U.S. BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS

ENTERED

TAWANA C. MARSHALL, CLERK
THE DATE OF ENTRY IS
ON THE COURT'S DOCKET

The following constitutes the ruling of the court and has the force and effect therein described.

Signed April 22, 2010 **United States Bankruptcy Judge**

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION**

IN RE:	§	
	§	**Chapter 11**
MIRANT CORPORATION, ET AL.,	§	**CASE NO. 03-046590 (DML)**
	§	
Debtors.	§	**Jointly Administered**
	§	
	§	
MC ASSET RECOVERY LLC AS SUCCESSOR-IN-INTEREST TO MIRANT CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**ADV. NO. 05-04142**
	§	
COMMERZBANK AG, ET AL.,	§	
	§	
Defendants.	§	

**PROPOSED FINDINGS OF FACT
AND CONCLUSIONS OF LAW
WITH RESPECT TO DEFENDANTS' MOTION TO DISMISS
PLAINTIFF'S FIRST AMENDED COMPLAINT**

TO THE HONORABLE DISTRICT COURT:

The United States Bankruptcy Court submits its proposed findings of fact and conclusions of law with respect to the defendants' motion to dismiss this adversary proceeding pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure and Rule 7012(b) of the Federal Rules of Bankruptcy Procedure.

I. Procedural Background

A. Mirant's Complaint And Commerzbank's Motion To Withdraw The Reference

Mirant Corporation ("Mirant"), a chapter 11 debtor, initiated this adversary proceeding by filing its original complaint on July 13, 2005. In its complaint, Mirant sought to avoid as fraudulent transfers certain payments made by Mirant to the defendants prior to Mirant's petition in bankruptcy. Mirant invoked this court's jurisdiction pursuant to 28 U.S.C. § 1334. Its claims are core claims pursuant to 28 U.S.C. § 157(b)(2)(h).

Defendant Commerzbank AG ("Commerzbank")[1] responded to the complaint by moving the District Court to withdraw the reference of this adversary proceeding. In its motion, Commerzbank announced its intention to demand a jury trial, as well as its lack of consent to a jury trial in the bankruptcy court. Given these facts, Commerzbank insisted that withdrawal of the reference was mandated. Mirant responded by arguing that the reference should not be withdrawn because Commerzbank had waived its right to a jury trial pursuant to a contractual waiver provision.

[1] Commerzbank is a lender and the administrative agent for the following organizations: ABN AMRO Inc., Intesa San Paolo (formerly Banca Intesa), ING Bank, The Royal Bank of Scotland PLC, Credit Lyonnais, Danske Bank A/S, Australia and New Zealand Banking Group Limited, Barclays Bank, and BN Paribas.

In its order of March 29, 2007, the District Court[2] held that Mirant itself could not enforce the jury-trial waiver provision against Commerzbank but noted that it was possible that another party might attempt to enforce it. Accordingly, the District Court denied the motion to withdraw the reference without prejudice to Commerzbank's right to reurge it after the completion of all pre-trial proceedings. The District Court further held that if no other party to the waiver provision attempted to enforce it against Commerzbank, the motion to withdraw the reference would be granted. Since the date of the District Court's order, no other party has attempted to enforce the jury-trial waiver against Commerzbank.

B. MCAR'S Substitution As Plaintiff, Commerzbank's Motion To Dismiss, And The Court's Conversion Of Part Thereof To A Motion For Summary Judgment

On December 20, 2006, MC Asset Recovery, LLC ("MCAR"), a litigation entity created by Mirant's plan of reorganization, was substituted as plaintiff in place of Mirant. MCAR filed its First Amended Complaint (the "amended complaint") on October 8, 2007. Commerzbank moved to dismiss the amended complaint pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

In its motion, Commerzbank argued, among other things, that the court should dismiss MCAR's claims under section 544(b). Section 544(b) permits a trustee to "avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b) (2010). Commerzbank argued that the "applicable law" governing MCAR's claims was either New York Debtor and Creditor Law or section 18-2-22 of the

[2] References to the "District Court" or the "Court" are to the United States District Court for the Northern District of Texas, Fort Worth Division.

Official Code of Georgia, both of which, it said, patently negate MCAR's right of recovery. MCAR responded by saying that the applicable law in this case is either the Federal Debt Collection Procedures Act ("FDCPA") and/or the Uniform Fraudulent Transfer Act ("UFTA") as enacted by forty-one states, including the UFTA enacted by Georgia, which became effective on July 1, 2002.

In its argument in opposition to the motion to dismiss, MCAR acknowledged that if the court concluded that the FDCPA is not applicable law under section 544(b) and that section 18-2-22 of the Official Code of Georgia is the applicable law, its claims are barred. But, MCAR also argued that this court could not make a choice-of-law determination on the basis of the pleadings.

On December 19, 2008, this court handed down its Order Converting Part of Defendants' Motions to Dismiss to Motions for Summary Judgment. There, the court preliminarily concluded that (1) the FDCPA is not applicable law under section 544(b), (2) to the extent that Georgia law is the appropriate law under a choice-of-law analysis, section 18-2-22 of the Official Code of Georgia, not the Uniform Fraudulent Transfer Act, is the applicable law of Georgia, and (3) that MCAR could not rely upon the laws of forty-one states to state a claim under section 544(b).

The court agreed with MCAR, however, that it could not make a choice-of-law determination based upon the pleadings in this adversary proceeding, even as supplemented by extensive matters of record in the Mirant bankruptcy case. Because of the potentially dispositive nature of the court's ruling on choice of law, the court found that it would be consistent with judicial economy and the efficient administration of justice to convert the choice-of-law issue from a motion to dismiss under Rule 12(b)(6) to

a motion for summary judgment under Rule 56. The court effected that conversion by order of December 19, 2008.

The parties conducted significant discovery on the choice-of-law issue. Upon completion of that discovery, MCAR argued that the "applicable law" was New York Debtor and Creditor Law, not section 18-2-22 of the Official Code of Georgia.[3] Commerzbank now argues that the choice-of-law analysis points to Georgia and, hence, to section 18-2-22 of the Official Code of Georgia. The court heard oral argument on the motion for summary judgment on February 2, 2010.

II. Application Of The Procedures Set Forth In Rule 9033 Of The Federal Rules Of Bankruptcy Procedure To This Matter

The complex procedural history of this proceeding raises a question as to the type of relief that this court may enter in response to Commerzbank's motion to dismiss. That is, should this court enter an order granting or denying the motion (and thus subject the parties to the appellate procedures set forth in 28 U.S.C. § 158), or should it submit proposed findings of fact and conclusions of law to the District Court? Section 157 of Title 28 does not answer this question.

Given the District Court's ruling that, at the appropriate time and under the appropriate circumstances, it will grant a motion to withdraw the reference, this court believes that it is appropriate to submit to the District Court proposed findings of fact and conclusions of law with respect to the motions. The closest procedural corollary is found

[3] The defendants and the court agree that by urging the application of New York law in response to the court's order converting the choice-of-law issue to a motion for summary judgment, MCAR has not waived its argument that the FDCPA and Georgia's Uniform Fraudulent Transfer Act are the applicable law under section 544(b). *See* Order Granting Unopposed Motion for Clarification Regarding Draft Proposed Findings of Fact and Conclusions of Law with Respect to Defendants' Motions to Dismiss Plaintiff's First Amended Complaint (Dec. 24, 2008).

in section 157(c)(1) of Title 28. That section provides that "a bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11." 28 U.S.C. § 157(c)(1) (2010). In that proceeding, the bankruptcy judge must submit proposed findings of fact and conclusions of law to the District Court, with any final order or judgment to be entered by the District Judge after considering the proposed findings and conclusions and after reviewing de novo those matters as to which any party has timely and specifically objected. *Id.*

This adversary proceeding is a core proceeding, but, because of Commerzbank's demand for a jury trial and its lack of consent to trial in the bankruptcy court, this court questions its ability to enter a final order on a dispositive motion. Bankruptcy Rule 9029(b) permits the court to adopt procedures consistent with federal law and the rules of bankruptcy procedure when there is no controlling law. FED. R. BANKR. P. 9029(b). It is consistent with 28 U.S.C. § 157(c)(1), Bankruptcy Rule 9033 (which implements section 157(c)(1)), judicial economy, and the efficient administration of justice to submit to the District Court proposed findings of fact and conclusions of law with respect to the motions. So, this court adopts the procedures in Rule 9033 with respect to the motions before it.

III. Factual Background

A. The Power Island Project

Mirant owns and operates domestic and international energy assets and power companies. Mirant Asset Development and Procurement B.V. ("MADP") was an indirect, wholly-owned subsidiary of Mirant. In December 2000 MADP entered into a Master Equipment Purchase and Sale Agreement (the "Master Agreement") with General

Electric International, Inc. and General Electric Company (collectively, "GE") to acquire nine power islands. Power islands are power generation structures that contain multiple turbines and heat recovery devices. The power islands were to be used at electric generating project sites in Europe. Mirant executed and delivered to GE a guaranty in which it guaranteed the obligations of MADP to GE under the Master Agreement and certain related agreements.

The financing for the purchase of the power islands was accomplished via a series of off-balance-sheet transactions. First, an entity called European Power Island Procurement B.V. ("EPIP") was created to act as the owner of the power islands. EPIP was owned by Stitching European Power Island (the "Foundation"). EPIP and the Foundation were independent from Mirant and MADP.

Next, MADP entered into a bridge financing transaction with Westdeutsche LandesBank Girozentrale ("West LB"). The bridge financing was then refinanced through the "1.1 Billion Euro Power Island Acquisition Facilities," which consisted of two facilities. Facility I was a revolving facility and the source of funding for progress payments under the Master Agreement. Facility II was to be used only if Facility I was fully drawn or to fund certain early funding events. Commerzbank AG, ABN AMRO, Inc., Intesa San Paolo (formerly Banca Intesa), ING Bank, The Royal Bank of Scotland PLC, Credit Lyonnais, Danske Bank A/S, Australia and New Zealand Banking Group Limited, Barclays Bank PLC, and BNP Paribas (collectively, "Commerzbank") acted as lenders or investors with respect to the facilities.

On February 15, 2001, MADP and West LB entered into an agreement that assigned MADP's interest in the Master Agreement to West LB. Later, West LB and

EPIP entered into an agreement that assigned West LB's interest in the Master Agreement and certain other contracts to EPIP.

After MADP assigned its interest in the Master Agreement it no longer owned any rights in either the Master Agreement or the power islands. Nevertheless, MADP and EPIP entered into an agreement pursuant to which MADP would administer the acquisition and construction of the power islands in accordance with the terms of the Master Agreement. Additionally, MADP, EPIP, the Foundation and Commerzbank entered into certain participation agreements that required MADP to acquire the power islands from EPIP. In connection with the participation agreements, Mirant executed and delivered a guaranty dated May 25, 2001, in favor of Commerzbank, pursuant to which Mirant guaranteed all amounts payable by MADP under the various financing agreements.

According to the amended complaint, MADP had three options with respect to each power island: (a) it could purchase EPIP's interest in each power island and its related interest in the Master Agreement; (b) not later than six months prior to the scheduled shipment date for a given power island, it could remarket the power island and the related interest in the Master Agreement and pay EPIP an amount of up to approximately 89.9% of the project costs as well as remarketing proceeds; or (c) not later than three months prior to the shipment date for a given power island, it could enter into a five-year lease of the power island.

MADP chose none of these options, but instead terminated its rights with respect to all of the power islands. Nevertheless, Mirant, either directly or via certain subsidiaries, paid Commerzbank $E136,873,950 in connection with the power islands.

MCAR alleges that neither Mirant nor MADP received anything of value in return for the guaranty and payments made by Mirant. It further alleges that when the guaranty was delivered to Commerzbank and the funds described above were transferred, (a) Mirant was insolvent or was rendered insolvent by such transactions, (b) Mirant should have reasonably believed that it would incur debts beyond its ability to pay when due; and (c) Mirant was engaged or about to engage in business or transactions for which its remaining assets were unreasonably small.

