstone to Stone Spire III, LLC ("Stone Spire"), an entity owned in part by Clemmens. The Stone Spire Transfers total $31,000.00 and were made on May 9 and June 15, 2011. [ECF No. 75.] The Trustee has not carried his burden to justify a right to recover the Stone Spire transfers, so Clemmens is entitled to judgment as a matter of law.

The "Finders' Fee Claims" refer to 8 transfers made by Revstone to Clemmens between March 5, 2010 and April 12, 2011, for a total amount of $685,000. These transfers are allegedly finder fees earned by Clemmens for sourcing over $23 million in loans extended by Boston Finance Group, LLC ("BFG") to Revstone. Clemmens seeks summary judgment on all issues [ECF No. 75.], while the Trustee only seeks partial summary judgment on the element of insolvency [ECF No. 77.] For the reasons stated herein, the Trustee is entitled to judgment as a

[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 ____."

matter of law on the issue of insolvency. There are issues of material fact remaining related to the Finder's Fee Transfers, so Clemmens is not entitled to summary judgment.

I. FINDINGS OF FACT.

The parties jointly stipulate to the following facts, unless otherwise indicated. [*See generally* Joint Stipulations, ECF No. 98.]

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.

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 later resigned.

C. The Horse Transfer.

On December 22, 2009, Revstone transferred $20,000 via wire to Clemmens to pay for thoroughbred horses. [Joint Stipulations, ECF No. 98.] The wire transfer indicates the beneficiary is the "Nelson Clemens Toroughbred [sic] Account." [*Id.*, Exhibit A, ECF No. 98-1.]

D. The Trustee Transfers.

On February 24, 2010, Revstone transferred $5,000 to Clemmens for trustee's fees. Revstone again transferred $5,000 to Clemmens on March 3, 2010, for trustee's fees. Both wire transfers including the following descriptor: "DESC: TRUSTEE." [*Id.*, Exhibits B and C, ECF Nos. 98-2 and 98-3.]

E. The Stone Spire Transfers.

Stone Spire is a limited liability company owned in equal parts by Clemmens, Hofmeister, and Leo Govoni. On May 9, 2011, and June 15, 2011, Revstone wire transferred $16,000.00 and $15,000, respectively, to Stone Spire. [*Id*., Exhs. L and M, ECF Nos. 98-12 and 98-13.]

F. The Finder's Fee Transfers.

Revstone and/or its affiliates received a series of loans from BFG totaling over $23 million from March 2010 through July 2011. During this time, Revstone made the following wire transfers to Clemmens:

EXHIBIT	DATE	AMOUNT	REFERENCE
D	March 5, 2010	$50,000.00	"TECH CAST FUNDING FINANCING FEE"
E	March 12, 2010	$150,000.00	"BI-TECH CAST 5%"
F	March 26, 2010	$200,000.00	"LANSING US TOOL 5% FINANCING FEE"
G	August 13, 2010	$100,000.00	
H	August 27, 2010	$100,000.00	
I	October 15, 2010	$10,000.00	
J	November 5, 2010	$50,000.00	
K	April 12, 2011	$15,000.00	

[*Id.*, Exhs. D-K, ECF Nos. 98-4 through 98-11.]

G. 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 August 21, 2014, Revstone filed a complaint in the Delaware Court seeking to avoid and recover as fraudulent transfers certain transfers made to Clemmens, among others, pursuant to sections § 544(b) and § 550 and the DUFTA. [*See* Complaint, ECF No. 1-1.]

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 April 8, 2016, and the case was filed as Adv. No. 16-5016. [Kentucky Adv. No. 16-5016, Memorandum Order, ECF No. 1.]

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, 150 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 claims, though statutorily core pursuant to §157(b), are 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[2] and the DUFTA,[3] 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 Partial Summary Judgment, Exh. A, ECF No. 77-1 (hereinafter "Lukenda Report")], and Clemmens confirmed at oral argument that he concedes this point.

To prevail on the 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) 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

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[2] (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.

[3] (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.

(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." 11 U.S.C. § 550(a)[4].

C. The Trustee is Entitled to Summary Judgment on the Element of Insolvency.

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 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,

[4] (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.

Clemmens has also 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[5] and Civil Rule 702 of the Federal Rules of Evidence.[6] [Clemmens' Objection to Exh. 1, ECF No. 100 (hereinafter "Clemmens' Objection").][7]

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;

[5] (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.

