ORDERED.

Dated: January 23, 2024

Grace E. Robson
United States Bankruptcy Judge

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

In re Richert Funding, LLC, as substantively consolidated with Dwight Donald Richert and Holly Berry Richert, Debtor.	Case No. 6:18-bk-06276-GER Chapter 7
Soneet R. Kapila, as Chapter 7 Trustee of the Bankruptcy Estate of Richert Funding, LLC, substantively consolidated with Dwight Donald Richert and Holly Berry Richert, Plaintiff, v. Elkhorn Goldfields, Inc. and Patrick Imeson, Defendants.	Adv. No. 6:21-ap-00064-GER

ORDER (1) DENYING MOTION FOR RECONSIDERATION AND (2) CLARIFYING THAT TRUSTEE IS NOT LIMITED IN OTHER PROCEEDINGS

This matter came before the Court upon the Motion for Reconsideration[1] (Doc. No. 172) filed by Plaintiff Soneet R. Kapila, Chapter 7 Trustee ("Trustee") and the Response[2] (Doc. No. 178) thereto filed by Defendants Elkhorn Goldfields, Inc. ("Elkhorn") and Patrick Imeson ("Imeson") (collectively, Imeson and Elkhorn are "Defendants"). For the reasons discussed below, the Court clarifies statements made after its oral ruling as to the impact on the Rackwise Adversary and the Black Diamond Adversary (defined hereinafter). However, because the Final Judgment does not contain clear error or result in manifest injustice, and the clarification does not impact the ruling on the Final Judgment, the Motion for Reconsideration is denied.

PROCEDURAL BACKGROUND

On April 9, 2021, Trustee filed a complaint against Defendants. An amended complaint was filed on October 11, 2021.[3] Trustee sought recovery for: (1) breach of contract, or in the alternative, unjust enrichment; (2) foreclosure of liens; and (3) avoidance and recovery of fraudulent transfers. The trial was conducted on September 11, 2023, with closing arguments on September 13, 2023 (the "Trial"). The Court orally rendered its ruling on November 28, 2023, finding in favor of Trustee on Counts VI through IX and in favor of Defendants on all other counts.[4] The final judgment was entered on November 29, 2023 (the "Final Judgment").[5] On December 12, 2023, Defendants appealed the Final Judgment,[6] and on December 13, 2023, Trustee filed the Motion for Reconsideration. Defendants filed their Response on December 27, 2023.

[1] *Plaintiff, Soneet R. Kapila, Chapter 7 Trustee's Motion for Reconsideration and Clarification of Final Judgment* (the "Motion for Reconsideration").
[2] *Defendants' Response to Motion to Reconsider Verdict* (the "Response").
[3] *First Amended Complaint* (Doc. No. 28).
[4] *See Transcript Regarding Hearing Held Nov. 28, 2023* (Doc. No. 169).
[5] Doc. No. 165.
[6] *Defendants' Notice of Appeal* (the "Appeal") (Doc. No. 171).

JURISDICTION

The Appeal has been docketed with the District Court.[7] However, this Court may consider the Motion for Reconsideration and enter this Order because the Appeal is not effective until the disposition of the Motion for Reconsideration,[8] and assertion of jurisdiction over the Motion for Reconsideration furthers the appeal.[9]

FACTUAL BACKGROUND

Debtor Richert Funding, LLC ("Debtor") was an accounts receivable factoring business. Debtor purchased accounts receivables, i.e., invoices, at a discount from clients, and then advanced a percentage of the face value of the invoice to the client.[10] Dwight Richert ("Richert") was the 100% owner and managing partner of Debtor, making all important operational decisions for Debtor.[11] The main bankruptcy case was commenced as an involuntary proceeding on October 11, 2018 (the "Petition Date"); the order for relief was entered on October 29, 2018.[12]

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[7] *Elkhorn Goldfields, Inc. v. Kapila (In re Richert Funding, LLC)*, 6:23-cv-02425-PGB (M.D. Fla. filed Dec. 19, 2023).
[8] *See* Fed. R. App. P. 4(a)(4)(B)(i) (providing that if a party files a notice of appeal after the court announces a judgment, but before it disposes of a motion under Federal Rule of Civil Procedure 59 to alter or amend that judgment, the notice of appeal becomes effective after the court rules on the Rule 59 motion); Fed. R. App. P. 4 advisory committee note to 1993 amendment ("A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals."); Fed. R. Bankr. P. 8002(b)(2) ("If a party files a notice of appeal after the court announces or enters a judgment, order, or decree—but before it disposes of any motion listed in subdivision (b)(1)—the notice becomes effective when the order disposing of the last such remaining motion is entered."); Fed. R. Bankr. P. 8002 advisory committee note to 1994 amendment (recognizing that Rule 8002 was amended to conform to the 1993 amendments to Federal Rule of Appellate Procedure 4(a)(4) and stating that "[a] notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the district court or bankruptcy appellate panel").
[9] *See Mahone v. Ray*, 326 F.3d 1176, 1179 (11th Cir. 2003) (first citing *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58, 103 S. Ct. 400, 402, 74 L. Ed. 2d 225 (1982); then citing *Doe v. Bush*, 261 F.3d 1037, 1064 (11th Cir. 2001); and then quoting *Lairsey v. Advance Abrasives Co.*, 542 F.2d 928, 930 (5th Cir. 1976)) (recognizing that while "[a]s a general matter, the filing of a notice of appeal deprives the district court of jurisdiction over all issues involved in the appeal," a notice of appeal "does not prevent the district court from taking action 'in furtherance of the appeal'"); *Odion v. Google, Inc.*, No. 1:13-CV-03906-SCJ, 2014 WL 12647930, at *1-2 (N.D. Ga. Oct. 31, 2014).
[10] *Joint Pretrial Stipulation* ¶ 16 (Doc. No. 137).
[11] *See BMO Harris Bank, N.A. v. Richert (In re Richert*), 632 B.R. 877, 882 (Bankr. M.D. Fla. 2021); Pl.'s Ex. 6 (Doc. No. 130-6).
[12] Pl.'s Ex. 1 (Doc. No. 130-1); Pl.'s Ex. 2 (Doc. No. 130-2); Pl.'s Ex. 3 (Doc. No. 130-3); *see also* Main Case, No. 6:18-bk-06276-GER, Doc. Nos. 1, 30, and 37.

