

No. 23-35292

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Timothy Rote,

Defendant-Appellant,

v.

Max Zweizig, et. al.

Plaintiffs-Appellees

On Appeal from the United States District Court
for the Portland District of Oregon
No. 3:15-cv-2401-HZ
Hon. Marco Hernandez

**APPELLANT'S EXCERPT OF RECORD
VOLUME III of III**

Timothy C. Rote
Defendant-Appellant *Pro Se*
7427 SW Coho Ct. #200
Tualatin, Oregon 97062
503.272.6264
timothy.rote@gmail.com

No. 23-352692

TABLE OF CONTENTS

ECF No.	DATE	DESCRIPTION	VOL.	ER PAGE#
365	11/15/22	Exhibit 11	III	567-659
369	4/5/23	Denial MTR (#367)	III	660-661
367	3/31/23	Motion to Reconsider	III	662-685
367	3/31/23	Exhibit 1	III	686-691
367	3/31/23	Exhibit 2	III	692-694
367	3/31/23	Exhibit 3	III	695-729
			III	
			III	
			III	
			III	

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

MAX ZWEIZIG,) Clackamas County
) Circuit Court
Plaintiff,)
) Case No. 19CV01547
vs.)
) No. A175781
TANYA ROTE and TIMOTHY ROTE,)
NORTHWEST HOLDING, LLC,)
)
Respondents.)

TRANSCRIPT OF PROCEEDINGS ON APPEAL

BE IT REMEMBERED that the above-entitled matter came on regularly for trial before the Honorable ULANDA L. WATKINS, Judge of the Circuit Court, Tuesday, March 9, 2021, at the Clackamas County Courthouse, Oregon City, Oregon.

APPEARANCES

For the Plaintiff:

Anthony V. Albertazzi, OSB #960036
Albertazzi Law Firm
296 SW Columbia Street, Suite B
Bend, OR 97702
541-317-0231
a.albertazzi@albertazzilaw.com

(Appearances continued on next page)

APPEARANCES

For Defendants Tanya Rote and Northwest Holding, LLC:

Brooks M. Foster, OSB #042873
Chenoweth Law Group
510 SW 5th Avenue, 4th Floor
Portland, OR 97204
503-221-7958
bfoster@chenowethlaw.com

Benjamin R. Scissors, OSB #204428
Mark C. Cogan PC
1500 SW 1st Avenue, Suite 780
Portland, OR 97201
503-985-8869
bscissors@coganlawoffice.com

For Defendant Timothy Rote:

Timothy Rote, Pro se

GENERAL INDEX

<u>March 9, 2021 Proceedings</u>	<u>Page No.</u>
Case called.....	1
Court's ruling.....	85
Transcriber's Certificate.....	87

WITNESS INDEX

FOR THE PLAINTIFF:

None

FOR THE DEFENDANT:

None

EXHIBIT INDEX

FOR THE PLAINTIFF:

Offered

Received

None

FOR THE DEFENDANT:

Offered

Received

None

1 OREGON CITY, OREGON; TUESDAY, MARCH 9, 2021

2 -000-

3 (Call to Order of the Court at 9:11 a.m.)

4 THE COURT: Good morning, everyone. This is
5 Judge Watkins. We are here in 19CV01547. And can I have
6 everyone who's on WebEx, can you identify yourself and who
7 you're representing or who you are?

8 MR. FOSTER: Good morning, Your Honor, can you
9 hear me?

10 THE COURT: I can.

11 MR. FOSTER: Thank you, Your Honor. I'm Brooks
12 Foster. I'm here today, representing Tanya Rote, and also
13 represent Northwest Holding, LLC in this action.

14 THE COURT: Okay, thank you, Mr. Foster.
15 I see you talking but I can't hear you.

16 MR. ROTE: I'm Timothy Rote here, Your Honor.

17 THE COURT: Good morning, Mr. Rote.

18 MR. ROTE: How are you today?

19 THE COURT: Good.

20 MR. ALBERTAZZI: Good morning, Your Honor, can
21 you hear me now?

22 THE COURT: I can. Mr. Albertazzi?

23 MR. ALBERTAZZI: Yes, good morning. I had some
24 trouble with the video connection this morning, so I
25 apologize for that. I just tried to connect any way I

1 could.

2 THE COURT: Understood.

3 MR. ALBERTAZZI: I represent, representing Max
4 Zweizig, the Plaintiff.

5 THE COURT: Okay. And I see Mr. Zweizig. Good
6 morning, sir.

7 MR. ZWEIZIG: Good morning, how are you doing,
8 Your Honor?

9 THE COURT: Good morning. I'm doing great. And
10 there's another gentleman that I can see but I can't hear.

11 MR. FOSTER: That's my colleague, Ben Scissors.
12 He's going to be observing the hearing, and I understand he
13 may need to leave before it's over due to another
14 appointment.

15 THE COURT: Understood. Well, welcome,
16 Mr. Scissors.

17 Okay, guys, so this morning is our dispositive
18 motions. I have two motions before me. Let's deal with
19 what I think is the easier motion first, and that is the
20 motion that is titled Petition for Pretrial Order that was
21 filed by Mr. Albertazzi.

22 Mr. Albertazzi, is there anything that you wanted
23 to add to your motion, or are you just standing by what you
24 filed?

25 MR. ALBERTAZZI: Your Honor, there is one

1 argument I'd like to add.

2 THE COURT: Certainly.

3 MR. ALBERTAZZI: As far as the authority for
4 this, I'm looking at this statute regarding the powers of
5 the court for contempt. And it seems to indicate initially
6 here that it is for actions or things that happened in the
7 presence of the Court.

8 THE COURT: Uh-huh.

9 MR. ALBERTAZZI: And this is a difficult
10 situation, because of course everything is remote now, and
11 the idea of presence, I think, has been somewhat expanded.
12 And I do think that what Mr. Rote had been doing is
13 impairing the integrity of the Court and the dignity of the
14 Court, and it's happening online. And it's happening in a
15 lot of different ways. And I just wanted to stress that if
16 there's a concern about the Court, well, I can't control
17 things that aren't in my presence, that the Court consider
18 that this -- that it really is affecting the dignity of
19 this Court.

20 So other than that, I think I've set forth the
21 legal arguments here, my authorities. I've provided two
22 declarations, one at the outset and then one supplemental
23 that we did. I do have my client on the line here. If
24 there are questions or if the Court is inclined to take any
25 testimony on this, he's certainly prepared to do that. So

1 other than that, I don't have anything to add.

2 THE COURT: Okay. Mr. Scissors or Mr. Foster, do
3 you intend to chime in on this motion, or no?

4 MR. FOSTER: No, Your Honor. My representation
5 today is limited to the summary judgment motion.

6 THE COURT: Okay. So Mr. Rote, I did read your
7 reply, and is there anything that you wanted to add or
8 supplement that isn't already written in your reply?

9 MR. ROTE: Yes, Your Honor. I'm a little
10 confused by the petition after the reply declaration, which
11 appears to me to want to modify the initial petition
12 request for an employment contract owned by Zweizig's
13 former employer, NDT and now owned by me, and some email
14 correspondence, also part of discovery of NDT and now also
15 owned by me.

16 Mr. Zweizig makes some representations as to a
17 protective order and doesn't provide a protective order to
18 support his claims. So I'm not sure if his reply
19 declaration was intended to modify the original petition or
20 to supplement it. It appeared to be modifying it. But all
21 of these documents have been filed in multiple cases in the
22 9th Circuit, U.S. District Court of Oregon and elsewhere.

23 And I would argue in the alternative to
24 Mr. Albertazzi is that the continuing solicitation by
25 Mr. Zweizig, asking any court to suppress what I believe is

1 my free speech right, is a compromise to the Court; it's
2 asking for bias. And I gave that argument very clear
3 elsewhere. I openly praise courts when I believe they're
4 right, and I critique if I think they're wrong, and I --

5 THE COURT: You're not alone in that respect. I
6 think we're pretty used to that. We get that response from
7 everyone.

8 MR. ROTE: I'm sure you do. I'm sure you're
9 pretty thick-skinned. You have to be to be a judge.

10 THE COURT: Absolutely.

11 MR. ROTE: So I don't think I've done anything
12 that is contrary to my absolute rights, and what I did in
13 response was to outline a particular case that I thought
14 was right on point. And so I'll reset my argument on those
15 points, Your Honor.

16 THE COURT: Okay. Well, Mr. Albertazzi, I have
17 to tell you that I was pretty surprised by the petition.
18 What it appears you're seeking is a, some sort of
19 injunction or restraining order. But that's not what
20 you've requested as outlined. It's titled Petition for
21 Pretrial Order, and I really was not able to find any legal
22 support for that under any statute or case law or anything
23 that I'm aware of. And so unfortunately, while I
24 understand how distressing the allegations or the stuff
25 that's posted on social media may be, Mr. Zweizig, and I'm

1 not trying to diminish how that may affect you or how it
2 makes you feel, there really isn't a legal basis for this
3 Court to basically, I don't know, muzzle Mr. Rote. There's
4 no legal support for this petition for pretrial order. And
5 the Court is bound by the law.

6 So Mr. Rote's denial is correct. He has a First
7 Amendment right, and there really isn't any evidence that
8 he is affecting any potential juror. And those are issues
9 that we will deal with when we start to select our jury.
10 We in fact, ask them questions, do you know any of the
11 parties? Do any of the parties look familiar? Do you know
12 any of the witnesses? Have you read anything about this
13 case? Do you have any particular feelings about this case?
14 Do you have any biases that would prevent you from being a
15 juror in this case? And we kind of examine all of those
16 things during the voir dire process. And we screen jurors.
17 Who admit now? I mean, obviously there are some jurors
18 that will never reveal their bias, but that's the role of a
19 good lawyer, is to dig into jurors and to find out, like
20 who is the most appropriate juror for this case and why,
21 and to reveal and uncover any particular bias or issue that
22 may make a potential juror not appropriate to sit on our
23 jury and weed them out. And you get to exclude so many
24 jurors through challenges.

25 So the petition for pretrial order is denied.

1 There is no basis for me to grant it. I will stress,
2 Mr. Rote, that we want to try this case in the courtroom
3 and not on social media, okay?

4 MR. ROTE: Understood, Your Honor.

5 THE COURT: All right. Now we're moving on to
6 the motion for summary judgment. And I did read the
7 response, the original motion for summary judgment, what
8 should be the amended but it's called Defendant's Reply in
9 Support of Motion for Summary Judgment Post-Discovery and
10 Defendant's Reply in Support of Motion for Summary
11 Judgment -- there's two titled that. I read all of those.
12 And so who wants to go first? Mr. Scissors?

13 MR. FOSTER: Your Honor, if it please the Court.

14 THE COURT: Oh, Mr. Foster's on.

15 MR. FOSTER: I represent Tanya Rote, as I said
16 earlier, and she's one of the movants seeking summary
17 judgment asking the Court to dismiss Zweizig's remaining
18 claim. The chief authorities in there are to the Sunriver
19 property.

20 THE COURT: Yep.

21 MR. FOSTER: The prior Judge, Judge Van Dyk, did
22 deny summary judgment twice in 2019 as to the Sunriver
23 property. And I don't know if Your Honor has had a chance
24 to review the transcripts, but they were provided into the
25 record by *Pereau* (phonetic), and I did review them. I

1 think they make it very clear that in the initial denial,
2 the Judge intended to allow the Plaintiffs to conduct its
3 summary. And that was the argument of Plaintiff's counsel
4 at that time, and the Judge's reasoning made that clear.

5 We also know that was his intent based on his
6 ruling on the second motion for summary judgment, where he
7 didn't chastise or penalize Mr. Rote at all or any of the
8 defendants for coming back with some new evidence that they
9 thought would be dispositive. And he said that there was a
10 reasonable basis, enough of a reasonable basis for the
11 motion, even though he disagreed with it and denied it.

12 THE COURT: Right.

13 MR. FOSTER: We are now past the close of
14 discovery, and it's almost two years from that second
15 summary judgment decision. So we also have a new judge in
16 Your Honor, and you have an opportunity to take a fresh
17 look at the case and decide whether it should proceed to
18 trial. This is also a way to narrow the issue and educate
19 the Court and prepare for trial. So there's a lot of value
20 in going through this summary judgment process, now that
21 we're at the close of discovery.

22 And there's certainly no rule that I'm aware of
23 that forbids a party from filing another motion for summary
24 judgment after the close of discovery based on new
25 argument, some new permutations, some new evidence, and

1 asking the Court to take a fresh look at it. In fact, we
2 know from the *Superbilt* case that trial judges have very
3 broad discretion to revisit any pretrial order and
4 reconsider it, change it, re-rule on it as part of their
5 role as a trial judge in deciding the case and bringing it
6 to conclusion.

7 So I would encourage the Court to see this
8 summary judgment proceeding as valuable to the Court and
9 the parties, and if in fact this Court's opinion is that
10 the movants have shown as a matter of law an undisputed
11 fact that they are entitled to summary judgment, then they
12 are in fact entitled to that, and they should receive
13 summary judgment, and I would be pleased to kind of explain
14 to Your Honor with just a few statutes and a few evidence
15 documents on the record why I think they are entitled to
16 summary judgment. Does Your Honor have any questions
17 before I proceed to do that?

18 THE COURT: The question that I have is what is
19 the new evidence that wasn't presented to my colleague that
20 would be the basis for summary judgment? Everybody has
21 outlined the appropriate standard, which is -- as you know,
22 it's pretty low. It's just no genuine issue. And while I
23 appreciate that my colleague was saying, hey, it's really
24 hard to get a summary judgment before you've even conducted
25 discovery, which it is, because you have no idea what

1 evidence the other side may produce, but it simply requires
2 an affidavit or a declaration saying, this is the evidence
3 that will be presented at trial to overcome a summary
4 judgment.

5 So what is the new evidence that would knock out
6 any material issue that a jury -- any material issue of
7 fact that a jury would observe? I mean, because what I've
8 seen from what Mr. Rote wrote was basically like, here's
9 their evidence, Judge; here's my evidence. We've done
10 discovery. They don't have anything better than before we
11 conducted discovery. Their evidence is still super weak,
12 and here's how strong my evidence is.

13 And so there is no way that when this goes to
14 trial, I'm not going to prevail. But as counsel knows,
15 that is not the standard. That simply means there is in
16 fact a material issue for a jury to decide. The jury's
17 role is to decide who has the stronger evidence and whether
18 the Plaintiff can meet their burden. That's not the
19 summary judgment time. Does that make sense, Mr. Rote,
20 what I'm saying? You're saying, Judge, here's their
21 evidence. Here's my evidence, which shows their claims are
22 nonsensical. There's no way their claims can go forward.
23 And now we've done discovery, now I'm able to see they
24 don't have anything extra to support their claim.

25 So my claims -- my evidence is still strong to

1 show their claims are ridiculous; therefore, I win summary
2 judgment. That's not the standard.

3 So my question to you, counsel is, knowing the
4 standard isn't really about looking up the evidence and
5 deciding, who's the stronger, what is the new evidence that
6 overcomes the no material issue for a jury?

7 MR. FOSTER: Thank you, Your Honor. It's an
8 excellent question. Your Honor said that if there's any
9 affidavit in opposition, then summary judgment should be
10 denied. That's sometimes true, but it's actually not
11 always the case. We know, for example, that construction
12 of a contract is part of the role of the judge, and it's
13 generally done at summary judgment, unless another party
14 can create a specific question of fact about the
15 authenticity of the contract or maybe a subsequent
16 modification or something like that. So the Court plays an
17 important gatekeeping role in deciding what, if any,
18 questions of fact must be tried.

19 THE COURT: Agreed.

20 MR. FOSTER: Now, as to the prior decision, just
21 to review what occurred in those proceedings, Judge Van Dyk
22 in the first proceeding, I believe that he was giving the
23 Plaintiff an opportunity to get evidence to oppose summary
24 judgment and therefore being very reluctant to grant it.
25 And he then said in the second hearing that there was a

1 question of fact about the intent to hinder, delay, or
2 defraud predators. He suggested that was the ultimate
3 question of fact that could not be decided as a matter of
4 law and undisputed fact of summary judgment.

5 But you notice, Your Honor, he did not -- at no
6 time did he say nobody should be coming to me again for
7 summary judgment after the close of discovery. At no time
8 did he say, I'm going to grant summary judgment to Mr.
9 Zweizig, dismissing an affirmative defense or deciding any
10 portion of the case and it's over. So it all remains open
11 for this Court to decide.

12 Now, I believe the question of was it already
13 decided or not should not be limited to is there any new
14 evidence? There is new evidence in the record now before
15 the court, and Mr. Rote detailed that. It does include
16 objective, authenticated, undisputed evidence, including
17 balance sheets, tax returns, documents that the response
18 treats fairly dismissively, but in fact they're highly
19 relevant, undisputed documents. And that's what makes for
20 a summary judgment determination. If the movant files
21 documents and doesn't just rely on their oral testimony
22 saying, take my word for it, I saw the light, it was red.
23 And if they have a photograph showing the light was red,
24 the Court should treat that as an undisputed fact unless
25 the other party meets their burden to show that there is a

1 genuine issue of material fact related to that objective
2 evidence.