[6] 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.

[7] 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.

- 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. 90 (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 that 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).

1. 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 and 3, *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.4.

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.

2. 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.C.3.

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[8] 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,

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

ECF No. 92, at p. 7.] 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. B, ECF No. 92-2 (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 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.

3. 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[9] 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

[9] 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.").

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 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. 90-1.] 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 Lukenda's conclusion that controlled group liability would still catch Revstone in relation to this pension plan is wrong.

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.

4. 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. 90-3 (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 BFG when it extended $23 million in loans to Revstone and its subsidiaries. [Clemmens' Response at p. 5.] 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.

5. 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.

6. 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.[10] 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

[10] The deadline to complete discovery passed on April 30, 2017. [Order for Pretrial Conference, ECF No. 55.] Clemmens moved for additional time to complete discovery [ECF No. 59], but withdrew his request at the hearing on April 6, 2017, following the Court's oral ruling, later memorialized in an order [ECF No. 67], granting the Motion of Non-Party Boston Finance Group, LLC for Protective Order.

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 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.

D. The Trustee is Entitled to Summary Judgment on the Horse Transfer and Trustee Transfers.

The Trustee has shown there are no genuine issues of material fact related to the Trustee and Horse Transfers. The joint stipulations provide that Revstone made the Horse Transfer to Clemmens. Clemmens testified that he received receipt of the Horse Transfer as payment for horses that he and Hofmeister purchased as part of a partnership with Hofmeister. [Trustee's

Objection, Exh. D, ECF No. 89-4 (hereinafter "Clemmens' Deposition"), pp. 52:154-53:18.] The wire transfer itself supports the same. [Joint Stipulations, Exh. A., ECF No. 98-1 ("NELSON CLEMENS TOROUGHBRED [sic] ACCOUNT").] There is no proof that Revstone received any value in return for the payment.

Similarly, the parties jointly stipulated that Clemmens served as a Trustee on the Children's Trusts. It is undisputed that Revstone made the Trustee Transfers directly to Clemmens and the wire transfers referenced: "TRUSTEE." [Joint Stipulations, Exhs. B and C, ECF Nos. 98-2 and 98-3.] Clemmens testified that he believed this was likely related to his role as trustee. [Clemmens' Deposition at pp. 54:30-56:6.] There is no evidence that shows Revstone received any value in return for the Trustee Transfers.

Further, counsel for Clemmens admitted at oral argument on June 6, 2017, that the only disputed element related to the Horse Transfer and Trustee Transfers is insolvency. As there is no genuine issue of material fact that Revstone was insolvent at the time of the transfer [*see* Section III.C], the Trustee is entitled to summary judgment on the Horse Transfer and Trustee Transfers as a matter of law.

E. Clemmens is Entitled to Summary Judgment on the Stone Spire Transfers.

Although the Trustee has proven that Revstone made the Stone Spire Transfers for no value in return, the Trustee has not produced any evidence that Clemmens was the initial transferee or a person for whose benefit the transfer was made pursuant to § 550.

The joint stipulations show that Revstone made two transfers to Stone Spire, not Clemmens. [Joint Stipulations, Exhs. L and M, ECF Nos. 98-12 and 98-13.] The burden is therefore on the Trustee to produce evidence that shows Clemmens somehow benefited from the Stone Spire Transfers sufficient to recover under § 550.

The Trustee argues that Clemmens was the beneficiary of the Stone Spire Transfers as a one-third member of Stone Spire. The Trustee also cites to Clemmens' testimony in support. [Trustee's Objection, ECF No. 89.] In particular, Clemmens testified that:

- The Stone Spire Transfers were capital contributions from Revstone to Stone Spire.
- Revstone probably did not receive any benefit from the Stone Spire Transfers.
- Clemmens sent at least one email to Hofmeister that discussed amounts that Revstone needed to pay either Clemmens or Stone Spire.
- At the time of the Stone Spire Transfers, Clemmens had control of Stone Spire's cash to make purchases and he was the agent or manager of Stone Spire.

[*See* Trustee's Objection, Exh. D, ECF No. 89-4.] Clemmens also received an email from Hofmeister that indicates Hofmeister wired $25,000 to his personal account for a related Stone Spire IV project. [*Id*., Exh. H, ECF No. 89-8.]