B. Mirant's Bankruptcy, The Lawsuit, And The Creation Of MCAR

On July 14, 2003, Mirant and numerous affiliated entities filed voluntary petitions under chapter 11 of the Bankruptcy Code. On July 13, 2005, Mirant commenced this proceeding by filing a complaint alleging that the guaranty it delivered and the payments it made to Commerzbank were voidable as fraudulent transfers. Mirant's plan was confirmed on December 9, 2005. Pursuant to that plan, MCAR was created to pursue litigation for the benefit of Mirant's creditors and shareholders. On December 20, 2006, MCAR was substituted as plaintiff in this adversary proceeding. It filed its amended complaint on October 8, 2007. Commerzbank filed its motion to dismiss the amended complaint on December 17, 2007. This court converted part of the motion to dismiss (the choice-of-law issue) to a motion for partial summary judgment on December 19, 2008.

IV. Standards For The Motion To Dismiss And The Motion For Summary Judgment

A. Standards For The Motion To Dismiss

When considering a motion to dismiss under Rule 12(b)(6), a court is to construe the complaint charitably, accepting as true all well-pleaded factual allegations and drawing reasonable inferences from those facts in favor of the non-moving party. *Bell*

Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007). The factual allegations "must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted).

B. Standards For The Motion For Summary Judgment

Summary judgment is proper if "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(C). When reviewing a motion for summary judgment, the court views the facts and the inferences therefrom in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The movant bears the initial burden of stating the basis for its motion and identifying evidence that shows that there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the movant carries its burden, the non-movant must set forth specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

Here, Commerzbank moved to dismiss MCAR's claims under Rules 12(b)(1) and 12(b)(6); it did not move for summary judgment. The court converted the choice-of-law issue in Commerzbank's motion to dismiss to a motion for summary judgment. Even though Commerzbank did not voluntarily assume the status of movant under a motion for summary judgment, it still bears the burdens of a movant in the procedural context of this case.[4]

[4] Despite its allocation of the burden to Commerzbank, the court's proposed findings and conclusions with respect to the choice-of-law analysis would be the same even if MCAR bore the burden on this issue.

V. Discussion

A. First Proposed Conclusion: If Mirant's Creditors Have Been Paid In Full, MCAR Lacks Standing To Prosecute Claims Under 11 U.S.C. § 544(b)

Commerzbank contends that MCAR's claims must be dismissed pursuant to Rules 12(b)(1) and 12(b)(6) because creditors of Mirant were paid in full under its plan and, as such, MCAR has no standing to pursue fraudulent transfer claims on their behalf. Commerzbank's argument is based upon unusual facts.

In its plan of reorganization, Mirant provided that unsecured creditors would receive New Mirant stock and an interest in the recoveries of MCAR. Before Mirant confirmed its plan, Judge Michael Lynn conducted a lengthy valuation hearing, after which he concluded that Mirant was solvent. Judge Lynn's valuation, coupled with rising prices in the energy market, generated significant interest in Mirant claims and equity. By the effective date of Mirant's plan, New Mirant's stock price supported an argument that unsecured creditors had been or would be paid in full on the basis of the stock alone.

The issue of whether creditors had been paid in full began to arise in Mirant's bankruptcy case. Professionals who filed fee applications sought to justify their fees on the ground, among others, that creditors had been paid in full. *In re Mirant Corp.,* 354 B.R. 113, 128-29 (Bankr. N.D. Tex. 2006). When Mirant sought approval of a settlement with Potomac Electric Power Company ("Pepco"), Mirant argued that certain objectors had no standing to oppose the settlement because their claims had been paid in full. *In re Mirant Corp.*, 348 B.R. 725, 732-33 (Bankr. N.D. Tex. 2006).

Mirant's paid-in-full argument created a problem for MCAR. MCAR's litigation assets included not only the causes of action that are the subject of this adversary proceeding, but a fraudulent transfer claim against The Southern Company, which was then pending in the United States District Court for the Northern District of Georgia. MCAR, which was represented by its own counsel, became concerned that Mirant's paid-in-full argument would undermine MCAR's causes of action. On July 5, 2006, MCAR appeared at the hearing on Mirant's motion to settle with Pepco and urged Judge Lynn to exercise caution in ruling on the paid-in-full issue. According to MCAR, such caution not only was necessary to preserve MCAR's claims but was justified because, by MCAR's calculations, creditor recoveries on the effective date of the plan were closer to 95%, rather than 100%.

Judge Lynn approved Mirant's settlement with Pepco. In doing so, he ruled that the objecting creditors had standing to object under section 1109 of the Bankruptcy Code, even though creditors had been "satisfied in full" by Mirant's plan. Judge Lynn elaborated on what he meant by "satisfied in full":

> The court here uses the phrase "satisfied in full" to mean that each holder of a Class 3 claim received "property of a value, as of the effective date of the [P]lan, equal to the allowed amount of such claim. . . ." Code § 1129(b)(2)(B)(i). That the court assesses the value of the stock issued by Mirant Corp. for purposes of that section should have no bearing on whether creditors are deemed fully satisfied for other purposes, including in litigation with Southern. The court understands the concern expressed at the commencement of the July 5, 2006, hearing that Southern (despite its anxiety to avoid the jurisdiction of this court) may find helpful and seek to use findings made in this court to block litigation against it in Georgia. Even assuming theories of issue preclusion may be so invoked by Southern, the courts in Georgia will no doubt recognize the distinction between "value" for purposes of a plan and "value" in determining any liability Southern may have by reason of misconduct respecting Debtors. *Cf.* Code § 506(a) ("value shall be determined in light of the purpose of the valuation"). It is especially important in any determination of value to

> remember that most creditors in Debtors' cases were not paid in cash but rather received stock.

In re Mirant Corp., 348 B.R. at 731 n.15.

Based upon this record and other similar comments by Judge Lynn, Commerzbank contends that it is the law of the case that creditors of Mirant have been paid in full. So, Commerzbank argues that there is no injury to be redressed by this adversary proceeding, and in the absence of any such injury, MCAR has no standing to prosecute its claims.

The issue of whether payment in full vitiates standing under section 544(b) is not new. In three cases where the issue has been broached, the courts have concluded that payment in full does not deprive the plaintiff of standing. *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 807-08 (9th Cir. 1994); *Stalnaker v. DLC, Ltd. (In re DLC, Ltd.)*, 295 B.R. 593, 605 (B.A.P. 8th Cir. 2003) (*aff'd*, 376 F.3d 819 (8th Cir. 2004)); *MC Asset Recovery v. The Southern Company*, No. 1:06-CV-0417, 2006 WL 5112612, at *4 (N.D. Ga. Dec. 11, 2006) *(Southern I)*.

The courts that have held that standing is not affected by payment in full rely upon section 544(b) itself. According to those courts, standing is tested at case commencement. *Acequia,* 34 F.3d at 807; *Stalnaker*, 295 B.R. at 605. So, if a creditor with a viable claim existed when the bankruptcy petition was filed, the standing requirement is satisfied. *Acequia*, 34 F.3d at 807. Notably, the District Court for the Northern District of Georgia agreed with this analysis when ruling on the defendant's motion for summary judgment as to MCAR's claims against The Southern Company. *Southern I*, 2006 WL 5112612, at *4.

The *Stalnaker* courts also rely upon section 550 of the Bankruptcy Code. They note that under section 550, recoveries under section 544(b) are preserved for the benefit of the estate, not just for the benefit of creditors. *Stalnaker*, 376 F.3d at 823; *Stalnaker*, 295 B.R. at 606. So, according to *Stalnaker*, the fact that creditors have been paid in full should not impede recovery as long as there is some benefit to the estate. *Stalnaker*, 295 B.R. at 607.

This court respectfully submits that while focusing on sections 544 and 550 of the Bankruptcy Code, the foregoing cases lost sight of Article III of the Constitution. The Constitution limits a federal court's jurisdiction to actual cases or controversies. U.S. CONST. art. III, § 2, cl. 1; *Raines v. Byrd*, 521 U.S. 811, 818 (1997). In order to have standing, and therefore a justiciable case or controversy, the plaintiff must show: (1) that it has suffered an injury in fact that is concrete and particularized and actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely that the injury will be redressed by judicial action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Even if a defensible argument for standing could be made under sections 544 and 550 of the Bankruptcy Code, "Congress cannot by statute vest the federal courts with jurisdiction to hear lawsuits that do not present a case or controversy under Article III or that are otherwise not within the limited jurisdiction which Article III grants the federal courts." *Gonzales v. Gorsuch*, 688 F.2d 1263, 1270 (9th Cir. 1982) (Wallace, J., concurring).

Despite the presence of a triggering creditor as of case commencement, if the debtor's creditors have been paid in full during the course of the debtor's case or pursuant to plan confirmation, any injury to those creditors is purely conjectural or hypothetical.

See Al Najjar v. Ashcroft, 273 F.3d 1330, 1336 (11th Cir. 2001) (per curiam) ("If events that occur subsequent to the filing of a lawsuit or an appeal deprive the court of the ability to give the plaintiff or appellant meaningful relief, then the case is moot and must be dismissed."); *Trautz v. Wiseman*, 846 F. Supp. 1160, 163-64 (S.D.N.Y. 1994) ("Even where a case presents a live controversy at the time of filing, subsequent developments that extinguish the controversy will divest a federal court of jurisdiction and require that the case be dismissed as moot." (citing *Steffel v. Thompson*, 415 U.S. 452, 459 (1974))). So, section 544(b)'s establishment of standing as of the date of case commencement is no answer to the constitutional requirement that a plaintiff demonstrate an actual, concrete injury in order to go forward.

Likewise, section 550 cannot supply standing in the absence of actual injury to creditors. It is the nature of bankruptcy that plans of reorganization comprise a series of tradeoffs. One class of creditors may make concessions to another in order to secure the latter's support for plan confirmation. Creditors of an insolvent company may agree that equity receive some form of compensation even though equity would receive nothing in a cramdown scenario. By carving the estate in this manner, it is possible that interests that could never have benefited from certain litigation recoveries under state law would nevertheless benefit from those recoveries under a confirmed plan. So it is here where Mirant's former shareholders are to receive 50% of MCAR's litigation recoveries. Still, this carving of the estate does not cure a standing defect. In the absence of any injury to creditors, it is irrelevant that there are parties who stand to benefit from fraudulent transfer recoveries.

The District Court for the Southern District of New York addressed the paid-in-full defense in *Adelphia Recovery Trust v. Bank of America, N.A.*, 390 B.R. 80, 89 (S.D.N.Y. 2008). In *Adelphia*, creditors were paid in full in cash under the plan, and Adelphia's plan created a liquidation trust to pursue recoveries under sections 544(b) and 548. *Id.* at 86. As here, the defendants in those adversary proceedings attacked the trust's standing to pursue the avoidance claims. *Id.* at 85.

Unlike the courts that previously addressed the paid-in-full defense, the *Adelphia* court directly addressed the Article III impediment. It noted that in order "to establish the existence of an actual case or controversy sufficing to create federal court jurisdiction, a litigant 'must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.* at 94-95 (citing *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)). Because all of Adelphia's creditors had been paid in full, the court found that the litigation trust was not able to allege an injury that was likely to be redressed and, as such, had no standing to sue. *Id.* at 95.

MCAR argues, however, that denying it standing here would be patently unfair because litigation recoveries were part of the bargained-for consideration that was integral to Mirant's plan of reorganization. Additionally, because creditors were receiving stock instead of cash, there was no assurance that creditors would receive full payment on the distribution date. Thus, according to MCAR, the right to litigation recoveries acted as a hedge to compensate creditors for the risk of price fluctuation in the stock. Moreover, MCAR argues that if payment in full precludes access to section 544(b), debtors will delay filing plans of reorganization until completing all potential

litigation, which contravenes the Bankruptcy Code's goal of quick and equitable reorganization. *See Acequia*, 34 F.3d at 808.

Despite the persuasiveness of MCAR's arguments, they are merely policy arguments. No policy, no matter how well-grounded in equity, can overcome the constitutional defect of absence of case or controversy. If Mirant's creditors have been paid in full, there is no federal jurisdiction in this adversary proceeding.

B. Second Proposed Conclusion: It Is Not Law Of The Case That Mirant's Creditors Were Paid In Full And The Court Should Not Estop MCAR From Denying So

1. Law Of The Case

Having established that payment in full vitiates standing under section 544(b), the court now addresses Commerzbank's arguments that it is the law of the case that Mirant's creditors have been paid in full or that, at a minimum, MCAR should be estopped from denying so.

"The rule of law of the case is a rule of practice, based upon sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. U.S. Smelting Ref. & Mining Co.*, 339 U.S. 186, 198 (1950). The decision to apply law of the case is discretionary, not mandatory. *Cont'l Ill. Nat'l Bank & Trust Co. v. Wooten (In re Evangeline Ref. Co.)*, 890 F.2d 1312, 1321-22 (5th Cir. 1989).

