ORDERED.

Dated: December 02, 2021

Caryl E. Delano
Chief United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION
www.flmb.uscourts.gov

In re:

ATIF, Inc.,

Debtor.
_____/

Case No. 2:17-bk-01712-FMD
Chapter 11

Daniel J. Stermer, as Creditor Trustee,

Plaintiff,

vs.

Old Republic National Title Insurance Company,
Old Republic National Title Holding Company,
Old Republic Title Companies, Inc., and
Attorneys' Title Fund Services, LLC,

Defendants.

_____/

Adv. Pro. No. 2:18-ap-531-FMD

ORDER (1) DENYING PLAINTIFF'S OMNIBUS MOTION FOR PARTIAL SUMMARY JUDGMENT AND (2) GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

THIS PROCEEDING came before the Court for consideration after a hearing on Plaintiff's *Omnibus Motion for Partial Summary Judgment*,[1] and Defendants' *Motion for Summary Judgment* (together, the "SJ Motions").[2]

In Plaintiff's *Corrected Third Amended Adversary Complaint* (the "Complaint"), Plaintiff, the creditor trustee under Debtor's liquidating Chapter 11 plan, seeks to recover actual fraudulent transfers under 11 U.S.C. § 548 and Florida's Uniform Fraudulent Transfer Act ("FUFTA"),[3] constructively fraudulent transfers under 11 U.S.C. § 548 and FUFTA, and judgment against certain Defendants on alter ego and successor liability claims.[4]

On November 30, 2020, the Court conducted a hearing on the SJ Motions. With the agreement of the parties, the Court deferred its ruling on the SJ Motions until after a trial (the "REV Trial") on an essential element of Plaintiff's claim to avoid alleged constructively fraudulent transfers: whether the transfers were for less than reasonably equivalent value.

Following the five-day REV Trial, the Court issued its *Findings of Fact, Conclusions of Law, and Memorandum Opinion Regarding Reasonably Equivalent Value* (the "REV Ruling").[5] In the REV Ruling, the Court held that Plaintiff did not meet his

---

[1] Doc. No. 155.
[2] Doc. No. 208.
[3] Fla. Stat. § 726.105.
[4] Doc. No. 162.
[5] Doc. No. 484.

burden of proof to establish that the subject transfers were for less than reasonably equivalent value. Plaintiff timely filed a notice of appeal (the "Appeal").[6] On November 22, 2021, the District Court dismissed the Appeal without prejudice, finding that the REV Ruling is a non-final order.[7]

The parties agree that unless the REV Ruling is ultimately reversed on appeal, Plaintiff is unable to satisfy a required element of his constructively fraudulent transfer claims, and Defendants are entitled to judgment as a matter of law as to the claims in Counts II, III, IV, VI, VII, and VIII of the Complaint.[8]

In Plaintiff's remaining claims, he seeks to recover actually fraudulent transfers (Counts I and V); a determination that Defendant Attorneys' Title Fund Services, LLC ("ATF Services") is liable for Debtor's debts as Debtor's successor (Counts X and XI); and a determination that Defendants Old Republic National Title Holding Company and Old Republic Title Companies, Inc., as ATF Services' alter egos, are liable for Plaintiff's claims against ATF Services (Count IX).

---

[6] Doc. No. 486. (The parties concurred that the issues presented in the SJ Motions are independent of the Court's findings in the REV Ruling, such that the Court was not divested of jurisdiction over the issues raised in the SJ Motions while the Appeal was pending in District Court (Doc. No. 506, ¶¶ 16-18)).

[7] United States District Court, Middle District of Florida, Case No. 2:21-cv-00311-JLB (Doc. No. 16).

[8] Doc. No. 506, ¶ 19.

I. FACTS

The historical facts relating to the relationships among the Defendants and the transactions giving rise to Plaintiff's claims are largely undisputed and were determined by the Court in the REV Ruling.[9]

A. The Parties

1. ATIF, Inc. ("Debtor") is a Florida corporation wholly owned by Attorney's Title Insurance Fund, a Florida Business Trust ("ATIF Trust").

2. On March 2, 2017, Debtor filed a petition for relief under Chapter 11 of the Bankruptcy Code, 11 U.S.C. § 101, *et seq.* The Court confirmed a plan of reorganization and Plaintiff, Daniel J. Stermer, was appointed as the Creditor Trustee.

3. Old Republic National Title Insurance Company ("OR Title") is a nationwide title company owned by Old Republic National Title Holding Company ("OR Holding").[10] Old Republic Title Companies, Inc. ("OR Companies"), also owned by OR Holding, is a mid-stream holding company for all of OR Holding's title insurance *service* businesses, not including OR Title or other title insurance companies owned by OR Holding.[11] Together, OR Title, OR Holding, and OR Companies are referred to as the "OR Defendants."

---

[9] Doc. No. 484 (with minor edits for clarity and additional citations to undisputed facts in the record).
[10] Doc. No. 360, Joint Pre-Trial Stipulation, ¶ 2.
[11] Doc. No. 360, ¶ 7.

B. Debtor's Former Business Operations

4. Prior to July 1, 2009, Debtor was licensed by the Florida Office of Insurance Regulation (the "Florida OIR") as a title insurance company.

5. The Florida OIR regulates Florida insurance companies, including title insurers.[12] Under Florida law, insurance companies are required to maintain a surplus of the value of its assets over the value of its policy liabilities.[13]

6. Debtor's business operations as a title insurance company included insuring title, underwriting and selling title insurance, selling title searches, managing and supporting insurance agents, and administering title insurance claims. Debtor conducted its business under the trade name "The Fund."[14]

7. Debtor's insurance business was conducted through a network of attorney-agents, who were themselves licensed as title insurance agents. Essentially, the attorney-agents handled real estate closings and "sold" Debtor's title insurance policies.[15]

8. Debtor's headquarters were located in an office building it owned in Orlando, Florida (the "Headquarters Property").[16]

---

[12] Doc. No. 360, ¶ 10.
[13] Fla. Stat. § 624.408.
[14] Doc. No. 360, ¶ 5.
[15] Doc. No. 360, ¶ 5c.
[16] Doc. No. 360, ¶ 5g.

9. Debtor owned and maintained a title plant of Florida real property records (the "Title Plant"). Generally, the Title Plant is an electronic compilation of property records and indexes to property records, such as deeds, mortgages, and judgments, that is maintained on a computer and used to examine the title to real property in connection with the issuance of title insurance policies.[17]

10. Between 2005 and 2008, Debtor's market share of premiums earned by all title insurance companies in the State of Florida ranged from 18.65% to 19.44%. During that same time period, OR Title's market share of premiums earned by title insurance companies in the State of Florida ranged from 6.84% to 7.71%.[18]

C. The Joint Venture Agreement

11. Beginning in late 2008, Debtor experienced financial difficulties for three primary reasons: $60 million in defalcations by some of its attorney-agents; the decline in value of its stock market investments resulting from the global financial crisis; and the reduction in income from title insurance policies because of the impact of the financial crisis on Florida's real estate market.[19]

[17] Doc. No. 360, ¶¶ 5d, 5e; Doc. No. 370, Joint Supplemental Pre-Trial Stipulation, ¶ 141.
[18] Doc. No. 462-11, Plaintiff's Ex. 679.
[19] Doc. No. 360, ¶ 14.

12. In early 2009, Debtor's surplus (the value of Debtor's assets over its liabilities) fell to a level near the minimum required by Florida law for a title insurer to continue to issue new policies.[20]

13. In early 2009, Debtor's President, Charles Kovaleski, contacted OR Title's President, Rande Yeager, regarding Debtor's financial difficulties.[21]

14. After Mr. Kovaleski's initial contact, Debtor's representatives met with representatives of OR Title at OR Title's headquarters in Minneapolis, Minnesota. Shortly thereafter, OR Holding proposed that Debtor and OR Holding enter into a joint venture agreement.[22]

15. On July 1, 2009, Debtor and OR Holding entered into a Joint Venture Agreement (the "2009 JVA").[23]

16. Under the 2009 JVA, Debtor and OR Holding formed a limited liability company known as Attorneys' Title Fund Services, LLC ("ATF Services") and entered into an operating agreement for ATF Services.[24] The 2009 JVA states that ATF Services was formed "for the purposes of servicing title insurance agencies."[25] Under the 2009 JVA, ATF Services provided services to OR Title in connection with OR Title's issuance

[20] Doc. No. 360, ¶¶ 14-16; Fla. Stat. § 624.408.
[21] Doc. No. 360, ¶ 17.
[22] Doc. No. 360, ¶¶ 18-20, 27.
[23] Doc. No. 424, Defendants' Ex. 10.
[24] Doc. No. 424, Defendants' Ex. 10, pp. 29-48, Operating Agreement of Attorneys' Title Fund Services, LLC, attached as Exhibit C to the 2009 JVA.
[25] Doc. No. 424, Defendants' Ex. 10, p. 1.

and underwriting of title insurance policies, and Debtor agreed that it would not engage in the business of title insurance underwriting or title insurance production.[26]

17. The 2009 JVA states:

> [Debtor] covenants and agrees that it will take all reasonable action to ensure that its former agents sign an agency agreement with [OR Title], and that it will shift all business currently being written by [Debtor] to [OR Title]. All ancillary services being provided by [Debtor] shall be transferred to [a new limited liability company to be known as Attorneys' Title Fund Services, LLC].[27]

18. Upon obtaining approval of the 2009 JVA from the Florida OIR, Debtor surrendered its license to sell title insurance. However, Debtor maintained its license to service and manage its existing title insurance policies and policy-related claims.[28]

19. Under separate contribution agreements attached to the 2009 JVA, Debtor contributed the Title Plant and related subscription agreements to ATF Services, and OR Holding contributed $10 million in cash and a promissory note for $700,000.00 to ATF Services.[29]

20. Debtor and OR Holding held equal interests in ATF Services.[30]

---

[26] Doc. No. 360, ¶ 54; Doc. No. 370, ¶ 140; Doc. No. 424, Defendants' Ex. 10, pp. 4-5, 2009 JVA, § 8a(ii).
[27] Doc. No. 424, Defendants' Ex. 10, pp. 4-5, 2009 JVA, § 8a(iii).
[28] Doc. No. 210-31.
[29] Doc. No. 424, Defendants' Ex. 10, pp. 49-53 and 54-57, attached as Exhibits D and E to the 2009 JVA; Doc. No. 370, ¶ 142.
[30] Doc. No. 424, Defendants' Ex. 10, pp. 2-4, 2009 JVA, preamble and §§ 2, 5; Doc. No. 360, ¶ 31.

21. As of July 1, 2009, 544 of Debtor's 568 employees became employees of ATF Services; Debtor retained 24 employees.[31]

22. In addition, a number of Debtor's officers and senior employees became officers and employees of ATF Services. For example, on June 30, 2009, Ted Conner was Debtor's Associate General Counsel. But on July 1, 2009, Mr. Conner became an employee of ATF Services, first as its Associate General Counsel and Vice President, and later as ATF Services' General Counsel and Senior Vice President. Also, in July 2009, Mr. Conner was appointed an Assistant Vice President of OR Title. In 2014, Mr. Conner's employment with ATF Services terminated and he became a Senior Vice President of OR Title and Deputy General Counsel and Vice President of OR Holding (which positions he still holds). As Deputy General Counsel of OR Holding, Mr. Conner is counsel to all of OR Holding's subsidiaries, including ATF Services.[32]

23. In addition, effective July 1, 2009, the following senior management employees terminated their employment with Debtor and became employees of ATF Services:

(a) Debtor's Chief Financial Officer, Jimmy Jones, became ATF Services' President and Chief Executive Officer. Mr. Jones presently serves as ATF Services' Chief Executive Officer.[33]

---

[31] Doc. No. 360, ¶¶ 38 and 39.
[32] Doc. No. 370, ¶¶ 123-126.
[33] Doc. No. 360, ¶¶ 40-42.

