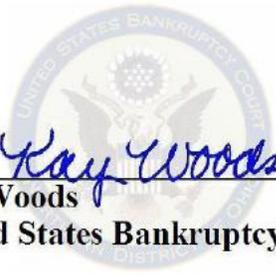


IT IS SO ORDERED.

Dated: August 24, 2016
08:56:27 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
	*	
D & L Energy, Inc., et al.,	*	
	*	CASE NUMBER 13-40813
Debtors.	*	
	*	
* * * * *	*	
	*	
ANTHONY J. DeGIROLAMO,	*	
CHAPTER 7 TRUSTEE,	*	
	*	ADVERSARY NUMBER 16-04039
Plaintiff,	*	
	*	
v.	*	
	*	
NORTHSTAR DISPOSAL SERVICES	*	
VI, LLC,	*	
	*	HONORABLE KAY WOODS
Defendant.	*	
	*	

MEMORANDUM OPINION REGARDING MOTION TO DISMISS

This cause is before the Court on Northstar Disposal Services VI's Motion to Dismiss ("Motion to Dismiss") (Doc. 5) filed by

Defendant Northstar Disposal Services VI, LLC ("Northstar #6") on May 16, 2016. Northstar #6 moves to dismiss this adversary proceeding on the basis that Resource Land Holdings, LLC ("RLH") did not assume any pre-closing liabilities when it purchased 100% of the membership interests in Northstar #6 from Debtor D & L Energy, Inc. ("D & L").¹ On May 23, 2016, Plaintiff Anthony J. DeGirolamo, Chapter 7 Trustee for the substantively consolidated estates of the Debtors ("Trustee"), filed Plaintiff's Response to Defendant's Motion to Dismiss ("Response") (Doc. 6). On June 3, 2016, Northstar #6 filed Northstar Disposal Services VI, LLC's Reply in Further Support of its Motion to Dismiss ("Reply") (Doc. 8).

For the reasons set forth herein, the Court will deny the Motion to Dismiss.

This Court has jurisdiction pursuant to 28 U.S.C. § 1334 and General Order No. 2012-7 entered in this district pursuant to 28 U.S.C. § 157(a). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1391(b), 1408, and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F) and (H). The following constitutes the Court's findings of fact and conclusions of law pursuant to Federal Rule of Bankruptcy Procedure 7052.

¹ Although the pleadings often refer to the Debtor as D&L Energy, Inc., the Voluntary Petition (Doc. 1) lists the entity as D & L Energy, Inc., which is the form the Court will use.

I. BACKGROUND

A. Main Case

Debtors D & L and Petroflow, Inc. (collectively, "Debtors") filed voluntary petitions pursuant to chapter 11 of the Bankruptcy Code on April 16, 2013.²

On September 9, 2014, the Debtors filed Motion of the Debtors for Entry of an Order (i) Authorizing the Private Sale of Certain Disposal Well Assets of Debtors Free and Clear of Liens, Claims, and Encumbrances and (ii) Granting Relating [sic] Relief ("Private Sale Motion") (Main Case, Doc. 834), in which the Debtors requested authority to sell certain saltwater disposal well assets to RLH free and clear of all liens, claims, and encumbrances. The Court held a hearing on the Private Sale Motion on October 6, 2014, at which the Court granted the Private Sale Motion. On that same date, the Court entered Order (i) Authorizing the Private Sale of Certain Disposal Well Assets of the Debtors Free and Clear of Liens, Claims and Encumbrances; and (ii) Granting Related Relief ("Private Sale Order") (Main Case, Doc. 867) to memorialize that ruling. Exhibit A to the Private Sale Order is Asset Purchase Agreement for Sale of Interests in Certain Salt Water Disposal Well Assets ("Private Sale APA") executed by the Debtors and RLH.

² The Court will refer to the Debtors' substantively consolidated bankruptcy cases — Case No. 13-40813 — as the "Main Case."

The Private Sale APA contained the following recitals regarding Northstar #6:

F. Northstar Disposal Services VI, LLC ("Northstar #6") is an Ohio limited liability company with its principal place of business located at 2761 Salt Springs Road, Youngstown, OH 44509. Northstar #6 owns and intended to operate a Class II Saltwater Injection Well (the "Northstar Disposal Well #6") located in the Coitsville Township, Mahoning County, State of Ohio.

G. D&L Energy, Inc. is the record, actual and beneficial owner of 100% of the units of membership interests in Northstar #6 (the "Northstar #6 Units").^[3]

(Private Sale APA at 1-2.) The Private Sale Order authorized and directed the Debtors to sell and transfer to RLH the "Sale Assets," as defined in § 2.1 of the Private Sale APA. The only Sale Assets related to Northstar #6 were:

(c) All of the Debtors' right, title and interest in and to the Northstar #6 Units and the Northstar #6 Lease.^[4]

(*Id.* § 2.1(c).) The Sale Assets did not include the limited liability company ("LLC") Northstar #6. The Private Sale APA expressly stated that no assets other than the Sale Assets were to be sold and transferred to RLH:

³ Unless otherwise indicated, the Court will utilize the defined terms set forth in the Private Sale Order and the Private Sale APA.

⁴ The Private Sale APA defined the "Northstar #6 Lease" as "that certain Oil and Gas/Disposal Well Lease entered into on August 5, 2011 by and between George E. Collins, Jr., as lessor and D&L Energy, as lessee and covering land situated in Coitsville Township, Mahoning County, State of Ohio . . . containing 10.380 acres" (Private Sale APA § 1.1(m).)

It is the Parties' intent that the Debtors are selling and the Buyer⁵ is purchasing **only** the Debtors' interest in the Sale Assets as described in this Section 2.1. To the extent that an asset of the Debtors is not expressly included in this Section 2.1, that asset shall not be transferred or otherwise affected by this Agreement, shall be considered an Excluded Asset pursuant to Section 2.2 of this Agreement, and shall remain an asset of Debtors' estates in the Bankruptcy.

(*Id.* at 6.)

