SO ORDERED.

SIGNED this 14 day of April, 2005.

Dale L. Somers
Dale L. Somers
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In Re:	
JONES STORAGE AND MOVING, INC.,	**CASE NO. 00-14862**
	CHAPTER 7
DEBTOR.	
J. MICHAEL MORRIS, Trustee,	
PLAINTIFF,	
v.	**ADV. NO. 04-5106**
EMPRISE BANK,	
DEFENDANT.	

MEMORANDUM AND ORDER GRANTING
DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

This is an adversary proceeding by the Trustee against defendant Emprise Bank pursuant to 11

U.S.C. § 550.[1] The plaintiff Trustee, J. Michael Morris, appears by Klenda, Mitchell, Austerman & Zuercker, L.L.C.. Defendant, Emprise Bank (Bank), appears by William B. Sorensen, Jr., Morris, Morris, Laing, Evans, Brock & Kennedy, Chartered. There are no other appearances.

Findings of Fact.

The Trustee commenced this action by filing an adversary complaint on May 7, 2004. The complaint alleged that within 90 days of filing of the bankruptcy of Jones Storage and Moving, Inc., Case No. 00-14862–7, the Debtor paid the defendant Bank $27,009.86 on behalf of Richard D. Jones; that the transfer to the Bank had been avoided by an order entered in Adversary No. 04–5064, and that the Trustee could recover the avoided transfer from the defendant Bank pursuant to section 550. This is a core proceeding over which the Court has subject matter jurisdiction.[2] The parties do not challenge personal jurisdiction or venue.

The Bank filed a motion to dismiss for failure to state a claim upon which relief can be granted.[3] The issues have been fully briefed, and the Court is ready to rule.

The facts are uncontroverted. This voluntary Chapter 7 bankruptcy was filed on December 8, 2000. J. Michael Morris was appointed interim trustee; subsequently, Mr. Morris became the Trustee. Prepetition, on May 14, 1999, Richard D. Jones (Jones), the sole shareholder and officer of the Debtor, entered into a Home Equity Line of Credit Agreement with the Bank. Jones borrowed

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[1] Future references in the text to the Bankruptcy Code shall be to section number only.

[2] 28 U.S.C.A. §157(b)(2)(F); 28 U.S.C.A. §1334.

[3] The Bank's motion was brought pursuant to Fed. R. Civ. P. 12 (b)(6), Bankr. R 7012, and D. Kan. LBR 7012.1.

$48,000 from the Bank pursuant to the line of credit by writing checks made payable to the Debtor. Within one year of the filing of the bankruptcy, the Debtor transferred $43,709.86 to the Bank in payment of Jones's obligation.

On June 12, 2002, the Trustee filed Adversary No. 02-5150 (the 548 Adversary) against the Bank under section 548, seeking to recover the $43,709.86 as fraudulent transfers. Bank defended the action on various grounds, including the contention that it was not liable under section 548 because the Debtor received a reasonably equivalent value. At the trial on February 17, 2004, the Trustee, having reviewed the case law on indirect benefit under section 548, agreed. The Trustee announced that he had settled the matter indirectly with Jones and that he would be dismissing the action against the Bank. The Bank agreed to the dismissal, and an order was entered on March 1, 2004 dismissing the 548 Adversary.

The two year statute of limitations established by section 546(a) for the bringing of a preference action under section 547 expired in December 2002, during the pendency of the 548 Adversary. Nevertheless, on March 1, 2004, the Trustee filed Adversary No. 04–5064 (the Jones Adversary) against Jones, but not the Bank, seeking to avoid allegedly preferential transfers to the Bank made during the 90 day period prior to the bankruptcy filing for the benefit of Jones in the amount of $27,090.86.[4] Three days later, on March 4, 2004, an Agreed Order Resolving Adversary Action was entered in the Jones Adversary. The Trustee's section 547 complaint was granted, and Jones agreed to

[4] Even though Mr. Jones was an insider, the Trustee did not allege that all transfers made by the Debtor to the Bank in payment of the home equity line within one year of filing were preferential.

a judgment avoiding the transfers to the Bank in the amount of $27,009.86.[5] On May 7, 2004, the Trustee commenced this adversary proceeding (the 550 Adversary) against the Bank alleging a right to recover the $27,009.86 from the Bank under section 550 based upon the avoidance judgment entered in the Jones Adversary.