It is not appropriate to apply law of the case under these facts for at least four reasons. First, Judge Lynn did not intend his "satisfied-in-full" comments to have preclusive effect. When the issue was broached in Mirant's motion to settle with Pepco, Judge Lynn specifically said that his "satisfied-in-full" assessment "should have no

bearing on whether creditors are deemed fully satisfied for other purposes, including in litigation with Southern." *In re Mirant Corp.*, 348 B.R. at 731 n.15.

Second, Reorganized Mirant and MCAR are separate entities. While their interests may overlap on certain issues, they conflict on others. One of the areas in which their interests do not coincide is the paid-in-full issue. As the record reveals, after confirmation, it was tactically advantageous for Mirant to argue that creditors had been paid in full, but disadvantageous for MCAR to do so. MCAR has consistently argued that creditors were not paid in full on the effective date. It would be unfair to saddle MCAR with Mirant's position on the paid-in-full issue when MCAR assiduously opposed that position in the bankruptcy case.

Third, MCAR had questionable standing to appear in the matters in which Judge Lynn made his observations. Because MCAR's powers are limited by the plan and its governing trust instrument, it had questionable authority to oppose settlement agreements or the award of professional fees in the bankruptcy case. Given its limited charter, MCAR could ask for restraint or qualification in any ruling by Judge Lynn on the paid-in-full issue, but its real or practical ability to litigate that issue was tenuous at best.

Fourth, the record is unclear that creditors have been paid in full. In its motion, Commerzbank focuses upon the effective date of the plan as the date on which all creditors were paid in full. But, the problem with fixing the effective date as the payment date is that Mirant's plan specifically contemplated that not all creditors would be paid on the effective date. According to Article XI of the plan, creditors were to receive plan distributions on the effective date or when their claims became Allowed Claims.

Paragraph 11.1 of the plan gave the disbursing agent up to 180 days *after* the effective date to object to claims.

Two logical inferences flow from these facts. First, it is possible, if not likely, that some claims, if not many claims, only became Allowed Claims after the effective date. If so, those holders of Allowed Claims received New Mirant stock after the effective date. So, it is also possible that some creditors received less than payment in full based upon Mirant's stock price as of their respective distribution dates. Because it is logical to infer that all creditors did not receive payment in full on the effective date, and because logical inferences must be drawn in MCAR's favor when considering a motion to dismiss, the court simply cannot conclude that all creditors were paid in full on the effective date.

2. Judicial Estoppel

Judicial estoppel prevents a party from taking a position in a legal proceeding that is contrary to a position previously taken in an earlier proceeding. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The purpose of judicial estoppel is to prevent parties from "playing fast and loose" with the court. *Browning Mfg. v. Mims (In re Coastal Plains, Inc.)*, 179 F.3d 197, 205 (5th Cir. 1999).

Because MCAR should not be held accountable for Mirant's paid-in-full arguments, MCAR's current position on the payment of creditors is consistent with its prior assertions on the topic. Moreover, the court does not perceive that MCAR has played fast and loose with this court or with Judge Lynn. Accordingly, the Court should not estop MCAR from denying that creditors have been paid in full.

C. Third Proposed Conclusion:
The FDCPA Is Not Applicable Law Under Section 544(b)

MCAR's case depends on its ability to avoid the guaranty to Commerzbank. MCAR concedes that the guaranty provides value for the payments made by Mirant to the defendants. Consequently, unless the guaranty is avoided, the payments made pursuant to it are insulated from attack. Mirant delivered the guaranty more than one year prior to its petition in bankruptcy; thus, section 548 provides no basis for its avoidance. Therefore, MCAR must rely on an "applicable law" that it can access via section 544(b).

MCAR initially points to the Federal Debt Collection Procedures Act (the "FDCPA") as applicable law. The FDCPA was enacted to provide a more consistent means of debt collection for the United States and "bring an end to the . . . situation whereby a crazy patchwork of laws in the fifty states dictate debt collection remedies available to [the government] in collecting Federal debts." *Pierce v. United States*, 232 B.R. 333, 335 (E.D.N.C. 1999). Commerzbank contends that the FDCPA is accessible only by the United States and may not be used by trustees under section 544(b).

This issue was addressed by the United States District Court for the Northern District of Georgia (the "Georgia District Court") in *MC Asset Recovery, LLC v. The Southern Company*, No. 1:06-CV-0417 (N.D. Ga. July 7, 2008) (*Southern II*) (order on motion to establish governing law). There, the Georgia District Court held that the FDCPA is not "applicable law" under section 544(b) because that act represents the exclusive civil procedures for the United States, and no other entity, to collect debts owed to it and to avoid fraudulent transfers as to those debts. *Southern II*, at 4, 8. The court's ruling was based upon 28 U.S.C. § 3001(a), which states, "This chapter provides the

exclusive civil procedures for the United States to (1) recover a judgment on a debt; or (2) to obtain, before judgment on a claim for a debt, a remedy in connection with such claim."

MCAR contends that the Georgia District Court erred because section 3001(a) only applies to actions in which the United States attempts to recover a debt or exercise a pre-judgment remedy. According to MCAR, the post-judgment remedy of fraudulent transfer avoidance is found in section 3304, and that section does not purport to limit avoidance actions exclusively to the United States.

This court disagrees. Section 3304 provides that transfers avoidable under the FDCPA are fraudulent "as to a debt to the United States." 28 U.S.C. § 3304(a), (b) (2009). Likewise, section 3306(a) provides that the remedies found in subchapter D (those relating to "Fraudulent Transfers Involving Debts") are available to the United States. 28 U.S.C. § 3306(a). Based upon the plain language of these sections, it could hardly be argued that outside of bankruptcy, creditors other than the United States could use the avoidance procedures set forth therein to redress private wrongs. *See TWU Local 555 v. Sw. Airlines Co.*, No. 3:02-CV-0554P, 2002 WL 31245372, at *2 (N.D. Tex. Oct. 1, 2002) (holding that the key inquiry in determining whether a private right of action may be implied under a certain federal law is "whether Congress, expressly or by implication, intended to create a private right of action"). Accordingly, this court agrees with the Georgia District Court that the FDCPA provides the "exclusive civil procedures for the United States, and no other entity, to utilize in collecting its debts." *Southern II*, at 8.

The Georgia District Court next concluded that the FDCPA is not applicable law under section 544(b) because the FDCPA expressly provides that it is not to be construed to "supersede or modify the operation of Title 11." *Id.* (citing 28 U.S.C. § 3003(c)). According to the Georgia District Court, United States Representative Brooks clarified the meaning of this phrase by explaining that this provision was "carefully worded to make clear that the [FDCPA] would have absolutely no effect on the Bankruptcy Code; even provisions of the Bankruptcy Code making reference to non-bankruptcy law are to be read as if this act did not exist." *Southern II*, at 8 (citing 136 CONG. REC. H13288-02 (1990) (statement of Rep. Brooks)).

MCAR argues that this court is not authorized to consider such legislative history unless the statute is ambiguous, and, in that instance, it may only consider committee reports, not statements of one member or casual comments from floor debates.

This court is unable to ascertain a consistent rule on the weight, if any, to be given to legislative history. *Compare Dist. of Columbia v. Heller*, 128 S.Ct. 2783, 2841 (2008) (noting that legislative history should be given little, if any, weight), *with Exxon Mobil Corp. v. Allapattah Servs. Inc.,* 545 U.S. 546, 568 (2005) (stating that legislative history may be used to illuminate otherwise ambiguous terms in the statute). Indeed, even those courts that look to legislative history do not agree on which portions of a bill's legacy constitute permissible legislative history for judicial consideration. *Compare Internal Rev. Serv. v. Teal (In re Teal)*, 16 F.3d 619, 621 n.4 (5th Cir. 1994) (treating congressman's floor statement as persuasive evidence of congressional intent) (citation omitted), *and Harding v. Dep't of Veterans Affairs*, 448 F.3d 1373, 1377 n.3 (Fed. Cir. 2006) (stating that the court may rely on the remarks of an introducing sponsor as an

indicator of congressional intent, at least in the absence of contradictory evidence) (citations omitted), *with Garcia v. United States*, 469 U.S. 70, 76 (1984) (stating that if a court resorts to legislative history, the authoritative source for legislative intent is the committee report on the bill, not the statement of one member), *and Weinberger v. Rossi*, 456 U.S. 25, 35 n.15 (1982) (stating "contemporaneous remarks of a sponsor of legislation are certainly not controlling in analyzing legislative history").

This court shares MCAR's skepticism when it comes to regarding the comments of a single representative as a manifestation of the intent of Congress as a whole. The phrase "shall not be construed to supersede or modify . . . Title 11" may have meant one thing to Representative Brooks and something else to other members of Congress. It is possible that other members gave no significant deliberative thought to the meaning of the phrase at all. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517 (1989) (opining that the "quest for 'genuine' legislative intent is probably a 'wild-goose chase'" because it is likely "Congress . . . didn't think about the matter at all"). Consequently, while this court takes no issue with the Georgia District Court's acceptance of Representative Brooks's comments as some manifestation of legislative intent, his comments form no part of this court's proposed conclusions.

The Georgia District Court also held that construing the FDCPA to be applicable law under section 544(b) would modify Title 11 by greatly expanding the intended reach of section 544(b). *Southern II*, at 8-9. According to the Georgia District Court, because the United States is frequently a creditor in many bankruptcy cases due to taxes owed by debtors, section 544(b)'s reach would be extended well beyond what was intended by

Congress if the FDCPA were construed to be applicable law. *Id*. at 9. Additionally, the Georgia District Court found that Title 11 would be expanded by grafting the FDCPA's six-year statute of limitations upon the Bankruptcy Code's existing fraudulent transfer framework. *Id*. The defendants urge this court to adopt those holdings.

This court respectfully disagrees with the notion that the FDCPA would supersede or modify the operation of Title 11 if it were construed to be applicable law under section 544(b). The court does not believe that the operation of Title 11 would be modified at all by making the FDCPA accessible to bankruptcy trustees. Granted, allowing a bankruptcy trustee to use the FDCPA might allow him to reach transfers that otherwise would be beyond his reach. Still, this does not supersede or modify the operation of Title 11. This can be demonstrated by comparing the effect of Congress's enactment of the FDCPA with Georgia's adoption of the Uniform Fraudulent Transfer Act.

States routinely modify their fraudulent transfer laws just as Georgia did in July 2002 when it replaced section 18-2-22 with the Uniform Fraudulent Transfer Act. By substituting one act for the other, Georgia may have liberalized the ability of creditors to avoid fraudulent transfers and, concomitantly, the rights of a bankruptcy trustee to avoid such transfers under section 544(b). Few would argue, however, that by expanding avoidance rights under state law, Georgia superseded or modified the operation of Title 11.

Just as Georgia could not supersede or modify the operation of section 544(b) of Title 11 by changing its fraudulent transfer laws, Congress did not supersede or modify the operation of Title 11 by enacting the FDCPA, even assuming it could be construed to

be applicable law. This is true even if the FDCPA could be said to expand the trustee's power to avoid fraudulent transfers.

This court also questions whether construing the FDCPA to be applicable law would dramatically expand the reach of section 544(b). Even before the enactment of the FDCPA, bankruptcy trustees could look to the IRS's standing as an unsecured creditor in many bankruptcy cases and, by using state fraudulent transfer laws, exercise avoidance powers pursuant to section 544(b). *See, e.g., Cambridge Meridian Group, Inc. v. Conn. Nat'l Bank (In re Erin Food Servs., Inc.)*, 117 B.R. 21, 25 (Bankr. D. Mass. 1990). Construing the FDCPA to be applicable law under section 544(b) might add another source to trigger that section's avoidance powers, but the impact of adding that source is open to conjecture.

Although it could be argued that giving a trustee access to a six-year statute of limitations under the FDCPA expands the trustee's avoidance powers under Title 11, the same could be said of practically any state statute that is accessible via section 544(b). If the benchmark for the "Code's existing fraudulent transfer framework" is the two-year period found in section 548,[5] then practically all state fraudulent transfer laws would modify Title 11 because their avoidance periods routinely exceed that limitation.[6] Even so, few would consider these statutes to supersede or modify Title 11.

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[5] Section 548's avoidance period was one year when Mirant filed its petition in bankruptcy.