The Private Sale Order contained the following provisions regarding the transfer of the Sale Assets from the Debtors to RLH:

9. Sale Free and Clear of All Liens, Claims, Encumbrances and Interests. Pursuant to Bankruptcy Code sections 105(a) and 363(f), the Debtors are authorized and directed to transfer the Sale Assets to RLH and upon the closing, the transfer of the Sale Assets to RLH under this Agreement will be a legal, valid and effective transfer, and will vest in RLH, at the closing, all right, title and interest of the Debtors in and to the Sale Assets, free and clear of any and all liens, claims, encumbrances or interests of any kind or nature

10. Liens, Claims, Encumbrances and Interests Transfer to Sale Proceeds. Upon consummation of the transaction contemplated by the Private APA, all liens, claims, encumbrances and interests (including, without limitation, all liens, claims, encumbrances and interests with respect to any post-petition financing extended to the Debtors or post-petition obligations incurred by Debtors) shall be released, terminated, and discharged as to the Sale Assets to the fullest extent permitted by law without necessity of any further notice to, or action by, any person or entity. . . .

(Private Sale Order ¶¶ 9-10.)

⁵ The Private Sale APA defined the "Buyer" as RLH "or an affiliate who is a permitted assignee under this Agreement." (Private Sale APA at 1.) Northstar #6 states that Bobcat Energy Resources, LLC ("Bobcat"), an affiliate of RLH, closed the purchase of the Sale Assets pursuant to the Private Sale Order and the Private Sale APA. (Mot. to Dismiss at 6.) Northstar #6 refers interchangeably to both RLH and Bobcat in its pleadings.

Likewise, the Private Sale APA provided that RLH was not assuming any liabilities, with certain specified exceptions, as follows:

2.4. **Excluded Liabilities.** EXCEPT AS IT HAS OTHERWISE SPECIFICALLY ASSUMED ANY SUCH LIABILITY OR OBLIGATION IN THIS AGREEMENT, THE BUYER SHALL NOT ASSUME, OR IN ANY WAY BE LIABLE OR RESPONSIBLE FOR, ANY LIABILITIES, OBLIGATIONS OR DEBTS OF THE DEBTORS OR THE LIMITED LIABILITY COMPANIES, OR ANY ENCUMBRANCES, OF ANY TYPE OR NATURE, KNOWN OR UNKNOWN, CONTINGENT OR OTHERWISE, BASED ON EVENTS, OR ON ACTS OR OMISSIONS OF THE DEBTORS OR THE LIMITED LIABILITY COMPANIES, OCCURRING ON, BEFORE OR AFTER THE CLOSING, FOR WHICH THE DEBTORS OR THE LIMITED LIABILITY COMPANIES HAD A LIABILITY, OBLIGATION OR DUTY THAT THE BUYER DID NOT EXPRESSLY ASSUME UNDER THIS AGREEMENT (collectively, the "Excluded Liabilities").

(Private Sale APA § 2.4 (n.3 omitted).) The Private Sale APA specified three limited categories of Assumed Liabilities:

2.3. **Assumed Liabilities.** Subject to the terms and conditions of this Agreement, at the Closing the Buyer shall assume and agree to discharge only the following specifically-described liabilities and obligations in connection with the Sale Assets (collectively, the "Assumed Liabilities"):

(a) To the extent arising after Closing, liabilities and obligations to be performed or discharged pursuant to any of the Contracts included in the Sale Assets, and for which the Bankruptcy Court has entered its order approving the Debtors' assumption and assignment to the Buyer, if any;

(b) To the extent they accrue after the Closing, liabilities or obligations arising out of the ownership, use or operation of the Sale Assets, to the extent any such liabilities or obligations do not arise out of and are not related to the Debtors' ownership, use or operation of the Sale Assets, the businesses using the Sale Assets, the limited liability companies or those companies' businesses before the Closing; and

(c) Liabilities or obligations related to the Buyer's performance under or enforcement of the terms of this Agreement.

(*Id.* § 2.3 (n.1-2 omitted).)

On March 25, 2015, the Debtors' bankruptcy cases were converted to chapter 7 (see Main Case, Doc. 1379) and Mr. DeGirolamo was appointed Chapter 7 Trustee (see Main Case, Doc. 1380). The Debtors' estates were substantively consolidated on May 28, 2015 (see Main Case, Doc. 1462).

B. Complaint

On April 14, 2016, the Trustee filed Complaint for (1) Avoidance and Recovery of Fraudulent Transfers; (2) Avoidance and Recovery of Preference Period Transfers; and (3) Disallowance of Claims ("Complaint") (Doc. 1), which commenced this adversary proceeding. The Complaint includes the following allegations:

1. "[A]t all times relevant to the allegations of the Complaint, D&L was the 100% owner of [Northstar #6]" (Compl. ¶ 11);
2. Northstar #6 was an "affiliate" of the Debtors, as set forth in 11 U.S.C. § 101(31)(E), and an "insider" of the Debtors, as defined in 11 U.S.C. § 101(31) and O.R.C. §§ 1336.01, *et seq.* (*id.*);
3. During the period December 19, 2011 through November 30, 2012, the Debtors transferred \$1,085,311.73 to Northstar #6 ("Fraudulent Transfers") (*id.* ¶ 17);

4. During the one-year period preceding the Petition Date, the Debtors transferred \$1,076,120.43 to Northstar #6 ("Preference Period Transfers") (together with the Fraudulent Transfers, "Transfers") (*id.* ¶ 20); and
5. The Transfers "were made for no useful purpose other than to defraud and hinder the Debtor's^[6] creditors, to the sole benefit of the insiders, and . . . in exchange for no value or for less than reasonably equivalent value and at a time when the Debtor was insolvent or on the verge of insolvency" (*id.* ¶ 16).