3 So the burden shifting has occurred based on the
4 record before this Court, and it's sort of disappointing to
5 me, Your Honor, that in response did not actually respond
6 to the merits of the motion. And fortunately we have oral
7 argument so that Your Honor can hear from the parties and
8 any remaining arguments they have. But I'm here today to
9 help focus the Court on, of all the evidence presented --
10 and I agree that at some level when I review the motion and
11 the supporting materials, it does include a lot of
12 evidence. And some of it could probably be subject to
13 different inferences.

14 And I believe Mr. Rote, he wanted to make sure
15 that Your Honor, being -- not having heard the prior
16 motions, didn't get the benefit of a complete record. Then
17 there was a question by Judge Van Dyk about where was the
18 creed at? So it seemed that he was concerned about making
19 a decision on an incomplete record. But as an attorney
20 who's been practicing in civil litigation in Oregon for
21 about 15 years, I usually try by the time I get to oral
22 argument, to focus everybody in on just a couple of
23 documents

24 THE COURT: Right.

25 MR. FOSTER: So I'd like to do that. I'd like

1 you to just give me the opportunity, if I can, Your Honor,
2 to try to convince to you that this is a case that summary
3 judgment is appropriate.

4 THE COURT: Okay.

5 MR. FOSTER: And even if you disagree, I believe
6 this will be valuable because it will help frame the issues
7 for trial, Your Honor.

8 THE COURT: Agreed.

9 MR. FOSTER: So first let's start with Plaintiffs
10 Zweizig's claim. The first claim for relief is entitled
11 Fraudulent Transfer.

12 THE COURT: Right.

13 MR. FOSTER: And it very clearly and concisely
14 alleges that the center of her property was transferred by
15 and Tim Rote and NWH for "less than reasonably equivalent
16 value." So it acknowledges that is an essential element of
17 the claim. The second claim is entitled Insider Fraud, and
18 it alleges the property was transferred to Tanya Rote with
19 "actual intent to hinder, delay or defraud Plaintiff." And
20 so we'll see in a second, however, that even that claim of
21 actual intent, which may sound like a difficult standard to
22 decide at summary judgment because it's a subjective mental
23 state.

24 THE COURT: Uh-huh.

25 MR. FOSTER: But we'll see there's another

1 statute that actually expressly says that claim is subject
2 to an affirmative defense if there's evidence of reasonably
3 equivalent value that it transfer in good faith. And we're
4 going to see in in the documents, the clear, unequivocal
5 objective documents show as a matter of undisputed facts
6 that a reasonably equivalent value was conferred at the
7 time of the transfer of ownership of Tim Rote's interest in
8 the property, Tim Rote being the debtor. He's the relevant
9 debtor. So reasonably equivalent value was given in
10 exchange for the transfer of the property and it was all in
11 good faith. That all happened in 2012.

12 But again, Your Honor, I will focus us and now on
13 the exact statute and document at issue, and I believe
14 you're going to see, this motion and these arguments do not
15 depend on you taking Mr. Rote's oral testimony for what it
16 states. These arguments rely on objective documents, that
17 his authenticity is not in dispute.

18 THE COURT: Okay.

19 MR. FOSTER: The first relevant statute is ORS
20 95.240, based on two subsections. Each subsection uses the
21 term reasonably equivalent value. So whether Your Honor,
22 95.240(1) or (2), and Your Honor is opening the statute --
23 I really appreciate you doing that. I was wondering if
24 there was a way I could just show this on my screen, but
25 I'm not aware of that.

1 THE COURT: I'm with you.

2 MR. FOSTER: So I'm glad you're already clicking
3 on it. Excuse me, Your Honor?

4 THE COURT: I'm with you.

5 MR. FOSTER: Okay, so (1) says, in pertinent
6 part: "A transfer made by a debtor is fraudulent if the
7 debtor made the transfer or incurred the obligation without
8 receiving a reasonably equivalent value in exchange." So
9 this statute does not provide a claim against a transfer
10 that was for a reasonably equivalent value, period, end of
11 story. That's dispositive.

12 Let's look at subsection (2). This says in
13 pertinent part: "A transfer made by a debtor is fraudulent
14 if the transfer was made to an insider for other than a
15 present, reasonably equivalent value." And again, we see
16 it espouses an element is whether the transfer was for a
17 reasonably equivalent value.

18 Now, I will refer the Court to ORS 95.230(1).

19 THE COURT: Okay.

20 MR. FOSTER: It quotes the related statute. This
21 says -- and by the way, Your Honor, the complaint is not
22 cite-specific statutory claims for relief, so
23 unfortunately, it's necessary to kind of check each box
24 here.

25 This says in pertinent part: "A transfer made or

1 obligation incurred by a debtor is fraudulent if the debtor
2 made the transfer or incurred the obligation: (a) With
3 actual intent to hinder, delay, or defraud any creditor of
4 the debtor, or (b) Without receiving a reasonably
5 equivalent value in exchange." So we see two prongs. And
6 one of them, and it's an or, it's an or between them. But
7 now we'll look at ORS 95.270(1). This creates a defense --
8 against, that's 95.270(1), Your Honor.

9 THE COURT: Yep, right there.

10 MR. FOSTER: This expressly cross-references
11 95.230(1)(a), the intent to hinder, delay provision, and it
12 says that "a transfer is not voidable under ORS
13 95.230(1)(a) as against a person who took in good faith and
14 for a reasonably equivalent value."

15 Now, I'm going to show, Your Honor, I'm going to
16 intend to show that in 2012 when the property was
17 transferred from Tim Rote to Northwest Holding, which is
18 the only transfer from the debtor at issue here, Your
19 Honor, that the documents show as a matter of law and
20 undisputed facts, it was for reasonably equivalent value
21 and it was in good faith.

22 THE COURT: Okay.

23 MR. FOSTER: So let's run through the documents.
24 Mr. Zweizig contends the 2017 quitclaim recording from Tim
25 Rote to NWH was a fraudulent transfer. We know this from

1 their filing. The quitclaim states it was given for \$0 in
2 consideration. Now, that might suggest at face value that
3 NWH should not give reasonably equivalent value, that it
4 got something for nothing, or it got more than it paid for.
5 But we now have the documents showing in fact it was quite
6 the opposite.

7 I'm going to refer Your Honor to the 2012 asset
8 contribution agreement, which is attached to the
9 declaration in support of the motion. I'd be happy to give
10 Your Honor a minute to find that. If you want, I'll give a
11 moment to get reference to it.

12 THE COURT: Yes, looking for it.

13 MR. FOSTER: Okay, thank you, Your Honor.

14 THE COURT: It is not attached. Was it filed?

15 MR. FOSTER: So this was attached to the
16 declaration filed in support of the motion for summary
17 judgment as Exhibit 4, I believe -- Tim, is that correct?
18 Can I ask Tim to speak up here and just help me make sure
19 I'm referring to the right part of the record?

20 MR. ROTE: Your Honor, Exhibit 2 and Exhibit 3
21 are the contracts. The OTA is Exhibit 2, the contribution
22 agreement is Exhibit 3, and the 2012 tax return and balance
23 sheet is Exhibit 4, found --

24 THE COURT: I'm trying to find those under --
25 Sam, am I missing it? Do you see the exhibits?

1 MR. FOSTER: Your Honor, I pulled my copy up. It
2 was filed on January 25, and it's attached to the
3 declaration of Timothy Rote and Exhibit in Support of
4 Motion for Summary Judgment Post-Discovery.

5 THE COURT: Okay.

6 THE CLERK: The declaration, January 25, it's
7 taking forever to open.

8 THE COURT: Well, why is it not popping -- I have
9 the motion the 21st, then the 28th.

10 THE CLERK: Yeah, and then the motion for the
11 28th. Oh, it's like 276 pages.

12 MR. FOSTER: Your Honor, is there any way that I
13 can show my screen? I don't see that option in my menu.

14 THE COURT: We have been able -- see, I'm on --
15 oh, this one? That declaration?

16 THE CLERK: I don't think it's 2019.

17 THE COURT: Well, I don't see another one. We
18 have had the ability to share screen. I'm sorry, I am not
19 the tech person, so I can't instruct you on how that
20 happens.

21 THE CLERK: I can read to the presenter.

22 MR. FOSTER: I think it would also be reasonable
23 for me to just describe the evidence, because I've
24 simplified this down quite a bit.

25 THE COURT: All right.

1 MR. FOSTER: Your Honor will obviously have a
2 chance to review it --

3 THE COURT: Can you see it, Sam?

4 MR. FOSTER: -- at any time and --

5 THE CLERK: February 2021.

6 MR. FOSTER: You know, I know you've read the
7 paper, so you're no stranger to the record that I'm going
8 to give you. But I definitely simplified this down quite a
9 bit so that you don't have to go digging all around, at
10 tons of different documents. It's actually just a few
11 specific documents section.

12 THE COURT: Okay, found it -- sorry. Okay, so
13 there are quite a few pages. It is Exhibit number 2?

14 MR. FOSTER: So the declaration might be 276
15 pages long.

16 THE COURT: It is.

17 MR. FOSTER: But I will refer the Court to
18 Exhibit 3 to that, which --

19 THE COURT: And this is 2 -- okay.

20 MR. FOSTER: Here we go. So this begins on Page
21 31 of the declaration PDF, and it is labeled as Exhibit 3,
22 Page 1. There are some other exhibits based on it, Your
23 Honor, but they're on the furthest bottom right area. It
24 says Exhibit 3. And this is the asset contribution
25 agreement.

1 THE COURT: Okay. Yeah, there are lots of
2 Exhibit C Page --

3 MR. FOSTER: Yeah, I believe there are some prior
4 exhibits there, Your Honor. So again, the exhibit stamps
5 that correspond to the declaration are the ones on the very
6 bottom right-hand corner of the page.

7 THE COURT: Okay.

8 MR. FOSTER: And so if you look at those --
9 against, it's Page 31 of 276 of my PDF.

10 THE COURT: Okay, I'm there.

11 MR. FOSTER: And it's labeled Exhibit 3.

12 THE COURT: I'm there. Okay.

13 MR. FOSTER: Okay, so if you look down at Article
14 1, Section 1.1, Contribution of Assets.

15 THE COURT: Yup.

16 MR. FOSTER: This says "(Indiscernible) that Tim
17 and Tanya Rote, TCR and TR, agree to and do hereby
18 contribute, transfer undersign to NWH, and NWH does accept
19 all of TCR's and TR's right, title and interest as of the
20 closing date in and to the assets of Sunriver set forth on
21 Schedule 1.1."

22 So what we have here is a contract that transfers
23 rights. As we look down at Schedule 1.1, it is the first
24 page after this contract. It is entitled "Buyers final
25 closing statement." And down on the bottom right corner,

1 written in pen is the number 1.1. And it is labeled
2 Exhibit 3 Page 6. There we see the buyer's final closing
3 statement identifying the assets by its address in
4 Sunriver. This is the Sunriver property. It lists the
5 purchase price paid by Tim Rote. And so what this does is
6 it clearly shows Tim was transferring all right, title and
7 interest to NWH, in the property. Now, these documents are
8 predicated, that's not in dispute, and it's up to the Court
9 to construe the contract, of the legal determination.

10 THE COURT: But -- okay, so here's my question.

11 MR. FOSTER: Okay.

12 THE COURT: Isn't this --

13 MR. FOSTER: I want to pause in case you had a
14 question, okay.

15 THE COURT: So isn't --

16 MR. FOSTER: Yeah, we --

17 THE COURT: Is it -- I do have a question --
18 isn't this interpretation of this very issue a question of
19 material fact? Isn't it the jurors' role to decide whether
20 or not this is a fraudulent transfer? That's the whole
21 question. They're to look at these documents and they're
22 to make a decision on whether the Plaintiff has met their
23 burden. It's not my role to look at the documents and say,
24 well, they look valid. Because they do; I'm not disputing
25 that at all. But it is not my role at a summary judgment

1 to say, ah, there's nothing for the jury to decide, because
2 in fact you're proving the very point that there is
3 something for the jury to decide. They have to take a look
4 at all of these documents, and they have to decide, has the
5 Plaintiff met their burden? Was this a fraudulent
6 transfer? Was it for zero dollars, or was it for
7 \$530,165.96? That's the role of the jury, is it not?

8 MR. FOSTER: Your Honor, if the case proceeds to
9 trial, the jury will be instructed as to certain undisputed
10 issue and will be asked to decide the issues of fact about
11 if there's a genuine issue of material fact.

12 THE COURT: Right.

13 MR. FOSTER: Summary judgment requires the
14 opposing party to actually identify a genuine issue of
15 material fact. If the only witness says the light was red
16 and the movant doesn't have any evidence otherwise, it is
17 not necessary to impanel a jury to decide whether that is
18 what happened or not. Okay, that is an undisputed fact.
19 Now --

20 THE COURT: I agree with you.

21 MR. FOSTER: There may be a case where that
22 witness is so impeachable that the jury might disbelieve
23 them. And so I would just go one step further, and
24 distinguish this from that sort of case, because without
25 asking Your Honor to decide whether anybody's telling the

1 truth, we're asking Your Honor to interpret the plain
2 language in a contract, and that is part of the role of the
3 judge, even if we go to a jury trial. And it's not clear
4 to me at all that this will be a jury trial. I didn't see
5 any request for a jury trial in the pleadings.

6 THE COURT: That's my understanding --

7 MR. FOSTER: And --

8 THE COURT: -- is that this was a jury trial.

9 MR. FOSTER: Well, okay, I guess that remains to
10 be determined, Your Honor, but the fact -- the only thing
11 that remains, summary judgment is determined based on the
12 law and whether there are any genuine issues of material
13 fact.

14 THE COURT: Right.

15 MR. FOSTER: So I would challenge my esteemed
16 colleague, Mr. Albertazzi, to tell us, what is the dispute
17 about whether this contract did in fact transfer ownership
18 of the property in 2012?

19 THE COURT: Okay, let's --

20 MR. FOSTER: Now, we know that --

21 THE COURT: Let's let him answer.

22 MR. FOSTER: -- the quitclaim was recorded in
23 2017. That's another undisputed fact.

24 THE COURT: Mr. Albertazzi?

25 MR. FOSTER: So there are many undisputed facts

1 in this case, Your Honor, and there's no need to impanel a
2 jury if those facts, combined with the applicable law,
3 decide the case.

4 THE COURT: And I would agree with you,
5 Mr. Foster, but what I have before me right now, I'm seeing
6 that it can be interpreted either way, and if it can be
7 interpreted either way, there is an issue of fact. So
8 let's have Mr. Albertazzi speak to that very question that
9 you just posed to him. Mr. Albertazzi?

10 MR. ALBERTAZZI: Yes, Your Honor. There's a
11 reason that -- when Judge Van Dyk heard this previously, he
12 was looking at the declaration of Tanya Basauri that was
13 filed, where in her declaration, she provided a copy of the
14 general warranty deed, which is recorded with Deschutes
15 County, on -- this was recorded 8/2 of '18, transferring
16 the summary of property from Northwest Property to Tanya
17 Rote for \$0.0. That was the document that he looked at.

18 I believe he also looked at the transfer
19 agreement that Mr. Foster was representing. So he looked
20 at those things, and he said, well, there's a question of
21 material fact here. Because here on one side I've got a
22 deed, and on the other side I've got this agreement that
23 happened. So the fact there, it seems like the jury could
24 look at that agreement, and they could look at this deed,
25 and the jury would have to decide, well, which one is it?

1 Because it says Mr. Rote signed the deed.

2 THE COURT: That's where I'm at, Mr. Foster.

3 MR. ALBERTAZZI: And it said general
4 consideration, so --

5 THE COURT: That's exactly where I'm at,
6 Mr. Foster, that I have these competing documents. And so
7 I have this issue. For a summary judgment, it has to be no
8 issue, not, eh -- it can be interpreted either way. And so
9 I'm tending to side with Mr. Albertazzi here. We have
10 these valid, legal documents; we have this declaration that
11 compete. And so that is going to be an issue that a jury
12 is going to have to decide. That's material to this claim.
13 I'm not speaking to how strong it is or either document,
14 but the whole point is there does appear to be a material
15 issue that a jury would have to decide, and so that gets us
16 past summary judgment on that part, the fraudulent
17 transfer.

18 So unless you all have something else, I think we
19 should move to the insider fraud. And I don't know how I'm
20 going to be able to look at the intent of Mr. Rote by
21 documents, but --

22 MR. FOSTER: Well, Your Honor, let me just make
23 sure I make my argument clear and that you've had a chance
24 to fully consider it.

25 THE COURT: Okay.

1 MR. FOSTER: I have not heard any argument from
2 Mr. Albertazzi -- I challenged him, point blank, to
3 identify evidence that the 2012 contract did not in fact do
4 what it said. And those are words of meaning. He doesn't
5 say anything authentic. He hasn't said it wasn't from
6 2012. He hasn't said any of that. He doesn't have any
7 evidence challenging it. In a contract case, it is the
8 role of a judge to instruct the jury as to the meaning of
9 the contract and what it says. So the jury will absolutely
10 not be, and it should not be deciding what the 2012
11 contract says or what that means or what it did. We know
12 here that the contract said that Tim Rote transferred all
13 right, title and interest to NWH.