Imeson is an individual who has known Richert for twenty years.[13] Imeson has been the President of Elkhorn since sometime in 2016 or 2017.[14] Elkhorn owns a mine in Montana.[15] Imeson and his investor group, through Black Diamond Holdings, LLC ("Black Diamond Holdings"), got involved with Elkhorn in or around 2000.[16] Minerals were extracted from the mine in 2011 or 2012, however, it is a development project, and Elkhorn has done nothing other than testing since the 2011 or 2012 mineral extraction.[17] Elkhorn has generated some revenue, but there has been no notable or consistent source of revenue.[18]

Additionally, Imeson is an officer of Black Diamond Financial Group, Inc. ("Black Diamond Financial") which manages[19] Elkhorn, the Rackwise Entities,[20] and Black Diamond Holdings.[21] Rackwise, Inc. is a software company that provides data center infrastructure management software that helps monitor, manage, and optimize data center assets.[22] Black Diamond Holdings owns a mine in Colorado that is not operating.[23] Trustee has also sued the Rackwise Entities and the Black Diamond Entities for breach of contract and fraudulent transfers in *Kapila v. Rackwise, Inc. (In re Richert Funding, LLC)*, Ch. 7 Case No. 6:18-bk-06276-GER, Adv. No. 6:21-ap-00056-GER (Bankr. M.D. Fla. filed Apr. 8, 2021) (the "Rackwise Adversary") and *Kapila v. Black Diamond Holdings, LLC (In re Richert Funding, LLC)*, Ch. 7 Case No. 6:18-

[13] Trial Tr. vol. 1, 150 (Doc. No. 153).
[14] Trial Tr. vol. 1, 149-51 (Doc. No. 153).
[15] *Joint Pretrial Stipulation* ¶ 13 (Doc. No. 137).
[16] Trial Tr. vol. 1, 146-48 (Doc. No. 153).
[17] Trial Tr. vol. 1, 146-48 (Doc. No. 153).
[18] Trial Tr. vol. 1, 146-48 (Doc. No. 153).
[19] Trial Tr. vol. 1, 151 (Doc. No. 153).
[20] Rackwise, Inc. and Rackwise Funding II, LLC are the "Rackwise Entities." *See Kapila v. Rackwise, Inc. (In re Richert Funding, LLC)*, Ch. 7 Case No. 6:18-bk-06276-GER, Adv. No. 6:21-ap-00056-GER (Bankr. M.D. Fla. filed Apr. 8, 2021).
[21] Black Diamond Holdings and Black Diamond Financial are the "Black Diamond Entities." *See Kapila v. Black Diamond Holdings, LLC (In re Richert Funding, LLC)*, Ch. 7 Case No. 6:18-bk-06276-GER, Adv. No. 6:21-ap-00055-GER (Bankr. M.D. Fla. filed Apr. 6, 2021).
[22] *See First Amended Complaint*, *Kapila v. Rackwise, Inc. (In re Richert Funding, LLC)*, Ch. 7 Case No. 6:18-bk-06276-GER, Adv. No. 6:21-ap-00056-GER (Bankr. M.D. Fla. July 18, 2022), Doc. No. 41.
[23] *See* Pl.'s Ex. 51 at 19 (Doc. No. 130-51); Trial Tr. vol. 1, 105, 108, 126, 214 (Doc. No. 153).

bk-06276-GER, Adv. No. 6:21-ap-00055-GER (Bankr. M.D. Fla. filed Apr. 6, 2021) (the "Black Diamond Adversary").

Debtor entered into factoring agreements with both Imeson and Elkhorn,[24] as well as the Rackwise Entities,[25] and the Black Diamond Entities.[26] Debtor was an important source of funding for these entities.[27] Before discussing the factoring agreements and the specific transactions at issue in this proceeding, detail regarding Debtor's insolvency and financial manipulations provide an important backdrop.

Debtor was Trying to Mask Insolvency During the Four Years Preceding Petition Date

Trustee was qualified as an expert on insolvency and testified at Trial.[28] The Court found Trustee was credible and established Debtor was insolvent during the period of October 22, 2014 through October 11, 2018 (the "Insolvency Period"). Trustee determined Debtor was insolvent during the Insolvency Period by analyzing whether the fair value of Debtor's assets exceeded Debtor's liabilities or obligations, commonly referred to as a "balance sheet test," which is appropriate under the Bankruptcy Code.[29] Trustee's analysis reflected that 90% of Debtor's assets consisted of factored receivables.[30]

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[24] *Joint Pretrial Stipulation* (Doc. No. 137). The factoring agreement with Imeson (the "Imeson Agreement") is dated June 8, 2010. Pl.'s Ex. 14 (Doc. No. 130-14). The factoring agreement with Elkhorn (the "Elkhorn Agreement") is dated January 12, 2017. Pl.'s Ex. 13 (Doc. No. 130-13).

[25] There are two factoring agreements with Rackwise, Inc. The first agreement is dated as February 9, 2012, and the second agreement, signed by Imeson, is dated August 30, 2017. The agreement with Rackwise Funding II, LLC is dated as June 2, 2014. *See First Amended Complaint*, *Kapila v. Rackwise, Inc. (In re Richert Funding, LLC)*, Ch. 7 Case No. 6:18-bk-06276-GER, Adv. No. 6:21-ap-00056-GER (Bankr. M.D. Fla. July 18, 2022), Doc. No. 41.

[26] The factoring agreement with Black Diamond Holdings is dated August 28, 2011, and the factoring agreement with Black Diamond Financial is dated June 1, 2016. *See Second Amended Complaint*, *Kapila v. Black Diamond Holdings, LLC (In re Richert Funding, LLC)*, Ch. 7 Case No. 6:18-bk-06276-GER, Adv. No. 6:21-ap-00055-GER (Bankr. M.D. Fla. Feb. 10, 2022), Doc. No. 38.

[27] Trial Tr. vol. 1, 151 (Doc. No. 153).

[28] The parties stipulated to the admission of Trustee's Expert Report. Pl.'s Ex. 51 (Doc. No. 130-51); *see also* Trial Tr. vol. 1, 7 (Doc. No. 153).

[29] 11 U.S.C. § 101(32).

[30] Trial Tr. vol. 1, 101 (Doc. No. 153).

Trustee determined the factored receivables were disputed or based on anticipated investments from prospective investors, and were therefore not collectible.[31] Trustee also determined the Rackwise Entities and the Black Diamond Entities (who were liable on the invoices) were not able to pay the receivables.[32] Based on his analysis and findings, Trustee concluded the fair value of the receivables owed to Debtor from the Rackwise Entities and the Black Diamond Entities was $0.00, thus rendering Debtor insolvent during the Insolvency Period.

In addition, Trustee analyzed Debtor's banking records and found that Debtor engaged in a pattern of "refreshing"[33] invoices and "round robin"[34] transactions that camouflaged both the transaction and value of the receivable, such that the factored receivables were valueless.[35] The refreshing of invoices and round robin transactions created a mirage of business transactions that in reality had no substance.[36] Based on these and other activities that Trustee examined, Trustee opined that during the Insolvency Period, Debtor was falsifying the aging reports provided to its lenders by grossly overinflating the value of the receivables.[37]

With Debtor's insolvency and financial deception in mind, the Court turns to the factoring agreements at issue.