The Complaint contains five counts:

- I. Count I - Pursuant to 11 U.S.C. §§ 548 and 550, the Fraudulent Transfers to Northstar #6 should be avoided and recovered for the benefit of the Debtors' bankruptcy estate (*id.* ¶¶ 22-28);
- II. Count II - Pursuant to O.R.C. §§ 1336.01, *et seq.*, the Fraudulent Transfers to Northstar #6 should be avoided and recovered for the benefit of the Debtors' bankruptcy estate (*id.* ¶¶ 29-36);
- III. Count III - Pursuant to 11 U.S.C. § 547, the Preference Period Transfers constitute avoidable preferences (*id.* ¶¶ 37-46);
- IV. Count IV - Pursuant to 11 U.S.C. § 550(a), the Trustee is entitled to recover from Northstar #6 an amount not less than

⁶ The Court notes that the Trustee collectively refers to the Debtors as the Debtor in his pleadings.

the aggregate amount of the Transfers, plus interest and the costs of this proceeding (*id.* ¶¶ 47-50); and

V. Count V - Pursuant to 11 U.S.C. § 502(d), any claims of Northstar #6 and its assignees against the Debtors' bankruptcy estate must be disallowed until such time as Northstar #6 pays to the Trustee an amount equal to the aggregate amount of the Transfers, plus interest and the costs of this proceeding (*id.* ¶¶ 51-53).

C. Motion to Dismiss and Responsive Pleadings

1. Motion to Dismiss

In its Motion to Dismiss, Northstar #6 states that Bobcat closed the purchase of the Sale Assets pursuant to the Private Sale Order and the Private Sale APA. (Mot. to Dismiss at 5.) Bobcat subsequently transferred the Northstar #6 Units to another RLH affiliate, Bobcat SWIW Holdings, LLC. (*Id.* at 5-6.)

Northstar #6 argues that the claims set forth in the Complaint are "ones this Court expressly ordered RLH did not assume, and therefore were left outstanding and available only as against D & L Energy and the proceeds of the private sale when RLH purchased D & L Energy's interests in Northstar #6." (*Id.* at 6.) Specifically, the APA stated that RLH "SHALL NOT ASSUME, OR IN ANY WAY BE LIABLE OR RESPONSIBLE FOR, ANY LIABILITIES, OBLIGATIONS OR DEBTS OF THE DEBTORS OR THE LIMITED LIABILITY COMPANIES." (*Id.* at 7 (quoting Private Sale APA § 2.4).) Northstar #6 asserts,

The Trustee, who is bound by the Court's [Private Sale Order], is likewise bound by the provisions of the Private Sale APA and the [Private Sale Order] that direct the assets and limited liability companies transferred free and clear of: (a) claims that accrued before the November 30, 2014 Closing⁷; and (b) liabilities or obligations arising out of the ownership, use or operation of the Sale Assets, to the extent any such liabilities or obligations arise out of and are related to the Debtors' ownership, use or operation of the Sale Assets, the businesses using the Sale Assets, the limited liability companies or those companies' businesses before the Closing.

As a result, because D & L Energy retained any liabilities or obligations of Northstar #6 and because Bobcat, the successor in interest to RLH, expressly did not assume any liabilities of Northstar #6, the Trustee cannot recover the funds he alleges D & L Energy fraudulently transferred to Northstar #6.

(*Id.* at 7-8.)

2. Response

In his Response, the Trustee argues,

The asset Debtor transferred to Resource Land Holdings, LLC (or its nominees or affiliates, Bobcat Energy Resources, LLC and Bobcat SWIW, LLC; collectively, "Bobcat") was Debtor's 100% equity stake in [Northstar #6]. This transfer was not occasioned by a release or waiver of claims that Debtor or its estate may have against [Northstar #6]. Thus, while [Northstar #6] stresses that Bobcat, as the buyer of [Northstar #6]'s membership units, did not assume any pre-closing liabilities of Debtor, this fact is irrelevant. The Complaint is brought against [Northstar #6], not its owner, Bobcat. That Bobcat did not assume [Northstar #6]'s liabilities to Debtor's estate does not relieve [Northstar #6] of its liability to Debtor's estate. Similarly, a sale of the Debtor's equity interest in [Northstar #6] free and clear of all claims does not relieve [Northstar #6] of its liability to the Debtor's estate.

⁷ The Court makes no finding regarding the actual date of the closing, which has no effect on the Court's analysis.

(Resp. at 1-2.)

The Trustee further argues that the Private Sale Order and the Private Sale APA “only speak to Bobcat’s non-assumption of [Northstar #6]’s liabilities and the sale of Debtor’s Northstar #6 Units free and clear of claims.” (*Id.* at 3.) The Trustee states that neither the Private Sale Order nor the Private Sale APA relieved Northstar #6 of any liabilities, particularly since Northstar #6 was not a party to the Private Sale APA. “[T]he Court only authorized – and only had the ability to authorize – a sale of Debtor’s assets (*i.e.* Debtor’s equity interest in [Northstar #6]), **not** the assets of [Northstar #6] itself, free and clear of claims and encumbrances.” (*Id.* at 3-4.)

Finally, the Trustee states that, pursuant to 11 U.S.C. § 363, the Debtors were only permitted to sell property of the estate. (*Id.* at 4-5.) “Thus, a bankruptcy court’s sale order may not go so far as to expunge interests held by parties in property that is not property of the estate.” (*Id.* at 4 (citation and parenthetical omitted).) The Trustee asserts that, while the Northstar #6 Units were property of the Debtors’ estate, Northstar #6 itself was not. “Trustee’s claims raised in the Complaint . . . are not claims against Bobcat as the owner of the Northstar #6 Units; they are claims against the limited liability company, [Northstar #6], itself. Nothing in the [Private Sale APA] or [the Private Sale

Order] resulted in a release or waiver of any of [Northstar #6]'s obligations." (*Id.* at 5.)