This evidence does not establish a genuine issue of material fact. The joint stipulations identify Stone Spire as a separate entity from Clemmens as its one-third owner. Further, Clemmens testimony merely confirms that he was acting as the agent or manager of Stone Spire. There is no evidence that proves Clemmens benefitted personally from the funds.

The Trustee argues that, despite the separate legal identity of Stone Spire, this Court could still determine Clemmens is a beneficiary to the Stone Spire Transfers pursuant to *In re Dreier*, LLP, 452 B.R. 451, 466 (Bankr. S.D.N.Y. 2011). The trustee plaintiff in *Drier* was chasing actually and constructively fraudulent transfers during a Ponzi scheme. The bankruptcy court found it was not enough to allege the defendant was the manager of the recipient of the funds. *Id*. Similarly, it is not enough to allege Clemmens acted as manager of Stone Spire and

expect a conclusion that Clemmens was benefitted by the transfer to the entity. The allegations do not show Stone Spire and Clemmens are one in the same and the Trustee has not suggested any legal means to make the connection (*e.g.*, veil piercing or alter ego theories).

The Trustee also argues that the unique circumstances of this Adversary Proceeding and the related bankruptcy litigation, as well as Hofmeister's alleged criminal activity, supports the fact that Clemmens benefited from the Stone Spire Transfers. Rather than produce evidence in support of this contention, the Trustee argues that he intends to introduce witnesses and documents at trial to demonstrate that Clemmens was the true beneficiary. [Trustee Response, ECF No. 89, at pp. 11-12.] The Trustee asks for, at a minimum, a presumption that he show Clemmens was the true beneficiary at a trial. [*Id*. at p. 12.]

There is no such presumption. The burden to rebut Clemmens *prima facie* showing is on the Trustee and the time to produce such evidence is now. Like Clemmens' insolvency arguments, the Trustee's promise to produce evidence at trial is insufficient to overcome a challenge on summary judgment. S*ee 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.")

Summary judgment for Clemmens is appropriate because the Trustee has failed to produce any evidence to create a genuine issue of material fact as to whether Clemmens received the benefit of the Stone Spire Transfers.

F. Genuine Issues of Material Fact Preclude Summary Judgment on the Finder's Fee Transfers.

Clemmens argues the undisputed proof shows that Clemmens was paid a reasonable finder's fee for loans he sourced from BFG. But there is a factual dispute regarding the existence and terms of a finder's fee agreement. The Trustee's expert, James Lukenda, found no documentation of a written agreement or evidence of services rendered by Clemmens in his review of Revstone's books and records. [Lukenda Report at p. 44.] The Trustee has cited enough evidence to raise a genuine issue of material fact regarding the credibility of Clemmens' testimony about its existence and terms of any agreement.

Further, even if the evidence indisputably showed a finder's fee agreement between Revstone and Clemmens, it not yet clear that Revstone received reasonably equivalent value when it made the Finder's Fees Transfers. Only two of the eight transfers make a specific reference to a financing fee and one other might arguably reference the same. The remaining five transfers do not contain a similar reference. Therefore, Clemmens is not entitled to summary judgment on the Finder's Fee Transfers.

IV. CONCLUSION.

The Trustee is entitled to partial summary judgment on the element of insolvency on the DUFTA claims for all of the transfers. [ECF No. 77.] Also, there are no remaining issues of material fact regarding the Horse Transfer and the Trustee Transfers, so the Trustee is entitled to summary judgment. [ECF No. 77].

The discussion also confirms there are no remaining issues of material fact regarding the Stone Spire Transfers, so Clemmens is entitled to summary judgment. [ECF No. 75.] Although this decision resolves the issue of insolvency for the Finder's Fee Transfers, other issues of

material fact still exist. Therefore, Clemmens' request for summary judgment on the Finders Fee Transfers is denied. [ECF No. 76.]

Pursuant to Bankruptcy Rule 9033, the Court hereby recommends that the District Court: (1) adopt the proposed findings of fact and conclusions of law set forth herein; (2) enter judgment in favor of the Trustee as to the Horse Transfer and Trustee Transfers; and (3) enter judgment in favor of Clemmens as to the Stone Spire Transfers.

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)