

No. 23-824

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DAVID L. MILLER

*ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT*

JOINT APPENDIX

ELIZABETH B. PRELOGAR
*Solicitor General
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217*

LISA S. BLATT
*Williams & Connolly LLP
680 Maine Avenue SW
Washington, D.C. 20024
lblatt@wc.com
(202) 434-5000*

*Counsel of Record
for Petitioner*

*Counsel of Record
for Respondent*

PETITION FOR WRIT OF CERTIORARI FILED: JAN. 29, 2024
CERTIORARI GRANTED: JUNE 24, 2024

TABLE OF CONTENTS

	Page
Adversary Complaint against the United States, Bankr. D. Utah, No. 18-2089, Doc. 1 (July 19, 2018)	1
Excerpts from Insolvency Analysis, Bankr. D. Utah, No. 18-2089, Doc. 14-1 (July 26, 2019)	10
Adversary Complaint against Richard Bizzaro, Bankr. D. Utah, No. 17-23687, Doc. 650 (July 18, 2018).....	38
Adversary Complaint against Gordon Cummins, Bankr. D. Utah, No. 17-23687, Doc. 694 (Apr. 18, 2019)	49
Appellant United States' Designation of Record and Statement of Issues of Appeal, Bankr. D. Utah, No. 18-2089, Doc. 35 (Apr. 27, 2020)	58
Excerpts from Appellant United States' Opening Brief, D. Utah, No. 20-cv-248, Doc. 7 (June 17, 2020)	63
Excerpts from Brief of Appellee David L. Miller, Chapter 7 Trustee, D. Utah, No. 20-cv-248, Doc. 10 (July 24, 2020)	66

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687
Chapter 7
Adversary Proceeding No. 18-2089
IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, CHAPTER 7 TRUSTEE, PLAINTIFF

v.

THE UNITED STATES OF AMERICA, THE UNITED STATES
TREASURY DEPARTMENT (UNDER THE DIRECTION OF
SECRETARY STEVEN MNUCHIN), AND THE INTERNAL
REVENUE SERVICE (UNDER THE DIRECTION OF ACTING
COMMISSIONER DAVID J. KAUTTER), DEFENDANT

Filed: July 19, 2018

COMPLAINT

Plaintiff David L. Miller, chapter 7 trustee of All Resort Group, Inc. (the “Trustee”), complains of the Defendants the United States of America, the United States Treasury Department (under the direction of Secretary Steven Mnuchin) (the “Treasury”) and the Internal Revenue Service (under the direction of Acting Commissioner David J. Kautter) (the “IRS”) (collectively the “United States”), and alleges as follows:

PARTIES AND JURISDICTION

1. David L. Miller is the chapter 7 trustee for the bankruptcy estate of All Resort Group, Inc. (“ARG”).

2. The United States, the Treasury and the IRS are governments and governmental units, agencies, or division charged with the duties, among others, of collecting receiving payment of tax obligations of citizens of the United States of America.

3. This is a core proceeding under 28 U.S.C. § 157 (b)(2).

4. This Court has jurisdiction under 28 U.S.C. § 1334 (b) and 157 (a), and D.U.Civ. R. 83-7.1, the general order of reference.

5. Venue is proper in this Court under 28 U.S.C. § 1409.

GENERAL ALLEGATIONS

6. All Resort Group, Inc. (“ARG”) filed a petition under chapter 11 of the United States Bankruptcy Code on April 28, 2017 (the “Petition Date”).

7. The case was converted to one under chapter 7 on September 14, 2017, and David L. Miller was appointed to serve as the interim chapter 7 trustee. He continues to serve as the permanent chapter 7 trustee in the case.

8. ARG transferred its property in the form of checks to the United States through the IRS and the Treasury on, or about, the following dates and in the following amounts (hereinafter referred to as the “Transfers”):

Date	Amount
06/23/14	\$ 71,829.68
06/23/14	73,309.10
TOTAL	\$ 145,138.78

9. ARG made these payments to the United States to pay the personal tax obligations owed by Gordon Cummins and Richard Bizzaro.

10. ARG made a payment on 6/23/14 in the amount of \$71,829.68 to the IRS from the All Resort Group, Inc. Zions bank account 98023443 check # 051100048 on behalf of tax payer Gordon Cummins XXX-XX-9548 for his personal tax liability for the year 2008. A copy of the front and back of the cancelled check is attached hereto as **Exhibit “1”** and by this reference incorporated herein.

11. ARG made a payment on 6/23/14 in the amount of \$73,309.10 to the IRS from the All Resort Group, Inc. Zions bank account 98023443 check # 051100049 on behalf of tax payer Richard Bizzaro XXX-XX-0454 for his personal tax liability for the year 2009. A copy of the front and back of the cancelled check is attached hereto as **Exhibit “2”** and by this reference incorporated herein.

12. Gordon Cummins was a stockholder, officer and director, and control person of ARG and an insider of ARG pursuant to 11 U.S.C. § 101 (31).

13. Richard Bizzaro was a stockholder, officer and director, and control person of ARG and an insider of ARG pursuant to 11 U.S.C. § 101 (31).

FIRST CLAIM FOR RELIEF

Avoidance of Fraudulent Transfer
(11 U.S.C. §§ 548, 550)

14. The Trustee incorporates herein all other factual allegations of this Complaint.

15. At the time of the Transfers, ARG was insolvent, or it became insolvent as a result of the transfers.

16. In the alternative, at the time of the Transfers, ARG intended to incur or believed that it would incur debts that would be beyond its ability to pay as they matured.

17. At the time of the Transfers, ARG received less than reasonably equivalent value in exchange for the Transfers; was engaged in business or a transaction, or was about to engage in a transaction, for which any property remaining with ARG was unreasonable small; and, the Transfers were paid on debts for which ARG had no obligation or for services the actual value of which was substantially less than the amount paid.

18. In the alternative, the Transfers were made with actual intent to hinder, delay or defraud creditors, in that the Transfers were made to for the benefit of insiders in disregard of the interests of creditors at a time when the company was known to be lacking in adequate financial controls and deficient in many of its operations.

19. Pursuant to 11 U.S.C. § 548 (a) or pursuant to 11 U.S.C. § 544 and Utah law as codified in Chapter 6 of Title 25 of the Utah Code, the Transfers constitute fraudulent transfers or are otherwise voidable by the Trustee.

20. Pursuant to 11 U.S.C. § 550, the Trustee is entitled to a judgment avoiding the transfer and to a judgment against the United States, through the IRS and the Treasury, as the immediate transferee in an amount equal to the value of the Transfers as may be proven at trial, but which is believed to be at least \$145,138.78 together with costs, interest, and such further relief as the Court may deem appropriate.

PRAYER FOR RELIEF

WHEREFORE, the Trustee prays for Judgment against United States as follows:

A. On the First Claim for Relief, for an order avoiding the Transfers and for an award of Judgment against the United States and in favor of the Trustee in an amount equal to the value of the Transfers as may be proven at trial, but which is believed to be at least \$145,138.78 together with pre-judgment interest, costs and fees and as may be allowed by law and such further relief as the Court may deem appropriate.

DATED July 19, 2018

STRONG & HANNI, PC.

/s/ ELIZABETH R. LOVERIDGE
ELIZABETH R. LOVERIDGE
Attorney for the Trustee

EXHIBIT "1"

ALL RESORT GROUP GORDON CUMMINS	ALL RESORT GROUP, INC. PO BOX 681780 PARK CITY, UT 84068	Zions Bank PO BOX 30709 Salt Lake City, UT 84130-0709	051100048 31-5/1240
UNITED STATES TREASURY		DATE Jun 23, 2014	AMOUNT \$71,829.68
Pay Seventy One Thousand Eight Hundred Twenty Nine Dollars and 68 Cents		VOID AFTER 60 DAYS	
to the Order of: Internal Revenue Service		<i>B. Fee</i>	
051100048 121240000540 098 02344 3*		70007182968/	

06610320002
970214

CUMMINS GORDON
20080721718323501467030554689548
07022014

DO NOT SIGN / NEGOTIATE / STAMP FOLLOW THIS LINE
FOR FEDERAL RESERVE INSTITUTIONS ONLY

ENCLOSURE

Date:07/03/14 Seq #:76064719 Account:98023443 Serial #:51100048 Amount:\$71,829.68 Dep Seq #:-

EXHIBIT "2"

ALL RESORT GROUP Richard Bazzos	ALL RESORT GROUP, INC. PO BOX 683780 PARK CITY, UT 84058	Zions Bank PO BOX 30789 Salt Lake City, UT 84130-0709	051180048 31-5/124
UNITED STATES TREASURY		DATE	AMOUNT
Pay <u>Seventy Three Thousand Three Hundred Nine Dollars and 10 Cents</u>		Jun 23, 2014	\$73,309.10
to the Order of: <u>Internal Revenue Service</u>		VOID AFTER 90 DAYS	
			
⑆054400049⑆ ⑆124000054⑆ 098 02344 3⑆		⑆0007330910⑆	

00618320001
070214

81778921718323500447030060340455
000010 07022014

RECEIVED
JUN 23 2014
INTERNAL REVENUE SERVICE

Original Document

DO NOT SIGN ABOVE - SIGN BELOW THIS LINE
FOR I-9 ONLY - SIGN HERE FOR I-9 ONLY

ENCLOSURE

Date:07/03/14 Seq #:76064718 Account:98023443 Serial #- Amount:\$73,309.10 Dep Seq #-

7/17/2019

Insolvency AnalysisAll Resort Group, Inc. Bankruptcy
Case 17-23687Barbara Smith, CPA, CIRA, CFF, CDBV
BARBARA M. SMITH ACCOUNTING, INC.

* * * * *

III. REASONS AND BASES FOR OPINIONS**A. Background of the Debtor**

To understand the financial solvency of All Resort Group, a familiarity with the history of the Debtor is necessary. The consolidated financial statements include the operations of All Resort Group, Inc., a Utah corporation, (“All Resort Group”) (the parent company), and its subsidiaries, Resort Express, Inc. (“Resort Express”), Park City Transportation, Inc. (“Park City Transportation”), Premier Transportation, Inc. (“Premier”), All Resort Coach, Inc. d/b/a/ Lewis States (“All Resort Coach”), DVIP Inc. (“DVIP”), All Resort Car Rental, LLC (“All Resort Car Rental”), and All Resort Las Vegas, Inc. (“All Resort Vegas”). The consolidated entities are referred to “All Resort Group”.²

Resort Express. Resort Express was a Utah corporation organized on November 8, 1990 for the purpose of providing transportation services.