3. Reply

Northstar #6 advances four primary arguments to rebut the Trustee's position that it can be held liable for the Transfers. First, the Private Sale Order and the Private Sale APA expressly extinguished any claims against the LLCs, including Northstar #6, that arose before the closing. (*Reply* at 3-4.) Second, Bobcat purchased both the Northstar #6 Units and all of the assets of Northstar #6. "Because the LLC itself is clearly 'naturally, connected to the property sold,' it was entirely proper for this Court to extinguish the liabilities of the LLC."⁸ (*Id.* at 4.) Third, Northstar #6 argues as follows:

[T]he LLC is not a separate asset that was somehow available for a separate purchase transaction or that now has some manner of separate liability. The only way to acquire an LLC is to acquire the membership interests (or, one can obtain a parallel result by purchasing all of the LLC's assets). One cannot purchase the LLC entity as if it were some manner of stand-alone thing, and not purchase the membership interests. (The same would be true with a corporation; one cannot purchase the entity and not purchase the shareholder interests.) Accordingly, the Trustee's efforts to hold the LLC liable as if it were something that was not the subject of the [Private Sale APA] and this Court's [Private Sale Order] is [sic] illogical and contrary to how corporate entities are structured and sold.

⁸ Although Northstar #6 indicates that this statement contains a quotation, it provides no citation thereto.

(*Id.*) Finally, “[w]here the Debtor’s interest is in a single member LLC, such as D&L Energy’s interest in Northstar #6, the Estate may transfer (and strip the liabilities from) both the membership interests and the LLC itself (which is exactly what happened here). (*Id.* (citation and parenthetical omitted).) “D&L Energy owned all of the membership interests and all of the assets of this single member LLC. Further, the Private Sale APA provided not only that Bobcat was purchasing the membership interests and the assets free and clear; it also it also [sic] specifically provided that the LLC was also free and clear.” (*Id.* at 5.)

II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6), incorporated by Federal Rule of Bankruptcy Procedure 7012(b), allows a defendant to move for dismissal of a complaint that fails “to state a claim upon which relief can be granted.” FED. R. CIV. P. 12(b)(6) (2016). The motion to dismiss will be denied if the complaint contains “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Thus, “to survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements

to sustain a recovery under some viable legal theory." *Eidson v. Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007) (citation omitted). When evaluating a motion to dismiss, the court must "construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the plaintiff." *Tam Travel, Inc. v. Delta Airlines, Inc. (In re Travel Agent Comm'n Antitrust Litig.)*, 583 F.3d 896, 903 (6th Cir. 2009) (quotation marks and citation omitted).

III. ANALYSIS

The Court will deny the Motion to Dismiss on two independent bases: (i) Northstar #6 and the assets of Northstar #6 were not property of the Debtors' estate and, thus, could not have been sold by the Debtors free and clear of all liens, claims, and encumbrances pursuant to 11 U.S.C. § 363; and (ii) Northstar #6 and the assets of Northstar #6 were not included in the Sale Assets and, thus, neither the Private Sale Order nor the Private Sale APA supports Northstar #6's position that all pre-closing claims against Northstar #6 were released.

A. Property of the Estate and 11 U.S.C. § 363

Northstar #6 argues that RLH purchased "both the membership interests of [Northstar #6] and all of the assets of the LLC. Because the LLC itself is clearly 'naturally, connected to the property sold,' it was entirely proper for this Court to extinguish

the liabilities of the LLC." (Reply at 4.) Northstar #6 further contends, "Where the Debtor's interest is in a single member LLC, such as D&L Energy's interest in Northstar #6, the Estate may transfer (and strip the liabilities from) both the membership interests and the LLC itself (which is exactly what happened here)." (*Id.*)

The Court finds that Northstar #6 has misstated Ohio law regarding the structure of LLCs.⁹ Even if a debtor in possession is the sole member of an LLC, neither the LLC itself nor the assets of the LLC are property of the estate permitted to be sold free and clear of all liens, claims, and encumbrances pursuant to § 363.

"Under Ohio law, a limited liability company, [sic] and a corporation are distinct legal entities separate from an individual. See [Ohio] Revised Code §§ 1701.01, *et seq.*; 1705.01, *et seq.*" *Wilson v. Waller*, No. 2:16-cv-119, 2016 U.S. Dist. LEXIS 50337, at *4 (S.D. Ohio Apr. 14, 2016). "Real and personal property owned or purchased by a limited liability company shall be held and owned in the name of the company. Conveyance of that property shall be made in the name of the company." O.R.C. § 1705.34 (2016). A "membership interest" in an LLC "means a member's share of the profits and losses of a limited liability

⁹ "[Northstar #6] is an Ohio limited liability company" (Private Sale APA at 1.) "Unless a countervailing federal interest exists, state law determines whether a debtor has a property interest for purposes of § 541(a)(1)." *Kitchen v. Boyd (In re Newpower)*, 233 F.3d 922, 928 (6th Cir. 2000) (citations omitted).

company and the right to receive distributions from the company." O.R.C. § 1705.01(H) (2016). "A membership interest in a limited liability company is personal property." O.R.C. § 1705.17 (2016).

In *Whittaker v. Groves Venture, LLC (In re Bolon)*, 538 B.R. 391 (Bankr. S.D. Ohio 2015), the individual debtor ("Individual Debtor") was the sole member of an LLC ("LLC 1") that held a 50% interest in another LLC ("LLC 2"). Prior to the Individual Debtor's petition date, he authorized LLC 1 to transfer its membership interest in LLC 2 to the other 50% owner of LLC 2. The chapter 7 trustee in the Individual Debtor's bankruptcy case sought to avoid LLC 1's transfer of its membership interest in LLC 2, but the Bankruptcy Court for the Southern District of Ohio found that the transfer could not be avoided because LLC 1's membership interest in LLC 2 was property of LLC 1, rather than the Individual Debtor. Discussing the above-referenced provisions of the Ohio Revised Code, the bankruptcy court explained:

