IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

GUS A. PALOIAN, not individually but as Chapter 7 Trustee, Plaintiff, vs. SCOTT A. WEINER, Defendant.	) No. 15 A 00016))) Chicago, Illinois) August 4, 2016) 1:30 p.m.
GRANT B. LUSTIG, Debtor.	) No. 14 B 32594

VOLUME V (Pages 1-132)
TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE CAROL DOYLE

APPEARANCES:

For the Plaintiff: Mr. Bret Harper;
Mr. Gus A. Paloian, Chapter 7 Trustee;

For the Defendant: Mr. Bradley Block;
Mr. Bruce de'Medici.

Court Reporter: MARY C. KELLY, CSR
United States Courthouse
219 South Dearborn Street
Room 661
Chicago, Illinois 60604

THE CLERK: Everyone please rise.

Grant Lustig, Gus Paloian as trustee versus Scott Weiner.

THE COURT: I don't know if we need appearances here. I suppose we should probably.

MR. PALOIAN: Your Honor, Gus Paloian, case trustee, and Bret Harper, counsel.

MR. BLOCK: Brad Block on behalf of the defendant.

MR. DE'MEDICI: Bruce de'Medici on behalf of Scott Weiner.

THE COURT: And I wanted to say last time, that argument, I think, was your closing argument, but I converted it into an oral argument with you people having no notice, and it went on for about five hours.

But at the end, I thought I was too harsh on Mr. Harper, so I'm sorry. At the end, I was saying things like, okay, okay, what you got, what you got, give me something new, all right? I normally would never do that, but I was at the end of my rope, and I'm sorry to do that.

MR. HARPER: No problem, your Honor.

THE COURT: All right. Have a seat.

I'm going to cut to the chase. I have a

40-page, single-spaced opinion to read, but Mr. Weiner is prevailing on all three counts.

I think the fundamental issue is pretty simple. I have to look at what was the value to Mr. Lustig had he not transferred it, and that's how you look at what was lost. And the value to Mr. Lustig at the time of the transfer was virtually zero.

And then I go through -- I go through all the expert testimony and all of that, and I process it all, and no matter how you evaluate the issues, I get to the same result, which is there was no fraudulent transfer here.

So I'm sorry to say I'm just going to just read this into the record. It's kind of long and complicated. I'm going to hope that the court reporter will actually put in the headings that I say. I don't know if that's possible. I never end up reading these transcripts. But, you know, it divides it up.

So it's very, very long. But I, again, tried to put in some headings so that somebody trying to read the long thing will have some idea about organization.

So here we go.

These are my Findings of Fact and Conclusions of Law.

Gus Paloian, the trustee in the Chapter 7 bankruptcy case of the debtor Grant Lustig, filed this adversary proceeding against Scott Weiner to recover an allegedly fraudulent transfer of an interest in some restaurant entities. The plaintiffs stipulated quite a few facts, and then I held a trial on the remaining issue.

After weighing all the evidence and considering the law on a number of issues, I will enter judgment in favor of Mr. Weiner and against the trustee on all counts. The trustee has failed to meet his burden of proving that Lustig's transfer of his interests in the four restaurant-related entities was fraudulent.

Roman Numeral I, the first section of my opinion, is called Jurisdiction. It's the shortest.

This is a core bankruptcy proceeding over which I have jurisdiction under 28 U.S.C. Section 157(b)(2)(H). Both parties expressly consented on the record at the beginning of the trial to me entering a final judgment in this adversary proceeding.

Heading Number II, Roman Numeral II of my opinion, is entitled The Claims and General Standards.

The trustee's complaint alleges three counts. Count I alleges a constructive fraudulent transfer. Count II alleges an actual fraudulent transfer. Count III alleges unjust enrichment.

Subsection A. Count I.

Count 1 alleges that the transfer of the restaurant interests from Lustig to Weiner was a constructively fraudulent transfer under 740 ILCS 160/5(a)(2), which is the trustee has standing to pursue under 11 U.S.C. Section 544(b)(1).

Section 544(b)(1) of the Bankruptcy Code provides that: Except as provided in Paragraph 2, the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under Section 502 of this title and it is not allowable only under Section 502(e) of this title.

Section 544(b)(1) is the derivative of state law and authorizes a trustee to "step into the shoes of an actual (unsecured) creditor who could have avoided the transfer outside bankruptcy using a state law cause of action." *In re Equipment Acquisition Resources, Inc.*, 742 F.3d 743 (7th Circuit 2014).

In this case, the state law on which the trustee relies is the Illinois version of the Uniform Fraudulent Transfer Act, and, more specifically, Count I is under 740 ILCS 160/5(a)(2) and 160/8(a) for constructively fraudulent transfers.

That provision states: A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whether the creditor's claim arose before or after the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation: And then skip 1. 2, without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (B) intended to incur or believed or reasonably should have believed that he would incur debts beyond his ability to pay as they became due.

That's the end of the quote from the statute.

"Fraud in law" -- which is what constructive fraud is -- "exists when the debtor conveys assets for inadequate consideration rendering himself insolvent during a time when he has existing or contemplated indebtedness." That's from *Wachovia Securities, LLC v. Jahelka*, J-A-H-E-L-K-A, 586 F.Supp.2d 972 at 1014 (Northern District of Illinois 2008). I believe it's bankruptcy. Maybe not. Unlike fraud in fact, fraud in law, which is constructive fraud, does not require proof of fraudulent intent. That's a zillion cases, but I will cite *Society of Lloyd's v. Collins*, 284 F.3d 727 at 730 (7th Circuit 2002). I'll skip the next one. Rather, fraud in law is presumed when a debtor makes a voluntary transfer without consideration or for inadequate consideration, and that consideration hinders or delays the rights of his creditors. See *Collins* 284 F.3d at 730. *Cordes & Company, LLC v. Mitchell Companies, LLC*, 605 F.Supp.2d 1015, 1020 to 21. That's the Northern District of Illinois 2009.

Here, the parties agree that there was a transfer from the debtor, Mr. Lustig, and to Mr. Weiner, the defendant, and Mr. Lustig was insolvent when the transfer was made. The only disputed issues regarding whether -- issues is whether the transfer was -- regarding whether the transfer was constructively fraudulent is whether Lustig got reasonably equivalent value for the transfer.

So Subparagraph 1 of my standards for Count I is entitled Reasonably Equivalent Value.

The factors utilized to determine reasonably equivalent value are: (1) whether the value of what was transferred is equal to the value of what was received; (2) the market value of what was transferred and received; (3) whether the transaction took place at an arm's length; and (4) the good faith of the transferee. Lots of cases I can cite for this, but some are: *Zeddun*, Z-E-D-D-U-N, *v. Griswold*, G-R-I-S-W-O-L-D, in the *In re Wierzbicki* case, W-I-E-R-Z-B-I-C-K-I, just issued a week or two ago by the Seventh Circuit, Number 16-1334 slip opinion at 5 (7th Circuit July 27, 2016); *In re Smith*, 811 F.3d 228 at 240, (7th Circuit 2016); *Barber v. Golden Seed Company, Inc.*, 129 F.3d 382 at 387 (7th Circuit 1997); *Grigsby v Carmell in the In re Apex Auto Warehouse, L.P.*, 238 B.R. 758, 773 (Bankruptcy Northern District of Illinois 1999). There is no fixed formula for determining reasonable equivalence, but it will depend on all the facts of each case. That's from the *Barber* case in the Seventh Circuit, 129 F.3d at 387, and common bankruptcy law.

Whether a debtor has received reasonably equivalent value in an exchange of property is a question of fact. And for that, I'll quote the *Zeddun* case of the Seventh Circuit again. There are thousands of cases saying that.

Valuing property and forbearance from litigation "is not an exact science," and a court must consider the "totality of the circumstances." That's also from *Zeddun* slip opinion at 8. "The exchange need not involve exact equality in value. It is enough for there to be 'rough' proximity. Citations omitted. Instead of a precise mathematical formula, courts look to the circumstances of the particular case to determine whether the value of what the debtor received falls within a reasonable range of equivalence." That's from *White v. Coyne* in the *In re Pawlak* bankruptcy case, 483 B.R. 169 at 183 to 84 (Bankruptcy Western District of Wisconsin 2012).

The burden of proving lack of reasonably equivalent value is on the trustee. *In re 4100*

West Grand, LLC, 481 B.R. 444 at 455 (Bankruptcy Northern District of Illinois 2012) citing other cases.

"In determining reasonably equivalent value, the focus is on what the debtor, in italics, surrendered and what the debtor, in italics again, received, not what any third party or creditor might have gained or lost as a result of the transfer." That's from *White v. Coyne* in the *In re Pawlak* case, 483 B.R. at 183 to 84. The transaction should be viewed from the point of view of unsecured creditors, what they would have had had the transaction not occurred versus what they had as a result of the transfer. See e.g., *Official Committee of Unsecured Creditors v. The Fountainhead Group, et al.*, in the *In re Bidgeview* case. And I was trying to figure out if there was a published cite, and let me just take a look. Aha. I have a B.R. site for that one. That's good because I rely on that a lot. 538 B.R. 477. It's also 2015 Bankruptcy LEXIS at 3350. It's Bankruptcy Northern District of Illinois 2015, Judge Hollis in this district, and it's an excellent opinion. Okay. So see that case. Only those transfers that diminished the debtor's prepetition assets should be avoided. *Jordan v. Kronenberger*, K-R-O-N-E-N-B-E-R-G-E-R, in the *In re Jordan* case, 392 B.R. 428 at 441 (Bankruptcy Northern District of Idaho 2008). "The proper focus is on the net effect of the transfers on the debtor's estate, the funds available to unsecured creditors. As long as the unsecured creditors are no worse off, no fraudulent" -- and I'm leaving out a lot -- "... no fraudulent transfer has occurred." *Harman v. First American Bank of Maryland, In re Jeffrey Bigelow Design Group, Inc.*, bankruptcy, 956 F.2d. 479 at 484 (4th Circuit 1992).

"Indirect benefits can constitute reasonably equivalent value." *In re Image Worldwide, Ltd.*, 139 F.3d 574 at 579 (7th Circuit 1998).

A promise which gives rise to an enforceable contract right constitutes an economic benefit for purposes of reasonable value. *Pawlak*, 483 B.R. at 185.

So that's Count I Section A, my Roman Numeral II section on standards.

Section B of the standards part is Count II, Actual Fraudulent Transfer.

In Count II, the trustee seeks recovery

based on the same transfer of the restaurant interests, but based on actual fraud in the transfer pursuant to 740 ILCS 160/5(a)(1) and 160/8(a). That statutes provides:

A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whether the creditor's claim arose before or after the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation (1) with actual intent to hinder, delay or defraud any creditor of the debtor.

Fraud, in fact, is when the debtor has a specific intent to hinder his creditors. *Cordes & Company v. Mitchell Companies, LLC*, 605 F.Supp.2d 1015 at 1020 (Northern District of Illinois 2009).

In determining whether a transfer is made with actual intent to defraud, the UFTA sets forth several factors, also known as the badges of fraud, from which an inference of fraudulent intent may be drawn. Section 5(b) of the UFTA, which Illinois follows, sets forth the following indicia:

1, the transfer or obligation was to an insider;

2, the debtor retained possession or control of the property transferred after the transfer;

3, the transfer or obligation was disclosed or concealed;

4, before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;

5, the transfer was of substantially all the debtors assets;

6, the debtor absconded;

7, the debtor removed or concealed assets;

8, the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

9, the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;

10, the transfer occurred shortly before or shortly after a substantial debt was incurred;

And, 11, the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

That's all from 740 ILCS 160/5(b).

"When these 'badges of fraud' are

present in sufficient number, they may give rise to an inference or presumption of fraud." *Steel Company v. Morgan Marshall Industries, Inc.*, 278 Ill.App.3d 241 at 251, 662 N.E.2d 595 at 602 (1st District Illinois Appellate 1996).

Okay. So Subsection C, capital C, of my Claims and General Standards Section, is entitled Remedies For Both Fraudulent Transfer -- for Both Fraudulent Transfer Claims.

Under the claims in both Count I and II, if a fraudulent transfer is proven, the remedy available is provided in Section 8(a), which allows the court to avoid the transfer, attach the asset and apply equitable principles, and do a number of other things in its discretion. Section 550 of the Bankruptcy Code, which is 11 U.S.C. Section 550, also applies to transfers that a trustee avoids under Section 544, which is what we're going under here. It provides that the court may order that the property or other value of the property -- I'm sorry -- the property or the value of the property must be brought into the estate. It also provides for how a trustee can recover from subsequent transferees who received the property from the initial transferee. As I'll discuss later, this provision is relevant to a portion of the trustee's claim.

Section 8(a) of the Illinois Uniform Fraudulent Transfer Act provides as follows:

In an action for relief against a transfer or obligation under this Act, a creditor, subject to the limitations of Section 9, may obtain:

1, the avoidance of the transfer or obligation to the extent necessary to satisfy the creditors claim;

2, an attachment or other provisional remedy against the asset transferred or other property of the transferee in accordance with the procedure described in the Code of Civil Procedure;

3, subject to applicable principles of equity and in accordance with applicable Rules of Civil Procedure (A) an injunction against further disposition by the debtor or transferee or both of the asset transferred or of other property; (B) appointment of a receiver...; and (C) any other relief that circumstances may require.

Subsection D of my Roman Numeral II section on standards. Subsection D is entitled Count III, Unjust Enrichment.

In Count III, the trustee purports to allege a claim for unjust enrichment. His counsel said nothing about it in his opening statement and he made no attempt to -- I really meant in his closing argument, and I don't believe in his opening statement he did either. And he made no attempt to demonstrate how he could recover under this count in his closing argument. I therefore determined at trial that the trustee had failed to prove and waived this claim. I'll enter judgment in favor of the defendant on Count III.

All right. Section Roman Numeral III of my opinion is entitled Facts.

I find the following facts based on the evidence presented at trial, the stipulations of the parties and the admissions of the parties. I'm about to make many factual findings in this section of my opinion, but I will also continue to make findings of fact throughout the later sections of my opinion as well. Also, I will make additional credibility findings where I think appropriate through my findings, but I will begin with my general findings regarding the two principal fact witnesses, Mr. Weiner and Mr. Lustig.

