IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

IN RE:	§	
	§	
FOOD FAST HOLDINGS, LTD.,	§	Case No. 02-10542
et al.,	§	(Jointly Administered)
	§	
Debtors	§	Chapter 11

ROBERT D. HOLMES, Trustee of the	§	
Food Fast Litigation Trust	§	
	§	
Plaintiff	§	
v.	§	Adversary No. 03-6082
	§	
A.I. CREDIT CORP.	§	
	§	
Defendant	§	

MEMORANDUM OF DECISION[1]

Before the Court is the Motion for Summary Judgment filed by the Defendant, A.I. Credit Corp. ("A.I. Credit" or "Defendant") in the above-referenced adversary proceeding and the opposition filed thereto by the Plaintiff, Robert D. Holmes, in his capacity as the trustee of the Food Fast Litigation Trust ("Trustee"). The Trustee was appointed pursuant to the confirmed plan of reorganization involving Food Fast Holdings, Ltd. and certain affiliated companies and he is charged with the duty to resolve certain claims held by the affiliated Debtors' Chapter 11 bankruptcy estates. This memorandum of decision

[1] This Memorandum of Decision is not designated for publication and shall not be considered as precedent, except under the respective doctrines of claim preclusion, issue preclusion, the law of the case or as other evidentiary doctrines applicable to the specific parties in this proceeding.

disposes of all matters pending before the Court.[2]

Factual and Procedural Background

On or about December 10, 2001, Food Fast Holdings, Ltd. (the "Debtor" or "Debtor-in-Possession") and A.I. Credit entered into a Premium Financing Agreement (the "2001 PFA"). Pursuant to the terms of that document, A.I. Credit agreed to advance the sum of $316,688.19 to cover the premiums and fees associated with certain insurance policies naming the Debtor as the insured. The Debtor made an initial down payment of $55,886.00 directly to the insurance broker. A.I. Credit financed the remainder of the premiums, with payments due on the 12th day of December and of each of the successive nine months (with the final payment due September 12, 2002). On December 26, 2001 and again on January 4, 2002, A.I. Credit received payments on the Debtor's obligation under the 2001 PFA. Each payment was in the amount of $32,534.03. The Trustee alleges these two payments constitute avoidable preferential transfers under 11 U.S.C. §547.

On January 23, 2002, the Debtor, along with its affiliated companies, filed a petition for relief under Chapter 11 of the Bankruptcy Code. On February 13, 2002, the Debtor, now acting as a Debtor-in-Possession, made an additional payment pursuant to the terms of the 2001 PFA, again in the amount of $32,534.03. The final seven payments

[2] This Court has jurisdiction to consider the complaint pursuant to 28 U.S.C. §1334 and 28 U.S.C. §157(a). The Court has the authority to enter a final judgment in this adversary proceeding since it constitutes a core proceeding as contemplated by 28 U.S.C. §157(b)(2)(F), (H) and (O).

were also made in the post-petition period according to the terms of the 2001 PFA. The Trustee contends that the February 13, 2002 post-petition transfer by the Debtor is also avoidable as a payment in violation of 11 U.S.C. §549.

It is uncontested that, if the Debtor had at any time failed to make payment under the 2001 PFA, A.I Credit held the right pursuant to the agreement to provide 10 days' written notice of intent to cancel, and if the default was not cured during that period, A.I. Credit was entitled to cancel the insurance policies in order to receive the remaining portion of the unearned insurance premiums as its collateral. A.I. Credit never exercised this right because the Debtor kept the policies in full force and effect by tendering all payments which were required to be made in both the pre-petition and post-petition periods. Put simply, the Debtor enjoyed the full benefit of its side of the bargain with respect to the insurance coverage under the related policies and thereby precluded any necessity by A.I. Credit to invoke the means by which it could protect itself from non-payment.

On October 3, 2002, over eight months subsequent to the bankruptcy filing, the Debtor sought Court approval for the execution of a new Premium Financing Agreement (the "2002 PFA"), under which A.I. Credit would again finance for the next year (and while under the protection of the Court) needed insurance premiums for the Debtor. Without objection after proper notice and by order entered on October 25, 2002, the Court approved the Debtor's entry into the 2002 PFA. On December 13, 2002, the Debtor filed

a motion requesting authority of the Court to assume various contracts under 11 U.S.C. §365, including a contract described simply as a "Premium Financing Agreement" between A.I. Credit and the Debtor.[3] The Court entered an order on January 8, 2003 authorizing the assumption of the designated contracts, including the new Premium Financing Agreement.