In its motion to dismiss, the Bank argues that the requirement of section 550 that the recovery against a transferee be based upon an avoided transfer is not satisfied. The Bank contends that the stipulated avoidance judgment entered against Jones in the Jones Adversary is not binding on the Bank, which was not a party to that action, and further that any avoidance claim under section 547 against the Bank is time-barred under section 546(a). The Trustee responds that the judgment against Jones in the Jones Adversary determining that the transfers in issue were preferential is a sufficient basis for the Trustee to satisfy the avoided transfer prerequisite to recovery against an initial transferee under section 550.

Analysis and Conclusions of Law.

The Trustee contends that the $27,009.86 paid by the Debtor to the Bank within 90 days prior to the filing of the bankruptcy was preferential and may be recovered from the Bank under section 550. Section 547 defines a preference as a transfer of an interest of the debtor in property (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt; (3) made while the debtor was insolvent; (4) made on or within 90 days before the date of filing of the petition (or between 90 days and one year before the date of filing of petition if the creditor at the time of the transfer was an insider);

[5] The Trustee did not seek and was not granted a monetary judgment against defendant Jones.

(5) that enabled the creditor to receive more than the creditor would receive if the case were under chapter 7, the transfer had not been made, and the creditor received payment of the debt to the extent provided by the Bankruptcy Code. Section 550 provides in relevant part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 547 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from –
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> (2) any immediate or mediate transferee of such initial transferee.

To recover under section 550 in reliance upon a preferential transfer under section 547, the Trustee must establish two elements: (1) That a transfer has been avoided under section 547; and (2) that the person from whom such transferred property is to be recovered is the initial transferee, the party benefitted, or an immediate or mediate transferee of such initial transferee. In this case, using section 547 and section 550 terminology, Jones was a creditor of the Debtor and the party who benefitted by the transfer. The Bank was the initial transferee.

A. Is the Avoidance Judgment entered in the Jones Adversary Res Judicata?

The Trustee, to satisfy the first element of his burden under section 550, relies on the agreed judgment in the Jones Adversary and asserts that it is a binding upon the Bank in this proceeding. The Trustee is therefore invoking the doctrine of issue or claim preclusion. "The fundamental policies underlying the doctrine of res judicata (or claim preclusion) are finality, judicial economy, preventing repetitive litigation and forum-shopping, and the 'interest in bringing litigation to an end.'"[6] Res judicata

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[6] *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1168 (10th Cir. 2000) quoting *Nwoson v. General Mills Restaurants, Inc.*, 124 F.3d 1255, 1258 (10th Cir. 1997).

may have two effects: (1) Foreclosing any litigation of matters that never have been litigated, because of a determination that they should have been litigated and advanced in an earlier suit; and (2) foreclosing relitigation of matters that have once been litigated.[7] According to the doctrine of issue preclusion as applied in the second sense, when "an issue of ultimate fact has been once determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."[8] In the 10th Circuit, preclusion requires the showing of four elements as follows:

> (1) the issue previously decided is idential with the one presented in the action in question; (2) the prior action has been fully adjudicated on the merits; (3) the party against whom the doctrine is invoked was a party, or in privity with a party, to the prior adjudication; and (4) the party against whom the doctrine is raised had a full and fair opportunity to litigate the issue in the prior action.[9]

The second element reflects the "basic premise of preclusion . . . that parties to a prior action are bound and nonparties are not bound."[10] The presumption that nonparties are not bound "draws from the due process right to be heard."[11] With respect to defendants, designation as a party in the prior litigation, compliance with procedures designed to give notice of the action, and a basis for personal

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[7] 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4002 (2d ed. 2002).