Ohio courts have interpreted these provisions of the Ohio Revised Code to mean that property owned by a limited liability company is property of the company, not property of the members of the company. *See Ogle v. Hocking Cty.*, 2014-Ohio-5422, 2014 WL 6977628, at *6 (Ohio Ct. App. 2014) ("Even if we were to assume that the Ogles are the sole members of Ogleshill Farm, LLC, they still do not have standing to sue on its behalf: A membership interest in a limited liability company . . . does not confer upon the member any specific interest in company property, whether personal property or real property. Such property is, instead, held and [owned] solely by the company.") (internal quotation marks omitted). The Bankruptcy Appellate for the Sixth Circuit ("BAP") and Ohio bankruptcy courts have followed

this established legal principle. See *In re Breece*, No. 12-8018, 2013 Bankr. LEXIS 203, 2013 WL 197399, at *3 (B.A.P. 6th Cir. Jan. 18, 2013) ("A membership interest in a limited liability company [under Ohio law] . . . does not confer upon the member any specific interest in company property, whether personal property or real property. Such property is, instead, held and [owned] solely by the company.") (internal quotation marks omitted); *In re Liber*, No. 08-37046, 2012 Bankr. LEXIS 2244, 2012 WL 1835164, at *4 (Bankr. N.D. Ohio May 18, 2012) ("[T]he Trustee, having only succeeded to the Debtor's membership interest in Nev-Mark, has no specific interest in Nev-Mark's property."); *In re Saunier*, No. 11-60997, 2012 Bankr. LEXIS 5449, 2012 WL 5898601, at *1 (Bankr. N.D. Ohio Nov. 20, 2012) ("[T]he real estate [that the Chapter 7 trustee] wants to sell is not property of the bankruptcy estate, but is property of the non-debtor company, Psalms. . . . Under Ohio law, '[r]eal and personal property owned or purchased by a limited liability company [is] held and owned in the name of the company.' O.R.C. § 1705.34. . . . What became part of the bankruptcy estate is Debtors' interest in Psalms.").

Id. at 398.

As explained by the bankruptcy court in *Bolon*, pursuant to Ohio law, the member of an LLC, even the sole member, is distinct from the LLC itself and has no personal interest in the assets of the LLC. Instead, only the membership interests in the LLC are personal property of the member. As a consequence, this Court finds that Northstar #6 itself and the assets of Northstar #6, as opposed to the Northstar #6 Units, were not property of the Debtors' estate.

Pursuant to § 363(b)(1), a trustee or debtor in possession¹⁰ “may use, sell, or lease, other than in the ordinary course of business, property of the estate” 11 U.S.C. § 363(b)(1) (2016). Section 363(f) authorizes a debtor in possession to “sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate” 11 U.S.C. § 363(f). Thus, as an initial matter, a debtor in possession may only sell property of the estate pursuant to § 363.

The bankruptcy court’s inability to authorize the sale of property owned by a non-debtor LLC was addressed by Judge Kendig of this Court in *In re Saunier*, No. 11-60997, 2012 Bankr. LEXIS 5449 (Bankr. N.D. Ohio Nov. 20, 2012). In that case, the chapter 7 trustee moved to sell real property owned by an LLC in which the debtors owned 100% of the membership interests. Judge Kendig began his analysis by stating, “The problem for Trustee is that the real estate she wants to sell is not property of the bankruptcy estate, but is property of the non-debtor company. . . . The real estate is therefore not under the jurisdiction of the bankruptcy court.” *Id.* at *2 (internal citations omitted). Even though the debtors owned 100% of the membership interests in the LLC, only the membership interests, rather than the assets of the LLC, were

¹⁰ Pursuant to 11 U.S.C. § 1107(a), “a debtor in possession shall have all the rights . . . and powers, and shall perform all the functions and duties . . . of a trustee serving in a case under this chapter.” 11 U.S.C. § 1107(a) (2016).

property of the estate. “[A]ssets of the company are retained for the benefit of creditors of the company, not for the benefit of its members, who are not liable for the debts of the company. . . . Under this principle, membership interests in the company only have value to the extent assets exceed the liabilities.” *Id.* at *3 (citations omitted). In response to the trustee’s argument that she had the authority to sell the real property because the debtors owned 100% of the membership interests in the LLC, Judge Kendig found:

Although Trustee may have the legal authority to do what she purposes, the court does not have the authority to sanction it. She either has the power or she does not. There is nothing the court can do to add [sic] or detract from the rights governed by Ohio law and any operating agreement that exists. . . .

The court is mindful that Trustee may want some type of court “cover” for this sale. The court cannot find that this is the appropriate vehicle. Trustee should look at other options, which may include some sort of notice, which does not require court approval. This would have no binding legal effect but would provide notice to those served. Other alternatives may also exist, including dissolution of the limited liability company. The court cannot authorize a sale of property that is not property of the bankruptcy estate, nor the operation of Debtors’ membership interests.

Id. at *3-4.

The same conclusion was reached by the Bankruptcy Court for the Western District of Michigan in *In re Hopkins*, No. 10-13592, 2012 Bankr. LEXIS 801 (Bankr. W.D. Mich. Feb. 2, 2012). In *Hopkins*, the chapter 7 trustee moved to sell real property that

was owned by a non-debtor LLC in which the debtor held 100% of the membership interests. The court found that "although the Debtor's interest in the LLC was part of the bankruptcy estate, the Property held by the LLC was not." *Id.* at *2 (citation omitted). The bankruptcy court concluded:

Because the property itself is not included within the bankruptcy estate, the court does not have the authority to issue orders authorizing its sale under 11 U.S.C. § 363(b). Additionally, because 11 U.S.C. § 363(f) and Fed. R. Bankr. P. 6004(h) only apply to the sale of estate property, neither would pertain to the Trustee's proposed transaction. For these reasons, and to this extent, the court is constrained to deny the Motion.

Id. at *3. Although the bankruptcy court could not authorize a sale of the LLC's assets pursuant to § 363, the court "acknowledge[d]" the sale. *Id.* at *3-4 ("[T]o the extent applicable law authorizes the Trustee to cause the LLC to sell the Property, the court will acknowledge the Trustee's authority to effectuate the sale.").