[6] *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 24.010(a)(1) (Vernon 2009) (four-year statute of limitations, or one year after the transfer was or could have reasonably been discovered); GA. CODE ANN. § 18-2-79 (2009) (four-year statute of limitations, or one year after the transfer was or could have reasonably been discovered); N.Y.C.P.L.R. § 213(8), (McKinney 2009) (greater of six years from the date the cause of action accrued or two years from the time the plaintiff discovered the fraud, or could with reasonable diligence have discovered it).

MCAR argues that the Georgia District Court's failure to conclude that the FDCPA is applicable law under section 544(b) is ironic because such a construction itself impermissibly modifies Title 11. According to MCAR, by categorically excluding the United States as a creditor who may trigger avoidance under 544(b), the Georgia District Court did precisely what 28 U.S.C. § 3003(c) said it could not do.

MCAR's argument has some initial appeal. After all, if (1) the United States is an unsecured creditor and (2) the FDCPA is the exclusive authority that permits the United States to avoid transfers in order to satisfy its claims, then (3) any ruling that the FDCPA is not applicable law would modify section 544(b) by excluding the United States as a triggering creditor.

An initial hurdle encountered by MCAR is that section 544(b)'s avoidance powers are not just dependent upon the existence of an unsecured creditor with standing to avoid the transfer, but also upon the existence of "applicable law" that would permit a creditor to pursue avoidance. MCAR responds by arguing that the FDCPA is such "applicable law" because of the broad construction given a similar phrase in *Patterson v. Shumate*, 504 U.S. 753 (1992). There, the Court held that the phrase "applicable non-bankruptcy law" in section 541(c)(2) of Title 11 refers to federal law as well as state law. *Id.* at 758. It further held that Congress, when it decided to do so, knew how to restrict the scope of "applicable non-bankruptcy law" to state law and did so with some frequency. *Id.* at 758. MCAR argues that because the phrase "applicable law" includes federal law as well as state law, then by the plain language of section 544(b), the FDCPA is applicable law under that section.

Section 544(b), however, is not the last word on Congress's intent when it comes to resolving the question of whether the FDCPA is applicable law under Title 11. Instead, the FDCPA itself not only is the most recent manifestation of congressional intent on that issue, but also the strongest.

Again, the avoidance powers in the FDCPA are exercisable by the United States solely for the benefit of the United States. Nothing in subchapter D of the FDCPA manifests any intent by Congress to benefit parties other than the United States. Under MCAR's theory, however, the beneficiaries under the FDCPA would be expanded to include every unsecured creditor of Mirant's bankruptcy estate.

Moreover, under section 3306 of the FDCPA, transfers may be avoided "to the extent necessary to satisfy the debt to the United States." 28 U.S.C. § 3306(a)(1). But, according to MCAR, once the FDCPA is construed to be applicable law under section 544(b), the scope of avoidance is vastly expanded. According to MCAR, once a transfer is avoided, under the rule of *Moore v. Bay*, 284 U.S. 4, 5 (1931), the scope of avoidance is not limited to the amount of the debt owing to the triggering creditor (here, the United States), but is expanded to satisfy the claims of all creditors. This is so according to MCAR because the power to avoid (found in sections 544, 547 or 548) is separate from the scope of avoidance (found in section 550).

The court agrees with MCAR that the Bankruptcy Code functions in this manner. *See Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 809 (9th Cir. 1994); *Liebersohn v. Internal Revenue Serv. (In re C.F. Foods, L.P.)*, 265 B.R. 71, 86 (Bankr. E.D. Pa. 2001); *Decker v. Voisenat (In re Serrato)*, 214 B.R. 219, 231 (Bankr. N.D. Cal. 1997). However, in the context of this case, the bifurcation of the avoidance power from

the scope of the remedy leads to the argument that even though under the FDCPA the United States could only avoid transfers to the extent necessary to satisfy the IRS's $175,000 claim, MCAR can avoid transfers to the defendants to the extent of E$136,873,950 and then use that amount to satisfy not only the claims of creditors, but the claims of former equity holders of Mirant.

MCAR insists that this result should not trouble the court because the Bankruptcy Code operates precisely in the same manner when it comes to state fraudulent transfer statutes. *Acequia*, 34 F.3d at 810; *Harris v. Huff (In re Huff)*, 160 B.R. 256, 261 (Bankr. M.D. Ga. 1993). The court does not agree because while section 550 of the Bankruptcy Code may have this preemptive effect when a trustee avoids transfers pursuant to state law under section 544(b), it is quite another thing for section 550 of the Bankruptcy Code to preempt section 3306(a)(1) of the FDCPA. When dealing with overlapping statutes, the court's duty is to harmonize them "to give effect to each one insofar as they are capable of co-existence and to preserve the sense and purpose of each, insofar as they are not manifestly incompatible." *Nw. Airlines Corp. v. Ass'n of Flight Attendants (In re Nw. Airlines Corp.)*, 349 B.R. 338, 373 (S.D.N.Y. 2006). Given the purpose of the FDCPA, its manifest intent to benefit only the United States, and the limited recovery thereunder, this court believes that the FDCPA can best be harmonized with sections 544(b) and 550 of the Bankruptcy Code by concluding that the FDCPA is not applicable law under section 544(b).

Additionally, if the FDCPA were construed to be applicable law under section 544(b), it could be co-opted by trustees in many cases and used to dilute the United States's recovery. For example, if a particular transfer were voidable only under the

FDCPA, then the United States would receive 100% of any recovery. But if a bankruptcy trustee could avoid that same transfer under the FDCPA, it likely would reduce the recovery to the United States. That is because in any given case the distribution to the United States will depend upon the amount available for distribution and the size of the United States' claim in relation to all other claims.

Such a result is patently inconsistent with the FDCPA's express language and purpose. One would expect that had Congress intended such a result, it would have said so. Thus, in the final analysis, MCAR's position must be rejected not because it impermissibly modifies the operation of Title 11 but because it impermissibly modifies the operation of the FDCPA.

There is another reason to reject MCAR's argument that failing to construe the FDCPA as applicable law impermissibly modifies section 544(b) by omitting the United States as a triggering creditor. Two courts have held that the enactment of the FDCPA does not limit the United States' right to avoid transfers under state law. *United States v. Maryans*, No. 592-401M, 1994 WL 681146, at *3 (N.D. Ind. 1994); *United States v. Carney*, 796 F.Supp. 700, 703 (E.D.N.Y. 1992). These holdings are premised upon section 3003 of the FDCPA, which says that "[t]his chapter shall not be construed to curtail or limit the right of the United States under any other Federal law or State law . . . to collect taxes or collect any other amount collectible in the same manner as a tax." 28 U.S.C. § 3003(b)(1). So, under these authorities the United States can be a triggering creditor under section 544(b) if it has standing to avoid the transfer under state law.

In *Hirsch v. Marinelli (In re Colonial Realty Co.)*, 168 B.R. 506 (Bankr. D. Conn. 1994), the court dealt with a statute similar to the FDCPA and reached the same result as

this court, but for a different reason. In *Hirsch*, the court addressed the ability of a bankruptcy trustee to utilize 12 U.S.C. § 1821(d)(17) as applicable law under section 544(b). Section 1821 authorizes the FDIC as conservator or receiver for an insured depository institution to avoid transfers that are fraudulent as to the insured depository institution or the FDIC. *Hirsch*, 168 B.R. at 510. Any transfers so avoided are for the benefit of the insured depository institution. *Id.* at 510. In *Hirsch*, the court held that section 1812 avoidance powers are personal claims accruing only to the benefit of the FDIC. *Id.* at 511. Accordingly, it concluded they can be pursued for the benefit of the FDIC alone and not for creditors at large. *Id*. Because the Supreme Court in *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 434 (1972), held that a trustee lacks standing to bring claims on behalf of specific creditors, the court dismissed the trustee's claims. *Hirsch*, 168 B.R. at 512. Whether one adopts this court's or the *Hirsch* court's reasoning, the conclusion is the same: the FDCPA is not applicable law under section 544(b) of the Bankruptcy Code.

MCAR argues that this conclusion is at odds with a decision by the United States Bankruptcy Court for the Middle District of Florida. MCAR correctly notes that in *Mills v. Gurley (In re Gurley)*, No. 95-00293 (Bankr. M.D. Fla. Aug. 15, 1997), the bankruptcy court found the FDCPA to be applicable law, and the court's decision was affirmed in both the district court and the court of appeals for the eleventh circuit. *Gurley v. Mills (In re Gurley)* No. 99-13416 (11th Cir. Sept. 20, 2000); *Gurley v. Mills (In re Gurley)*, No. 98-1169-Civ-Orl-18A (M.D. Fla. Aug. 9, 1999).

Like the Georgia District Court, this court does not view *Gurley* as persuasive authority on this issue. While the bankruptcy court in *Gurley* held that the FDCPA was

applicable law under section 544(b), neither the district court nor the eleventh circuit court of appeals addressed that issue when they affirmed the bankruptcy court's decision. Moreover, it is not clear from the bankruptcy court's opinion that this issue was aggressively contested by any party. In *Gurley*, the United States was the largest, if not the only, creditor of the debtor. In fact, the United States urged the chapter 7 trustee to pursue the FDCPA claims on its behalf. In its opinion, the bankruptcy court applied the FDCPA to the facts of that case but did not discuss its analysis of how that act constituted applicable law under section 544(b). If this issue was a contested issue in *Gurley*, this court respectfully disagrees with that court's conclusion.

D. Fourth Proposed Conclusion: Choice-Of-Law Factors Point To New York Law As The Applicable Law

Having concluded that the FDCPA is not applicable law under section 544(b), the court must decide which state law is applicable law under that section. Commerzbank argues that a proper choice-of-law analysis points to Georgia, where it contends that the applicable law is section 18-2-22, which contains no provision for the avoidance of guaranties. MCAR places its eggs in two baskets. It contends that if Georgia law applies, the applicable law is the Georgia UFTA, which replaced section 18-2-22 on July 1, 2002. MCAR prefers the UFTA because it permits the avoidance of obligations such as guaranties. But, if the court concludes that section 18-2-22 is the applicable law of Georgia, then MCAR contends that New York law (which also permits the avoidance of guaranties) is the applicable law.

In federal courts there are two potential sources for choice-of-law tests. Federal courts exercising diversity jurisdiction apply choice-of-law rules of the forum state. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). Texas, the forum state,

would apply the most significant relationship test to a fraudulent transfer action. *Guiterrez v. Collins*, 583 S.W.2d 312, 318 (Tex. 1979) (applying most significant relationship test to a tort claim).

However, this adversary proceeding is not premised on diversity jurisdiction, but on bankruptcy jurisdiction under 28 U.S.C. § 1334. Consequently, in a case such as this, it could be argued that the court should apply federal choice-of-law rules. The federal choice-of-law rule is the "independent judgment" test, which is a "multi-factor, contacts analysis" that applies the law of the state with the most significant relationship to the transaction at issue. *In re Consol. Capital Equities Corp.*, 143 B.R. 80, 85 (Bankr. N.D. Tex. 1992).

The question of which of these tests should be applied under these facts has not been resolved by the fifth circuit. *See ASARCO LLC v. Americas Mining Corp.*, 382 B.R. 49, 61 (S.D. Tex. 2007) (suggesting that unless a compelling federal interest dictates otherwise, the court should follow Texas choice-of-law rules); *Consol. Capital Equities*, 143 B.R. at 85. However, in this case, the two alternatives lead to the same result because Texas's "most significant relationship" test is essentially the same as the federal independent judgment test. *Consol. Capital Equities*, 143 B.R. at 85; *Kaiser Steel Corp. v. Jacobs Steel Corp. (In re Kaiser Steel Corp.)*, 87 B.R. 154, 157 (Bankr. D. Colo. 1988) (holding that the two tests are essentially synonymous).