14 THE COURT: That's --

15 MR. FOSTER: You don't need to balance any
16 evidence. It is very unequivocal on its face. That is for
17 the Court to consider. So I would suggest that Your Honor
18 would not be asking the jury to decide whether that
19 contract transferred the property. That's the -- that's
20 the judge's role to (indiscernible) the contract unless
21 there's a very special case in which the -- the nonmoving
22 party, the opposing -- the opponent of apposition creates
23 some specific issue of fact about that contract. It's
24 authenticity or whether there's some modification of it
25 later and there's been no argument of that here, Your

1 Honor.

2 THE COURT: I understand that's your --

3 MR. FOSTER: And -- and I --

4 THE COURT: I understand that's your position,
5 Mr. Foster but -- and I'll have Mr. Albertazzi speak for
6 himself.

7 MR. FOSTER: Your Honor, I can't -- I'm sorry,
8 Your Honor, I can't hear you.

9 THE COURT: I said I understand. Is that better?

10 MR. FOSTER: Yeah, thank you.

11 THE COURT: No? Yes?

12 UNIDENTIFIED FEMALE SPEAKER: Yes.

13 THE COURT: You -- can you hear guys hear me?
14 Okay. I said I understand that your position is that there
15 is a contract and this is a contracts case. As I
16 understand what Mr. Albertazzi just said. This is not an
17 interpretation of a 2012 contract. That there are
18 different documents out there that lead the issue for the
19 jury to decide is not interpreting a 2012 contract. But,
20 in fact, interpreting whether there was a fraudulent
21 transfer and that there are very different documents.
22 There are several, at least two documents that deal with
23 the issue of whether or not this was a fraudulent transfer.

24 There's a contract. There's a declaration and
25 there are several other documents. And so it's not simply

1 just interpreting whether the 2012 contract is valid or not
2 but it's, in fact, deciding was this transfer valid or
3 fraudulent.

4 Mr. Albertazzi, I'll have you speak to the 2012
5 contract if you could, please.

6 MR. ALBERTAZZI: Yes. Well, I -- you know, this
7 is a contract that Mr. Rote created on his own with -- with
8 Mrs. Rote. How would we know -- how would we be able to
9 tell or have evidence that that's a fake? Where I could
10 come in and say, oh, no, I have a witness that was standing
11 there and you really didn't sign that or this is an
12 inauthentic document.

13 Of course, there's no way to prove that. Well,
14 that's why the statute it talks about a transfer. What is
15 a transfer under 95.200? A transfer is every mode of
16 disposing or parting with an asset or an interest in an
17 asset. So perhaps the contract that Mr. Foster's been
18 talking about is a mode. Well, certainly another mode is
19 recording a deed. So it really doesn't matter that I --
20 that -- that I could come forward with evidence and say
21 that contract that Mr. Rote submitted to the Court is a
22 fake and it didn't really happen. That's -- that -- that's
23 one point I wanted to make.

24 The other is, for purposes of fraudulent transfer
25 for the timing of when that transfer happens, specifically,

1 in 95.250, it talks about when a transfer is made with
2 respect to real estate it -- it is -- when it is perfected.
3 Meaning when it is recorded. So why are we talking about
4 this unrecorded private agreement between the spouses? Has
5 nothing to do with this case.

6 MR. FOSTER: Your -- Your Honor, if I may respond
7 to that?

8 THE COURT: Absolutely.

9 MR. FOSTER: This is why I started out by going
10 over the statute that show that the legislature did not
11 intend the Fraudulent Transfer Act to be brought against a
12 transfer for recent equivalent value. Okay. We -- we went
13 over four different prongs of the statute. Three of them,
14 that was the dispositive issue. The other one it was that
15 plus good faith and I'll -- I'll be happy to address that
16 additional good faith element based on the undisputed fact.

17 It's interesting, however, that -- and so, Your
18 Honor, that's why the 2012 contract is of the utmost
19 importance because it shows reasonably equivalent value.
20 It documents that. And it does that where it says that Mr.
21 Rote, if I may refer you to the specific provision, under
22 consideration, Section 2.1 says, "NWH agrees to and does
23 hereby accept and assume -- assume liabilities and shall
24 credit to TCR, that's Tim Rote his equity in the center of
25 her property."

1 So he had a contractual right. He traded his
2 equity in the property. He traded a property subject to
3 any liability in exchange for a contractual right to have
4 credited to his capital account in NHW that exact amount
5 dollar for dollar.

6 So if that isn't as a matter of law reasonably
7 equivalent value, I don't know what is. Trading a dollar
8 for a dollar is reasonably equivalent value. It says right
9 there. "Shall credit to TCR his equity." It said he had a
10 right to that.

11 THE COURT: Okay. Where does it say the equity?
12 It says contribution of assets and assumption of liability.

13 MR. FOSTER: Section -- Section 2.1
14 consideration, Your Honor.

15 THE COURT: Oh. 2 point.

16 MR. FOSTER: The very bottom line of the page.
17 Exhibit 3, page 1.

18 THE COURT: Yep. I'm there.

19 MR. FOSTER: It says, "shall credit to TCR his
20 equity in the -- in the center of her property." And so
21 know when the -- so -- so I think what this shows is that
22 the 2012 contract not only was a transfer, but it also gave
23 reasonably equivalent value. It gave up a right. It gave
24 back a right and the exact same monetary value.

25 Now Mr. Albertazzi, argued that he doesn't have

1 any evidence that this was an inauthentic 2012 contract and
2 I believe that is a -- is an admission against his client's
3 interest in this proceeding because they're the nonmovant.
4 If they think there's an issue about authenticity, it's
5 their burden to show that. He said that he doesn't have
6 that evidence. We've been through discovery.

7 So the Court will -- is duty bound I respectfully
8 submit to conclude that this contract for summary judgment
9 purposes is authentic. That it's not -- there's no genuine
10 issue about the document's authenticity.

11 Now I'd like to proceed to look at the remainder
12 of this analysis, Your Honor.

13 THE COURT: Okay.

14 MR. FOSTER: What about the 2017 quitclaim? We
15 know that does, in fact, say (indiscernible) and
16 consideration. First of all, invalidating a valueless
17 transfer would be a meaningless gesture and that there was
18 no windfall to Northwest Holding in 2017. Why? Because
19 we've just established it already had ownership of the
20 property by right under the 2012 contract. And it gave
21 equity in -- it gave capital account credit in exchange for
22 that equity. The -- you know, what did Mr. Rote have at
23 the time of the 2017 quitclaim? He had nothing of value.
24 That is not based on a he said/she said proposition. It's
25 based on the plain terms of the 2012 contract.

1 He gave up all his right, title and interest
2 subject to the liabilities associated with the property.
3 And he gave up everything he had in Northwest Holding and
4 in exchange he got the value of his equity in capital
5 account. So what did he have in 2017? It's
6 (indiscernible) with law that a quitclaim does not
7 represent to the receiver -- to the transferee that
8 anything of value is being exchanged. And in this case, we
9 have proof that that, in fact, did not happen.

10 That there was no value given with the quitclaim.
11 It was simply a recording -- now, Mr. Albertazzi's very
12 astute in point out that the statute dates the date of the
13 transfer to the date of perfection and the public record.

14 THE COURT: Uh-huh.

15 MR. FOSTER: But that's only for statute of
16 limitations purposes, Your Honor. That is very clear in
17 the statute he -- he quoted and cited. For statute of
18 limitations purposes, the date of the transfer is the 2017
19 quitclaim deed. But for determining whether there is
20 reasonably equivalent value as a matter of law and
21 undisputed fact, you look at and construe the 2012
22 contract.

23 So what about the question of good faith? Well,
24 the -- as -- as the contribution agreement says that
25 Northwest Holding would take the property subject to

1 liability. And, in fact, we know that it took the property
2 subject to the mortgage that was on the property. And
3 that's shown throughout additional documents submitted into
4 the record, balance sheet, tax return. Again, to challenge
5 my colleague, Mr. Albertazzi to point to a piece of
6 evidence in the record that calls into question whether
7 Northwest Holding actually assumed the liability of the
8 mortgage.

9 And if it did as we've shown then the transfer in
10 2012 could not have been to hinder, delay or frustrate or
11 defraud creditors. Instead, it was subject to the known
12 liability. Is the transfer subject to creditor? Subject
13 to the mortgage that was placed on the property and then
14 paid by Northwest Holding.

15 The mortgage was on the books for years before
16 Mr. Zweizig brought a claim against Tim Rote. And this is
17 another reason why we can conclude that there was good
18 faith. Based on the 2012 contract, it clearly states its
19 purpose was to set up a rental business at a property that
20 Tanya would operate and that Tim would -- where Tim would
21 own the property. And it does that on -- it does that in
22 clear terms and it does that with respect to the mortgage.

23 And it even says, Your Honor, this is very true.
24 It even said that Tim Rote has a duty to quitclaim the
25 property in the future. And I would refer Your Honor to

1 Section 2.3. This is one of the last critical statute --
2 or sorry, contractual provisions I'd ask the Court to -- to
3 consider in deciding this motion.

4 THE COURT: And that's --

5 MR. FOSTER: That the two points that he clearly
6 says in the last sentence that TRC agrees -- that Tim Rote
7 agrees to quitclaim title to NWH if NWH is unable to
8 refinance the assumed debt within three years of the date
9 of agreement. What's that saying is if unless NWH has
10 already refinanced and -- and cleared the mortgage and put
11 title into its name in the public record, then Tim Rote
12 will quitclaim the property to it after three years.

13 That agreement and that right for NWH to received
14 that quitclaim existed over three years before Mr. Zweizig
15 brought him claim against Tim Rote and almost six years
16 before he obtained his judgment. So how could -- where's
17 the evidence, Your Honor. Again, my -- the nonmovant.
18 Where is the evidence creating a genuine issue of material
19 fact as to whether that promise to quitclaim was intended
20 to frustrate, hinder, delay or defraud a creditor, any
21 creditor?

22 THE COURT: Let's --

23 MR. FOSTER: What creditor was there? What
24 creditor was identified as of 2012 that was -- that was
25 defrauded by this, Your Honor.

1 THE COURT: Okay.

2 MR. FOSTER: It was absolutely in good faith.
3 There's no evidence to dispute that.

4 THE COURT: I would like to have Mister --

5 MR. FOSTER: Now, what about the 28 --

6 THE COURT: I would like to give Mr. Albertazzi
7 the opportunity to respond to that. Mr. Albertazzi?

8 MR. ALBERTAZZI: Okay. So also in Ms. -- Ms.
9 Basauri's declaration in the prior summary judgment motion,
10 she submitted an online listing for the Sunriver property
11 showing that it had been recently listed for \$850,000. Had
12 a mortgage of about 300 -- \$400,000. So there was
13 significant value there.

14 Now -- and there was a significant amount of
15 equity. So I have that. I also have Mr. Zweizig's
16 declaration about when he got his judgment and how long he
17 had been into litigation with Mr. Rote. So those two
18 things together, certainly there was a huge amount of value
19 transferred with that -- with that quitclaim deed. I mean,
20 whether there was a contract before, the fact is that until
21 that deed was recorded, it really didn't cut off the rights
22 of creditors.

23 When it was recorded, there was a tremendous
24 amount of value that went there and there was no -- there
25 was no declaration or no affidavit that, oh, I gave more

1 value besides that. So once again, this is all the same
2 evidence that Judge Van Dyk looked at these documents. So,
3 you know, I -- I -- I think it's just an issue of fact for
4 the jury on -- on both of these. Whether there was actual
5 fraud, whether there was intent or on the constructive
6 fraud claim. So I don't have anything to add besides that.

7 THE COURT: Well, here's the -- here's the issue
8 that I'm having. On the one hand, there is no motion for
9 reconsideration in Oregon law. You all know that. I am
10 not going to go line by line through the transcript of the
11 hearing that occurred before my colleague to determine if
12 the exact same evidence and the exact same arguments were
13 presented to him and therefore that is what he used to make
14 his overall ruling. That would be inappropriate. So what
15 I am left with is at this point trying to determine based
16 on what has been presented to me, this Court, not what was
17 presented to Judge Van Dyk, whether there is a material
18 issue of genuine fact.

19 I have one attorney arguing there is this
20 contract. There is no dispute. This is a valid contract.
21 This contract shows clearly that there was value. This
22 contract shows clearly that there was an agreement to file
23 a quitclaim deed within three years. Long before plaintiff
24 received his judgment. So therefore, Judge, there's no
25 possibility that this could be fraud.

1 And now I'm asking you, Mr. Albertazzi, what is
2 there against that argument that this could be fraud. If I
3 take this contract as authentic and I haven't heard
4 anything otherwise, then what evidence is there at all that
5 would go to a jury to say, okay, despite this contract,
6 there is still an issue of material -- a material element
7 dealing with whether or not this transfer was made
8 fraudulently to frustrate and everything else that the
9 statute requires.

10 What do I have? What am I left with?

11 MR. ALBERTAZZI: Well, I would -- I would respond
12 to that. I mean, we have the recording of the subsequent
13 date.

14 THE COURT: That said 00.

15 MR. ALBERTAZZI: We -- I think that the jury
16 could certainly make an inference that if you had this
17 contract going way back when and the deed was never
18 recorded that, you know, perhaps that wasn't a real
19 contract. I mean, that's certainly a reasonable inference
20 the jury could make.

21 The other would be the jury could take a look at
22 the circumstances of all the litigation and when that --
23 when the quitclaim deed was recorded. Those two things put
24 together could certainly lead you -- lead a jury to
25 believe, well, you know, I know that the plaintiff can't

1 prove that that contract is a fake and that it was
2 contrived just for these purposes. But looking at the
3 circumstances we can draw a reasonable inference that
4 perhaps it was because of the timing of what happened here
5 and because of the value of the property at the time the
6 quitclaim deed was recorded.

7 When people bring fraudulent transfer cases, of
8 course, they look at the public records.

9 THE COURT: Right.

10 MR. ALBERTAZZI: And to determine whether they
11 can do that. And if -- I mean, that's -- that's what
12 happened here. So I -- I think there's ample evidence.
13 That this is a matter for the jury to determine.

14 THE COURT: And when you say ample evidence,
15 okay, talk to me like I'm a juror. Well, how is the timing
16 important? If this contract says within three years if
17 they are -- TCR agrees that if the quitclaim title to NWH
18 is unable to refinance the assumed debt within three years
19 of the date of this agreement that they will give them a
20 quitclaim title.

21 So this -- now, obviously, I don't know when this
22 is drawn up. Are you going to -- is there going to be
23 someone that's going to come in that is going to look at
24 this contract and look at the date where it's signed
25 10/31/12 and say based on the ink and the paper, it's clear

1 to me this really wasn't signed back -- it says 2012 but it
2 was really signed in 2019, Judge, and we know that because
3 it was printed on this type of paper and this type of paper
4 was only available as late or as early as 2019?

5 Or we can tell by deciphering the signatures and
6 the ink. And by the ink we can tell that this was really
7 signed in 2019 even though it says 2012. Or someone that's
8 going to say, you know, I'm very good friends with the
9 Rotes and we had many discussions over dinner and they
10 talked about when they were going to make this contract and
11 say that it was signed in 2 -- like what evidence is there
12 that if one takes this contract as authentic and true that
13 it's still a fraudulent transfer because this contract was
14 made for the sole purpose of fraud and not at a -- for a
15 reasonable value?

16 MR. ALBERTAZZI: Well, I think this came up when
17 I took the -- the Rotes' depositions where I specifically
18 asked did you tell anybody about this contract. Does
19 anybody know about it? Was it provided to anybody? And
20 yes, that's the type of evidence that we would bring up.
21 You know, of if -- if -- if you did this, and did it way
22 back when, was anybody else there. Well, no, there wasn't.
23 Does anybody else know about it? Did you tell anybody else
24 about it? I mean, somebody could -- it -- with -- with
25 something like this, if -- if the Court would grant summary

1 judgment because I can't prove that a document that's been
2 presented was signed on that date and is really an
3 authentic document and not just something contrived post-
4 litigation, I mean, that's -- there's no way anybody could
5 prevail on a fraudulent transfer case.

6 Somebody could just after the fact draw up this
7 document. They will see here it is. We had this
8 agreement. It was way back when. And there is value and
9 you can't prove it's not authentic. That's not the way it
10 works. We -- we have other evidence here and -- and all of
11 that comes in.

12 THE COURT: And that -- I guess that's what I'm
13 getting to. What is the other evidence other than when it
14 was recorded the quitclaim deed that says this is enough
15 that a jury can make that determination on whether there is
16 a material issue as to whether this was a fraudulent
17 transfer even if --

18 MR. ALBERTAZZI: I think just --

19 THE COURT: -- I take this as authentic.

20 MR. ALBERTAZZI: Right. Just -- just the delay
21 in actually transferring the title, there's certainly an
22 inference that could be had there. There -- why didn't the
23 quitclaim deed get recorded? Well, he forgot about it.
24 That's what he said in his deposition or it was -- it
25 escaped him. Well, why --

1 THE COURT: And when was it recorded? You all
2 tell me.

3 MR. ALBERTAZZI: Let me see.

4 THE COURT: Mr. Rote, are you not joining us
5 anymore visually? Did we lose Mr. Rote? Oh.

6 MR. ROTE: Nope, I'm here, Your Honor.

7 THE COURT: Okay.

8 MR. ROTE: I -- I was afraid you might catch me
9 drinking a cup of coffee so I went off video.

10 THE COURT: Ah. See if we were in court, you
11 wouldn't get that benefit of drinking coffee and watching
12 TV.

13 MR. ROTE: I -- I -- I know. I know, Your Honor.
14 I'm watching not TV. I'm paying (indiscernible). April
15 2017 was when the quitclaim was -- was transferred and --

16 THE COURT: Thank you.

17 MR. ROTE: -- the house was -- yeah.

18 THE COURT: Okay.

19 MR. ROTE: House was put up for sale.

20 THE COURT: And when was the judgment? When did
21 Mr. --

22 MR. ROTE: Judgment was November of 2018.

23 THE COURT: Okay. So it was still before the --
24 the judge. Oh, but when -- let's see. You all were in
25 litigation for quite some time but you didn't get the

1 judgment until November of '18.

2 MR. FOSTER: Your Honor?

3 THE COURT: Yes.

4 MR. FOSTER: I -- I'm very sorry. Can I request
5 a short recess? Is that -- is that possible?

6 THE COURT: Certainly.

7 MR. FOSTER: Would you mind?

8 THE COURT: How long do we need? Five, ten
9 minutes?

10 MR. FOSTER: I -- I think ten minutes would
11 probably be fine. I would appreciate it.

12 THE COURT: All right. Everybody we're going to
13 be in recess for ten minutes. Take a comfort break. Now,
14 you can drink your coffee, Mr. Rote.

15 MR. ROTE: Thank you, Your Honor.

16 (Recess taken from 10:14 a.m. to 10:29 a.m.)

17 THE COURT: Okay. We're back on the record,
18 19CV0157, Zweizig v. Rote and Northwest Holding, LLC. And
19 as we took a comfort break, the dates that were provided by
20 Mr. Rote were that it was recorded April 2017 and the
21 judgment was granted November of 2018.

22 MR. ALBERTAZZI: Right. Your Honor, I believe I
23 was speaking and I wanted to just continue.

24 THE COURT: Yep.

25 MR. ALBERTAZZI: Okay.

1 So with regards to the agreement over the break,
2 this is called asset contribution agreement, and I was
3 trying to find where this first appeared in the record and
4 it appeared in the amended declaration of Timothy Rote with
5 supporting documents. It was filed in the court May 5th
6 and this was -- what had happened is, as I understand it, I
7 was not the attorney there.

8 Mr. Rote had lost on summary judgment. He then
9 comes back and says, oh wait a minute, I've got new
10 evidence, and he submits this declaration and attached to
11 it is the asset contribution agreement, which starts at
12 page 8 of that document.

13 As far as I know, I don't -- I didn't review the
14 transcripts, but I know Judge Van Dyk declined, or denied
15 this motion based on new evidence. So I wanted to make
16 sure the Court understood that, that we're not talking
17 about anything new here.

18 I think what -- what Mr. Foster is saying is,
19 well you haven't been able to dispute the authenticity of
20 this document, and --

21 THE COURT: He'd definitely saying that.

22 MR. ALBERTAZZI: He's saying that. And I'm
23 saying that, well let's say that I cannot prove that this
24 is a fake or it's contrived. Well, I still think the jury
25 could infer with the sequence of events in the subsequent

1 recording, that no, this is not dispositive of the
2 transfer.

3 And you know, frankly that's -- that's what
4 the -- that's what Judge Van Dyk said also. He said, you
5 know, get some more discovery, or get something different.
6 For instance, I mean maybe there was actual money that
7 changed hands or something.

8 THE COURT: Right.

9 MR. ALBERTAZZI: Maybe there was a document where
10 they could prove this happened, but something that, you
11 know, but it didn't happen. And I mean when we're dealing
12 with intent and fraudulent transfers, of course -- you
13 know, it's -- we think, or Plaintiff believes, based on the
14 facts and circumstances and the timeline, that a jury could
15 certainly come to the conclusion that, yes this was a
16 fraudulent transfer.

17 THE COURT: And that's why I asked about the
18 dates because I would agree with you, if -- if we have a
19 trans -- if we have a judgment that is 15, and then we have
20 a transfer that is after judgment, I think hands down no
21 issue.

22 But I have -- that's why I asked about the dates.
23 But I have --

24 MR. ALBERTAZZI: Oh --

25 THE COURT: -- this recording in '17 and I have

1 this judgment that isn't until November of '18, way beyond
2 12 months after. So --

3 MR. ALBERTAZZI: Right.

4 THE COURT: -- when you said -- earlier you said,
5 well judge a jury could infer based on the timing that
6 there's still something fraudulent about this, that's why I
7 asked about the dates.

8 MR. ALBERTAZZI: Oh --

9 THE COURT: Based on the dates --

10 MR. ALBERTAZZI: Okay, I --

11 THE COURT: -- how could a jury infer that the
12 transfer was fraudulent based on this timing?

13 MR. ALBERTAZZI: Well, I guess -- and I could
14 respond to that, that the date the judgment was entered was
15 very long after the jury rendered its verdict and everybody
16 knew what was going on.

17 And I wanted to pull up -- I'm going to ask --
18 Mr. Zweizig had -- there was a declaration here and I'm
19 trying to pull that up -- in the initial motion, in
20 response to the initial motion where -- where he talks
21 about that.

22 THE COURT: Can anyone tell me the date that the
23 jury rendered the verdict?

24 MR. ALBERTAZZI: Mr. Zweizig if you know that
25 offhand, please let us know.

1 MR. ZWEIZIG: I'm looking around Your Honor. I
2 don't know that offhand, but I definitely want to say that
3 I will be offering testimony during this trial, and I think
4 we've talked about an awful lot of things here, and this is
5 sounding like it's a trial to me, and I would request that
6 the Court definitely give me, you know, a jury trial on
7 this.

8 There's an awful lot of evidence, you know, that
9 we do have, and I don't know if it's incredibly to have us
10 proffer that evidence now, giving Mr. Rote a possible
11 chance to fabricate more evidence --

12 THE COURT: And I completely --

13 MR. ZWEIZIG: And I believe -- and without making
14 an accusation, I will tell you that my belief is that that
15 is going on, you know, that's all I'll say about that.

16 THE COURT: And Mr. Zweizig, I understand what
17 you're saying, and a summary judgment does not require that
18 you show your hand, and I'm certainly not asking for that.

19 The problem that I'm having is that your lawyer
20 has to show that there is a material issue of fact for a
21 jury and right now what I have -- I started this morning
22 thinking, okay there must be -- I don't know all of the
23 evidence, you all know this case much better than me, and
24 I'm not supposed to know all the evidence. This is, I
25 understand, going to be a jury trial.

1 At this stage, all I'm determining is if there's
2 something to go to this jury, and when I started this
3 hearing, I understood that there were lots of contrary
4 documents, and if there are contrary documents to the very
5 issues of the case, the things that you all are asking the
6 jurors to decide, the material issues, then this goes to a
7 jury, summary judgment is denied.

8 But my role here is a gatekeeper and now I'm
9 understanding, at least we're still on the very first
10 issue, which is fraudulent transfer. You know how your
11 complaint has like several different -- so we're still on
12 the first issue.

13 MR. ZWEIZIG: Understood.

14 THE COURT: So as I understand it, as we've
15 gotten through the morning, they're -- I'm learning that
16 there really aren't contrary documents on this issue of
17 fraudulent transfer.

18 The argument that I've heard so far this morning
19 is, there is a contract, there is no dispute from anyone
20 that this is a valid contract. And under this contract
21 there was valuable consideration in that the date of the
22 transfer was long before your judgment.

23 And so now I'm left with -- I'm not asking your
24 lawyer to sh -- you know, show his hand and tell me all,
25 everything that he has, so that the other side can prepare,

1 certainly not. I'm just looking for what material issue is
2 there, if I take this contract as valid, and that's why I
3 was asking about the date, because your lawyer's response
4 was, "Well Judge, a jury can infer, based on the timing,
5 that this is fraudulent."

6 And so I said okay when is the timing; when was
7 it recorded; when did you get your judgment; and if you got
8 your judgment long after it was recorded, but that's --
9 right now that's my next question is when did the jury
10 render its verdict. Because if it was transferred after
11 the jury rendered its verdict then I would agree with your
12 lawyer; there could be an inference and there would be an
13 issue of material facts.

14 So can someone please tell me the date that the
15 jury rendered the verdict?

16 MR. ALBERTAZZI: So Your Honor, I can tell you
17 that the complaint was filed in federal court from which
18 this judgment comes on December 24th of 2015.

19 THE COURT: Right.

20 MR. ALBERTAZZI: Now looking at -- the jury found
21 for Mr. Zweizig on January 17th, 2018; that's on his
22 declaration.

23 THE COURT: Okay. April --

24 MR. ALBERTAZZI: In our -- and in our response to
25 this summary judgment motion, because we thought it was the

1 same thing, we incorporated, you know, the previous
2 materials that had been filed.

3 So the judgment, and I don't know why it would
4 take so long it -- that it would take literally a year, or
5 more than a year. Well, oh no, not quite a year --

6 THE COURT: Eleven months.

7 MR. ALBERTAZZI: -- to get a judgment put in.

8 MR. ZWEIZIG: There were a lot of motions filed
9 in the case, you know, by Mr. Rote, and it held up some
10 things in order to get that done, is my suspicion about why
11 that is.

12 I mean I have, you know, (indiscernible), you
13 know, material things that I think would be questions of
14 fact, should I be mentioning them? I will if you want me
15 to.

16 THE COURT: Well, I'm not trying -- I know that
17 you have counsel, and so hopefully you and your lawyer have
18 talked about what it is you want to share and what it is
19 you don't want to share, but we're trying to get past
20 summary judgment here, and for you to get past summary
21 judgment you have to show that there are material issues of
22 fact, something for a jury to consider on the very issues
23 that you are alleging.

24 And so on the fraudulent transfer, knowing that
25 the verdict was rendered January of '18, I still have the

1 recording April of '17, but I have the lawsuit started back
2 in 2015, a jury could look at the timing of the transfer,
3 the only problem -- the only problem that you have is we
4 still have a contract from 2012.

5 So in terms of being able to infer from the
6 timing whether there is a fraudulent transfer, that's very,
7 very, very light, but that would be -- a jury could infer
8 that -- I'm -- you know, that's going to be tough at a
9 trial --

10 MR. ZWEIZIG: Yeah, (indiscernible) -- I'm sorry,
11 Your Honor. I did not mean to cut you off.

12 THE COURT: No, go ahead.

13 MR. ZWEIZIG: We -- I guess -- evidence -- I
14 have evidence to support that for sure.

15 THE COURT: Okay.

16 MR. ZWEIZIG: Mr. Rote tried to use the property
17 to gain a loan at the time he was not supposed to be in
18 control of it and we have documentation that should satisfy
19 Mr. Foster's red-light issue on that.

20 THE COURT: Oh.

21 MR. ZWEIZIG: Also, the mortgage that Mr. Rote
22 had expressly for bid using the property as a VRBO, so it
23 was done in bad faith at some point. There's some intent
24 there --

25 THE COURT: Oh.

1 MR. ZWEIZIG: -- to do something that is not
2 allowed, and I would consider that, at least a yellow light
3 for Mr. Foster.

4 THE COURT: Okay.

5 MR. ZWEIZIG: We have, you know, something; we
6 have evidence; we have a case is what I would really like
7 to convey to you; that I feel is very strong; I feel we're
8 going to win it, of course, or believe me, I would not go
9 through all this effort. I would not put up with what's
10 going on the internet.

11 I would just drop this whole thing if I didn't
12 feel that this was, not only something in my best interest,
13 but in the best interest of, you know, not setting some
14 sort of limit on what a rich person can do to a person.
15 This has been tough and I think I have a very good case for
16 this or I wouldn't bring it.

17 THE COURT: And I appreciate that. I'm just
18 trying to find out whether there is a material issue for a
19 jury, and so those pieces of information, that's very
20 helpful to know that in the mortgage on this property it
21 says it cannot be utilized as a VRBO; that's important
22 information.

23 And also that there would be evidence that Mr.
24 Rote, after the transfer, after the date of this signing,
25 tried to take a loan out on the property. That would also

1 be important information, so those two things are actually
2 kind of what I was asking your lawyer for, to present a
3 material issue of whether this is, in fact, a fraudulent
4 transfer.

5 Mr. Brooks (sic), do --

6 MR. ZWEIZIG: I appreciate that.

7 THE COURT: Mr. Brooks --

8 MR. FOSTER: Yes, Your Honor.

9 THE COURT: -- kind of got me with that, that
10 information that evidence would, if presented to a jury
11 would be enough to get past whether there's a material
12 issue for a fraudulent transfer.

13 MR. ZWEIZIG: And I promise you it's not all the
14 evidence that we have, Your Honor.

15 THE COURT: And I'm not asking you to share all
16 your cards; that's not necessary; we're just going through
17 the claims to see if there is a material issue.

18 MR. ZWEIZIG: Understood. Thank you.

19 MR. FOSTER: Your Honor, may I jump in here and
20 respond to that?

21 THE COURT: Please, Mr. Foster.

22 MR. FOSTER: So first of all, I think I need to
23 state for the record as a moving party categorically object
24 to the introduction -- attempt to introduce evidence by
25 hearsay statements and not through admissible means as

1 summary judgment.

2 The evidence is supposed to be in the record,
3 it's supposed to submitted in opposition of the motion, and
4 then we have an opportunity to reply. And here we've just
5 heard multiple representations from Mr. Albertazzi and his
6 client tag teaming the argument and talking about evidence
7 that may promise the judge they have and will be able to
8 present at trial.

9 And unfortunately that is not how summary
10 judgment is to be decided, Your Honor, so we firmly object
11 to consideration of any representations or descriptions
12 about the evidence, any testimony by opposing counsel, or
13 any attempt by his client to supplement the record through
14 his hearsay statements here today.

15 THE COURT: And let me respond -- let me ask.
16 Were those items, that you just referenced, are those
17 things that are in your declaration, or are those things
18 that have already been submitted in the record as an
19 exhibit?

20 MR. ZWEIZIG: Without looking, Your Honor, I'm
21 not aware of that. Maybe my attorney can answer that, I
22 don't know. But they are both public records. The deed of
23 trust is public record and the other document -- or -- or
24 yeah, deed of trust is public record and the other document
25 that I mentioned to you is public record. The Rotes would

1 certainly be aware of these documents.

2 THE COURT: But have they been submitted in this
3 case by either side, as an exhibit, or referenced, or
4 shared in discovery?

5 MR. ZWEIZIG: I believe they were shared in
6 discovery.

7 MR. FOSTER: I'm not sure of that, Your Honor.

8 THE COURT: Mr. Albertazzi --

9 UNIDENTIFIED SPEAKER: Right now, that I see it,
10 I'm not sure.

11 MR. ALBERTAZZI: I'm looking right now, Your
12 Honor. This was the previous motion, previous two motions
13 were handled by someone else, and I'm look for -- at some
14 point there's -- the trust deed, the actual trust deed
15 itself, with those provisions in it was filed with the
16 Court. And that's what makes it difficult is that -- I'm
17 sorry. Okay.

18 I see here that there is a trust deed referred to
19 in -- I'm looking at a doc -- at a document here -- or in
20 our response, excuse me -- a response in opposition to
21 Defendant's motion for summary judgment, which we filed on
22 February 12th.

23 THE COURT: And it references the -- both of the
24 documents that your client just --

25 MR. ALBERTAZZI: And I --

1 THE COURT: -- spoke about?

2 MR. ALBERTAZZI: I want to point to this, just so
3 I -- make sure I'm very clear.

4 Let's see here.

5 The quitclaim deed -- okay, that's the Basauri
6 declaration. Northwest assumed the mortgage, but did pay
7 monetary consideration for it. Okay.

8 I don't see that the --

9 Well, let's see here.

10 I don't see that the trust -- oh excuse me.

11 The Basauri declaration, Exhibit E -- and I'm
12 going to look at that. And I believe it's on there, but
13 before I say that I want to make sure I see it.

14 (Pause)

15 THE COURT: Ma'am, I wish there was a way that I
16 could click on -- like when it references the Basauri
17 declaration, I could click on the declaration and pull it
18 up.

19 UNIDENTIFIED SPEAKER: Yep.

20 UNIDENTIFIED SPEAKER: I came from litigation in
21 California where the attorneys hyperlinked -- they put
22 hyperlinks in their briefs and I -- I foresee a day when
23 that will be the standard, Your Honor.

24 THE COURT: Well actually we can do that in DR
25 cases; it's really nice; their exhibits we can just click

1 on it and it pulls up the exhibit.

2 UNIDENTIFIED SPEAKER: Your Honor, while I --
3 I'll be happy to --

4 MR. ALBERTAZZI: I think I've --

5 UNIDENTIFIED SPEAKER: If it helps, the deed of
6 trust is mentioned in Timothy's affidavit and Mr. Rote's
7 affidavit. So the deed of trust is mentioned there.