[8] *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093 (10th Cir. 2003) quoting *United States v. Botefahr*, 309 F.3d 1263, 1282 (10th Cir. 2002).

[9] *Id.*; *see also Plotner v. AT&T Corp.*, 224 F.3d at 1168.

[10] 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4449 (2d ed. 2002).

[11] *Id.*

jurisdiction are the fundamental requirements for becoming a party.[12]

Limited exceptions to the rule that nonparties are not bound have been expressed by expanding the preclusive effect to persons "in privity" with the party to the prior action. "There is no definition of 'privity' which can be automatically applied in all cases involving the doctrines of Res judicata and collateral estoppel."[13] "The most direct basis for applying preclusion against a nonparty rests on actual participation in prior litigation."[14] To be precluded, the nonparty must have had adequate control of the litigation and must have had a sufficient interest in the result.[15] In addition, a person whose interest was represented by one having authority to represent him is bound by a judgment, although he was not formally a party.[16] Likewise, successive representatives of the same interest are bound by judgment as to which their predecessors were parties.[17] Generally, the party bound in the second suit by the prior judgment must be the same "person whose interest, in substance if not formally, was at stake in the prior litigation."[18]

In this case, the elements of collateral estoppel are not satisfied. The Bank was not a party to

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[12] *Id*.

[13] *St. Louis Baptist Temple, Inc. v. Fed. Deposit Ins. Corp*., 605 F.2d 1169, 1174 (10th Cir. 1979).

[14] 18 Charles Alan Wright, Arthur R. Miller, & Edward H. Cooper, *Federal Practice and Procedure* § 4451 (2d ed. 2002).

[15] *Id*.

[16] *St. Louis Baptist Temple, Inc.*, 605 F.2d at 1176, quoting 1 B Moore's Federal Practice, § 0.411(1) (2nd Ed. 1974).

[17] *Id.*

[18] *Id.*

the Jones Adversary proceeding. The Bank asserts that it was not in privity with Jones. The Trustee agrees that under the traditional definition, "privity" does not exist between the Bank and Jones.[19] The Trustee's only argument in support of an expanded definition of privity is the assertion that the Bank should nevertheless be bound because the Bank's interests in the 547 Adversary were adequately represented by Jones.[20] The Court rejects this argument. There is no evidence that the Bank had any contact with Jones or any control over the litigation. Although Jones may have had a full and fair opportunity to litigate whether the transfer was avoidable under section 547, in fact, Jones did not fully litigate the issue, as he elected to waive his obvious statute of limitations defense. Jones did not represent the interests of the Bank, which would have urged the assertion of the statute of limitations defense. There was no relationship between Jones and the Bank sufficient to hold that the judgment against Jones is binding upon the Bank.

Case law supports the Court's analysis. The Bank cites two cases,[21] which, although not directly addressing the issue presented here, do generally support its position. The Court's research located *Thompson v. Jonovich (In re Food & Fiber Prot., LTD.)*, [22] where the court was presented

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[19] Trustee's Supplemental Brief on Issue of Res Judicata, Doc. No. 32 at 3.

[20] *Id.*

[21] *Sims v. DeArmond (In re Lendvest Mortgage, Inc.)*, 42 F.3d 1181 (9th Cir. 1994); *Marlow v. United States (In re The Julien Co., Inc.)*, 1992 WL 677884 (Bankr. W.D. Tenn. 1992) (stating that the declaratory judgment of avoidance sought by the Trustee, if granted, would not be binding on shareholders for purposes of section 550, because they were not parties to the present action).

[22] 168 B.R. 408 (Bankr. D. Ariz. 1994); *see also In re Downs*, 205 B.R. 93 (Bankr. N.D. Ohio 1996) (holding Chapter 7 debtor–wife, who was not a party to trustee's prior adversary proceeding to avoid deed transferring debtors' home to a relative, was not bound by stipulated

with a situation more similar to this case. Prepetition, Jonovich, the Debtor's president, director, and sole shareholder, had arranged with Stephens that Stephens would lend money to Jonovich and Jonovich would in turn lend the money to the debtor for business purposes. Within 90 days prepetition, the Debtor paid Jonovich the amount owed Stephens, and Jonovich transferred the payment to Stephens. The Trustee brought a preference action against Jonovich, the debtor, and Stephens alleging that the payment from the debtor to Jonovich could be avoided as a preference and that the payment from Jonovich to Stephens was recoverable under section 550. Jonovich did not answer, and a default judgment was entered on the claim of preference. Jonovich then filed personal bankruptcy. With respect to the claim under section 550 against Stephens, the trustee argued that he did not need to prove that the transfer from the debtor to Jonovich was a preference because this had already been determined by virtue of the default judgment. The court rejected this contention, reasoning as follows:

> The application of the Trustee's rule could lead to anomalous and unfair results. Suppose, for example, the following: A trustee sues a non-insider initial transferee and also its immediate transferee to recover a preference. The initial non-insider defendant defaults, thereby "avoiding" the transaction. Under this Trustee's theory, the immediate transferee is now bound, regardless of the facts. Assume, however, that the hypothetical transfer took place on the ninety-first day prior to the bankruptcy, requiring, as a matter of law, the court to dismiss the complaint. If the trustee were able to rely conclusively upon the default and also establish the unavailability of the "good faith" defense of Section 550(b)(1) for the immediate transferee, the result would be a judgment against the immediate transferee that would require the immediate transferee to pay money for a transfer that was clearly not avoidable. That risk, of being deprived of all lawful defenses to the default of another, is presented to J.S. Stephens in this case if the

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judgment against debtor-husband in that proceeding, and therefore judgment did not have res judicata effect as to trustee's subsequent objection to debtor-wife's claimed homestead exemption).

> Trustee's theory were to be adopted.
>
> The court rejects this theory as unsupported by Rule 55,...., Rule 7055, Rules of Bkrtcy. Proc., or other applicable law. Since Jonovich's default did not involve J.S. Stephens, the Trustee must establish that it is proper to avoid the transfer from the Debtor to Jonovich, then establish that J.S. Stephens as a subsequent recipient of the money the Debtor paid Jonovich, is a "transferee" from whom payment may be recovered under Section a 550(a), subsections (1) or (2).[23]

This Court finds the foregoing reasoning persuasive. In general, a prior judgment is res judicata only when the party in the current action was a party in the prior action. When faced with the issue of expanding res judicata based upon "privity," the relationship between the prior and present defendants and the nature of the prior judgment must be examined to determine whether res judicata is appropriate. The Court has no hesitation in holding that res judicata does not apply in this case. It cannot be said that Jones so represented the interests of the Bank in the 547 Adversary that the Bank should be bound by the consent judgment agreed to by Jones. To hold that res judicata applies in this circumstance would deprive the Bank of its right to defend the claim against it and would open the door to substantial abuse. As pointed out by the Bank whenever multiple parties are involved in a transaction voidable under the Code, the trustee could select one party, obtain a stipulated avoidance judgment against that party (perhaps with an agreement not to collect the judgment against the cooperating party), then seek to collect the balance from the other parties under section 550, irrespective of the defenses the parties might have had to the avoidance in the first place. The Court sustains the Bank's position that the Trustee may not rely upon the stipulated avoidance judgment against Jones in the Jones

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[23] *Id*., 168 B.R. at 416.

Adversary to satisfy his burden under section 550 to establish that the transfer by the Debtor of the $27,009.86 has been avoided under section 547.

B. Is the Trustee's claim of preference against the Bank barred by the statute of limitations?

The Court's holding that the Trustee may not rely upon the judgment in the Jones Adversary does not, however, end the matter. The Court must also determine whether the Trustee may prevail even when required to litigate against the Bank the avoidability of the transferor in issue. In *In re Food & Fibre Prot.*, the court, after finding that the prior default judgment was not binding upon Stephens, then applied the elements of a preference to the transfer from the debtor to Jonovich and held that they were satisfied. In this case, likewise, the Court must determine whether the Trustee has a claim against the Bank if the Trustee cannot rely upon the Jones Adversary judgment.

In order to recover under section 550, the Trustee must establish that the transfer to the Bank was avoidable under section 547 and that the Bank was a transferee of the funds. In this case, the 2 year statute of limitations of section 546(a), which governs the Trustee's bringing of a preference action, ran in December 2002, long before the filing of the section 550 Adversary. The Bank, as a defendant to the Trustee's claim that the Debtor's payments to the Bank of $27,009.86 within 90 days of filing for bankruptcy relief were preferential, therefore has a statute of limitations defense.

To avoid a holding that the Bank can assert a statute of limitations defense, the Trustee argues that Jones was the only party against whom a section 547 action could be brought and that only he was a proper party to raise the statute of limitations defense. The Trustee's primary authorities are *Am. Env't Services Co., Inc. v. Blue Cross/Blue Shield of the Rochester Area (In re Am. Env't Services*

Co., Inc.)[24] and *Cox v. Jefferson-Pilot Life Insurance Co. (In re Env't Reductions, Inc.)*.[25] In *In re Am. Env't Services*, the Chapter 7 trustee brought an adversary proceeding to recover allegedly preferential transfers to its employees' group health care insurer. Blue Cross filed a motion for summary judgment claiming that two necessary elements of section 547 were not present because there was no debtor-creditor relationship between the debtor and Blue Cross and the monies paid to Blue Cross were not property of the debtor's estate. The facts indicated that the insurance coverage was pursuant to individual contracts between each of the employees and that the debtor acted as agent for his employees to remit the premiums required by the respective contracts. The trustee argued that the sole issue was whether Blue Cross was a creditor of the debtor within the meaning of section 547(b)(1). The court held that Blue Cross was a conduit, not a creditor, and on this basis granted summary judgment without reaching the additional issue whether the payments were property of the estate. In so holding, the court did not discuss whether the defendant in a preference action must be a creditor; the court simply addressed the issue presented to it by the parties.

In re Env't Waste Reductions is similar. In that case, the court followed *Am. Env't Services* and held that prepetition payments by the debtor to an insurer, representing monthly premiums for health insurance benefits for the debtor's employees, were not recoverable as preferences, since the insurer was not a creditor and the payments were not made on account of an antecedent debt. The court noted that nothing in the insurance contract provided the insurer with the right to assert a right to payment against the debtor, either on behalf of employees or in the insurer's own right. Again, the case does not

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[24] 164 B.R. 462 (Bankr.W.D. N.Y.1994).

[25] 241 B.R. 918 (Bankr. N.D. Ga. 1999).

give rise to a principle of law that the trustee may bring a preference action only against a creditor of the debtor. The Court finds that the holdings in the foregoing cases, to the extent that they may hold that a preference defendant must be a creditor, should be limited to the unique situation where a debtor pays insurance premiums on behalf of its employees.

The Trustee also cites *Weinman v. Simons (In re Slack-Horner Foundries Co.)*[26] in support of its argument that if he had sought to avoid the transfer in an action naming only the Bank as the defendant and not joining Jones as a codefendant, the Bank could have defended on the ground that it was not subject to avoidance because it was not a creditor.[27] In *Slack-Horner* the debtor's interest in real property was transferred to the state prepetition in a tax lien sale at which Simons purchased the property. The state was the initial transferee and defendant Simons was an immediate transferee the initial transferee. The trustee alleged that the transfer was fraudulent under section 558 (a)(2)(A)-(B)(I) and sought to recover the value of the property from Simmons under section 550, without making any attempt to have the transfer by the debtor to the state voided under section 558. The court held that in the absence of such an avoidance, the trustee had not demonstrated any basis for recovering the property from Simmons, the immediate transferee of the state. The decision clearly does not stand for the proposition that only a creditor may be defendant in an action to set aside a transfer under section 547.

Section 547 defines the elements of a preference. There is nothing in section 547 which defines

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[26] 971 F.2d 577 (10th Cir. 1993).