When Texas courts apply the most significant relationship test, they look to the RESTATEMENT (SECOND) OF CONFLICT OF LAWS. *State Farm Fire & Cas. Co. v. Miraglia*, No. 07-CV-013-A, 2008 U.S. Dist. LEXIS 7197, at *6 (N.D. Tex. Jan. 30, 2008). Section 6 of the RESTATEMENT (SECOND) says that the following considerations

are relevant to a choice-of-law analysis: (a) the needs of the interstate and international systems, (b) the relevant policies of the forum, (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue, (d) the protection of justified expectations, (e) the basic policies underlying the particular field of law, (f) certainty, predictability and uniformity of result, and (g) ease in the determination and application of the law to be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

MCAR's claims sound in tort. *ASARCO*, 382 B.R. at 62; *Warfield v. Carnie*, No. 3:04-CV-633-R, 2007 WL 1112591, at *7 (N.D. Tex. April 13, 2007); *Faulkner v. Kornman (In re The Heritage Org., LLC)*, 413 B.R. 438, 462 (Bankr. N.D. Tex. 2009). Section 145 of the RESTATEMENT (SECOND) lists certain contacts to be weighed when applying the principles of section 6 to a tort case. Those contacts include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any, between the parties is centered. *Hughes Wood Prods. Inc. v. Wagner*, 18 S.W.3d 202, 205 n.1 (Tex. 2000).

1. Section 145 Factors

a. The Domicile, Residence, Nationality Or Place Of Business Of The Parties

Mirant was incorporated in Delaware. Neither the parties nor the court ascribe much significance to this fact. Although Mirant's operations were both national and international in scope, its principal place of business was in Atlanta, Georgia.

Commerzbank is a German bank. Its principal place of business is in Frankfurt am Main, Germany. Commerzbank has a branch office in New York and an agency

office in Atlanta. Its New York operations appear to be more substantial than its Georgia operations. Even so, neither party contends that Commerzbank's principal place of business is in New York or Georgia. And, because neither party contends that German law governs the issues in this case, Commerzbank's domicile and principal place of business do not sway the analysis one way or the other.

The other lenders under the loan facilities have their principal places of business or places of incorporation in foreign countries. Again, because neither party contends that the laws of these countries should be controlling law, these contacts have little bearing on choice of law.

Another group of interests whose location is the subject of heated debate includes the creditors of Mirant. MCAR retained Carianne Basler, an employee of Alix Partners, LLP, to review the proofs of claim filed against Mirant and its affiliates. According to Basler, creditors in New York held 99.175% in dollar amount of claims against Mirant, while creditors in Georgia held only .0123% of the debt. But, in terms of numerosity, 35.164% of claimholders were in Georgia and 17.582% of the creditors were in New York.

Commerzbank disputes the accuracy of Basler's assertions, as well as their relevance even if they could be proved. According to Commerzbank, Basler's statistics are misleading for several reasons, foremost among which is the fact that Basler based her analysis on proofs of claim filed against Mirant. According to Commerzbank, this leads to several flaws: first, creditors who may have been creditors of Mirant when the fraudulent transfer was made may no longer be creditors of Mirant; second, because of claims trading, creditors who stand to benefit from this litigation could be significantly

different than those who filed claims. Commerzbank contends that MCAR could have gotten a much more accurate picture had it analyzed creditor concentration based upon ballots cast in connection with the confirmation of Mirant's plan.

Next, Commerzbank argues that the proofs of claim cannot be used to establish the creditors' "places of business." Commerzbank says that, at most, the proofs of claim establish only a place to remit bankruptcy distributions; they do not prove that the creditors had their places of business at the addresses reflected in the proofs of claim.

Finally, Commerzbank points out that Mirant's creditors are not the only beneficiaries of MCAR's claims in this case. Under Mirant's plan, Mirant shareholders are also beneficiaries, and, as Commerzbank notes, MCAR has made no effort to identify the location of the shareholders.

Commerzbank's arguments go to the weight that the court should ascribe to the Basler affidavit, not its admissibility. The data compiled by Basler is a summary of proofs of claim and may be considered to the same extent as the proofs of claim themselves. If Commerzbank disagrees with Basler's approach, it was free to summarize data that it deemed to be more probative.

Commerzbank is correct that the mere filing of a proof of claim does not prove that the creditor's place of business is the address on the proof of claim form. On this point, however, the court must yield to concerns of judicial economy and the efficient administration of justice. Thousands of creditors filed claims against Mirant. Neither the parties nor the court can afford to vet the true principal place of business of every creditor of Mirant.

Moreover, while it is true that simply listing a particular address on a proof of claim is not dispositive of that creditor's place of business, it is evidence that the creditor conducted at least some business there, perhaps its most significant business. After all, a creditor has little incentive to list an address on its proof of claim to which it has no connection. And, while listing a particular address may not be altogether probative of a creditor's place of business, it is not likely to be manipulative. After all, rarely, if ever, would a creditor anticipate that by listing an address on its proof of claim, it was making a choice-of-law decision.

Finally, even if Basler does not account for the location of Mirant's shareholders, this defect may weaken but does not completely vitiate Basler's summary. While Basler's affidavit does not account for the location of all beneficiaries of this action, it does constitute some evidence of where some beneficiaries are located.

Commerzbank also argues that the location of creditors is not a relevant consideration at all because creditors are not parties to this adversary proceeding. Even so, it cannot be denied that creditors are beneficiaries of this action. Courts that have considered the application of the most significant relationship test in the context of fraudulent transfers have routinely considered the location of the beneficiaries of that action. *ASARCO*, 382 B.R. at 62-63; *Weinman v. Fidelity Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 198 B.R. 352, 362 (Bankr. D. Colo. 1996); *Consol. Capital Equities*, 143 B.R. at 85; *Murphy v. Meritor Sav. Bank (In re O'Day Corp.)*, 126 B.R. 370, 391 (Bankr. D. Mass. 1991); *Ferrari v. Barclays Bus. Credit, Inc. (In re Morse Tool, Inc.)*, 108 B.R. 384, 387 (Bankr. D. Mass. 1989).

b. The Place Where The Conduct Causing The Injury Occurred

Commerzbank focuses both broadly and narrowly when identifying the place where the conduct causing the injury occurred. First, Commerzbank points to the fact that the European power island project was part of a broad strategy formulated and initiated by Mirant in Georgia. Then, Commerzbank argues that the operative conduct causing the injury was Mirant's decision to guarantee the debt. That action, as well as the drafting and execution of the guaranty, took place in Georgia.

MCAR's response is broad and narrow in equal measure. MCAR points to the fact that the great bulk of the negotiation and documentation of the loan transaction was accomplished in New York. Most of the key documents were drafted in New York, and the loan transaction was closed and funded in New York. In response to Commerzbank's focus on the guaranty, MCAR argues that the guaranty was only effective upon delivery, and the guaranty was delivered to Commerzbank's lawyers in New York.

The court finds Commerzbank's position the more persuasive. If there is any "culpable" conduct in this case, it occurred at Mirant's headquarters in Atlanta, Georgia, where Mirant's management made the decision to issue the guaranty. Mirant's management was in a far better position than Commerzbank to know if Mirant was or would be made insolvent as a result of this transaction. Its management was likewise much better situated to know if the guaranty would affect its ability to pay debts as they became due. Whether fully or inadequately informed, Mirant's management made the decision to issue the guaranty. That decision was the operative act that caused the injury, and it occurred in Georgia. *See Faulkner*, 413 B.R. at 463.

c. The Place Where The Injury Occurred

MCAR contends that the injury occurred in New York because the loan facility was closed there, became effective there, and was funded there. It also argues that because the purpose of fraudulent transfer actions is to remedy injuries to creditors, and creditors holding 99% of Mirant's debt are located in New York, the injury should be "deemed" to have occurred in New York.

The court disagrees. In cases involving constructively fraudulent transfers, the initial injury is the degrading of the economic well-being of the transferor, which contributes to insolvency or an inability to pay debts as they become due. This injury occurs where the debtor has its principal place of business.

Analyzing the injury in terms of where the majority of the debtor's creditors are located is misguided for several reasons. First, many of Mirant's creditors at the time of the transfer may have been paid in the ordinary course of Mirant's business and suffered no injury at all. Second, even if creditors holding claims as of the transfer date were not paid by the time Mirant filed for bankruptcy, it is possible that many of those creditors sold their claims prior to the proof of claim bar date. Thus, creditor concentration as of the claims bar date may have a tenuous connection to where creditors were located when the transfer occurred.

Moreover, using creditor concentration to fix the place of injury ignores the fundamental fact that even if most creditors are from one state, many others are not. And, if the injury occurs where the creditors are located, then the injury "occurs" in all states where creditors reside. So, using creditor concentration in this case to define the place of injury is both artificial and imprecise.

Finally, and perhaps more importantly, the real injury to creditors is the debtor's failure to pay their claims. Typically, the decision not to pay such claims and the failure to pay occurs at the place where the debtor has its principal place of business. *See id.* Thus, the injury itself occurs at the debtor's principal place of business. Here, that place is Atlanta, Georgia.

d. The Place Where The Relationship Between The Parties Was Centered

The parties disagree about the place where the relationship was centered. Commerzbank focuses on the fact that its Atlanta agency was the relationship manager with Mirant. MCAR focuses on the fact that the financing transaction was centered in New York.

After giving due consideration to both the quantity and quality of the contacts in Georgia and New York, the court cannot conclude that one set of contacts dominates over the other. Moreover, as one court has pointed out, the real parties-in-interest in a fraudulent conveyance, the creditors and the transferee, usually have not dealt directly with each other at all. *Morse Tool*, 108 B.R. at 387. So, there is no "relationship" to center upon. Accordingly, the court regards this factor as neutral.

2. Section 6 Factors

a. Basic Policies Underlying The Particular Field Of Law And The Relevant Policies Of Other Interested States

Before addressing the respective policies of New York and Georgia, the court must first address the question of which Georgia law is the applicable law in this case. Commerzbank contends that the applicable law is section 18-2-22 of the Official Code of Georgia. Section 18-2-22 was the law in effect when Mirant executed and delivered its guaranty to the defendants. Section 18-2-22 has no provision allowing a creditor to avoid obligations such as guaranties. GA. CODE ANN. § 18-2-22 (repealed 2002).

MCAR contends that the applicable law is the UFTA, which Georgia's governor signed into law on April 4, 2002, and which became effective on July 1, 2002. Unlike section 18-2-22, the UFTA permits a creditor to avoid obligations such as guaranties. GA. CODE ANN. § 18-2-74(a) (2009).

MCAR contends that the selection of the applicable Georgia law is, in fact, part of the choice-of-law analysis. According to MCAR, choice-of-law rules require the court to apply the policy of the state with the most interest in the litigants and the outcome of the litigation. Consequently, MCAR argues that the court should look to the Georgia law that best protects the interests of creditors, which, in this case, is the UFTA.

As support, MCAR cites *Berghammer v. Smith*, 185 N.W.2d 226 (Iowa 1971). In *Berghammer*, the Iowa Supreme Court dealt with a Minnesota resident's claim for loss of consortium resulting from an accident. 185 N.W.2d at 230. The court concluded that the plaintiff's claims were governed by Minnesota law. *Id*. at 232. Minnesota's common law did not recognize claims for loss of consortium when the accident occurred, but it did by the time that the plaintiff filed his lawsuit in Iowa. *Id.*

Even though Minnesota courts would only allow a loss of consortium claim to be prosecuted after a change in the common law, the Iowa Supreme Court ruled otherwise. *Id.* It held that if it enforced Minnesota's law, it would ignore Iowa's policy (which allowed loss of consortium claims) without advancing Minnesota's. *Id.* at 232-33. But, in *Zurn v. State Farm Auto. Ins. Co.*, 482 N.W.2d 923, 926 (Iowa 1992), the same court refused to follow *Berghammer* when it came to statutory amendments. In *Zurn*, the Iowa Supreme Court held that when the change in the other state's law is mandated by statute, as opposed to common law, the courts are "not free . . . to sort through and decide the policy considerations." *Id.* at 926. According to *Zurn*, because the other state's legislature had the authority to set the effective date of the change of the statutory rule, the courts of Iowa "are bound to abide by it." *Id.* So, if *Berghammer* had any persuasive logic to begin with, it does not apply here because the Georgia legislature specifically selected July 1, 2002, as the effective date for the UFTA.

More importantly, determining which Georgia law is the applicable law is not part of the choice-of-law analysis. Instead, when confronted with a change in law such as the one before the court, the court's responsibility is to resolve the question in the same manner that Georgia's highest court would. *Chepstow Ltd. v. Hunt*, 381 F.3d 1077, 1080 (11th Cir. 2004).