8 THE COURT: Okay.

9 MR. FOSTER: And Your Honor, can I just speak to
10 the substance of these argument as well? I'm -- I presume
11 they could potentially correct any omission in the record
12 if Your Honor would allow it. And I'm going to try to
13 explain why these items of evidence are legally
14 (indiscernible).

15 THE COURT: Okay.

16 MR. FOSTER: Okay?

17 The first one is this trust deed that allegedly
18 limits what can be done with the property and how it can be
19 used. And the argument for that somehow is evidence that
20 the 2012 transfer is (indiscernible) I don't believe to be
21 (indiscernible) any genuine dispute.

22 But the 2012 transfer contract was somehow in bad
23 faith. I don't really see the connection, Your Honor, the
24 bad faith, the -- the good faith standard, which is only
25 relevant to one of the four different types of fraudulent

1 transfer claims authorized by statute, is set up in
2 opposition to actual intent to hinder the (indiscernible)
3 creditors.

4 So good faith can only be understood in
5 opposition -- in -- in contravention of that. And so why
6 would it be somehow intended to defraud creditors, such as
7 Mr. Zweizig, who was no -- was not a creditor until 2018,
8 to transfer the property to NWH, subject to a mortgage, and
9 the mortgage has the limitations on the use of the
10 property.

11 That mortgage, I believe, the trustees will also
12 confirm, there were no intended third-party beneficiaries.
13 It's not enforceable by Mr. Zweizig. He has no standing to
14 enforce it. He has no standing to complain if the mortgage
15 company allowed it to be used as a VRBO, even if that could
16 have been a default. Parties to contracts do that all the
17 time. They don't enforce all their rights, and there's
18 what's known as an efficient breach. It's when a party
19 breaches a contract, but it doesn't cause any harm, so
20 nobody's cares.

21 (Indiscernible) -- I don't know if this is true,
22 Your Honor, because I haven't seen this -- this alleged
23 trust deed, but let's just play with that. Let's just say
24 it's true. So what? Why is that legally relevant at all
25 to either the 2012 transfer that predated the claim by Mr.

1 Zweizig by over three years was actually intended to hinder
2 or defraud a creditor.

3 If NWH was assuming the mortgage, and in fact it
4 was paid in full, and there's no dispute that it was --
5 that it was ever -- that that mortgage company ever took
6 any loss on this, how are the terms of that mortgage
7 relevant to the intent behind the 2012 contract?

8 And you know, this is -- also addresses the point
9 we briefly touched on earlier about what is the date of the
10 transfer. If we gave the transfer to the date of the
11 recording, and I appreciate Your Honor's attempt to create
12 a precise timeline.

13 Now, interestingly, if the judgment had been
14 entered, (indiscernible) Mr. Zweizig, before the quitclaim
15 was recorded, I don't think we would be here today.

16 There might be an interesting case about whether
17 NWH was a good faith transferee for value that
18 (indiscernible) was a bona fide purchaser and held priority
19 over the quit -- over the judgment.

20 But in fact that didn't happen. What we saw was
21 that the transfer was documented in 2012 by contract; it
22 was not recorded. But we're assessing the reasonably
23 equivalent value exchange and it was to be at the time of
24 the transfer. So that value was documented in the 2012
25 contract in the form of capital account credit, and we're

1 accepting the good faith or intent, actual intent, to
2 hinder and defraud a creditor as of the time of the
3 transfer, the 2012 contract.

4 And both predate even the claim by Mr. Zweizig
5 let alone the jury verdict or the judgment. So I really
6 question whether the trust deed has any relevance. I
7 question whether these arguments raised -- you know, we've
8 been in this case for several years. When we entered
9 discovery, we have a summary judgment motion, and we have a
10 Plaintiff who is saying that they have evidence that
11 apparently, they didn't put in the record.

12 But you know, the question is not whether they
13 could provide evidence at trial, it is their burden --

14 THE COURT: Uh-huh.

15 MR. FOSTER: -- to show a genuine issue -- I see
16 Your Honor nodding. I won't -- I won't repeat this too
17 much.

18 Can I just make my final comments? Just a few
19 more final comments to kind of wrap this up, if I -- if it
20 please the Court?

21 THE COURT: Well, can I ask you --

22 MR. FOSTER: So first of all --

23 THE COURT: Can I ask you one question, Mr.
24 Foster? I would like you to address --

25 MR. FOSTER: Yes.

1 THE COURT: -- the issue that they would present
2 evidence that Mr. Rote, after the transfer, tried to either
3 get a loan on the mortgage or in some way get money off of
4 that property that was already allegedly transferred.

5 Would that not show, was this really transferred?
6 Wouldn't that go to the question of whether there was a
7 material issue of fact on whether this transfer was
8 legitimate or not, despite there being a contract? If
9 there's evidence that, after this valid contract no one's
10 disputed, that Mr. Rote, not Ms. Rote or the entity, tried
11 to take a mortgage out.

12 Would that not show that there really wasn't a
13 transfer? Maybe a transfer --

14 MR. FOSTER: Well, I believe you're -- you're
15 assuming for the purpose of this hypothetical that --

16 THE COURT: Uh-huh.

17 MR. FOSTER: -- Mr. Rote tried to get a
18 mortgage --

19 THE COURT: Yep.

20 MR. FOSTER: -- and he didn't. But if he tried
21 and he didn't get it, then I would say what relevance is
22 that? Anybody can try to get mortgage and not get it on
23 any property.

24 But, you know, let's just -- let's imagine he
25 did. Let's imagine Mr. Rote took out a mortgage in his

1 name. Under the 2012 contract, so that he would quitclaim
2 the property in the future, but it said that NWH was taking
3 the property subject to liability.

4 So it'd be perfectly consistent with that
5 contract for Mr. Rote to take out a mortgage on the
6 property and then have that -- that loan assumed by NWH.
7 And that could be done without prejudice to any creditor
8 because Mr. Rote would be personally guaranteeing the
9 mortgage of a property owned by NWH.

10 And yet, you know this is a heck of a
11 hypothetical, Your Honor, because I don't have the alleged
12 document, I can't assess it, we haven't had the opportunity
13 to reply to it.

14 So you know, if you're -- I mean, I've had
15 proceedings that had to be extended, and it ended up a good
16 thing because the parties actually got summary judgment and
17 the judge was willing to work a little further and make
18 sure that they knew what the status of the case was and
19 what the issues were that needed to be presented at trial.

20 So, you know, we could do that here. You know,
21 we could have a surresponse and a surreply, but I
22 absolutely need to have an opportunity to reply to any
23 specific evidence and not just operate on a hypothetical.
24 It's one thing to say, you know, assume one simple fact,
25 but we're talking about a whole fact pattern here.

1 So I just respectfully suggest that that might be
2 grounds to extend the proceedings and not grounds to deny
3 the motion today, Your Honor.

4 THE COURT: Got you.

5 MR. FOSTER: Well, and -- and you know, and I
6 guess I ought to -- I ought to make sure you understand I'm
7 not waiving the argument that it's their burden --

8 THE COURT: I --

9 MR. FOSTER: -- we shifted it to them. We're
10 here today to decide this and they should have done that.
11 And in fact, I would object to any request for further
12 briefing on this, but I -- I understand that the Court
13 could overrule the objection.

14 No, just a couple of final comments.

15 I would like to draw the Court's attention to a
16 document that is new evidence in the record that was
17 adduced in discovery --

18 THE COURT: Okay.

19 MR. FOSTER: -- that Plaintiffs had a full
20 opportunity to (indiscernible) whatever witnesses he wanted
21 about it, and I don't think we need this, Your Honor,
22 because I think the contract is clear and it's a legally
23 scrutable document.

24 But you know, an opposing party has some right to
25 reasonable inferences in their favor --

1 THE COURT: Uh-huh.

2 MR. FOSTER: -- and it's the -- I think it's the
3 art of summary judgment to decide -- where a judge decides
4 what's reasonable and what's just speculation.

5 THE COURT: Right.

6 MR. FOSTER: Or what is an immaterial dispute of
7 facts.

8 THE COURT: Right.

9 MR. FOSTER: And you know, I contend that that
10 2012 contract, if it's authentic, and it says what it says,
11 which is -- we've proven -- then let's -- let's -- you can
12 stop there.

13 But if you look at Exhibit 4 to the declaration
14 of Tim Rote and -- and I believe you'd probably have that
15 open, we referred to it earlier, this is the 50th page out
16 of 276, and this is a 2012 tax return for Northwest Holding
17 Company. This return shows the unreasonableness of
18 speculating about whether the transfer happened. It
19 absolutely corroborates the transfer.

20 THE COURT: In what way?

21 MR. FOSTER: I don't need we need it, but --
22 What's that, Your Honor?

23 THE COURT: In what way?

24 MR. FOSTER: Does Your Honor have it open?

25 THE COURT: I'm still trying to --

1 Sam (phonetic), can you help me hold that --

2 (Court and clerk confer)

3 MR. FOSTER: Your Honor, it's on the bottom
4 right; it's marked Exhibit 4, page 8, and at the top it
5 says, "Depreciation and amortization."

6 (Court and clerk confer)

7 THE COURT: All right, I'm there.

8 MR. FOSTER: Okay. So Your Honor, this -- this
9 document; again this a piece of subjective (indiscernible).
10 It's authenticity has not been put in dispute.

11 THE COURT: Okay.

12 MR. FOSTER: It's from 2012, and yeah, Mr. Rote
13 has authenticated it in his declaration, and what it shows
14 at the top left, name shown on return Northwest Holding
15 Company, LLC.

16 THE COURT: Yep.

17 MR. FOSTER: Below that is says 8825 Sunriver.
18 There's no dispute that there was only one Sunriver
19 property owned by -- yeah, involved in the case, or owned
20 by anybody here. Okay. So --

21 THE COURT: Okay.

22 MR. FOSTER: -- this is the property in question
23 and what's really important here, because if you look down
24 at the schedule at the bottom under Section B, the title
25 says, "Assets placed in service during 2012 tax year."

1 THE COURT: Yep.

2 MR. FOSTER: Using the general depreciation
3 system, you see residential rental property, Row H, month
4 and year placed in service 10/12 --

5 THE COURT: Uh-huh.

6 MR. FOSTER: -- okay, October 2012 corresponding
7 to the October date of the asset contribution agreement.
8 To the right of that, (indiscernible) depreciation is
9 425,000. This shows that the 2012 counter was not a
10 fabrication, unless Mr. Rote had a crystal ball and could
11 foresee all that he would do in the future to deceive his
12 creditors by setting it up in a 2012 tax return. I mean,
13 you have to be conspiracy theorists to reach that
14 conclusion.

15 It is, Your Honor, not a reasonable inference
16 that can be drawn against (indiscernible) summary judgment
17 proceeding in the absence of any specific evidence that
18 support it.

19 Now, just a couple of last comments, Your Honor.

20 Again, I think we need to look briefly at the
21 2018 deed from Northwest Holding's (indiscernible).

22 THE COURT: What page is that on?

23 MR. FOSTER: Oh, well actually I don't -- I'm
24 sorry, I don't have it referenced here, Your Honor. There
25 was a 2018 deed. It -- what we really -- what I really

1 This is -- that is not -- that is a pure matter
2 of law, Your Honor, it is a pure question of law, it is
3 painfully apparent on the face of the statute. So this is
4 why I didn't argue this first. Okay. Because if there is
5 to be a lien as one of the remedies for a legitimate
6 fraudulent transfer claim arising from the 2012 contract,
7 then the downstream owners could be subject to the that
8 remedy.

9 But their transfers are not fraudulent transfers
10 as a matter of law and undisputed fact because there is no
11 evidence that NWH has ever been a debtor of Mr. Zweizig.

12 So to summarize, Your Honor, in 2012 Tim Rote
13 bought the property. Then he transferred all of his right,
14 title, and interest by written contract to NWH in exchange
15 for a right to have his capital account in that company
16 credited for the amount of equity he has in the property.

17 That transfer was for reasonably equivalent
18 value.

19 It was also in good faith, because it predated
20 the 2015 claim of Zweizig. Now, there's -- just as an
21 aside, there's been some argument that litigation among the
22 parties predated that claim. That's not really accurate,
23 Your Honor, as stated in Mr. Zweizig's response, there was
24 litigation by Mr. Zweizig against some other, one of our
25 other companies, that he alleges were owned by Mr. Rote.

1 But I -- I'm telling Your Honor, that is not --
2 that is not a claim against Mr. Rote, and he was -- he
3 bought this property in his personal capacity, there's no
4 evidence that any party or business entity that was
5 involved a prior litigation by Zweizig, had any interest in
6 this property. Okay.

7 So it's really irrelevant that there may have
8 been prior litigation involving one of Mr. Rote's companies
9 and Mr. Zweizig.

10 But, yeah, the good faith is apparent by the
11 timing of the 2012 transfer and the lack of any claim by
12 Mr. Zweizig against Mr. Rote at that time, and it's
13 apparent by the fact that NWH assumed the liability and
14 assumed the mortgage. It's apparent by the fact that that
15 mortgage, and all the debts of the property were, in fact,
16 paid in 2018 when the property was transferred out of NWH
17 to Tanya. There's no dispute about any of that.

18 And so there's no evidence that the 2012 contract
19 was for anything less than reasonably equivalent value, and
20 that it was not in good faith. As a matter of law and
21 undisputed facts, none of the Available Transfer Act claim
22 can apply to the 2012 asset (indiscernible) agreement,
23 which was not a fraudulent transfer.

24 Meanwhile the 2017 quitclaim was a transfer of no
25 value and it was actually performance of an obligation Tim

1 Rote already contracted to assume; again, shown clearly in
2 the 2012 contract that said he would quitclaim the property
3 after three years if NWH had not already taken record title
4 to it.

5 And the 2017 quitclaim was also in good faith
6 because of that contract provision. The intent of the
7 parties has to be determined as of the 2012 contract.

8 Finally, the 2018 deed for Northwest Holding to
9 Tanya could not have been a fraudulent transfer because
10 there was no debtor -- a debtor was not the transferer of
11 that deed.

12 I rest my (indiscernible), Your Honor.

13 THE COURT: Okay.

14 Mr. Albertazzi, your response. I'm looking at --

15 MR. ALBERTAZZI: Okay, so --

16 THE COURT: -- apparently the new piece of
17 evidence that wasn't presented at the argument, the summary
18 judgment argument before my colleague, is this 2012 tax
19 return for Northwest Holding LLC.

20 MR. ALBERTAZZI: Well, I -- under that -- that
21 document is from Mr. Rote. It was not produced in the
22 prior summary judgment hearings and he's now producing --
23 he's producing it now.

24 I don't think it makes any difference because we
25 just have to look at the facts as they are to see whether a

1 jury could draw rea -- a reasonable inference.

2 THE COURT: And I'm with you, but so far --

3 MR. ALBERTAZZI: Okay.

4 THE COURT: -- I'm trying to understand how this
5 doesn't support the contract.

6 MR. ALBERTAZZI: The tax return itself --

7 THE COURT: Correct.

8 MR. ALBERTAZZI: -- I -- I mean, I guess it would
9 support that a contract was sign -- I don't what it would
10 support or not. I mean, it just supports that that's what
11 he filed on his taxes.

12 THE COURT: Okay. But it backs up -- it has --
13 it lists the property; it list that it's shown that it's
14 held by Northwest Holding.

15 Are you saying that -- like this wasn't filed in
16 2012, this isn't a legitimate return for Northwest Holding?
17 Because that would be the only way that this doesn't
18 completely back up and support the 2012 contract, which
19 knocks out any issue of fraud, unless like Mr. Foster was
20 arguing, he would -- Mr. Rote would really have to think
21 far in the future and think like, hey if I'm ever sued, and
22 there is a judgment that comes up against me, I'd better,
23 in 2012 transfer this property now to ward off any
24 potential judgment in five years.

25 MR. ALBERTAZZI: Well, and I -- I appreciate

1 that, but I think that the evidence -- I do agree that
2 the -- that that return would support that, you know, that
3 agreement, or that that agreement really happened.

4 But as stated in the prior summary judgment
5 motion, and where we presented my prior counsel, Taryn
6 Basauri, objected to that and provided evidence in her
7 declaration, she's saying that -- she talks about the
8 judgment in November '18. We now know that -- that the
9 jury rendered its verdict in January of '18.

10 THE COURT: Right.

11 MR. ALBERTAZZI: Debtor quitclaimed his interest
12 in the property in April of '17. We learned -- she says,
13 my office learned that the property was quitclaimed to a
14 wholly-owned -- to a company wholly owned by the debtor at
15 the time of the transfer. So when that '17 transfer
16 happened, it was to a company wholly owned by Mr. Rote.

17 She says, my office further learned that the
18 judgment debtor added his wife Tanya Rote as an owner of
19 the company -- owner of the company holding the property.
20 So the wife was then added. We then learned that after the
21 jury rendered a verdict and before judgment was entered,
22 the company transferred property to the judgment debtor's
23 wife via deed that recited zero of monetary consideration.