I found Mr. Weiner to be highly

credible. He was a straight-shooting and honest businessman who answered questions directly and truthfully. Weiner was not in any way in cahoots with Mr. Lustig.

Mr. Lustig, on the other hand, was not a credible witness. He lied to Mr. Weiner and his co-manager and owner Mr. Mohr on a number of occasions. He lied to the City of Chicago on liquor license applications, and he lied to this court. He was not credible.

The story begins with Grant Lustig, who is the debtor in the bankruptcy case in which this adversary proceeding arises.

Mr. Lustig used money that he transferred from an account of an entity that he controlled with his father, but still he controlled, called Lustig Capital, and another company he controlled, Workforce Financial, to buy an interest placed in his name personally in four related restaurant entities that were formed to operate two restaurants, the Bleeding Heart Bakery and Roots. Both are in what is now a trendy neighborhood, Wicker Park, in Chicago. For each enterprise, two separate entities were created to own the real estate and to operate the restaurants.

Roots, the pizza and craft beer business, is owned and operated by Roots Handmade Pizza, LLC, while the real estate in which Roots is located is owned by Chicago Division Street Restaurants, LLC, or CDSR. For the Bleeding Heart Bakery, the bakery and restaurant is owned by BHB & Cafe Management Company, LLC, or BHB Cafe for short. The real estate in which Bleeding Heart is located is owned by -- did I say that right? I hope so. The real estate in which the Bleeding Heart Bakery is located is owned by BHB Real Estate, LLC, or BHB Cafe for short. Because of the many serious problems in the operation of Bleeding Heart Bakery, the enterprise now operated by BHB Cafe is now called the Westown Bakery, I believe, or something like that. So it's no longer called Bleeding Heart.

As Weiner credibly testified, Lustig had been a frequent customer of a different restaurant that was owned, at least in part, and managed by Weiner and his business partner Greg Mohr, spelled M-O-H-R. Mohr and Weiner had met -- they had met each other while working at yet another restaurant, Joe's Seafood or something or another, a Lettuce Entertain You restaurant. They decided to open their own restaurant together, 50/50 Restaurant, at which Mr. Lustig became a frequent customer. 50/50 was the first restaurant that these two, Weiner and Mohr, opened on their own and together, though both had worked for other successful restaurants before.

Weiner and Mohr decided to try to open two more restaurants, the ones at issue in this case. Weiner began work on business plans for both Roots restaurant and Bleeding Heart Bakery Cafe in January and February of 2010. The two restaurants would be next to each other in the 1900 West block of Chicago Avenue in Chicago's Wicker Park neighborhood.

As explained in the Roots business plan given to all potential investors, which is Plaintiff's Exhibit 10, the Roots restaurant was to feature hand-crafted pizza based on the style of pizzas Mohr had known from the Quad Cities where he grew up. They would be made in an open kitchen producing high-quality hand-thrown pizzas, an extensive salad list, and gourmet sausages in a comfortable and casual atmosphere. The idea was to be family friendly and offer this new kind of pizza in the Chicago market where people could also drink alcoholic beverages. This was the beginning of the craft beer boom that has now gone crazy, and they wanted to be the first place to have a large local and Midwestern craft beer selection. As shown in the Roots business plan, again, Plaintiff's Exhibit 10, sales of alcohol constituted 48 percent of the sales projections for Roots. The sale of alcohol was essential to the success of this business. The restaurant was built out to have a huge bar that seats 65 people. If they didn't sell alcohol in the restaurant, there was nothing to distinguish themselves from take-out pizza places in the area. If the restaurant could not sell alcohol, it would be catastrophic. It would fail quickly.

The second restaurant was to be called the Bleeding Heart Bakery and Cafe. It would have a large space featuring organic pastries, cupcakes, brownies, vegan foods, et cetera. As described in the business plan, which is also in Plaintiff's Exhibit 10, the bakery has 6500 square feet of space. Immediately inside is a host stand. To the right is a retail counter selling all kinds of fresh baked goods. To the left is seating for 185 guests for breakfast and lunch. There is also a studio cake room, whatever that may be. Behind and through the glass you can see the bakery production. Then through a stairwell, you walk into a private room with a fully stocked bar, and then you can go outside to a rooftop deck that seats 85 people where they can have private events, showers, dinners, et cetera. The bakery would also sell alcohol, which was important to brunch sales and the private parties for all the special spaces, but alcohol was less important to the success of the bakery than it was to Roots where it was absolutely critical to the success of the restaurant. The bakery would not be able to attract a brunch crowd or private parties for showers and other events without liquor sales. So it was a significant part of the overall business plan. Weiner credibly testified that if they had planned not to sell alcohol at the bakery, the concept would have been completely different. They would have just made it a big wholesale bakery. But the business plan called for alcohol sales in there for the retail spaces that I've just described.

The Roots business plan called for the real estate to be purchased for around 1.1 million. It's stated that 1.7 million in financing would be required to open the restaurant with 700,000 in construction loan coming from the SBA, meaning the Small Business Administration, or another lender, and approximately 1 million coming from limited partners. The business plan of the bakery called for the purchase of real estate that would cost from 1 to 1.2 million. The bakery business plan also called for approximately 1.7 million required to open with about 1.7 million coming from the limited partners and $700,000 construction loan for the build out of the property.

So the cost of -- estimated cost to start up Roots was approximately 2.519 million, and the total estimated cost of starting up the Bleeding Heart was about 2.51 million, so pretty close. The estimated total loans for the project was about 3.2 million with around 2 million in additional funding coming from these individual investors.

After Weiner completed the business plans, they had subscription and operating agreements drawn up that were consistent with the business plans. Weiner and Mohr then began looking for and meeting with potential investors. Lustig grew up in the same town as Weiner, though they did not know each other growing up. Lustig was a friend of Weiner's sister, and Weiner and Lustig met at some point after Lustig became a big spender at 50/50, probably using other people's money, I might add.

Lustig expressed an interest in investing in the businesses. Weiner then met with Lustig at the 50/50 Restaurant to discuss the possibility of Lustig investing. Miles Lustig, Grant's father, was also at the first meeting. They had several face-to-face meetings about the investment, including at least one that Mohr attended. As they did with all potential investors, Weiner gave Lustig the business plan, subscription agreements and operating agreements. They discussed price rates for purchasing more shares and a lot of the details of the investment and then attempted to figure out if Lustig was interested. He was interested, so then they continued on to the next phase of the discussions and discussed the investment in more detail.

Weiner discussed with each investor, including Lustig, that they would need a liquor license for both restaurants, and that no matter what the level of investment, an investor would have to disclose information about themselves to the City of Chicago for the liquor license. I should say liquor license application. For the smallest investors, they would require only giving name, address, Social Security Number, et cetera. But for investors of 5 percent or more, which would include Lustig, Weiner specifically told them before they invested they would have to be on the liquor licenses for each restaurant, and they could not have any criminal convictions. Weiner explained this to each potential investor up front because many people are hesitant to have any association with liquor licenses. He also explained that a guarantor or 5 percent investor would be fingerprinted and would have to disclose any criminal history.

So Lustig said he was originally considering investing around $250,000, but he decided to increase it to 375 -- although I think I made a typo. I think it's 370 -- and to become a guarantor on the loans so that he could get an extra 1 percent interest just by being the guarantor. Before Lustig agreed to invest, Weiner specifically told Lustig he would have to be part of the application for the liquor license to the

City, and he would have to submit to a criminal background check. He specifically asked Lustig if he had any felony convictions, and Lustig said, no, that would be no problem.

Lustig testified at trial, conveniently, that he did not recall having this conversation with Weiner about having to submit to a background check and not having felony convictions. I did not believe Lustig on this. Instead, I found far more credible Mr. Weiner's testimony that he told Lustig before he invested he would have to have a criminal background check and could not have any felony convictions, and Lustig lied about it probably because he didn't want to admit he had criminal convictions. Weiner had already opened one restaurant, the 50/50, so he was fully familiar with the details of starting an operation requiring a liquor license. He had every reason to make sure this was not a problem up front before investors get involved. If Lustig had admitted his criminal history before he invested, Weiner would have turned him down right then and not accepted his subscription, but Lustig lied.

He then signed the agreement, the subscription agreement, gave Weiner a check for

$120,000 that was drawn on the account of Lustig Capital, a company Grant owned with his father Miles Lustig. The check was dated May 17, 2010. Weiner remembers asking Lustig about why the check was from Lustig Capital, and Lustig just told him it was one of his companies. Lustig sent another check for $125,000 from Workforce Financial that showed up in the corporate accounting records in Defendant's Exhibit 8. There is a third check that isn't in the record, but it also came from Workforce Financial, a company that Grant Lustig managed and partially owned with investments from a bunch of other creditors that are the plaintiffs in another adversary proceeding against Lustig that was called Shepard, et al., versus Lustig. Lustig invested a total of $370,000 in the four entities involved in this case using those three checks from Lustig Capital and Workforce Financial. As the subscription agreements show and the operating agreements as well, the membership interests were owned by Grant Lustig individually, not by Lustig Capital or Workforce Financial or any other Lustig-related entity, and the parties have essentially stipulated to that.

After Weiner and Mohr got enough

subscriptions from investors like Lustig, the operating agreements were executed on October 12, 2010. Those agreements are in Plaintiff's Exhibit 12. After that, Weiner and Mohr proceeded to carry out their plans, buying the real estate, getting loans from the SBA and the Gold Coast Bank. They paid 1.4 million for the Roots building and $800,000 for the bakery building for a total of $2.2 million. They used 800,000 of investor money for the down payment and got a loan from Gold Coast Bank for the $1.4 million balance. The bank got guarantees from Weiner, Mohr, Mohr's parents, Grant Lustig, the two Garcias who were to operate the bakery, and two other people. All the guarantees were for equal liability, except one guarantor had to put up 500,000 into a collateral account that actually shows up in the entities' books.

As Weiner and Mohr moved forward and invested more and more money and obtained more loans, Lustig still said nothing about his convictions. If Weiner had known about the criminal convictions before they closed on the real estate, he would have delayed the closing and forced Lustig to withdraw and try to find other investors before proceeding. Instead, they forged ahead, bought the properties, incurred the debt, and then finalized architectural plans and hired a lawyer to help get the liquor license in November of 2010. They got building permits in early January 2011 and began heavy building construction for the build out right after that.

In January of 2010, Weiner sent an e-mail to update investors, including Grant Lustig, and remind them they would have to provide background information for the liquor license. Lustig still disclosed nothing. Weiner testified that if he had known even at that point that Lustig had a criminal conviction, he would have halted the project and tried to replace Lustig as an investor. Instead, they forged ahead. They applied for their first liquor license February 2, 2011. They needed four licenses for -- and I have the bakery, but I'm not sure if that's right -- but they had to have multiple licenses for each location because of the way the City does things. They applied for both Roots and bakery licenses around the same time.

At sometime between February and April of 2011, Lustig and any other investor with at least a 5 percent investment had to fill out a form for the liquor license, which is in Defendant's

Exhibit 2. It's called an individual history form or an IHF. It requires the person submitting it to disclose personal information like address, Social Security Number, driver's license number, employer, et cetera, and had a special section entitled "criminal history." That section that was prominently marked halfway down the one-page form asked "have you ever been convicted of a criminal offense," and then it had check boxes for yes or no. If the answer was yes, you were required to list the crime in two spaces provided for Crime Number 1 and Crime Number 2. Just above the signature line at the bottom of the one-page form is an acknowledgment in which the signer certifies that all the information is true and complete and authorizes the City to investigate to verify the accuracy of the statements.

The form also states that making a false statement may violate a whole bunch of laws and that, quote, persons who submit false information are subject to the denial of the requested City action, close quote, and here we mean denial of the liquor license.

Lustig filled out one of these forms stating that he had no convictions, and he signed it despite the warning that lying would result in denial of the liquor license. Lustig did this intentionally, knowing full well that he had a criminal conviction and that they had not been expunged, probably because he didn't want to admit he'd been lying all along about the conviction.

Then in early April, Weiner informed all the guarantors that they had to get fingerprinted for background checks. Lustig showed up and was fingerprinted on April 14, 2011. By that time, a lot of construction had been done, especially on the Roots property, and a lot of money drawn down on the loans. Lustig still didn't tell anybody about the convictions.

In the meantime, construction and preparation for opening wasn't going as planned. The cost of the projects was much higher than had been planned. Instead of having the planned 3.2 million in loans, by May 31st they had 5.9 million in loans from both the SBA and Gold Coast Bank as shown in the consolidated balance sheet prepared as of May 31, 2011, Plaintiff's Exhibit 13.

Work was also significantly behind schedule. By the last week of May, Roots was finally ready to open, a couple months later than planned, to friends and family around Memorial Day and to the public around June 3, 2011. The bakery property at this time still needed a huge amount of work. It still had dirt floors and might not have had a roof on May 26th and couldn't possibly open for several months.

On May 26, 2011, right before Roots was scheduled to open for family and friends and the week before it was to open for the public when construction of the Roots property was completed and all the supplies and food were bought, staff was hired and trained, Weiner learned that the City of Chicago was denying the liquor licenses for Roots.

Weiner and the lawyer they hired to get the license met with the liquor commissioner who told them that the reason for the denial was that Lustig had criminal -- a criminal conviction, actually multiple, and he had lied about it on the application.

As Gregory Steadman stated in a letter in Defendant's Exhibit 3, the license application was originally denied because Lustig had a disqualifying conviction and because he lied on the application. Weiner thought based on his conversation with the liquor commissioner, that it might have been possible to have gotten the license anyway depending on the nature of the convictions if Lustig had not lied, but he did lie, and they refused to issue any license while he was an investor at any level in any of the four entities, not just as a guarantor, and not just for the operating company, which here was Roots.

So Lustig could not be an investor in any of the four entities for them to have a liquor license -- any liquor licenses. This was a catastrophe for everyone involved in the project. Without the liquor license, there was no point in opening the Roots restaurant that would depend on half of its sales from liquor and other alcohol, especially beer. So the denial of the liquor license would have been the end of the road before they even opened one of the two restaurants.

Weiner persuaded the liquor commissioner in a meeting on May 26, 2011, to issue the liquor licenses on the promise that Weiner would provide an affidavit from Lustig within 24 hours stating that Lustig would immediately get out of the business, and that he would be, in fact, formally removed from all ownership and lending relationships with all four of the related entities within 30 days.