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[31] Pl.'s Ex. 51 at 13-14, 17-18, 23-24 (Doc. No. 130-51).
[32] Trial Tr. vol. 1, 101 (Doc. No. 153); Pl.'s Ex. 51 at 11-13, 17 (Doc. No. 130-51).
[33] "Refreshing" an invoice refers to where Debtor would deem aged invoices to be paid on its books then reissue the same invoice with a new date and invoice number to make it appear as if Debtor's accounts receivable were not as old as they really were. *See* Trial Tr. vol. 1, 97-98 (Doc. No. 153); *see also* Pl.'s Ex. 51 at 28 (Doc. No. 130-51).
[34] "Round Robin" refers to circular transactions where funds would come into and out of Debtor's bank accounts within a short period of time. *See* Trial Tr. vol. 1, 103 (Doc. No. 153); *see also* Pl.'s Ex. 51 at 14-17, 24-27 (Doc. No. 130-51) (recognizing that round robin transactions had no apparent business purpose, were an exchange of funds that could not be characterized as payment for invoices, and should be ignored).
[35] *See* Trial Tr. vol. 1, 97-98 (Doc. No. 153).
[36] *See* Trial Tr. vol. 1, 97-110 (Doc. No. 153) (Trustee testified regarding valueless receivables, refreshing of invoices, "round robin" transactions and concluding "the same telltale signs of how Richert Funding and its clients were conducting business and just creating a mirage . . . of business transactions which really don't have any substance"); Pl.'s Ex. 51 (Doc. No. 130-51) (Trustee's Expert Report concluding Debtor was falsifying financial information); Pl.'s Ex. 6 (Doc. No. 130-6) (Judge Jennemann's opinion in *BMO Harris Bank*, 632 B.R. 877, finding Richert and Debtor prepared falsified accounts receivable aging reports to induce a lender to loan money to a client so that Debtor could be repaid part of amounts owed to it from the client).
[37] Pl. Ex. 51 at 32-36 (Doc. No. 130-51).

The Imeson and Elkhorn Factoring Agreements

Pursuant to the Imeson Agreement and the Elkhorn Agreement, Debtor agreed to purchase invoices that were for "[b]ona fide existing obligations arising from the sale of Goods in which both title and risk of loss has passed."[38] Debt owed on account of the invoices was to be "[o]wed by a Payor that is not, directly or indirectly, an Affiliate of Seller or in any way not an 'arms-length' transaction."[39]

Imeson testified that in practice, when Imeson or entities he was involved with had a financial need, he would call Richert and request that Debtor make an advance.[40] For instance, Imeson, on behalf of Elkhorn, would ask Debtor for an advance, then Elkhorn would create an invoice and would email it to Debtor to be factored. Imeson, on behalf of Elkhorn, would then sign an account purchase addendum[41] that was made part of and supplemented the Elkhorn Agreement.[42] Debtor would advance the money sometimes before the purchase addendum was executed, and sometimes after the fact.[43]

Lack of Reasonably Equivalent Value in Exchange for Advances/Transfers

Trustee testified that Debtor did not receive reasonably equivalent value for the advances/transfers made in exchange for the Elkhorn Invoices[44] or the Imeson Invoices.[45] Contrary to the terms of both the Imeson Agreement and the Elkhorn Agreement, none of the invoices admitted at Trial were for the sale of goods. Further, all invoices were subject to risk of loss and

[38] Pl.'s Ex. 13, ¶ 14.4.1 (Doc. No. 130-13); Pl.'s Ex. 14, ¶ 14.4.1 (Doc. No. 130-14).
[39] Pl.'s Ex. 13, ¶ 14.4.3 (Doc. No. 130-13); Pl.'s Ex. 14, ¶ 14.4.3 (Doc. No. 130-14).
[40] Trial Tr. vol. 1, 170 (Doc. No. 153).
[41] Trial Tr. vol. 1, 164-65 (Doc. No. 153).
[42] The Account Purchase Addendum refers to the Elkhorn Agreement as the "Master Account Receivable Purchase Agreement." Pl.'s Ex. 18 (Doc. No. 130-18).
[43] Trial Tr. vol. 1, 164-65 (Doc. No. 153).
[44] Invoice numbers 9600, 6158, 6162, 6165, 6168, 6169, 6170, and 6175 are collectively the "Elkhorn Invoices"; "Elkhorn Invoices" specifically excludes invoice numbers 6176, 6177, and 6178, which will be referred to as the "Refreshed Elkhorn Invoices" and discussed further below.
[45] Invoice numbers 7241 and 2640 are collectively the "Imeson Invoices."

were owed by payors that were affiliates of Imeson and Elkhorn and not at arms' length. When asked whether he had seen any evidence that Debtor received reasonably equivalent value in exchange for the transfers at issue in this proceeding, Trustee answered that he did not.[46] For these and the additional reasons discussed below, the Court found that Debtor did not receive reasonably equivalent value in exchange for the Imeson transfers or the Elkhorn transfers.

Imeson Transactions (Counts II, VIII, and IX)[47]

During the four-year period preceding the Petition Date, while Debtor was insolvent, Debtor made twelve transfers to Imeson; payments were made on three of the transfers, leaving nine transfers at issue as to Imeson.[48] Two of the transfers relate to the Imeson Invoices, and Imeson asserts the seven other transfers were payments for commissions. Trustee asserts claims for breach of contract as to the Imeson Invoices (Count II); in addition, Trustee seeks to avoid and recover all nine transfers (including the two advances made on account of the Imeson Invoices) as constructively fraudulent transfers (Counts VIII and IX).

Debtor made transfers to Imeson totaling $508,715.91, of which $149,500 was repaid or returned. Imeson asserts the transfers were for commissions he earned pursuant to a handshake agreement with Debtor that provided Imeson would be paid 25% of Debtor's profit on factoring clients Imeson introduced to Debtor.[49] There were no corroborating business records or other evidence reflecting the terms of any commission agreement between Imeson and Debtor, nor any accounting of the amounts allegedly owed to Imeson. Even if there were a commission agreement

[46] Trial Tr. vol. 1, 119-20 (Doc. No. 153).
[47] Charts detailing the transactions for Counts II and IX are a part of the Composite Exhibit attached to this Order. The two-year transfers subject of Count VIII are subsumed in the four-year transfers subject of Count IX.
[48] Pl.'s Ex. 46 (Doc. No. 130-46); Pl.'s Ex. 48 (Doc. No. 130-48).
[49] Trial Tr. vol. 1, 195 (Doc. No. 153).

as Imeson described, there was no evidence that Debtor earned a profit on any factoring clients Imeson introduced to Debtor, so there could not be any commission earned by Imeson.

Imeson created the Imeson Invoices.[50] Invoice number 7241 is dated May 3, 2016 and has a face value of $25,000 for "accrued consulting fees" [51] Imeson supposedly earned for consulting services provided to Black Diamond Financial, an entity that he was affiliated with and from which he was already receiving compensation as an officer. Imeson testified the invoice was for consulting services that were in addition to his regular duties and responsibilities.[52] Imeson testified he invoiced third parties for consulting fees and similarly invoiced Black Diamond Financial because he was expecting to get paid the consulting fee in the future.[53] Trustee testified there was questionable value and inherent collectability issues with factoring management fees of affiliated entities.[54] At the time of this invoice, Debtor was already owed a significant sum of money for invoices it factored for the Black Diamond Entities and the Rackwise Entities.[55] Based on the foregoing, the Court found the invoice number 7241 had no value and Debtor could not possibly believe the invoice had any value when it was factored.