(b) Debtor's general counsel, Norwood Gay, became ATF Services' Chief Legal Officer.[34]

(c) Debtor's Controller, Deanna Bolger, joined ATF Services effective July 1, 2009, and is currently ATF Services' Chief Financial Officer and Chief Information Officer.[35]

(d) Debtor's Human Resources Director, Gwen Geier, became ATF Services' Senior Vice President and Chief Financial Officer. Ms. Geier is currently ATF Services' President.[36]

(e) Jeannie L. Calabrese, a Debtor employee, became ATF Services' Senior Vice President and Chief Information Officer.[37]

(f) Sharon Priest, a Debtor employee, became ATF Services' Senior Vice President and Chief Operating Officer.[38]

24. Charles Kovaleski, Debtor's president on July 1, 2009, later became a member of the Board of Directors of OR Holding's parent company.[39]

---

[34] Doc. No. 360, ¶¶ 50-51.
[35] Doc. No. 360, ¶¶ 52-53; Doc. No. 464, February 16 Trial Transcript, p. 207.
[36] Doc. No. 360, ¶¶ 43-45.
[37] Doc. No. 360, ¶¶ 46-47.
[38] Doc. No. 360, ¶¶ 48-49.
[39] Old Republic International Corporation (Doc. No. 467, February 19 Trial Transcript, p. 202; Doc. No. 360, ¶ 9).

25. Commencing July 1, 2009, ATF Services' principal place of business was located in the Headquarters Property, which it leased from Debtor.[40]

26. After July 1, 2009, most of Debtor's attorney-agents signed title agency agreements with OR Title.[41]

27. After July 1, 2009, Debtor's business operations consisted of the administration of its previously issued title policies and the management of its policy claims by its remaining employees.[42]

28. Commencing July 1, 2009, ATF Services—not Debtor—maintained and updated the Title Plant.[43] Deanna Bolger, ATF Service's Chief Financial Officer since 2014, testified that the cost for ATF Services to maintain the Title Plant is approximately $10 million per year.[44]

29. ATF Services earns fees from OR Title and third parties for searches of real property records conducted on the Title Plant in connection with their issuance of title insurance policies.[45]

30. Debtor did not retain a copy of the Title Plant as it existed on July 1, 2009.

---

[40] Doc. No. 360, ¶ 58; Doc. No. 370, ¶ 134.
[41] Doc. No. 360, ¶ 32.
[42] Doc. No. 210-9, Deposition transcript of John Simmons, pp. 41-42.
[43] Doc. No. 360, ¶ 37; Doc. No. 370, ¶ 143.
[44] Doc. No. 468, February 22 Trial Transcript, pp. 127-128.
[45] Doc. No. 360, ¶ 63; Doc. No. 370, ¶ 140.

31. After Debtor and OR Holding formed ATF Services, Debtor permitted ATF Services to operate under the trade name "The Fund."[46]

32. The evidence suggests that, after the 2009 JVA, all of Debtor's business operations related to the sale, issuance, and underwriting of title insurance policies were moved to OR Title, and all of Debtor's "ancillary" business operations were moved to ATF Services. In other words, OR Title received the revenues from the sale of title insurance policies, while ATF Services bore the cost of maintaining the Title Plant and employing 544 of Debtor's former employees.

33. In addition, because ATF Services operated from Debtor's Headquarters Property and used Debtor's trade name, "The Fund," third parties doing business with "The Fund" after the 2009 JVA may not have been aware that "The Fund" was no longer the Debtor.

34. In 2010, the year after the 2009 JVA and the formation of ATF Services, OR Title's market share of premiums earned by title insurance companies in the State of Florida increased to 28.65%, and for the years 2011 through 2015 ranged between 29.6% and 32.5%.[47]

[46] Doc. No. 360, ¶¶ 56-57; Doc. No. 370, ¶ 127.
[47] Doc. No. 462-11, Plaintiff's Ex. 679.

D. Debtor transfers its tradename "The Fund" and service marks to its parent, ATIF Trust.

35. In June 2011, two years after entering into the 2009 JVA, Debtor transferred all of its trade and services marks (the "Marks"), including its trade name "The Fund," to Debtor's parent, ATIF Trust.[48]

36. Plaintiff acknowledges that Debtor was solvent in 2011.[49]

E. The Amended 2009 JVA

37. As of October 2011, ATF Services reported operating losses of approximately $30 million, and OR Holding had loaned ATF Services approximately $20 million under a loan agreement.[50]

38. On October 6, 2011, Debtor, OR Holding, and ATF Services entered into an Amended and Restated Joint Venture Agreement (the "Amended 2009 JVA"). The Amended 2009 JVA stated that it was predicated on an understanding between the parties "with respect to the organization and financing" of ATF Services.[51]

39. The Amended 2009 JVA included three critical provisions:

(a) OR Holding agreed to continue making loans to ATF Services under the existing loan agreement;[52]

---

[48] Doc. No. 370, ¶ 129.
[49] Doc. No. 466, February 18 Trial Transcript, p. 99; Doc. No. 469, February 23 Trial Transcript, pp. 14-15, 46.
[50] Doc. No. 360, ¶¶ 67-68.
[51] Doc. No. 427, Defendants' Ex. 26, pp. 2-18; Doc. No. 360, ¶ 73.
[52] Doc. No. 427, Defendants' Ex. 26, p. 6, Amended 2009 JVA, § 4c(i).

(b) Debtor agreed that it would not engage in the business of title insurance underwriting or title insurance production;[53] and

(c) Debtor represented and warranted that it held intellectual property rights in certain trade names and marks, including the trade name "The Fund," and granted a license to ATF Services to use the trade names and marks at no cost.[54]

40. The Amended 2009 JVA provided for: (a) an initial term ending on July 1, 2014, to be renewed automatically for successive one-year terms, unless Debtor or OR Holding gave notice of its election to terminate the Amended 2009 JVA at least 120 days prior to the expiration of the initial term or a renewal term; (b) termination upon the mutual written consent of both parties; and (c) immediate termination upon the dissolution of ATF Services pursuant to the terms of its operating agreement.[55]

41. The Amended 2009 JVA granted a "Put Option" to Debtor, conditioned on Debtor's meeting certain requirements, and also granted a "Call Option" to OR Holding. If Debtor exercised the Put Option, ATF Services was required to provide Debtor with a current copy of the Title Plant and related software.[56]

42. In the Amended 2009 JVA, Debtor and OR Holding stated that it was their "overriding intent," upon the dissolution or liquidation of ATF Services or the exercise

---

[53] Doc. No. 427, Defendants' Ex. 26, p. 7, Amended 2009 JVA, § 8a(ii).
[54] Doc. No. 427, Defendants' Ex. 26, p. 7, Amended 2009 JVA, § 8a(iii); Doc. No. 370, ¶ 128.
[55] Doc. No. 427, Defendants' Ex. 26, p. 5, Amended 2009 JVA, § 3.
[56] Doc. No. 427, Defendants' Ex. 26, pp. 8 and 12, Amended 2009 JVA, §§ 10, 11, 18a.

of a Put Option or a Call Option, to mutually cooperate so that Debtor and OR Holding would each receive a useable and working copy of the Title Plant, its software, "derivatives," and licenses, not including the computer hardware.[57]

43. Under the Amended 2009 JVA, ATF Services was required to deliver an electronic copy of the Title Plant to Debtor and OR Title every six months.[58] ATF Services satisfied this obligation and, every six months, delivered a copy of the updated Title Plant to Debtor's then-president, John Simmons.[59] Mr. Simmons retained a copy of the newly updated Title Plant, and the prior update, referred to as the "A and B Tapes."[60]

44. In addition, Debtor, OR Holding, and ATF Services entered an Amended and Restated Operating Agreement for ATF Services (the "Amended Operating Agreement").[61] Under the Amended Operating Agreement, Debtor held 50 Class B Units in ATF Services and OR Holding held 50 Class A Units.[62] Debtor had a "conversion option" to relinquish its Class B Units and purchase one-half of OR Holding's Class A Units prior to July 1, 2019 (the "Conversion Option"). The

---

[57] Doc. No. 427, Defendants' Ex. 26, p. 12, Amended 2009 JVA, § 18a; Doc. No. 370, ¶ 144.
[58] Doc. No. 427, Defendants' Ex. 26, p. 12, Amended 2009 JVA, § 18e.
[59] Mr. Simmons was appointed acting president of Debtor as of March 1, 2013, and served as President of Debtor as of December 2013 through at least December 2015 (Doc. No. 370, ¶ 121).
[60] Doc. No. 464, February 16 Trial Transcript, pp. 152-153.
[61] Doc. No. 427, Defendants' Ex. 26, pp. 82-103.
[62] Doc. No. 427, Defendants' Ex. 26, p. 94, Amended Operating Agreement, Article VI, § 2.

Conversion Option was conditioned on Debtor's first paying OR Holding 50% of all loans that OR Holding had made to ATF Services and 50% of the interest that had accrued on the loans on the date of the exercise of the Conversion Option "regardless of whether such loans and interest have been repaid or remain outstanding."[63]

45. Under the Amended Operating Agreement, upon the termination of the 2009 JVA: (a) ATF Services was to terminate its business operations, and (b) conditioned upon ATF Services' obligations to OR Holding having been satisfied, Debtor and OR Holding were each to receive a copy of the Title Plant and related software.[64]

46. In other words, Debtor's right to receive a copy of the Title Plant under the Amended 2009 JVA and Amended Operating Agreement was conditioned on

(a) the dissolution of ATF Services by an event requiring dissolution under the Florida Limited Liability Company Act or the termination of the Amended 2009 JVA *and* the payment of all debts owed by ATF Services to OR Holding; or

(b) Debtor's exercise of its Put Option upon the conditions set forth in the Amended 2009 JVA or OR Holding's exercise of its Call Option.

[63] Doc. No. 427, Defendants' Ex. 26, p. 94, Amended Operating Agreement, Article VI, § 3.
[64] Doc. No. 427, Defendants' Ex. 26, pp. 96-97, Amended Operating Agreement, Article VIII, §§ 1, 3.

F. The 2015 Master Agreement

47. After entering into the 2009 JVA and the Amended 2009 JVA, Debtor continued to service its existing title insurance policies and to manage its policy-related claims. To maintain its insurance license, Debtor was required by Florida law to maintain a surplus equal to 10% of the value of its assets over the amount of its liabilities.[65]

48. Beginning in late 2014, the value of Debtor's surplus declined.[66]

49. In 2015, Debtor's President, John Simmons, contacted OR Title and requested that OR Title make a proposal to reinsure all of Debtor's title policy exposure.[67] OR Title authorized Debtor to seek similar arrangements with other insurance companies.

50. The OR Defendants were aware that a transfer of Debtor's assets in connection with OR Title's agreement to reinsure Debtor's title policy liabilities could be open to attack as a fraudulent transfer. For example, OR Title's attorney's notes from an October 2015 meeting with OR Title state "do this before [Debtor] is [insolvent] because of clawbacks" and that "Ted [Conner] knows that OR will get sued."[68]

---

[65] Fla. Stat. § 624.408.
[66] Doc. No. 360, ¶ 74.
[67] Doc. No. 360, ¶ 77.
[68] Doc. No. 435-1, Plaintiff's Ex. 390; Doc. No. 462-9, Plaintiff's Ex. 408.

51. On October 1, 2015, SOBC Corp. ("SOBC") offered to purchase 100% of Debtor's stock in exchange for the payment of $1.00 and $100,000.00 to cover Debtor's expenses in documenting the transaction.[69]

52. By the fall of 2015, the value of Debtor's surplus was nearing zero.[70]

53. As of December 2015, Debtor had not given OR Holding notice of intent to terminate the Amended 2009 JVA in advance of the Amended 2009 JVA's initial term or any renewal term; Debtor and OR Holding had not terminated the Amended 2009 JVA by mutual agreement; Debtor had not exercised its Put Option; OR Holding had not exercised its Call Option; and ATF Services had not been dissolved under Florida law or under the Amended Operating Agreement.

54. By December 2015, OR Holding had advanced over $40 million to ATF Services under its loan agreements to cover ATF Services' reported losses.[71] In addition, in his Answers to Contention Interrogatories, Plaintiff does not contend that in December 2015, Debtor could have raised the equity capital necessary to satisfy any of the financial requirements to terminate the Amended 2009 JVA, dissolve ATF Services, or exercise its Put Option.[72]

---

[69] Doc. No. 360, ¶ 81; Doc. No. 457, Defendants' Ex. 158.
[70] Doc. No. 360, ¶ 82.
[71] Doc. No. 464, February 16 Trial Transcript, pp. 156-157.
[72] Doc. No. 432, Defendants' Ex. 417.