24 THE COURT: Right.

25 MR. ALBERTAZZI: And so that -- that's

1 essentially what we have.

2 THE COURT: And now -- and that's what I
3 understood. But now we have evidence that that's not true.
4 It wasn't after the jury rendered a verdict and that it was
5 transferred five, six years prior to the judgment. And so
6 while it appeared prior to discovery that those things were
7 true. That it's questionable. It was transferred after
8 the -- your client received his judgment. We now have a
9 tax return that supports a contract that was -- that's
10 valid on its face because I don't have any evidence that
11 it's not. That it was signed way back in 2012.

12 So the things in her declaration are no longer
13 true.

14 MR. ALBERTAZZI: Well, they're talking about --

15 THE COURT: Those were the suspicions before
16 discovery.

17 MR. ALBERTAZZI: Well, you're talking about --
18 well, the -- the fact is that when Mr. Zweizig was in
19 federal court arguing his case, that property was not
20 titled the way it is now. That that changed. And what was
21 in the public record is really what matters. And that's
22 why the statute says that's when the transfer occurs. And
23 a transfer can happen. Maybe they transferred it in 2012
24 but then to perfect that transfer, well, you have to record
25 the deed. And the statute talks about any mode of a

1 transfer. And --and recording of a quitclaim deed
2 certainly finalizes it. And so that's the date I'm looking
3 at.

4 THE COURT: The day that it was recorded.

5 MR. ALBERTAZZI: Yes. Because any -- I mean,
6 so -- so that's what we're looking at and the -- if you're
7 talking about a -- a husband and wife and a solely owned
8 company here. That the jury could say, well, you know,
9 that maybe he had more control over this than -- than he's
10 saying. And that's the point of it. That any disposition
11 of an asset by any mode is -- is a transfer.

12 So that's really what this case is about and --
13 and I think that's the way -- why it was decided the way it
14 was before. And clearly the statute of limitations doesn't
15 apply. So that -- that's really what we're saying and
16 it's -- it's a matter of intent that -- that that
17 particular deed being recorded.

18 Okay so if we didn't have this lawsuit and we
19 didn't have this judgment, well, then why record that deed.
20 And the answer is, well, I forgot to record it. It slipped
21 -- it slipped by me. Well, that -- that's a thing for the
22 jury to decide.

23 THE COURT: Well, I appreciate the arguments from
24 all. I am all about making sure that people have access to
25 justice and that everyone has their day in court. And

1 courts are here for disputes to be resolved if they can't
2 be resolved outside of court.

3 I also have to follow my oath as a gatekeeper and
4 with the issue of summary judgment, I really can't rely
5 upon the record that was made before my colleague. I have
6 to rely upon the record that is made before me. This
7 record is the one that a Court of Appeals would look at and
8 say what was Judge Watkins thinking. Why did she make the
9 decision that she made? What was the reasoning behind her
10 decision? What were the arguments that were presented to
11 her? What law was she following?

12 And they're certainly not going to listen to this
13 transcript and then go and listen to the transcript before
14 Judge Van Dyk to decide whether I was appropriate or not in
15 my decision. So the problem -- and I understand the
16 limitation that you have, Mr. Albertazzi is that you
17 weren't the lawyer in -- and actually, neither was Mr.
18 Brooks (sic). Neither of you were the lawyers that argued
19 the original summary judgment so you're both stepping in
20 like I, new, to this argument.

21 The record that I have before me is whether there
22 is a material issue of fact and the burden unfortunately is
23 yours, Mr. Zweizig. It's not the burden of Mr. Rote. He's
24 the one that brought the -- the summary judgment motion as
25 he has every right to under the statute. But it's based on

1 the record that's before me and it's viewed in a manner
2 most favorable to the adverse party. And if I'm --

3 THE PLAINTIFF: I understand that.

4 THE COURT: And --

5 MR. FOSTER: I'm sorry.

6 THE COURT: And so that's the problem that I'm
7 having. The adverse party has the burden of producing
8 evidence on any issue that it raises to show that you all
9 would have the burden at trial. They don't have the burden
10 at trial. You have the burden at trial to prove your
11 claims.

12 MR. FOSTER: And I believe we can satisfy that,
13 Your Honor. NWH could not have owned the property as a
14 term of their contract and I have a document right in front
15 of me that says, you know, the -- the lis pendens that was
16 used by opposing counsel to try and force a settlement. A
17 lis pendens interfered with my ability to borrow money for
18 counsel.

19 This a document from Mr. Rote, you know, saying
20 that the lis pendens interfered with his ability to borrow
21 money. The lis pendens was only on that Sunriver property
22 which he is claiming is not in his control. There are
23 plenty issues of fact here, Your Honor.

24 THE COURT: But the issue -- the material issue
25 is whether the transfer was fraudulent. That's the

1 material issue that we're all agreeing to, correct? Not --

2 THE PLAINTIFF: I understand that.

3 THE COURT: -- other action.

4 THE PLAINTIFF: But he was a debtor. He was a
5 debtor to me for a very long time. I mean, since somewhere
6 in 2012 or before. I'm not sure I would have to look it up
7 but. And he was also very aware that the litigation
8 against him was asking for an awful lot of money and he was
9 probably in a pretty bad position as proven by how that
10 litigation turned out. It was the highest award in -- in
11 Oregon history to that time.

12 THE COURT: But what evidence do I have that this
13 is a fraudulent transfer? The evidence that I've gotten
14 this morning that we can all agree that the only thing I've
15 seen is that there is a valid contract from 2012. There's
16 a tax return also from 2012 that no one has disputed in
17 terms of when it was actually filed. No one is telling me
18 that, yes, it says 2012 but it was filed much, much later.
19 After the 2018 judgment.

20 So I have a tax return that supports a October
21 2012 transfer. I have a 2012 transfer which talks about
22 doing a quitclaim deed within three years. All of this is
23 done long before your judgment. I don't have anything on
24 the record, guys. I -- everything that you have said, Mr.
25 Zweizig would have been extremely helpful to show there was

1 judgment.

2 What should have been filed in response to the
3 summary judgment motion is all of the evidence that you're
4 telling me now that you have that would show -- that would
5 support fraudulent transfer. It doesn't require that you
6 tip your hand and tell me everything. It just requires
7 some issue of material fact and I don't have that on this
8 record.

9 I don't --

10 THE PLAINTIFF: Well, I think -- I think I've
11 presented that to you, Your Honor. And, you know,
12 unfortunately, my journey here to try and access the Court
13 correctly has been greatly hindered by Mr. Rotes' actions
14 against me, against my attorney. I had to get my attorney
15 in here up to speed as quick as possible.

16 And what I would ask is that, you know, those
17 actions not be rewarded by denying me my day in court. You
18 said to me here today that, you know, I said some things to
19 you and I've shown you some things even that, you know,
20 would create, you know, materials of fact.

21 THE COURT: If they had been filed, correct.

22 THE PLAINTIFF: There are --

23 THE COURT: I -- I'm agreeing with you.

24 THE PLAINTIFF: I understand.

25 THE COURT: But they weren't. And they

1 weren't -- they're not before me. I don't have the
2 documents that you referenced. You and your lawyer looked
3 for those to see if those were filed. They were not.
4 Unfortunately --

5 THE PLAINTIFF: I --

6 THE COURT: -- it requires -- the law requires
7 that you support any claim that you file and there are
8 certain ways that you have to do that. And I am so sorry,
9 that this --

10 THE PLAINTIFF: Oh, I fully understand.

11 THE COURT: -- results in you --

12 THE PLAINTIFF: But these particular documents,
13 the two that I think are very strong to -- to show what
14 we're trying to show are documents that are both authored
15 and signed and in public record by Mr. Rote. These are
16 things publicly accessible.

17 THE COURT: And okay.

18 THE PLAINTIFF: So I think even if we were to go
19 to trial, we would be able to bring those in even if we
20 had -- had never produced them.

21 THE COURT: And let's say that we do.

22 THE PLAINTIFF: Of course we would do it in the
23 counsel. What's that?

24 THE COURT: Let's say that we do. Let's say that
25 we bring in the document that says under the mortgage

1 agreement it says you can't have a VRO. Let's say we have
2 that one. And then the other that I -- I think you talked
3 about was Mr. Rote trying to take out a mortgage on the
4 property that he transferred in 2012. That's the other
5 document that we're talking about, Mr. Zweizig?

6 Okay. So let's say --

7 THE PLAINTIFF: Yeah.

8 THE COURT: Let's say that we have those two.
9 How does that get us around the fact that we have a 2012
10 signed, authenticated transfer contract as well as a tax
11 return? Now contract, one thing. But now we have a tax
12 return also from 2012 that completely 100 percent supports
13 the contract and shows that contract is, in fact, valid.
14 Was made in October of 2012. Lists the very property that
15 we are talking about. It validates that contract 100
16 percent.

17 THE PLAINTIFF: I understand that.

18 THE COURT: How do we get around that?

19 THE PLAINTIFF: Well, I -- unfortunately, I have
20 seen many different tax returns within these cases. Mr.
21 Rote is a CPA and I fully agree with anyone that would say
22 it would be our extreme burden to try and prove that they
23 weren't what they appeared to be.

24 THE COURT: Yep.

25 THE PLAINTIFF: I assure you we would try to do

1 that.

2 THE COURT: But we don't have that. If you had
3 that today then we would be in good shape. But all I have
4 now is supposition and I can't let supposition go to a
5 jury. There has to be a material issue of fact. And while
6 I -- I appreciate that you know much more about this case
7 and that you and Mr. Rote have a history and the two of you
8 don't really care for each other and there's a long history
9 of litigation, that's not really what I have to consider.

10 And I'm not trying to be dismissive of your
11 feelings or what you believe in terms of whether. But you
12 haven't provided -- basically, what you and your lawyer are
13 telling me is, Judge, we don't -- we can't really prove
14 that the contract's not valid. I can't really prove that
15 the tax return isn't valid. Mr. Rote's timing and when he
16 provided it was after the first summary judgment which is
17 what he argues, which is new evidence and that would be
18 correct. It would be new evidence.

19 But we can't really trust him, Judge. We know so
20 many things about him. He's a CPA. I've seen lots of tax
21 returns. Well, if you had a tax return that contradicts
22 this tax return, that would be evidence that would show a
23 material. But you haven't presented that. You're both
24 just telling me trust me, Judge, we'll be able to throw a
25 bunch of things at the jury and make them suspicious and

1 question the timing and wonder, hmm, why would he transfer
2 this property.

3 But even the timing isn't suspicious based on the
4 timeline that you all have presented to me this morning. I
5 understand that the complaint was filed in '15. The
6 transfer was recorded in April of '17. Your verdict wasn't
7 until January of '18. And so even the timing isn't
8 suspicious. The timing doesn't -- the jury -- it's not a
9 material issue that even the timing doesn't create a
10 material issue I guess is what I'm trying to say.

11 Had the transfer occurred after or even within a
12 month or two months of when you received your jury verdict,
13 I would completely agree with you. We would -- it would
14 not be an issue. It would be pretty darn obvious and
15 pretty suspicious. And yes, it would be a material issue.
16 But based on the record that you all have presented to me
17 today, there -- I don't see it. I'm so sorry.

18 THE PLAINTIFF: Okay. If -- if I could ask, Your
19 Honor, I -- I am sorry that I monopolized the floor. I
20 don't know if my attorney had anything left to say. If --
21 if you could just give him the opportunity, I would
22 appreciate that and I'm sorry that I busted in here.

23 THE COURT: No, it -- it's fine. You don't have
24 to apologize. You are a party to the case and you are well
25 within your rights to talk. In terms of being able to give

1 your attorney more time, that's not something that I'm able
2 to do. Today was the day for dispositive motions. We
3 created this timeline, guys, way back when we met and we
4 talked about the date that things would happen. So today
5 is the day that all parties were expected to bring their
6 evidence, to file their motions, to make their arguments.
7 And for me to decide --

8 THE PLAINTIFF: I'm sorry, I didn't -- I did not
9 mean -- I'm very sorry. I did not -- I did not mean in the
10 future. I -- I meant today.

11 THE COURT: Oh, okay. Yeah, certainly.

12 THE PLAINTIFF: Mr. Foster has spoken and then I
13 spoke. I didn't know if Mr. Albertazzi had anything more
14 to bring.

15 THE COURT: Oh, I understand what you're saying.
16 Okay. Yeah, Mr. Albertazzi, is --

17 THE PLAINTIFF: Sorry.

18 THE COURT: No, I get it. Is there anything else
19 that you wanted to say based on the evidence before me?
20 That's kind of where I'm at right now?

21 MR. ALBERTAZZI: All right. I just wanted -- I'm
22 not going to belabor this. I wanted to make a couple
23 things clear just for the record. That the tax return
24 argument was made at the motion for summary judgment based
25 on new evidence and I -- I think I argued that but I just

1 wanted to make that clear. And that that motion was
2 denied.

3 I made the point that when someone makes a motion
4 for summary judgment, they're supposed to include all
5 affidavits or all supporting materials. And that should --
6 that was -- that should've been done in the prior motion.
7 With regards to timing, I just wanted to clarify that the
8 transfer to Tanya Rote occurred after the jury verdict and
9 prior to the entry of the judgment. So those are the --
10 just the points I wanted to emphasize that I think are in
11 the record and other than that, I don't have anything
12 additional to say.

13 THE COURT: Okay. And I'm curious about that
14 last statement to Tanya Rote. So you're saying the
15 transfer -- the 2012 agreement, NWH transfer is not a
16 transfer that would give Tanya Rote all of the liabilities
17 and assets and equity?

18 MR. ALBERTAZZI: Right. I -- I just don't think
19 that that was a complete transfer. I think that -- So that
20 was the argument I was trying to make.

21 THE COURT: Understood. Okay.

22 Well, Mr. Zweizig, I'm very, very sorry. I'm --
23 I really believe that people deserve their day in court.
24 Unfortunately, you and your lawyer were not able to
25 demonstrate that there is a material issue of fact for the

1 jury other than possibly speculating and/or, you know,
2 being curious or suspicious about timing. You were not
3 able to overcome the 2012 documents that were provided by
4 Mr. Rote and argued by Mr. Brooks (sic). So the summary
5 judgment is granted.

6 Mr. Brooks (sic), I will expect you to draft the
7 judgment and provide it to counsel for signature and I will
8 sign it upon receipt.

9 MR. FOSTER: Thank you, Your Honor. Understood.

10 THE COURT: Everybody stay safe and be well.

11 THE PLAINTIFF: Thanks, Your Honor.

12 (Proceedings adjourned at 11:30 p.m.)

13

14

15

16

17

18

19

20

21

22

23

24

25 ///

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

CERTIFICATE OF TRANSCRIBER

I, Nicole Horton-Ellis, court-approved transcriber, certify that the foregoing is a full and correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

/s/

Nicole Horton-Ellis
Weber Reporting
7590 East Gray Road, Ste 202
Scottsdale, AZ 85260
800.406.1290

Date: May 12, 2021

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF CLACKAMAS

MAX ZWEIZIG,

Plaintiff,

v.

TANYA ROTE and TIMOTHY ROTE,
wife and husband; and NORTHWEST
HOLDING, LLC, an Oregon limited
liability company,

Defendants.

Case No.: 19CV01547

ORDER GRANTING DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

Hon. Ulanda Watkins

TIMOTHY ROTE,

Third Party Plaintiff,

v.

JOEL CHRISTIANSEN, SANDRA WARE,
TARYN BASAURI, and WILLIAMS
KASTNER,

Third Party Defendants.

TANYA ROTE,

Fourth Party Plaintiff,

v.

JOEL CHRISTIANSEN, SANDRA WARE,
TARYN BASAURI, and WILLIAMS
KASTNER,

Fourth Party Defendants.

1 This matter came before the Court in the regular course for a hearing and oral
2 argument by video conference on March 9, 2021, at 9:00 am on *Defendants' Motion for*
3 *Summary Judgment Post Discovery* filed on January 22, 2021 ("Motion"). Defendants Tanya
4 Rote and Northwest Holding, LLC ("NWH") were represented at the hearing by Brooks M.
5 Foster, of Chenoweth Law Group. Defendant Timothy Rote appeared and represented
6 himself. Plaintiff Max Zweizig appeared and was represented by Anthony V. Albertazzi of
7 Albertazzi Law Firm.

8 Having reviewed the filings and submissions of the parties related to the Motion and
9 relevant portions of the court record, having heard oral argument, and being therefore well
10 informed, THE COURT HEREBY ORDERS AND CONCLUDES AS FOLLOWS:

11 (1) the Motion is GRANTED;

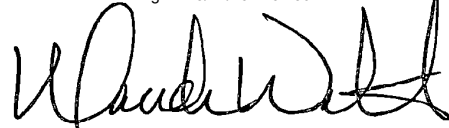
12 (2) the court DENIES Plaintiff's request for an award of attorney fees
13 pursuant to ORS 20.105;

14 (3) there is no genuine issue of material fact that the transfer of ownership of
15 the real property located at 58009 Cypress Lane, Sunriver, Oregon (also
16 referred to as 4 Cypress Lane, Sunriver, Oregon) ("Sunriver property")
17 from Timothy Rote to NWH was made for reasonably equivalent value, in
18 good faith, and not to hinder, delay, or defraud any creditor of Timothy
19 Rote, as evidenced by the 2012 *Asset Contribution Agreement* and 2012
20 tax return of Northwest Holding, LLC;

21 (4) there is no genuine issue of material fact that the 2018 transfer of the
22 Sunriver property from NWH to Tanya Rote was not a transfer by a debtor
23 because it is undisputed that NWH has never been a debtor of Zweizig;
24 and

1 (5) Defendants are entitled to summary judgment dismissing Plaintiff's First
2 Claim for Relief ("Fraudulent Transfer") and Second Claim for Relief
3 ("Insider Fraud") with respect to the Sunriver property.
4

Signed: 3/24/2021 07:56 AM



Circuit Court Judge Ulanda Watkins

5
6
7
8
9
10
11
12
13
14 RESPECTFULLY SUBMITTED BY:

15 Brooks M. Foster, OSB #042873
16 Benjamin R. Scissors, OSB #204428
17 Chenoweth Law Group PC
18 510 SW 5th Ave 4th Fl.
19 Portland OR 97204
20 Bfoster@chenowethlaw.com
21 Bscissors@chenowethlaw.com

22 *Attorneys for Defendants*
23 *Northwest Holding, LLC*
24 *and Tanya Rote*
25
26



Timothy Rote <timothy.rote@gmail.com>

Activity in Case 3:15-cv-02401-HZ Zweizig v. Northwest Direct Teleservices, Inc. et al Order on motion for reconsideration

1 message

info@ord.uscourts.gov <info@ord.uscourts.gov>
To: nobody@ord.uscourts.gov

Wed, Apr 5, 2023 at 12:39 PM

This is an automatic e-mail message generated by the CM/ECF system. Please **DO NOT RESPOND** to this e-mail because the mail box is unattended. *****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

**U.S. District Court
District of Oregon**

Notice of Electronic Filing

The following transaction was entered on 4/5/2023 at 12:39 PM PDT and filed on 4/5/2023

Case Name: Zweizig v. Northwest Direct Teleservices, Inc. et al

Case Number: 3:15-cv-02401-HZ

Filer:

WARNING: CASE CLOSED on 11/20/2018

Document Number: 369(No document attached)

Docket Text:

ORDER: The Court DENIES Defendant's Motion for Reconsideration [367]. Ordered by Judge Marco A. Hernandez. (jp)

3:15-cv-02401-HZ Notice has been electronically mailed to:

S. Ward Greene wgreene@fwwlaw.com, glocati@fwwlaw.com

Joel W. Christiansen joel@employeelawyer.io, christiansenj@gmail.com

Shenoa L. Payne spayne@paynelawpdx.com

Jared Hager jared.hager@usdoj.gov, CaseView.ECF@usdoj.gov, samantha.schultz@usdoj.gov

Timothy C. Rote timothy.rote@gmail.com

3:15-cv-02401 -HZ Notice will not be electronically mailed to:

Northwest Direct Marketing of Oregon, Inc.

Northwest Direct Marketing, Inc.

Northwest Direct Marketing, Inc.

Northwest Direct Teleservices, Inc.

Northwest Direct of Iowa, Inc.

Rote Enterprises, LLC

Timothy C. Rote
7427 SW Coho Ct. #200
Tualatin, OR 97062
Phone: (503) 272-6264
E-Mail: timothy.rote@gmail.com
Pro Se Defendant

Honorable Marco Hernandez

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MAX ZWEIZIG,

Plaintiff,

vs.

TIMOTHY C. ROTE, *et al.*,

Defendants.

Case No.: 3:15-CV-2401-HZ

DEFENDANT'S MOTION FOR
RECONSIDERATION ON MOTION TO
VACATE JUDGMENT FOR FRAUD UPON
THE COURT

ARGUMENT

Defendant respectfully moves this Court to reconsider his Motion to Vacate the Judgment and Dismiss the Plaintiff's the Judgment for Fraud upon the Court under FRCP 60 (d) (3). Defendant argues there is no tenable or possible way for this Court to avoid the necessary finding that Max Zweizig and Joel Christiansen perpetrated this Fraud Upon The Court.

I. STATUTE OF LIMITATIONS

The Court concluded that a Motion to Vacate For Fraud Upon The Court has a statute of limitations of one year after the judgment. Defendant has found no support for that position.

Rather, Rule 60(b), which governs relief from a judgment or order, provides no time limit on

PAGE 1. DEFENDANT MOTION FOR RECONSIDERATION TO
VACATE FOR FRAUD UPON THE COURT

courts' power to set aside judgments based on a finding of fraud on the court. *11 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* § 2870 (2d ed. 1987).

We exercise the power to vacate judgments for fraud on the court "with restraint and discretion," *Chambers*, 501 U.S. at 44, and only when the fraud is established "by clear and convincing evidence," *England v. Doyle*, 281 F.2d 304, 310 (9th Cir. 1960).

If by chance Defendant misstated or miscited the FRCP necessary to vacate for fraud upon the Court, this Court is obligated to show Defendant deference and not exploit this or any other error.

II. ADMISSIONS BY ZWEIZIG

Although it is unclear how the Court could possibly render an opinion that Zweizig did not engage in perjury during the trial and further that the perjury was not suborned, Defendant nonetheless offers Zweizig's testimony during the arbitration that confirms he did engage in perjury on a key question asked of him by counsel during the 3:15-cv-2401 trial and direct on whether Zweizig downloaded, possessed or disseminated pornography (including child porn), stolen music and videos, all found on the 120 gig hard drive he used from his home while employed by Northwest Direct.

Defendant reaffirms the record already provided to the Court in the Motion to Vacate.

A. May 28, 2010 Arbitration testimony

Defendant offers a few pages of Zweizig's testimony of May 28, 2010, pages 191-196 (**Exhibit 1, page 1-6**). Linda Marshall, Zweizig's attorney, inquired of Zweizig what he did with the 120 gig hard drive that failed in May 2003:

Page 192

1 Q. And that's when the -- the computer

2 crashed, and you discovered the blue screen?

3 A. Yes.

4 Q. And you're not able to resurrect it again.

5 What's the word other than resurrect?

6 A. Boot it up.

7 Q. Boot it up?

8 A. It wouldn't boot in Windows.

9 Q. You're unable to boot it up. What did you

10 do?

Page 195

5 Q. Okay. And then what did you do with the

6 old hard drive?

7 A. I know I stored it in the safe, and I got

8 all the -- I got all the programs off of it.

9 MR. CROW: How do you get the programs off

10 of it if you can't boot it up?

continuing...

24 Q. And I'm not sure whether you answered

25 clearly what you did with the old hard drive. Did

Page 196

1 you save it, or did you throw it away?

2 A. No, no, no, no. I didn't throw it away.

3 I, you know, got everything off it, and at some

4 point I would have formatted it.

Defendant has already provided to this Court the unanimous opinions, reports and testimony of the forensic experts that opined during the arbitration that the porn, child porn, music and videos were downloaded during a time when the 120 gig hard drive was in Zweizig's possession, from 2021 through November 13, 2003.

The full transcript of the May 28, 2010 arbitration is available.

B. June 1, 2010 Arbitration Direct testimony.

Defendant offers a few pages of Zweizig's testimony of June 1, 2010, pages 36-38 (**Exhibit 2, page 1-3**). Linda Marshall, Zweizig's attorney, inquired of Zweizig *again* what he did with the 120 gig hard drive that failed in May 2003:

Page 36

9 Q. Okay. You mentioned the 120 gigabyte hard

10 drive.

11 A. Um-hum.

12 Q. That was the one that crashed --

13 A. Yeah, right, right.

14 Q. -- that there's been some testimony about.

15 Had -- had you done anything to make that hard drive

16 usable again?

17 A. Oh, yes, I did. I had that hard drive --

18 you know, I think I already told you that I put it

19 in as a secondary drive in there and copied

20 everything I needed off it. And it sat there for a

PAGE 4. DEFENDANT MOTION FOR RECONSIDERATION TO
VACATE FOR FRAUD UPON THE COURT

21 while, because you copy everything you need off it.
22 And just from experience, you know, if you think you
23 have everything you need off it, and you disconnect
24 it, you put it in the box, within 10 minutes you're
25 going to go get that box, and you're going to bring

Page 37

1 that hard drive back. You didn't realize something
2 that you -- you didn't realize --

3 THE WITNESS: I will.

4 A. -- you're going to realize something that
5 you -- you might still need off it. So I just left
6 it sit in the computer probably for -- could have
7 been weeks. When I was completely sure that I
8 really didn't need anything more off of that hard
9 drive, I took it out of the computer, I formatted it
10 so it could be used as a regular Windows drive if
11 ever needed again, and put it in a box, put it in a
12 fireproof safe, and that's where it sat until Tim
13 came over.

14 BY MS. MARSHALL:

15 Q. Now, what does that mean? You formatted
16 it so it could be used again?

17 A. Well, here's the thing. Without

18 formatting it, it can be used as a regular hard
19 drive, but it has an issue. We know there's an
20 issue on that hard drive. You know, you don't plug
21 a hard drive into a computer and boot up the
22 computer. When it used to be a bootable drive, it
23 would make the computer work all by itself and it's
24 going to go and crash on you, there's some file on
25 that hard drive that is causing some grief. And

Page 38

1 rather than deal with it -- I already have replaced
2 my Windows hard drive. Rather than deal with it,
3 you reformat it, and that takes care of all those
4 issues. Now you can use it again for whatever you
5 want.

6 At the time, if this was now, I would have
7 thrown that hard drive in the trash. I would have
8 just thrown it away. But at the time, that was, I
9 would say, between a 400 and \$600 hard drive,
10 because 120 gig at that time was pretty big. That
11 was a -- that was a pretty -- pretty large hard
12 drive. It's not my hard drive. So, you know, if
13 our data -- my thinking at the time was if our data
14 requirements increased to where I need a lot more

15 space for something, we're planning to grow, you
16 know, maybe I would and whatever, here's a -- here's
17 a hard drive we've already paid for that I have,
18 so...

The full transcript is part of the record in this case, *Doc # 120-1*.

C. June 1, 2010 Arbitration Cross testimony

Defendant offers a few pages of Zweizig's testimony on Cross of June 1, 2010, pages 132-166 (Exhibit 3, page 1-34). Scott Cliff, Rote's and Employer's attorney, inquired of Zweizig again what he did with the 120 gig hard drive that failed in May 2003:

Page 132

18 Q. Okay. Well, let's just talk about your --

19 your computer for a moment.

20 A. Okay.

21 Q. That was the Sony Vaio.

22 A. Okay. Yes, sir.

23 Q. First of all, when did -- what's your

24 recollection as to when that was placed into

25 service?

Page 133

1 A. I don't remember. I've tried to think of

2 that answer in preparation. I -- I don't know.

3 Q. But initially --

4 A. There may be a bill for it around

5 somewhere.

6 Q. Initially you were in the Delaware office

7 when that was in place, correct?

8 A. That's true, sir.

9 Q. Okay.

10 A. Yes.

11 Q. And when it was there, did you -- did you

12 have a password on it?

13 A. I believe I would have.

14 Q. Well, that's just common sense, correct?

15 A. Yeah.

16 Q. Never would leave it --

17 A. I'm sorry. When you said that, I was

18 trying to think of the password. Yes, I'm sure I

19 would have a password.

20 Q. I'm not asking you for the password.

21 A. I know you're not.

22 Q. Okay.

23 A. I'm sorry.

24 Q. So the purpose of a password is to prevent

25 unauthorized access, correct?

Page 134

1 A. Yes, sir.

2 Q. Okay. So do you have any reason to
3 believe that Mr. Bower, who you have testified
4 earlier worked in the Delaware office with you, that
5 he would have somehow been able to access that
6 computer while it was under your care and protection
7 and password protected?

8 A. I -- I can't completely answer that. I
9 wasn't there at the computer the whole time.

10 Q. The answer is no, you don't have any
11 evidence of that?

12 A. The answer is, I can't answer that.

13 Q. Okay. Now, the Sony Vaio you testified
14 initially had the 120-gig hard drive in it, correct?

15 A. Yes, sir.

16 Q. Okay. And then there's been testimony
17 about some sort of event that resulted in the 60-gig
18 hard drive being placed into service --

19 A. Yes, sir.

20 Q. -- somewhere around March 12 of 2003,
21 correct -- May 12, 2003; is that correct?

22 A. That is correct.

23 Q. Okay. Now, at the time that the -- well,
24 do you recall, first of all, when you moved the

25 machine from the Delaware office to your home?

Page 135

1 A. I don't. I don't recall when I started
2 working in -- I mean, I was there in my home a year.

3 I don't recall exactly when that was, I'm sorry.

4 Q. Okay. Once you moved into your home
5 office, I assume you continued to employ basic
6 common sense security precautions regarding access
7 to Northwest Direct's computer and its data,
8 correct?

9 A. Yes, sir.

10 Q. Okay. That would have included password
11 protection at a minimum, correct?

12 A. Yes, sir.

13 Q. Firewall?

14 A. Yeah. I mean, that came through a -- a
15 network hub that -- yeah, certainly Windows firewall
16 was on the machine, and that's what I believe I used
17 at the time.

18 Q. And you've testified that you -- you've
19 lived with Ms. Ware for quite some time, your
20 fiancée?

21 A. Yes, I have.

22 Q. Okay. You didn't allow her access to that
23 machine, did you?

24 A. No.

25 Q. Okay. You understood that machine had

Page 136

1 sensitive customer information on it?

2 A. It had customer information on it. The
3 sensitivity is not a huge issue. We -- we didn't
4 have any accounts that had actual credit card
5 numbers. These credit card numbers would be
6 encrypted when sent to us. And when the -- when the
7 credit card numbers would go back, it was a
8 proprietary logarithm that the -- each client would
9 have to be able to decrypt them so that a
10 representative never saw it. And I could never tell
11 what it was. Nobody could tell what it was. So
12 there were names and addresses. There were things
13 like that, and Social Security numbers.

14 Q. The question is, it had customer
15 information?

16 A. It had customer information.

17 Q. And for some of your banking clients, it
18 had -- it had some additional information beyond

19 just name and phone number, correct?
20 A. Not really, no. Social Security number
21 was not there, no.
22 Q. Well, in any event, I take it you
23 understood that preserving the integrity of that
24 data was important to Northwest Direct?
25 A. Certainly.

Page 144

23 Q. Okay. And you testified that that
24 computer never worked again, correct?
25 A. That hard drive never worked again. The

Page 145

1 computer with a new hard drive worked fine. To be
2 clear and answer your question, we did not get to
3 looking at code. It didn't happen.
4 Q. Okay. But the 120-gig drive failed at
5 that point and never worked again, correct?
6 A. Yes, sir.
7 Q. Okay. And you testified that after maybe
8 a week or two -- I don't recall -- some period of
9 time you somehow plugged -- plugged -- I didn't
10 quite understand this. You plugged a ribbon into
11 the back of that drive --

12 A. Okay.

13 Q. -- and somehow extracted some information
14 from it. How did you do that when it didn't work?

Page 147

5 Q. Okay. And then after a period of a couple
6 weeks or so, you put that 120-gig drive in the box?
7 You put it in the fireproof safe; do you recall
8 that?

9 A. Yes, sir.

10 Q. Okay. But it's still your firm
11 recollection that that's what you did with it?

12 A. Yeah. I don't remember how long exactly
13 after, but yes.

14 Q. Okay. But you didn't use it personally, I
15 take it, for anything of any sort?

16 A. No. It sat in the box.

17 Q. And I think it was your testimony that you
18 reformatted it before you put it in the safe; is
19 that correct?

20 A. At some point.

21 Q. And from that point on, it would have been
22 completely empty; is that right?

23 A. Reformatting it, as we should all know by

24 now, doesn't remove the data from it completely. If
25 you want to, you know, forensically try and do so.

Page 148

1 And there's -- there's tools out there that you
2 don't need to be a forensic expert that can get data
3 back off of the formatted drive.

4 Q. So in other words, a forensic expert could
5 -- could take that drive that's been reformatted and
6 fairly quickly pull up enough information to
7 determine when files were created, when they were
8 last accessed, that sort of thing?

9 A. I don't know -- I've seen recovery things
10 that even I've tried to do myself, like on a USB
11 drive or something like that. Sometimes when you
12 recover things, some of that information goes
13 missing. So as far as what information you can pull
14 off of that, I would have -- I would rather you ask
15 an expert that because it's not always the same.

16 Q. So certainly, for instance, if a program
17 file was on there and it was missing one piece, you
18 wouldn't necessarily put that program file back into
19 service for a client, would you?

20 A. No, not --

21 Q. That would be too dangerous, wouldn't it?

22 A. Yeah, yeah, yeah. You wouldn't want to do

23 that.

24 Q. Okay.

25 A. Yeah.

The balance of the testimony goes into the Ebay files Zweizig used to sell a variety of things including guitars, books, suntan lotions, etc... all traceable to him and admitted by him.