In *Byers v. McGuire Props., Inc.*, 679 S.E.2d 1, 6 (Ga. 2009), the Georgia Supreme Court held that the repeal of section 18-2-22 on July 1, 2002 did not extinguish causes of action that arose under that section before that date. While that decision is instructive, it does not address MCAR's contention that the UFTA can be applied to transfers that occurred prior to July 1, 2002. According to MCAR, this question was

answered by an intermediate appellate court in *Miller v. Lomax*, 596 S.E.2d 232, 238 n.1 (Ga. Ct. App. 2004). In a footnote, *Miller* states that pre-UFTA transfers can be challenged under the UFTA itself. According to *Miller*, this is so because, "it is the general rule that the appellate court shall apply the law as it exists at the time of its judgment, absent impairment of vested rights under the previous law." *Id.* (quoting *Pine Pointe Hous., L.P. v. Lowndes County Bd. of Tax Assessors*, 561 S.E.2d 860, 865 (2002)).

In *Chepstow Ltd. v. Hunt*, the eleventh circuit court of appeals addressed the question of whether Georgia's enactment of the UFTA had retroactively extinguished all pending claims under section 18-2-22. 381 F.3d at 1080-81. At that time, Georgia's supreme court had not resolved the issue. So, the eleventh circuit approached the question in the same manner in which it deemed that that court would. *Id.* at 1081.

First, the court noted that "the Georgia constitution provides that '[n]o bill of attainder, ex post facto law, retroactive law, or laws impairing the obligation of contract or making irrevocable grant of special privileges or immunities shall be passed.'" *Id.* at 1081. Next, the court held that Georgia's constitution forbids the legislature from "snuffing out" vested statutory rights by enacting retroactive repealer provisions. *Id.* at 1082 citing *Dennigton v. Mayor of Town of Roberta*, 61 S.E. 20, 21 (Ga. 1908)). It further held that because vested rights are protected by Georgia's constitution, Georgia's legislature is not required to enact a separate savings clause in order to specifically preserve them. *Id.* Thus, the court concluded that "[u]nder Georgia law, if a right is substantive and it is vested, it cannot be extinguished." *Id.* at 1084.

The eleventh circuit then addressed the question of whether the plaintiff's rights under section 18-2-22 were vested and substantive. It concluded that they were vested

because the actions of the defendants occurred before July 1, 2002, the effective date of the UFTA. *Id.* Next, it concluded the plaintiff's rights were substantive "because '[s]ubstantive law is that which creates rights, duties and obligations.'" *Id.* (quoting *Polito v. Holland*, 365 S.E.2d 273, 274 (Ga. 1988)). Thus, *Chepstow* suggests that section 18-2-22 is the Georgia law that applies to fraudulent transfers occurring prior to July 1, 2002.

The eleventh circuit knew of *Miller v. Lomax* when it considered *Chepstow*, and it instructed the parties to address the case in their arguments. *Chepstow*, 381 F.3d at 1087. Both parties agreed that the footnote in *Miller* was dictum and urged the eleventh circuit not to follow it. *Id.* The court agreed and held that it did not control the decision in that case. *Id.*

This court agrees with the eleventh circuit that the footnote in *Miller* is dictum and is not controlling. If one accepts the premise that a creditor's right to pursue a fraudulent transfer under section 18-2-22 was vested and substantive prior to July 1, 2002, then so were the duties and defenses of the transferors and transferees. Just as a creditor's right to avoid a transfer that violates section 18-2-22 cannot be extinguished by subsequent legislation, neither could a transferee's right to defend on the basis that a transfer it received fully complied with then-existing laws. *See Bullard v. Holman*, 193 S.E. 586, 589 (Ga. 1937) ("[A] vested ground of defense is as fully protected from being cut off or destroyed by an act of the legislature as is a vested cause of action.").

In the *Southern* case, the Georgia District Court agreed that section 18-2-22 governs actions to avoid transfers that occurred prior to July 1, 2002. It noted that Georgia courts have continued to apply section 18-2-22 to transfers made before July 1,

2002. *MC Asset Recovery, LLC v. The Southern Company*, No. 06-CIV-0417, at *17 (N.D. Ga. April 1, 2008) *(Southern III)* (order granting in part, denying in part defendant's motion to establish governing law) (citing *Laddin v. Edwards*, No. 1:02-CV-3327, 2006 WL 1097491, at *7 n.3 (N.D. Ga. April 21, 2006); *Flatau v. Smith (In re Smith)*, No. 07-50410, 2007 WL 3238717, at *2 n.1 (Bankr. M.D. Ga. Oct. 30, 2007); *McLain v. Brown (In re McLain)*, 2004 No. 01-12342, WL 5309101, at *5 (Bankr. N.D. Ga. Sept. 30, 2004); *Gerschick v. Pounds*, 636 S.E.2d 663, 665 n.8 (Ga. Ct. App. 2006)). This court agrees and concludes that section 18-2-22 is the applicable law of Georgia when it comes to avoiding transfers that occurred before July 1, 2002. Thus, in conducting its choice-of-law analysis, the court regards section 18-2-22 as the applicable law of Georgia.

Having established that section 18-2-22 is the applicable Georgia law, the court must consider the relevant policies of that law and the fraudulent transfer law of New York. But, before doing so, the court must address Commerzbank's position that the specific content of the local law is not relevant to the choice-of-law analysis. Section 145 of the RESTATEMENT (SECOND) supports this argument. According to the comments to section 145, the forum should "not concern itself with the complications that might arise if [a particular] state's choice-of-law rules were applied." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. h (1971). This suggests, as Commerzbank does, that as long as the laws of New York and Georgia both fulfill the underlying policies of fraudulent transfer law, the court does not need to concern itself with which law best serves that interest.

But, the comments to section 6 of the RESTATEMENT (SECOND) say that the "content of the relevant local law rule of the state may be significant in determining whether [a particular] state is the state with the dominant interest." *Id.* § 6 cmt. f. It notes, for example, that applying a particular state's statute to absolve the defendant from liability can "hardly be justified on the basis of [that] state's interest in the welfare of the injured plaintiff." *Id*. Or, rephrased in the context of this case, applying section 18-2-22 to absolve the transferee from liability can hardly be justified on the basis of a policy intended to protect victims of fraudulent transfers. This suggests that the court should consider the content of the respective local laws and whether it furthers or impairs the underlying policies of each state's fraudulent transfer laws.

Moreover, in conducting a choice-of-law analysis, it appears that Texas courts would consider the content of the local law in assessing the relative interests of the states. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984) ("We can conceive of no legitimate reason why the New Mexico legislature should be concerned with the application of its statute to a Texas settlement to cut off a Texas resident's claim against a Kansas corporation."). Thus, the court must consider not only the relevant policies of New York and Georgia fraudulent transfer law, but must assess how those policies are or are not fulfilled by the local law.

The fundamental policy of fraudulent conveyance law is the protection of creditors. *See Hassett v. Far W. Fed. Sav. & Loan Ass'n. (In re O.P.M. Leasing Servs., Inc.)*, 40 B.R. 380, 393 (Bankr. S.D.N.Y. 1984). As the comments to the RESTATEMENT (SECOND) note, most state legislatures are focused upon the protection of the citizens of their own states. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. c. Thus, the

overriding policy of a state's fraudulent transfer law is the protection of in-state creditors. *O.P.M. Leasing*, 40 B.R. at 394. Another less obvious purpose of fraudulent transfer laws may be to encourage out-of-state companies to do business in a particular state by enacting laws that protect those creditors from in-state debtors. Thomas H. Day, *Solution for Conflict of Laws Governing Fraudulent Transfers: Apply the Law that was Enacted to Benefit the Creditors*, 48 BUS. LAW 889, 894 (1993). Presumably, the fraudulent transfer laws of Georgia and New York are intended to fulfill both of these policies.

Taking the first of these policies, it can be seen that New York's policy of protecting its in-state creditors would be served by applying its law to New York creditors. However, New York has no interest in applying Georgia law to New York creditors, especially when that law is more restrictive with respect to creditor recovery.

New York's policy of encouraging out-of-state creditors (such as creditors in Georgia) to do business in New York would also be served by applying New York's fraudulent transfer law because it protects their interests to the same degree that it protects the interests of New York creditors. Although New York's fraudulent transfer law is more liberal than Georgia's law, this does not create a policy conflict. After all, a creditor from Georgia would not be discouraged from doing business in New York if it had greater protection under New York law than under Georgia law. Thus, applying New York law in this case would fulfill both of New York's policies.

Georgia's law also protects the interests of in-state creditors. But, the interests of Georgia creditors would not be offended if Georgia were to apply the more liberal laws of New York to protect Georgia creditors in a case such as this. So, even though New

York and Georgia law differ, there would be no policy conflict if this court were to apply New York law to protect Georgia creditors.

Georgia's policy of encouraging out-of-state companies to do business in Georgia would be fulfilled by applying the fraudulent transfer law of Georgia. However, once again, out-of-state creditors would not be discouraged from doing business in Georgia if Georgia chose to apply the more creditor-friendly laws of New York. Thus, this policy would not be impaired if this court applied New York law.

As the foregoing discussion illustrates, neither the policies of New York nor Georgia are offended by applying New York law to this dispute. However, New York's policies could be impaired by applying Georgia law to the dispute.

The court now returns to Commerzbank's argument that the court should not give undue weight to fulfilling New York's fraudulent transfer policies because MCAR has not proven that the great bulk of Mirant's creditors, or even most of them, are from New York. In a pure policy-driven analysis, Commerzbank's argument misses the point. Even if most claims and creditors emanated from Georgia, Georgia's policies of protecting Georgia creditors and encouraging out-of-state business would not be offended by applying the more liberal New York law in this case. But, New York's policy of protecting New York creditors and encouraging out-of-state creditors to do business in New York would be offended by applying Georgia law. Consequently, even if MCAR's evidence concerning the location of creditors is imprecise as to dollar amount and numerosity, New York's and Georgia's underlying policies in fraudulent transfer law still point to New York as the preferred law.

b. Protection Of Justified Expectations

The court attributes little significance to the factor of protecting justified expectations in this case. As the comments to the RESTATEMENT (SECOND) explain, this factor normally applies when one party has justifiably molded its conduct to conform to the requirements of a particular law. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. g. Under those circumstances, it might be unfair and improper to apply another law. *Id.*

This element may or may not be relevant in the context of fraudulent transfers. For example, in a complex leveraged buyout, the parties may attempt to craft the transaction to comply with the fraudulent transfer laws of one or more states. In that case, the justified expectations of the parties might be a valid consideration. However, there is no evidence of such forethought or planning here. Moreover, even if such evidence existed, its value is subject to question. After all, it is logical to argue that the defendant in a fraudulent transfer action should not be allowed to choose the law that governs its conduct. *See Morse Tool*, 108 B.R. at 386.

c. Relevant Policies Of The State Of The Forum

MCAR argues that Texas policy weighs heavily in favor of applying New York law because Texas's law, like that of New York, allows the avoidability of guaranties, whereas Georgia's does not. The comments to the RESTATEMENT (SECOND) negate this assertion. When the forum state has no interest in the case apart from the fact that it is the place of the trial of the action, the "only relevant policies [of that state] will be embodied in its rules relating to trial administration." RESTATEMENT (SECOND) OF CONFLICT OF LAWS at § 6 cmt. e. Except for applying Texas choice-of-law rules, no

party argues that Texas law governs this case. Consequently, the fact that Texas's substantive law may be closer to New York's than Georgia's is not a relevant consideration.

d. Predictability And Foreseeability Of Result

In *Morse Tool*, the court addressed a choice-of-law question in a fraudulent transfer case. There, the court placed great emphasis on choosing the law that would best foster predictability and foreseeability of result. 108 B.R. at 387. The court held that this factor tilts heavily in favor of applying the law of the state where the transferred assets are located. *Id*. In most cases, this will be the state where the transferor has its principal place of business. *See id.* at 388.

Morse Tool based its analysis upon the reasonable expectations of what it considered to be the real parties-in-interest in a fraudulent transfer case, the unsecured creditors and the transferee. *Id*. at 387. Applied to this case, *Morse Tool* would say that Georgia law should apply because creditors from Georgia and states other than New York would have no cause to suspect that New York law would govern the collectability of their claims. *Id*. But, creditors from New York and Commerzbank itself "would have been justified in looking to the law of the state in which the Debtor and its assets were located, simply because the Debtor and especially the transferred assets are the known common *foci* in a fraudulent conveyance action." *Id.*

Morse Tool's approach does not fit well here because the subject of this case is not the transfer of an asset but the incurrence of an obligation by Mirant. And, while *Morse Tool's* approach may afford some degree of predictability, it does not foster complete predictability. After all, if the transferred asset were located in a state other

than the transferor's place of business, say in this case, Texas, then Commerzbank might have had cause to expect that Texas law would apply, but creditors from states other than Texas would have little cause to suspect that Texas law would govern their collection actions.