55. On December 1, 2015, the Florida OIR notified Debtor that it would refer Debtor to the Florida Department of Financial Services ("DFS") for DFS to commence a state court receivership proceeding against Debtor.[73] In order to avoid a receivership proceeding, Debtor, OR Holding, and OR Title discussed entering into a proposed "master agreement."[74]

56. OR Title's Chief Financial Officer, Gary Horn,[75] testified at trial regarding notes he prepared for his presentation of the proposed master agreement to OR Title's board of directors.[76] His notes reflect Debtor's "ongoing rights" to the Title Plant, and include the following:

> Why are we doing this: Our [ATF Services] operation is nicely profitable for us -it's working exactly as intended [*note: this is despite ATF Services' reported losses*]. By doing the deal, we're avoiding any potential negative impact that a receivership might have on our business. Also, ATIF has certain ongoing rights to the title plant and certain other assets that we want to keep out of our competitors (sic) hands. The deal eliminates all of those ongoing rights - so it really strengthens our hand.[77]

57. On December 12, 2015, Debtor, ATIF Trust, OR Holding, OR Title, and ATF Services entered into a master agreement (the "2015 Master Agreement").[78] The 2015 Master Agreement states that OR Title was willing to reinsure Debtor's title

---

[73] Doc. No. 360, ¶ 90.
[74] Doc. No. 360, ¶¶ 92-98.
[75] Doc. No. 360, ¶ 18; Doc. No. 466, February 18 Trial Transcript, p. 36.
[76] Doc. No. 466, February 18 Trial Transcript, pp. 12-18.
[77] Doc. No. 435-8, Plaintiff's Ex. 39 (italicized note added).
[78] Doc. No. 435-4, Plaintiff's Ex. 501, pp. 1-14.

policies under an attached *Title Insurance Assumption Reinsurance Contract* (the "Reinsurance Contract"),[79] in exchange for Debtor and ATIF Trust's transfer of certain assets to OR Title, including:

(a) all of Debtor's cash and cash equivalents (except $1.5 million in cash and other limited cash assets) having a stipulated value of $30,361,074.00;

(b) the Headquarters Property and an adjacent vacant parcel of land, having a stipulated value of $17.21 million; and

(c) all of Debtor's rights in the Title Plant and other intellectual property, as defined in an attached *Intellectual Property Assignment* (the "IP Assignment").[80]

58. Under the IP Assignment, Debtor and ATIF Trust agreed to transfer to OR Title a list of intellectual property, including the Marks, together with the Title Plant "and all software, data, documentation relating thereto and all copies thereof."[81]

59. The Florida OIR approved the 2015 Master Agreement.[82]

60. Thereafter, the transfers provided for in the 2015 Master Agreement (the "2015 Transfers") were effectuated, and Debtor delivered the A and B Tapes of the Title Plant to OR Title.[83]

---

[79] Doc. No. 435-4, Plaintiff's Ex. 501, pp. 15-25.
[80] Doc. No. 435-4, Plaintiff's Ex. 501, p. 2, 2015 Master Agreement, §§ 1(a), (c).
[81] Doc. No. 435-4, Plaintiff's Ex. 501, pp. 37-43.
[82] Doc. No. 360, ¶ 100.
[83] Doc. No. 464, February 16 Trial Transcript, pp. 151-152, 158.

61. After Debtor made the 2015 Transfers, its remaining assets consisted of $1.5 million, and Debtor retained its liabilities that were not related to title policy claims.[84] In addition, Debtor retained its membership interest in ATF Services until January 2016, when OR Holding elected to exercise its Call Option and offered it to ATIF Trust. Since that time, ATIF Trust holds a membership interest in ATF Services.[85]

II. THE BANKRUPTCY CASE AND THE ADVERSARY PROCEEDING

In early 2017, less than 14 months after Debtor entered into the 2015 Master Agreement and made the 2015 Transfers, Debtor retained Gerard McHale as its Chief Restructuring Officer.[86] On March 2, 2017, Mr. McHale, in his capacity as Chief Restructuring Officer, caused Debtor to file a Chapter 11 petition.[87] The Office of the United States Trustee appointed an Official Committee of Unsecured Creditors.[88]

On July 5, 2018, the Court entered an *Order Confirming Second Amended Chapter 11 Plan Filed by Official Committee of Unsecured Creditors*, and Plaintiff was appointed as the creditor trustee.[89]

---

[84] Doc. No. 435-4, Plaintiff's Ex. 501, p. 2, 2015 Master Agreement, § 1(a)(i); Doc. No. 370, ¶ 131.
[85] Doc. No. 360, ¶¶ 104-106.
[86] Mr. McHale is a well-known forensic accountant, chief restructuring officer, and Chapter 11 bankruptcy trustee.
[87] Main Case, Doc. No. 1.
[88] Main Case, Doc. Nos. 51, 67.
[89] Main Case, Doc. No. 338.

On October 16, 2018, Plaintiff, in his capacity as the creditor trustee, commenced this adversary proceeding. In the Complaint, Plaintiff alleges that (a) Debtor made the 2015 Transfers with the actual intent to hinder, delay, or defraud its creditors, such that they are avoidable under 11 U.S.C. § 548 and FUFTA;[90] (b) ATF Services is Debtor's successor in interest under de facto merger and "mere continuation" theories, such that ATF Services is liable for Debtor's debts;[91] and (c) ATF Services is the alter ego of OR Companies and OR Holding, such that OR Companies and OR Holding are liable for the debts of ATF Services.[92]

III. SUMMARY JUDGMENT STANDARD

Under Federal Rule of Civil Procedure 56(a), a party "may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought." Summary judgment is appropriate when the moving party shows that there is no genuine dispute as to any material fact and that it is entitled to judgment as a matter of law.[93]

For issues on which the movant bears the burden of proof, the movant must come forward with credible evidence that, if not controverted at trial, would entitle the movant to a directed verdict. But for issues on which the nonmovant bears the

[90] Doc. No. 162, Complaint, Counts I, V.
[91] Doc. No. 162, Complaint, Counts X, XI.
[92] Doc. No. 162, Complaint, Count IX.
[93] Fed. R. Civ. P. 56(a) made applicable to this proceeding by Fed. R. Bankr. P. 7056.

burden at trial, the moving party may either show that there is an absence of evidence to support the non-moving party's claim or may come forward with affirmative evidence showing that the non-moving party will be unable to prove its claim or defense at trial. If the moving party carries its initial burden, the responsibility moves to the non-moving party to show the existence of a genuine issue of material fact.[94]

The standard is the same for cross-motions for summary judgment.[95] In such cases, the court must evaluate each motion on its own merits and draw all reasonable inferences against the party whose motion is under consideration. However, in evaluating cross-motions, courts may "assume that there is no evidence which needs to be considered other than that which has been filed by the parties."[96]

Here, Plaintiff bears the burden of proof as to each required element of his actual fraudulent transfer claims,[97] and also bears the burden of proof on his alter ego claim[98] and successor liability claims.[99]

---

[94] *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993); *In re Fields*, 2018 WL 1616840, at *2 (Bankr. M.D. Fla. Mar. 30, 2018).
[95] *In re Van Arsdale*, 2017 WL 2267021, at *2 (Bankr. N.D. Cal. May 18, 2017) (citing *Taft Broadcasting Co. v. U.S.*, 929 F.2d 240, 248 (6th Cir. 1991)).
[96] *In re Van Arsdale*, 2017 WL 2267021, at *2 (quoting *Greer v. U.S.*, 207 F.3d 322, 326 (6th Cir. 2000)).
[97] *See In re American Way Service Corporation*, 229 B.R. 496, 525-26 (Bankr. S.D. Fla. 1999).
[98] *In re Paul C. Larsen, P.A.*, 610 B.R. 684, 688 (Bankr. M.D. Fla. 2019).
[99] *See Orlando Light Bulb Service, Inc. v. Laser Lighting and Electrical Supply, Inc.*, 523 So. 2d 740, 742 (Fla. 5th DCA 1988). (Florida follows the corporate law rule which does not impose the liabilities of a predecessor corporation upon the successor company unless specific elements are present.)

IV. ACTUALLY FRAUDULENT TRANSFER CLAIMS AGAINST OR TITLE (COUNTS I AND V)

Plaintiff contends that Debtor made the 2015 Transfers with the actual intent to hinder, delay, or defraud its creditors, and that they are avoidable under § 548(a)(1)(A) of the Bankruptcy Code[100] and § 726.105(1)(a) of the Florida Statutes.

A. Elements of an Actually Fraudulent Transfer

Both § 548(a)(1)(A) and Fla. Stat. § 726.105(1)(a) provide for the avoidance of a transfer of the debtor's property if the debtor made the transfer "with actual intent to hinder, delay, or defraud" its creditors. Under § 548(a), transfers may be avoided if they were made within two years of the filing of the bankruptcy petition; under § 726.105(1)(a), actions to avoid the transfer must be filed within four years after the transfer was made.[101]

Fraudulent transfer claims under FUFTA are analogous "in form and substance" to those under § 548 and they are frequently analyzed contemporaneously.[102] "The only material difference between the state and bankruptcy provisions is the favorable four-year look-back period under the Florida law."[103]

---

[100] Unless otherwise stated, statutory references are to the United States Bankruptcy Code, 11 U.S.C. § 101, *et seq*.
[101] Fla. Stat. § 726.110.
[102] *In re Pearlman*, 515 B.R. 887, 894 (Bankr. M.D. Fla. 2014) (citing *In re Stewart*, 280 B.R. 268, 273 (Bankr. M.D. Fla. 2001)).
[103] *In re Pearlman*, 515 B.R. at 894 (citations omitted).

B. Fraudulent Intent and the Badges of Fraud

In considering whether to avoid a transfer as actually fraudulent, the court focuses its inquiry on the intent or state of mind of the debtor/transferor; culpability on the part of the transferee is not essential.[104] Because actual intent to defraud is difficult to prove, "courts look to the totality of the circumstances and badges of fraud surrounding the allegedly fraudulent transfers."[105]

Section 726.105(2) of the Florida Statutes provides a non-exhaustive list of eleven badges of fraud that a court may consider in determining actual intent under § 726.105(1)(a):

> (a) The transfer or obligation was to an insider.
>
> (b) The debtor retained possession or control of the property transferred after the transfer.
>
> (c) The transfer or obligation was disclosed or concealed.
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all the debtor's assets.
>
> (f) The debtor absconded.
>
> (g) The debtor removed or concealed assets.

---

[104] *In re Pearlman*, 478 B.R. 448, 453 (M.D. Fla. 2012) (quoting *In re Cohen*, 199 B.R. 709, 716-17 (9th Cir. B.A.P. 1996)).

[105] *In re D.I.T., Inc.*, 561 B.R. 793, 802 (Bankr. S.D. Fla. 2016) (citing *In re Model Imperial, Inc.*, 250 B.R. 776, 790-91 (Bankr. S.D. Fla. 2000)).

> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.
>
> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.
>
> (j) The transfer occurred shortly before or shortly after a substantial debt was incurred.
>
> (k) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.[106]

Plaintiff contends that seven of the eleven badges of fraud support a finding that the 2015 Transfers were actually fraudulent transfers.[107] The Court will discuss each of the seven badges of fraud in turn.

1. Whether Debtor Received Reasonably Equivalent Value for the 2015 Transfers

The first badge of fraud is whether "the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred."[108]

---

[106] Fla. Stat. § 726.105(2).

[107] Plaintiff has not alleged (1) that Debtor retained control of the property after the transfers, (2) that Debtor absconded, (3) that Debtor removed or concealed assets, or (4) that Debtor transferred its business assets to a lienor who then transferred them to an insider, and has stipulated that his case does not turn on these four badges of fraud (Doc. No. 325, November 30, 2020 Hearing Transcript, p. 130).