Right after that meeting, Weiner called Lustig and said they had to meet right away. Either during the conversation or at the meeting later that day or both, Weiner told Lustig that his lie had been found out. That's not a direct quote. That's the gist. That the licenses for both restaurants would be denied if he was an investor in any of the four entities, and that he should give up his shares.

Weiner told Lustig that if Lustig did not turn over the investments, Weiner and everyone else involved in the projects would sue him for causing the failure of the businesses. Both of them knew that the businesses would fail and all investments would be lost if Lustig remained an owner of the interests. Weiner also told Lustig that the loans wouldn't be paid off from the assets of the company, that Lustig would not only lose his entire investment, he would also be liable as a guarantor on the bank loans and the SBA loans. In fact, the Gold Coast loan allowed it to declare a default on the loan as soon as any necessary licenses were denied.

Lustig told Weiner during this conversation that it was all a mistake. It was not clear whether Lustig was saying this because Lustig had tried to get at least one of the convictions expunged or if Lustig was still just pretending he wasn't a convicted felon. Lustig knew there was no mistake of any kind, however, so he was lying once again. He had two different criminal convictions, neither of which were expunged nor would be expunged in the future.

Lustig had, in fact, tried to get a conviction in state court expunged as shown in Defendant's Exhibit 5. That case was filed against him for two counts of aggravated reckless driving from when he was 16 or 17 years old. Lustig had filed a petition to seal or expunge that record in the Circuit Court of Cook County on March 4 of 2011, probably soon after he lied on the background information form submitted for the liquor license. The state court records show he was given 24 months probation, and that he was arrested during that two years for violation of his probation. Someone, presumably the state's attorney, objected to the motion to seal and/or expunge, and a hearing was held on May 23rd, 2011, at which the motion to seal and expunge was denied.

So Grant Lustig went into this meeting with Weiner on May 26, 2011, knowing that his motion to have the state court conviction expunged had been denied three days earlier.

Lustig also had been convicted of perjury in federal court for lying to a federal grand jury. He admitted in his testimony at trial that he had pled guilty to committing perjury before a federal grand jury in federal court, so he pled guilty in federal court, though he didn't remember the date. His amended Schedule E identifies a debt owed to the U.S. Department of Justice for $3200 for "perjury 2010."

So even if Lustig had been able to have the conviction from the state court action expunged on the basis that it was comitted while he was a minor or some other ground, he still would have a federal conviction for perjury in federal court that he pled guilty to. There is no legal basis of which this court is aware for a 25-year old adult expunging a conviction for perjury in federal court, yet Grant continued to lie, telling Weiner it was all a mistake.

In return for Lustig transferring the membership interests, Weiner made a number of promises to Lustig.

First, he promised Lustig he would not sue him for lying about his criminal history and causing the collapse of both projects.

Second, Weiner promised to get Lustig -- to try to get Lustig removed from the guarantee obligations to the two lenders, Gold Coast Bank and SBA.

Third, Weiner promised to continue to give Lustig and his family members the 40 percent investor discounts and would extend it, I guess, to four family members.

Finally, Weiner told Lustig that if Lustig was right and somehow "it was all a mistake" that he couldn't be on the license, that Lustig could become an investor again down the road if it was legal. So they agreed that if the convictions either had already been expunged or expunged in the future and, in effect, that it was okay with the liquor commission, Lustig could return as an investor, though they did not expressly agree on any economic terms in the event that it occurred, i.e., would he be restored as an investor to his original share, what would happen to the loan guarantee if it was removed, would there be additional contributions required depending on the financial status of the businesses, et cetera. None of this was resolved by the agreement. But at this time, none of that really mattered because Lustig knew full well that the chance that his perjury conviction ever be expunged was zero. Weiner, however, did not know this, so he, in good faith, promised if the liquor commission had, in fact, made a mistake, Lustig could get his shares back.

By the end of the meeting on May 26, 2011, Lustig agreed to transfer his membership interests to Weiner personally. Weiner took the interests personally instead of transferring back to the corporations themselves, not because he was looking for additional ownership interests for himself, but for two reasons. First, this was his understanding of what the other investors wanted him to do, and, second, if Lustig was telling the truth, and there really was a mistake about his convictions, if the shares had gone back to the corporations, they were gone forever and could not be reconveyed to Lustig. Weiner was trying to structure the transaction so that if Lustig was telling him the truth, he could get the interests back.

In his testimony, Lustig denied that he and Weiner had discussed Lustig being sued, getting Lustig off the guarantee, Lustig and family members continuing with the investor discounts and any other benefits that Lustig would get from giving up the membership interests. I did not believe Lustig's testimony on this, and, instead, I believed Mr. Weiner who I found to be a credible witness as I had said.

Weiner did not offer Lustig a cash payment for the transfer, and Lustig -- I think Lustig might have admitted it, but at least there was no evidence that he asked for any consideration other than what Weiner offered. Weiner told Lustig that he'd be sued by everybody for causing the failure of the two businesses if he hadn't done this, plus Lustig knew he'd be liable on the guarantee for the expected deficiency, and Lustig didn't argue anything back.

So on May 26, 2011, Lustig executed an affidavit that is Plaintiff's Exhibit 2, in which he states that as of May 25, 2011, he owned

7 percent of the four entities, and that he, quote -- well, and I quote: "I hereby transfer my entire ownership interest" in those entities to Scott Weiner, a managing member. He further states that a change of ownership amendment will be filed with the proper authorities, including the Chicago liquor commission. And while this has been called an affidavit, and it is an affidavit, it is also an instrument by which Lustig transferred his interests to Weiner.

The affidavit was provided to the liquor commissioner on the next day, May 27, 2011, as Weiner had promised to the commissioner, and as a result, the commission did not rescind the liquor licenses for Roots that had been provisionally granted the day before on the condition that Lustig be removed as owner and funder of the business immediately.

Lustig and Weiner then entered into a formal document assigning the membership interests in accordance with the requirements of the subscription and operating agreement. Those documents are in Plaintiff's Exhibit 1. The documents say nothing other than the interests are assigned, the assignment is accepted, et cetera.

The documents are dated June 7, 2011.

There is no writing that memorializes the oral agreement and the exchange -- that in exchange for giving up his interests, Weiner and others would not sue Lustig, Weiner would try to get Lustig out of the guarantees, Lustig family members would continue to get the 40 percent investor discount, and I think I'm forgetting the last one there. So Weiner testified he didn't write it down because he didn't need to have it written down. The basis for the lawsuits, which was the principal bases of the consideration, were eliminated by the transfer of the interests.

After Lustig turned over the interests, Roots was able to keep its liquor licenses, and they didn't have any trouble getting licenses needed for the bakery. They did, however, have to incur more debt and spend a lot more money to finish the bakery build out. It cost another 1.3 million beyond the amount borrowed from banks and obtained from investors as of May 31, 2011, to finish the bakery build out and get the bakery ready to open when it finally opened in October 2011.

Roots opened to the public around

June 3, 2011, a couple months after originally planned, and the debt of these companies was more than twice the amount that had been originally planned in the business plan. As I mentioned, the bakery opened in October 2011, but it had a very rocky path. Weiner had not had previous experience with bakeries, so they teamed up with a married couple, the Garcias, who had owned the Bleeding Heart Bakery in another location and had established a name for themselves. The Garcias, however, ended up being a disaster for these entities, as they split up personally, I believe, and the bakery plan did not work out well because of them. There have been three distributions to investors over time to the Roots members but still no distributions at all to investors in the bakery business.

Jumping ahead to February 2014. In February 2014, Weiner got a court order from a state court, the Circuit Court of Cook County, ordering him to turn over $120,000 worth of Grant Lustig's investment in the enterprises to Freeborn & Peters. Freeborn is a Chicago law firm that had represented Lustig, his father Miles, and various entities owned by them, including Lustig Capital.

There is no evidence of the scope of the representation, but Freeborn & Peters seem to have represented Lustig, his father Miles, and these various entities, including Lustig Capital, in litigation filed by some of Grant Lustig's creditors, including Wally Posner who testified in this case, as well as William Shepard and others who had invested money with Grant Lustig to fund a high-interest loan business called Workforce Financial. They gave $3 million to Grant Lustig to use in Workforce starting in the spring of 2010.

Beginning in early 2011 and culminating in the summer of 2011, these investors, creditors of Grant, realized Grant had misappropriated a lot of their money, and they sued him and various related entities in state court. It appears that those parties filed suit against Miles and Grant Lustig and various Lustig entities, including Lustig Capital, in August of 2011.

Freeborn & Peters then sued Grant Lustig and Miles Lustig and all those entities they represented for failure to pay their attorneys' fees. Freeborn & Peters got two default judgments in that case. The first was a default judgment for $200,493 against just the corporate entities, Lustig Capital, Client Funding Solutions Corp and W&M Trading Corp, all Lustig-owned entities. That default judgment was obtained November 30, 2012. In January 2014, Freeborn got a second default judgment for the attorneys' fees owed to it. This default judgment was against Grant and Miles personally. The judgment order states that $200,493 was owed, but that Freeborn had been able to execute on the corporate entities for $70,000 of that amount, leaving $130,493 owed. It further held that Grant and Miles were both personally liable and jointly and severally liable for the remaining debt with those corporate entities that included Lustig Capital for the balance of $130,493.

Freeborn had been pursuing citations to discover assets to collect on the default judgments and issued one against Weiner. On February 6, 2014, Freeborn filed a motion for turnover against Weiner in the state court action. The motion states that Freeborn learned that Grant Lustig or Lustig Capital may have invested significantly in companies managed by Weiner. It also stated that Weiner gave a citation dep, and that Grant Lustig had invested in two of the companies Weiner manages, but based on a check produced by Weiner showing that 120,000 of the money for Grant Lustig's investment was paid for by a check written by Lustig Capital for the Chicago Division Street Restaurants, LLC, Freeborn asserts in that motion that Weiner continues to control the "investment that was likely made by Lustig Capital rather than by Grant Lustig." That's Defendant's Exhibit 10.

Freeborn then asked the court to order Weiner and the Chicago Division Street Restaurants to turn over "all rights, title and interest in Lustig Capital's $120,000 investment in Chicago Division Street Restaurants" to be applied in satisfaction of Freeborn's judgments against Lustig Capital. Freeborn gave no explanation in the motion for how Lustig Capital had any ownership in Chicago Division Street Restaurants when Weiner testified in citation proceedings and all the documents showed that Grant Lustig personally was the member and not Lustig Capital. Freeborn also failed to mention in the motion for turnover that Grant Lustig was jointly and severally liable on the debt of Lustig Capital, so it really made no difference whether Lustig Capital or Grant Lustig personally own the investment.

On February 25, 2014, the state court presiding over the citation proceedings entered an uncontested order stating that "Freeborn's motion to turn over assets filed February 6, 2013, seeking turnover of all rights, title and interest in Lustig Capital LLC's $120,000 investment in Chicago Division Street Restaurants, LLC, to be applied in satisfaction of Freeborn's judgment against Lustig Capital is hereby granted."

Instead of contesting the motion or the order, even though Lustig Capital didn't actually own any interests in Chicago Division Street Restaurants, Weiner complied with the substance of the order and transferred $120,000 worth of interest in the Chicago Division Street Restaurants to Freeborn, informing Freeborn it would be treated as an assignee of a member, but not as an actual member.

Freeborn then continued to pursue Weiner in the state court proceeding, so he decided that rather than fight them and continue to incur attorneys' fees and time and expense, he would negotiate. Weiner and Freeborn then entered into a settlement agreement to resolve all the issues between the parties. In November of 2014, Freeborn accepted a payment of $40,000 in cash from Weiner for a complete release of any -- of all potential current -- future liability of any type.

Through this agreement, Weiner, once again, became the owner of the $120,000 worth of interests in November of 2014 after paying Freeborn the $40,000. Weiner testified credibly that he only paid Freeborn the money to end the cost of litigating with them. He didn't give the interests much value at that time.

I also note that Freeborn may have asserted that the interest was owned by Lustig Capital and not Grant Lustig individually, even though they knew that Grant was the member of the entities but not Lustig Capital because they wanted to avoid any possible claim for a preferential transfer if Grant filed for bankruptcy, which they undoubtedly knew was a real possibility having represented him.

The turnover order doesn't make much sense otherwise because they already had a judgment under which Grant Lustig was personally liable with Lustig Capital for the entire debt, so they could have easily asked for a turnover of what they knew was Lustig's personal member interests in the restaurants directly to pay Grant Lustig's debt to them.

And, in fact, Lustig filed a Chapter 7 bankruptcy on September 5 of 2014. He listed -- 2015. He listed an interest in three of the four entities as assets, though it's very odd and doesn't really matter here. Gus Paloian, the trustee in Lustig's Chapter 7 case, filed this adversary proceeding against Weiner attempting to get back the value of the interests or at least what he contends were the value of the interests in the four restaurant entities formerly held by Lustig.

So, now, Roman Numeral IV. Section IV of my opinion is entitled Count I and Reasonably Equivalent Value.

The most important issue contested in this trial is whether Lustig received reasonably equivalent value for the transfer of his shares to Weiner.

Weiner does not dispute that there was a transfer for purposes of Section 165(a)(2) of the Illinois statute for constructively fraudulent transfer or, for that matter, under the section for actually fraudulent transfers. Weiner also does not contest that Lustig was insolvent at the time of the transfer. Therefore, the really only contested issue in the case is whether or not Lustig got reasonably equivalent value for the transfer.

To determine this, I have to evaluate both the value of his interests at the time of the transfer and the value of what he got in return. The essence of a fraudulent transfer claim is that the debtor's creditors are deprived of the value they would have had in an asset if the debtor had not transferred it to someone else.

While the value of the transfer is often thought of in terms of what benefit the debtor received versus the value that he gave up, the important concept to remember is that the court should be determining what Lustig's creditors lost because of the transfer.

This case is unusual because it is virtually undisputed that the value of these enterprises without the liquor licenses at the time of the transfer was essentially zero. In fact, it was less than zero. Therefore, the transfer cannot be avoided as constructively fraudulent. If Lustig had held on to the membership interests, his creditors would have never obtained any value from them. Lustig's creditors and, therefore, the trustee standing in their shoes are not entitled to recover more from a transferee than what they would have gotten from the debtor if he hadn't transferred them in the first place.