² EXHIBIT 1—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants’ Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

Resort Express provided limousine, taxi, shuttle, and shared ride services as well as car rentals.³ All stock of Resort Express was transferred to its parent, All Resort Group, as a non-taxable distribution from a subsidiary to its parent corporation under Section 368 of the IRS Code on December 31, 2010.⁴

Park City Transportation. Park City Transportation was a Utah corporation organized on April 14, 2009 for the purpose of providing transportation services. Park City Transportation provided limousine, taxi, shuttle, and shared ride services.⁵ Park City Transportation guaranteed the credit line of Resort Express and All Resort Coach to Zions Bank on January 28, 2013.⁶ On March 5, 2013 they executed a Guaranty in favor of Bank of America in behalf of All Resort Group.⁷ On May 6, 2013 a guaranty was executed by Park City Transportation relating to the extension of

³ EXHIBIT 1—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants' Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

⁴ EXHIBIT 2—Subscription Agreement dated December 31, 2010 as signed by Richard Bizzaro

⁵ EXHIBIT 1—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants' Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

⁶ EXHIBIT 3—Unanimous written consent in lieu of Meeting of the Board of Directors of Park City Transportation, Inc. dated January 28, 2013

⁷ EXHIBIT 4—Unanimous written consent in lieu of Meeting of the Board of Directors of Park City Transportation, Inc. dated March 5, 2013

\$950,000 of secured credit to Barron Wilson, LLC (“Barron Wilson”) by Bank of America.⁸

Premier. Premier was a Utah corporation organized on September 30, 2011, for the purpose of providing transportation services. Premier provided limousine services.⁹ Premier guaranteed the credit line of Resort Express and All Resort Coach to Zions Bank on January 28, 2013.¹⁰ On March 5, 2013 they executed a Guaranty in favor of Bank of America in behalf of All Resort Group.¹¹ On May 6, 2013 a guaranty was executed by Premier relating to the extension of \$950,000 of secured credit to Barron Wilson by Bank of America.¹²

All Resort Coach. All Resort Coach was a Utah corporation organized on January 24, 2006 for the purpose of providing charter bus services.¹³ A Guaranty in favor of Bank of America was con-

⁸ EXHIBIT 5—Unanimous written consent in lieu of Meeting of the Board of Directors of Park City Transportation, Inc. dated May 6, 2013

⁹ EXHIBIT 1—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants’ Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

¹⁰ EXHIBIT 6—Unanimous written consent in lieu of Meeting of the Board of Directors of Premier Transportation, Inc. dated January 28, 2013

¹¹ EXHIBIT 7—Unanimous written consent in lieu of Meeting of the Board of Directors of Premier Transportation, Inc. dated March 5, 2013

¹² EXHIBIT 8—Unanimous written consent in lieu of Meeting of the Board of Directors of Premier Transportation, Inc. dated May 6, 2013

¹³ EXHIBIT 9—Articles of Incorporation of All Resort Coach, Inc. dated January 24, 2006

sented to on March 5, 2013.¹⁴ All Resort Coach also guaranteed the \$950,000 loan to Barron Wilson from Bank of America on May 6, 2013.¹⁵

DVIP. DVIP was a Utah corporation organized on December 9, 2009 for the purpose of providing full service destination management services.¹⁶ DVIP was created by Richard Bizzaro (“Bizzaro”), Gordon Cummins (“Cummins”), Jeffrey R. Volmrich (“J. Volmrich”), and Fiona F. Volmrich (“F Volmrich”).¹⁷ DVIP elected S-Corporation status on November 12, 2009¹⁸, however, the S-election was terminated effective January 1, 2011.¹⁹

On December 31, 2010, Bizzaro transferred his 510 shares of DVIP common stock to All Resort Group. These shares were transferred as part of a non-taxable “B” Reorganization wherein he received 6,500 shares of All Resort Group. Cummins also transferred his 160 shares of DVIP

¹⁴ EXHIBIT 10—Unanimous written consent in lieu of Meeting of the Board of Directors of All Resort Coach, Inc. dated March 5, 2013

¹⁵ EXHIBIT 11—Unanimous written consent in lieu of Meeting of the Board of Directors of All Resort Coach, Inc. dated May 6, 2013

¹⁶ EXHIBIT 1—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants’ Report prepared July 15, 2016 by Neiderhauser & Davis, LLC, Certified Public Accountants

¹⁷ EXHIBIT 12—Unanimous Written Consent In lieu of Organizational Meeting of the Board of Directors of Newco Destination, Incorporated dated December 9, 2009

¹⁸ EXHIBIT 13—Form 2553 dated 12/9/2009 for Destination VIP, Incorporated

¹⁹ EXHIBIT 14—Notice of Termination of Status as an S Corporation dated May 6, 2013.

common stock to All Resort Group as part of a non-taxable “B” Reorganization wherein he received 3,300 shares of All Resort Group.²⁰

A special meeting of the DVIP Board of Directors was held on September 15, 2011. During the meeting, there was a discussion between Bizzaro and the Volmrichs regarding intercompany loans between other members of the All Resort Group. F. Volmrich indicated some of the cash transfers were too large and could impair the corporation's ability to pay its vendors timely and that some portion of the corporation's funds represented deposits from its clients. F. Volmrich wanted more documentation of the cash transfers made by the corporation to other members of the All Resort Groups and stated that the timing and amounts of recent cash transfers by the corporation may be “dangerous.” The Volmrichs' indicated they would be interested in selling their combined 33% stock interest in the corporation to All Resort Group. The Board recessed and later reconvened, after which Bizzaro indicated he would like to work toward the purchase of the Volmrichs' stock.²¹

All Resort Group closed the acquisition of the Volmrichs' 33% minority interest in DVIP on February 27, 2012, whereby they agreed to pay the Volmrichs' \$350,000 under a promissory note at 5%, with a default rate of 12%. The note required quarterly payments of \$25,000. The buy-

²⁰ EXHIBIT 15—Unanimous written consent in Lieu of Meeting of the Board of Directors of Resort Express, Inc. dated December 31, 2010

²¹ EXHIBIT 16—Minutes of Special Meeting of the Board of Directors of DVIP Inc. held September 15, 2011

out was contingent on Frontier Bank agreeing to release the stock from the seller's pledge and accepting the promissory note as assignment.²² As security for the note, All Resort Group executed a stock pledge agreement whereby they pledged 330 shares of DVIP to secure All Resort's payment of the note. Volmrichs held possession of the pledged stock through the date of October 6, 2015, when they filed a complaint for non-performance under the terms of the agreement.

On October 6, 2015, the Volmrich's filed a complaint against All Resort Group for failure to pay the balance of interest and principle in accordance with the terms of the note and demanded payment of the balance of \$55,621.89 in full, along with legal fees and costs of collection.²³

DVIP guaranteed the credit line of Resort Express and All Resort Coach to Zions Bank on January 28, 2013.²⁴ On March 5, 2013, they executed a guaranty in favor of Bank of America in behalf of All Resort Group.²⁵ On May 6, 2013, a guaranty was executed by DVIP relating to the extension of \$950,000 of secured credit to Barron Wilson by

²² EXHIBIT 17—Promissory note dated February 13, 2012 between All Resort Group, Inc. and Jeffery R. Volmrich and Fiona F. Volmrich and letter to Jeffrey R. Volmrich and Fiona F. Volmrich dated February 23, 2012 from All Resort Group, Inc.

²³ EXHIBIT 18—Complaint and Jury Demand, Jeffrey Volmrich, Fiona Volmrich, Plaintiffs, v. All Resort Group, Inc., a Utah corporation; Richard Bizzaro, an individual; and Gordon Cummins, an individual; and Destination Services, Corporation, a Colorado Corporation, Defendants.

²⁴ EXHIBIT 19—Unanimous written consent in lieu of Meeting of the Board of Directors of DVIP, Inc. dated January 28, 2013

²⁵ EXHIBIT 20—Unanimous written consent in lieu of Meeting of the Board of Directors of DVIP, Inc. dated March 5, 2013

Bank of America.²⁶ Barron Wilson was a related party of the Debtor owned by the stockholders of the Debtor. Bank of America funds were used by Barron Wilson to purchase a maintenance facility which was leased to the debtor.²⁷

In spite of indications in November 2014 that DVIP was having a great year,²⁸ an Asset Sale Agreement was entered into on or about June 10, 2015 whereby the assets and operations of DVIP were sold to Destination Services Corporation for \$1,200,000 with a deferred revenue payment due on or before June 30, 2016 determined by the 2015 actualized revenues.²⁹ Funds of \$482,775 from the sale were used to retire the loan with Bank of America.³⁰ Of the initial \$400,000 that went to All Resort Group, on June 11, 2015, \$82,000 went to the bank account of Wendy Bizzaro (“Wendy”), who was a shareholder at the time of the transfer. An \$18,000 dividend payment was made to Bizzaro on June 11, 2015, and another \$25,000 dividend payment was made to Bizzaro on July 16,

²⁶ EXHIBIT 21—Unanimous written consent in lieu of Meeting of the Board of Directors of DVIP, Inc. dated May 6, 2013

²⁷ EXHIBIT 22—2015 Form 1065, U.S. Return of Partnership Income of Barron Wilson, LLC. And Loan Agreement documents from Bank of America dated May 6, 2013 for Account 26-0000077016

²⁸ EXHIBIT 23—November 18, 2014 Minutes of Meeting of the Board of Directors, Part II, Financial Report, item c.

²⁹ EXHIBIT 24—Asset Sale Agreement effective June 11, 2015 between DVIP, Inc., All Resort Group, Inc. and Destination Services Corporation.