[108] Fla. Stat. § 726.105(2)(h); *In re Vaso Active Pharmaceuticals, Inc.*, 2012 WL 4793241, at *15 (Bankr. D. Del. Oct. 9, 2012).

As set forth in the REV Ruling, the Court has already found that Debtor transferred to OR Title tangible assets having a value of $47,571,074.00[109] in exchange for OR Title's assumption of Debtor's title insurance policy liabilities determined by the Court to be in the range of $45 million to $57.2 million; that Plaintiff failed to establish the value of Debtor's intangible assets in 2015;[110] and that Plaintiff did not meet his burden of proof to establish that the 2015 Transfers were for less than reasonably equivalent value.[111]

Based on the REV Ruling, the OR Defendants contend that OR Title is entitled to summary judgment on Plaintiff's actual fraud claims, because, other than cases involving Ponzi schemes or other fraudulent schemes encompassing all of a debtor's operations, a transfer for reasonably equivalent value is *never* made with actual fraudulent intent.[112]

The bankruptcy court *In re Dual D Health Care Operations, Inc.*,[113] addressed this very issue. There, the court noted that other than in cases where the transfers were made to non-insiders under arms-length agreements, the receipt of reasonably equivalent value is "not dispositive of the question of whether the debtor intended to

---

[109] The parties stipulated to the values of Debtor's cash equivalents ($30,361,074.00) (Doc. No. 149) and the Headquarters Property and other real property owned by Debtor ($17.21 million) (Doc. Nos. 137, 141) for a total of $47,571.074.00.
[110] Doc. No. 484, pp. 30-31.
[111] Doc. No. 484, p. 31.
[112] Doc. No. 506, p. 7 (emphasis added).
[113] 2021 WL 3083344 (Bankr. N.D. Tex. July 21, 2021).

hinder, delay or defraud its creditors in making the transfer, *particularly where other badges of fraud have been alleged*."[114]

Here, in light of the totality of circumstances giving rise to the 2015 Transfers, the Court finds that the REV Ruling is not dispositive on the issue of whether Debtor made the 2015 Transfers with the intention of defrauding its creditors. Therefore, the Court will consider whether the other six badges of fraud alleged by Plaintiff support a finding of Debtor's fraudulent intent.

2. Whether the 2015 Transfers Were of Substantially All of Debtor's Assets

Under the 2015 Master Agreement, Debtor transferred the following property interests to OR Title: (a) cash equivalents and real property having a stipulated value of $47,571,074.00;[115] (b) Debtor's interest in intellectual property, including the name "The Fund," the Marks, and all related data and software; and (c) Debtor's contingent right to obtain a copy of the Title Plant. After the 2015 Transfers, Debtor's remaining

[114] *In re Dual D Health Care Operations, Inc.*, 2021 WL 3083344, at *8 (emphasis added). *See also In re Equipment Acquisition Resources, Inc.*, 481 B.R. 433, 440 (Bankr. N.D. Ill. 2012) ("[T]he equivalence of value given in exchange for the actual intent fraudulent transfer is immaterial to the question whether the transfer is actually fraudulent." (citation omitted)).
[115] Doc. Nos. 137, 141, 149.

assets consisted of $1.5 million in cash[116] and a bond worth up to $1 million,[117] for total remaining assets worth no more than $2.5 million.[118]

The OR Defendants do not dispute that the 2015 Transfers were of substantially all of Debtor's assets.[119] The Court finds that Plaintiff met his burden to establish this badge of fraud.

3. Whether the 2015 Transfers Were Concealed

Plaintiff asserts that the 2015 Transfers were concealed in two ways. First, the parties to the 2015 Master Agreement agreed not to release any confidential or proprietary information to third parties prior to the closing of the transaction and, after the closing, Debtor and ATIF Trust agreed not to disclose any information of any kind concerning the 2015 Master Agreement or the "Contemplated Transactions."[120] Second, Mr. Conner, on OR Title's behalf, physically marked the 2015 Master Agreement as a "trade secret" when it was submitted to the Florida OIR for approval, with the intent of prohibiting the Florida OIR from providing copies to third parties.[121]

---

[116] Doc. No. 435-4, Plaintiff's Ex. 501, p. 2, 2015 Master Agreement, § 1(a).
[117] Doc. No. 155, p. 9.
[118] In the REV Ruling, the Court found that Debtor had divested itself of its primary business operations beginning with the 2009 JVA, and that the 2009 transfers were beyond any lookback period for avoiding fraudulent transfers.
[119] For example, in their SJ Motion, the OR Defendants assert that eight badges of fraud do not exist, but do not contend that Debtor retained substantial assets after the 2015 Transfers (Doc. No. 208, p. 42).
[120] Doc. No. 435-4, Plaintiff's Ex. 501, pp. 8-9, 2015 Master Agreement, § 7(b).
[121] Doc. No. 153, ¶¶ 253-255; Doc. No. 155, pp. 10-11.

But the OR Defendants contend that the following evidence demonstrates that the 2015 Transfers were never concealed: (a) the parties submitted the 2015 Master Agreement to the state agency that regulates title insurers, the Florida OIR, and the Florida OIR thoroughly reviewed it;[122] (b) OR Title directly paid Debtor's policy claims—claims made on policies issued by Debtor—after OR Title received the 2015 Transfers (in other words, the claimants received payment from OR Title rather than from Debtor, so they would have been aware of OR Title's role);[123] (c) Jimmy Jones, ATF Services' president, informed ATF Services' employees that OR Title had assumed responsibility for Debtor's policy claims;[124] and (d) the warranty deed to OR Title for the real property included in the 2015 Transfers was recorded in the public records.[125]

The Court notes that Plaintiff has not provided any record evidence that Debtor participated in common methods of concealing a transfer such as using secret bank accounts or secret entities,[126] deliberately falsifying financial statements,[127] or failing to report the transfer to appropriate taxing authorities.[128] In addition, Plaintiff has provided no authority for the proposition that a debtor that has disclosed a transaction

---

[122] Doc. No. 208, p. 44; Doc. No. 210, ¶¶ 175-184.
[123] Doc. No. 210, ¶¶ 223, 232.
[124] Doc. No. 210, ¶¶ 224-225.
[125] Doc. No. 210, ¶ 226.
[126] *In re Jie Xiao*, 608 B.R. 126, 162 (Bankr. D. Conn. 2019).
[127] *In re Bayou Group, LLC*, 362 B.R. 624 (Bankr. S.D.N.Y. 2007).
[128] *In re Sigma-Tech Sales, Inc.*, 570 B.R. 408, 416 (Bankr. S.D. Fla. 2017).

to a governmental or regulatory agency has "concealed" the resulting transfer under applicable fraudulent transfer statutes.

The Court concludes that Plaintiff has not met his burden to establish that Debtor or the OR Defendants concealed the 2015 Transfers.

4. Whether Debtor Had Been Sued or Threatened with Suit

Prior to the 2015 Master Agreement, the Federal Deposit Insurance Corporation ("FDIC") filed a number of lawsuits against Debtor arising from Debtor's issuance of closing protection letters ("CPLs").[129]

The Court concludes that Plaintiff met his burden to establish that Debtor had been sued or threatened with suit before the 2015 Transfers, although the Court notes that there is no evidence of a causal connection between the FDIC's litigation claims and the 2015 Transfers.

5. Whether the 2015 Transfers Occurred Shortly After a Substantial Debt Was Incurred

A few months before the 2015 Transfers, one of Debtor's policy claimants obtained a judgment against Debtor for approximately $1.4 million (the "$1.4 Million

[129] Generally, in a CPL, a title company agrees to reimburse a lender for losses incurred by the lender in connection with a closing if the losses arise out of the fraud or dishonesty of the title agent in handling the funds or closing documents. *See Brinker v. Chicago Title Insurance Company*, 2012 WL 1081211, at *9 (M.D. Fla. Feb. 9, 2012). (Doc. No. 153, ¶¶ 235, 237; Doc. No. 155, p. 12. The OR Defendants do not dispute this contention (Doc. No. 208, p. 42)).

Judgment").[130] Plaintiff asserts that the $1.4 Million Judgment supports a finding that Debtor made the 2015 Transfers shortly after it incurred a substantial debt.

But the OR Defendants assert that the $1.4 Million Judgment does not evidence Debtor's fraudulent intent because, under the 2015 Master Agreement, OR Title *assumed liability* for the $1.4 Million Judgment and, in fact, *paid it in full* shortly after the 2015 Transfers. The OR Defendants further contend that when Debtor entered into the 2015 Master Agreement and made the 2015 Transfers, Debtor intended to *ensure* payment of the $1.4 Million Judgment, rather than to avoid its payment.[131]

In *In re Able Body Temporary Services, Inc.*,[132] this Court held that the "incurrence of substantial debt" badge of fraud ordinarily arises when the debtor incurs substantial debt to a new creditor and shortly thereafter transfers assets in order to place them beyond the new creditor's reach.[133] Here, there is no evidence that Debtor transferred assets in order to place them beyond a new creditor's reach. The Court finds that Plaintiff has not met his burden to establish the "incurrence of substantial debt" badge of fraud.

---

[130] Doc. No. 155, p. 12; Doc. No. 208, p. 46.
[131] Doc. No. 208, p. 46; Doc. No. 325, November 30, 2020 Hearing Transcript, pp. 89-90.
[132] 626 B.R. 643 (Bankr. M.D. Fla. 2020).
[133] *In re Able Body Temporary Services, Inc.*, 626 B.R. at 663 (quoting *In re Hill*, 342 B.R. 183, 202 (Bankr. D.N.J. 2006)).

6. Whether Debtor Was Insolvent or Became Insolvent as a Result of the 2015 Transfers

Plaintiff contends that two undisputed facts establish that Debtor was insolvent at the time of the 2015 Transfers or became insolvent as a result: first, Debtor's October 31, 2015 financial statement to the Florida OIR showed a negative surplus of $500,505.00,[134] meaning that Debtor's liabilities exceeded its assets by $500,505.00, satisfying the insolvency test under Fla. Stat. § 726.103[135] and the definition of insolvency under the Bankruptcy Code;[136] and second, after the 2015 Transfers, Debtor's remaining assets were approximately $2.5 million ($1.5 million in cash and a $1 million bond), but Debtor's known liabilities at that time included the $1.4 Million Judgment[137] and approximately $1.5 million in other unpaid claims,[138] for total outstanding liabilities of at least $2.9 million.

---

[134] Doc. No. 153, ¶ 148; Doc. No. 325, Transcript of November 30, 2020 hearing, pp. 37-38. For example, on page 3 of the Monthly Statement to the Florida OIR for the month ended October 31, 2015 [Exhibit 47 to Doc. No. 153, pp. 3-4], Debtor reported "common capital stock" of $2,000,000.00, "gross paid in and contributed surplus" of $13,250,000.00, and "unassigned funds (surplus)" of negative $15,750,505.00, for a "surplus as regards policyholders" of negative $500,505.00. And on page 4 of the Monthly Statement, Debtor reported "surplus as regards policyholders, December 31 prior year" of $4,066,265.00, and "change in surplus as regards policyholders for the year" of negative $4,566,770.00, for a "surplus as regards policyholders as of statement date" of negative $500,505.00.

[135] Doc. No. 155, p. 13; Fla. Stat. § 726.103(1)("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.").

[136] Doc. No. 155, p. 13; 11 U.S.C. § 101(32)(A)("Insolvent" means that "the sum of such entity's debts is greater than all of such entity's property, at a fair valuation, exclusive of — (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors.").

[137] Doc. No. 155, p. 12; Doc. No. 208, p. 46.

[138] Doc. No. 153, ¶ 236.

Plaintiff further asserts that Debtor was liable for "more like $54 million of claims, as reflected on the claims register," but that he only needs to show that Debtor's liabilities exceeded its assets after the 2015 Transfers.[139]

Although the OR Defendants do not assert that Debtor was solvent at the time of the 2015 Transfers,[140] they argue that Plaintiff has not met his burden of proof to establish insolvency, an essential element of his claims.[141] But the record evidence here reflects that as of October 31, 2015, shortly before the 2015 Transfers, Debtor had a negative surplus of $500,505.00, and that, after the 2015 Transfers, Debtor's liabilities exceeded its $2.5 million in assets.