A.I. Credit filed a proof of claim in the underlying bankruptcy case of the Debtor, in the amount of $260,272.24. This amount represented the amount originally owed under the 2001 PFA as of the date of the Debtor' bankruptcy filing, which was, as a matter of course, proportionately reduced in each succeeding month. On January 7, 2003, the Debtor filed an Objection to A.I. Credit's proof of claim which was based upon the 2001 PFA. The basis for the Debtor's claim objection was that the "claim ha[d] been paid in full" which was, of course, absolutely correct.[4] Because it acknowledged that its claim based upon the 2001 PFA had been paid in full, A.I. Credit did not contest the claim objection. With no response filed after proper notice, and on the basis alleged by the Debtor that the claim had been paid in full, the Court sustained the claim objection.[5]

---

[3] The Trustee contends that it is unclear which Premium Financing Agreement the Debtor wished to assume (the 2001 PFA or the 2002 PFA). However, he offers no explanation as to how an agreement such as the 2001 PFA, which had been fulfilled and completed by its own terms at the time of the filing of the assumption motion, or the 2002 PFA, which was not in existence upon the filing of the case, could have properly been characterized as "executory" under the provisions of 11 U.S.C. §365.

[4] See "Objection to Claim#38 Filed by Imperial A.I. Credit Companies," [docket #361]. Notwithstanding its title, the claim was actually filed in the name of A.I. Credit Corporation, apparently as one of the "Imperial A.I. Credit Companies."

[5] The Court entered the order sustaining the objection on February 4, 2003.

On January 8, 2003, the Court entered an Order Confirming Debtor' First Amended Plan of Reorganization under Chapter 11 which authorized the transfer of all outstanding avoidance claims to the Plan Trust, to be administered by the Plan Trustee.[6] Robert D. Holmes was therein appointed Plan Trustee. The effective date of the plan was May 12, 2003.[7]

Discussion

A motion for summary judgment should be granted if the summary judgment evidence shows there is no genuine issue of material fact, and the motion should be granted as a matter of law. FED. R. CIV. P. 56(c); *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). To determine whether summary judgment is appropriate, the record presented is reviewed in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

A.I. Credit seeks summary judgment on the Trustee's First Amended Complaint to Recover Avoidable Preferences. The Amended Complaint contains two counts: the first alleging grounds whereby the pre-petition transfers should be avoided, and the second alleging grounds whereby the post-petition transfer should be avoided. A.I. Credit

---

[6] *See* ¶¶ 71-73 of the "Order Confirming Debtors' First Amended Plan of Reorganization under Chapter 11" [docket #411 in case no. 02-10542].

[7] *See* "Notice of Occurrence of Effective Date Under Debtor' First Amended Plan of Reorganization on May 12, 2003" [docket #774 in case no. 02-10542].

submits three reasons why summary judgment in its favor is proper with respect to Count I– the pre-petition transfers: (1) the PFA was assumed, (2) A.I. Credit was fully secured, and (3) the cause of action is barred by *res judicata*. The Defendant further asserts four reasons why summary judgment in its favor is proper with respect to the post-petition transfer referenced in Count II: (1) the payment was authorized, (2) the payment was made within the ordinary course of business under U.S.C. §363(c), (3) the Trustee is estopped from asserting a cause under §549, and (4) the action is barred by *res judicata*.[8]

Judicial Estoppel

Before reaching the merits of the Defendant's arguments, the Court must address whether the Plaintiff is precluded from maintaining this action due to the doctrine of judicial estoppel.[9] Because judicial estoppel is considered to be a matter of federal procedure, federal law governs its application. *Ergo Science, Inc. v. Martin*, 73 F.3d 595, 600 (5th Cir. 1996); *accord Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 530 (5th Cir. 2000); *see also Exxon Corp. v. Burglin*, 42 F.3d 948, 950 (5th Cir. 1995) [holding that even where federal courts are adjudicating claims under diversity jurisdiction and therefore applying state substantive law, they apply federal procedural

[8] Because of the applicability of the Defendant's *res judicata* argument and the Court's invocation of the doctrines of equitable and judicial estoppel resolve all issues, there is no need to address the remainder of the Defendant's contentions.

[9] It is important to distinguish the claims of equitable estoppel and judicial estoppel. Judicial estoppel "looks to the connection between the litigant and the judicial system, whereas equitable estoppel focuses on the relationship between the parties." *In re Neptune World Wide Moving, Inc.*, 111 B.R. 457, 461 (Bankr. S.D.N.Y. 1990).

law to the proceedings]. The use of federal standards in this area has been expressly endorsed when arising in a bankruptcy case. *Matter of Coastal Plains, Inc.*, 179 F.3d 197, 205 (5th Cir. 1999).

As explained by the Fifth Circuit:

> The doctrine of judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding. *United States v. McCaskey,* 9 F.3d 368, 378 (5th Cir. 1993), *cert. denied,* 511 U.S. 1042, 114 S.Ct. 1565, 128 L.Ed.2d 211 (1994). We recognize the applicability of this doctrine in this circuit because of its laudable policy goals. The doctrine prevents internal inconsistency, precludes litigants from "playing fast and loose" with the courts, and prohibits parties from deliberately changing positions based upon the exigencies of the moment.

Ergo Science, 73 F.3d at 598.

The Fifth Circuit has also clearly explained the requirements for application of the doctrine of judicial estoppel:

> In this Circuit, two bases for judicial estoppel must be satisfied before a party can be estopped. First, it must be shown that the position of the party to be estopped is clearly inconsistent with its previous one; and [second,] that party must have convinced the court to accept that previous position.

Hall v. GE Plastic Pac. PTE Ltd., 327 F.3d 391, 396 (5th Cir. 2003) (citations and internal quotations omitted).[10] *Hall* further recognized that the United States Supreme

[10] "The 'judicial acceptance' requirement minimizes the danger of a party contradicting a court's determination based on the party's prior position and, thus, mitigates the corresponding threat to judicial

Court had endorsed a third consideration: "whether the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped." *Hall,* 327 F.3d at 399 (*citing New Hampshire v. Maine*, 532 U.S. 742, 751, 121 S.Ct. 1808, 1815, 149 L.Ed.2d 968 (2001). "Because the doctrine is intended to protect the judicial system, rather than the litigants, detrimental reliance by the opponent of the party against whom the doctrine is applied is not necessary." *Coastal Plains,* 179 F.3d at 205.

When a trustee is appointed pursuant to a confirmed plan, that plan trustee succeeds to the position of the debtor-in-possession as to the various assets under his charge. *Sunrise Energy Co. v. Maxus Gas Mktg. (In re Sunpacific Energy Mgmt., Inc.),* 216 B.R. 776, 778 (Bankr. N.D.Tex. 1997). Thus any claim owned by the Plaintiff, as Trustee, is subject to the same burdens and benefits which attached to that claim when held by Food Fast Holdings, Ltd., the Debtor-in-Possession, prior to confirmation.

It is uncontroverted that the Debtor-in-Possession previously convinced this Court to disallow A.I. Credit's proof of claim based upon the 2001 PFA on the grounds that the claim had been paid in full. The order sustaining that claim objection constitutes the Court's adoption of that position. By now asserting that some of the payments made by

---

integrity." *Coastal Plains,* 179 F.3d at 206 (*citing United States for Use of American Bank v. C.I.T. Constr. Inc. of Tex.*, 944 F.2d 253, 258 (5th Cir. 1991)). However, "the judicial acceptance requirement does not mean that the party against whom the judicial estoppel is to be invoked must have prevailed on the merits. . . . [it] means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition." *Coastal Plains,* 179 F.3d at 206 (*citing Reynolds v. Comm. of Internal Revenue*, 861 F.2d 469, 473 (6th Cir. 1988) (internal quotations omitted)).

the Debtor in satisfaction of its obligations under the 2001 PFA and through which the A.I. Credit claim amount was satisfied and therefore disallowed, should now be held avoidable and returnable to the Trust, the Trustee advocates a position which is clearly inconsistent and incompatible with the previous position he assumed from the Debtor. Thus, the Trustee, or, in actuality, his predecessor-in-interest, has acted to satisfy the first two requirements of the judicial estoppel test: (1) by advocating a position clearly inconsistent with a prior position; and (2) by convincing the Court of the validity of that prior position.[11]