³⁰ EXHIBIT 25—Payment notice and check dated 6/11/2015 for \$482,775.20

2015.³¹ Wendy received another \$25,000 on July 27, 2015.³² Pursuant to the deferred revenue terms of the agreement, \$200,000 was paid to the Debtor in March 2016. When the DVIP funds of \$200,000 were received, the Debtor immediately paid dividends of \$250,000 to the shareholders, with \$100,060 (40%) in dividends paid to Cummins and \$149,940 (60%) in dividends paid to Bizzaro.³³

All Resort Car Rental. All Resort Car Rental was a Nevada limited liability company of which All Resort Group owns an 80% interest. All Resort Car Rental was formed October 6, 2014 for the purpose of providing rental car service in Las Vegas, Nevada.³⁴

All Resort Vegas. All Resort was a Nevada corporation organized on January 22, 2015 for the purpose of providing transportation services. All Resort Vegas provided limousine services in Las Vegas, Nevada.³⁵

³¹ EXHIBIT 26—June 1, 2015 to June 30, 2015 Bank of America Account 501014693481 6/11/2016 Withdrawal of \$82,000 to Wendy Bizzaro

³² EXHIBIT 27—See Mountain West Bank Statement dated July 2015 and copies of checks.

³³ EXHIBIT 28—Mountain West Bank Statement July 1, 2016

³⁴ EXHIBIT 1—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants' Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

³⁵ EXHIBIT 1—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants' Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

B. Solvency

The determination of solvency is an issue of valuation. The definition of the term “value” is driven by the need or purpose of the valuation.³⁶ Valuation standards include, among others, fair market value. Fair market value is the value at which the subject asset would trade hands between a willing buyer and a willing seller when both have reasonable knowledge of relevant facts and neither is under any compulsion to act, without consideration of unforeseeable subsequent events.³⁷

Summary of Approaches. Generally, the value of an entity is determined by one or more of the following approaches: 1) the replacement cost or balance sheet approach, (2) the market comparison approach³⁸, and (3) discounted cash flow anal-

³⁶ 11 U.S.C. § 506(a)

³⁷ Stan Bernstein, Susan H. Seabury, Jack Williams, “Squaring Bankruptcy Valuation Practice with Daubert Demands”, *ABI Law Review*, 2008, Vol. 16, pp. 161-265.

³⁸ The market approach leads to an estimate of value based on what other purchasers and sellers in the market have paid for the stock of companies similar to the entity being considered. This approach is based on the principle of substitution. When this approach to value is used, data is collected on the price for the common equity of companies reasonably similar to the entity under consideration (guideline companies). Adjustments are made to the guideline companies to compensate for the differences between them and the stock being valued. Use of the market approach results in an indication of value based on an estimate of the price one may reasonably expect to realize on the sale of the subject stock. The market approach was considered in determining the fair value of All Resort’s equity as of the applicable dates. However, due to the size of All Resort, the nature of the ownership, and the inability to find comparable guideline companies, I have determined the

ysis or the income approach.³⁹ Deciding which method is most appropriate is based on the nature of the enterprise and its unique characteristics.⁴⁰ To evaluate the solvency of All Resort Group, I have considered each approach. However, the Utah Code⁴¹ indicates an entity is insolvent if the sum of the entity's debts is greater than the aggregate, at a fair valuation, of all of the entity's assets.⁴² This definition leads to a primary evaluation of All Resort Group's solvency based on the replacement cost method, which is also called the balance sheet approach ("Cost Approach").

The Cost Approach analysis has been supplemented by the income approach based on my re-

market approach is not applicable for purposes of valuation of the equity of All Resort.

³⁹ Courts have indicated that discounted cash flow analysis "is widely, if not universally, used in the business and financial world as a tool to assist management in making decisions whether to invest in or dispose of business or major assets. It is generally not used as a tool for determining fair market value, particularly when that determination can be made using either replacement cost or market comparables." (*In re Nextwave Personal Communications Inc.*, (15 235 B.R. 227, 294 (Bankr. S.D.N.Y. 1999)). The income approach estimates the fair market value of an entity based on its cash generating ability. The approach quantifies the present value of the future economic benefits that accrue to the investors of a business. These benefits, or future cash flows, are discounted to the present or capitalized at a rate of return that is commensurate with the company's inherent risk and expected future growth. The income approach was considered in determining an indication of the value of All Resort's equity as of the applicable dates.

⁴⁰ Hart, James F., "Consideration Related to Solvency." Available from http://www.ercllc.net/pdfs/articles/Considerations_Related_to_Solvenchy_2007_Hart.pdf. Internet; accessed 3 Nov 2010.

⁴¹ See Utah Code Ann. § 25-6-9(1)

⁴² See Utah Code Ann. § 25-6-3(2). Generation definitions. Utah Code.

view of the cash flows of All Resort Group for the applicable periods of consideration. The income approach estimates the fair market value of an entity based on its cash generating ability by quantifying the present value of the future economic benefits that accrue to the investors of a business. These benefits, or future cash flows, are discounted to the time period being reviewed by capitalizing the cash flows at a rate of return that is commensurate with the company's inherent risk and expected future growth. The details of this analysis are discussed further under paragraph E., beginning on page 35 of this report.

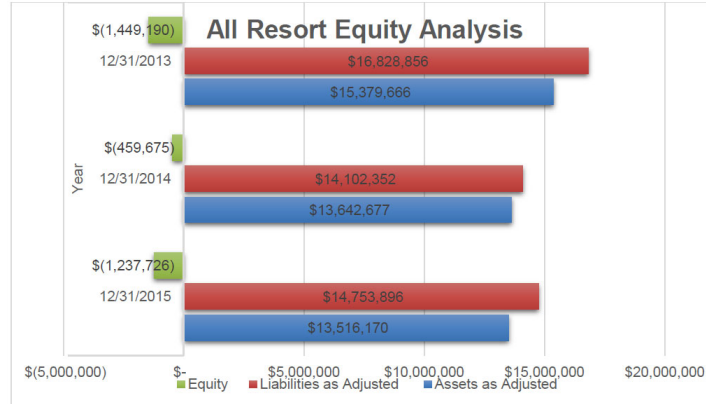
In addition to considering valuation under the three general approaches, I have also considered whether the Debtor had adequate working capital.⁴³ This analysis entails reviewing the income generated by the Debtor to determine whether the cash flow it provides is sufficient to pay the current liabilities.

Detailed Analysis Under Cost Approach. The Cost Approach is based on the theory that a prudent investor would pay no more than the cost of construction of a similar asset of like utility, at prices applicable at the time of the appraisal. This approach estimates the value of the enterprise by reference to the fair value of the subject's assets, both tangible and intangible (i.e., going concern and goodwill), net of the enterprise's liabilities.⁴⁴ As shown in the chart below, All Resort Group had negative equity of \$1,449,190 as of December

⁴³ Hart, James F., "Consideration Related to Solvency." Available from http://www.ercllc.net/pdfs/articles/Considerations_Related_to_Solvency_2007_Hart.pdf. Internet; accessed 3 Nov 2010.

⁴⁴ AICPA Statement on Standards for Valuation Services 1.

31, 2013;⁴⁵ ⁴⁶ ⁴⁷ negative equity of \$459,675 at December 31, 2014; and negative equity of \$1,237,726 at December 31, 2015.



The indication of value based on the Cost Approach was calculated based on information provided from the Debtor's financial documents. Adjustments were made to the balances as reported on All Resort's financial statements and tax returns⁴⁸ as described in the paragraphs that follow

⁴⁵ EXHIBIT 1 All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2015 with Independent Accountants' Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

⁴⁶ EXHIBIT 29—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2014 with Independent Accountants' Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

⁴⁷ EXHIBIT 30—All Resort Group, Inc. Reviewed Consolidated Financial Statements for December 31, 2013 with Independent Accountants' Report prepared July 15, 2016 by Neiederhauser & Davis, LLC, Certified Public Accountants

⁴⁸ The balances as reported on the financial statements were reported for each period, with the supporting detail for each category. These balances were then reviewed and adjustments were

to reflect the fair value of assets, using the definition of fair value as outlined by the AICPA.⁴⁹ Complete details outlining each asset and the adjustments made on a year by year basis are provided in the attached Exhibit A. Values were reported based on the information available as of the date of this report. Should additional information become available, I reserve the right to amend this report.

C. Fair Value Versus Liquidation Value

In evaluating the solvency of an entity, it is appropriate to consider whether value should be given for *going concern*. When an entity can continue in operation and meet its obligations only by its creditors infusing additional funds and, thereby increasing the ratio of debt to equity, substantial doubt arises as to whether the entity has the ability to continue as a *going concern*. If at the time of consideration of value, the business is so close to closing its operations that a *going concern* standard is unrealistic, liquidation value may need

made to the book balances to reflect fair value for each individual asset as of the Analysis Date.

⁴⁹ Statement of Standards for Valuation Services issued by the AICPA Consulting Services Executive Committee defines *fair market value* as “the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms’ length in an open and unrestricted market, when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts.” AICPA Statement on Standards for Valuation Services 1.

to be considered.⁵⁰ This issue was litigated in *In re Mama D'Angelo, Inc.*, where the court stated,

We are mindful of the authority to the effect that fair valuation ordinarily must be made from the vantage of a going concern and that subsequent dismemberment should not enter into the picture. See 2 Collier on Bankruptcy ¶ 101.32 (1995); *Cissell v. First Nat'l Bank of Cincinnati*, 476 Fd. Supp. 474, 484 (S.D. Ohio 1979) (a company's assets must be valued at the time of the alleged transfer and not at what they turned out to be worth at some time after the bankruptcy intervened); *Mutual Sav. & Loan Assn's v. McCants*, 183 F.2d 423 (4th Cir. 1950). But we "may consider information originating subsequent to the transfer date if it tends to shed light on a fair and accurate assessment of the asset or liability as of the pertinent date." *In re Chemical Separations Corp.*, 38 B.R. 890, 895-96 (Bankr. E.D. Tenn. 1984). Thus, it is not improper hindsight for a court to attribute current circumstances which may be more correctly defined as current awareness or current discovery of the existence of a previous set of circumstances.⁵¹

The facts and circumstances surrounding the bankruptcy filing of All Resort Group differ from the facts as outlined in *In re Mama D'Angelo, Inc.* in that All Resort Group was a service-oriented business. However, All Resort Group encoun-

⁵⁰ "In re MAMA D'ANGELO, INC., Debtor." United States Court of Appeals, available from <http://ftp.resource.org/courts.gov/c/F3/55/55.F3d.552.94-4137.html>.internet.