[27] Trustee's Response to Motion of Emprise Bank to Dismiss for Failure to State a Claim upon which Relief can be Granted, Doc. No. 21 at 10.

the proper defendant in a preference action. *Crafts Plus+, Inc. v. Foothill Capital Corp. (In re Crafts Plus+, Inc.)*[28] holds that a Chapter 7 trustee may bring an avoidance action against a non-creditor transferee, without naming as a party or bringing the proceeding against the creditor for whose benefit the transfer was made. In *Crafts Plus+* $5 million had been transferred by the debtor during the preference period to Foothill for the benefit of a third party. The estate, without having first avoided the transfer as preferential, brought an adversary action pursuant to sections 547 and 550 against Foothill, who was never a creditor of the debtor. The transferee Foothill moved for summary judgment. The court first rejected Foothill's claim that it could not be the subject of the action because it was not a creditor of the debtor. The court found that a plain reading of sections 547(b) and 550 "require neither that the transfer, in order to be avoided, be only *to* a creditor, nor that the avoided transfer be recovered only from a creditor."[29] Next, the court determined that the trustee could establish the existence of the avoidance action as part of the recovery under section 550, or, stated differently, that a trustee can obtain a judicial determination avoiding a transfer without naming as a party the creditor for whose benefit the transfer was made.[30] The court thoroughly examined many preference actions, including the10th Circuit's opinion in *Slack-Horner*[31], cited to the Court by the Trustee in this case, and stated:

> Because of this transfer focus of §547, we conclude that there is no need for the transfer in this case to be avoided *as against* [the creditor who was benefitted by the transfer], and hence no need either to bring

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[28] 220 B.R. 331 (Bankr. N.D. Tex. 1998).

[29] *Id.*, 220 B.R. at 334.

[30] *Id.*, 220 B.R. at 335.

[31] *In re Slack-Horner Foundries Co.*, 971 F.2d at 577.

> an independent avoidance action against [the creditor] , or alternatively to name [the benefitted creditor] as a party to this litigation. While the targeted party in many cases is and will be the debtor's creditor (i.e. "the entity for whose benefit such transfer was made"), . . . we also find cases in which the initial transferee is the sole defendant. Such a reading comports with the transfer-oriented, almost declaratory nature of avoidance under section 547. While the avoidance and recovery process is conceptually bifurcated, both steps can be taken in the same proceeding, and nothing in the text of §§547 and 550 require the joinder of the "entity for whose benefit such transfer was made" for the purpose of *avoiding* the transfer. §550(a)(1) that expressly allows recovery against either the initial transferee or the preferred creditor.[32]

This Court adopts the reasoning of Crafts Plus+.

In this case, the Trustee therefore could have combined his claims under sections 547 and 550 against both Jones (the party benefitted) and the Bank (the immediate transferee), or could have proceeded under both sections against only the Bank or only Jones. In any event, in order to prevail on the section 547 claim, assuming that the defendants would not waive the statue of limitations defense, the action must have been commenced within two years of the filing of the bankruptcy. The Trustee failed to file a timely action. Rather, he filed an out of time action against Jones, obtained a consent judgment, and now proceeds to atempt to rely upon that judgment to enforce liability against the Bank. As stated above, this consent judgment in the Jones Adversary is not binding on the Bank. At this juncture, it is too late for the Trustee to commence an action under section 547 against the Bank, which can assert its own statute of limitations defense to the preference action.

For the foregoing reasons, the Trustee's complaint against the Bank fails to state a claim upon which relief may be granted. The Bank's motion is granted.

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[32] *Id*., 220 B.R. at 338.

The foregoing constitutes Findings of Fact and Conclusions of Law under Rule 7052 of the Federal Rules of Bankruptcy Procedure and Rule 52(a) of the Federal Rules of Civil Procedure. A judgment based on this ruling will be entered in a separate document as required by Federal Rule of Bankruptcy Procedure 9021 and Federal Rule of Civil Procedure 58.

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