Weiner testified that if they had not gotten the liquor licenses when they did in May 2011, both the pizza and bakery enterprises would have failed almost immediately. The trustee offered no evidence to contest this assertion. They didn't even argue that it wasn't true.

I find that Weiner was right. The pizza business depended on alcohol sales for 50 percent of its revenue. Without the ability to sell alcohol, it would not have been able to even break even, let alone pay secured debt or have any hope of making a profit or paying anything out to investors. A huge portion of the restaurant was bar space, seating 65 people, which would be useless without the ability to sell alcohol. And at that point in time, they needed 1.3 million more dollars than they already had from the investors, the bank, the SBA, to complete the bakery build out and open the bakery still a number of months down the road. Without revenue from the pizza restaurant, they would not have been able to find more funding and complete the bakery build out so that business could have opened. In fact, the lender could have declared a default as soon as the liquor license was denied, which would have been before either opened its doors.

So on May 26, 2011, the going concern value of the entire enterprise to Grant Lustig with Grant Lustig as a member was essentially zero. With Lustig as a member, both businesses would have failed. There is no point in opening, and -- I'm sorry, a lot of this is repetitive. I did not have enough time to edit this down. So, in fact, the value of the investment to Grant Lustig and, therefore, to his creditors on May 6, 2011, before he executed the affidavit was less than zero because Lustig would have lost not only the entire investment of $370,000 from the failure of the business caused by their failure to get a liquor license caused by his lying about his convictions, he would have been liable on the guarantee of the loans.

As Mr. Brackett credibly explained -- Mr. Brackett is Mr. Weiner's expert -- the value of the assets would not cover the liability to the lenders, so Lustig and the other guarantors would owe the lenders on their guarantees and in addition to losing their entire investments. Brackett testified that the enterprise had a value at the time of a negative 1.5 million. While that value may have been somewhat higher based on factors I'll discuss in a few moments, I find that the deficit to the bank would have been at least $790,000, and Lustig would have been liable for that amount with the other guarantors. So at this time, with Lustig as a member, his membership interests were worthless to him, and he would very likely be held liable on guarantees for a deficiency that would have been at least $790,000. Lustig's creditors, therefore, lost nothing when he transferred the interests to Weiner. If Lustig had kept them instead of transferring them, there would have been no value to any of his creditors, and his liability on the guarantees would have simply increased the amount of debt he owed his creditors to be paid from his limited assets. Plus, Lustig would have faced significant claims from Weiner, Mohr and the entities themselves, and probably his fellow investors, for causing the demise of both businesses by his intentional lies. All of this was avoided by transferring the interests to Weiner.

The trustee failed to provide any basis for concluding that a creditor in a fraudulent transfer action is entitled to more after the transfer than it would have gotten if there had been no transfer. As Judge Hollis explained well in the *Bidgeview* case, *Official Committee of Creditors v. The Fountainhead Group, et al.*, when evaluating whether there was reasonably equivalent value in a fraudulent transfer action, "whether the debtor received a reasonably equivalent value is analyzed from the point of view of the debtor's creditors, because the function of this element is to allow avoidance of only those transfers that result in a diminution of a debtor's prepetition assets." And I'm not going to recite all those cases I cited earlier. But that you focus on the net effect to unsecured creditors. If they are no worse off after the transfer, then there was no fraudulent transfer.

In *Bidgeview*, Judge Hollis held that a debtor's transaction giving up a $3.5 million promissory note in exchange for a $700,000 cash infusion provided reasonably equivalent value to the unsecured creditors because they would receive nothing from the proceeds of that $3.5 million note that had been cancelled, while the 700,000 of cash from the cash infusion would have been available for unsecured creditors. So even though it may have appeared that there was an unequal exchange in that case in light of the large difference between the $3.5 million note and the $700,000 they took instead, when viewed from the point of view of what unsecured creditors would have before and after the transfer, there was reasonably equivalent value, and she so held.

In this case, there was essentially no value to Lustig from his interests in the LLCs right before he transferred them and, therefore, no value to his creditors that could have been recovered had he not transferred the interests. In fact, the trustee, perhaps implicitly, recognizes this because he really seems to be arguing that Lustig was required to transfer the shares for the benefit of the creditors, but he should have gotten a better deal. The trustee cites no authority for the proposition that the debtor is obligated to get more value for his creditors than he could get for himself. This is just not the way it works.

The following illustration -- the following illustrates the trustee's position. It is not perfect, but at least it's an example. A hypothetical. Let's assume a debtor owned a car, but the engine did not work. The debtor then gave the car to a friend because it had no value to the debtor. The friend then buys and installs a new engine. If the trustee were correct, the friend would have to give up the car with the new engine even though the value was provided by the transferee and the car had virtually no value when it was transferred without the engine.

So here, the restaurant interests had no value on May 26 because Lustig was the owner. Creditors, therefore, lost nothing when he transferred them to Weiner without obtaining cash or a promise to pay cash in the future from Weiner. And as I will discuss below, Lustig did receive value from the transaction through the various promises made by Weiner, but those need not even be considered to reject the trustee's arguments in this case. See -- this is vaguely relevant -- *8000 Md., LLC v. Huntleigh Financial Services, Inc.*, 292 S.W.3d 439, 451, 2009 No.App.Lexis 1079 -- sorry, it's not a great cite but -- Missouri Appellate Court 2009, for the proposition that result in a fraudulent transfer action should not place the plaintiff in a better position than it would have been if the fraudulent transfer had not taken place. That's really the key.

I note this may seem like an unusual result at first glance, but this is an unusual case. The debtor owned an asset that had no value to the debtor or his creditors if he owned it, but that could have potential value only if he transferred it. So the trustee's case really is that the debtor should have transferred the assets, but that he was obligated to get a better deal for his creditors. The trustee cites no cases for this, and I reject that theory.

I'm also going to note here, although it doesn't flow well, but I haven't had time to make it flow better, that the evidence in this case shows that there were, in fact, no willing buyers of those interests at this time. Weiner was not willing to pay Lustig anything for them because the interests themselves had no significant monetary value to Weiner at the time. He already owned around 35 percent of the interests in the companies, and he wasn't looking for a bigger percentage, and he didn't have money to pay anything to Lustig. He just needed Lustig out of the business so that it would not fail, and the easiest way to achieve that immediately, as was necessary, was for Lustig to transfer them to Weiner personally. But there were no other potential buyers for these shares at the time. In fact, Weiner had been looking for more investors and lenders to provide the additional 1.3 million he needed, and he wasn't finding any. So these parties were operating in the real world, not some idealized perfect market with full information to everyone and plenty of time to assess value and no compulsion on either side.

Trustee has failed to prove there was anyone in the world who would potentially want to pay any money to Lustig or even give him a note for future payments of these interests, either at time of the transfer or at any time in the future up to the present.

Now that I've finished that detour, let me return to the valuation analysis.

This is Subsection capital A of my Roman Numeral IV section of Count I and Reasonably

Equivalent Value.

So, capital A, Trustee's Valuation Theories.

So instead of focusing on what creditors would have gotten if Lustig had not transferred the shares, which is nothing, the trustee argues that I should look at the value of the interests at the time in the general marketplace, which is presuming Lustig is not a member, so the businesses can operate with liquor licenses. That is, I shouldn't look at the value that Lustig or his creditors would have had if he had held on to the interests, but instead look at their fair market value which the two experts explained is the value a hypothetical buyer would pay to a hypothetical seller acting in an arm's length in an open and unrestricted market where there is neither a compulsion to buy or sell and when both have reasonable knowledge of the relevant facts. I reject this is the appropriate way to evaluate the loss to creditors in this case, but even using this approach would not make Weiner liable for a fraudulent transfer.

Subsection 1 under Section A, the heading is Valuation Based on Glaysher Subscription

Payment Made in May 2011.

The trustee's first argument about how to calculate the value of Lustig's interests, and the only one the trustee made in its case in chief, is that the value should be calculated based on a payment made by one of the subscribers in May 2011. Even if I accepted the premise that I should ignore what Lustig's creditors would have gotten if he hadn't transferred the interests, and should instead focus on what those interests would have sold for under the idealized definition of fair market value, this argument would fail.

The trustee contends I should take the value of a half percent interest purchased by one of the original subscribers before October 12, 2011, the Glayshers, which I believe is spelled G-L-A-Y-S-H-E-R, and multiply that to get a 7 percent value for the Lustig share as of May 26, 2011. I reject that approach as not being valid in light of all the facts that affected value as of May 26, 2011.

The Glayshers became subscribers by signing a subscription agreement sometime before the date of the operating agreement, which is October 12, 2010. At that time in 2010, they made an irrevocable commitment to pay $17,500 for a one-half percent interest in both the bakery operating company and the real estate company for the bakery, and also a $17,500 payment for a one-half percent share of the pizza operating company and the pizza real estate company.

The Glayshers owed that money before October 2010, but didn't actually pay it until May of 2011. The trustee therefore asserts that I should view their payment in May 2011 as a "current market transaction" that reflects the value of a .5 interest in May 2011. The trustee argues that I should therefore determine that a half percent of each of these entities is worth 17,500, and, therefore, a half percent of all the entities is worth $35,000, so a hundred percent of the interests for all four entities is worth $7 million. Lustig's 7 percent share of $7 million would then be worth $490,000 just doing simple math. The Glayshers payment of the 17,500 contributions in May 2011 does not, however, reflect the value of the enterprises at that time, nor at any time, but instead only represents payment of a contractual obligation made before October 12, 2010.

The trustee's argument has many flaws, some of which will be discussed later when I deal with the two experts. But even without looking at expert testimony, I find that the amounts charged for particular interests were not intended to and did not, in fact, reflect the value of the enterprises. Instead, as Weiner testified, Weiner and Mohr began with the principle that they were wanting to own 65 percent of the entities. Then they figured out how much investor capital they would need to get bank loans and working capital. They determined they needed to raise about $1 million from private investors for each restaurant, so they created an investment structure that got them what they wanted, got them the money from investors that they thought they needed, and then it provided some benefits for people who wanted to invest more and an extra 1 percent to those who were going to guarantee the loans. This is how they came to that number of 17,500 for the half percent of two of the entities. Thus, the investment amounts were not intended to reflect the actual value of the enterprise at any particular time, and they did not reflect that value.

In fact, under this theory of value, the trustee is asking me to conclude that Lustig's $370,000 investment in the -- the checks were really written in May of 2010, but really the whole thing came together in October of 2010, so between October 2010 and May 26, 2011, that his investment had increased in value by $120,000, the difference between 370,000 that he paid in back in 2010 and the 490,000 that the trustee contends that Weiner owes for the 7 percent share doing the multiplication that I said. This increase, if I did the math right, which is not always assured, but this is an increase in value of approximately 32 percent, if I calculated it right, over what Lustig paid in for those interests for an enterprise that had taken on almost twice as much debt as was anticipated in October 2010, all of which debt was senior to the investors' interests, and which significantly increased the amount of the debt Lustig guaranteed when there were huge cost overruns and the bakery needed an additional 1.3 million to even open its doors, let alone break even or succeed, and it was already at least six months behind schedule.

Frankly, this argument, which is really all the trustee offered in its case in chief, boarders, dare I say it, on the frivolous. Even without considering expert testimony, I would reject this position as not supported by the evidence and as not reflecting the realities of these entities at that time in May of 2011 when they were in a very precarious position.

Evidence -- so I make that conclusion just from all the numbers without experts crunching any present values. But the evidence provided by the experts also supports this conclusion.

It was Mr. Weiner, not the trustee, who proffered expert testimony to try to present a more realistic estimate of the value of the enterprise as of the transfer. Mr. Brackett, Weiner's expert, used two different analyses to support his view that the enterprise had no value as of the valuation date.

As I stated earlier, I believe the correct analysis for the fraudulent transfer claims is to look at the value that the enterprises would have had if Lustig still owned them. While Brackett didn't frame the issue this way, his analysis supports the court's conclusion that the enterprise had value when Lustig was a member -- oh, I'm sorry -- had no value with Lustig as a member.

Brackett's analysis, while flawed in a number of ways, also supports the conclusion that even if you look at value that was achieved only after the transfer and did not exist for Lustig or its creditors before the transfer, the trustee still cannot prevail.

So that was Section 1 of my Trustee's Valuation Theories. Section 1 was about the value based on the Glaysher payment.

Section 2 is on to Expert Testimony Generally.

Two experts have testified about the value of the combined enterprise on June 7, 2010. As I said, I'm looking at May 26, 2010, as the transfer date because that allows me to look at the value before and after the transfer better in this case, but the actual numbers don't change whether I use May 26th or June 7th as the date.

As often happens, we have a battle of experts with each expert producing an opinion that supports their client's interests. So we have the trustee's expert artificially inflating his value in a number of ways, while Mr. Weiner's expert made similar errors -- I won't say similar errors -- but artificially decreased the value and made errors that resulted in the value being too low.

I note Brackett chose to evaluate value on June 7, 2011, the date that the transfer documents were executed. Mr. Gordon, the trustee's expert, therefore, adopted the same date. As I said before -- I'm sorry this is repetitive -- the actual date of the transfer for my analysis is May 26, 2011, the date on which the liquor commission was denying the license and only agreed to grant the license upon Weiner's promise to have an affidavit from Lustig removing himself from ownership and the lending to the entities within 24 hours. That affidavit was executed by Lustig on May 26th, and in that document, he transferred the interests to Weiner. The later documents executed on June 7, 2011, merely met the formal requirements for the organization to accept Weiner as the new owner of those shares. I therefore find that May 26th is the proper date to value Lustig's interests and the benefits that he got from that transaction. But there is no material difference between the numbers that should be used for as of May 26th versus June 7th for any valuation, so I'm not adjusting numbers that the experts used for this reason.

Neither expert used a methodology that worked in a way that produced a result that I can adopt, so I've had to adjust their analyses when possible to determine values that make sense in light of the precarious position of the entities when Lustig still held them on the day of the transfer, May 26, 2011.

Subsection 3 of this section is entitled Net Asset Value.

First, Mr. Brackett, who is Weiner's expert, testified that the combined entities had a negative value on the date of the transfer, and he was not even evaluating the enterprise without a liquor license. He assumed a going-concern value in which the restaurant entities had liquor licenses.

To reach his conclusion, he performed two different analyses.