⁵¹ *Ibid.*

tered several events that ultimately led to their demise. These events are discussed below.

1. Excessive Dividend Payment. Although the financial reports to the Board of Directors (“Board”) reported decreasing revenues⁵², the Board continued to declare and pay substantial dividends to the owners.⁵³ During the periods of consideration, dividends totaling \$227,000 were paid to the owners.
2. Distribution of Profits of DVIP to Shareholders. On June 10, 2015, the assets of DVIP were sold to Destination Services Corporation (“Destination”), a Colorado corporation, for \$1,600,000. The sale agreement provided that
 - a. All Resort Group would receive \$1,200,000 of cash;
 - b. All Resort Group would pay the Assumed Receivables to Destination, less any offsetting liabilities to the purchaser by sending \$227,149 in cash to Destination; and
 - c. Destination would pay All Resort Group a deferred revenue payment on or before June 30, 2016. The deferred revenue payment was dependent on actualized revenues in 2015 and could range between \$200,000 and \$400,000.⁵⁴

⁵² EXHIBIT 31—See Minutes of the Board of Directors All Resort Group, Inc held February 23, 2015, Item II. Financial Report and Minutes of the Board of Directors All Resort Group, Inc. held March 18, 2016, Item II. Financial Report, a., e., f.

⁵³ EXHIBIT 32—See Minutes of the Board of Directors All Resort Group, Inc. held April 27, 2017, Item III. New Business, Item h.

⁵⁴ EXHIBIT 34—Form 8594 attached to Form 1120 showing \$1,200,000

Ultimately, All Resort Group received an additional \$200,000 in June 2016.

The sale resulted in \$600,000 flowing into All Resort Group, with \$400,000 being deposited in June 2015 in 2015 and \$200,000 coming in June 2016. Of the initial \$400,000 that went to All Resort Group, \$82,000 immediately went to the bank account of Wendy on June 11, 2015.⁵⁵ A \$149,940 dividend payment was made to Bizzaro through a transfer to his personal bank account held at Mountain West Bank Account on July 1, 2015 from the Debtor's Mountain West Bank account. Thus, of the net sales price of \$972,851 paid to All Resort Group,^{56 57} \$231,940 or 24% of the funds, went directly to the owners immediately after receipt.

One year later, on July 1, 2016, when the remaining \$200,000 from the DVIP sale was made to All Resort Group, Cummins received a dividend payment of \$100,060 and Bizzaro received a dividend payment of \$149,940. Thus, the remaining sales proceeds were transferred directly to the shareholders, and none of the deferred revenue payment funds went to benefit the debtor.⁵⁸

⁵⁵ EXHIBIT 26—June 1, 2015 to June 30, 2015 Bank of America Account 501014693481 6/11/2016 Withdrawal of \$82,000 to Wendy Bizzaro

⁵⁶ EXHIBIT 33—Form 8594 attached to Form 1120 showing \$1,200,000

⁵⁷ EXHIBIT 34—DVIP Flow of Funds Statement showing \$227,149 wire of Assumed Receivables

⁵⁸ EXHIBIT 28—See Mountain West Bank Statement dated July 2016 and copies of checks.

d. Shareholder Disputes.

The Debtor had several contingent liabilities relating to shareholder disputes that were not recorded on the balance sheet. These liabilities are discussed further in this report under the title of contingent liabilities. These liabilities in and of themselves did not cause the insolvency of the Debtor. However, the lack of harmony among the shareholders did create an environment where poor management prevailed, leading to the financial decisions that resulted in the Debtor's insolvency. The beginning of this strain is shown in the Reviewed Consolidated Financial statements for December 31, 2013 and 2012 prepared April 30, 2014 by Neiderhauser & Davis, LLC, independent accountants. The last paragraph of the Review report states:

“At this time, the Company's management does not believe it is practical to develop and provide a schedule of the aggregate amount of maturities of long-term debt for each of the next five years, the related interest rates, maturity dates, collateral or subordinate features, the amount of interest paid, or the noncash financing activities. Disclosure of this information is required by accounting principles generally accepted in the United States of America, but it is not included in these financial statements.”⁵⁹

⁵⁹ EXHIBIT 30—All Resort Group, Inc. Reviewed Consolidated Financial Statement December 31, 2013 and 2012 with Independent Accountants' Report dated April 30, 2014 prepared by Neiderhauser & Davis, LLC.

The unwillingness of the management to track long-term debt, maturity dates, collateral, interest, etc. is an indicator that management was 1) unwilling to comply with general accepted accounting principles; and 2) irresponsible in the management of their financing activities. For an entity to provide adequate cash flow to the business and owners, the entity needs to be cognizant of their debt reporting responsibilities.

The Board Meeting Minutes (“Board minutes”) show a continual turnover among the management team. For example, the May 6, 2013 Written Consent in lieu of Meeting of Board of Directors lists Gary Nielsen (“Nielsen”) as President.⁶⁰ The Board minutes dated September 30, 2014 list Jaison Wagmeister (“Wagmeister”) as President and Bandon Fife (“Fife”) as the Controller.⁶¹ Less than two months later, on November 18, 2014, the Board minutes report the President as Rick Redford (“Redford”), with Fife continuing as Controller.⁶² Redford continues as the President through 2016, but the March 18, 2016 minutes report the Controller as Larry Killingsworth (Killingsworth”).⁶³

⁶⁰ EXHIBIT 11—Written Consent in Lieu of Meeting of Board of Directors.

⁶¹ EXHIBIT 47—Minutes of the Board of Directors All Resort Group, Inc. dated September 30, 2014

⁶² EXHIBIT 23—Minutes of the Board of Directors of All Resort Group, Inc. dated November 18, 2014

⁶³ EXHIBIT 31—Minutes of Board of Directors All Resort Group, Inc. dated March 18, 2016

The January 27, 2015 minutes state “Bizzaro noted that the turmoil of 2013 and 2014 have caused the financial results of 2014” Later the same minutes state “Bizzaro expressed frustration with our charter business. He proposed we look outside the box, that perhaps we have fundamental issues.”⁶⁴ The following month, on February 23, 2015, minutes indicate that “Bizzaro expressed frustration and concern with our charter business both in SLC and Las Vegas. In an effort to increase sales and revenue, Mr. Larry Killingsworth has been hired as a consultant for 90 days (3 months) at \$7,500.00 per month. After 90 days Mr. Killingsworth and Lewis Stages would be re-evaluated.”⁶⁵ After 90 days, the company continued to deteriorate. On October 12, 2016, Killingsworth arranged for the Debtors’ accounts receivable to be purchased by a factoring company, Access Business Finance LLC.⁶⁶ Despite the company’s decline, Killingsworth received a \$25,000 bonus according to the Board of Directors minutes for January 20, 2016.⁶⁷

The company continued to struggle, and a Chapter 11 Bankruptcy petition was filed on

⁶⁴ EXHIBIT 35—Minutes of the Board of Directors All Resort Group, Inc. dated January 27, 2015

⁶⁵ EXHIBIT 36—Minutes of the Board of Directors All Resort Group, Inc. dated February 23, 2015

⁶⁶ EXHIBIT 37—Letter dated October 12, 2016 to Larry Killingsworth and accepted by Killingsworth October 24, 2016 regarding purchase of accounts receivable.

⁶⁷ EXHIBIT 38—Minutes of the Board of Directors All Resort Group, Inc. dated January 20, 2016 with attached copies of bank transfers dated April 4, 2016 and May 3, 2016

April 28, 2017. The case was converted to a Chapter 7 proceeding on September 17, 2017, and David Miller was appointed as Trustee. For purposes of this report, I have not reported the assets at liquidation values. However, if it is determined liquidation values are appropriate, the insolvency of the Debtor would be increased, and I reserve the right to amend this report to report liquidation values.

* * * * *

G. Inability to Pay Debts as They Became Due

An alternate test for insolvency that may apply in a particular case examined whether the debtor was able to pay its debts as they fell due in the usual course of business.¹³⁵ This test determines the debtor's ability to pay debts from the income of operations rather than rely on short-term financing.

During the period between December 31, 2013 through December 2015, the Debtor relied on short-term financing to maintain its operations. Short-term financing included accounts payable, accrued expenses, accrued taxes, and accrued payroll liabilities. The chart below outlines the Debtor's total short-term financing for each of the periods considered as reported in the reviewed financial

¹³⁵ As quoted in *in re Tribune Co. Fraudulent Conveyance Litg.* 2018 WL 632919339, at *2-3 (S.D.N.Y. Nov 30, 2018) (“Tribune1”). Reducing Litigation Risk Through Transaction Independence. Garza, Levin and Bouslog. ABI Journal June 2019, Vol XXXVII, No. 6

statements.¹³⁶ The short-term financing increased each period, with a significant increase between 2014 and 2015.

Liability Account	12/31/2015	12/31/2014	12/31/2013	12/31/2012
Accounts Payable	\$2,514,817	\$1,006,748	\$981,177	\$1,085,702
Accrued Expenses	133,473	9,750	96,195	83,875
Accrued Taxes	95,497	211,648	85,038	117,951
Accrued Payroll	773,977	715,359	718,092	459,638
Total Short-Term Debt	\$3,517,764	\$1,943,505	\$1,881,102	\$1,747,166

The Board minutes also provide evidence that the company was struggling to make a profit. A special meeting of the Board was held October 30, 2013. Fife reviewed with the Board the financial statements of the corporation and its subsidiaries for the month ended August 31, 2013. Fife discussed some of the reasons why the consolidated and individual in-

¹³⁶ EXHIBITS 1, EXHIBIT 29, AND EXHIBIT 30—All Resort Group, Inc. Notes to Consolidated Financial Statement for years ending December 31, 2013, December 31, 2014 and December 31, 2015

comes before taxes was down from the same period in 2012.¹³⁷

The June 27, 2014 minutes include comments from Bizzaro that the company used to make money even in the down times of the bus seasons. He noted that the company was over selling and scrambling to find the necessary equipment to fill orders and that the company may not stay in business. Wendy Bizzaro noted that the company spent too much money on equipment to be profitable.¹³⁸

The July 2014 minutes indicate that \$150,000 of debt had been forgiven by Kennecott Utah Copper, LLC due to the inability of the company to make payments in full. The company president, Wagneister reported that the present debt ratio of 10/1 needed to be closer to 6/1 in order for the company to operate profitably.¹³⁹ Thus, the Board was aware that the company was overly leveraged and unable to make payments on their debts as of July 2014.

