The relief described hereinbelow is SO ORDERED.

SIGNED this 14th day of August, 2019.

Robert D. Berger
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re:

GENERATION RESOURCES HOLDING COMPANY, LLC,

Debtor.

Case No. 08-20957
Chapter 7

ERIC C. RAJALA, TRUSTEE FOR GENERATION RESOURCES HOLDING COMPANY, LLC,

Plaintiff,

v.

HUSCH BLACKWELL LLP,

Defendant.

Adv. No. 18-06016

ERIC C. RAJALA, TRUSTEE FOR GENERATION RESOURCES HOLDING COMPANY, LLC,

Plaintiff,

v.

SPENCER FANE LLP,

Defendant.

Adv. No. 18-06020

ORDER DENYING MOTIONS TO DISMISS

Plaintiff Eric Rajala is the Chapter 7 trustee for the bankruptcy estate of Generation Resources Holding Company, LLC ("**GRHC**"). The Trustee has filed adversary complaints against law firms Husch Blackwell LLP and Spencer Fane LLP (together, the "**Firms**") in which he seeks to recover approximately $2 million from the Firms under § 550 of the Bankruptcy Code.[1] This matter comes before the Court on the Firms' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6).[2]

The issue presented by the Firms' motions is whether § 550(a)(2) permits the Trustee to recover money from an entity who received the proceeds[3] of fraudulently-

[1] All statutory references in this order are to Title 11, United States Code (the "**Bankruptcy Code**").

[2] Adv. No. 18-06016, ECF 20; Adv. No. 18-06020, ECF 18.

[3] This order uses the term "proceeds" (which is not defined by the Bankruptcy Code) to mean "the value of an asset when converted into money." *See* ***proceeds***, *Garner's Modern English Usage* (4th ed. 2016).

transferred property, but to whom the property *itself* was never transferred. For the reasons stated below, the Firms' motions to dismiss will be denied.

The Trustee's allegations (simplified for purposes of this order)[4] are as follows: Three married couples (the "**Insiders**") formed GRHC in 2002 to pursue opportunities in wind-generated electricity. GRHC developed several wind-power projects, including one in western Pennsylvania called Lookout Windpower ("**Lookout**"). The Insiders then formed a new company called Lookout Windpower Holding Company ("**LWHC**") and transferred GRHC's interest in Lookout (the "**Lookout Interest**") to it, rendering GRHC insolvent. Next, LWHC sold Lookout to a subsidiary of Edison Mission Energy. GRHC filed for bankruptcy in 2008.

LWHC received $6,706,086.35 of the Lookout proceeds (the "**Proceeds**") in 2012. LWHC then transferred some of that money to the Firms: $1,343,750 to Husch Blackwell and $722,566 to Spencer Fane. However, in 2017, the United States District Court for the District of Kansas entered a consent judgment avoiding the transfer from GRHC to LWHC of the Lookout Interest.[5]

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[4] More detailed factual background can be found in *Rajala v. Gardner*, 709 F.3d 1031 (10th Cir. 2013); and *Rajala v. Gardner*, No. 09-2482-EFM, 2012 WL 1189773 (D. Kan. Apr. 9, 2012).

[5] The consent judgment, which does not specify the statutory predicate for avoiding the transfer, provides:

> **IT IS . . . ORDERED and ADJUDGED** that (1) GRHC transferred an interest in the Lookout wind project to defendant Lookout Windpower Holding Company, LLC, and that transfer is avoided, and (2) [the Trustee] shall recover the value of the transfer from defendant Lookout Windpower Holding Company, LLC, in the amount of

Citing § 550, the Trustee now seeks to recover the money LWHC transferred to the Firms for the benefit of GRHC's bankruptcy estate. Section 550(a) provides:

> Except as otherwise provided in this section, to the extent that a transfer is avoided . . . , 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.

For purposes of these motions to dismiss, the parties agree that LWHC is the "initial transferee," that the "property transferred" was the Lookout Interest (however defined),[6] and that the transfer of that interest from GRHC to LWHC has been "avoided" for purposes of § 550. The only issue presented here, then, is whether either Firm is an "immediate transferee" of LWHC under § 550(a)(2). The Firms argue that that term is limited to an entity to whom the fraudulently-transferred property *itself*—in this case, the Lookout Interest—was transferred.

> $9,941,448.00 with each party to bear their own costs and fees.

Rajala v. Gardner, No. 09-2482-EFM, ECF 432 (D. Kan. May 26, 2017). This Court approved the settlement between LWHC and the Trustee but noted that such settlement would not bind the Firms, who were not parties to it. *See* Case No. 08-20957, ECF 96.

[6] In his responses to the Firms' motions to dismiss, the Trustee defines the Lookout Interest not as an interest in Lookout per se, but rather as "[GRHC's] interest in being paid the Lookout developer fee and having its sunk costs reimbursed." Adv. No. 18-06016, ECF 22 at 4; Adv. No. 18-06020, ECF 20 at 4. The distinction is irrelevant for purposes of these motions, however, as the Lookout Interest was never transferred to the Firms under either definition.