First, he offered what he called a net value -- net asset value analysis. For this analysis, he looked at the book value of assets and made adjustments for their value to reflect a static value of the enterprise on the valuation date. He relied on a real estate appraisal that is in Plaintiff's Exhibit 16 in which the appraiser appraised the two properties to be used for both restaurants together for the Gold Coast Bank and the SBA, and that was as of April 26, 2011, so one month before the transfer.

The appraiser gave two values: An as is value as of the date of the appraisal on April 26, 2011, when some of the planned improvements had been completed, but many had not been completed. The value he gave as of the actual date of the appraisal was approximately $2.8 million for both properties combined. The appraiser also gave an estimate of a projected value taking into account improvements that were planned for the future but not yet completed. That value, the as expected when completed value, was $4.9 million together for both properties.

Brackett knew that the improvements to the bakery property weren't anywhere near complete as of his valuation date of June 7, 2011, that $5.9 million in loans had already been taken out by the companies, and that they would still need an additional $1.3 million more in addition to the money already provided by the lenders under those 4.9 million in loans to get the property into the state -- completed state that the appraiser anticipated and that to which he gave a $4.9 million value.

Brackett reflected this in his net asset valuation by using the as is value of the appraiser, which was approximately 2.8 million as of April 26, instead of the completed future value of 4.9 million.

When Brackett added up all the values in the list of assets, and he deducted the 5.9 million of debt as of valuation date that he used, the total net asset value was a negative 1.5 million. You can see this in his table on Page 17 of his report in what he calls Note 3 on "adjusted net tangible value method."

Michael Gordon, the trustee's expert, criticized Brackett's net asset value approach on a number of grounds. First, he said the net asset approach works best as a valuation method for holding companies. They're holding financial assets and themselves -- and those assets themselves that they're holding are generating the income for the enterprise. He stated that this method, this net asset value method, is not appropriate for an entity that generates cash by sales to the public. The value of that kind of entity, he contended, should be determined by a discounted cash flow analysis and perhaps a market analysis.

In Brackett's view, however, when you have restaurant businesses that have not reported even one week of sales, a discounted cash flow is very speculative and inappropriate, and is especially inappropriate here where the cash flow projections were created back in May 2010, and it's now, for his purpose, June 2011 with not a single week of sales recorded on the books.

Both experts made valid points on this issue. The net asset value approach is not ideal for an operating company that is generating future sales revenue. But I also agree with Brackett that the cash flow projections in the business plan are highly speculative, and the discounted cash flow method is much less persuasive than it would be if there had been a record of actual sales to use as a basis for making the projections of future sales.

Now, I'm only on Page 22 just so you know. I'm sorry.

Brackett testified that the net sales value gives an idea of what the assets could be sold for as of the valuation date. While he also said he considered these assets in the context of businesses operating as a going concern, this approach gives me the best evidence presented of what the company would be worth to Lustig's creditors just before the time of the transfer if he had not transferred them. If Lustig refused to transfer the interests, Roots would have soon gone out of business, having lost its liquor license, and the bakery property would never have been finished to be able to operate at all or to be sold by a bank for anything -- anything near the estimated completion value of 4.9 million given by the real estate appraiser.

So I reject Gordon's position that the net asset approach used by Brackett should not be used at all in this case. Instead, I think it best reflects the value to Lustig of his interests at the time of the interest.

In addition to attacking the use of this method at all by Brackett, Gordon said that Brackett made errors in how he calculated net asset value. One criticism involved 29,000, so it's not significant.

The other alleged error that Gordon

thinks Brackett made is greater in size, but I reject Gordon's position for the most part. Gordon said that Brackett was wrong to use the real estate appraiser's as is value as of April 26, 2011, the date of the real estate appraisal, that reflects the construction that was actually completed as of that date. Gordon says you have to use the full appraisal value for the future assuming that all planned improvements are completed, even though it would cost 1.3 million more than what was loaned as of June 7, 2011, to get that to that value.

Mr. Gordon contends, in effect, that the businesses took the loans for improvements before the valuation date that was supposed to be enough to complete construction, so he's saying that the value of those loans must be there and should be reflected by using expected value upon completion of the improvements. Put another way, he said if the debtor took the full amounts of the loans available, all of that value must be on the asset side of the balance sheet, so you have to include the value at completion of the improvements to reflect that.

This argument was not persuasive. There were significant cost overruns and delays in construction. Brackett took into account the actual situation on his valuation date of June 7th. Though I would use May 26th, it makes no difference here. The entities needed to spend an additional 1.3 million to complete the bakery build out and get it ready to open after this valuation date, so after the money from the loans reflected in Brackett's net asset value were taken and spent or perhaps held in cash, but nonetheless already reflected in his net asset value. It therefore inflates the value of the assets in the net asset valuation if you pretend that the real estate is actually worth 4.9 million on the valuation date when it will cost an additional 1.3 million above the amount already borrowed on the valuation date to bring the property to the condition that would justify a $4.9 million future valuation.

Now, while some work was undoubtedly done on the Roots property between April 26, the appraisal date, and May 26, the transfer date, that should be included in the value of the property as of May 26th, it does not affect the bottom line of Brackett's analysis. He used the as is value in the appraisal, which was 2.8 million, in his adjusted net tangible asset value found on Page 17 of his report. Using that value and subtracting liabilities, including the total debt of 5.9 million, he came to a total net asset value of negative 1.5 million.

The renovation of the Roots property must have been pretty close to completion at the time of the appraisal on April 26 because they were fully stocked and ready to open with staff hired and trained by Memorial Day weekend of 2011 when it was opening to friends and family. Memorial Day in 2011 was on May 30th I happen to know, so Roots opened privately just a day or two after the transfer was made on May 26, 2011. So it had to be pretty close to completion when the appraiser inspected the property on April 26, approximately a month before it opened to friends and family. The renovation of the bakery property, on the other hand, was nowhere near completed on April 26th or May 26th.

I therefore conclude a reasonable value to use for the real estate value in the net asset approach is better achieved by taking the appraiser's future value, which is 4.9 million, and deducting the 1.3 million needed to get it to that condition. So I would use a land and building value of 3.6 million, not the 2.85 used by Brackett and not the 4.9 used by Gordon in his revision of Brackett's net asset analysis in Gordon's report, Plaintiff's Exhibit 17 at Exhibit 1 to Gordon's report.

Using Brackett's number in making my judgment for the actual state of the real estate on May 26th, the net asset value is still a negative $790,050. I did not find persuasive or credible Gordon's argument that the net asset value had to reflect the finished value of the property in the future merely because the total amount of the 5.9 million in loans had been received and spent. That was simply not the financial reality on May 26th.

While both experts testified that the net asset value approach was not intended to generate a liquidation value, and Gordon suggested that such analysis would require a completely different analysis, the liquidation value would most likely be less than this value because Brackett was evaluating assets for the going concern value, not how a bank or other party liquidating would dispose of the assets. He used the book value of most assets, other than the real estate, which is really a cost, and it is unlikely those assets would be sold for their book value after businesses failed and its assets are being sold to satisfy bank debt. Brackett's net asset value as I reduced it reflected improvements made between April 26th and May 26th, and that is the best evidence in the record of the net value of the business on May 26, 2011, when Lustig transferred his assets, and it's most likely higher than a liquidation value would actually have been, so the trustee gets the benefit of the doubt here.

So rounding up the net asset value to a negative $800,000 as of May 26th, Lustig's investment had no value to him on the valuation date, and, in fact, it generated significant liability from the guarantee of bank debt that could not be satisfied from the assets of the LLCs. Brackett's net asset value analysis therefore supports my conclusion that Lustig's interests in the four companies had no value that could have been retained for the benefit of creditors if he had not transferred them.

Okay. Subsection 4 of my analysis and valuation is called Trustee's Fallback Position, Discounted Free Cash Flow Analysis.

As I stated earlier, the trustee's primary position in this case is that I should decide that the enterprise had a value of 7 million on the valuation date, the transfer date, because the Glayshers paid their subscription at that time.

Only after Weiner hired an expert to value the interests did the trustee hire his own expert who criticized Weiner's expert and then offered his own analysis.

So both experts performed a discounted cash flow analysis to estimate the value of the enterprise after Lustig transferred his assets, so assuming that the businesses had valid liquor licenses.

Again, while I don't think these analyses reflect the value that Lustig had when he owned the interests, I will discuss them to show that even if I accepted the unspoken premise of the trustee's position that I shouldn't look at what the interests were worth when Lustig was the owner, but instead should value them as though a non-felon capable of getting a liquor license owned them, the trustee still does not prevail.

The discounted cash flow analysis of both experts contain serious flaws, although Mr.

Gordon's was more flawed than Mr. Brackett's analysis. As I noted earlier, although Mr. Gordon testified that the discounted cash flow method was the best way to estimate value of a retail operation that expected sales to the public, he refused to acknowledge the serious weaknesses of any such analysis based on sales projections estimated in May 2010, a year before Roots opened and a year-and-a-half before the bakery would open. I agree with Brackett's concern about basing the value of these companies solely on projections that were all theoretical before one week of sales has occurred. I've nonetheless looked at both expert's analyses and find as follows:

Subheading capital A, Brackett's Discounted Cash Flow Analysis.

Brackett calculated a value based on a discounted cash flow to the enterprise using the revenue projections created in May of 2010 that were included in the business plan. Brackett then had to determine the appropriate discount rate to apply to the stream of earnings to determine the present value. He wanted to look at the value to equity, as in a holder of an interest in the LLCs, someone who would be purchasing Lustig's membership interests so he had to calculate the equity cost of capital.

He included -- he -- I should say he used an analysis that Gordon didn't really quibble with using the riskless rate from U.S. 20-year Treasuries, an equity risk premium, and an industry risk premium, all of which are commonly used by professionals in business valuations and are obtained from accepted industry sources as discussed on Page 20 to 21 of Brackett's report, which is Plaintiff Exhibit -- I think it might be 15. He also included a size premium, which Ibbotson calculates annually, which imposes more risk on the smallest segments of businesses which these companies in this case fall into as discussed on Page 21 of his report. He then included -- this is Brackett -- then included a company specific risk factor to reflect the added risk for this type of investment, a small non-chain restaurant operation that has no actual sales yet, so no track record, and a lot of financial problems before either of the two restaurants even opened. From these factors, he concluded that the cost of equity to be applied to the discounted cash flow is 25 percent.

He then used company projections to determine projected cash flow as shown on pages 22 to 23 of his report. He deducted all operating expenses using the same business plan projections from the expected income and came up with a combined free cash flow for all of the enterprises before taxes on the bottom line of Page 23 of his report for each of the first five years of operations, which are the only years for which he had projections. Then he used a terminal value for the remaining years.

The only adjustments he made to the projections were -- from over a year earlier that had been created in May of 2010, was to add an extra interest expense to reflect only the interest due on the additional debt that had not been anticipated in the business plan and projections that had been incurred by June 7, 2011. He did not include anything to reflect the additional debt the enterprises would have to take on to complete the bakery project, so he did not include extra interest expense from that expected borrowing or anything to reflect the payment of principal for that additional debt. So his model underestimated the interest and debt repayment that would undoubtedly be required if the bakery was to operate.

He also reduced the 25 percent cost of equity by 3 percent, I think, to reflect expected annual growth, so his actual discount rate that he applied was 22.4 percent as discussed on Page 25 of his report. He then crunched the numbers to get a present value of the combined enterprises before debt service, meaning after paying interest but before paying principal, of approximately $2.3 million. Then Brackett simply deducted the full amount of the debt outstanding on his valuation date of June 7, which was $5.9 million, and he came to a total of a negative 3.6 million dollars as his net asset value for the enterprises.

Not surprisingly, Mr. Gordon offered many criticisms of Brackett's approach, some of which were valid.

First, Mr. Gordon credibly testified that Brackett mixed and confused two different approaches, cash flow to the enterprise versus cash flow to equity. While Brackett said he was attempting to determine the net value -- the net value -- the value of equity -- the value to equity of the enterprise, he didn't do it correctly.

Although Brackett's overall methodology throughout the process was correct, Brackett erred significantly when at the end of his analysis, after he discounted the cash flows back to the present value, Brackett inexplicably then just deducted the entire outstanding debt in a lump sum instead of balancing out those expected payments over time.

Gordon credibly explained that either one of two approaches can work in a discounted cash flow analysis and should get you to a similar result if done properly, whether it's the cash flow to the enterprise approach or the cash flow to equity approach. With cash flow to the enterprise, you take operating profit, sales minus operating costs, you subtract cash flow adjustments like adding back in depreciation and subtracting increases in working capital, et cetera. From this, you get cash flow to the enterprise. You then apply discount rate, which for this approach is the weighted average cost of capital or WACC, W-A-C-C, to get a present value of cash flows to the enterprise. And then, to determine the value to equity, which is what we want in this case, you subtract the current total value of the debt in a lump sum, which gives you the value to equity. So this is the approach -- oh, I am sorry. That gives you the value to equity. This is the approach that Gordon used.

Brackett said he was using the cash flow -- cash flow to equity approach as opposed to cash flow to enterprise. So under that method, you start with operating profit and subtract adjustments just like you would for cash flow to the enterprise approach. From the values -- those values, you subtract interest payments on debt and expected repayment of principal on the debt over time which resulted in a cash flow to equity. And so then you project interest and principal repayments over time and discount it all back to the equity cost of capital to get the equity value.

Brackett did the expected cash flow analyses, though Gordon criticizes some of those details, and then he deducted interest payments over time, but instead of projecting debt repayment over time and discounting back using the equity cost of capital, he just deducted the debt in a total lump sum, which, essentially, invalidated the result.

So Brackett saw that Gordon's report

criticized his analysis and attempted to rebut a number of Gordon's criticisms, but he did not really contest this criticism in any meaningful way.

Gordon also criticized a lot of Brackett's choices for what to include for income and expenses, some of which were valid criticisms and some were not. I'm going to go through four of five of those right now. Hopefully, that won't take that long.

Subparagraph 1, Depreciation Error.