Volmrich Dispute. The increasing debt of All Resort Group was the subject of a dispute between the Volmrichs' and the shareholders of All Resort Group, eventually leading to the buyout by All Resort Group of the Volmrichs' shares of DVIP. At a special meeting of the DVIP Board of Directors held July 20, 2011, a

¹³⁷ EXHIBIT 65—Minutes of the Board of Directors of All Resort Group, Inc. held October 30, 2013

¹³⁸ EXHIBIT 63—Minutes of the Board of directors of All Resort Group, Inc. held June 27, 2014.

¹³⁹ EXHIBIT 64—Minutes of the Board of directors of All Resort Group, Inc held July 30, 2014

discussion was held between Bizzaro and the Volmrichs' regarding intercompany loans between DVIP and other members of the All Resort Group. The Volmrichs' indicated that these loans could impair DVIP's ability to pay its vendors in a timely manner and that some of the funds used in the inter-company loans represented client deposits, which would put DVIP in a dangerous position.

On September 15, 2011, an additional DVIP Board of Directors meeting was held to discuss DVIP's participation in guaranteeing All Resort Group Inc's \$500,000 revolving line of credit loan from Zions Bank. Bizzaro indicated the line of credit would be made to All Resort Group, with funds being available from the line of credit for DVIP's use if it would collateralize the loan with its accounts receivable. The Volmrichs' were not in favor of DVIP participating in the guarantee, and indicated they would rather sell their shares in DVIP than agree to the motion. A motion was made to approve the Corporate Resolution to grant collateral for DVIP's participation in the \$500,000 revolving line of credit.¹⁴⁰ The motion passed by 3 of 5 voting in favor. The Volmrichs' voted against the motion.¹⁴¹

On or about February 8, 2012, All Resort Group agreed to purchase the Volmrichs' shares. They closed the acquisition of the Volmrichs' 33% minority interest in DVIP on February 27, 2012, whereby they agreed to pay

¹⁴⁰ Exhibit 16 DVIP Board Minutes dated September 15, 2011

¹⁴¹ Exhibit 16 DVIP Board Minutes dated September 15, 2011

the Volmrichs' \$350,000 under a promissory note at 5%, with a default rate of 12%.¹⁴²

The dispute between the Debtor and the Volmrichs' over the inter-company loans and the impairment of the DVIP's ability to pay vendors on a timely basis in early 2012 is insightful to the Debtor's borrowing pattern that began in late 2011. The obtaining of a \$500,000 revolving line of credit from Zions in September 2011 was the beginning of a model of increasing debt. The Board also approved a Master Financial Lease with Zions on November 10, 2011.¹⁴³ They purchased property from Brown's Canyon, L.L.C. for \$825,000 with \$125,000 down and financing the remaining \$725,000 with a note on March 9, 2012.¹⁴⁴ Credit in the amount of \$3,150,000 was obtained from Bank of America in March 2013.¹⁴⁵ In June 2013, additional credit was obtained from Sun Trust Equipment Financing & Leasing Corporation.¹⁴⁶ Finally, during 2014, the Debtor entered into various note payable agreements and capital and operating lease obligations for vehicles for its fleet operations.¹⁴⁷

¹⁴² Exhibit 17—Promissory Note Volmrich

¹⁴³ Exhibit 66—Board of directors Unanimous Consent in lieu of meeting dated September 30, 2011 granting LOC with Zions.

¹⁴⁴ Exhibit 67—Board of Directors minutes dated March 9, 2012

¹⁴⁵ Exhibit 10—All Resort Coach BOD Consent Bank of America Guaranty

¹⁴⁶ Exhibit 68—Motion for Relief from the Automatic Stay filed by SunTrust Equipment Finance & Leasing Doc 294

¹⁴⁷ Exhibit 30—Reviewed Financial Statements December 31, 2013—Page 14

Thus, during the 30-month period between September 2011 and March 2014, the Debtor began to incur increased amounts of debt, while at the same time experiencing declining sales.¹⁴⁸ Rather than work to decrease debt as sales declined, thereby improving cash flow, the Debtor did just the opposite. They increased their debt obligations as sales declined, thereby hindering cash flow, and making it so they could not pay their debts as they became due.

Contingent Liabilities. Additional verification that the Debtor was not paying debts as they became due is confirmed by several of the contingent liabilities that were not recorded on the books and records. The Debtor entered into a promissory note and security agreement with Zions Bank on June 14, 2012 in the original principal amount of \$528,648.98. The note matured in December of 2012, and Zions Bank released its security interest in the vehicles securing the loan. However, late fees of \$37,403.11 were not paid, and as of April 30, 2015 the fees still had not been paid.¹⁴⁹

The Volmrich note was for \$350,000 with a stated interest rate of 5%. In the event of default, the rate of interest on the note was to in-

¹⁴⁸ Exhibit 64—Minutes of the Board of directors of All Resort Group, Inc held July 30, 2014

¹⁴⁹ EXHIBIT 58—Letter dated April 30, 2015 from Kami L. Peterson of Zions Bank to Richard Bizzaro and Gordon Cummins of All Resort

crease to 12% per annum.¹⁵⁰ This note was not paid off pursuant to the terms. On October 6, 2015, the Volmrichs' filed a complaint against All Resort Group for failure to pay the balance of interest and principal in accordance with the terms of the note.

* * * * *

¹⁵⁰ EXHIBIT 17—Promissory Note dated February 13, 2012 between All Resort Group Inc. and Jeffery R. Volmrich and Fiona F. Volmrich for \$350,000.

[FOLDOUT]

[FOLDOUT]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687
Chapter 7
Adversary Proceeding No. 18-2087
IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, CHAPTER 7 TRUSTEE, PLAINTIFF

v.

RICHARD BIZZARO, DEFENDANT

Filed: July 18, 2018

COMPLAINT

Plaintiff David L. Miller, Chapter 7 Trustee of All Resort Group, Inc. (the “Trustee”), complains of the Defendant Richard Bizzaro, and alleges as follows:

PARTIES AND JURISDICTION

1. David L. Miller is the Chapter 7 Trustee for the bankruptcy estate of All Resort Group, Inc. (“ARG”).
2. Defendant Bizzaro is currently a resident of Texas, and is a former principal of ARG.
3. Bizzaro is an “insider” of ARG pursuant to 11 U.S.C. §101 (31).
4. This is a core proceeding under 28 U.S.C. § 157 (b)(2).

5. This Court has jurisdiction under 28 U.S.C. § 1334 (b) and 157 (a), and D.U.Civ. R. 83-7.1, the general order of reference.

6. Venue is proper in this Court under 28 U.S.C. § 1409.

GENERAL ALLEGATIONS

7. All Resort Group, Inc. filed a petition under Chapter 11 of the United States Bankruptcy Code on April 28, 2017 (the “Petition Date”).

8. The case was converted to one under Chapter 7 on September 14, 2017, and David L. Miller was appointed to serve as the interim Chapter 7 Trustee. He continues to serve as the permanent Chapter 7 Trustee in the case.

9. The “Bizzaro Payments.” Within four years prior to the Petition Date, ARG made the following transfers to or for the benefit of Mr. Bizzaro:

(a) The “Salary Payments.” After Mr. Bizzaro ceased to participate in the day-to-day management of ARG beginning in approximately the fall of 2013, he was paid at least the following as salary and wages or other compensation:

Date	Amount
04/28/16	\$ 21,697.55
05/12/16	21,697.55
05/26/16	21,697.55
06/09/16	21,697.55
06/23/16	21,697.55
07/07/16	21,697.55
07/21/16	21,697.55
08/04/16	21,697.55

08/18/16	21,697.55
09/01/16	21,697.55
09/15/16	21,697.55
09/29/16	21,697.55
10/13/16	21,697.55
10/27/16	21,697.55
11/10/16	21,697.55
11/24/16	21,697.55
12/08/16	21,697.55
12/22/16	21,697.55
01/05/17	21,697.55
01/19/17	21,697.55
02/02/17	21,697.55
02/16/17	21,697.55
03/02/17	21,697.55
03/16/17	21,697.55
03/30/17	21,697.55
04/13/17	21,697.55
TOTAL	\$ 564,136.30

(b) The “Dividend Payments.” Within four years prior to the Petition Date, ARG made at least the following payments to Bizzaro as shareholder draws, dividends, or other non-employee payments:

Date	Check No.	Amount
05/03/13	6404	\$12,500.00
06/04/13	6823	12,500.00
07/01/13	7185	12,500.00
07/29/13	7572	12,500.00
09/05/13	8122	12,500.00
10/03/13	8508	12,500.00

10/03/13	8510	17,000.00
11/04/13	8854	12,500.00
12/02/13	9390	12,500.00
01/10/14	29	35,000.00
02/06/14	10154	12,500.00
03/06/14	34	6,000.00
03/06/14	10674	12,500.00
04/01/14	35	15,500.00
04/04/14	11069	12,500.00
05/02/14	11509	12,500.00
05/09/14		19,000.00
06/20/14	40	8,500.00
09/05/14	13102	20,000.00
11/18/14	14060	5,000.00
12/31/14	14438	3,500.00
03/27/15	52	10,000.00
04/02/15	15549	50,000.00
04/05/15		50,000.00
05/28/15	16317	5,000.00
05/28/15		5,000.00
06/08/15	16388	10,000.00
07/16/15	17037	25,000.00
09/11/15	5465	6,000.00
10/07/15		25,000.00
01/20/16	19991	25,000.00
01/20/16	19993	50,000.00
01/20/16	5939	25,000.00
02/19/16	20275	25,000.00