Invoice number 2640 is dated April 13, 2018 and has a face value of $20,000. The invoice is for a personal insurance claim made by Imeson against Farmers Insurance for damage to his home.[56] Imeson never sent invoice number 2640 to Farmers Insurance,[57] and despite being paid $60,000 from Farmers Insurance, Imeson testified he did not pay Debtor because the amount was

[50] *See* Trial Tr. vol. 1, 168-71 (Doc. No. 153).
[51] Pl.'s Ex. 35 (Doc. No. 130-35); *see also* Pl.'s Ex. 42 (Doc. No. 130-42).
[52] Trial Tr. vol. 1, 169 (Doc. No. 153).
[53] Trial Tr. vol. 1, 156 (Doc. No. 153).
[54] Trial Tr. vol. 1, 106 (Doc. No. 153). The Court notes that there is an error in the *Transcript Regarding Hearing Held September 11, 2023* (Doc. No. 153) at page 106; Trustee used the word "colorable" rather than "probable" at line 16 of page 106.
[55] By the end of 2015, Debtor's books reflect that Debtor was owed $36,671,007 from the Black Diamond Entities and the Rackwise Entities. *See* Pl.'s Ex. 51 at 8, 46 (Doc. No. 130-51). The debt increased to over $60 million in 2016. *See* Pl.'s Ex. 51 at 8, 46 (Doc. No. 130-51).
[56] Pl.'s Ex. 39 (Doc. No. 130-39); *see also* Pl.'s Ex. 42 (Doc. No. 130-42).
[57] Trial Tr. vol. 1, 170-71 (Doc. No. 153).

offset by commissions due to him from Debtor.[58] However, as discussed above, that is not possible because Imeson did not earn any commission. By this point in time, Imeson knew Richert was under pressure to collect significant amounts owed to Debtor, including from the entities Imeson was affiliated with,[59] and they were speaking several times a day.[60] If Debtor truly owed Imeson for commissions, Debtor could have simply paid Imeson the commission; instead, there was no commission owed to Imeson reflected on Debtor's books, and because of the pressure Richert and Debtor were under to collect, it is apparent that the only way Richert could get Imeson money was for Imeson to issue an invoice.

Based on the foregoing, Debtor did not receive reasonably equivalent value in exchange for factoring the Imeson Invoices, nor in exchange for the other transfers to Imeson. Accordingly, Trustee was entitled to judgment on Counts VIII and IX in the amount of $386,685.91.

Elkhorn Transactions (Counts I, VI, and VII)[61]

During the four-year period preceding the Petition Date, while Debtor was insolvent, Debtor made ten transfers to Elkhorn; one of the transfers was repaid or returned.[62] After taking into account payments made, there are nine net transfers Trustee seeks to avoid and recover as constructively fraudulent transfers in Counts VI and VII. The nine transfers consist of advances on account of the eight Elkhorn Invoices, which includes invoice numbers 6170 and 6175,[63] plus

[58] Trial Tr. vol. 1, 171 (Doc. No. 153).
[59] Trial Tr. vol. 1, 184-85 (Doc. No. 153).
[60] Trial Tr. vol. 1, 184 (Doc. No. 153).
[61] Charts detailing the transactions subject of Counts I and VII are a part of the Composite Exhibit attached to this Order. The two-year transfers subject of Count VI are subsumed within Count VII.
[62] Pl.'s Ex. 46 (Doc. No. 130-46).
[63] The parties stipulated to the admission of invoice numbers 6170 and 6175 into evidence. *See* Pl.'s Ex. 15 (Doc. No. 130-15); Pl.'s Ex. 16 (Doc. No. 130-16); Pl.'s Ex. 17 (Doc. No. 130-17); Pl.'s Ex. 18 (Doc. No. 130-18); Pl.'s Ex. 19 (Doc. No. 130-19); Pl.'s Ex. 20 (Doc. No. 130-20); Pl.'s Ex. 21 (Doc. No. 130-21); Pl.'s Ex. 22 (Doc. No. 130-22); Pl.'s Ex. 23 (Doc. No. 130-23); Trial Tr. vol. 1, 7 (Doc. No. 153). The parties also stipulated to the admission of invoice numbers 9600, 6158, 6162, 6165, 6168, and 6169 into evidence. *See* Defs.' Ex. 13 (Doc. No. 138-14); Defs.' Ex. 14 (Doc. No. 138-15); Defs.' Ex. 15 (Doc. No. 138-16); Defs.' Ex. 16 (Doc. No. 138-17); Defs.' Ex. 17 (Doc. No. 138-18); Defs.' Ex. 18 (Doc. No. 138-19); Defs.' Ex. 19 (Doc. No. 138-20); Defs.' Ex. 24 (Doc. No. 138-25); Trial

one unexplained payment. Trustee also seeks to recover for breach of contract on invoice numbers 6170 and 6175, as well as the Refreshed Elkhorn Invoices[64] as part of Count I.[65] However, there are no corresponding transfers to recover as to the Refreshed Elkhorn Invoices, because these three invoices are merely "refreshed" versions of invoice numbers 9600, 6158, 6162, 6165, 6168, and 6169.[66]

Invoice numbers 9600 and 6176 identify Elkhorn as both the payee and payor and reference "Black Diamond Gold Inc. unit purchase."[67] The other invoices identify Black Diamond Gold Inc. as the payor and identifies the "obligation" as "Gold Stream Investment."[68] Black Diamond Gold was an entity formed solely to raise money; it sold membership units and gold streaming contacts.[69] Imeson testified the Gold Stream Investment was for potential, unrealized investment funds that he was working to obtain on behalf of Elkhorn – not a present existing obligation.[70] Trustee's testimony regarding this type of invoice was that

> there is nothing being factored there which has true value. It is an expectation that someone will invest in that client at a later date. That's [a] pretty soft asset . . . . And that puts into question the [collectability] of your money because Black

Tr. vol. 1, 8 (Doc. No. 153). Trustee presented the date, amount, and corresponding bank record for each transfer, but did not correlate the transfers as payments for the referenced invoices.

[64] The Refreshed Elkhorn Invoices are invoice numbers 6176, 6177, and 6178. *See supra* note 44.

[65] *See* Pl.'s Ex. 25 (Doc. No. 130-25); Pl.'s Ex. 26 (Doc. No. 130-26); Pl.'s Ex. 27 (Doc. No. 130-27); Pl.'s Ex. 28 (Doc. No. 130-28); Pl.'s Ex. 29 (Doc. No. 130-29); Pl.'s Ex. 33 (Doc. No. 130-33); Trial Tr. vol. 1, 19 (Doc. No. 153). While at Trial, counsel for Trustee referred twice to invoice number 6178, based on the other evidence admitted at Trial, it is obvious that counsel intended to refer to invoice number 6176.

[66] Debtor made no advances that correspond with the July 30, 2017 advance date reflected in the aging report attached to the June 7, 2018 demand letter. *See* Pl.'s Ex. 33 (Doc. No. 130-33); Pl.'s Ex. 46 (Doc. No. 130-46). Defendants' response to interrogatories explains the Refreshed Elkhorn Invoices replaced/recycled invoice numbers 9600, 6158, 6162, 6165, 6168, and 6169. *See* Defs.' Ex. 47 (Doc. No. 138-45); *see also* Defs.' Ex. 27 (Doc. No. 138-28); Defs.' Ex. 28 (Doc. No. 138-29). Debtor had a practice of refreshing invoices. *See* Trial Tr. vol. 1, 97-98, 108 (Doc. No. 153); Pl.'s Ex. 51 (Doc. No. 130-51).

[67] Defs.' Ex. 13 (Doc. No. 138-14); Pl.'s Ex. 25 (Doc. No. 130-25).

[68] *See* Defs.' Ex. 14 (Doc. No. 138-15); Defs.' Ex. 15 (Doc. No. 138-16); Defs.' Ex. 16 (Doc. No. 138-17); Defs.' Ex. 17 (Doc. No. 138-18); Defs.' Ex. 18 (Doc. No. 138-19); Defs.' Ex. 19 (Doc. No. 138-20); Pl.'s Ex. 26 (Doc. No. 130-26); Pl.'s Ex. 27 (Doc. No. 130-27).

[69] Trial Tr. vol. 1, 201 (Doc. No. 153).

[70] Trial Tr. vol. 1, 202 (Doc. No. 153).

> Diamond isn't really factoring a tangible receivable per se. That was another aspect that was of concern.[71]

The Court agrees with Trustee and finds the Elkhorn Invoices had no underlying value because they were for prospective investments in a non-operational mine that was not generating revenue, and there was no realistic possibility that Elkhorn could repay Debtor within the ninety-day time frame[72] required under the Elkhorn Agreement.[73] Because the Elkhorn Invoices were valueless, Debtor did not receive reasonably equivalent value in exchange for the advances to Elkhorn. Accordingly, Trustee was entitled to a judgment on Counts VI and VII in the amount of $212,700.00.

RELIEF SOUGHT

Trustee seeks reconsideration of the Court's findings and application of the law, or in the alternative, to clarify how the Court applied the law to the evidence presented at Trial. Trustee argues that the Court erred in ruling that he could not recover on breach of contract based on lack of consideration and erred in finding that the breach of contract and fraudulent transfer claims were mutually exclusive.

Trustee also seeks reconsideration arguing the Court erred by limiting enforcement of the Final Judgment in state courts because doing so ignores his rights under 28 U.S.C. § 1963. Finally, Trustee asserts that the Final Judgment is "a manifest injustice in light of the related adversary proceedings," referring to the Rackwise Adversary and the Black Diamond Adversary.

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[71] Trial Tr. vol. 1, 104 (Doc. No. 153).
[72] Pl.'s Ex. 13 at 18 (Doc. No. 130-13) (defining "Late Payment Date" as "ninety (90) days from the Purchase Date").
[73] *See* Trial Tr. vol. 1, 148 (Doc. No. 153); *see also* Pl.'s Ex. 9 at 7-9 (Doc. No. 130-9) (deposition of Imeson, wherein Imeson testified that the mine is not operational, has no present source of revenue, needs capital to move forward, would take six months of development after capital is available, such investments are necessary before production, and that the necessary investments have not been secured).

STANDARD FOR RECONSIDERATION

Reconsideration of an order under Federal Rule of Civil Procedure 59(e)[74] "is an extraordinary remedy to be employed sparingly" due to interests in finality and conservation of judicial resources.[75] "A trial court's determination as to whether grounds exist for the granting of a Rule 59(e) motion is held to an 'abuse of discretion' standard."[76] Where courts have granted relief under Rule 59(e), they generally act to: (1) account for an intervening change in controlling law, (2) consider newly available evidence, or (3) correct clear error or prevent manifest injustice.[77] "Far too often, litigants operate under the assumption . . . that any adverse ruling confers on them a license to move for reconsideration, and utilize such motion as a platform to relitigate issues that have already been decided or otherwise seek a 'do over.' Such use of Rule 59 is improper."[78] "Indeed, a court's order is not intended as a mere first draft, subject to revision at the litigant's whim."[79] "In order to demonstrate clear error, the party must do more than simply restate his previous arguments, and any arguments the party failed to raise in the earlier motion will be deemed waived."[80]

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[74] Rule 59 is made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 9023.
[75] *Mathis v. United States (In re Mathis)*, 312 B.R. 912, 914 (Bankr. S.D. Fla. 2004) (quoting *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 694 (M.D. Fla. 1994)).
[76] *Id.* (first citing *Am. Home Assurance Co. v. Glenn Estess & Assocs.*, 763 F.2d 1237, 1238-39 (11th Cir. 1985); then citing *McCarthy v. Manson*, 714 F.2d 234, 237 (2d Cir. 1983); and then citing *Weems v. McCloud*, 619 F.2d 1081, 1098 (5th Cir. 1980)).
[77] *Id.* (first citing *Sussman*, 153 F.R.D. at 694; then citing *Morris v. United States*, No. 96-1035-CIV-T-24(F), 1998 U.S. Dist. LEXIS 14046 (M.D. Fla. Aug. 6, 1998); and then citing *Firestone v. Firestone*, 76 F.3d 1205 (D.C. Cir. 1996)).
[78] *Woide v. Fed. Nat'l Mortg. Ass'n (In re Woide)*, No. 6:16-cv-1484-Orl-37, 2017 WL 549160, at *2 (M.D. Fla. Feb. 9, 2017) (citing *Michael Linet, Inc. v. Vill. of Wellington*, 408 F.3d 757, 763 (11th Cir. 2005)).
[79] *Id.* (citing *Plummer v. PJCF, LLC*, No. 2:15-CV-37-FTM-38CM, 2015 WL 2359996, at *1 (M.D. Fla. May 18, 2015)).
[80] *Caldwell v. Dodge Chrysler Grp.*, No. 8:18-CV-2525-T-35SPF, 2019 WL 13215059, at *1 (M.D. Fla. Nov. 12, 2019) (quoting *O'Neill v. Home Depot U.S.A., Inc.*, 243 F.R.D. 469, 483 (S.D. Fla. 2006)).

ANALYSIS

Breach of Contract Claim Fails as to Elkhorn (Count I)

As stated above, Trustee seeks recovery for breach of contract on five invoices – numbered 6170, 6175, 6176, 6177, and 6178.[81] Trustee presented evidence that Debtor sent a demand letter to Elkhorn with respect to the invoices subject of the complaint,[82] and that there was no written dispute in response to the demand letter.[83] Therefore, Trustee believes he should recover the amounts set forth in the demand letter. However, there are multiple reasons why Count I fails.

First, Trustee cannot recover the damages sought in Count I for invoice numbers 6170 and 6175 because the amount Trustee is seeking is usurious under Florida law.[84] The only relief Trustee would be entitled to is the principal sum advanced,[85] which is the same amount sought and already awarded in the Final Judgment with respect to Counts VI and VII. Second, Trustee cannot recover the damages sought in Count I as to invoices numbers 6176, 6177, and 6178, because Trustee did not prove Debtor made advances to purchase these invoices.[86] Finally, allowing recovery under Counts I, VI, and VII would result in impermissible double recovery for the identical injuries.[87]

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[81] *See supra* note 65.
[82] Pl.'s Ex. 33 (Doc. No. 130-33).
[83] Trial Tr. vol. 1, 185-87 (Doc. No. 153).
[84] Fla. Stat. § 687.02. Trustee argues that pursuant to paragraphs 28 and 33.9 of the Elkhorn Agreement, Florida law governs the applicable statute of limitations, but South Carolina law governs whether the transactions are usurious. *See Trustee's Trial Memorandum Regarding Usury Defense* 2-3, 5-10 (Doc. No. 149). While Trustee cited authority regarding the enforceability of choice-of-law provisions, none of the cited cases dealt with, and the Court could not find any authority for, the unsupported position that parties can choose to apply the laws of multiple states depending on what provision is being enforced. If this were the case, every contract could incorporate the laws of all states and provide that the most favorable provision applied to the party seeking enforcement. Instead, there has to be a nexus between the contract, the parties, and the applicable law. *See* Restatement (Second) of Conflict of Laws § 187 (1971); *see also Cont's Mortg. Invs. v. Sailboat Key, Inc.*, 395 So. 2d 507, 512 (Fla. 1981). The Court rejects Trustee's argument and concludes Florida law governs the Elkhorn Agreement.
[85] Fla. Stat. § 687.04.
[86] Invoice numbers 6176, 6177, and 6178 have an advance date of July 30, 2017. *See* Pl.'s Ex. 33 (Doc. No. 130-33). However, Debtor made no payments on that date. *See* Pl.'s Ex. 46 (Doc. No. 130-46). Imeson testified that Debtor would send the money *after* the purchase addendum was executed. Trial Tr. vol. 1, 167 (Doc. No. 153). *See supra* note 66 (explaining that these invoices were recycled versions of prior invoices).
[87] *See Novak v. Gray*, 469 F. App'x 811, 818 (11th Cir. 2012) (recognizing that, under Florida law, a plaintiff may not recover damages for fraud and breach of contract unless the plaintiff establishes the damages are separate or distinguishable).

Trustee fails to point out any unpaid invoice subject of Count I that does not overlap with the fraudulent transfers subject of Counts VI and VII as illustrated below:

Invoice No. and Face Value	Included in Breach of Contract? (Count I)	Included in 2- and 4-Year Transfers?[88] (Counts VI and VII)
6170[89] $19,000	Yes	Yes – Transfer on 2/14/2017 as advance in amount of $9,470
6175[90] $35,000	Yes	Yes – Transfer on 3/17/2017 as advance in amount of $24,970
6176[91] $96,362.50	Yes	Yes – Transfer on 1/13/2017 as advance in amount of $39,970 for Invoice 9600[92] and Transfer on 2/6/2017 as advance in amount of $7,470 for Invoice 6168[93]
6177[94] $92,950	Yes	Yes – Transfer on 1/26/2017 as advance in amount of $31,970 for Invoice 6158[95] and Transfer on 1/31/2017 as advance in amount of $12,470 for Invoice 6162[96]
6178[97] $74,412	Yes	Yes – Transfer on 2/1/2017 as advance in amount of $12,470 for Invoice 6165[98] and Transfer on 2/7/2017 as advance in amount of $23,970 for Invoice 6169[99]

[88] All transfers are reflected in Pl.'s Ex. 46 (Doc. No. 130-46). The transfer amount does not match the invoice amount as Debtor would advance only a percentage of the face value of the invoice.
[89] Pl.'s Ex. 15 (Doc. No. 130-15); Pl.'s Ex. 16 (Doc. No. 130-16); Pl.'s Ex. 17 (Doc. No. 130-17); Pl.'s Ex. 18 (Doc. No. 130-18); Pl.'s Ex. 19 (Doc. No. 130-19).
[90] Pl.'s Ex. 20 (Doc. No. 130-20); Pl.'s Ex. 21 (Doc. No. 130-21); Pl.'s Ex. 22 (Doc. No. 130-22); Pl.'s Ex. 23 (Doc. No. 130-23).
[91] Pl.'s Ex. 24 (Doc. No. 130-24); Pl.'s Ex. 25 (Doc. No. 130-25); Pl.'s Ex. 28 (Doc. No. 130-28); Pl.'s Ex. 29 (Doc. No. 130-29); Defs.' Ex. 47 (Doc. No. 138-45).
[92] Defs.' Ex. 13 (Doc. No. 138-14).
[93] Defs.' Ex. 17 (Doc. No. 138-18).
[94] Pl.'s Ex. 24 (Doc. No. 130-24); Pl.'s Ex. 26 (Doc. No. 130-26); Pl.'s Ex. 28 (Doc. No. 130-28); Pl.'s Ex. 29 (Doc. No. 130-29); Defs.' Ex. 47 (Doc. No. 138-45).
[95] Defs.' Ex. 14 (Doc. No. 138-15).
[96] Defs.' Ex. 15 (Doc. No. 138-16).
[97] Pl.'s Ex. 24 (Doc. No. 130-24); Pl.'s Ex. 27 (Doc. No. 130-27); Pl.'s Ex. 28 (Doc. No. 130-28); Pl.'s Ex. 29 (Doc. No. 130-29); Defs.' Ex. 47 (Doc. No. 138-45).
[98] Defs.' Ex. 16 (Doc. No. 138-17).
[99] Defs.' Ex. 18 (Doc. No. 138-19).

For the foregoing reasons, the Court does not find any clear error that would support reconsideration of the Final Judgment.

Breach of Contract Claim Fails as to Imeson (Count II)

Trustee seeks recovery from Imeson for breach of contract based on failure to pay the Imeson Invoices. Trustee presented evidence that Debtor made advances to Imeson on account of the Imeson Invoices,[100] sent a demand letter to Imeson with respect to the invoices,[101] and that there was no written dispute in response to the demand letter.[102] Therefore, Trustee believes he should recover the amounts in the demand letter. However, Trustee cannot recover the damages sought in Count II as to invoice number 7241 because the amount Trustee is seeking is usurious under Colorado law.[103] The only invoice Trustee could possibly recover on for breach of contract is invoice number 2640. However, Trustee's Count II fails in its entirety because the principal sums advanced on account of the Imeson Invoices overlap with the amounts already awarded in the Final Judgment for Counts VIII and IX; allowing recovery on Counts II, VIII, and IX would result in an impermissible double recovery as illustrated below:

Invoice No. and Face Value[104]	Included in Breach of Contract? (Count II)	Included in 2- and 4-Year Transfers?[105] (Counts VIII and IX)
7241 $25,000	Yes	Yes – Transfer on 5/3/2016 as advance in amount of $12,470
2640 $20,000	Yes	Yes – Transfer on 4/13/2018 as advance in amount of $15,000

[100] Pl.'s Ex. 46 (Doc. No. 130-46).
[101] Pl.'s Ex. 42 (Doc. No. 130-42).
[102] Trial Tr. vol. 1, 185-87 (Doc. No. 153).
[103] *See* Colo. Rev. Stat. § 5-12-103. Trustee argues that pursuant to paragraph 28 of the Imeson Agreement, Florida law governs the applicable statute of limitations, but Colorado law governs whether the transactions are usurious. *See Trustee's Trial Memorandum Regarding Usury Defense* 4, 11-12 (Doc. No. 149). The Court rejects this argument and concludes that Colorado law governs the Imeson Agreement. *See supra* note 84.
[104] *See* Pl.'s Ex. 35 (Doc. No. 130-35); Pl.'s Ex. 39 (Doc. No. 130-39); Pl.'s Ex. 42 (Doc. No. 130-42).
[105] All transfers are reflected in Pl.'s Ex. 46 (Doc. No. 130-46). *See also* Pl.'s Ex. 48 (Doc. No. 130-48); Pl.'s Ex. 63 (Doc. No. 130-63).

For the foregoing reasons, the Court does not find any clear error that would support reconsideration of the Final Judgment.

Recovery for Breach of Contract and Fraudulent Transfer Would be Inconsistent in this Instance

In the Motion for Reconsideration, Trustee argues the Court erred by ruling that he could not recover on both breach of contract and fraudulent transfer claims because such theories are not mutually exclusive.[106] The cases cited by Trustee involve facts and circumstances that are distinguishable from those presented in this proceeding. In *Rizack v. Starr Indemnity & Liability Co. (In re Grandparents.com, Inc.)*, the plaintiff was suing on a theory of fraudulent transfer and *did not* assert a claim for breach of contract.[107] The plaintiff argued that the debtor did not receive reasonably equivalent value based on the level and quality of consulting services provided by defendant.[108] The defendant filed a motion to dismiss arguing that the complaint was really a breach of contract action in disguise and that the complaint failed to state a claim for relief because payments made under a valid contract constituted reasonably equivalent value.[109] The Bankruptcy Court held that "[t]he existence of a binding contract does not foreclose a fraudulent conveyance claim"[110] and "[a] transfer may be fraudulent even if it is made in accordance with the terms of a contract."[111] The Bankruptcy Court cited to *Cohen v. Ernst & Young Corporate Finance, LLC (In re Friedman's, Inc.)* for the proposition that the elements of a statutory fraud claim are distinct from those for a breach of contract claim.[112] In *In re Friedman's Inc.*, the plaintiff asserted claims for fraudulent conveyance under Georgia law and the Bankruptcy Code for audit work that was

[106] Motion for Reconsideration 14-16 (Doc. No. 172).
[107] *Rizack v. Starr Indem. & Liab. Co. (In re Grandparents.com, Inc.)*, 614 B.R. 625 (Bankr. S.D. Fla. 2020).
[108] *Id.* at 630.
[109] *Id.* at 631.
[110] *Id.*
[111] *Id.* (quoting *EBC I, Inc. v. Am. Online, Inc. (In re EBCI I Inc.)*, 356 B.R. 631, 640 (Bankr. D. Del. 2006)).
[112] *Id.* at 633 (citing *Cohen v. Ernst & Young Corp. Fin., LLC (In re Friedman's, Inc.)*, 372 B.R. 530, 546-47 (Bankr. S.D. Ga. 2007)).

not fully completed, in addition to a breach of contract claim arising from a failure to audit certain financial statements.[113] The defendants argued that the fraudulent conveyance claims were breach of contract claims disguised as bankruptcy claims.[114] The Bankruptcy Court analyzed whether the claims should be arbitrated, and held that "the fact that a fraudulent conveyance claim may arise out of a common set of facts in which the elements of a breach of contract claim might also exist does not prevent the Trustee from pleading both claims in his complaint."[115] Unlike in this proceeding, the plaintiff in *In re Friedman's* brought the claims in the alternative. The Bankruptcy Court found "the Trustee is permitted to pursue alternative theories" and concluded the claims were not arbitrable.[116]

While the Court agrees that as a general rule claims for breach of contract and fraudulent transfer are not mutually exclusive, as applied in this proceeding, they are. It is not credible that Defendants or Debtor genuinely believed that any money would be repaid to Debtor on account of the Imeson Invoices or the Elkhorn Invoices under the circumstances presented at Trial. The Court cannot overlook or ignore the substantial evidence demonstrating that the transactions had no substance at a time Debtor was engaged in fraudulent financial activity.[117] The evidence at Trial demonstrated that Elkhorn signed the factoring agreement in 2017 when: (i) Debtor was insolvent, (ii) Elkhorn owned a mine that had not been operating for a number of years and was a "development project,"[118] (iii) Elkhorn owed Black Diamond Holdings (an entity with whom Debtor also had a factoring relationship and was owed money) almost $14,000,000,[119] and (iv)

[113] *In re Friedman's, Inc.*, 372 B.R. at 535.
[114] *Id.* at 545.
[115] *Id.* at 546 (first citing *Brookhaven Landscape & Grading Co., Inc. v. J.F. Barton Contracting Co.*, 676 F.2d 516, 523 (11th Cir. 1982); and then citing *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 397 (7th Cir. 2003)).
[116] *Id.*
[117] *See supra* note 36.
[118] Trial Tr. vol. 1, 148 (Doc. No. 153).
[119] Pl.'s Ex. 51 at 20 (Doc. No. 130-51).

Debtor was falsifying aging reports.[120] Despite this, Trustee takes two inconsistent positions on the identical transactions, namely that each invoice: (a) was supported by adequate consideration (the purchased invoices had value), and (b) lacked reasonably equivalent value (the purchased invoices had no value). Trustee cannot have it both ways, [121] and the Court's job is to ascertain the truth and render a just determination.

Furthermore, if Trustee's argument were to stand as to Elkhorn, then not only would Trustee lose on breach of contract because the Elkhorn Agreement was usurious under Florida law, he would only recover the one unexplained transfer for $49,970 because the other transactions he is seeking to avoid and recover as fraudulent transfers would be supported by the "value" of the Elkhorn Invoices Debtor purchased – which is likely why Trustee did not point out the correlation between the transfers and the invoices at Trial.

It is Not Clear Error to Direct Enforcement of Judgment to State Courts

The Court did not retain jurisdiction to issue post-judgment enforcement orders or writs and directed enforcement to the appropriate state court. Trustee argues this ignores his rights, citing to 28 U.S.C. § 1963. The cited statute deals with registration of judgments entered by federal courts. The Final Judgment does not limit Trustee's rights to register the Final Judgment, nor does it limit Trustee's ability to pursue any available remedies – it simply requires Trustee to proceed where Defendants or their assets are located, which is wholly logical and appropriate. Judgments are typically registered and recorded where the judgment defendant and or its assets are located so that a judgment lien can be perfected and executed upon. The execution on a registered judgment

[120] Pl.'s Ex. 51 at 32-36 (Doc. No. 130-51).

[121] Parties are entitled to plead theories that are inconsistent; however, a party cannot recover on inconsistent theories. *See* Fed. R. Bankr. P. 7008; Fed. R. Civ. P. 8; *Brookhaven Landscape & Grading Co.*, 676 F.2d at 523 (citation omitted) (first citing Fed. R. Civ. P. 8(e)(2); and then citing *Fredonia Broad. Corp. v. RCA Corp.*, 481 F.2d 781, 801 (5th Cir. 1973)) ("Litigants in federal court may pursue alternative theories of recovery, regardless of their consistency. A party may not, however, recover separately on inconsistent theories when one theory precludes the other or is mutually exclusive of the other.").

is then pursued under the procedures of the state where the judgment is registered.[122] Here, Defendants are located in Montana and Colorado.

The Court does not believe there was any clear error in directing enforcement of the Final Judgment to the appropriate state courts. Therefore, the Court will not reconsider the Final Judgment on this basis.

Clarification Regarding Statements Made After the Oral Ruling

On November 28, 2023, after the Court concluded its oral ruling, the Court expressed its hope that the parties would be able to limit the discovery and issues to be tried in the Rackwise Adversary and the Black Diamond Adversary based on the ruling in this proceeding. However, the Court was not requiring the parties to do so and there was no pending motion asking for such relief. To the extent Trustee or Defendants take the position that the scope of discovery or claims to be prosecuted in the Rackwise Adversary or the Black Diamond Adversary should be limited based on the ruling in this proceeding, a motion should be presented for the Court's consideration. Unless and until such a motion is filed and a ruling made, the Court has not pre-determined the scope of discovery or claims that can proceed and clarifies its statements accordingly.

The Final Judgment Does Not Result in Manifest Injustice

Trustee argues that the Final Judgment results in manifest injustice if the Court's findings and Final Judgment were to frame "the balance of those proceedings," referring to the related Rackwise Adversary and the Black Diamond Adversary. Trustee argues that the Court's finding regarding the enforceability of the factoring agreements in this proceeding will result in a significantly smaller recovery in the Rackwise Adversary and the Black Diamond Adversary.

[122] Federal Rule of Civil Procedure 69, which is made applicable to this proceeding by Federal Rule of Bankruptcy Procedure 7069, provides that the procedure to execute on a money judgment must accord with the procedure of the state where the court is located.

However, the possibility that Trustee may recover less in the referenced actions as a result of findings made in this proceeding does not constitute manifest injustice as contemplated in Rule 59. Therefore, the Court will not reconsider the Final Judgment on this basis either.

CONCLUSION

The Court does not find any clear error in ruling that Trustee may only recover on those transfers avoided as constructively fraudulent transfers (Counts VI through IX) as awarded in the Final Judgment. In addition, the Court finds the Final Judgment does not result in manifest injustice. Because Trustee fails to state a basis for reconsideration, it is

ORDERED:

1. The Motion for Reconsideration (Doc. No. 172) is **DENIED**.

# # #

Attorney Esther A. McKean is directed to serve a copy of this Order on interested parties who do not receive service by CM/ECF and file a proof of service within three days of entry of this Order.

COMPOSITE EXHIBIT

COUNT I – BREACH OF CONTRACT
(Elkhorn)

Invoice Date and Number	Invoice Face Amount	Date and Amount Debtor "Advanced" to Defendant	Interest Sought (Face Amount Less Advance Amount)	Usurious Interest Under Florida Law[1]
2/14/2017 Invoice 6170	$19,000	2/14/2017 $9,470	Interest: $9,530 ≈50%	Yes
3/17/2017 Invoice 6175	$35,000	3/17/2017 $24,970	Interest: $10,030 ≈29%	Yes
7/21/2017 Invoice 6176	$96,362.50	$0	N/A	N/A
7/21/2017 Invoice 6177	$92,950	$0	N/A	N/A
7/21/2017 Invoice 6178	$74,412	$0	N/A	N/A

[1] Fla. Stat. § 687.02.

COUNT II – BREACH OF CONTRACT
(Imeson)

Invoice Date and Number	Invoice Face Amount (Damages Sought)	Date and Amount Debtor "Advanced" to Defendant	Interest Sought (Face Amount Less Advance Amount)	Usurious Interest Under Colorado Law[1]
5/3/2016 Invoice 7241	$25,000	5/3/2016 $12,470	Interest: $12,530 ≈50%	Yes
4/13/2018 Invoice 2640	$20,000	4/13/2018 $15,000	Interest: $5,000 25%	No

[1] Colo. Rev. Stat. § 5-12-103.

COUNT VII – FOUR-YEAR TRANSFERS FROM DEBTOR TO ELKHORN[1]

Transferor	Transferee	Date of Transfer and Amount Transferred	Transfer Within 4 Years of Petition Date	Debtor Insolvent	Reasonably Equivalent Value from Defendant to Debtor[2]	Damages Sought
Debtor	Elkhorn	8/13/2015 $49,970	Yes	Yes	No	$49,970
Debtor	Elkhorn	1/13/2017 $39,970	Yes	Yes	No Invoice 9600	$39,970
Debtor	Elkhorn	1/26/2017 $31,970	Yes	Yes	No Invoice 6158	$31,970
Debtor	Elkhorn	1/31/2017 $12,470	Yes	Yes	No Invoice 6162	$12,470
Debtor	Elkhorn	2/1/2017 $12,470	Yes	Yes	No Invoice 6165	$12,470
Debtor	Elkhorn	2/6/2017 $7,470	Yes	Yes	No Invoice 6168	$7,470
Debtor	Elkhorn	2/7/2017 $23,970	Yes	Yes	No Invoice 6169	$23,970
Debtor	Elkhorn	2/14/2017 $9,470	Yes	Yes	No Invoice 6170	$9,470 Overlaps with Count I
Debtor	Elkhorn	3/17/2017 $24,970	Yes	Yes	No Invoice 6175	$24,970 Overlaps with Count I
Debtor	Elkhorn	4/13/2017 $37,470	Yes	Yes	Yes Repaid $34,500 on 4/18/2017 and $3,000 on 4/19/2017	$0

[1] Pl.'s. Ex. 61 (Doc. No. 130-61); Defs.' Ex. 28 (Doc. No. 138-29); Defs.' Ex. 29 (Doc. No. 138-30).

[2] As the Court concluded in this Order at pages 8, 12, and 19, Debtor did not receive reasonably equivalent value in exchange for factoring the Elkhorn Invoices, nor in exchange for the other transfers to Elkhorn.

COUNT IX – FOUR-YEAR TRANSFERS FROM DEBTOR TO IMESON[1]

Transferor	Transferee	Date of Transfer and Amount Transferred	Transfer Within 4 Years of Petition Date	Debtor Insolvent	Reasonably Equivalent Value from Defendant to Debtor[2]	Damages Sought
Debtor	Imeson	10/30/2015 $74,970	Yes	Yes	Yes Repaid 11/4/2015	$0
Debtor	Imeson	12/30/2015 $49,970	Yes	Yes	Yes Repaid 1/26/2016	$0
Debtor	Imeson	5/3/2016 $12,470	Yes	Yes	No Invoice 7241	$12,470 Overlaps with Count II
Debtor	Imeson	11/22/2016 $4,000	Yes	Yes	No	$4,000
Debtor	Imeson	11/23/2016 $1,000	Yes	Yes	No	$1,000
Debtor	Imeson	12/1/2016 $212,057.95	Yes	Yes	No	$212,057.95
Debtor	Imeson	1/3/2017 $26,201.47	Yes	Yes	No	$26,201.47
Debtor	Imeson	2/21/2017 $13,596.49	Yes	Yes	No	$13,596.49
Debtor	Imeson	2/23/2017 $99,720.00	Yes	Yes	No	$99,720.00
Debtor	Imeson	3/7/2017 $3,700	Yes	Yes	No	$3,700
Debtor	Imeson	9/7/2017 $23,500	Yes	Yes	Yes Repaid 9/8/2017	$0
Debtor	Imeson	4/13/2018 $15,000	Yes	Yes	No Invoice 2640	$15,000 Overlaps with Count II

[1] Pl's. Ex. 63 (Doc. No. 130-63).

[2] As the Court concluded in this Order at pages 8, 9, and 10, Debtor did not receive reasonably equivalent value in exchange for factoring the Imeson Invoices, nor in exchange for the other transfers to Imeson.