Northstar #6 included a quotation from an article in the American Bankruptcy Institute Journal ("ABIJ Article") for the following proposition: "Where the Debtor's interest is in a single member LLC, such as D&L Energy's interest in Northstar #6, the Estate may transfer (and strip the liabilities from) both the membership interests and the LLC itself (which is exactly what happened here)." (Reply at 4 (citing Robert C. Furr & Jason S. Rigolli, *A Debtor's Membership Interest in an LLC: What a Trustee*

Receives, AM. BANKR. INST. J. 38, 39 (Aug. 2012) (“Where a debtor holds an interest in a single-member LLC, the analysis of the trustee’s interest in that LLC is easy: The trustee holds the ‘full right, title and interest’ in that LLC. The debtor’s interest is freely alienable, personal property of the debtor, constituting property of the estate pursuant to § 541(a)(1) of the Code.”).) The quoted passage from the ABIJ Article, in turn, cites *In re Albright*, 291 B.R. 538 (Bankr. D. Col. 2003). However, the facts and holding in *Albright* are distinguishable from the facts and holding in this case and do not detract from this Court’s analysis.

In *Albright*, the debtor was the sole member of an LLC that owned real property. The chapter 7 trustee filed “Motion to Allow Trustee to Take Any and All Necessary Actions to Liquidate Property Owned by [the LLC] (‘Motion to Liquidate’)[.]” *Id.* at 539. The chapter 7 trustee argued that, because the debtor was the sole member and manager of the LLC, the trustee (i) controlled the LLC; and (ii) could cause the LLC to sell its real property and distribute any net proceeds to the bankruptcy estate. The Bankruptcy Court for the District of Colorado agreed and granted the Motion to Liquidate. The court found that the debtor’s 100% membership interest in the LLC constituted personal property that was property of the estate and concluded, “Because there are no other members in the LLC, the entire membership interest passed to the bankruptcy estate, and the Trustee has become a ‘substituted

member.'" *Id.* at 540 (n.5 omitted). The court explained the effect of its ruling as follows:

The Colorado limited liability company statute provides that the members, including the sole member of a single member limited liability company, have the power to elect and change managers. Because the Trustee became the sole member of [the LLC] upon the Debtor's bankruptcy filing, the Trustee now controls, directly or indirectly, all governance of that entity, including decisions regarding liquidation of the entity's assets.

Id. at 541 (n.10 omitted). As a result, the court ordered, "[T]he Trustee, as sole member, controls [the LLC] and may cause the LLC to sell its property and distribute net proceeds to his estate. Alternatively, the Trustee may elect to distribute the LLC's property to the bankruptcy estate, and, in turn, liquidate that property himself[.]" *Id.* at 542.

As distinguished from the argument raised by Northstar #6 in this case, the trustee in *Albright* did not seek to sell the assets of the LLC free and clear of all liens, claims, and encumbrances pursuant to § 363. Rather, that court authorized the trustee to "cause" the LLC to sell the LLC's assets and distribute the "net proceeds" to the bankruptcy estate. Such ruling recognized that, upon the liquidation of an LLC's assets, members of the LLC are not entitled to a distribution until obligations of the LLC are satisfied. See O.R.C. § 1705.46(A) (2016) ("Upon the winding up of a limited liability company and the liquidation of its assets, the assets shall be distributed in the following order: (1) To the

extent permitted by law, to members who are creditors and other creditors in satisfaction of liabilities of the company other than liabilities for distributions to members[.]").

In addition, the court in *Albright* concluded that the trustee could either cause the LLC to sell its property and distribute any net proceeds to the bankruptcy estate or distribute the LLC's property to the bankruptcy estate. In this case, the Debtors, acting as debtors in possession, took neither action. Instead, the Debtors simply sold their membership interests in Northstar #6 to RLH, after which time RLH could exercise its membership rights as permitted pursuant to applicable law and Northstar #6's operating agreement.

Each of the above-referenced cases demonstrates that, because Northstar #6 itself and the assets of Northstar #6 were not assets of the Debtors' estate, Northstar #6 could not be sold free and clear of all liens, claims, and encumbrances pursuant to § 363.

Finally, neither Northstar #6 nor another party acting as the agent of Northstar #6 was a party to the Private Sale APA. As explained by the bankruptcy courts in *Saunier* and *Hopkins*, a membership interest in an LLC, even if the LLC has only a single member, does not grant the member the personal authority to sell property of the LLC. While the member may have agent authority to act on behalf of the LLC pursuant to applicable law and the LLC's operating agreement, the member in his or her personal capacity is

not able to sell assets of the LLC. O.R.C. § 1705.34 ("Real and personal property owned or purchased by a limited liability company shall be held and owned in the name of the company. Conveyance of that property shall be made in the name of the company."). Accordingly, Northstar #6 and the assets of Northstar #6 were not and could not have been sold by the Debtors acting as debtors in possession.

B. The Private Sale Order and the Private Sale APA

Even assuming, *arguendo*, that the Court was able to authorize the sale of Northstar #6 and the assets of Northstar #6 free and clear of all liens, claims, and encumbrances pursuant to § 363, neither the Private Sale Order nor the Private Sale APA supports the conclusion that either Northstar #6 or its assets were so conveyed. Only the Northstar #6 Units, rather than Northstar #6 itself or the assets of Northstar #6, were included in the Sale Assets. As a consequence, the Court finds that no claims against Northstar #6 were released pursuant to the Private Sale Order or the Private Sale APA.

Northstar #6 states that RLH "purchased both the membership interests of the LLC and all of the assets of the LLC." (Reply at 4.) Northstar #6 contends:

The only way to acquire an LLC is to acquire the membership interests (or, one can obtain a parallel result by purchasing all of the LLC's assets). . . . Accordingly, the Trustee's efforts to hold the LLC liable as if it were something that was not the subject

of the [Private Sale APA] and [the Private Sale Order] is [sic] illogical and contrary to how corporate entities and structures are sold.

(*Id.*) Northstar #6 further argues that the Private Sale Order “expressly directed that the Private Sale APA, which extinguished any claims asserted against the LLC arising before the Closing Date . . . , was enforceable in accordance with its terms, and specifically provided that the Private Sale APA would bind any subsequently-appointed trustee.” (*Id.* at 3 (internal citations omitted).)