05/11/16		6,000.00
05/11/16		6,000.00
05/19/16		2,400.00
05/26/16		19,000.00
06/02/16		2,400.00
06/23/16	ACH	2,400.00
07/08/16	22246	2,400.00
12/08/16	24183	25,000.00
12/21/16	24270	5,000.00
01/31/17	366	5,000.00
02/09/17	406	1,200.00
02/22/17	429	1,200.00
03/13/17	907	1,200.00
03/20/17	1030	2,500.00
03/24/17	1594	1,200.00
03/30/17		14,992.66
04/10/17	1586	2,000.00
04/14/17		15,000.00
04/24/17	1591	2,000.00
TOTAL		\$707,392.66

(c) The Walking Around Money or “WAM Payments.” During the four years prior to the Petition Date, Bizzaro received regular monthly payments for incidental spending money referred to in the company as “walking around money” or “WAM.” These payments were typically delivered in cash taken directly from the cash receipts of ARG and are not recorded on the books and records of the companies. As a result, the dates and amounts of these payments are largely un-

known to the Trustee, but the Trustee reserves the right to amend this Complaint to add such additional WAM Payments as may be identified. The WAM Payments were typically used for purposes unrelated to ARG. As of the date of this Complaint, the Trustee has identified the following WAM Payments:

Date	Check No.	Amount
10/07/15	3658	\$6,000.00
01/22/16	3839	6,000.00
03/28/16	Transfer	2,400.00
04/08/16	20814	2,400.00
05/09/16		2,400.00
05/11/16		1,095.11
TOTAL		\$20,295.11

(d) The “DVIP Proceeds.” On approximately July 1, 2016, ARG made a payment to Bizzaro of \$149,940.00 as an owners’ dividend paid from the proceeds of the sale of ARG’s interest in an entity known as DVIP.

10. The “Third-Party Payments.” In addition, within the four years preceding the Petition Date, ARG made the payments to third parties on behalf of or for the benefit of Bizzaro. These Third-Party Payments did not benefit ARG or serve its business purposes, or were made on behalf of obligations of Bizzaro which were not obligations of ARG. They include at least the following:

(a) The “IRS Payments.” On approximately June 23, 2014, ARG made a payment of approximately \$73,309.10 to the IRS on behalf of Bizzaro.

(b) The “Laszlo Payments.” Between February 13, 2014 and April 28, 2017, ARG made payments to Bihari Laszlo in the total amount of \$142,980.23, as set

forth in the attached Exhibit “A”. Bihari Laszlo was a personal caregiver for Bizzaro, whose services were unrelated to the operation of ARG.

(c) The “Gayos Payments.” Between June 22, 2016 and April 24, 2017, ARG made payments to Antonia Gayos in the total amount of \$57,600.00, as set forth in the attached Exhibit “B”. Antonia Gayos was a personal caregiver for Bizzaro, whose services were unrelated to the operation of ARG.

11. In total, Bizzaro received payments from ARG of \$1,565,713.40 within four years prior to the Petition Date, summarized as follows:

Category	Amount
Salary Payments	\$564,136.30
Dividend Payments	707,392.66
WAM Payments	20,295.11
IRS Payment	73,309.10
Laszlo Payments	142,980.23
Gayos Payments	57,600.00
TOTAL	\$1,565,713.40

These payments are referred to herein as the “Bizzaro Transfers.”

FIRST CLAIM FOR RELIEF

(Fraudulent Transfer)

12. The Trustee incorporates herein all other factual allegations of this Complaint.

13. At the time of the Bizzaro Transfers, ARG was insolvent, or it became insolvent as a result of the Bizzaro Transfers.

14. In the alternative, at the time of the Bizzaro Transfers, ARG intended to incur or believed that it would incur debts that would be beyond its ability to pay as they matured.

15. ARG received less than reasonably equivalent value for the Bizzaro Transfers. In particular, the Bizzaro Transfers were paid toward debts for which ARG had no obligation or for goods or services that had no value to ARG or had value which was substantially less than the amount paid.

16. In the alternative, the Bizzaro Transfers were made with actual intent to hinder, delay or defraud creditors, in that the Transfers were made to an insider in disregard of the interests of creditors at a time when the company was known to be lacking in adequate financial controls, facing financial difficulty, and deficient in its operations.

17. Pursuant to 11 U.S.C. § 548 (a) or pursuant to 11 U.S.C. § 544 and Utah law as codified in Chapter 6 of Title 25 of the Utah Code, the Bizzaro Transfers constitute fraudulent transfers or are otherwise voidable by the Trustee.

18. Pursuant to 11 U.S.C. § 550, the Trustee is entitled to a judgment avoiding the transfer and to a judgment against Bizzaro as the immediate transferee in an amount equal to the value of the Bizzaro Payments as may be proven at trial, but which is believed to be at least \$1,565,713.40, together with costs, interest, and such further relief as the Court may deem appropriate.

SECOND CLAIM FOR RELIEF

(Equitable Lien—Gray Barron Ranch)

19. The Trustee incorporates herein all other factual allegations of this Complaint.

20. During the four years prior to the Petition Date, Bizzaro was the owner of certain real property known as the “Gray Barron Ranch” located at 20700 Northridge Road in Chatsworth, California, which is identified as Assessor’s Parcel No. 2707-002-001, and is more particularly described as follows:

NORTHERN POR OF THE EX MISSION DE
SAN FERNANDO SECTIONS TOWNSHIP
AND RANGE AS PER R S 57 19 TO 21 LOT
COM S 50.42 FT AND N 7811’20” W 287.73 FT
FROM NE COR OF SE 1/4 OF SEC 8 T 2N R
16W TH SE LOT 8.

21. During that time period, proceeds of the Bizzaro Payments were used to increase the value of Bizzaro’s interest in the Gray Barron Ranch, including uses for the following:

- (a) Construction of improvements;
- (b) Repair, replacement, or remodeling of improvements;
- (c) Payment of the mortgage obligation secured by the property.

22. As a result of the use of proceeds of the Bizzaro Payments, the value of the Gray Barron Ranch and of Bizzaro’s interest in the Gray Barron Ranch has in fact increased in an amount to be proven at trial, but which is believed to be substantially more than \$100,000.00.

23. Justice and equity require that to the extent the value of Bizzaro's interest in the Grey Barron Ranch has increased as a result of the proceeds of the Bizzaro Transfers, the Gray Barron Ranch should be subject to an equitable lien in favor of the Trustee and the bankruptcy estate as security for any Judgment that may enter in this matter.

24. The Trustee is entitled to a Judgment imposing an equitable lien on the Gray Barron Ranch as described, and awarding such further relief as may be deemed appropriate under the circumstances.

PRAYER FOR RELIEF

WHEREFORE, the Trustee prays for Judgment against Bizzaro as follows:

1. On the First Claim for Relief, for an order avoiding the Bizzaro Payments and for an award of Judgment against Bizzaro and in favor of the Trustee in an amount equal to the value of the Bizzaro Payments as may be proven at trial, but which is believed to be at least \$1,565,713.40, together with costs, interest, and such further relief as the Court may deem appropriate under the circumstances.

2. On the Second Claim for Relief, for an order imposing an equitable lien upon the Gray Barron Ranch as security for Bizzaro's obligation to pay any Judgment entered in this case up to the full amount by which the proceeds of the Bizzaro Payments increased the value of Bizzaro's interest in the Gray Barron Ranch, and for such further relief as the Court may deem appropriate under the circumstances.

DATED this 18th day of July, 2018.

STRONG & HANNI, PC.

/s/ REID W. LAMBERT
REID W. LAMBERT
Attorney for the Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687
Chapter 7
Adversary Proceeding No. 19-2038
IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, CHAPTER 7 TRUSTEE, PLAINTIFF

v.

GORDON CUMMINS, DEFENDANT

Filed: Apr. 18, 2019

COMPLAINT

Plaintiff David L. Miller, Chapter 7 Trustee for All Resort Group, Inc. (the “Trustee”), complains of the Defendant Gordon Cummins, and alleges as follows:

PARTIES AND JURISDICTION

1. David L. Miller is the Chapter 7 Trustee for the bankruptcy estate of All Resort Group, Inc. (“ARG”).
2. Defendant Cummins is a former principal of ARG, residing in the State of Arizona.
3. Cummins is an “insider” of ARG pursuant to 11 U.S.C. §101 (31).
4. This is a core proceeding under 28 U.S.C. § 157 (b)(2).

5. This Court has jurisdiction under 28 U.S.C. § 1334 (b) and 157 (a), and D.U.Civ. R. 83-7.1, the general order of reference.

6. Venue is proper in this Court under 28 U.S.C. § 1409.

GENERAL ALLEGATIONS

7. All Resort Group, Inc. filed a petition under Chapter 11 of the United States Bankruptcy Code on April 28, 2017 (the “Petition Date”).

8. The case was converted to one under Chapter 7 on September 14, 2017, and David L. Miller was appointed to serve as the interim Chapter 7 Trustee. He continues to serve as the permanent Chapter 7 Trustee in the case.