This court respectfully submits that greater predictability and uniformity can be achieved by placing less emphasis on the location of the transferred assets and more emphasis on the policies underlying fraudulent transfer law. In complex transactions such as this, it is far easier to identify the law that best implements creditor protection than the state where the transferred asset was located. And because this assessment is easier, it better serves the interest of fostering predictability and uniformity of result.

e. Ease In The Determination And Application Of The Law To Be Applied

"Ideally, choice-of-law rules should be simple and easy to apply." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. j. This policy should not be overemphasized "since it is obviously of greater importance that choice-of-law rules lead to desirable results." *Id*. This policy is best served in fraudulent transfer cases by applying that law that best fulfills the underlying policies of fraudulent transfer law.

As this case demonstrates, while it is relatively easy to identify the law that best fulfills the underlying policies of fraudulent transfer law, it is often quite challenging to identify (1) where the injury or the conduct causing the injury occurred, (2) where creditors had their principal places of business, and (3) where the relationship between the transferor and transferee was centered.

Although section 145 was intended to facilitate the determination of the state with the "most significant relationship" with the occurrence, its utility is diminished when

each of its factors is subject to heated debate. For example, a particular court's identification of the act causing the injury and the place of injury may depend entirely upon how the court defines the injury in the first place. In this case, if the court had defined the injury as the transfer of funds instead of the issuance of the guaranty, it could easily have concluded that the act causing the injury itself occurred in New York, where the funds were deposited. That would sway the section 145 factors away from Georgia in favor of New York.

In fraudulent transfer actions the determinations of "place" and "injury" are frequently based upon the court's perception of the relative significance of hundreds of contacts in different places, not upon a clearly observable act that injured a person at a particular place and time. Thus, the concepts of place and injury may be completely subjective. And because identifying these factors tends to be so subjective, a contacts-based approach does little to ease the determination and application of law. Conversely, a choice-of-law approach that is focused on fulfilling the goals of fraudulent transfer policy is relatively easy and simple to apply.

f. The Needs Of The Interstate And International Systems

"Probably the most important function of choice-of-law rules is to make the interstate and international systems work well." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. d. Consequently, adopting "the same choice-of-law rules by many states will further the needs of the interstate and international systems and likewise the values of certainty, predictability and uniformity of result." *Id.*

This factor also points to a choice-of-law rule that emphasizes facilitating the underlying policies of the competing states, rather than merely defaulting to a contacts-

based analysis. If the fundamental policy of fraudulent transfer law can be fulfilled by applying a law that does not offend the underlying policies of either state, then the law of that state should govern. Here, that law is New York law.

3. Analysis Of All Choice-Of-Law Factors

When weighing section 145 factors, it is not the number of contacts, but the qualitative nature of those contacts that determines which state has the most significant relationship to the occurrence and the parties. *ASARCO*, 382 B.R. at 62; *Duncan*, 665 S.W.2d at 421. Here, the contacts of the parties favor Georgia law. Mirant has its principal place of business in Georgia, the injury occurred there, and the conduct causing the injury occurred there. Although the greatest percentage of claims is held by creditors in New York, more claimholders are in Georgia than New York. Ultimately, both the quantity and quality of contacts between the parties favor applying Georgia law.

On the other hand, almost all of the section 6 factors favor New York law. New York law goes the farthest in protecting the rights of creditors and applying New York law would not undermine the fraudulent transfer policies of Georgia. Moreover, applying the law that best protects victims of fraudulent transfers promotes certainty and predictability of result, eases the determination and application of the law to be applied, and serves the needs of the interstate and international systems.

While Georgia has a weightier connection based on physical contacts, the driving policies behind a contacts-based approach are not present in this case. The primary purpose of tort laws is to deter or punish misconduct, so the place where the conduct occurred has peculiar significance because of the state's interest in curtailing that conduct. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. e. But a

constructively fraudulent transfer is not a traditional tort. In many cases, as here, a fraudulent transfer case does not involve intentional or even negligent conduct. So, while facts such as where the parties met and conducted business might be relevant in the context of a traditional tort, they are less so in a case such as this.

Many, if not most, fraudulent transfer cases involve nothing more than an after-the-fact assessment of the debtor's financial condition at the time of the transfer and the relative consideration passing between the parties. In those cases, fraudulent transfer law is not intended to deter or punish misconduct but simply to provide a remedy that places all creditors on an equal footing. Consequently, while the state with the most physical contacts might have great interest in regulating tortious conduct that occurs within its borders, that interest is not implicated when the conduct involves no real moral culpability on the part of the parties.

Where the policies of the interested states are largely the same but there are minor differences between the relevant local law rules, "there is good reason for the court to apply the local law of that state which will best achieve the basic policy, or policies, underlying the particular field of law involved." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. h. Here, applying New York's law would best achieve the fundamental policy of fraudulent transfer law, which is to protect the interests of creditors.

Commerzbank could certainly argue that "[a] rule which exempts the actor from liability for harmful conduct is entitled to the same consideration in the choice-of-law process as is a rule which imposes liability." RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 cmt. c. But in this case the policy underlying the field of fraudulent transfer

law is clear, that being the protection of creditors. And applying a Georgia statute that would absolve the defendant from liability can hardly be justified when the basis of Georgia's fraudulent transfer policy is to vindicate the rights of injured creditors. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. f. So, while the court must give due consideration to the fact that Georgia law would exempt Commerzbank from liability in this case, that consideration cannot overcome the overriding policy of fraudulent transfer law, which is to protect creditors, not transferees. Ultimately, Georgia's interest in applying its own law should not be furthered at the expense of the policies that underlie that law in the first place.

Commerzbank and any party who allegedly has received a fraudulent transfer has a legitimate concern about the court's approach to this issue: the emphasis on policy considerations could overwhelm the contact factors of section 145 so as to make them irrelevant. The court does not intend such a result.

Any fraudulent transfer choice-of-law analysis should involve consideration of the factors in section 145. If nothing else, that analysis should reduce the number of states with significant contacts to a manageable number. In some cases the contacts may point so overwhelmingly to one state that the policy considerations in section 6 do not outweigh the significance of the physical contacts. *See e.g., Mayo v. Hartford Life Ins. Co.*, 354 F.3d 400, 404-05 (5th Cir. 2004); *Askanase v. Fatjo*, 130 F.3d 657, 671 (5th Cir. 1997); *Warfield*, 2007 WL 1112591, at *8; *Consol. Capital Equities*, 143 B.R. at 85. But in cases where the parties have significant contacts with two states and the contacts analysis could easily justify applying the law of either state, the nod should go to that

state's law that best serves the fundamental purpose of fraudulent transfer law. Here, that law is New York law.

E. Fifth Proposed Conclusion: The Amended Complaint Does Not Show That Mirant Received Fair Consideration

Commerzbank contends that even under New York law the amended complaint shows that Mirant received fair consideration for its issuance of the guaranty. According to Commerzbank, this consideration consisted of (1) available credit to EPIP in the amount of $E1.1 billion to be used to construct the power islands, (2) actual loan proceeds to EPIP in the amount of $E136 million, (3) certain tax and accounting benefits to Mirant, and (4) furtherance of Mirant's growth strategy. Commerzbank also argues that the fact that the guaranty was issued for the benefit of MADP (Mirant's indirect subsidiary) does not change the analysis because MADP's value was augmented by the transaction and Mirant received the benefit of that augmentation.

A person challenging an obligation – here, the guaranty – as constructively fraudulent under New York law must show that it was made without fair consideration. *Silverman v. Paul's Landmark, Inc. (In re Nirvana Rest., Inc.)*, 337 B.R. 495, 501 (Bankr. S.D.N.Y. 2006). Fair consideration is given when in exchange for the guaranty, property is conveyed "as a fair equivalent therefor, and in good faith." N.Y. DEBT. & CRED. LAW § 272 (McKinney 2001).

In *Mellon Bank, N.A. v. Official Comm. of Unsecured Creditors of R.M.L., Inc. (In re R.M.L., Inc.)*, 92 F.3d 139, 152 (3d Cir. 1996), the court addressed the question of whether a commitment letter issued by a bank for a loan that never funded was voidable under section 548(a)(2) of the Bankruptcy Code. Although section 548 refers to

"reasonably equivalent value" rather than "fair consideration," *R.M.L.'s* analysis is still instructive. According to *R.M.L.*, the concept of reasonably equivalent value involves two distinct inquiries. First, the court must determine if the debtor received any value at all. *Id*. at 152. If so, then the court must determine whether that value was reasonably equivalent to what the debtor gave up. *Id*.

Employing *R.M.L.*'s approach, the court can conclude that Mirant received some value for the issuance of its guaranty even though (1) it did not receive a direct benefit from the transaction, and (2) the more immediate beneficiary of the guaranty, MADP, ultimately cancelled the transaction. That is because there is no requirement that the consideration for the guaranty flow directly to the issuer in order to constitute value. *In re Nirvana*, 337 B.R. at 502. The benefit may be indirect. *Id*. at 502 (citing *Leibowitz v. Parkway Bank & Trust Co. (In re Image Worldwide, Ltd.)*, 139 F.3d 574, 578-79 (7th Cir. 1998)) (noting that indirect benefits may include "synergy, increased access to capital, safeguarding a source of supply and protecting customer relationships")). Moreover, the opportunity to receive an economic benefit in the future can constitute value under the Bankruptcy Code. *In re R.M.L.*, 92 F.3d at 148. And, because the value of what the debtor received is determined at the time that the guaranty was signed, and not with 20/20 hindsight, the failure to close the transaction is not dispositive of the value issue. *In re R.M.L.*, 92 F.3d at 151; *In re Nirvana*, 337 B.R. at 502. Because Mirant's guaranty made available a $E1.1 billion credit facility that would benefit its indirect subsidiary, MADP, and Mirant expected to enjoy certain tax and accounting benefits from the transaction, Mirant received some "value" or "consideration" for the issuance of the guaranty.

However, in order to thwart avoidance under New York's Debtor and Creditor Law, it is not enough that Mirant received "some" benefit for the issuance of its guaranty. To determine whether Mirant received "fair consideration," the court must determine the likelihood that Mirant would actually realize the benefits it expected to receive at the time of the transaction. *In re Nirvana*, 337 B.R. at 504. To constitute fair consideration, the value of the benefit to be received by Mirant must approximate the value of the obligation it incurred. *Rubin v. Mfrs. Hanover Trust Co.*, 661 F.2d 979, 991-92 (2d Cir. 1981); *In re Nirvana*, 337 B.R. at 502.

The question of the value received by the debtor for the issuance of its guaranty is "inherently fact-laden, turning, as it often does, on the case-specific circumstances surrounding the debtor's decision to enter into the particular transaction." *Butler Aviation Int'l, Inc. v. Whyte (In re Fairchild Aircraft Corp.)*, 6 F.3d 1119, 1125 n.5 (5th Cir. 2002). Because of the fact-intensive nature of this inquiry, rarely will a finding of "fair consideration" be a ground for dismissal under Rule 12(b)(6). So it is here. The financing of the power islands was an extremely complicated off-balance-sheet transaction. Although the court can conceive of some indirect benefit to Mirant because of its issuance of the guaranty, the precise value of that benefit is not ascertainable from MCAR's amended complaint. MCAR has alleged that Mirant did not receive a fair consideration. Based upon the facts alleged in the amended complaint, its allegations raise a claim for relief above the speculative level. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 555 (2007). Therefore, the court cannot conclude on the basis of the amended complaint that Mirant received fair consideration for its issuance of the guaranty.

F. Sixth Proposed Conclusion: The Amended Complaint Does Not Show That Mirant Was Solvent

Commerzbank argues that MCAR's claims must be dismissed because the operative transactional documents, Mirant's SEC filings, and Judge Lynn's valuation establish that at all times relevant to the amended complaint, Mirant was solvent. As Commerzbank points out, a finding of solvency is fatal to MCAR's claims. *See* N.Y. DEBT. & CRED. LAW § 273 (McKinney 2009) ("Every conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration.").

Under New York Debtor and Creditor law, "[a] person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured." N.Y. DEBT. & CRED. LAW §271(1). Section 271 employs a balance sheet test. *In re Nirvana*, 337 B.R. at 506. "Fair salable value" is measured "by the fair market value of the debtor's assets that could be obtained if sold in a prudent manner within a reasonable period of time to pay the debtor's debts." *Lawson v. Ford Motor Co. (In re Roblin Indus., Inc.)*, 78 F.3d 30, 35 (2d Cir. 1996); *In re Nirvana*, 337 B.R. at 506.