The Court concludes that Plaintiff met his burden to establish that Debtor was insolvent at the time of the 2015 Transfers or became insolvent as a result of them.

7. Whether the 2015 Transfers Were to an Insider

Although Plaintiff acknowledges that OR Title is not Debtor's "statutory insider" as defined in § 101(31) or Fla. Stat. § 726.102(8),[142] he argues that OR Title was an insider under the Eleventh Circuit's analysis in *In re Florida Fund of Coral Gables,*

---

[139] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 37.
[140] Doc. No. 208, pp. 41-46.
[141] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 82.
[142] Generally, under Florida Statutes and the Bankruptcy Code, if the debtor is a corporation, an insider is a director, officer, person in control, or partner of the debtor, or a relative of an insider, or an "affiliate" of the debtor, as defined, which includes an entity that directly or indirectly owns or controls 20% of the debtor. Fla. Stat. § 726.102(1); 11 U.S.C. § 101(2).

Ltd.[143] In *Florida Fund*, the Eleventh Circuit described the two factors that courts focus on in considering insider status: "(1) the closeness of the relationship between the transferee and the debtor; and (2) whether the transactions between the transferee and the debtor were conducted at arm's length."[144]

Plaintiff asserts that the following facts evidence Debtor's and OR Title's close relationship after the 2009 JVA: (a) Debtor's attorney-agents became OR Title's attorney-agents; (b) Debtor's former associate general counsel, Ted Conner, became an officer of OR Title in 2009; (c) Debtor and OR Title designated five out of the six members of ATF Services' Board of Governors; and (d) OR Title provided ongoing review and advice regarding Debtor's finances.[145]

And Plaintiff asserts that the 2015 Master Agreement was not an arms-length transaction because: (a) OR Title prepared the term sheet that formed the basis of the 2015 Master Agreement; (b) Mr. Conner recommended to Debtor's Board of Directors that they "take one for the team;" and (c) the 2015 Master Agreement was negotiated directly between John Simmons, for Debtor, and Ted Conner—Debtor's former associate general counsel—for OR Title.[146]

---

[143] 144 F. App'x 72 (11th Cir. 2005).
[144] *In re Florida Fund of Coral Gables, Ltd.*, 144 F. App'x at 75 (quoting *In re Holloway*, 955 F.2d. 1008, 1011 (5th Cir. 1992)).
[145] Doc. No. 155, p. 15.
[146] Doc. No. 155, pp. 15-16.

In response, the OR Defendants contend: (a) that Debtor and OR Title had an ordinary business relationship as a result of the 2009 JVA between Debtor and OR Title's parent company, OR Holding; (b) that Mr. Simmons, on Debtor's behalf, negotiated the 2015 Master Agreement at arms-length with Gary Horn, on OR Title's behalf, and not, as Plaintiff contends, with Mr. Conner; (c) that Mr. Simmons had no relationship with OR Title, and Mr. Horn had no relationship with Debtor; and (d) that Debtor's Board of Directors independently approved the 2015 Master Agreement.[147]

After the Eleventh Circuit's decision in *Florida Fund*, courts addressing "non-statutory insider status" focus on whether the relationship between the transferor and the transferee was of "the type that should subject the transaction to heavy scrutiny"[148] to determine if the non-debtor "gained an advantage attributable simply to affinity rather than to the course of business dealings between the parties."[149]

---

[147] Doc. No. 208, pp. 43-44.

[148] *In re Florida Fund of Coral Gables*, 144 F. App'x at 75.

[149] *In re Bos*, 561 B.R. 868, 883 (Bankr. N.D. Fla. 2016) (quoting *In re Friedman*, 126 B.R. 63, 70 (9th Cir. B.A.P. 1991), *overruled on other grounds*, *Zachary v. California Bank & Trust*, 811 F.3d 1191 (9th Cir. 2016)). This Court conducted a similar analysis in 34 adversary proceedings filed by Plaintiff against law firms that had been retained and paid by Debtor to defend Debtor's insureds on policy claims. In those adversary proceedings, Plaintiff sought to avoid Debtor's payments to the law firms as fraudulent transfers, alleging that the law firms—some of whose members were Debtor's attorney-agents—were Debtor's insiders. In granting the law firms' motions to dismiss Plaintiff's complaints, the Court considered whether the law firms exercised such a high degree of control over Debtor that they were able to improperly influence the payments made to them; the Court concluded that the law firms were not Debtor's insiders. *In re ATIF, Inc.*, 2020 WL 5746057, at *7 (Bankr. M.D. Fla. Sept. 14, 2020) (quoting *In re Island One, Inc.*, 2013 WL 652562, at *2 (Bankr. M.D. Fla. Feb. 22, 2013)).

Here, the relationship between Debtor and OR Title commenced when Debtor and OR Holding entered into the 2009 JVA and Debtor shifted all of its title insurance business to OR Title and agreed to encourage its attorney-agents to sign contracts with OR Title. But Plaintiff has not presented any evidence that OR Title influenced the terms of the 2015 Master Agreement *solely* as a result of this relationship with Debtor.

For example, when faced with Debtor's mounting insolvency, Debtor's president initiated contact with OR Title to ask if OR Title would consider reinsuring Debtor's title policies.[150] OR Title did not immediately accept Debtor's request, but instead began a due diligence inquiry of Debtor's reserves.[151] And in connection with the 2015 Master Agreement, Debtor and OR Title were represented by separate counsel, with Debtor represented by the Foley & Lardner law firm and OR Title represented by Carlton Fields.[152]

While Debtor and OR Title were discussing the possibility of entering into the 2015 Master Agreement, another completely unrelated entity, SOBC Corp., offered to purchase Debtor's stock for $1.00 plus an additional $100,000.00 to cover Debtor's transactional expenses.[153] In October 2015, Debtor's Board of Directors met to discuss the two competing proposals from OR Title and SOBC and voted to authorize the 2015

---

[150] Doc. No. 360, ¶ 77.
[151] Doc. No. 360, ¶ 79.
[152] Doc. No. 360, ¶¶ 96-97. Carlton Fields had represented Debtor with respect to the Amended 2009 JVA (Doc. No. 360, ¶ 99).
[153] Doc. No. 360, ¶ 81; Doc. No. 457, Defendants' Ex. 158.

Master Agreement.[154] Because the 2015 Master Agreement was subject to the Florida OIR's review and approval, it was then submitted to the Florida OIR.[155]

The Court concludes that the evidence shows that Debtor and OR Title had a business relationship stemming from the 2009 JVA, but does not show that OR Title gained advantages from the relationship that were "attributable simply to affinity,"[156] rather than advantages it obtained from exercising its independent business judgment.

If anything, the record here suggests that: (a) Debtor was a competent bargaining party in its relationship with the OR Defendants; (b) Debtor's senior management may have been motivated to support the 2009 JVA so that they, and other employees of Debtor, would become employees of either ATF Services or OR Title;[157] and (c) Debtor's directors may have been motivated to approve the 2015 Master Agreement, in part, to avoid the impact upon themselves personally if the Florida OIR took action to place Debtor into receivership.[158]

---

[154] Doc. No. 360, ¶¶ 83-85.
[155] Doc. No. 360, ¶¶ 86-87.
[156] *In re Bos*, 561 B.R. at 883 (quoting *In re Friedman*, 126 B.R. at 70).
[157] Debtor was experiencing financial difficulty before the 2009 JVA and, on the day of the 2009 JVA, most of Debtor's employees and many of Debtor's officers became employees of ATF Services (Doc. No. 360, ¶¶ 14-16, 38-52).
[158] The Florida OIR had notified Debtor that it would refer Debtor to the Florida Department of Financial Services to initiate a state court receivership proceeding (Doc. No. 360, ¶ 90). Debtor's directors had been advised by counsel that "there is a bar on an officer or director from a company that has gone into receivership from acting in that capacity for two years in another company in the same business without approval from the Department [of Financial Services]" (Exhibit 49 to Doc. No. 153, Notes for Minutes of BOD Meeting 10/9/15).

The Court concludes that Debtor and OR Title entered the 2015 Master Agreement after separately evaluating the transaction and weighing their specific interests, and that Plaintiff failed to meet his burden of proof to establish that OR Title is either a statutory insider of Debtor or a non-statutory insider under the test established in *Florida Fund*.

C. The 2015 Transfers were made for a legitimate purpose.

Finally, the OR Defendants assert that the Court should not find actual fraudulent intent in connection with the 2015 Transfers if Debtor had a legitimate or independent reason to enter the 2015 Master Agreement.

In *In re Porter,* the bankruptcy court held that the presence of a single badge of fraud is not sufficient to establish actual fraudulent intent, but that "the confluence of several [badges] can constitute conclusive evidence of an actual intent to defraud, *absent 'significantly clear' evidence of a legitimate supervening purpose*."[159] In *In re Global Outreach, S.A.*,[160] the court found that the debtor did not have actual fraudulent intent when it made the subject transfers because it transferred its assets for a legitimate purpose, in order to obtain loans from the transferee.[161] And in *In re Earle*,[162] the court held that the debtor transferred her residence to a qualified personal residence trust

---

[159] *In re Porter*, 2009 WL 902662, at *15 (Bankr. D.S.D. Mar. 13, 2009) (internal citation omitted) (emphasis added).
[160] 2014 WL 4948184 (Bankr. D.N.J. Oct. 2, 2014).
[161] *In re Global Outreach, S.A.*, 2014 WL 4948184, at *9.
[162] 307 B.R. 276 (Bankr. S.D. Ala. 2002).

for legitimate estate planning purposes on the advice of her accountant and not with actual intent to defraud her creditors.

The parties have stipulated that Debtor's president, Mr. Simmons, approached OR Title and asked OR Title to propose a reinsurance agreement, and that OR Title did, in fact, assume Debtor's reinsurance obligations.[163] The OR Defendants contend that, as shown by the Reinsurance Contract incorporated in the 2015 Master Agreement, the essence of the 2015 Master Agreement was a reinsurance agreement;[164] that Debtor's policy holders were protected by OR Title's reinsurance of Debtor's policy liabilities; and that Debtor made the 2015 Transfers in consideration of the Reinsurance Contract.[165]

In addition, the Florida OIR determined that the 2015 Master Agreement was fair to Debtor's policy holders and approved the 2015 Master Agreement.[166] In his letter informing OR Title of the Florida OIR's approval, Robert Ridenour, the Director of the Florida OIR, wrote:

> After review under the provision of Section 628.481, Florida Statutes, and amendment of certain originally filed documents, the Office determines that, *due to the declining surplus position of ATIF, it is in the best interest of ATIF title insurance policyholders to approve the Master Agreement* and amended Attachments referenced above. Additionally, such a transfer of all title insurance and reinsurance obligations of ATIF as well as certain

[163] Doc. No. 360, ¶¶ 77, 94, 101.
[164] Doc. No. 435-4, Plaintiff's Ex. 501, pp. 4, 15-25.
[165] Doc. No. 208, p. 40; Doc. No. 325, November 30, 2020 Hearing Transcript, pp. 83-84.
[166] Doc. No. 360, ¶ 100; Doc. No. 210, ¶¶ 183.

> remaining assets to Old Republic will not substantially reduce the protection or service to ATIF title insurance policyholders.[167]

The Court concludes that the 2015 Master Agreement and the 2015 Transfers had the "legitimate supervening purpose" of enabling Debtor to obtain reinsurance of its policy liabilities.

D. The 2015 Transfers were not made with actual fraudulent intent.

The Court concludes that Plaintiff has established only three of the eleven badges of fraud listed in Fla. Stat. § 726.105(2): (1) that the 2015 Transfers were of substantially all of Debtor's assets; (2) that Debtor had been sued or threatened with suit before the 2015 Transfers; and (3) that Debtor was insolvent or became insolvent as a result of the 2015 Transfers.

Plaintiff does not allege four of the enumerated badges of fraud,[168] and has failed to establish the remaining four badges: (1) whether Debtor received less than reasonably equivalent value in exchange for the 2015 Transfers; (2) whether the 2015 Transfers were concealed; (3) whether Debtor incurred a substantial debt that it intended to avoid; and (4) whether the 2015 Transfers were made to an insider.

In other words, Plaintiff has failed to establish eight of the eleven badges of fraud; in addition the Court has found that Debtor entered the 2015 Master Agreement

---

[167] Doc. No. 210-60 (emphasis added).

[168] Plaintiff has not alleged that (1) Debtor retained control of the property after the 2015 Transfers; (2) Debtor absconded; (3) Debtor removed or concealed property; or (4) Debtor transferred assets to a lienor who transferred them to an insider.

for the legitimate, independent purpose of obtaining reinsurance of its title policy liabilities.

The Court concludes that Plaintiff failed to meet his burden of proving that Debtor made the 2015 Transfers with the actual intent to hinder, delay, or defraud its creditors. On the same record, the Court also concludes that the OR Defendants met their burden of proving an absence of evidence to support Plaintiff's actual fraudulent transfer claims, and that OR Title is entitled to summary judgment on Counts I and V.

V. SUCCESSOR LIABILITY CLAIMS AGAINST ATF SERVICES, OR HOLDING, AND OR COMPANIES (COUNTS X AND XI)

Plaintiff alleges that, after the 2009 JVA, there was "a continuity of management, personnel, physical location, assets, and general business operations between Debtor and ATF Services," such that ATF Services is Debtor's successor in interest.[169]

In Counts X and XI of the Complaint, Plaintiff seeks a judgment determining that ATF Services has successor liability to Debtor's creditors under two theories: "de facto merger" and "mere continuation." Plaintiff has moved for partial summary judgment on his claim that ATF Services has successor liability under the mere continuation theory (Count XI), and the OR Defendants have moved for summary judgment on both Count XI and on Plaintiff's claim for successor liability under the de facto merger theory (Count X).

[169] Doc. No. 162, Complaint, ¶¶ 132, 142.

A. Elements of the De Factor Merger and Mere Continuation Theories

1. The "De Facto Merger" Theory of Successor Liability

A de facto merger occurs when one entity is absorbed by another, without complying with the statutory requirements for a merger. The elements of a de facto merger are: (a) the two entities share the same management, personnel, assets, and physical location; (b) continuity of the entities' owners; (c) dissolution of the predecessor entity; and (d) assumption of liabilities by the successor entity.

These elements need not occur at the same time, but the "bottom-line question is whether each entity has run its own race, or whether, there has been a relay-style passing of the baton from one to the other."[170]

2. The "Mere Continuation" Theory of Successor Liability

In *In re All Sorts of Services of America, Inc.*,[171] the bankruptcy court explained the "mere continuation" theory of successor liability:

> A successor entity is the mere continuation of its predecessor when the successor is merely a "new hat" for the predecessor with the same or similar ownership. In other words, "[t]he change is in form, but not in substance." Courts universally agree that the "key element of a continuation is a common identity of the officers, directors and stockholders."[172]

---

[170] *Coral Windows Bahamas, LTD, v. Pande Pane, LLC*, 2013 WL 321584, at *4 (S.D. Fla. Jan. 28, 2013) (quoting *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d 145, 153-54 (Fla. 4th DCA 1994)).
[171] 631 B.R. 63 (Bankr. M.D. Fla. 2021).
[172] *Id.* at 72 (quoting *Bud Antle, Inc. v. E. Foods, Inc.*, 758 F.2d 1451, 1458-59 (11th Cir. 1985); and *Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d at 154).

Stated differently, a successor is a "mere continuation" if it is simply a reincarnation of the predecessor entity under a different name.[173]

B. Analysis

Because the de facto merger and mere continuation theories are so similar, and the terms are frequently used interchangeably, the Court will consider them together.[174]

1. Whether Debtor and ATF Services Had the Same Management and Personnel

After the formation of ATF Services under the 2009 JVA, Debtor's management team[175] and 544 of 568 of its employees became employees of ATF Services.[176] Although the OR Defendants do not dispute this fact, they contend that the movement of employees is typical of many asset purchases.[177]

---

[173] *Coral Windows Bahamas, Ltd. v. Pande Pane, LLC*, 2013 WL 321584, at *5.

[174] In addressing the theories under Massachusetts law, the court stated that an asserted dichotomy between de facto merger and mere continuation is "a distinction without a difference" because, even though the "labels have been enshrined separately in the canonical list of exceptions to the general rule of no successor liability, they appear, in practice to refer to the same concept [,], and courts have often used the two terms interchangeably." *In re Comprehensive Power, Inc.*, 578 B.R. 14, 35, n. 14 (Bankr. D. Mass. 2017) (quoting *National Gypsum Co. v. Continental Brands Corp.*, 895 F. Supp. 328, 336 (D. Mass. 1995)). Under both theories, the focus is "whether one company has become another for the purpose of eliminating its corporate debt." *In re Comprehensive Power, Inc.*, 578 B.R. at 35 (citation omitted).

[175] Ted Conner (legal and executive), Jimmy Jones (financial and executive), Norwood Gay (legal), Deanna Bolger (financial), Gwen Geier (human resources, financial, and executive), Jeannie Calabrese (information and executive), and Sharon Priest (executive).

[176] Doc. No. 360, ¶¶ 38-39.

[177] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 64.

The Court concludes that Debtor and ATF Services had the same management and personnel.

2. Whether Debtor and ATF Services Had the Same Assets

Under the 2009 JVA, Debtor contributed a copy of its Title Plant to ATF Services[178] and allowed ATF Services to use its trade name "The Fund" at no charge.[179] In addition, Debtor leased its Headquarters Property to ATF Services to use as its principal place of business.[180]

But as Debtor reported to the Florida OIR, as of September 30, 2009—three months after it entered into the 2009 JVA—Debtor was still in possession of assets having a value of $240 million.[181] And Debtor's continued retention of substantial assets is further evidenced by the 2015 Transfers, when—six years *after* the 2009 JVA—Debtor transferred cash, cash equivalents, and real property with a stipulated value of more than $47 million, exclusive of the value of Debtor's intangible assets.

Plaintiff cites the district court's ruling in *Murphy v. Blackjet, Inc.*,[182] to support his argument that a transfer of assets from the debtor to the alleged successor entity is

---

[178] Doc. No. 370, ¶ 142.
[179] Doc. No. 360, ¶¶ 5(a), 56-57; Doc. No. 370, ¶ 127.
[180] Doc. No. 360, ¶¶ 5g, 58; Doc. No. 370, ¶ 134.
[181] Doc. No. 210, ¶¶ 82-83; Doc. No. 210-29, p. 3. Debtor's reported assets included bonds of $78 million, real property valued at $11 million, cash and short-term investments of $42 million, its contingent interest in the Title Plant valued at $5 million, uncollected premiums of $10 million, and a net deferred tax asset of $64 million.
[182] 2016 WL 3017224, at *5 (S.D. Fla. May 26, 2016).

not required to find successor liability.[183] In *Blackjet*, the debtor's senior lender transferred the debtor's assets to the alleged successor after the lender had foreclosed on the assets. Although the debtor had not transferred its assets *directly* to the alleged successor, *Blackjet* stands only for the proposition that the transfer of assets need not be a *direct* transfer from the debtor to the alleged successor; the case does not stand for the proposition that a transfer of the debtor's assets to the alleged successor is not a required element of successor liability.

Here, the record evidence is that after the July 1, 2009 JVA, Debtor retained substantial assets that were not transferred to ATF Services. The Court concludes that Debtor and ATF Services did not have the same assets.

3. Whether Debtor and ATF Services Had the Same Business Operations

Prior to the 2009 JVA, Debtor's business operations included underwriting and selling title insurance, insuring title, administering title insurance claims, retaining attorneys to defend title insurance claims, paying allowed or adjudicated title insurance claims, maintaining the Title Plant, and selling title searches. In addition, Debtor provided ancillary support services to its network of attorney-agents, such as providing training programs, continuing legal education services, and other agent events.[184]

---

[183] Doc. No. 325, November 30, 2020 Hearing Transcript, pp. 102-103.
[184] Doc. No. 360, ¶ 5.

Under Florida OIR's August 2009 Consent Order approving the 2009 JVA (the "Consent Order"), Debtor surrendered its license to issue title insurance policies, and, as agreed in the 2009 JVA, Debtor "shifted" its title insurance operations to OR Title and transferred its "ancillary services" to ATF Services.[185] In other words, after the 2009 JVA, ATF Services took over only part of Debtor's business operations—the part related to the Title Plant, the sale of title searches, and support services for OR Title's attorney-agents.[186]

Further, ATF Services performed these "ancillary services" not for Debtor's benefit—because Debtor was no longer licensed as a title insurer—but for OR Title's benefit in connection with its sale of title insurance policies, a business in which Debtor no longer engaged.[187] Finally, ATF Services itself was not licensed to—and *did not*—operate as a title insurer, nor did ATF Services administer Debtor's policy claims.[188]

The Court concludes that prior to the 2009 JVA, Debtor's core business was that of a licensed title insurer and, after the 2009 JVA, ATF Services' business was to provide ancillary services to title insurers *other than* selling title insurance or administering policy claims. Debtor and ATF Services did not have the same business operations.

---

[185] Doc. No. 424, Defendants' Ex. 10, p. 5, 2009 JVA, § 8a(iii).
[186] Doc. No. 360, ¶¶ 54, 63.
[187] Plaintiff acknowledges that Debtor's and ATF Services' business operations were not "identical." Doc. No. 325, November 30, 2020 Hearing Transcript, p. 105.
[188] Doc. No. 360, ¶ 55.

4. Whether Debtor and ATF Services Had the Same Ownership

The parties agree that, at all relevant times, Debtor was owned by ATIF Trust and, under the 2009 JVA, ATF Services was owned 50% by Debtor and 50% by OR Holding.

Plaintiff, while acknowledging that the ownership of Debtor and ATF Services ownership is not identical, contends that "identical ownership" is not required for purposes of successor liability and that "continuity of ownership" is sufficient.[189] Plaintiff contends that continuity of ownership exists here because Debtor (and later, Debtor's parent, ATIF Trust) was a 50% owner of ATF Services.

As a general rule, courts agree that common ownership, not identical ownership, is a key element for a finding of successor liability.[190] But the existence of *some* overlap between the old and the new ownership does not support a finding of successor liability. To the contrary, courts generally find successor liability when the same individuals are the *primary* owners of both the predecessor entity and the successor entity, such that: (a) both entities are controlled by the same person or ownership group;[191] (b) the same ownership group benefits from continuing the

---

[189] Doc. No. 325, Transcript of November 30, 2020, hearing, pp. 105-106.

[190] *In re All Sorts of Services of America, Inc.*, 631 B.R. at 73. *See also Florio v. Manitex Skycrane, LLC*, 2010 WL 5137626, at *5 (M.D. Fla. Dec. 10, 2010) ("In applying the de facto merger doctrine, Florida courts have uniformly required a finding of substantial continuity of ownership.").

[191] *Global One Financial, Inc. v. Intermed Services, P.A.*, 2015 WL 1737710, at *4 (S.D. Fla. Apr. 16, 2015).

business;[192] or (c) the common owner retained its interest "after cleansing [the] assets of liability."[193]

Here, ATF Services was not formed "for the benefit of the same equity owners" as Debtor's equity owner (ATIF Trust),[194] and despite Debtor's 50% ownership of ATF Services, ATF Services was neither owned nor controlled primarily by Debtor as a majority partner.[195] The Court concludes that Debtor and ATF Services did not have the same ownership.

5. Whether Debtor Has Been Dissolved

The dissolution of the predecessor entity is a required element for imposition of liability upon a successor entity.[196] The Eleventh Circuit has held that the dissolution element is satisfied if "[t]he seller corporation ceases its ordinary business operations, liquidates, and dissolves as soon as legally and practically possible."[197] Here, the issue is whether Debtor "dissolved" after the formation of ATF Services and Debtor's transfers to it under the 2009 JVA.

Under the Florida OIR's Consent Order approving the 2009 JVA, Debtor was required to surrender its certificate of authority to issue title insurance policies and to

---

[192] *See Amjad Munim, M.D., P.A. v. Azar*, 648 So. 2d at 154-55.
[193] *ADT LLC v. Security Networks, LLC*, 2016 WL 8943163, at *4 (S.D. Fla. June 8, 2016) (citing *U.S. v. General Battery Corporation, Inc.*, 423 F.3d 294, 306-07 (3d Cir. 2005)).
[194] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 61.
[195] *In re All Sorts of Services*, 631 B.R. at 72.
[196] *Amjad Munim, M.D. P.A. v. Azar*, 648 So. 2d at 153-54.
[197] *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985)).

cease writing any new policies; however, Debtor was also required to "continue to service its existing policyholders, to include claim administration," and to appoint a general manager responsible for the oversight of Debtor's balance sheet, cash flow needs, and claims activity.[198] And the parties have stipulated that, after the 2009 JVA, Debtor retained 24 employees and "engaged in the process of administering the remaining title policies it was responsible for, referred to as running off its claims tail."[199] In other words, there is no dispute that Debtor did not dissolve after the 2009 JVA, the creation of ATF Services, or Debtor's transfers to ATF Services.

Alternatively, Plaintiff contends that Debtor will cease to exist *in the future* when Debtor's liquidating Chapter 11 case—filed in 2017 nearly eight years after the 2009 JVA—is fully administered and closed. Under these facts, Plaintiff asserts that "Debtor has been dissolved" as required for successor liability.[200] But Debtor did not cease all of its business operations after the 2009 JVA and today, more than twelve years after the 2009 JVA, Debtor still has not completed its liquidation.

The Court concludes that Debtor has not been dissolved.

6. Whether ATF Services Assumed Debtor's Liabilities

Plaintiff does not assert that ATF Services assumed Debtor's title policy liabilities or general operating liabilities under the 2009 JVA. Rather, Plaintiff asserts

[198] Doc. No. 210-31, p. 2.
[199] Doc. No. 360, ¶ 36.
[200] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 23.

that ATF Services assumed Debtor's obligations under real property leases for Debtor's three Florida branch offices, which were then utilized by ATF Services in its business operations.[201]

The Court finds that ATF's assumption of business leases, for premises that it used in its own operations, is insufficient to establish that ATF Services assumed Debtor's liabilities.

C. ATF Services is not Debtor's successor in interest.

To summarize, although the Court has found that Debtor and ATF Services had the same management and most of the same personnel, the Court has also found that (1) Debtor and ATF Services did not have the same assets, business operations, or continuity of ownership, (2) Debtor has not been dissolved, and (3) ATF Services did not assume Debtor's liabilities. In other words, Plaintiff has established only one of the factors that courts consider in determining whether a defendant is liable as the successor of another entity.

The Court finds that Plaintiff has not met his burden of proof on summary judgment to come forward with credible proof that would entitle him to a directed verdict on the issue of whether ATF Services is Debtor's successor in interest under the mere continuation theory (Count XI).

[201] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 107.

In addition, the Court finds that the OR Defendants have met their burden of proof on summary judgment on the issue of whether ATF Services is Debtor's successor in interest under both the de facto merger (Count X) and the mere continuation (Count XI) theories. The burden then shifted to Plaintiff, and Plaintiff has not met his burden to show the existence of a genuine issue of material fact on Count X or Count XI. Therefore, the Court will grant summary judgment for the OR Defendants on Counts X and XI of the Complaint.

VI. ALTER EGO CLAIMS AGAINST ATF SERVICES, OR HOLDING, AND OR COMPANIES (COUNT IX)

The OR Defendants have moved for summary judgment on Count IX of the Complaint. In Count IX, Plaintiff seeks a determination that ATF Services is the alter ego of OR Holding and OR Companies. Plaintiff acknowledges that his successor liability claims in Counts X and XI are dependent on Count IX's alter ego claim,[202] presumably because his success solely against ATF Services on the successor liability claims is unlikely to lead to a monetary recovery.[203]

Although the Court has determined that the OR Defendants are entitled to summary judgment on Counts X and XI, the Court will separately address Plaintiff's claim that ATF Services is the alter ego of OR Holding and OR Companies.

---

[202] In the Complaint, Plaintiff alleges that the successor liability claims in Counts X and XI are dependent on the alter ego claim in Count IX (Doc. No. 162, ¶¶ 131, 141).
[203] Doc. No. 325, November 30, 2020 Hearing Transcript, pp. 101-102.

A. Elements of an Alter Ego Claim

To prevail on an alter ego claim, a plaintiff must establish three required elements: "(i) domination and control; (ii) improper or fraudulent use of the corporate form; and (iii) injury to the claimant as a result of the fraudulent or improper use of the corporate form."[204]

Plaintiff bears the burden of proof on the three elements.[205] Therefore, on their motion for summary judgment, the OR Defendants must show either that there is no evidence of each of these required elements, or affirmative evidence that Plaintiff will be unable to prove each of the elements.

B. Analysis

1. Whether OR Holding Dominated and Controlled ATF Services

Plaintiff contends that OR Holding's [206] domination and control of ATF Services is evidenced by the *October 2011 Amended and Restated Operating Agreement of ATF Services, LLC* (the "Amended Operating Agreement"),[207] and OR Holding's control

[204] *In re Fundamental Long Term Care, Inc.*, 507 B.R. 359, 373 (Bankr. M.D. Fla. 2014).
[205] *In re Paul C. Larsen, P.A.*, 610 B.R. at 688.
[206] Although OR Companies is named as a defendant in Count IX, Plaintiff's allegations to support his alter ego claim center on OR Holding and do not appear to specify any conduct attributed to OR Companies.
[207] Doc. No. 427, Defendants' Ex. 26, pp. 82-103.

and domination of ATF Services' (a) Board of Governors, (b) management, (c) revenue and expenses, and (d) employees.[208]

a. Whether OR Holding Dominated and Controlled ATF Services' Board of Governors

Under the Amended Operating Agreement, ATF Services' Board of Governors (the "ATF Board") consisted of six members ("Governors"): three Governors designated by OR Holding; two Governors who were "member agents of [Debtor] designated by [Debtor's] board of directors;" and, as the sixth Governor, the current Chief Executive Officer of ATF Services.[209]

The OR Defendants contend that OR Holding neither dominated nor controlled the ATF Board as demonstrated by the facts that: (i) the ATF Board independently met several times each year and kept formal minutes of those meetings;[210] (ii) the OR Holding-designated Governors did not direct the actions of the ATF Board, and the ATF Board never took an action advocated by an OR Holding-designated Governor over the objection of the other Governors;[211] and (iii) Jimmy Jones, ATF Services' Chief Executive Officer, stated in his sworn declaration (the "Jones Declaration")[212] that OR

---

[208] The OR Defendants point out that "Plaintiff's domination and control argument conflicts with his argument of continuity of ownership that's necessary to support their successor liability. In other words, how can ATF Services have common ownership [with Debtor] for successor liability purposes but OR [Holding] dominates [ATF Services] for alter ego purposes?" (Doc. No. 325, November 30, 2020 Hearing Transcript, p. 71).
[209] Doc. No. 427, Defendants' Ex. 26, p. 88, Amended Operating Agreement, Article IV, § 2.
[210] Doc. No. 210, ¶ 104; Doc. No. 210-2, Jones Declaration, ¶ 27.
[211] Doc. No. 210, ¶ 106; Doc. No. 210-2, Jones Declaration, ¶ 28.
[212] Doc. No. 210-2.

Holding was a "hands off" owner of ATF Services that provided input to the ATF Board only as was commensurate with OR Holding's ownership interest, "such as opining on how to increase ATF Services' revenues or how to potentially decrease expenses."[213]

However, Plaintiff asserts that Mr. Jones was an assistant vice president of OR Title as stated in the minutes of the ATF Board's July 23, 2009 meeting,[214] and that the OR Defendants therefore controlled four of the six Governors, because Mr. Jones, as ATF Services' Chief Executive Officer, and the three Governors appointed by OR Holding were each employed by OR Title.[215] Plaintiff further contends that these four OR Holding-designated Governors are relevant to the "domination and control" issue because, under the Amended Operating Agreement, the ATF Board was empowered to act by majority vote on most business decisions (other than major decisions such as to close ATF Services or sell major assets), with the result that OR Holding controlled ATF Services' business operations.[216]

---

[213] Doc. No. 210, ¶ 108; Doc. No. 210-2, Jones Declaration, ¶ 25.

[214] The July 2009 ATF Board meeting minutes are contradicted by Mr. Jones' deposition testimony that he did not become an OR Title employee until April 1, 2017 (Doc. No. 232, p. 74) and by the Jones Declaration in which Mr. Jones does not refer to an appointment with OR Title in 2009 (Doc. No. 210-2).

[215] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 114.

[216] Doc. No. 427, Defendants' Ex. 26, p. 89, Amended Operating Agreement, Article IV, § 5; Doc. No. 325, November 30, 2020 Hearing Transcript, pp. 114-115.

On this record, the Court concludes that the OR Defendants have not met their burden on summary judgment to prove that Plaintiff is unable to establish OR Holding's control and domination of the ATF Board, and that Plaintiff has met his burden to show the existence of genuine factual disputes on this factor. The factual disputes include whether Mr. Jones became an employee of OR Title in 2009, whether OR Holding controlled a majority of ATF Services' Governors, and whether OR Holding actually dictated decisions of the ATF Board. Therefore, the Court concludes that a genuine issue of material fact exists as to whether OR Holding controlled the ATF Board.

b. Whether OR Holding Dominated and Controlled ATF Services' Management

Under the Amended Operating Agreement, ATF Services' management consisted of one or more persons elected by the ATF Board to serve as Chief Executive Officer and Chief Financial Officer, and other officers appointed by the ATF Board as appropriate and advisable, including a president, vice presidents, a secretary, and a treasurer.[217] And under the Amended Operating Agreement, ATF Services' officers were empowered to make all decisions on business transactions involving amounts up to $500,000.00 without first obtaining approval of the ATF Board.[218]

[217] Doc. No. 427, Defendants' Ex. 26, p. 90, Amended Operating Agreement, Article V.
[218] Doc. No. 427, Defendants' Ex. 26, p. 92, Amended Operating Agreement, Article V, § 16.

The OR Defendants contend that, at all times, ATF Services managed its own daily operations through its own officers and employees.[219] For example, in the Jones Declaration, Mr. Jones stated that ATF Services managed its own day-to-day affairs, books and records, and accounting system, and that OR Holding "never participated in the day-to-day operations of ATF Services."[220]

Plaintiff does not directly dispute the evidence that ATF Services managed its daily business affairs through its own appointed officers. In opposing the OR Defendants' contentions regarding ATF Services' management, Plaintiff does not mention the appointment or duties of ATF Services' officers and, instead, refers only to the ATF Board. In addition, Plaintiff's arguments on this issue focus primarily on transactions that occurred *years after* the 2009 JVA.[221] For example, Plaintiff cites to an ATF Board meeting that took place on December 15, 2016 — *seven years after* the 2009 JVA and a year *after* the 2015 Master Agreement.[222]

On this record, the Court concludes that the OR Defendants have met their burden on summary judgment to prove that Plaintiff is unable to establish OR Holding's domination and control of ATF Services' management, and that Plaintiff has failed to show the existence of a genuine factual dispute on this factor. Therefore, the

[219] Doc. No. 208, p. 28.
[220] Doc. No. 210-2, Jones Declaration, ¶¶ 30-31.
[221] Doc. No. 239, pp. 12-17.
[222] Doc. No. 239, p. 17.

Court concludes that the evidence does not establish that OR Holding dominated and controlled ATF Services' management.

c. Whether OR Holding Dominated and Controlled ATF Services' Revenue and Expenses

Under the Amended Operating Agreement, ATF Services' management was authorized to take any and all reasonable actions deemed necessary to reduce ATF Services' costs and to increase its revenue without approval of the ATF Board. However, OR Holding reserved the right to impose additional restrictions upon ATF Services' management by "communicating to said management from time to time what actions require advance [OR Holding] approval."[223]

The OR Defendants acknowledge that the Amended Operating Agreement gave OR Holding the right to direct actions affecting ATF Services' revenue and expenses, but contend that Plaintiff failed to prove that OR Holding actually took any action under that authority.[224] For example, Gary Horn, OR Holding's Chief Financial Officer from 2001 to 2013, attested that OR Holding never exercised the right to direct ATF Services' management, even though the right was granted to it in the Amended Operating Agreement,[225] and Mr. Jones, ATF Services' Chief Executive Officer, also

[223] Doc. No. 427, p. 93, Amended Operating Agreement, Article V, § 17.
[224] Doc. No. 208, p. 29; Doc. No. 210, ¶ 130.
[225] Doc. No. 210-1, ¶ 55.

attested that OR Holding never exercised its right under the Amended Operating Agreement to direct ATF Services' management.[226]

However, the evidence at the REV Trial was that ATF Services' cost to maintain the Title Plant after the 2009 JVA was approximately $10 million per year,[227] and that as of December 2015, OR Holding had loaned over $40 million to ATF Services to cover ATF Services' reported losses.[228] And Plaintiff's expert, Laureen Ryan, opined that "OR Holding dominated ATF Services solely for its own economic benefit by controlling ATF Services' revenue and profits and sustaining its operations despite its operating losses and inadequate capitalization."[229]

Ms. Ryan reached her opinion after reviewing: (i) OR Holding's control over ATF Services' revenues and expenses; (ii) the profits and losses reported by OR Holding; (iii) the level of ATF Services' capitalization; (iv) OR Holding's control over the management team and workforce; (v) lease arrangements between OR Holding and ATF Services that lacked economic substance; and (vi) the failure to respect corporate formalities by maintaining accurate records.[230]

On this record, the Court concludes that the OR Defendants have not met their burden on summary judgment to prove that Plaintiff is unable to establish OR

---

[226] Doc. No. 210-2, Jones Declaration, ¶ 34.
[227] Doc. No. 468, February 22 Trial Transcript, pp. 127-128.
[228] Doc. No. 464, February 16 Trial Transcript, pp. 156-157.
[229] Doc. No. 310, ¶ 1; Doc. No. 232-41, Report of Laureen M. Ryan, p. 6.
[230] Doc. No. 310, ¶ 3; Doc. No. 232-41, Report of Laureen M. Ryan, pp. 19-32.

Holding's domination and control of ATF Services' revenue and expenses, and that Plaintiff has met his burden to show the existence of genuine factual disputes on this factor. The factual disputes include whether OR Holding took action to sustain ATF Services' operations or affect its reported operating losses after the 2009 JVA. Therefore, the Court concludes that a genuine issue of material fact exists as to whether OR Holding dominated and controlled ATF Services' revenue and expenses.

d. Whether OR Holding Dominated and Controlled ATF Services' Employees

Finally, Plaintiff alleges that a First Amendment to the Amended Operating Agreement allowed OR Holding to direct the transfer ATF Services' employees to OR Title, "with the employees made available to [ATF Services] through employee leasing or a professional employer organizations [sic] agreement or alternatively an attendant adjustment in the service fee paid to [ATF Services]."[231] Plaintiff also asserts that he is entitled to an inference that OR Holding actually directed such a transfer of employees because ATF Services employees became OR Title employees without a vote at ATF Services.[232]

The OR Defendants respond that ATF Services' employees were transferred to OR Title, not to OR Holding, and that the transfer does not show OR Holding's control of ATF Services because: (i) the transfer of employees did not occur until 2017, eight

[231] Doc. No. 162, Complaint, ¶ 120c.
[232] Doc. No. 325, November 30, 2020 Hearing Transcript, p. 116.

years *after* the 2009 JVA and more than a year *after* the 2015 Master Agreement; (ii) the transfer of ATF Services' employees to OR Title in 2017 was discussed by the ATF Board at several meetings in 2016 and was not achieved by OR Holding's unilateral mandate; and (iii) the transfer of ATF Services' employees was for valid business reasons, including the consolidation of employee benefit plans and possible tax advantages.[233]

On this record, the Court concludes that the OR Defendants have met their burden on summary judgment to prove that Plaintiff is unable to establish OR Holding's domination and control of ATF Services' employees, and that Plaintiff has failed to show the existence of genuine factual disputes on this factor. Therefore, the Court concludes that the evidence does not establish that OR Holding dominated and controlled ATF Services' employees.

e. Genuine issues of material fact preclude summary judgment on the issue of OR Holding's domination and control of ATF Services.

The Court has found that the OR Defendants have met their burden on summary judgment to prove that Plaintiff is unable to establish OR Holding's domination and control of ATF Services' management and employees. However, the Court has found genuine issues of material fact on the issues of OR Holding's domination and control of the ATF Board and ATF Services' revenue and expenses.

[233] Doc. No. 267, pp. 45-46; Doc. No. 268, ¶¶ 12, 13.

The Court concludes that the OR Defendants have not their burden on summary judgment to prove that Plaintiff is unable to establish OR Holding's domination and control of ATF Services.

2. Whether ATF Services Was Created Through an Improper Use of Corporate Form

To establish the improper use of corporate form, a plaintiff generally bears a heavy burden to show that "the corporation was specifically organized or used to mislead creditors or to perpetrate fraud."[234] Courts may disregard the corporate form and impose alter ego liability only in extraordinary cases, such as where the entity was formed and used as a device or sham to achieve some ulterior purpose.[235] The plaintiff's burden is not met if the entity was initially created and thereafter used for a legitimate purpose.[236]

Under the 2009 JVA, Debtor and OR Holding formed ATF Services as a separate limited liability company with the stated purpose of "servicing title insurance agencies."[237] ATF Services has observed all corporate formalities,[238] and was managed by the ATF Board, which held regular meetings with documented minutes, and by its own officers and employees on a daily basis. In addition, the Amended Operating

---

[234] *In re Paul C. Larson, P.A.*, 610 B.R. 684, 688 (Bankr. M.D. Fla. 2019).
[235] *In re Bull*, 528 B.R. 473, 488 (M.D. Fla. 2015) (citations omitted).
[236] *In re Fundamental Long Term Care, Inc.*, 507 B.R. 359, 374 (Bankr. M.D. Fla. 2014).
[237] Doc. No. 424, Defendant's Ex. 10, p. 1, 2009 JVA, preamble.
[238] Doc. No. 210-2, Jones Declaration, ¶ 22.

Agreement requires ATF Services to maintain (a) copies of its federal, state, and local income tax returns, (b) copies of its financial statements, and (c) "any other books and records required to be maintained" by the Florida Limited Liability Company Act.[239]

To support his contention that ATF Services was formed through an improper use of the corporate form, Plaintiff points to undisputed evidence that ATF Services maintained a joint checking account in which its funds were commingled with those of OR Title. The record evidence is that OR Title deposited premium payments it received from agents into the joint account, and ATF Services deposited payments for services that it received from third parties into the joint account.[240]

But Plaintiff introduced no evidence to show that the joint account was actually *used* to divert funds from ATF Services' creditors or to advance a fraudulent scheme.[241] The Court finds that the existence of a single joint account held by ATF Services and OR Title, without more, does not establish egregious misconduct or the fraudulent use of ATF Services' business entity.

The Court concludes that the OR Defendants have met their burden on summary judgment to prove that Plaintiff is unable to establish that ATF Services was created through an improper use of corporate form, and that Plaintiff has failed to show the existence of a genuine factual dispute on this factor. Therefore, the Court

[239] Doc. No. 427, Defendants' Ex. 26, p. 96, Amended Operating Agreement, Article VII, § 1.
[240] Doc. No. 232, pp. 75-76 (quoting testimony of Deanna Bolger); Doc. No. 239, p. 14.
[241] *See, e.g.*, *In re Sigma-Tech Sales, Inc.*, 570 B.R. 408, 419 (Bankr. S.D. Fla. 2017).

concludes that the evidence does not establish that ATF Services was created through an improper use of corporate form.

3. Whether Debtor's Creditors Were Injured by ATF Services' Corporate Form

Plaintiff contends that the OR Defendants' improper use of ATF Services' corporate form allowed them "to reap the benefits from Debtor while misleading people regarding the true nature of OR Companies' and OR Holding's relationship with Debtor, ATIF Trust, and OR Title, all of which occurred to ensure that 'Old Republic' retained the intellectual property and market share formerly belonging to Debtor." Plaintiff contends that the OR Defendants' actions caused harm to creditors on whose behalf Plaintiff seeks to recover.[242]

Here, under Debtor's confirmed Chapter 11 plan, Plaintiff serves as Creditor Trustee on behalf of the creditors who filed claims in Debtor's bankruptcy case.[243] As such, Plaintiff stands in the creditors' shoes. But Plaintiff has not disputed the OR Defendant's assertion that most of the claims filed in Debtor's bankruptcy case "are CPL [closing protection letter] and other non-policy tort claims" that arose *before the formation of ATF Services* under the 2009 JVA.[244] And Plaintiff has presented no

---

[242] Doc. No. 162, Complaint, ¶ 129.
[243] Main Case, Doc. No. 338, *Order Confirming Second Amended Chapter 11 Plan Filed by Official Committee of Unsecured Creditors*.
[244] Doc. No. 210, ¶ 222; Doc. No. 209, *Defendants' Request to Take Judicial Notice* of the claims register for Debtor's bankruptcy case.

evidence that any of Debtor's creditors were misled or injured because they did not know of the relationship between ATF Services and OR Holding, OR Title, or OR Companies.

The Court concludes that the OR Defendants have met their burden on summary judgment to prove that Plaintiff is unable to establish that Debtor's creditors were injured by ATF Services' corporate form, and that Plaintiff has failed to establish the existence of a genuine factual dispute on this factor. Therefore, the Court concludes that the evidence does not establish that Debtor's creditors were injured by ATF Services' corporate form.

C. ATF Services is not the alter ego of OR Holding and OR Companies.

The three required elements of an alter ego claim are domination and control, improper use of corporate form, and injury to the claimant. Plaintiff bears the burden of proof on each of these three elements. The OR Defendants have moved for summary judgment in their favor on Count IX.

Although the Court has concluded that the OR Defendants did not meet their burden on summary judgment on the element of control and domination, the Court has concluded that the OR Defendants have met their burden on summary judgment to prove that Plaintiff is unable to establish that ATF Services was created through an improper use of corporate form and that Debtor's creditors were injured by ATF Services' corporate form.

Therefore, the Court finds that the OR Defendants have met their burden of proof on summary judgment on two of the three required elements of Plaintiff's claim that ATF Services is the alter ego of OR Holding and OR Companies (Count IX). The burden then shifted to Plaintiff, and Plaintiff has not met his burden to show the existence of a genuine issue of material fact on this claim. Therefore, the Court will grant summary judgment for the OR Defendants on Count IX.

VII. CONCLUSION

In his SJ Motion, Plaintiff seeks the entry of a judgment on his claims that the 2015 Transfers were actually fraudulent (Counts I and V), and that ATF Services was Debtor's successor in interest under a "mere continuation" theory (Count XI). For the reasons explained in this Order, the Court concludes that Plaintiff did not meet his burden of proving that Debtor made the 2015 Transfers with the actual intent to hinder, delay or defraud its creditors, or that ATF Services was Debtor's successor in interest under the mere continuation theory. Therefore, Plaintiff's SJ Motion will be denied.

In their SJ Motion, the OR Defendants seek the entry of a judgment determining that the 2015 Transfers were not actually fraudulent (Counts I and V), that ATF Services is not Debtor's successor in interest under the de facto merger theory (Count X) or the mere continuation theory (Count XI), and that ATF Services is not the alter ego of OR Holding and OR Companies (Count IX).

For the reasons explained in this Order, the Court concludes that the OR Defendants met their burden on summary judgment of proving an absence of evidence to support Plaintiff's fraudulent transfer claims, successor liability claims, and alter ego claims. Therefore, the OR Defendants' SJ Motion will be granted.

Accordingly, it is

ORDERED:

1. Plaintiff's *Omnibus Motion for Partial Summary Judgment* (Doc. No. 155) is **DENIED.**

2. Defendants' *Motion for Summary Judgment* (Doc. No. 208) is **GRANTED.**

3. The Court will enter a separate judgment in Defendants' favor.

Clerk's Office to serve on interested parties via CM/ECF.