9. The “Cummins Transfers.” Within four years prior to the Petition Date, ARG made the following payments to or for the benefit of Cummins:

(a) The “Salary Payments.” Although Cummins did not actively participate in the day-to-day management or operations of ARG during the two years prior to the Petition Date, he was paid at least the following as salary, wages, or other employee compensation:

Date	Amount
04/28/16	\$ 7,692.30
05/12/16	7,692.30
05/26/16	7,692.30
06/09/16	7,692.30

06/23/16	7,692.30
07/07/16	7,692.30
07/21/16	7,692.30
08/04/16	7,692.30
08/18/16	7,692.30
09/01/16	7,692.30
09/15/16	7,692.30
09/29/16	7,692.30
10/13/16	7,692.30
10/27/16	7,692.30
11/10/16	7,692.30
11/24/16	7,692.30
12/08/16	7,692.30
12/22/16	7,692.30
01/05/17	7,692.30
01/19/17	7,692.30
02/02/17	7,692.30
02/16/17	7,692.30
03/02/17	7,692.30
03/16/17	7,692.30
03/30/17	7,692.30

04/13/17	7,692.30
TOTAL	\$ 199,999.80

(b) The “Note Payments.” In 2014, ARG made cash payments to Cummins of \$94,750.00, for which Cummins signed promissory notes to ARG due 30 days from the date of each payment (the “2014 Notes”). Cummins did not repay the 2014 Notes. ARG may have forgiven the 2014 Notes or treated them as being satisfied in whole or in part by an offset of dividends declared for distribution to ARG equity holders in 2014 or 2015. The Note Payments were as follows:

Date	Amount
01/17/14	\$ 22,000.00
02/05/14	29,000.00
03/04/14	23,000.00
04/02/14	20,750.00
TOTAL	\$ 94,750.00

(c) The “Dividend Payments.” Within four years prior to the Petition Date, ARG made at least the following transfers to Cummins as shareholder draws, dividends, or other non-employee payments, with payments being made in cash or in credit against obligations of Cummins to ARG:

Date	Amount
04/05/15	25,000.00
07/01/15	25,000.00
10/01/15	25,000.00
04/30/15	50,000.00
01/20/16	25,000.00
10/03/16	35,945.88
01/27/17	2,224.50
01/31/17	5,000.00
03/30/17	5,381.04
04/10/17	2,000.00
04/24/17	2,000.00
04/24/17	2,000.00
TOTAL	\$ 204,551.42

(d) The Walking Around Money or “WAM Payments.” During the four years prior to the Petition Date, Cummins received regular monthly payments for incidental spending money referred to in the company as “walking around money” or “WAM.” These payments were typically delivered in cash taken directly from the cash receipts of ARG and often were not recorded on the books and records of ARG. As a result, the dates and amounts of these payments are largely unknown to the Trustee, but the Trustee reserves the right to amend this Complaint to add such additional WAM Payments as may be identified. The WAM Pay-

ments were typically used for purposes unrelated to ARG. As of the date of this Complaint, the Trustee has identified the following WAM Payments:

Date	Amount
04/08/16	1,200.00
04/22/16	1,200.00
05/05/16	1,200.00
05/19/16	1,200.00
06/01/16	1,200.00
06/16/16	1,200.00
06/29/16	1,200.00
02/09/17	1,200.00
02/22/17	1,200.00
03/24/17	1,200.00
TOTAL	\$ 12,000.00

(e) The “DVIP Proceeds.” On approximately July 1, 2016, ARG made a payment to Cummins of \$100,060.00 as an owners’ dividend paid from the proceeds of the sale of ARG’s interest in a business known as DVIP.

(f) The “IRS Payment.” Within the four years preceding the Petition Date on approximately June 23, 2014, ARG paid approximately \$71,829.68 to the IRS on behalf of Cummins.

10. In total, Cummins received transfers from ARG of \$683,190.90 within four years prior to the Petition Date, summarized as follows:

Category	Amount
Salary Payments	\$ 199,999.80
Note Payments	94,750.00
Dividend Payments	204,551.42
WAM Payments	12,000.00
DVIP Proceeds	100,060.00
IRS Payment	71,829.68
TOTAL	\$ 683,190.90

These payments are referred to herein as the “Cummins Transfers.”

CLAIM FOR RELIEF

(Fraudulent Transfer)

11. The Trustee incorporates herein all other factual allegations of this Complaint.

12. At the time of the Cummins Transfers, ARG was insolvent, or it became insolvent as a result of the Cummins Transfers.

12. In the alternative, at the time of the Cummins Transfers, ARG intended to incur or believed that it would incur debts that would be beyond its ability to pay as they matured.

14. ARG received less than reasonably equivalent value for the Cummins Transfers. In particular, the Cummins Transfers were paid toward debts for which ARG had no obligation or for goods or services that had no value to ARG or had value which was substantially less than the amount paid.

15. In the alternative, the Cummins Transfers were made with actual intent to hinder, delay or defraud creditors, in that the Transfers were made to an insider in disregard of the interests of creditors at a time when the company was known to be lacking in adequate financial controls, facing financial difficulty, and deficient in its operations.

16. Pursuant to 11 U.S.C. § 548 (a) or pursuant to 11 U.S.C. § 544 and Utah law as codified in Chapter 6 of Title 25 of the Utah Code, the Cummins Transfers constitute fraudulent transfers or are otherwise voidable by the Trustee.

17. Pursuant to 11 U.S.C. § 550, the Trustee is entitled to a judgment avoiding the Cummins Transfers and

to a judgment against Cummins as the immediate transferee in an amount equal to the value of the Cummins Transfers as may be proven at trial, but which is believed to be at least \$683,190.90, together with costs, interest, and such further relief as the Court may deem appropriate.

PRAYER FOR RELIEF

WHEREFORE, the Trustee prays for Judgment against Cummins avoiding the Cummins Transfers and for an award of Judgment against Cummins and in favor of the Trustee in an amount equal to the value of the Cummins Transfers as may be proven at trial, but which is believed to be at least \$683,190.90, together with costs, interest, and such further relief as the Court may deem appropriate under the circumstances.

DATED this 18th day of April 2019.

STRONG & HANNI, PC.

/s/ REID W. LAMBERT
REID W. LAMBERT
Attorney for the Trustee

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF UTAH

Bankruptcy Case No. 17-23687-RKM
Chapter 7
Adv. No. 2:18-02089

IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, CHAPTER 7 TRUSTEE, PLAINTIFF

v.

UNITED STATES OF AMERICA, UNITED STATES
TREASURY DEPARTMENT, DEFENDANT

Filed: Apr. 27, 2020

**UNITED STATES' STATEMENT OF ISSUES AND
DESIGNATION OF RECORD**

The United States of America filed a Notice of Appeal of “Order and Judgment Granting the Trustee’s Motion for Summary Judgment and Denying the United States’ Motion for Summary Judgment,” along with the accompanying Memorandum Decision (Dkt. Nos. 28 and 29 in the above-captioned adversary proceeding,, both entered on March 31, 2020) (Notice of Appeal, Dkt. No. 30). The United States hereby submits, pursuant to Federal Rule of Bankruptcy Procedure 8009, this statement of issues on appeal and the designation of the record on appeal.

STATEMENT OF ISSUES ON APPEAL

1. Whether the Bankruptcy Court erred in finding that 11 U.S.C. § 106(a)(1) waives the United States' sovereign immunity not only with respect to 11 U.S.C. § 544(b), but also with respect to any number of undefined state law causes of action, including an action under Utah's fraudulent transfer laws to avoid payments made to the IRS by a corporation for the federal tax liabilities of the corporation's principals.
2. Whether the Bankruptcy Court erred in finding that Appellee had satisfied the substantive requirements of 11 U.S.C. § 544(b) necessary to avoid the payments to the IRS, including the requirement that the transfers be "voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1).
3. Putting sovereign immunity aside, whether the Bankruptcy Court erred in finding that a state law cause of action to avoid payments to the IRS was not barred by preemption or other constitutional obstacles discussed by the Seventh Circuit in *In re Equip. Acquisition Res., Inc.* ("EAR"), 742 F.3d 743 (7th Cir. 2014).

DESIGNATION OF RECORD ON APPEAL

The following documents filed in David Miller v. United States, Adversary Proceeding No. 2:18-02089:

Filing Date	Docket No.	Description
07/19/2018	1	Complaint
08/29/2018	7	Answer
10/23/2019	16	U.S. Motion for Summary Judgment
10/23/2019	17	Notice of Hearing re U.S. SJ Motion
10/25/2019	18	Plaintiff's Motion for Summary Judgment
10/25/2019	19	Smith Declaration in support of Plaintiff's SJ Motion
10/25/2019	20	Notice of Hearing re Plaintiff's SJ Motion
11/15/2019	24	U.S. Opposition to Plaintiff's SJ Motion
11/15/2019	25	Plaintiff's Opposition to U.S. SJ Motion
11/22/2019	26	U.S. Reply to Plaintiff's Opposition to U.S. SJ Motion
12/10/2019	27	Hearing on Summary Judgment Motions
03/31/2019	28	Memorandum Decision re S.J. Motions

03/31/2020	29	Order and Judgment Granting Plaintiff's SJ, Denying U.S. SJ
04/13/2020	30	Notice of Appeal and Statement of Election
04/13/2020	31	Clerk's Notice of Filing of Appeal
04/23/2020	34	Request for Transcript
		Transcript from 12/10/2019 Hearing (Ordered pursuant to Rule 8009(b)(1)(A))

Respectfully submitted this 27th day of April, 2020,

RICHARD E. ZUCKERMAN
Principal Deputy Assistant Attorney General

/s/ LONDON YOST
LONDON YOST
Trial Attorney, Tax Division
U.S. Department of Justice

JOHN W. HUBER (#7226)
United States Attorney

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that service of the foregoing has been made this 27th day of April, 2020, by the Court's ECF system to:

Reid W. Lambert, Esq.
STRONG & HANNI.
Counsel for Plaintiff

/s/ LANDON YOST
LANDON YOST
Trial Attorney, Tax Division
U.S. Department of Justice

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:20-cv-00248-BSJ
Bankr. No. 17-23687-RKM
Chapter 7
Adv. No. 2:18-02089

IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, CHAPTER 7 TRUSTEE, PLAINTIFF

v.

UNITED STATES OF AMERICA, UNITED STATES
TREASURY DEPARTMENT, DEFENDANT

Filed: June 17, 2020

APPELLANT UNITED STATES' OPENING BRIEF

TABLE OF CONTENTS

* * * * *

II. An alternative Section 550 argument, not addressed by the parties below, also fails 15

* * * * *

II. An alternative Section 550 argument, not addressed by the parties below, also fails

Aspects of the Section 544(b) issue have been considered for some time. *See, e.g., In re Independent Clearing House*, 77 B.R. 843. And the Bankruptcy Court thoughtfully considered these aspects. But an argument surrounding this issue has been raised that perhaps merits some consideration, even though it was not raised by Appellee in the Bankruptcy Court. In the *DBSI* litigation, the argument was raised that it would be immaterial whether an avoidance action could proceed under Section 544(b) against the United States, because the Trustee could, arguably, avoid the IRS payments against the ARG shareholders as alleged “person[s] for whose benefit the [tax payments were] made,” Utah Code § 25-6-304,¹⁰ and then recover from the IRS under Section 550(a)(1), which permits recovery against an “initial transferee” “to the extent that a transfer is avoided under section 544,” without any express reference to the party against whom the “transfer is avoided.” *DBSI Appellee Response Brief*, 2016 WL 6778772 at 29.