Northstar #6’s position that RLH purchased “all of the assets” of Northstar #6 is incorrect and not supported by the express terms of the Private Sale APA. Section 2.1 of the Private Sale APA defined the Sale Assets to include “[a]ll of the Debtors’ right, title and interest in and to the Northstar #6 Units and the Northstar #6 Lease” (Private Sale APA § 2.1(c).) In turn, the Private Sale APA defined the Northstar #6 Units as “100% of the units of membership interests in Northstar #6.” (*Id.* at 2.) Moreover, the Northstar #6 Lease was between George E. Collins, Jr. and D & L – Northstar #6 was not a party to the Northstar #6 Lease. (*Id.* § 1.1(m).) While the record is devoid of what, if any, assets Northstar #6 owned, it is clear from the express terms of the Private Sale APA that RLH did not purchase any assets of Northstar #6. Instead, RLH purchased only the Debtors’ membership

interests in Northstar #6 and the Northstar #6 Lease, to which Northstar #6 was not a party.

Furthermore, the Court addressed its jurisdiction over property of the Debtors' estate and its lack of jurisdiction over the Debtors' affiliates in the Private Sale Order:

The Court is not exercising jurisdiction over non-debtor affiliates referenced in the [Private Sale APA], and is approving the sale transactions for which that agreement provides only insofar as it pertains to property of the estate, the Debtors and their actions.

(Private Sale Order at 2.) Thus, the Court's Private Sale Order expressly disclaimed any jurisdiction over non-debtor affiliates of the Debtors, including Northstar #6. The Private Sale Order also recognized that the Private Sale APA only pertained to property of the Debtors' estate, which did not include Northstar #6 itself or its assets.

The Private Sale Order also included the following provisions regarding the transfer of the Sale Assets free and clear of all liens, claims, and encumbrances:

8. Authorization to Sell Assets. The Debtors' interests in the Sale Assets constitute property of the Debtors' estates pursuant to section 541(a) of the Bankruptcy Code. Debtors are hereby authorized to sell all of their rights, title and interests in and to the Sale Assets to RLH in accordance with the terms and subject to the conditions of the Private APA, and/or per further order of this Court. RLH is hereby authorized to take title to the Sale Assets as approved herein and in any subsequent orders of this Court either directly or by RLH's affiliate, Bobcat Energy Resources, LLC. RLH is acquiring none of the Excluded Assets listed in Section 2.2 of the Private APA.

9. Sale Free and Clear of All Liens, Claims, Encumbrances and Interests. Pursuant to Bankruptcy Code sections 105(a) and 363(f), the Debtors are authorized and directed to transfer the Sale Assets to RLH and upon the closing, the transfer of the Sale Assets to RLH . . . will vest in RLH, at the closing, all right, title and interest of the Debtors in and to the Sale Assets, free and clear of any and all liens, claims, encumbrances or interests of any kind or nature

10. Liens, Claims, Encumbrances and Interests Transfer to Sale Proceeds. Upon consummation of the transaction contemplated by the Private APA, all liens, claims, encumbrances and interests (including, without limitation, all liens, claims, encumbrances and interests with respect to any post-petition financing extended to the Debtors or post-petition obligations incurred by Debtors) shall be released, terminated, and discharged as to the Sale Assets to the fullest extent permitted by law without necessity of any further notice to, or action by, any person or entity. . . .

(*Id.* ¶¶ 8-10 (emphasis added).)

As explained above, the Sale Assets included only the Northstar #6 Units, not Northstar #6 itself or the assets of Northstar #6. Moreover, the Private Sale Order authorized the Debtors to sell and transfer only the Northstar #6 Units to RLH, not Northstar #6 itself. Furthermore, only "all right, title and interest of the Debtors in and to the Sale Assets" were transferred to RLH free and clear of all liens, claims, and encumbrances. (*Id.* ¶ 9 (emphasis added).) Similarly, all liens, claims, and encumbrances were "released, terminated, and discharged as to the Sale Assets." (*Id.* ¶ 10 (emphasis added).) Because the Sale Assets included only the Northstar #6 Units, not Northstar #6

itself or its assets, no liens, claims, and encumbrances against Northstar #6 were released. As a consequence, the Court finds that its Private Sale Order did not release Northstar #6 from any liabilities.

In turn, the Private Sale APA provided,

2.4. **Excluded Liabilities.** EXCEPT AS IT HAS OTHERWISE SPECIFICALLY ASSUMED ANY SUCH LIABILITY OR OBLIGATION IN THIS AGREEMENT, THE BUYER SHALL NOT ASSUME, OR IN ANY WAY BE LIABLE OR RESPONSIBLE FOR, ANY LIABILITIES, OBLIGATIONS OR DEBTS OF THE DEBTORS OR THE LIMITED LIABILITY COMPANIES, OR ANY ENCUMBRANCES, OF ANY TYPE OR NATURE, KNOWN OR UNKNOWN, CONTINGENT OR OTHERWISE, BASED ON EVENTS, OR ON ACTS OR OMISSIONS OF THE DEBTORS OR THE LIMITED LIABILITY COMPANIES, OCCURRING ON, BEFORE OR AFTER THE CLOSING, FOR WHICH THE DEBTORS OR THE LIMITED LIABILITY COMPANIES HAD A LIABILITY, OBLIGATION OR DUTY THAT THE BUYER DID NOT EXPRESSLY ASSUME UNDER THIS AGREEMENT (collectively, the "Excluded Liabilities").

(Private Sale APA § 2.4 (n.3 omitted) (emphasis added)).) The three specified categories of Assumed Liabilities in § 2.3 of the Private Sale APA are not relevant to Northstar #6's Motion to Dismiss because they did not include the claims asserted in the Trustee's Complaint and the Trustee does not make that argument.

Section 2.4 of the Private Sale APA likewise does not support Northstar #6's position that all claims against Northstar #6 were released. Specifically, § 2.4 provided only that RLH – *i.e.*, the Buyer – rather than Northstar #6 itself – *i.e.*, one of the limited liability companies – would have no liability for any claims against Northstar #6. Section 2.4 has no bearing on the

liabilities of Northstar #6 itself and cannot be interpreted to mean that all claims against Northstar #6 were somehow terminated by the Private Sale APA.