The operative date for the determination of solvency is May 25, 2001, the day that Mirant delivered its guaranty to Commerzbank. In any trial under section 544(b), the court would "reconstitute the balance sheet" to reflect the market value of Mirant's assets and liabilities as of that date. *In re Nirvana*, 337 B.R. at 506.

Commerzbank argues that in the transaction documents associated with the guaranty, Mirant represented that it was solvent and would not be made insolvent by the

transaction. These representations were bolstered, according to Commerzbank, by SEC filings that reflected that Mirant was continuously solvent from 2001 to 2006.

There are two problems with Commerzbank's reliance upon these pre-petition sources. First, they are not binding on MCAR. When asserting claims under section 544(b) of the Bankruptcy Code, MCAR stands in the shoes of Mirant's creditors, not Mirant itself. *See Gandy v. Gandy (In re Gandy)*, 299 F.3d 489, 495 (5th Cir. 2002). So, just as Mirant's admissions would not be binding on a creditor of Mirant, they are not binding on MCAR.

The second problem with Commerzbank's reliance upon Mirant's pre-petition statements is that even if they did constitute admissions, they are not dispositive in the context of a motion to dismiss. Admissions constitute evidence in our system of justice, and they may prove to be very persuasive at trial. But, admissions alone do not foreclose claims at the pleading stage. This is especially true of admissions of solvency found in transaction documents and SEC filings. Unfortunately, the recent history of this country is replete with examples too great to number where these representations have been proven to be not just untrue, but grossly so.

Still, Commerzbank points out that Mirant's bankruptcy schedules, Judge Lynn's valuation of Mirant, and Mirant's post-petition SEC filings – which it contends *are* attributable to MCAR – show that it was solvent at all times during its bankruptcy case and after its emergence therefrom. These sources (all of which are dated after July 14, 2003) are more troubling to the court, but not because they prove beyond contradiction that Mirant was solvent on May 25, 2001. They are troubling because they suggest that Mirant's creditors did not suffer – or at least should not have suffered – any injury

because of the issuance of the guaranty. Again, if MCAR is unable to prove injury to creditors, it has no standing to proceed in any event. Still, for the reasons previously stated, the court cannot conclude on the basis of the pleadings and the bankruptcy record that Mirant's plan paid creditors in full. So, Commerzbank's motion to dismiss based upon the alleged solvency of Mirant at the time of the issuance of the guaranty should be denied.

G. Seventh Proposed Conclusion: The Confirmation Of Mirant's Plan Does Not Bar MCAR's Claims Due To Res Judicata

Commerzbank argues that the doctrine of res judicata precludes MCAR from denying that all creditors have been paid in full. Under the doctrine of res judicata, all issues that were or could have been resolved at confirmation are precluded from relitigation. *See Stoll v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Republic Supply Co. v. Shoaf*, 815 F.2d 1046, 1051 (5th Cir. 1987).

Commerzbank contends that at least one class of creditors rejected Mirant's plan, but that when Judge Lynn confirmed the plan, he found that it was fair and equitable under section 1129(b)(2)(B). According to Commerzbank, because (1) a plan can only be fair and equitable as to creditors if (a) creditors are paid in full or (b) equity receives nothing and (2) here, equity received value, Judge Lynn must have found that creditors' claims had been satisfied in full as a condition to plan approval. *See* 11 U.S.C. § 1129(b)(2)(B). The court disagrees.

In any plan of reorganization, equity may receive value in one of three ways: (1) if all classes of claims are paid in full and there is surplus value for equity, (2) if all classes of claims are not paid in full, but all classes of claims vote in favor of a plan in

which equity is to receive value, or (3) if all classes of claims are not paid in full and one or more classes objects to the plan, but the objecting class or classes will be paid in full under the plan. *See* 11 U.S.C. § 1129(a)(8), (b)(1), (b)(2)(B). Scenario (3) applies in this case.

One class of claims, Mirant Peaker, did not cast a ballot on Mirant's plan; so, it was deemed to have rejected the plan. To satisfy Mirant Peaker's claim, Mirant amended the plan to provide enhanced treatment for that class. Under the amendment, not only was Mirant Peaker to receive New Mirant stock, but if market fluctuation reduced the value of that stock on the distribution date, New Mirant was to make up any such difference through a cash payment. Thus, the amendment insured that Mirant Peaker would be paid in full.

So, even though Judge Lynn found that the plan was fair and equitable, that finding was only necessary with respect to Mirant Peaker, the only objecting class of claims. In order to confirm Mirant's plan, Judge Lynn was not required to find that all classes of Mirant claims would be paid in full pursuant to the plan. Accordingly, the confirmation of Mirant's plan does not preclude MCAR from arguing that creditors were not paid in full.

H. Eighth Proposed Conclusion: The Amended Complaint Does Not Show An Absence Of Benefit To The Estate Under 11 U.S.C. § 550

Commerzbank contends that this adversary proceeding is an exercise in futility. It argues that even if the payments made pursuant to the guaranty are recovered pursuant to section 550, it will be entitled to a claim against Mirant in that same amount under section 502(h) of the Bankruptcy Code. And, according to Commerzbank, because

creditors in Mirant's bankruptcy were paid in full, it too would have to be paid in full. So, Commerzbank contends that because the net result of this adversary proceeding would be, at best, a wash for the estate, there can be no benefit to the estate, and demonstrating such "benefit" is essential to maintaining a cause of action under section 550. *See* 11 U.S.C. § 550(a) (stating that the trustee "may recover, for the benefit of the estate, the property transferred").

MCAR replies that if Mirant's guaranty is avoided, then the guaranty is nullified, whereupon Commerzbank will have no claim at all against Mirant. Or, it argues, at best Commerzbank might be entitled to a claim in the amount of the value that it is determined to have given for Mirant's guaranty. In either case, MCAR contends that this adversary proceeding will not result in a wash.

This court disagrees with MCAR's analysis. If MCAR succeeds in avoiding the guaranty, that does not cause the guaranty to evaporate. Once Commerzbank pays the amount of any fraudulent transfer, it is entitled to an allowed claim under section 502. *See* 11 U.S.C. § 502(d), (h). Under section 502(a), if Commerzbank paid $E136 million as a fraudulent transfer, then it would stand in the position of a pre-petition creditor with an unsatisfied guaranty claim in that amount. *See Fleet Nat'l Bank v. Gray (In re Bankvest Capital Corp.)*, 375 F.3d 51, 62 (1st Cir. 2004). If Mirant objected to Commerzbank's claim, Mirant's liability on that claim would not be governed by New York Debtor and Creditor Law, which only applies to fraudulent transfers, but by New York law governing the enforcement of contracts. Under that law, "a valuable consideration, however small" is sufficient to support a guaranty. *See generally Jacob Dold Packing Co. v. Lampe*, 192 N.Y.S. 102, 104 (N.Y. App. Div. 1921).

In its amended complaint, MCAR alleges that "in the end" Mirant received nothing of value from the issuance of the guarantee. (Am. Compl. 19). But, it also alleges that "[t]he only potential benefit from the transaction to Mirant was the intangible business opportunity relating to Power Islands." (Am. Compl. 8). This potential benefit may constitute sufficient value to support a guaranty under New York law. So, it does not necessarily follow that if its guaranty is avoided under section 544(b), Commerzbank will have no claim or a significantly reduced claim.

While the court disagrees that avoiding the guaranty will necessarily foreclose or significantly reduce any claim of Commerzbank, it still recommends that the Court deny the motion to dismiss the section 550 claim on the basis of lack of benefit to the estate. Commerzbank's motion assumes that creditors were paid in full under Mirant's plan, a proposition this court cannot concede on the basis of the pleadings and the bankruptcy record alone. Because MCAR's allegations at least surpass the speculative threshold, the court cannot conclude that creditors would not benefit under section 550 of the Bankruptcy Code if the guaranty were avoided.

I. Ninth Proposed Conclusion:
The Amended Complaint States A Claim Under 11 U.S.C. § 550(a)
As To Two Cash Transfers Made To Mirant Investments, B.V.

Commerzbank insists, however, that at a minimum, the court must dismiss MCAR's claims as to two cash transfers that were made by Mirant to Mirant Investments, B.V. and then to Commerzbank. Commerzbank argues that (1) in order to avoid these transfers MCAR would first have to avoid them as to the initial transferee, Mirant Investments, (2) MCAR failed to do so, and (3) because MCAR is now time-barred from suing Mirant Investments, its claims against Commerzbank must be

dismissed. Commerzbank bases its argument on section 550(a), which says that the trustee may recover from an immediate or mediate transferee "to the extent a transfer is avoided" under section 544 or 548. 11 U.S.C. § 550(a).

MCAR rejects this analysis. It alleges that Mirant Investments was a "mere conduit" of Mirant and, as such, MCAR is not required to avoid the transfers as to Mirant Investments before pursuing Commerzbank.

Every court of appeals to consider this issue has declined to find "mere conduits" to be initial transferees. *Christy v. Alexander & Alexander of New York, Inc. (In re Finley, Kumble, Wagner, et al.)*, 130 F.3d 52, 58 (2d Cir. 1997). In the fifth circuit, "a party that receives a transfer from the debtor will not be considered the initial transferee unless that party gains actual dominion or control over the funds." *Sec. First Nat'l Bank v. Brunson (In re Coutee)*, 984 F.2d 138, 141 (5th Cir. 1993) (citing *Bonded Fin. Servs., Inc. v. European American Bank*, 838 F.2d 890, 893 (7th Cir. 1988)). And, one who holds funds "only for the purpose of fulfilling an instruction to make the funds available to someone else" is not an initial transferee. *Id*. at 141. Because it is logical to infer that Mirant Investments was merely a conduit, and such an inference must be drawn in MCAR's favor, the motion to dismiss on this basis should be denied.

Moreover, this court does not believe that section 550 requires a party such as MCAR to avoid the transfer to Mirant Investments before proceeding against Commerzbank even if Mirant Investments is not a mere conduit. The court acknowledges a split of authority on this issue. One line of authorities holds that the phrase "to the extent that a transfer is avoided" in section 550 requires avoidance first as to any initial transferee before immediate or mediate transferees can be pursued. *See*

Weinman v. Simons (In re Slack-Horner Foundries Co.), 971 F.2d 577, 580 (10th Cir. 1992); *Enron Corp. v. Int'l. Fin. Corp. (In re Enron Corp.)*, 343 B.R. 75, 80-82 (Bankr. S.D.N.Y. 2006). The other holds that avoidance is not required as to the initial transferee as a predicate to pursuit of other transferees. *See IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs., Inc.)*, 408 F.3d 689, 704 (11th Cir. 2005); *Crafts Plus+, Inc. v. Foothill Capital Corp. (In re Crafts Plus+, Inc.)*, 220 B.R. 331, 338 (Bankr. W.D. Tex. 1998). Because this court believes that interpreting section 550 to require avoidance of the initial transfer before allowing recovery from subsequent transferees "conflates Chapter 11's avoidance and recovery sections," it believes the latter line of authorities is more persuasive. *IBT Int'l*, 408 F.3d at 706 (quoting *Kendall v. Sorani (In re Richmond Produce Co., Inc.)*, 195 B.R. 455, 463 (N.D. Cal. 1996)). Thus, MCAR's amended complaint states a claim for relief under sections 550(a)(1) and (a)(2).

J. Tenth Proposed Conclusion:
The Amended Complaint States A Claim For Relief Under 11 U.S.C. § 548

According to the amended complaint, Mirant made two payments to Commerzbank within the year prior to its petition in bankruptcy. MCAR seeks to avoid those payments pursuant to section 548 of the Bankruptcy Code. Commerzbank argues that because the guaranty is not avoidable, any payments made by Mirant on account of the guaranty are not avoidable under section 548.

Because MCAR's amended complaint states a claim for the avoidance of the guaranty, it also states a claim for avoidance of all payments made on account of the guaranty.

K. Final Conclusion:
The Motion To Dismiss And
The Motion For Summary Judgment Should Be Denied

For the reasons set forth herein, this court respectfully recommends that the District Court deny Commerzbank's motion to dismiss and motion for summary judgment.

Respectfully submitted,

/s/
Russell F. Nelms
United States Bankruptcy Judge

END OF PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW #