



1 (“Janisch”) for cash transfers to him in the amount of \$487,360 during the calendar year 2006. The  
2 motion also seeks to avoid the satisfaction during that same time frame of a promissory note  
3 executed by Janisch in favor of the debtor in the amount of \$295,000. The motion further seeks to  
4 avoid the release of the security for that note in the form of a deed of trust against the Janisch  
5 residence, which was reconveyed, and a UCC financing statement filed against certain personal  
6 property belonging to Janisch, which was released. The motion, then, seeks to reinstate the  
7 \$295,000 note and the security therefore, in addition to recovering the \$487,360 in cash transfers.

8 The motion also seeks to obtain a judgment against Kai Moldskred (“Moldskred”), who was  
9 the financial backer for Janisch. The trustee seeks to avoid \$123,000 in checks drawn by CRI in  
10 favor of Moldskred and delivered to Moldskred during 2006. The trustee also seeks a judgment for  
11 \$150,000 against Moldskred as the immediate transferee of funds paid by the debtor to Janisch,  
12 which were then transferred to Moldskred. The trustee, then, seeks a judgment against Moldskred  
13 in the total amount of \$273,000.

## 14 II. FACTS

15 The debtor was in the business of providing educational training to students to become court  
16 reporters, computer operators and computer network administrators.<sup>1</sup> The debtor ceased doing  
17 business at the end of August 2006,<sup>2</sup> and filed bankruptcy on November 27, 2006. Janisch owned  
18 all of the stock in the debtor, and he was the sole director, president and secretary. Janisch ran the  
19 debtor on a day-to-day basis and was familiar with all management aspects of the debtor.<sup>3</sup>

20 The debtor depended upon federal student aid for its financial existence, as most tuition or  
21 income for the debtor, was paid in the form of financial aid.<sup>4</sup> The financial aid moved directly from  
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24 <sup>1</sup>The 2004 examination of Janisch taken June 6, 2007 (hereinafter “Janisch Dep”), pg. 6, ln. 2.

25 <sup>2</sup>Janisch Dep, pg. 17, ln. 6.

<sup>3</sup>Janisch Dep, pg. 26, lns. 15-25.

<sup>4</sup>Janisch Dep, pg. 29, ln. 18.

1 the government to the debtor, which then put the money into its operating account.<sup>5</sup> Much of this  
2 financial aid was prepaid tuition and expenses for the students.<sup>6</sup> There were no separate accounts  
3 nor a trust account for each student, even though the student aid was paid in advance.<sup>7</sup>

4 In order to qualify for financial aid, the debtor obtained an annual financial audit and an  
5 annual audit of its financial aid accounting.<sup>8</sup> The United States Department of Education requires  
6 these audits to ensure that schools are in compliance with its regulations so as to qualify for financial  
7 aid.<sup>9</sup> In the words of Janisch:

8 “There were several different government programs available that we  
9 were eligible for such as Pell, P-E-L-L, Grants and federal loan  
10 programs. And we had to abide by volumes of regulations that we  
11 did. And this audit was to insure that we complied with those  
12 regulations as the Department of Education imposed.”<sup>10</sup>

11 As a part of those regulations, the debtor had to maintain minimum capital assets and net  
12 income.<sup>11</sup> If the debtor failed to maintain minimum capital requirements it would not qualify for  
13 student aid and, therefore, it would go out of business.<sup>12</sup>

14 This requirement was the subject of the debtor’s board of directors meeting held on June 27,  
15 2005.<sup>13</sup> The minutes for that meeting recite that in order to maintain the requisite capital accounts,  
16 under the Department of Education regulations, the debtor required an additional \$295,000 in capital  
17 as of December 31, 2004. Consequently, arrangements were made for Janisch to execute a  
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19 <sup>5</sup>Janisch Dep, pg. 43, ln. 2.

20 <sup>6</sup>Janisch Dep, pg. 43, ln. 13.

21 <sup>7</sup>Janisch Dep, pg. 73, ln. 14.

22 <sup>8</sup>Janisch Dep, pg. 10, lns. 11 and 24.

23 <sup>9</sup>Janisch Dep, pg. 11, lns. 1 and 14.

24 <sup>10</sup>Janisch Dep, pg. 12, ln. 20.

25 <sup>11</sup>Janisch Dep, pg. 20, ln. 3.

<sup>12</sup>Janisch Dep, pg. 64, ln. 13.

<sup>13</sup>Janisch Dep, ex. 6, pg. 1.

1 promissory note in favor of the debtor in that amount. The note was incorporated into the debtor's  
2 2004 financial reports and tax return for the year end December 31, 2004, even though the note is  
3 dated June 29, 2005.<sup>14</sup> The note was secured by a second place deed of trust against the Janisch  
4 residence and certain personal property.

5 The corporate minutes are found at Exhibit 6 to the Janisch Dep, pages 1 and 2. The  
6 promissory note is pages 3 and 4. It states:

7 "The principal balance of this Note together with accrued and unpaid  
8 interest thereon shall be due and payable upon the dissolution or  
9 bankruptcy of Holder, but not later than May 31, 2010."

9 The deed of trust is found at pages 5 through 9 of Exhibit 6. The UCC financing statement is found  
10 at pages 10 through 12, and a stock assignment is found at page 13 of Exhibit 6.

11 The corporate minutes for the debtor for the meeting held the following year, June 26, 2006,  
12 are found at Exhibit 6, page 14. Those minutes address the calendar year and tax year ending  
13 December 31, 2005. Those minutes recite that in order to meet the Department of Education  
14 requirements for capital for 2005, a note less than the note amount posted in 2004 was required. So  
15 the balance owed on the note was reduced to \$137,000. No consideration for the reduction in the  
16 note was given.

17 Two months later, on August 21, 2006, days before the debtor closed its doors, the debtor  
18 held another corporate meeting and minutes were issued directing Janisch to satisfy in full the  
19 promissory note wherein he was the maker and the debtor was the beneficiary.<sup>15</sup> The security for  
20 the note was also released as is further demonstrated by Exhibit 6.

21 The purpose for the Janisch promissory notes was to increase the corporate equity so that the  
22 debtor would qualify for Department of Education student aid. Without such student aid, the debtor  
23 could not survive.<sup>16</sup> The purpose for the rule is to ensure that schools which receive financial aid

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25 <sup>14</sup>Janisch Dep, ex. 6, pg. 3.

<sup>15</sup>Janisch Dep, ex. 6, pg. 19.

<sup>16</sup>Janisch Dep, pg. 66, ln. 11.

1 are financially sound. Schools which are not financially sound are more likely to fail and breach  
2 their obligations to provide students with the education which they pay for in advance.

3 The debtor filed a 2005 1120S tax return with the Internal Revenue Service.<sup>17</sup> On page 4  
4 of that tax return, at line 7, under the assets category, the debtor lists loans to shareholders as of  
5 January 1, 2005, in the amount of \$295,000, and as of December 31, 2005, in the amount of  
6 \$137,000. These numbers comport with the audited financial statements prepared by the debtor's  
7 accountants. In other words, the promissory note was treated by the debtor as an asset. Janisch  
8 owed the money to the debtor and that was the asset reported to the Internal Revenue Service and  
9 to the Department of Education. This note comprised a substantial portion of the debtor's equity  
10 or capital.

11 Janisch treated the Department of Education requirements as though they only applied on  
12 December 31 of each calendar year. He viewed the capital requirements as a "snapshot" of the  
13 company.<sup>18</sup> The common term for this approach to accounting is fraud.

14 Janisch's strategy was to pay money into the debtor at the year end in order to improve the  
15 debtor's financial statements, and then draw down whatever cash was available after the December  
16 31 snapshot.<sup>19</sup> The money infused into the corporation by Janisch was not treated as a loan from  
17 Janisch.<sup>20</sup>

18 Janisch was able to draw a very significant amount of cash out of the debtor between January  
19 1, 2006, and September 7, 2006, because his transfers inflated the checking account balance and  
20 because student aid was paid in advance. The checks issued by the debtor to Janisch during 2006  
21 are set forth as follows:

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24 <sup>17</sup>Janisch Dep, ex. 4.

25 <sup>18</sup>Janisch Dep, pg 64, ln. 5.

<sup>19</sup>Janisch Dep, pg. 63, ln. 4.

<sup>20</sup>Janisch Dep, pg. 68, ln. 2.

|    | <u>Check Number</u> | <u>Check Date</u> | <u>Amount</u>               |
|----|---------------------|-------------------|-----------------------------|
| 1  |                     |                   |                             |
| 2  | 21202               | 01/02/2006        | \$ 2,700.00                 |
|    | 21203               | 01/02/2006        | \$ 8,000.00                 |
| 3  | 21204               | 01/02/2006        | \$ 10,000.00                |
|    | 21205               | 01/02/2006        | \$ 48,000.00                |
| 4  | 21206               | 01/02/2006        | \$ 50,000.00                |
|    | 21207               | 01/02/2006        | \$ 50,000.00                |
| 5  | 21208               | 01/02/2006        | \$ 100,000.00               |
|    | 21209               | 01/02/2006        | \$ 100,000.00               |
| 6  | 21279               | 01/12/2006        | \$ 15,000.00                |
|    | 21328               | 01/23/2006        | \$ 15,000.00                |
| 7  | 21412               | 01/26/2006        | \$ 15,000.00                |
|    | 21464               | 02/02/2006        | \$ 15,000.00                |
| 8  | 21530               | 02/09/2006        | \$ 15,000.00                |
|    | 21532               | 02/10/2006        | \$ 5,000.00                 |
| 9  | 21601               | 02/21/2006        | \$ 5,000.00                 |
|    | 21697               | 03/01/2006        | \$ 4,500.00                 |
| 10 | 21706               | 03/02/2006        | \$ 5,000.00                 |
|    | 21940               | 04/04/2006        | \$ 5,000.00                 |
| 11 | 22705               | 07/20/2006        | \$ 5,000.00                 |
|    | 22775               | 07/31/2006        | \$ 5,000.00                 |
| 12 | 22886               | 09/07/2006        | \$ <u>9,160.00</u>          |
| 13 | TOTAL:              |                   | \$ 487,360.00 <sup>21</sup> |

14 Janisch testified in his 2004 deposition that, although the Statement of Financial Affairs at  
15 paragraph 23 states that he drew an average monthly compensation of \$15,000, this amount was  
16 simply a draw against the “company earnings,” and that in 2006 he did not have any income as  
17 salary from the debtor.<sup>22</sup> In the eight months prior to filing bankruptcy, however, Janisch drew  
18 nearly one half million dollars out of the debtor in checks made payable to himself. Janisch has  
19 testified that this was not a salary. Likewise, it could not have been a repayment of a loan from  
20 Janisch to the debtor because no such loan existed. The 2005 1120S federal income tax return at  
21 page 4, line 19, states that as of December 31, 2005, there was no loan in existence from the  
22 shareholder, Janisch, to the debtor. Janisch may claim that these funds came from his “capital  
23 account” but, according to the Declaration of Richard Ginnis, the debtor was insolvent on and after  
24 December 31, 2005.

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<sup>21</sup>Janisch Dep, ex. 5.

<sup>22</sup>Janisch Dep, pg. 22, ln. 22, and pg. 23, lns. 2-19.

1 Janisch may have had “book equity” in his capital account and the evidence for this is the  
2 debtor maintained general ledger account for Janisch.<sup>23</sup> That ledger shows that on December 31,  
3 2005, Janisch deposited \$372,700 into his capital account. This was not booked as a loan, nor treated  
4 as a loan. Again, returning to the 2005 tax return,<sup>24</sup> the balance sheet indicates that this cash was  
5 in the debtor’s bank account, not a loan from Janisch.<sup>25</sup>

6 The cash Janisch infused into the corporation on December 31, 2005, was not adequate to  
7 pump up the financial statement enough for the Department of Education’s requirements. Those  
8 regulations required an additional \$137,000 in assets. Janisch created this asset by executing a  
9 promissory note in favor of the debtor in that amount or, more correctly, he retroactively reduced  
10 the then existing note in the amount of \$295,000 at the corporate meeting on June 26, 2006. In other  
11 words, on June 26, 2006, Janisch took a 20/20 hindsight view of the facts. In order to qualify under  
12 the Department of Education’s requirements as of December 31, 2005, he required a promissory note  
13 only in the amount of \$137,000 and not in the then existing amount of \$295,000. *See* corporate  
14 minutes of June 26, 2006.<sup>26</sup> So, while the debtor was insolvent, two months before it quit doing  
15 business, the debtor reduced a promissory note owed by Janisch to the debtor from \$295,000 to  
16 \$137,000. The debtor received no consideration for this. Again, this note was part of the debtor’s  
17 capital or assets in the same way that the debtor’s computers and desks were part of its capital or  
18 assets.

19 Had the company been solvent, and disregarding the Department of Education’s  
20 requirements, writing down a promissory note may not be an issue. Given the fact, however, that  
21 the note was originally posted to ensure the solvency of the debtor, and thus the continuation of the  
22 school and the graduation of the students who paid tuition, the debtor’s write off of the note for no

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24 <sup>23</sup>Janisch Dep, ex. 2.

25 <sup>24</sup>Janisch Dep, ex. 4, pg. 4.

<sup>25</sup>Janisch Dep, ex. 4, pg. 2, ln. 1.

<sup>26</sup>Janisch Dep, Ex. 6, pgs. 14-17.

1 consideration is an issue. The note was specifically required to prevent the instant circumstance of  
2 students paying tuition for which they did not receive the agreed consideration in the form of classes.  
3 When the debtor stopped doing business, this was exactly what happened, but the note is gone<sup>27</sup> and  
4 there are no assets with which to reimburse the students for their prepaid tuition.

5 Janisch was not satisfied with reducing the amount due under the note. Less than two  
6 months later, on August 21, 2006, days before the school ceased to do business, the corporation  
7 satisfied the revised promissory note in the amount of \$137,000.<sup>28</sup> Janisch then owed the company  
8 nothing under the satisfied note.

9 The security agreement which secured the note was likewise reduced in June of 2006, and  
10 then released in August 2006. The first modification of the promissory note is found in the Janisch  
11 Dep, ex. 6, pg. 16. The release of the security interest is found in the Janisch Dep, ex. 6, pg. 17. The  
12 release and assignment of stock account is found in the Janisch Dep, ex. 6, pg. 18.

13 The documents which effectuated the August 21, 2006 corporate meeting are also found in  
14 the Janisch Dep, ex. 6. The request for full reconveyance of the deed of trust is found in the Janisch  
15 Dep, ex. 6, pg. 20. The release of the security interest is found in the Janisch Dep, ex. 6 pgs. 21 and  
16 22, the UCC termination statement is found in the Janisch Dep, ex. 6, pgs. 23 and 24, and the request  
17 for full reconveyance is found in the Janisch Dep, ex. 6, pg. 20.

18 In summary, during 2006, not only did Janisch withdraw one half million dollars in cash  
19 from the debtor, he terminated a promissory note and agreements securing that note to the tune of  
20 nearly \$300,000. Janisch, then, withdrew \$800,000 in assets from the debtor during the months  
21 immediately prior to its bankruptcy filing.

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25 <sup>27</sup>The State of Washington has filed proof of claim number 80 in the amount of \$540,877.79 for tuition paid  
for the full quarter of 2006. The students listed did not receive the classes for which they paid.

<sup>28</sup>Janisch Dep, ex. 6, pg. 19.

1           The question then becomes, where did Janisch obtain the money he paid into the debtor each  
2 December 31? The answer is that he utilized Moldskred as his personal banker.<sup>29</sup> During the  
3 time frame in question, the debtor had no financial obligation to Moldskred.<sup>30</sup> During 2006,  
4 Moldskred did not make any payments or transfer any property to CRI.<sup>31</sup> The last time Moldskred  
5 made a transfer of money or property to CRI was eight to ten years ago.<sup>32</sup> Moldskred is a semi-  
6 retired business person who invests in real estate and companies.<sup>33</sup>

7           The course of dealings between the parties was such that Janisch would borrow money from  
8 Moldskred and then Janisch would pay the money into the debtor.<sup>34</sup>

9           When it became time for Janisch to repay Moldskred, the repayment occurred in two ways.  
10 First, the debtor made payments directly to Moldskred.<sup>35</sup> During 2006, the debtor paid Moldskred  
11 directly 9 payments totaling \$123,000.<sup>36</sup> Second, Janisch paid Moldskred an additional \$150,000  
12 on January 2, 2006, out of funds he, Janisch, received from the debtor.<sup>37</sup>

13           Janisch determined that corporate funds were available to be withdrawn by himself by  
14 looking to the debtor's bank account. If there was money in the account he withdrew it.<sup>38</sup> For  
15 instance, Janisch withdrew \$400,000 from the debtor in January of 2006. He took the money  
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17  
18 <sup>29</sup>Janisch also borrowed money from his landlord. Janisch Dep, pg. 48, ln. 4.

19 <sup>30</sup>Janisch Dep, pg. 45, ln. 23.

20 <sup>31</sup>Janisch Dep, pg. 46, ln. 1.

21 <sup>32</sup>Janisch Dep, pg. 46, ln. 4.

22 <sup>33</sup>Janisch Dep, pg. 50, ln. 9.

23 <sup>34</sup>Janisch Dep, pg. 7, lns. 4-21, and pg. 34, lns. 18-22.

24 <sup>35</sup>Janisch Dep, pg. 37, lns. 11-16.

25 <sup>36</sup>Moldskred answer to Interrogatory No. 9.

<sup>37</sup>Moldskred answer to Interrogatory No. 8.

<sup>38</sup>Janisch Dep, pg. 39, ln. 22.

1 because it was there and he needed it.<sup>39</sup> Janisch would make these withdrawals from the debtor's  
2 checking account even though the federal student aid received by the debtor was simply deposited  
3 to the checking account, whether or not the student presently owed the debtor any tuition.<sup>40</sup> Janisch  
4 could not know whether or not the funds he was withdrawing were funds already earned by the  
5 debtor or a deposit of prepaid tuition.<sup>41</sup>

6 In order to repay the loans which Janisch had taken from Moldskred, Janisch directed the  
7 debtor to issue payment directly to Moldskred and additionally Janisch withdrew funds from the  
8 debtor which he in turn used to pay Moldskred. Janisch also transferred to Moldskred the two  
9 diamond rings he had previously pledged to the debtor.<sup>42</sup> He then provided Moldskred with a deed  
10 of trust against his residence, which had previously been used to secure the loan from the debtor.<sup>43</sup>

11 Janisch did pay certain amounts into the debtor's accounts during 2006. He paid \$110,000  
12 to the debtor in April 2006, \$30,000 in May 2006, and \$25,000 in June 2006. He received a credit  
13 in the amount of \$4,500 from the debtor in August 2006. These payments were recorded as  
14 contributions to his capital account by the debtor.<sup>44</sup> It should also be noted that these entries were  
15 preliminary, in that the year end statements have not been finalized.

16 In his 2004 examination, however, Janisch argued that these contributions paid off the then  
17 existing \$137,000 note made by himself and held by the debtor. This only explains the reduction  
18 of the promissory note from \$137,000 to zero in the August 21, 2006 corporate meeting,<sup>45</sup> not the  
19 reduction of the note from \$295,000 to \$137,000, which occurred at the June 26, 2006 meeting, just  
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21 <sup>39</sup>Janisch Dep, pg. 39, lns. 1-11, and pg. 41, ln. 2.

22 <sup>40</sup>Janisch Dep, pg. 43, lns. 2-16.

23 <sup>41</sup>Janisch Dep, pg. 43, lns. 23 through pg. 44, ln.7.

24 <sup>42</sup>Janisch Dep, pg. 54, lns. 16-21, and pg. 56, ln. 15.

25 <sup>43</sup>Janisch Dep, pg. 87, lns 20-25, and pg. 88, ln. 1.

<sup>44</sup>Declaration of Richard Ginnis, para. 9.

<sup>45</sup>Janisch Dep, ex 6, pg. 19.

1 two months prior to the debtor closing its doors. This explanation also disregards the manner in  
2 which the deposits were booked to Janisch's capital account.

3 That note was pledged for the purpose of complying with the Department of Education's  
4 requirements in case the debtor filed bankruptcy.<sup>46</sup> Janisch disingenuously testified at his 2004  
5 examination, however, that he thought there was "no circumstance under which the note would  
6 become due and payable."<sup>47</sup> The corporation, however, was insolvent at the time the note was  
7 reduced, notwithstanding the fact that the expressed purpose of the note was to ensure payment to  
8 creditors in the case of the debtor's liquidation or bankruptcy. Janisch will argue, as he did in his  
9 2004 examination, that the company made money in 2005, so it was not still necessary to have the  
10 larger promissory note in place.<sup>48</sup> That begs the question. The debtor was, in fact, insolvent at that  
11 time, the note was in place and there was no consideration for reducing it.

12 Janisch's financial model, then, was simply to deceive the Department of Education. In late  
13 December of 2004 and 2005 he deposited a substantial amount of cash to the debtor's accounts and  
14 did not treat the deposits as loans. This increased the debtor's equity on its audited financial  
15 statements. The cash was withdrawn after the first of the year. Then, in June, just before finalizing  
16 the audit, he would look back and see how much additional capital was necessary to satisfy the  
17 Department of Education's requirements as of December 31 of the prior year. At that point, he  
18 would execute a promissory note from himself to the corporation in the requisite amount and pledge  
19 his home and personal property as security for the note. This apparently satisfied the Department  
20 of Education's requirements, retroactively.

21 In order to satisfy his own requirements, Janisch would then withdraw a substantial portion  
22 of the cash infused immediately after the first of the year. He withdrew subsequent amounts as the  
23 cash was available without regard to whether or not the debtor had earned the funds, thus

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25 <sup>46</sup>Janisch Dep, ex. 6, pg. 1.

<sup>47</sup>Janisch Dep, pg. 52, ln. 16.

<sup>48</sup>Janisch Dep, pg. 61, lns. 3-11.

1 withdrawing prepaid tuition in the form of student loans paid directly to the debtor’s checking  
2 account. In June of 2006, he wrote down the promissory note for the prior December and issued  
3 partial releases of his collateral. In late August of 2006, he marked the note paid in full and released  
4 all of the remaining security. Then, when the debtor closed its doors, the students were left holding  
5 the empty bag, as it were. The education they received was financial in nature, rather than court  
6 reporting or computed related as advertised.

### 7 III. LEGAL ANALYSIS

#### 8 A. The trustee has the initial burden.

9 F.R.Civ.P. is incorporated into F.R.Bankr.P. 7056 and applies to this motion. The party  
10 seeking summary judgment bears the initial burden of asserting that the pleadings, depositions,  
11 answers to interrogatories, admissions and affidavits establish the absence of a genuine issue of  
12 material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2566, 91 L.Ed 2d 265,  
13 279 (1986).

14 The ultimate burden of demonstrating the existence of a genuine issue of material fact,  
15 however, lies with the nonmoving party. *Id.* at 324. When the moving party has carried its burden  
16 under Rule 56(c), its opponent must do more than simply show that there is some metaphysical  
17 doubt as to the material fact. Rather, the nonmoving party must come forward with “specific facts  
18 showing that there is a genuine issue for trial.” F.R.Civ.P. 56(e). These facts must be in the form  
19 of “significant, probative evidence tending to support its claim or defense.” *In re Aubrey*, 111 B.R.  
20 268, 272 (9<sup>th</sup> Cir. BAP 1990), quoting *Richard v. Neilsen Freightlines*, 810 F.2d 898, 902 (9<sup>th</sup> Cir.  
21 1987). Where the record taken as a whole could not lead a rational trier of fact to find for the  
22 nonmoving party, there is no “genuine issue for trial.” *Matsushita Electric Industrial Company*  
23 *Limited v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). There are no disputed facts in this case  
24 and the plaintiff is entitled to a judgment as a matter of law.  
25

1           **B.       The transfer may be avoided under 11 U.S.C. § 548(a)(1)(A).**

2       11 U.S.C. § 548 provides:

3           (a)(1) The trustee may avoid any transfer (including any transfer to or for the  
4           benefit of an insider under an employment contract) of an interest of the debtor in  
5           property, or any obligation (including any obligation to or for the benefit of an  
6           insider under an employment contract) incurred by the debtor, that was made or  
7           incurred on or within 2 years before the date of the filing of the petition, if the debtor  
8           voluntarily or involuntarily—

9                   (A)     made such transfer or incurred such obligation with actual  
10                   intent to hinder, delay, or defraud any entity to which the  
11                   debtor was or became, on or after the date that such transfer  
12                   was made or such obligation was incurred, indebted.

13           The trustee, then, may avoid any transfer of an interest in property of the debtor made within  
14           two years before the date of filing the petition if the debtor made such transfer with actual intent to  
15           hinder, delay or defraud any creditor.

16           Inasmuch as insolvency is not an element of actual fraud under Section 548(a)(1)(A), the  
17           only possible issue is one of intent. There can be no issue that there was a transfer within two years  
18           of filing bankruptcy of property of the debtor. Since there is seldom evidence one way or another  
19           of a corporation's intent, the courts have looked to circumstantial evidence. In the case where a  
20           corporate debtor is controlled by a single individual, that individual's intent is deemed to be the  
21           corporation's intent. *In re Chase & Sanborn Corp.*, 51 B.R. 739 (Bkrtcy S.D. Fla. 1985). In the  
22           case where the corporation pays the debts of the corporate manager, the transfer is one intended to  
23           hinder, delay or defraud. The transfer to Moldskred was for the benefit of Janisch as there was no  
24           financial relationship between the debtor and Moldskred. That transfer was one of actual fraud.

25           In the case where there is a transfer between insiders without a transfer for equivalent value,  
26           a presumption of actual fraud arises. *Tavener v. Smoot*, 257 F.3d 401 (4<sup>th</sup> Cir. 2001). This  
27           presumption establishes the trustee's *prima facie* case and shifts the burden to the debtor to establish  
28           the absence of fraudulent intent. *Tavener v. Smoot, Supra*, at 408. In the instant case, there was  
29           no consideration to the benefit of the debtor for the transfers to Moldskred. Likewise, according to  
30           the debtor's books and records, there was no benefit to the debtor for the transfers to Janisch, nor

1 for the reduction of the promissory note. These transfers were presumptively intentionally  
2 fraudulent.

3 Similarly, distributions to shareholders by an insolvent corporation or which render a  
4 corporation insolvent are considered to be actually fraudulent transactions. *In re Focus Media, Inc.*,  
5 387 F.3d 1077 (9<sup>th</sup> Cir. 2004). *See, United States v. Neidorf*, 522 F.2d 916, 917 (9<sup>th</sup> Cir. 1975),  
6 concluding that allegation that the corporation had been rendered insolvent by distributions to  
7 shareholders stated a cause of action for a fraudulent conveyance. A corporate dividend made while  
8 a debtor is insolvent has long been held to be a subterfuge and avoidable as a fraudulent conveyance.  
9 *Lytle v. Andrews*, 34 F.2d 252 (8<sup>th</sup> Cir. 1929).

10 Similarly, the existence of a Ponzi scheme, which is a fraudulent endeavor, has been held  
11 to fulfill the requirement of actual fraudulent intent on the part of the debtor. *In re Agricultural*  
12 *Research and Technology Group, Inc.*, 916 F.2d 528 (9<sup>th</sup> Cir. 1990). The case at hand is a fraudulent  
13 endeavor in the same sense that a Ponzi scheme is a fraudulent endeavor. In a Ponzi scheme, the  
14 debtor seeks new “investors” to pay dividends to existing investors, creating a subterfuge which will  
15 eventually collapse. In the case at hand, the debtor pumped up its financial statement with infusions  
16 of cash and a promissory note which were stripped away from the debtor with the same ease with  
17 which they were acquired. This subterfuge allowed the debtor to continue its financial existence,  
18 to continue to receive financial aid, and to continue to make payments to Janisch.

19 Janisch’s conception of a “snapshot” financial statement ignores the underlying realities  
20 supposedly reflected by that financial statement: that the debtor has assets and the debtor is solvent.  
21 This subterfuge by Janisch fulfills the requirement that the debtor have actual intent to hinder, delay  
22 or defraud any creditor. All of the transfers to Janisch and Moldskred should be avoided under this  
23 cause of action.



1 The Declaration of Richard Ginnis establishes the debtor's insolvency, at least as of December 31,  
2 2005.

3 The transfers are avoidable under 11 U.S.C. § 548.

4 **D. The trustee may recover the \$150,000 paid by Janisch to Moldskred.**

5 11 U.S.C. § 550 provides:

6 (a) Except as otherwise provided in this section, to the extent that a  
7 transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or  
8 724(a) of this title [11 USCS § 544, 545, 547, 548, 549, 553(b), or  
9 724(a)], the trustee may recover, for the benefit of the estate, the  
10 property transferred, or, if the court so orders, the value of such  
11 property, from--

- 12 (1) the initial transferee of such transfer or  
13 the entity for whose benefit such  
14 transfer was made; or  
15 (2) any immediate or mediate transferee  
16 of such initial transferee.

17 Moldskred is the immediate or mediate transferee of the initial transferee, Janisch. The  
18 trustee, then, may recover the \$150,000 Janisch received from the debtor and subsequently paid to  
19 Moldskred. *In re Video Depot, Ltd.*, 127 F.3d 1195, 1198 (9<sup>th</sup> Cir. 1997).

20 IV. CONCLUSION

21 The trustee has established fraudulent conveyances to Janisch in the amount of \$487,360 and  
22 to Moldskred in the amount of \$273,000, and judgment should be entered accordingly.  
23 Additionally, the Janisch note and security should be reinstated.

24 DATED this 10<sup>th</sup> day of October, 2007.

25 THE RIGBY LAW FIRM

*/S/ James Rigby*

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Of Attorneys for Plaintiff/Trustee