The Trustee disagrees, arguing that the term includes an entity who, like each Firm, received the *proceeds* of fraudulently-transferred property.[7]

To support their argument, the Firms cite *In re Ruthaford*,[8] a 2015 decision from a Massachusetts bankruptcy court. In *Ruthaford*, a Chapter 7 trustee argued that transfers of real property from debtor Ruthaford to one Santosuosso (who subsequently sold the property to a good-faith buyer) were avoidable under § 544. The trustee sought to recover some of the proceeds of that property under § 550(a)(2) from two defendants—an attorney and a law firm—to whom the real property itself had never been transferred. The *Ruthaford* court held that the defendants were entitled to summary judgment, reasoning:

> Section 550(a) does not extend the right of recovery to the proceeds of the property transferred. Where the drafters of the Bankruptcy Code meant to include proceeds, they were clear about it. See 11 U.S.C. §§ 541(a)(6) (property of the estate includes proceeds of property of the estate) and 552(b)(1) (extending certain prepetition security interests to postpetition proceeds). I conclude . . . that § 550(a) permits a trustee to recover that property, or its value, only from transferees of that property.[9]

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[7] The Trustee also argues that the Firms' motions to dismiss are improper under Fed. R. Civ. P. 12(g) because the Firms previously moved for a more definite statement under Fed. R. Civ. P. 12(e). However, because Rule 12(g) would allow the Firms to raise the same argument in a motion for judgment on the pleadings, such that it would be harmless error to grant the motions under the current procedural posture of these cases, *see Albers v. Bd. of Cty. Comm'rs*, 771 F.3d 697, 702-04 (10th Cir. 2014), the Court will consider the Firms' motions on the merits.

[8] *Lassman v. Santosuosso (In re Ruthaford)*, No. 11-1340-FJB, 2015 WL 1510566, at *12 (Bankr. D. Mass. Mar. 30, 2015).

[9] *Id.* at *12. The Firms also cite *Bailey v. Big Sky Motors, Ltd. (In re Ogden)*, 314 F.3d 1190, 1202 (10th Cir. 2002), apparently for the proposition that the "dominion and control" test applies. *See* Case No. 18-06016, ECF 21 at 7; Case No. 18-06020, ECF 19 at 6. "Under that test, 'the minimum requirement of status as a transferee

This Court respectfully disagrees with *Ruthaford*. The absence of the word "proceeds" from § 550(a) is not dispositive, because § 550(a) authorizes the recovery of either fraudulently-transferred property *or the value* of that property. This means that if LWHC had retained the Proceeds, the Trustee could have recovered them from LWHC under § 550(a)(1)—even though § 550(a) does not specifically mention "proceeds"—because the Proceeds represent the value of the Lookout Interest.[10]

Here, the plain language of § 550(a) allows the Trustee to recover the value of the Lookout Interest from "any immediate or mediate transferee" of LWHC without any reference to, or limitation on, *what* property LWHC transferred away. This Court's inquiry ends with the plain language of the statute. *See United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). As entities to whom LWHC has transferred portions of the Proceeds, the Firms are immediate transferees of LWHC under § 550(a)(2).[11] For this reason, the Firms' motions to dismiss will be denied.

[under § 550] is dominion over the money or other asset, the right to put the money towards one's own purposes.'" *Id.* (quoting *Bonded Fin. Servs., Inc. v. European Am. Bank*, 838 F.2d 890, 893 (7th Cir. 1988) (Easterbrook, J.)) (alteration in original). However, that test does not apply here, because it is uncontroverted that (1) LWHC had dominion and control over the Proceeds when it transferred part of them to the Firms, and (2) the Firms have dominion and control over their relative portions of the Proceeds now.

[10] At the hearing, Husch Blackwell argued that sale proceeds do not necessarily represent the value of the property sold. While that is certainly true, no one is arguing here that the Proceeds did not represent the value of the Lookout Interest. Rather, the point is that § 550(a)—by including "value"—authorizes the recovery of money from the Firms.

[11] At the hearing, Spencer Fane argued that this interpretation would render each law firm potentially liable for the entire value of the Lookout Interest as opposed to the portion of the Proceeds they each received. This Court disagrees, because the

However, the Court also notes that the purpose of § 550 is "to restore the estate to the financial condition that would have existed had the transfer never occurred." *Rodriguez v. Drive Fin. Servs. (In re Trout)*, 609 F.3d 1106, 1112 (10th Cir. 2010). Under the Firms' interpretation of § 550, the Proceeds are immune from recovery so long as LWHC transferred them to *anyone*, whether for value or not, and whether in good or bad faith. The Firms' interpretation of § 550 thus conflicts—whereas the Trustee's interpretation is consonant—with the purpose of the statute.[12]

For these reasons, the Firms' motions to dismiss will be denied.

IT IS SO ORDERED.

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Lookout Interest can be represented as "x(Lookout Interest) + y(Lookout Interest) + z(Lookout Interest)," where x, y, and z are fractions that add up to one. If the money received by Husch Blackwell and Spencer Fane represents fractions "x" and "y," respectively, of the Proceeds (i.e., the ostensible value of the Lookout Interest, *cf.* note 9 *supra*), then the "value of the property" in the Trustee's § 550 actions against Husch Blackwell and Spencer Fane would be x(Proceeds) and y(Proceeds), respectively.

[12] While Spencer Fane argued at the hearing that to allow recovery of the proceeds of fraudulently-transferred property would unreasonably subject "anybody that got a dollar from that transfer" to liability under § 550(a), this Court disagrees, for two reasons. First, such transferees would (as Husch Blackwell conceded at the hearing) undeniably face liability under § 550(a) if the fraudulently-transferred property had been cash. Second, § 550(b) protects those transferees who take in good faith, for value, and without notice of the fraudulent transfer.

Spencer Fane's argument as to the different burdens of proof for § 550(a)(2) claims and UFTA claims is also unavailing, in the absence of any argument that such claims are mutually exclusive.