By way of example, § 2.4 provided that RLH would not be liable for any claims against the Debtors. Stated differently, as a result of purchasing the assets of the Debtors, RLH would not be liable for the debts of the Debtors, including any debts that resulted from the Debtors' operation of those assets. Instead, any third parties' claims against the Debtors would attach to the sale proceeds. The same is true with respect to the membership interests in the LLCs purchased by RLH. Section 2.4 simply means that RLH could not be held liable for the pre-closing debts of those LLCs as a result of its purchase of the membership interests therein. Such provision is simply a recitation of one of the basic tenets of the law governing LLCs, which is that members generally are not liable for the debts of an LLC. See O.R.C. § 1705.48(A) (2016) ("The debts, obligations, and liabilities of a limited liability company, whether arising in contract, tort, or otherwise, are solely the debts, obligations, and liabilities of the limited liability company."). As a result, the Court finds that the Private Sale APA did not release Northstar #6 from any liabilities.

Finally, Northstar #6's position runs afoul of the Federal Rules of Bankruptcy Procedure and due process. Federal Rule of

Bankruptcy Procedure 6004(c) states, "A motion for authority to sell property free and clear of liens or other interests . . . shall be served on the parties who have liens or other interests in the property to be sold." FED. R. BANKR. P. 6004(c) (2016). In the Private Sale Order, the Court found that notice was provided to "investors/parties who may have an interest in the Sale Assets." (Private Sale Order at 2-3.) Because the Sale Assets did not include Northstar #6 or its assets, there was never a representation to the Court or a finding by the Court that any third parties possessing claims against Northstar #6 received notice of the Private Sale Motion. Moreover, any third party who actually received notice of the Private Sale Motion and the proposed asset purchase agreement would not have been put on notice that claims against Northstar #6, which was not a party to the Private Sale APA or included in the Sale Assets, were allegedly affected.

For the reasons set forth above, the Court finds that neither the Private Sale Order nor the Private Sale APA extinguished any claims of third parties, including the Trustee, against Northstar #6, which was neither a party to the Private Sale APA nor included in the Sale Assets.

IV. CONCLUSION

Northstar #6 and the assets of Northstar #6, as opposed to the membership interests in Northstar #6, were not property of the

Debtors' estate. As a consequence, Northstar #6 and the assets of Northstar #6 could not have been and were not sold by the Debtors free and clear of all liens, claims, and encumbrances pursuant to 11 U.S.C. § 363.

Northstar #6 and the assets of Northstar #6, as opposed to the membership interests in Northstar #6, were not included in the Sale Assets, as defined in § 2.1 of the Private Sale APA. Thus, neither the Private Sale Order nor the Private Sale APA supports Northstar #6's position that all pre-closing claims against Northstar #6 were released.

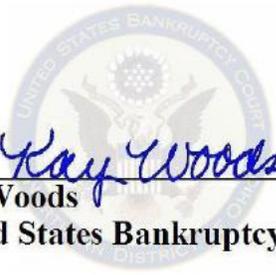
As a consequence, Northstar #6's Motion to Dismiss, which is based on the legally and factually incorrect argument that all pre-closing claims against Northstar #6 were released pursuant to the Private Sale Order and the Private Sale APA, is without merit. The Court will deny the Motion to Dismiss.

An appropriate order will follow.

#

IT IS SO ORDERED.

Dated: August 24, 2016
08:56:42 AM


Kay Woods

Kay Woods
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

IN RE:	*	
	*	
	*	
D & L Energy, Inc., et al.,	*	
	*	CASE NUMBER 13-40813
Debtors.	*	
	*	
* * * * *	*	
	*	
ANTHONY J. DeGIROLAMO,	*	
CHAPTER 7 TRUSTEE,	*	
	*	ADVERSARY NUMBER 16-04039
Plaintiff,	*	
	*	
v.	*	
	*	
NORTHSTAR DISPOSAL SERVICES	*	
VI, LLC,	*	
	*	HONORABLE KAY WOODS
Defendant.	*	
	*	

ORDER DENYING MOTION TO DISMISS

This cause is before the Court on Northstar Disposal Services VI's Motion to Dismiss ("Motion to Dismiss") (Doc. 5) filed by

Defendant Northstar Disposal Services VI, LLC ("Northstar #6") on May 16, 2016. Northstar #6 moves to dismiss this adversary proceeding on the basis that Resource Land Holdings, LLC did not assume any pre-closing liabilities when it purchased 100% of the membership interests in Northstar #6 from Debtor D & L Energy, Inc. On May 23, 2016, Plaintiff Anthony J. DeGirolamo, Chapter 7 Trustee for the substantively consolidated estates of the Debtors, filed Plaintiff's Response to Defendant's Motion to Dismiss (Doc. 6). On June 3, 2016, Northstar #6 filed Northstar Disposal Services VI, LLC's Reply in Further Support of its Motion to Dismiss (Doc. 8).

For the reasons set forth in the Court's Memorandum Opinion Regarding Motion to Dismiss¹ entered on this Date, the Court hereby:

1. Finds that Northstar #6 and the assets of Northstar #6 were not property of the Debtors' estate;
2. Finds that Northstar #6 and the assets of Northstar #6 could not have been and were not sold by the Debtors free and clear of all liens, claims, and encumbrances pursuant to 11 U.S.C. § 363;

¹ Any terms not defined herein are defined in the Memorandum Opinion Regarding Motion to Dismiss.

3. Finds that Northstar #6 and the assets of Northstar #6 were not included in the Sale Assets, as defined in § 2.1 of the Private Sale APA;
4. Finds that neither the Private Sale Order nor the Private Sale APA supports Northstar #6's position that all pre-closing claims against Northstar #6 were released; and
5. Finds that Northstar #6's Motion to Dismiss, which is based on the legally and factually incorrect argument that all pre-closing claims against Northstar #6 were released pursuant to the Private Sale Order and the Private Sale APA, is without merit.

As a consequence, the Court hereby denies the Motion to Dismiss.

#