But this argument artificially conflates the state-law statutory provisions allowing for avoidance and recovery, which, like the federal provisions at issue allowing

¹⁰ Idaho Code § 55-917(2)(a) in the *DBSI* litigation.

for avoidance and recover under the Bankruptcy Code (Sections 544 and 550), are clearly distinct sections. An actual creditor under Utah state law would need to avoid the tax payments pursuant to Utah Code § 25-6-202 and Utah Code § 25-6-303. But the provision that this alternate argument relies on to claim that the Trustee could avoid the tax payments against Cummins and Bizarro as “person[s] for whose benefit [the tax payments were] made” is not an avoidance provision, but like Section 550, a recovery provision. Utah Code § 25-6-304(2) (“*to the extent a transfer is avoidable* in an action by a creditor under Subsection 25-6-303(1)(a), the following rules apply: . . . (a) the creditor may recover judgment . . . ; and (b) the judgment may be entered against: (i) the first transferee of the asset or the person for whose benefit the transfer was made”) (emphasis added). There is no legal or historical support for the claim that a Trustee could *avoid* the transfers under Section 544(b) using language from a state-law recovery/*non-avoidance* provision, and then recover using the federal provision, Section 550.¹¹

Moreover, the background principles of federal supremacy and sovereign immunity discussed above counsel against interpreting the statutes in this novel, and certainly, at best, ambiguous, way.

* * * * *

¹¹ This coincides with the language of Section 550 as well, which “allows recovery against an initial transferee “to the extent that a transfer is avoided under section 544.” The most natural interpretation of this language is that recovery is available only “to the extent” that transfer is avoided *against the transferee from whom the Trustee seeks to recover*.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

Case No. 2:20-cv-00248-BSJ
Bankruptcy Case No. 17-23687
Adv Proceeding No. 18-02089

IN RE: ALL RESORT GROUP, INC., DEBTOR

DAVID L. MILLER, CHAPTER 7 TRUSTEE, PLAINTIFF

v.

THE UNITED STATES OF AMERICA,
THE UNITED STATES TREASURY, DEFENDANT

Filed: July 24, 2020

**BRIEF OF APPELLEE DAVID L. MILLER,
CHAPTER 7 TRUSTEE**

TABLE OF CONTENTS

* * * * *

I.	THE COURT CORRECTLY DETERMINED THAT THE WAIVER OF SOVEREIGN IMMUNITY IN SECTION 106 (a)(1) EXTENDS TO ALL ASPECTS OF SECTION 544, INCLUDING THE HYPOTHETICAL CLAIM OF AN ACTUAL CREDITOR UNDER APPLICABLE LAW	4
----	---	---

* * * * *

B.	Section 106 (a)(1) abrogates sovereign immunity as to all aspects of a trustee’s claim under section 544 (b).....	7
----	--	----------

* * * * *

3.	Decided Cases Recognizing that the Unambiguous Abrogation of Sovereign Immunity in § 106 (a)(1) Extends to All Aspects of a Claim Under § 544 (b).....	13
----	---	-----------

* * * * *

3.	<u>Decided Cases Recognizing that the Unambiguous Abrogation of Sovereign Immunity in § 106 (a)(1) Extends to All Aspects of a Claim Under § 544(b).</u>	
----	---	--

The principal appellate decision supporting the Trustee’s position is the Ninth Circuit’s opinion in *In re DBSI*, 869 F.3d 1004 (9th Cir. 2017). In that case, the court acknowledged that outside of bankruptcy, sovereign immunity would bar a suit against the United

States under Idaho's fraudulent transfer statute. *DBSI*, 869 F.3d at 1010. Applying "well-settled canons of statutory interpretation," including a holistic look to "the language and design of the statute as a whole," the Ninth Circuit concluded that "read in light of Section 106 (a)(1)'s clear abrogation of sovereign immunity, Section 544 (b)(1) can only mean one thing: a trustee need only identify an unsecured creditor, who, but for sovereign immunity, could bring an avoidance action against the IRS." *Id.*

The Trustee contends that the *DBSI* holding is correct for at least two additional reasons not fully addressed above. First, the *DBSI* court properly acknowledged the breadth of the unambiguous abrogation of sovereign immunity "with respect to" § 544. In its zeal to create and parse a two-step interpretation of § 544, the *EAR* court simply ignored that the abrogation of sovereign immunity in § 106 (a)(1) was complete, unambiguous, and unlimited "with respect to" § 544. Instead, it parsed "applicable law" right out of § 544, looking at it as a separate, hypothetical, distinct creature of state law wholly unrelated to bankruptcy or its purposes. The *DBSI* court did not make that mistake. It viewed the unambiguous abrogation of sovereign immunity under § 106 (a)(1) as reaching all aspects of § 544 (b)(1), including the actual creditors' claim under applicable law.⁵

⁵ The Bankruptcy Court followed *DBSI* in this respect, relying in part on the breadth of the phrase "with respect to" as reaching all matters related to § 544 (b). (R. 194). The Trustee notes that the actual creditor requirement is itself a creation of § 544 (b) and unmistakably within the scope of matters relating to that statute.

Second, the *EAR* court's analysis overstates the "derivative" nature of the trustee's avoiding powers under § 544. While the actual creditor requirement of § 544 undoubtedly requires proof of an underlying claim, it is important not to push the "derivative" point too far. For instance, a trustee may recover under § 544 an amount greater than the value of the actual creditor's claim. See, *In re AFI Holding, Inc.*, 525 F.3d 700, 703 (9th Cir. 2008). In fact, a trustee may avoid transfers exceeding the total claims of creditors in the case. *MC Asset Recovery, LLC v. Southern Co.*, 2006 WL 5112612, at 5 (N.D. Ga. Dec. 11, 2006). Moreover, because the actual creditor's claim at the time of the transfer and on the petition date need not be the same, a trustee may assert claims under § 544 that the actual creditor would no longer be able to bring. *In re Allou Distributors, Inc.*, 392 B.R. 24, 34 (Bankr. E.D.N.Y. 2008); *Allard v. DeLorean*, 884 F.2d 464, 466 (9th Cir. 1989). In short, while the trustee's avoiding power under § 544 is somewhat derivative of the actual creditor's state-law claim, it is much more than a mere tool by which the trustee may stand in the creditor's shoes. As part of the package of avoiding powers designed to bring a debtor's assets back into the estate, § 544 (b)(1), including the underlying applicable law, must be viewed as a single, integrated avenue for relief, the whole of which operates within the scope of the § 106(a)(1) abrogation of sovereign immunity.⁶

⁶ In Part II of its Brief, the United States addresses the interplay of § 544, § 550, and the UUFTA and concludes with an assertion that § 550 does not allow a recovery against any transferee unless the transfer is first avoided as to that specific transferee. The discussion is perhaps beyond the scope of the issues presented on appeal and appears to answer an argument raised but not di-

Beyond *DBSI*, the Trustee submits that the the Bankruptcy Court’s decision is also consistent with the only decided district court case on the subject within the Tenth Circuit, *In re Valley Mortgage, Inc.*, 2013 WL 5314369 (Bankr. D. Colo. Sept. 18, 2013). In that case, the Colorado Bankruptcy Court faced the issue prior to *EAR* and *DBSI*, and it held that “the abrogation of sovereign immunity extends to all sections of § 544, regardless of whether the application of § 544 (b)(1) is predicated on a state law cause of action . . . or, for that matter, any other “applicable law.”

Outside of the Seventh Circuit, the Trustee is aware of no court that has followed *EAR*. Among the handful of cases that have reached the opposite conclusion, a discussion of note is found in *Matter of Hatchett*, 588 B.R. 472 (Bankr. E.D. Mich. 2018). In that case, the court summarized the reasoning of both *EAR* and *DBSI*, and then concluded as follows:

This Court finds the reasoning of the Ninth Circuit, and that of my colleague from this District [*see In re Lewiston*, 528 B.R. 387 (Bankr. E.D. Mich. 2015)] to be far more persuasive than the reasoning of the Seventh Circuit. This Court acknowledges that the Bankruptcy Code’s abrogation of sovereign

rectly addressed in *DBSI*. The Trustee merely notes here that the argument ignores the plain language of § 550, which permits a recovery not only against an initial transferee, but also as to any immediate or mediate transferee, subject to certain defenses. The Trustee would also clarify that § 544 (b) does not incorporate the state-law scheme for recovery of a money judgment, but merely as to whether a transfer is voidable. In the bankruptcy scheme, recovery of money judgment based on a transfer avoided under § 544 (b) is governed exclusively by § 550, another section expressly included in the § 106 (a) abrogation of sovereign immunity.

immunity as to suits brought pursuant to § 544 (b)(1) allows a trustee to bring a fraudulent transfer action that could not have been brought absent the abrogation of immunity. But that is precisely the point of § 106 (a)(1). One of the primary goals of bankruptcy is to provide a mechanism for the orderly distribution of assets to a debtor's creditors. [citations omitted]. To effectuate this goal, the Bankruptcy Code permits trustees to recover assets fraudulently transferred by a debtor prior to bankruptcy so that those assets may be distributed to a *debtor's* creditors. If a party received a pre-bankruptcy payment from a debtor in payment of an obligation that was *not* an obligation of the debtor, and for which the debtor received no value, that payment *must* be recovered for the benefit of the *debtor's* creditors.

It is undisputed that Debtor does not have a tax liability to the IRS. In its fraudulent transfer action under § 544(b)(1), the Trustee is simply seeking to recover money that Debtor should have used to pay her own creditors. In abrogating governmental immunity for suits brought under § 544, Congress's clear intention was that the fraudulently transferred property must be recovered for the benefit of *Debtor's* creditors, regardless of the status of the recipient of the fraudulent transfer. In light of the clear language of § 106(a), the Court finds the IRS's argument that it should be protected from defending fraudulent transfer suits on the merits unpersuasive.

Id. at 480-81.

The Trustee submits that the Memorandum Decision of the Bankruptcy Court is consistent with and supported by the well-reasoned analysis set forth in these

authorities. In simplest terms, the best interpretation of the plain language of § 106 (a)(1) is that the unequivocal abrogation of sovereign immunity reaches all aspects of a trustee's claim under § 544 (b).

* * * * *