One valid criticism of the cash flow analysis used by Brackett is that while it is appropriate to deduct expense for depreciation from the initial analysis of income minus expenses, because you're analyzing cash flow, the depreciation amounts are added back in to get accurate cash flow numbers to discount. Brackett admitted he made an error by including depreciation on Roots, the pizza operating company, resulting in an $87,000 a year underestimation of cash flow. Actually, I think what he should have -- I said that wrong. He should have added it back in to the cash flow. He was correct in originally subtracting it but should have added it back in, and he did not do that. Brackett claimed that the depreciation mistake was a wash, but he didn't explain why, and I accepted Gordon's testimony this was not a wash but an error of $87,000 of cash flow per year.

Number 2, Apartment Rental Income.

Gordon also testified that Brackett erred in not including what was significant rental income that the entities could have achieved from renting four apartments in the two buildings. The real estate appraisal described four apartments and some planned renovations to them. The appraiser also noted that some renovations originally planned, like to the kitchens, were not going to be done. The real estate appraisal reflects a potential rental value of $1,350 per apartment, which is incorporated into the estimated future value of the overall properties after renovations are completed.

Based on the real estate appraisal, Gordon contended that investors would expect assets to be used at their highest and best use, and so you must include 1350 per month times four apartments into the income stream. Gordon never visited the properties. Brackett did and knew the apartments were not rented out. They were not rented out at the time of the valuation date, and they were not rented out when they went there.

Weiner also testified credibly that at the time of the valuation, two apartments were occupied with previous renters, but they were not paying any rents because the construction made the apartments basically unlivable. He also said the rental rate that had been being paid was $900 a month. So at the time of the valuation, there was no rental income from apartments. Although some renovations were theoretically planned, there is no evidence they were carried out at that time and that the apartments would, in fact, be rented or at what price. Weiner also testified at least one of the apartments was used as an office for the business, which is an appropriate use of the space of the enterprise.

The appraiser did not testify at trial and, therefore, provided no evidence that persuaded me that potential rental income should be included in projected income for a cash flow analysis of the entities being valued in this case.

Also, while the business plan mentions that there are apartments, and they were rented when the plan was written in 2010, it does not say that the rents from the apartments will be part of the expected income to investors that would inure to the benefit of investors.

Also, Brackett correctly notes that if you include rental income of any sort, you have to offset it with the cost of renting, which includes maintenance, utilities potentially, and various other costs incurred by landlords. Renting is not free. There was no source of information for these costs of renting, so he choose to exclude the potential rental income.

Gordon, when he did his own discounted cash flow analysis using the cash flow to the enterprise approach, included rental income for all four apartments at 1350 with no deduction for any expenses of renting it. He did not know if they were rented on the valuation date or any date or what management was actually planning to do with the apartments. He also did not deduct -- and I already said this -- anything from the rental projections to offset the cost of the real estate entities of renting.

He said that he delayed including rent as income for about six months, meaning he didn't include rental income from the apartments until the beginning of 2012, and so he thought that would offset any expenses that would be incurred at any point in the future, but he gave no basis in the evidence. There was no basis in the evidence for that kind of an assumption. And he didn't allow any break in time for rental income because of change in tenants or difficulties of any sort, which Brackett testified was common and which I found to be credible.

After hearing all the evidence on this issue of the apartments, I find the potential investor on the valuation date would not expect the real estate entities to be generating significant income from renting apartments. The businesses were not created to rent apartments. They were created to operate restaurants, and rental income from the apartments was not used in any of the projections in the business plans.

Any potential investor in a small business like this should have investigated the premises before deciding to invest and would have seen the apartments were not generating any income as of May 26th and, therefore, would not have had any expectation of income from those apartments.

Since the apartments were not rented at the time of the valuation and were not renovated at the time, there was no promise of an income stream from these apartments, and Gordon included no offset for the expense of renting, I find it more reasonable not to include apartment rental income or expenses as Brackett did than to include four apartments at $1350 per month with no offsetting expenses.

The third criticism or issues that Gordon made of Brackett's income cash flow analysis is titled Intercompany Rent Expense.

Gordon also criticized Brackett's cash flow analysis on the basis that his inputs didn't recognize the income generated from intercompany rent, that's I-N-T-E-R, meaning between the four entities. The two restaurant operating entities paid rent to the two real estate entities. Brackett didn't include that rent or the offsetting costs to the real estate companies. He admitted, however, that if he had included those transactions, it would not have been just a wash on a combined entity basis. It would have generated some income for investors. Gordon never stated, however, what impact this error had on Brackett's analysis. While he includes this intercompany rent payment in his own analysis, he uses different cash flow approach, the cash flow to the enterprise method, so it's not possible for me to tell how this failure of Brackett to include the intercompany rent really affected his conclusions.

Gordon himself also inflated the income to the real estate entities in his cash flow analysis, but I'll discuss that more later when I'm talking more specifically about his.

All right. The final issue I'm going to talk about for Brackett's approach and Gordon's criticisms is Number 4, Company Specific Risk.

Gordon then criticized Brackett's application of a company specific risk to Brackett's cost of equity calculation.

Brackett testified that this is a subjective factor, but it is key to evaluating the risk of a particular company over the general market risk. It's appropriate to apply it in this case because the existence of the company is in jeopardy, there's substantial likelihood of default, and the debt level is much higher than restaurants of this type. That's what Mr. Brackett said, and I agree with him.

Trustee counsel challenged Brackett's

chart in which he evaluated the various risks which were set out in Appendix F to Brackett's report in which he went through a list of factors in determining the amount of company specific risk to assign, but I was persuaded that it was appropriate to apply a significant company specific risk to this enterprise and find that Brackett's 6 percent value for this risk was reasonable in the circumstances of this company. In fact, at this point in the lives of these entities, the risk of failure was high and the risk of investors not being repaid at all, let alone in the foreseeable future, in light of all the cost overruns and double the debt justifies this 6 percent addition to the cost of equity rate.

Gordon's testimony that there should have been no specific company-specific risk component was not credible. He said the fact that this company had zero track record of sales, had twice the bank debt that had been projected, had many problems getting ready to open, several months late in opening even the first restaurant, and even months later in opening the second, which could only be opened with a significant amount of additional funding, made no difference.

He stated that high-risk startups with no track record are incorporated into the other published risk factors. He also stated the fact that Weiner and Mohr had significant restaurant management experience was enough to counteract any company-specific risk. He thought that the fact that this type of a pizza concept that was being tried at Roots had never been done in the Chicago market didn't increase the risk of a brand new restaurant any more than an already established restaurant would face. This was not persuasive. Brackett was correct to include a significant company-specific risk for these companies.

Despite these specific criticisms, Gordon did not redo Brackett's analysis to come up with what he thought was a better cash flow to equity approach and then to, you know, apply out the discounted debt payments to get an actual potentially real number for the cash flow to enterprise approach.

Now I'm going to my subheading capital B, Gordon's approach -- I'm sorry, Gordon's Cash Flow to Enterprise Approach. So that's the heading of this section. I'm now launching into what Gordon did instead.

Instead of redoing Brackett's cash flow to equity model but using projected numbers he thought were more accurate, Gordon did his own cash flow to enterprise analysis using corrections to cash flow. In doing so, he properly added back into the cash flow the depreciation of $87,000 annually for the Roots restaurant that I discussed earlier that Brackett forgot to add back. But he also overestimated cash flow in many significant ways, and now I am going to give a list of five to six, depending how you count it, criticisms of Gordon's approach.

Number 1, Apartment Rental Income.

As I mentioned earlier, it was not appropriate to include income in the cash flow projection for $1,350 in rent for four apartments when no rent was being collected at the time and the income projections for the businesses did not include rental income.

Gordon also didn't deduct any expenses for renting, and he ignored that management decided to use one of the apartments for an office.

The result is an overstating of any potential income from the apartments even if it is reasonable to take into account some portion of apartment rent as income.

Gordon used annual rental income up from $64,000 in 2012 up to 74,000 in 2016, which I think reflected a potential increase in rent every year. These figures are shown in Exhibit 3 to his report and result in significant overstatement of cash flow.

2, Intercompany Rental Expense.

As I noted earlier, Brackett admitted that there would have been a cash flow to the real estate entities that would add value for the equity holders, the interest holders, if you considered intercompany rents paid from the restaurant entities to their relevant real estate entities. So Gordon included those values in his cash flows, which is fine in principle, except he overstated those amounts by failing to properly adjust for depreciation expense. He, therefore, overestimated the income of -- to the rental -- I'm sorry -- to the real estate entities for intercompany rent by $120,000 of depreciation expense per year.

3 is entitled Management Expense.

Gordon also overstated cash flow to the enterprise by failing to take into account management fee payable to both Weiner and Mohr and some other managers that is separate from the salaries for managers included in the budget in the business plan. Weiner testified he never took this as a salary expense, and Gordon failed to take into account that each of the restaurant operating agreements provided -- well, one provided for Weiner and Mohr, Roots, to be paid annual management fees totaling $120,000, plus the other operating agreement for the bakery provided for $130,000 to the managers of that enterprise. Gordon said he didn't see these figures in Brackett's projections, which is true, but I was persuaded by Weiner and the provisions in the operating agreement that these fees must be deducted somewhere in this cash flow analysis. Gordon, therefore, estimated -- overestimated cash flow by 250,000 a year for this expense.

4, Preferred Shareholder Dividend.

Gordon also interpreted the provisions of the operating agreement to require a 10 percent annual dividend to preferred shareholders like Lustig. He incorporated these payments he thought were required annually into his analysis in Exhibit 2.1 for preferred shareholder dividends. This exhibit shows this amount being calculated in each year. The operating agreements do not call for an annual payment of this preferred member dividend. Instead, it's a one-time payment.

"Preferred distribution" is a defined term, and it is in the definition section at the beginning of each of the two restaurant operating agreements, which are the -- and the restaurant operating agreements are the only ones -- or the restaurant operating entities are the only ones with preferred members. So these operating agreements provide that a "preferred distribution" quote, means a sum equivalent to 10 percent of the aggregate capital contributions of all the preferred members which shall be payable as set forth herein. Each preferred interest representing a required capital contribution of $35,000 will be entitled to an aggregate preferred distribution equal to $3,500, subject to..., a bunch of things that aren't relevant here.

This language makes it clear that preferred members are entitled to the distribution only once, not annually. An aggregate capital contribution. I'm sorry. I shouldn't have focused on that. It is an aggregate preferred distribution equal to $3,500. So, in fact, the language in this definition makes it clear that this was a one-time distribution, not an annual distribution. It says in plain English the preferred distribution to a member investing $35,000 will be $3,500, 10 percent of the capital contribution period.

Mr. Gordon attempted to justify his including an annual 10 percent payout of preferred dividends by referring to Paragraph 4.8 of these agreements. That provides for distributions of net cash flow, "first, to preferred members in an amount equal to an unpaid amount of the preferred distributions." Here again, however, there is no mention of an annual payment. It simply says preferred distributions get paid before the preferred and common members divide distributions according to a sharing ratio that is defined elsewhere in the agreement. The agreement does not provide for an annual preferred dividend.

Gordon included an annual preferred dividend of 10 percent in his discounted cash flow analysis as shown in Exhibit 2.1 of his report. For the first year, he included a dividend of $158,747. In the following years, he included varying amount between 144,000 and 119,000, all of which should not have been included. His present value of these preferred cash dividends, the great majority of which should not have been included, is $672,798 as shown in the right-hand column of his Exhibit 2.1 to his report.

So Gordon used that 672,798 figure in his summary of his discounted cash flow analysis, which is in Exhibit 2 of his report, the third line down. Instead, he should have used 158,747, the amount expected in the first one-time payment of 10 percent. If the calculations in his Exhibit 2 are done with the correct figures for preferred dividends, the difference this error caused in this calculation on the value of Lustig's 7 percent share, assuming there is a liquor license, is that it inflates that value by $42,632.

Here I will note there have been no distributions to any members of the bakery entities and only small distributions to Roots members over the past three years beginning in 2014. Although the discounted cash flow is a forward looking exercise from the valuation date and is not based on what actually happened, I cannot help but noting that projections for new enterprises are inherently very speculative, just as Brackett testified. So view that last bit as a footnote.

Subheading Number 5. And this is on my analysis/critique of Gordon's discounted cash flow. So subheading 5 is called Weighted Average Cost of Capital or WACC.

Since Gordon chose to use net cash flow to the enterprise approach instead of net cash flow to equity as Brackett had done, it is appropriate to use a different discount rate in determining the present value. Instead of using cost of equity like Brackett used, you must use a weighted average cost of capital or WACC, W-A-C-C.

Gordon illustrated how he arrived at his WACC in Exhibit 4 of his report. To determine this, he used a weighted average cost of capital for the different components of the capital structure, which includes -- in this case includes preferred equity, common equity and debt. His calculation of this rate is illustrated in Exhibit 4 to his report.

He also ultimately applies a pre-tax WACC of 14.7 percent and a post tax or what he labels "tax effected" rate of 13.9 percent. He made an important error in this analysis in determining the cost of preferred equity because he again assumed that a preferred distribution was required annually instead of just on a one-time basis. This means that his weighting for the preferred dividend rate and preferred distribution rates were way off. Instead of being the 47 percent and 53 percent weighting percentages that he used, they should have been 15 percent and 85 percent. This would have resulted in significantly increasing the 14.6 percent pre-tax rate and 13.9 percent post-tax weight for WACC, W-A-C-C, that he should have used.

Brackett credibly testified that the WACC should be somewhere between 15 percent and 25 percent depending on various factors. So higher than what Gordon used.

Brackett also testified that the preferred distribution error alone would result in a change in the WACC by .6 percent, and that this would reduce the value of the enterprise overall by $600,000, even using all of Gordon's overstatements of cash flow.

Gordon was asked, in effect, if in his 50 to 60 business valuations he's done, he has ever used a WACC this low as he used for this case. He claimed not to remember, but this was not credible. If he had answered the question directly, I believe he would have admitted that this was a very low WACC to use. So I find that the WACC used by Gordon was too low to generate a realistic estimate of value based on cash flow to this enterprise, and that the .6 percent error that Brackett demonstrated for just improperly calculating preferred dividend payments does not fully correct this underestimate. I have not been presented any evidence, however, of what a more appropriate WACC would be beyond the .6 correction to his numbers, and, therefore, I could not make a corrected -- and by the way, I could not make a corrected present value calculation on my own in any event.

Gordon's calculated value of Lustig's 7 percent interest, assuming that the enterprises had a license, so only after the interests were transferred by Lustig, after controlling for tax effects, as both experts agreed a prospective investor would do, was $240,070. So this was his estimate of the value of Lustig's interests to another investor using what he believed was correct methodology and correct projections of income, expenses and the like.