As to the final requirement that the party derive an unfair benefit from its inconsistent positions, it cannot be legitimately contested that the Debtor derived a benefit from its fulfillment of its obligation with A.I. Credit. The summary judgment evidence clearly establishes that if the Debtor had failed to make any payment under either PFA, A.I. Credit could have given notice and exercised its foreclosure rights on its collateral.[12] In order to prevent that occurrence and to insure that its insurance coverage remained in effect, the Debtor tendered the payments which the Trustee now seeks to recoup. To hold that a debtor-in-possession can systematically make payments under a contract to keep its insurance coverage in place which thereby negates any necessity (and opportunity) for a

---

[11] As explained *supra*, the plan provision regarding the relationship between the Debtor's claim objections and the Trustee's right to pursue avoidance actions is ineffective to preclude the application of these doctrines.

[12] Affidavit of Joan Stratton, at ¶6.

creditor to exercise its security interests until such a time as that estate has completely reaped the benefits of that coverage and the creditor no longer has an opportunity to protect itself, and that such debtor at that subsequent time can pursue an avoidance of the payments made is simply untenable. A party cannot induce such forbearance for its own benefit with impunity. That type of unfair benefit is exactly what judicial estoppel is designed to prevent.

Thus, the Court concludes that the application of judicial estoppel is appropriate in this context as to both the pre-petition and post-petition payments, because A.I. Credit's proof of claim related to payments in both time periods. While the amount of the claim as filed, $260,272.24, represented the amount outstanding under the 2001 PFA existing as of the petition date, had the payments been avoided at that point, the claim would have been adjusted accordingly and A.I. Credit could have protected its position through the exercise of its collateral rights. Instead, by alleging the claim had been paid in full, the Debtor-in-Possession affirmatively asserted that the entire transaction had been successfully consummated. Attempting to recover at this point in time any payments under either PFA contract, whether pre- or post-petition, subverts that assertion and cannot be allowed. Thus, summary judgment in favor of the Defendant is appropriate as to each count of the Plaintiff's complaint.

While the doctrine of judicial estoppel constitutes sufficient grounds for granting the Defendant's summary judgment, the application of equitable estoppel and *res judicata* merit discussion.

Equitable Estoppel

The doctrine of equitable estoppel is summarized by the phrase, "One who is silent when he ought to speak will not be heard to speak when he ought to be silent." 28 AM. JUR. 2D *Estoppel and Waiver* §53 (1966). The Fifth Circuit has noted, "The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted.... Such a change in position is sternly forbidden." *Texas Mortg. Servs. Corp. v. Guadalupe Sav. & Loan Ass'n. (In re Texas Mortg. Servs. Corp.)*, 761 F.2d 1068, 1074 (5th Cir. 1985) (*citing Dickerson v. Colgrove*, 100 U.S. 578, 580, 25 L.Ed. 618 (1879)).

It is clear in the present case that the Trustee should not be allowed to pursue this avoidance action. By continuing to perform its obligations under the PFAs, the Debtor represented to A.I. Credit that it desired the ongoing benefits of insurance coverage. Had it acted swiftly to forego that benefit by bringing an avoidance action, the Debtor possibly could have recovered the payments made prior to and shortly after the bankruptcy petition, but it would have lost the benefit of continued coverage. Had it acted swiftly to assume the contract, the Debtor would have received the insurance coverage but the payments would not be avoidable. But by shrewdly bringing the avoidance action now, the Trustee, as the Debtor's successor-in-interest, attempts to "have his cake and eat it too" by recovering the payment *after* the Debtor has bided the course of the contract and

received the full benefit the payments were intended to secure. With his predecessor-in-interest having remained silent when it could and should have spoken, the Trustee is now estopped from advocating for the return of these payments.

Res Judicata

Res judicata expresses the concept that a final judgment on the merits of a cause of action in a court of competent jurisdiction precludes relitigation of issues that were or could have been adjudicated as part of that action. *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411, 414, 66 L.Ed.2d 308 (1980). Generally, there are four elements to a valid *res judicata* claim: (1) the parties must be the same or privies of the parties in the two actions, (2) the prior judgment must have been rendered by a court of competent jurisdiction, (3) there must have been a final judgment on the merits, and (4) the same cause of action must be involved. *Eubanks v. FDIC*, 977 F.2d 166, 169 (5th Cir. 1992) [discussing whether a bankruptcy confirmation order can be the basis of a *res judicata* claim]; *Jones v. Texas Tech Univ.*, 656 F.2d 1137, 1141 (5th Cir. Unit A Sep. 1981). The Trustee suggests that *res judicata* is not properly applied in a bankruptcy setting, citing the United States Bankruptcy Court for the Northern District of Texas: "The common law doctrine of *res judicata* should not be used to frustrate the scheme and coherency of the Bankruptcy Code. Rather, the court must apply the doctrine in the context of the 'unique form of litigation of bankruptcy proceedings.'" *Sunrise Energy Co. v. Maxus Gas Mktg. (In re Sunpacific Energy Mgmt., Inc.)*, 216 B.R. 776, 778 (Bankr. N.D. Tex. 1997) (*citing*

D-1 Enter., Inc. v. Commercial State Bank, 864 F.2d 36, 39 (5th Cir. 1989)). *Sunpacific* dealt with the possibility of *res judicata* barring an action which could have been brought as part of the plan confirmation process. However, the *Sunpacific* court acknowledged that its opinion did not address whether the preference claim should be brought as part of a claims resolution proceeding. *Sunpacific*, 216 B.R. at 779. Furthermore, the Supreme Court has expressly held that "[t]he normal rules of *res judicata* and collateral estoppel apply to the decisions of bankruptcy courts." *Katchen v. Landy*, 382 U.S. 323, 334, 86 S.Ct. 467, 475, 15 L.Ed.2d 391 (1966).

The parties have framed their *res judicata* arguments in the context of 11 U.S.C. 502(d), but that section is not precisely on point. With varying degrees of success, parties in other litigation have asserted that, under §502(d), a debtor's failure to bring preference or similar avoidance actions simultaneously with objections to the claims of the party who received the avoidable transfer bars later litigation on the avoidable transfers. *See AFD Fund v. Transmed Foods*, – B.R. — (Bankr. W.D. Pa. 2004) *available at* 2004 WL 2181741 (creditor unsuccessfully arguing that §502(d) bars a preference action after claim was allowed without objection); *TWA Inc. v. City and County of San Francisco Airports Comm'n (In re TWA Inc. Post Confirmation Estate)*, 305 B.R. 221 (Bankr. D. Del. 2004) (creditor unsuccessfully arguing §502(d) bars a preference action where the parties reached a negotiated claim settlement *after* the debtor gave notice of this intent to pursue the preference action); *Cohen v. TIC Fin. Sys. (In re Ampace)*, 279 B.R. 145

(Bankr. D. Del. 2002) (creditor unsuccessfully arguing §502(d) bars a preference action after claim was allowed without objection)*; but see Caliolo v. Azdel, Inc. (In re Cambridge Indus. Holdings, Inc.)*, No. 00-1919, 02-03293, 2003 WL 21697190 (Bankr. D. Del. July 18, 2003) (creditor successfully arguing §502(d) bars a preference action where the preference action was brought before claim objection was filed); *Caliolo v. TKA Fabco Corp. (In re Cambridge Indus. Holdings, Inc.)*, No. 00-1919, 00-1921, 02-3405, 2003 WL 1818177 (Bankr. D. Del. April 2, 2003) (creditor successfully arguing §502(d) bars a preference action brought after the court entered an order allowing the claim); *LaRoche Industries, Inc. v. Gen. Am. Transp. Corp. (In re LaRoche)*, 284 B.R. 406 (Bankr. D. Del. 2002) (creditor successfully arguing §502(d) bars a preference action after the court entered an order sustaining the debtor's claim objection). However, in each of these cases, §502(d) was applied to invoke *res judicata* in situations where claims were *allowed*. Indeed, the logical lynchpin of *res judicata* under §502(d) is the claim allowance.[13] Where, as here, a claim is *disallowed*, §502(d) does not support a *res*

---

[13] §502(d) provides:

> Notwithstanding subsections (a) and (b) of this section, the court shall disallow any claim of any entity from which property is recoverable under section 542, 543, 550, or 553 of this title or that is a transferee of a transfer avoidable under section 522(f), 522(h), 544, 545, 547, 548, 549, or 724(a) of this title, unless such entity or transferee has paid the amount, or turned over any such property, for which such entity or transferee is liable under section 522(i), 542, 543, 550, or 553 of this title.

The logical syllogism by which §502(d) supports a *res judicata* claim is roughly as follows: If an entity receives an avoidable transfer and doesn't return it, the court *shall* disallow the claim. The court did not disallow the claim. Therefore, the entity was not the recipient of an avoidable transfer.

judicata argument.

Nevertheless, the particular facts of this case present a scenario ripe for application of *res judicata*, apart from §502(d). The four elements under which the principles of *res judicata* are generally applied are present in this action: (1) the parties are the same (recognizing that the Trustee succeeds to the position of the Debtor-in-Possession); (2) the order disallowing the claim was issued by this Court under the proper exercise of its jurisdiction under 28 U.S.C. §§157(a) and 1334; (3) the claim was litigated and the resulting order represents a final order[14] and (4) the same cause of action is involved. Indeed, it is the extreme similarity of the causes of action that makes this situation ripe for application of *res judicata* when some previously-cited cases were not. The position espoused in the claim objection goes to the very heart of this adversary proceeding. When the arguably avoidable payments were the very basis upon which the claim was disallowed, one would clearly expect that the position adopted in the claim objection would preclude further litigation on the propriety of the payments.

The Trustee asserts that application of *res judicata* would be particularly inappropriate in this case because the confirmed plan explicitly provided that all of the Debtor's avoidance actions would be evaluated and pursued independently by the Trustee.

---

[14] *See generally In re Colley*, 814 F.2d 1008, 1010 (5th Cir. 1987) ["We interpret Rule 9024 to provide that, when a proof of claim has in fact been litigated between parties to a bankruptcy proceeding, the litigants must seek reconsideration of the bankruptcy court's determination pursuant to the usual Rule 60 standards if they elect not to pursue a timely appeal of the original order allowing or disallowing the claim."].

However, the transfer of any such actions to the Trust did not alter the *nature* of those actions as possessed by the bankruptcy estate prior to the transfer.[15] They were transferred with all of the strengths and weaknesses attributable to those claims attached. In this context, the actions of the Debtor-in-Possession had already invoked these doctrines which precluded any subsequent avoidance action regarding these transfers. Thus, the language contained in the order confirming the plan, that "nothing herein shall authorize the Debtor ... to compromise or release any Avoidance Action as part of any resolution of a Disputed Claim"[16] was ineffective in this context both chronologically[17] and substantively. On the substantive side, it must be recognized that there was only one set of rights held by the bankruptcy estate throughout its relationship with the Defendant and the language in the confirmation order cannot properly bifurcate those rights nor launder them. Either the Debtor possessed the right to object to A.I. Credit's claim with all attendant consequences (both intended and unintended) or it did not. Since no party challenged the Debtor's standing to pursue that course of action,[18] the resolution of that course of action is binding upon the current holder of rights formerly held by the

---

[15] It is important to note that the avoidance actions were transferred to the trust on the effective date of the plan, May 12, 2003. The litigation regarding the claim disallowance concluded with the Court's order of February 4, 2003.

[16] *See* Order Confirming Plan, p. 16, ¶ 60.

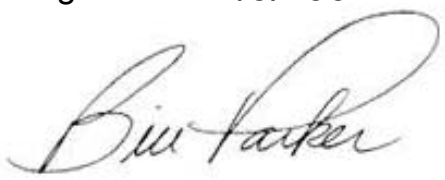
[17] *See supra* note 14.

[18] That obviously would have had to be done by some party other than the Trustee, whose tenure had not yet begun.

bankruptcy estate (and any beneficiaries thereof), notwithstanding any attempt to preclude that result by language which can only be described as precatory. Thus, summary judgment in favor of the Defendant is also appropriate on the alternative ground that the common law principle of *res judicata* bars further pursuit of the avoidance actions.

This Court accordingly concludes that the Motion for Summary Judgment filed by the Defendant, A.I. Credit, should be granted and that all relief requested by the Trustee-Plaintiff's First Amended Complaint to Recover Avoidable Preferences should be denied. An appropriate order and a judgment will be entered which are consistent with this opinion.

Signed on 11/9/2004



THE HONORABLE BILL PARKER
CHIEF UNITED STATES BANKRUPTCY JUDGE