I was unable to recalculate the value using corrected figures for various expense and income categories as I've already said, and I am unable to process it using a higher WACC.

So Weiner's counsel did provide a helpful summary in closing argument, however, and it relies on Gordon's too low WACC and adjusts his bottom line for four of the items that I have found were erroneously included or not included by Gordon.

As I said I would, I reviewed the testimony of the two experts to make sure that there was actual testimony in the record by experts that supported the simple calculations that were done in that demonstrative exhibit, and I found that it was there, and it did simply reflect testimony that had been given.

So Subsection 6 of the analysis of Gordon's cash flow analysis. Subsection 6 is entitled Corrections to Gordon's DCF or Discounted Cash Flow.

Both experts agreed that the best value to look at in considering what an investor would pay for an interest is the after-tax value.

So I'll use Gordon's after-tax figure. He estimated the after-tax value of Lustig's 7 percent interest of $240,979 or at $240,979.

Adjusting only for four errors, that value is reduced to $45,186. Those four errors are:

1, treating the one-time preferred dividend of 10 percent as an annual payment that overstates the after-tax value of Lustig's interests by $42,632.

2, the depreciation that should not have been added back into the estimated intercompany rent expense, which caused a decrease in the business enterprise value of $720,000, which results in a $31,329 reduction in the estimate of the after-tax value of Lustig's interests.

3, omission of the $250,000 in annual management fees. This results in a 1.5 million decrease in the business enterprise value and a $65,267 decrease in the after-tax value of Lustig's interests.

4, omitting payments for 1.3 million in additional debt incurred for a build out that were not included in his analysis. And I failed to write down the actual number attributed to that error.

So if just those items are reduced from Gordon's number -- after-tax number, and the WACC is not even corrected, the post-tax value of

Lustig's interests is only $45,186.

So I'm unable to quantify how that $45,000 would decrease if a higher WACC was used, and I also cannot calculate how much the number would decrease if no apartment income was used or a smaller number was used, but I conclude that this number is too high to estimate even the value of the interests in the hands of another investor.

The trustee has the burden of providing the value of the property transferred. Based on all the errors I was able to quantify and by the too low WACC rate and inflated apartment rent, I find the trustee failed to establish by a preponderance of the evidence that any significant value was transferred to Weiner.

And even if I used the inflated 45,186 value, I find that the value Lustig received from the transfer exceeds this amount even before reducing for any potential award -- I'm sorry -- reducing any potential award to the trustee by 32 percent based on the transfer of the interests initially purchased with the $125,000 check from Lustig Capital that was ordered to be turned over to Freeborn & Peters by the Circuit Court of Cook County, which I will discuss closer to the end.

Subheading C of my opinion, which is dealing with the different approaches to valuation, is entitled Market Approach to Value.

Before I get into the details of the analysis of the value provided to Lustig in the transfer though, I will address the third potential way to value the interest in addition to the net asset value approach and the discounted free cash flow approach that I've already discussed.

The third potential approach is called the market approach. As both experts testified, in some circumstances, the value of an interest in an organization can be determined by looking at recent market transactions.

Brackett concluded there were no actual market transactions at all, and you would need more than one in any event.

Gordon testified to the contrary, that essentially any transaction within one to two years, depending on the circumstances, could be used as evidence of value. He said some analyses use up to three years for transactions depending on the stability of expectations in that market.

Here, however, I find there is no "stability of expectation" at all. These were entirely new, small and risky enterprises with no basis for any finding of stability of any sort. I reject Mr. Gordon's testimony on this issue as not persuasive.

Also, the Glayshers' payment was a payment based on the subscription agreement entered before October 12 of 2010. As I noted earlier, those subscription payments were not intended to reflect the value of the enterprise, and in any event, the company's financial situation and outlook for investors was far different and much worse on May 26, 2011, than it was in October of 2010.

I also reject the argument by really the witness, Gordon, and trustee's counsel, that the Glayshers, who were making a payment required under a contract entered many months before, should be expected to simply breach that agreement and refuse to pay if they thought the investment was worth less than what they had originally agreed to pay for it. They had a contractual obligation to pay and could have been sued for the money with no obvious defense. The fact they chose not to face that consequence doesn't reflect anything significant about the value of Lustig's membership interests on May 26, 2011.

Okay. Subparagraph 5, which follows Subparagraph 3 which was on the net asset value approach, Subparagraph 4 on discounted cash flow approach, and now I'm calling this Number 5. And whether I've numbered these correctly or not, I'm not a hundred percent sure. But this section is entitled Value Received By Lustig in the Transfer.

Just so you know, I'm only on Page 33, but the end is at Page 43.

Okay. So Value Received by Lustig in the transfer.

Even assuming that somehow Lustig's creditors were entitled to the value of the shares after he transferred them, and not before he transferred them, so not as though he'd actually kept them, and even if I give any weight to the inflated $45,000 value produced by making some necessary adjustments to Mr. Gordon's discounted cash flow, the value that Lustig received from the transfer easily exceeds this amount. I also specifically find, not necessarily in a great place, but that each of these promises provided a real value to Lustig at the time of the transfer and when they were made, and that each was very likely to be carried out by Weiner.

A. Avoidance of Potential Lawsuits by Weiner and Others Involved in the Enterprises.

As I found earlier, if Lustig had not transferred the interests, both enterprises would have failed in short order. The sole cause of this failure would have been Lustig's lying about his convictions.

Weiner threatened to sue Lustig for his losses that would have been caused by Lustig's lies. Weiner had potential claims for fraud as his counsel stated during trial. Lustig was fully informed on a number of occasions that he could not be an investor if he had a felony conviction, yet he lied about those convictions on a number of occasions, and he lied on the form required by the City of Chicago.

In addition, while the subscription agreements did expressly ask subscribers to verify that they had no felony convictions, Paragraph 5(j) in the representations and warranties section required the purchaser to state he had no knowledge of any suit -- action, suit, government investigation or legal or administrative proceeding that is pending or threatened against the purchaser in any court which could have a very material adverse effect on the purchaser and his ability to comply with the agreements.

Here, Lustig knew that he had criminal convictions, including a recent felony conviction that required him to pay at least $3,200 as disclosed in his schedules which reflect a debt owed to the Department of Justice in connection with his conviction. If that amount was still owed on the date he filed his bankruptcy petition in 2015, it is fair to assume that the criminal matter was still open and ongoing. Lustig clearly knew it would disqualify him from being an investor in this business.

It's also highly likely he violated other provisions of the agreement which required him, among other things, to certify that he had at least $100,000 in liquid assets, and that his net worth, excluding his home, furnishings and automobiles, was at least four times the amount invested. So in this case, that would be four times $370,000 or 1.4 million. So he had certified that he had a net worth, excluding home and autos and furnishings, of 1.4 million when he signed the subscription agreement. In addition, the duty of good faith is implied in every contract, and Lustig clearly breached that duty.

So Weiner and Mohr and the entities themselves, and even maybe their other investors, had serious claims that could have been asserted against Weiner if he refused to turn over the interests. Each investor would have lost their entire investment, and the guarantors like Weiner and all the other guarantors would have been liable on the guarantees. The elimination of these potential claims alone would be enough to provide a reasonably equivalent value for the transfer of less than $45,000 in value.

And if Lustig had kept the interests and refused to transfer them and caused the collapse of the enterprises, Lustig himself would have been personally liable on the guarantee of the debt. As I found earlier, the deficiency after all assets were liquidated would have been at least $790,000, and this was a low estimate. Lustig would have faced this direct liability to which he has no defense as a direct result of his refusal to transfer the shares. The avoidance of this guarantee liability alone is sufficient to provide reasonably equivalent value to Lustig, and in conjunction with Weiner's promise not to sue and eliminating the grounds for others to sue him by giving up the interests so liquor licenses could be obtained, he eliminated the principal grounds for any potential suit against him.

Subparagraph B of the value to Lustig is Promise to Try to Get Lustig Out of Loan Guarantees.

Weiner also promised to try to get Lustig off the guarantees of the loans. While the trustee's counsel argues that Weiner couldn't ensure that they would remove him from the guarantees and suggests that this promise had no value to Lustig, his promise -- Weiner's promise to attempt to accomplish it did have value. Otherwise, it's very unlikely the bank would have been willing to release Lustig from the obligation.

Weiner had an incentive to get Lustig removed because he wouldn't want to take the risk the City of Chicago might still consider him as a lender to the entities on the basis of the guarantee, and Weiner did deliver on that promise and was able to get Lustig released from the guarantee on the loans from Gold Coast Bank.

The trustee contended this release only

happened because of a refinance, but that's not necessarily true. Weiner took advantage of the refinance to have Lustig's guarantee eliminated. Weiner attempted to accomplish this for Lustig, and he did accomplish it.

Trustee's counsel similarly argues that the actual value from getting the guarantee released shouldn't count here because technically the release was granted by the bank and not Weiner himself, but this is not the proper analysis.

As I noted a long time ago at the beginning of my opinion, in considering the exchange of value, the focus is on the value given up by the debtor and the value received by the debtor and not on the exact source of it, and indirect benefits count. I find that real value flowed to Lustig from this promise to -- from Weiner's promise to try to get Lustig out of the guarantees, and that Weiner performed on those promises by getting Lustig out of the Gold Coast guarantee. Lustig and his creditors got a benefit from the elimination of this obligation.

Subsection C of the benefit to Lustig is entitled Investor Discount.

Weiner also promised that Lustig and

four family members could keep a 40 percent investor discount that would apply at Roots, the bakery and Weiner's other restaurant 50/50. The trustee downplays the significance of this promise, but Lustig and his family used this discount in excess of $60,000, much of which could be attributed to Grant Lustig's spending on himself and friends. It's very likely that Grant Lustig himself got a benefit in excess of $20,000 from these discounts. Lustig admitted that he ate often at the two restaurants, and he was known as a big spender at 50/50 where he was also given the discount. He only stopped using them in 2014 when Lustig created a hostile environment for one of the managers at Roots, so they would no longer permit him in that restaurant. They still permitted him to take out -- the discount on take-out food, however.

This promise to provide the investor discount even though he was no longer an investor was fully within Weiner's power to perform, and it provided real value to Lustig and adds to the value he received in excess of the value of his interests even looking at the value after Lustig transferred them, not if Lustig had kept them.

The trustee also argues that Weiner did not personally provide the discounts, meaning it's the corporate entities who actually got less money by providing the discounts. But as I noted earlier, this does not matter. The focus is on what Lustig received, and there is no doubt that he only kept the investor discount because Weiner agreed that he could, and as the manager of those restaurants, he ensured they all gave him the discount even though he was no longer an investor.

Subsection D, Promise to Return Shares if the Convictions were a "Mistake."

Weiner also orally agreed to return the interests to Lustig if Lustig was telling the truth and the City was mistaken.

As I noted earlier, there was no chance that that would ever happen. But it demonstrates Weiner's good faith and supports his testimony that he did not give any real value to these interests when they were transferred. I also specifically find there was no evidence there were any side agreements between Weiner and Lustig whereby Weiner held the shares and Lustig could continue to have some sort of beneficial interest.

Weiner had no desire to take the shares

personally, and he only entered into the transaction because Lustig's lies required him to deal with the issue immediately. So it turns out this promise to return the shares, while made in good faith by Weiner, had no value to Lustig because Lustig knew his perjury conviction would never be expunged, and combined with his lying on the City form would prevent him from ever owning an interest in any of these entities in the future. So this promise, in fact, provided no value to Lustig.

Paragraph E on the benefits to Lustig is Statute of Fraud Defense.

The trustee argued in closing argument that Weiner and Lustig did not write down any of these oral agreements, so he contends they are unenforceable under the statute of frauds.

This is not correct. Under Illinois law, the statute of frauds is not a defense against a party who has already fully performed a contract. There are many cases that so hold, but I'll cite just a few. *Barber v. Golden Seed Company*, a Seventh Circuit case, 129 F.3d 382, 388-89; *Noesges*, N-O-E-S-G-E-S, *v. Servicemaster Company*, 598 N.E.2d 437 at 441. "It is well settled, however, that complete performance on the part of one of the parties to the oral agreement bars application of the statute" with many, many citations omitted. Also, *Time Warner Sports Merchandising v. Chicagoland Processing*, 974 F.Supp. 1176 (Northern District of Illinois 1997). In this case, Lustig fully performed his obligations under the oral agreement when he transferred the shares on May 26, 2011, and then when he executed whatever else was required on June 7th. Weiner, therefore, would not be able to avoid performance by relying on the statute of frauds. The oral agreements were therefore enforceable promises that provided value to Lustig that more than offset the value of the interests on May 26, 2011.

Subsection F I'm calling Other Findings for lack of a better heading.

As I noted earlier, the typical test for reasonably equivalent value has four elements that look at the value of what was given, the value of what was received, whether the transaction was an arm's length, and the good faith of the transferee.

I find that Weiner acted in good faith at all times with respect to this transaction.

Neither side gave me a definition of an arm's length transaction, but Black's Law Dictionary defines it as: "Dealings between two parties who are not related or on close terms and who are presumed to have roughly equally bargaining power and not involving any confidential relationship." The transaction between these two parties meets the test. You have two parties not related, not on close terms, had roughly equal bargaining power and are not involved in any confidential relationship. So all the requirements for a finding of reasonably equivalent value have been met by Weiner.

Subparagraph 6. And this is on to an entirely new topic really. Offset for Transfer to Satisfy Debt of Freeborn & Peters and The Rooker-Feldman Doctrine.

I'm on Page 36.

Another issue in this case is the impact of the turnover order entered by the Circuit Court of Cook County. As I discussed earlier, this order required Weiner to turn over Lustig Capital's $120,000 investment in the Chicago Division Street Restaurants entity to satisfy the debt of Lustig Capital to Freeborn & Peters. As I noted also, Grant Lustig was jointly and severally liable on that debt, and Freeborn & Peters may have had their own bankruptcy planning reasons for drafting the order the way -- the order that the judge signed that way. Whatever their motivation, Weiner was ordered to transfer $120,000 worth of the $370,000 of interests that everybody agrees was owned by Grant Lustig, not Lustig Capital, to satisfy debt that was, in fact, owed by both Grant Lustig and Lustig Capital.

Although the motion for turnover does not mention fraudulent transfer, and the action was ostensibly merely a collection action through a citation to discover assets proceeding after entry of a judgment, there is no possible way Scott Weiner could be holding assets of Grant Lustig or Lustig Capital unless the transfer from Grant Lustig to Lustig Capital was considered a fraudulent transfer.

So Weiner decided not to oppose the motion or the order, and Freeborn was not forced to defend their undefensible contentions that Lustig Capital had the ownership interest or that Weiner had to turn over the interests. In the end, however, a valid court order was entered requiring

Weiner to turn over the interests purchased with the $120,000 check that had been issued by Lustig Capital, and Weiner once again concluded the value of those interests wasn't worth the value of the attorneys' fees to fight it.

After the completion of the transfer to Freeborn in compliance with that court order, Freeborn obviously decided that it didn't want the restaurant interests either, and that they were not worth the $120,000 to them, so they negotiated to give up the right to collect on the remainder of that judgment and all rights of any kind and to give back the interests to Mr. Weiner for the one-time payment of $40,000 in cash.

Weiner's counsel in this case filed an extremely late motion to dismiss a week before trial raising this issue and contending that this court lacks jurisdiction over an adversary proceeding because it would involve this court sitting in review of the state court order.

As I stated a number of times orally in this case, but I haven't formally ruled yet, and this will constitute the ruling, I reject this argument. I'm not going to take the time to cite a lot of cases here, but the Rooker-Feldman Doctrine essentially bars the losing party in a state court proceeding from then going to federal court to try to get a more favorable result. *See, e.g., Lance v. Dennis*, 546 U.S. 459, 464 (2006); *Exxon Mobil v. Saudi Basic Industries Corp*, 544 U.S. 280 at 284, a 2005 U.S. Supreme Court case.

The parties to that proceeding in state court who matter here are Lustig, Lustig Capital, Freeborn and Weiner. The trustee was not a party, and he does not stand in the shoes of Lustig for purposes of the claims in this case before me today. Instead, he stands in the shoes of Lustig's creditors under 11 U.S.C. Section 544 invoking the rights of creditors under the Illinois fraudulent transfer statutes. So the trustee is not a losing party who has now come to federal court for a better result. Rooker-Feldman, therefore, does not bar me from asserting jurisdiction over this claim.

This does not mean, however, that I can or should ignore that state court order. Instead, it must be considered in determining what, if anything, Weiner should be required to transfer to the trustee, what is the appropriate remedy.

In other words, I should and will give effect to that order. But I interpret that order to require Weiner to pay $120,000 or 32 percent of Weiner's total interests that he got from Lustig to a creditor of Lustig to pay a debt owed by Lustig, and, therefore, for the benefit of Lustig and ultimately his bankruptcy estate which has fewer creditors as a result. Lustig was jointly and severally liable for that debt with Lustig Capital. So while the order specifically talks about the payment being applied to Lustig Capital's debt, that makes no difference. That payment, that order and that payment necessarily reduced Grant Lustig's personal liability for that debt on a dollar-for-dollar basis. That transfer by Weiner of the $120,000, whatever amount of shares that was or interests that was, therefore also did pay Lustig's debt to Freeborn & Peters, as well as Lustig Capital's joint debt with the debtor to Freeborn & Peters.

And as I mentioned, that turnover motion functioned like a fraudulent transfer action with the result being that a party to whom a debtor transferred interests was required to turn over some of those interests to pay a creditor of the debtor. So Weiner has already been required by a valid state court order to turn over what I hopefully calculated correctly is 32 percent of Lustig's former interests to satisfy a debt owed by the debtor to a creditor.

Section 550 of the Bankruptcy Code contains a number of provisions that probably mandate that this be the result. That's at 11 U.S.C. Section 550. Section 550 applies to, among other claims, a trustee's attempt to bring assets into the bankruptcy estate under 11 U.S.C. Section 544, which, as I mentioned at the beginning, is the section under which the trustee is proceeding in this case.

Section 550(a) provides that to the extent a transfer is avoided under Section 544, the trustee may recover for the benefit of the estate the property transferred or, if the court so orders, the value of that property from the initial transferee or any immediate or immediate transferee of such initial transferee.

Section 550(b) then places limits on when a trustee can recover from a subsequent transferee. Weiner has not specifically argued that the defenses in 550(b) be applied to him, although he raised this issue generally in his answer and generally in that motion to dismiss and for summary judgment.

But putting that aside, Section 550(d) then provides that the trustee is entitled only to a single satisfaction of his claim. Section 550(e) places other limits on what a trustee can recover from a good faith transferee. Each of these provisions is intended to prevent a trustee from making a transferee pay more than once for the same transferred assets. 550(d) was designed to restore the estate to the financial condition that would have existed had the transfer never occurred. That's extremely consistent, I might add, with my previous ruling on reasonably equivalent value here. All the creditors get and all the trustee gets is what the debtor would have if he hadn't made the transfer.

Then -- that is, by the way, that the 550(d) is designed to restore the estate to the financial condition that would have existed had the transfer never occurred is from *In re Sawran*, S-A-W-R-A-N, 359 B.R. 348 at 354, and that's Bankruptcy Southern District of Florida.

And by the way, as a footnote, I have about eight people in the courtroom, and you all may leave any time you want as this drags on longer than anybody could have ever thought, so free feel to go. I'm not going to be bothered.

Section 550(d) is invoked to prevent a trustee from recovering twice from a single transferee under 550(a). And there's a whole bunch of cases that cite this, and I'll just cite one or two. *Bakst v. Wetzel* in the *In re Kingsley* case where perhaps the best cite is 2007 WL 1491188, Bankruptcy Southern District of Florida, May 2007, which was confirmed by the Seventh Circuit, quoting *Dobin v. Presidential Financial Corp of Delaware Valley* in the *In re Cybridge Corp.* case, 312 B.R. 262 at 271, District of New Jersey, and on and on.

Here, the trustee himself has not required from Mr. Weiner -- recovered, I'm sorry, from Mr. Weiner before, but a creditor of the debtor has recovered from Mr. Weiner before, providing the benefit of those assets to satisfy one of the debts owed by the debtor, thereby reducing the amount of claims against the debtor. Even if Section 550(d) does not technically apply here, I have the discretion to fashion a fair remedy under both federal and state law. Courts have the power to prevent a party from paying more than once for the same wrong in many contexts. I have a few cites, and I'll eliminate a few. *Portuguese-Sanatna v. Rekomdiv International*, 657 F.3d 56, 63 to, I think, 65 (1st Circuit 2011); and *Vesey v United States*, 626 F.2d 627 at 633 (9th Circuit 1980).

And Illinois law allows me to exercise discretion and equity in determining the appropriate amount of damages for any fraudulent transfer, as trustee's counsel has conceded. I have discretion under 740 ILCS 160/8(a) to fashion an equitable remedy for any fraudulent transfer.

The turnover motion in state court was the functional equivalent of a fraudulent transfer action, and it would be highly inequitable to require Weiner to turn over the value of the same interests twice to a trustee acting on behalf of Lustig's creditors. I find that to permit the trustee to take any value from Weiner for the 32 percent of the interests already paid over to Freeborn would be an inappropriate double recovery against Mr. Weiner, and it would be inequitable.

So that's my conclusion, but, unfortunately, just on the constructive fraud.

So under my first analysis above, there is no potential fraudulent transfer because the interests had no value with Lustig as an owner and, therefore, no value to his creditors, so they lost nothing when he transferred it.

Because the parties spent so much time on the expert opinions and in looking at it in a different way, I did my second analysis showing that even if I value the shares before Lustig transferred them as though someone else other than Lustig actually owned them, the value of those shares was still small, and he received more than the transfer -- more from the transfer than whatever that small value is.

Here, I conclude that if I found that Weiner -- that there had been a significant value transferred that exceeded the value of what Lustig received, I would still reduce any damages by 32 percent taking into account that Weiner was already -- had already been compelled to transfer 32 percent of the shares to satisfy one of Lustig's creditors.

For all these reasons, I find the trustee has not sustained its burdens under Count I of the complaint of proving that the transfer of interests from Lustig to Weiner was constructively fraudulent under 740 ILCS 160/5(a)(2). I'll therefore enter judgement for the defendant Mr. Weiner on Count I for the constructive fraud count.

Much shorter will be my analysis of actually fraud, but it's still another three or four pages just so you know, although it's not exactly single spaced.

Section Roman Numeral V is called Count II, Actually Fraudulent Transfer.

The trustee alleges in Count II that the transfer by Lustig to Weiner was actually fraudulent. I've discussed the standards for a claim for actually fraudulent transfers and the various badges of fraud in the beginning of my opinion, but the crux of such a claim is that the trustee -- the transferee must have made -- I'm sorry -- the transferor, which would be Mr. Lustig, must have made the transfer with the actual intent to defraud his creditors. I find the trustee has failed to sustain his burden of proof that the transfer was actually fraudulent.

Subheading 1, Badges of Fraud Applied in this Case.

I'm relying on all my previous findings of fact in reaching this conclusions, but I'll quickly go through the badges of fraud and explain if they exist.

The first is that the transfer was to an insider. Insider is defined in a definition section of the Illinois Uniform Transfer Act -- I think it's Fraudulent Transfer Act, I should say, as follows:

(g), Insider includes:

1, if the debtor is an individual. Which we have here.

A, a relative of the debtor or a general partner of the debtor. No.

B, a partnership in which the debtor is a general partner. No.

C, a general partner in a partnership described in clause B. No.

D, a corporation in which the debtor is a director, officer or person in control. No.

Under this definition, Weiner is not an insider of Lustig, so this badge is not present.

The second badge is that the debtor retained possession or control of the property after the transfer. This factor is not present. Lustig did not retain control of the interests in any way, and Weiner's promise to return the interests if it had all been a mistake in this case was meaningless because there was no mistake, which Lustig knew. Lustig never asserted and never had a right to assert, in the future, control over these interests.

The third badge is that the transfer or obligation was disclosed or concealed. I find this element is neutral. These were small privately owned LLCs where there would be no expectation of any public disclosure of any transfer in any event, so this badge doesn't cut either way here.

Fourth, the fourth badge is the debtor has been sued or threatened with suit before the transfer. This badge is present. By May, the investors in Workforce, including Wally Posner and William Shepard, had figured out enough about Lustig's misappropriation of their assets that they were threatening legal action by May 26, 2011. In fact, I believe they filed suit by August 2011 against him.

The fifth badge is that the transfer was of substantially all of the debtor's assets. This is true, so this badge exists.

The sixth badge is that the debtor absconded. That is not present.

The seventh badge is that the debtor

removed or concealed assets, and this factor, like the third one, isn't strongly in favor of fraud either. It's a private investment, and nothing here is indicative of fraud on that issue.

The eighth badge is that the debtor didn't get reasonably equivalent value. For all the reasons I discussed earlier in the context of constructive fraud, I find the creditors have not been defrauded -- deprived of reasonably equivalent value.

The ninth badge is that the debtor was insolvent or became insolvent shortly after the transfer was made. This badge is present.

The tenth badge is that the transfer occurred shortly before or after a substantial debt was incurred. This badge is not really here.

The eleventh badge is that the debtor transferred the essential assets of the business to a lienor who transferred them to an insider of the debtor. That badge is not present here.

Subsection 2 is entitled No Actual Fraud Here.

In determining if actual fraud occurred, the court doesn't simply add up the positive badges and the negative badges, but uses them as a tool for evaluating whether the evidence supports a finding of actual fraud, that the debtor intended to actually defraud the creditors by this transfer.

Here I find that Lustig did not actually have a fraudulent intent in making this transfer. Instead, he evaluated the facts, probably not that differently than I did here, and realized these interests had no value to him, his lies would be the cause of the loss of a lot of people's investments and their incurring a lot of liabilities for the loans, that he would be sued by all of them for all of their losses if he didn't transfer, and he would have liability on the guarantee after the businesses failed.

If he kept the interests -- I mean, if he gave them away, he would be able to keep the investor discounts so he could still pretend to be a high roller. So he probably figured he would gain more by the transfer than he would lose. He knew the effect that his lies would have on the entire enterprise and all involved in it, and he probably knew that the collapse of these businesses would probably make a lot of people with whom he associated aware of his criminal convictions and his betrayal of these people.

Lustig also could probably tell that Weiner was not going to pay him one cent for the interests in light of the precariousness of the financial situation of the entities even without being denied a liquor license.

Based on all these facts and circumstances that I've already described in this very long opinion, I find Grant Lustig did not make this transfer in an effort to defeat his creditors but because he didn't see any other viable way out of the situation.

I note that the trustee argues that Lustig was obligated to try to extract some sort of cash payment or note in exchange for the interests. He argues it was Weiner and all the other managers and investors who were in a desperate position because of Lustig's lies, so the trustee contends Lustig was in the catbird seat and should have refused to transfer to extract more out of Weiner that could have inured to the benefit of Lustig's creditors. The trustee cites no authority for this proposition, and I will reject it. I'll readily admit extortion is too strong a word for this situation, but something a few steps short of that would probably be accurate, and I do not believe that that was required under the law in this situation.

Also, I note that I made an offhand comment at trial that Lustig might actually have done the right thing for once in his life in turning over the shares. I want to make clear that I don't believe Lustig made the transfers because he thought if was the morally right thing to do. Instead, I find he thought it was to his overall benefit to get out of the investment and avoid all the lawsuits and liabilities that would come from refusing to turn over.

So for all these reasons, I conclude that the trustee failed to prove an actually fraudulent transfer. I will, therefore, enter a judgment order finding for the defendant Mr. Weiner on all three counts.

So I have finally come to the end. I'm very sorry for that extremely long rendition.

I am going to just enter a minute order denying whatever the motion that Mr. Weiner's counsel filed before trial, summary judgment, motion to dismiss, whatever it was, and I think that's it.

So my apologies, again, for the length.

MR. BLOCK: Thank you, Judge.

MR. HARPER: Thank you.

THE CLERK: All rise.

Court is adjourned.

(Which were all the proceedings had in the above-entitled cause, August 4, 2016, 1:30 p.m.)

I, MARY C. KELLY, CSR, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND ACCURATE TRANSCRIPT OF PROCEEDINGS HAD IN THE ABOVE-ENTITLED CAUSE.(f)