The forensic experts concluded that the 120 gig hard drive had not failed, but that Zweizig used that fabricated failure to delete and reformat the hard drive to destroy programming that his employer desperately needed. Some 1900 Foxpro program files were found on the 120 gig hard drive, programs owned by employer Northwest Direct that Zweizig destroyed when reformatting of that hard drive. And he did so as part of an attempt to extort money from his employer.

The full transcript is part of the record in this case, Doc # 120-1.

III. The Power of the Court

The Ninth Circuit itself acknowledged that “a long trail of [even] small misrepresentations—none of which constitutes fraud on the court in isolation—could ... paint a picture” of fraud on the court. *Sierra Pacific Industries, Inc., et al.*, No. 15-15799 (July 13, 2017). The evidence is a long trail of more than small misrepresentation and criminal conduct stemming back to September 2002.

A. Affirming the Forensic Reports

The Court has in its possession the forensic reports and evidence that place the 120 gig hard drive in Zweizig's hands and used exclusively by him. All experts confirmed that the hard

drive was not used again after Zweizig returned it. There is no other possible finding but that Zweizig and Christiansen committed Fraud upon the Court and with the Court's blessing and assistance.

Defendant reaffirms the following is in evidence:

Motion Exhibit 8 (#120-18) was the first forensic report. In 2005, the first of many forensic reports was issued forensic experts showing Zweizig fabricated the crash of the 120 gig hard drive and reformatted it on November 12, 2003, just before returning it to NDT.

Motion Exhibit 9 (#120-17) addressed whether the 120 gig hard drive was used by Zweizig after Zweizig claimed he had reformatted it, for any known purpose, expert Cox concluding that it was used to store videos up until November 12, 2003 when Zweizig reformatted that hard drive.

Motion Exhibit 10 (#116-5) addressed again whether the 120 gig hard drive was used by Zweizig during a period of time in which Zweizig claimed the hard drive had been reformatted and placed in his safe. Expert Cox opined that the hard drive was in continuous use through November 12, 2003 by Zweizig and that the hard drive had not been used or accessed after that time. By May of 2003, Zweizig had refused to provide the programming and processing software generated by him during his employment, property that was owned by his employer NDT. On a visit to see Zweizig in New Jersey, Zweizig was making a presentation to Rote and feigned the crash of the 120 gig hard drive, a computer hard drive used exclusively by Zweizig from August 2001 to November 2003. Zweizig testified that the 120 gig hard drive had crashed and he reformatted it immediately thereafter. This and other forensic reports refute Zweizig's testimony.

Motion Exhibit 11 (Doc #120-2) is a report from expert Cox opining that the Foxpro program files deleted by Zweizig when he reformatted the hard drive on November 12, 2003 could not be recovered. This report also corroborates the existence of programs Zweizig claimed did not exist.

Motion Exhibit 14 is a forensic report from Mark Cox opining that Zweizig did not maintain a digital email file on the active 60 gig hard drive Zweizig used from May 12, 2003 through November 13, 2003.

Motion Exhibit 13 is testimony from Jaime Gedye that he could find no programming files created by Zweizig or anyone else, on the Eugene servers, when he traveled to the Eugene location of NDT. Gedye had to recreate the programming and during that time NDT was shut down. Zweizig's behavior and performance deteriorated after the May 2003 feigned crash of the 120 gig hard drive, to the point that he was more than five months late in completing processing and returning data files to key clients. That came to an apex when Zweizig's failures were brought to Rote's attention. Zweizig refused to complete the processing unless given a raise. He was rebuffed in that raise, completed the processing and was immediately terminated on October 2, 2003 but with 45 days of notice, Rote wanting to secure the processing programs. Zweizig did not provide the programming and NDT shutdown for 10 days right after Zweizig's last day. Ultimately the programming files were found on the 120 gig hard drive by the forensic experts.

B. Clear and Convincing Evidence Has Been Provided

A judgment may be set aside under Rule 60(d)(3) if the movant provides clear and convincing evidence of "fraud on the court." Fed. R. Civ. P. 60(3); see also *United States v. MacDonald*, No. 87-5038, 1998 U.S. App. LEXIS 22073, at *6 (4th Cir. Sept. 8, 1998) ("It is settled that the clear and convincing standard applies in . . . cases alleging fraud upon the court.")

(citing cases). Fraud on the court, as the Fourth Circuit recently emphasized, is “not your ‘garden-variety fraud.’” *Fox*, 739 F.3d at 135 (quoting *George P. Reintjes Co. v. Riley Stoker Corp.*, 71 F.3d 44, 48 (1st Cir. 1995)). The doctrine instead involves “corruption of the judicial process itself,” *Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 (4th Cir. 1986), and “should be invoked only when parties attempt ‘the more egregious forms of subversion of the legal process.’”

“Almost all of the principles that govern a claim of fraud on the court are derivable from the Hazel-Atlas case.” Wright & Miller, *Federal Practice and Procedure* §2870 (3d ed.).

Defendant also published the summary of perjury by Zweizig. **See Doc # 120-16**. That evidence is not refuted. What’s new is that Zweizig no longer refutes that he downloads and disseminates child porn and that at least one of his attorney’s resigned from representing him over reaching the same conclusion and not wanting to be associated with it. While Zweizig may claim that defendant Rote “...successfully denied me my right to counsel by asking one of my attorneys, Given your age how many children have you raped...”, by reference to the forensic reports, this is not a denial by Zweizig that he downloaded and disseminated child porn using a peer to peer program registered to him.

Motion Exhibit 8 shows that Zweizig used his business computer and the 120 gig hard drive to maintain personal files, including porn, child porn, movies, music, identity records (that should not have been there) and programming he denied existed. Withholding and destroying the programming caused the shutdown. This evidence was ignored by the arbitrator at the request of judicial actors. This same evidence was suppressed in this by the plaintiff’s Motion in Limine. That act of suppression suborned Zweizig’s perjury in this case.

Motion Exhibit 9 shows that the 120 gig hard drive did not crash as Zweizig alleged and was used by him post May 8, 2003 to store videos. This evidence was ignored by the arbitrator at the request of judicial actors, the evidence suppressed in this case by the plaintiff's Motion in Limine. That act of suppression suborned Zweizig's perjury in this case.

Motion Exhibit 10 shows that the 120 gig hard drive was reformatted on November 12, 2003, not in May 2003 as Zweizig alleged. This evidence was ignored by the arbitrator at the request of judicial actors, the evidence suppressed in this case by the plaintiff's Motion in Limine. That act of suppression suborned Zweizig's perjury in this case.

Motion Exhibit 11 shows that the programming found on the 120 gig hard drive could not be recovered safely after Zweizig's reformatting of the hard drive. This evidence was ignored by the arbitrator at the request of judicial actors and the evidence was suppressed in this case by the plaintiff's Motion in Limine. That act of suppression suborned Zweizig's perjury in this case.

Motion Exhibit 14 shows that Zweizig did not maintain his email on the active 60 gig hard drive he returned on his last day, November 13, 2003. This evidence was ignored by the arbitrator at the request of judicial actors and the evidence was suppressed in this case by the plaintiff's Motion in Limine. That act of suppression suborned Zweizig's perjury in this case.

Interestingly, although Rule 60(d) (3) is the only rule that even mentions the fraud-on-the-court doctrine, other Federal Rules of Civil Procedure, including Rules 11, 16, 26, 37, and 41, have been cited in applying the doctrine. For example, courts have dismissed, defaulted, and sanctioned litigants for fraud on the court, and have found the necessary authority outside of Rule 60(d)(3)—often citing the inherent power given to all courts to fashion appropriate remedies and sanctions for conduct which abuses the judicial process. See, e.g., *Brockton Sav. Bank v. Peat, Marwick, Mitchell & Co.*, 771 F.2d 5, 11–12 (1st Cir. 1985); *Wyle v. R.J. Reynolds*

Indus., Inc., 709 F.2d 585, 589 (9th Cir. 1983); and *Eppes v. Snowden*, 656 F. Supp. 1267, 1279 (E.D. Ky. 1986).

CONCLUSION

Based on the above facts and arguments, and also be reference to the Motion referenced herein, Defendant asks the court to vacate the judgment. There is no statute of limitation under Rule 60 (d) (3). Rule 60(d) (3), serves one purpose: to “set aside a judgment for fraud on the court.” That is the remedy defendant seeks.

The history of the case shows the Court was motivated to assist child predator Zweizig for at the very least because Defendant Rote had published a blog critical of Judges Kugler and Arbitrator Bill Crow. Zweizig’s legal team asked this Court to use this litigation to attack defendant’s right to critique the Court.

While Defendant appreciates that the road to becoming presiding Judge is paved with compromises that target and punish certain litigants, it is well past time to acknowledge that Zweizig is a child predator, a criminal and engaged in numerous criminal acts against his employer—and with the assistance of his counsel also against this Court that tainted due process.

Dated: March 31, 2023

s/ Timothy C. Rote

Timothy C. Rote

Pro Se Defendant

Certificate of Service

I hereby certify that on March 31, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following and have also served Christiansen by United States Postal Service first class mail:

Joel Christiansen
P.O. Box 4120 #83585
Portland, OR 97208

and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants:

FBI HEADQUARTERS
CRIMES AGAINST CHILDREN
935 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20535-0001

HON. KEVIN MCCARTHY
SPEAKER OF THE HOUSE
H-232, THE CAPITOL
WASHINGTON, D.C. 20515
202-225-4000

s/ Timothy C. Rote

Timothy C. Rote
Pro Se Defendant
E-Mail: Timothy.Rote@gmail.com

Timothy C. Rote
Defendant, Pro Se
7427 SW Coho Ct. #200
Tualatin, OR 97062
T: (503) 272-6264
E: timothy.rote@gmail.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON
PORTLAND DIVISION

MAX ZWEIZIG,

Case No. 3:15-cv-02401-HZ

Plaintiff,

**DECLARATION OF TIMOTHY
ROTE IN SUPPORT OF MOTION
FOR RECONSIDERATION TO
VACATE THE JUDGMENT FOR
FRAUD UPON THE COURT**

v.

TIMOTHY C. ROTE, a citizen of the state of Oregon, **NORTHWEST DIRECT TELESERVICES, INC.**, an Oregon for-profit corporation, **NORTHWEST DIRECT MARKETING OF OREGON, INC.**, an Oregon for-profit corporation, **NORTHWEST DIRECT MARKETING, INC.**, an Oregon for-profit corporation, **NORTHWEST DIRECT OF IOWA, INC.**, an Iowa for-profit corporation, **ROTE ENTERPRISES, LLC**, an Oregon limited liability company, **NORTHWEST DIRECT MARKETING, INC.**, aka Northwest Direct Marketing (Delaware), Inc., a Delaware Corporation, and **DOES 1 through 5**,

Defendants.

I, Timothy Rote, do hereby declare:

1. I represent myself in the above-captioned case. I make this declaration on personal knowledge and am competent to testify to the matters stated herein.

2. Attached hereto as Exhibit 1 is a true and correct copy of an excerpt of the arbitration transcript between the same parties, dated May 28, 2010, pages 191-196. Zweizig admits to reformatting the 120 gig hard drive and placing the hard drive in his safe before turning it over to Defendant Rote on November 13, 2003.

3. Attached hereto as Exhibit 2 is a true and correct copy of an excerpt of the arbitration transcript between the same parties, dated June 1, 2010, pages 36-38. The transcript further confirms Zweizig's timeline of having possession of the 120 gig hard drive and reformatting that hard drive. That entire transcript is in the record of this case as **Doc #120-1**.

4. Attached hereto as Exhibit 3 is a true and correct copy of an excerpt of the arbitration transcript between the same parties, dated June 1, 2010, pages 132-166. The transcript further confirms past testimony and Zweizig's affirmation of his possession of the 120 gig hard drive, placing material unrelated to his employer on that hard drive, placing a password to protect the hard drive while in his home and from Sandra Ware, and affirms his date of possession and use while in his home office, from January 1, 2002 through November 13, 2003. That entire transcript is in the record of this case as **Doc #120-1**.

I HEREBY DECLARE THAT THE ABOVE STATEMENT IS TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF, AND THAT I UNDERSTAND IT IS MADE FOR USE AS EVIDENCE IN COURT AND IS SUBJECT TO PENALTY FOR PERJURY.

Dated: March 31, 2023

/s/ Timothy C. Rote
Timothy C. Rote,
Defendant *Pro Se*

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing DECLARATION OF TIMOTHY C. ROTE on:

Joel Christiansen, OSB #080561
VOGELE & CHRISTIANSEN
812 NW 17th Avenue
Portland, OR 97209
T: (503) 841-6722
E: joel@oremploymentlawyer.com

through the Court's electronic filing system on March 31, 2023 and by first class mail. I also served the following:

FBI HEADQUARTERS
CRIMES AGAINST CHILDREN
935 PENNSYLVANIA AVENUE, NW
WASHINGTON, D.C. 20535-0001

HON. KEVIN MCCARTHY
SPEAKER OF THE HOUSE
H-232, THE CAPITOL
WASHINGTON, D.C. 20515
202-225-4000

/s/ Timothy C. Rote
Timothy C. Rote,
Defendant *Pro Se*

1 There was some talk about that, because I think Tim
2 had some conversation of, you know, he liked it
3 better to work, you know, at an office. And I'll
4 tell you, I don't disagree with that. I mean, it's
5 -- it's nice to go -- it's -- separation is nice,
6 you know. It's not bad. I don't have any problem
7 with that. It just didn't happen.

8 **MR. CROW:** So after Mr. Bower left, you
9 had a conversation with Mr. Rote.

10 **THE WITNESS:** Um-hum.

11 **MR. CROW:** And you gave up the office in
12 Delaware and started operating from your home?

13 **THE WITNESS:** Right. I believe I was told
14 about the cost of the office at one time by Paul or
15 someone. It was like \$1,200 an office a month, or
16 11, for all the costs and everything. And -- and
17 the drive for me, 45 minutes each way for me, cost
18 for the office for him, all of it was not necessary.
19 Instead of driving, I -- I can be, you know,
20 working. I needed those hours.

21 **BY MS. MARSHALL:**

22 **Q. Okay. So sometime after that**
23 **conversation, at least Mr. Rote was in your home**
24 **office.**

25 **A. Right.**

1 Q. And that's when the -- the computer
2 crashed, and you discovered the blue screen?

3 A. Yes.

4 Q. And you're not able to resurrect it again.
5 What's the word other than resurrect?

6 A. Boot it up.

7 Q. Boot it up?

8 A. It wouldn't boot in Windows.

9 Q. You're unable to boot it up. What did you
10 do?

11 A. I used Remote Desktop on -- on my own
12 computer to get into the centers and finish the work
13 for the day because I was also supposed to meet with
14 Mr. Rote. We were supposed to have a lunch, you
15 know. I believe Tonya was there. I believe Tonya
16 met us.

17 Q. Okay.

18 A. And so I -- I took about three hours, I
19 think, to get everything done, you know, and then I
20 met Mr. Rote for lunch.

21 Q. Okay. So I take it you -- you did the
22 rest of your work not on your own computer but the
23 computers in Eugene?

24 A. Yeah. The work was functionally done on
25 the computer in Eugene. I was trying to think. It

1 might have been Dyersville.

2 **Q. Well, whichever it was.**

3 A. It was one of them.

4 **Q. Whichever it was?**

5 A. It was one of them.

6 **Q. Okay. And what caused you to decide to**
7 **put in a new hard drive?**

8 A. Well, you can't -- there's a risk with
9 taking the -- the -- the disks that come with your
10 computer, using a bad hard drive, and trying to
11 repair it with the disks. You know, there's -- you
12 know, things that are useful in that hard drive. If
13 I can do it another way, I got permission to buy the
14 hard drive. But, you know, if I can do it another -
15 - I can put a new drive in there, bring it back up
16 as a new machine, and then just copy stuff over from
17 the other hard drive. And, I mean, I'm actively
18 working on things at home. Yeah, it was a backup of
19 the programming there. But, you know, I have things
20 I'm working on all the time. It's easier to just
21 copy them from the hard drive. That was my
22 preferential way of doing it.

23 **Q. Okay. So explain to us physically what --**
24 **if we could see what you did, what would we see you**
25 **doing.**

1 A. You'd see me drive to the store and drive
2 back with a hard drive.

3 **Q. Okay. You've got the hard drive home.**

4 A. So I get the hard drive home, open up the
5 computer case, remove the -- the quote, unquote, bad
6 hard drive, and put it on the desk, put the new hard
7 drive in, place the Windows recovery disk, if you
8 want to call it that. It's just a disk that comes
9 with it. Sometimes they're called recovery disks,
10 sometimes not. You put it in the computer, and you
11 basically shut that hard drive case, and it takes
12 over. It boots from the -- from the DVD. It was
13 probably a DVD at that point, not a CD. It boots
14 from that, and then it pretty much knows what you're
15 doing because it senses it's got a hard drive in it
16 that has nothing, and it wants to -- you know, it
17 asks, you know, are you setting this computer up or
18 some question like that. You say yes, go through a
19 few prompts, that sets up Windows, and now you have
20 a Windows machine. So now you have to reinstall PC
21 Anywhere on -- on it. You can't really just take
22 the programs, like PC Anywhere, from the old hard
23 drive and put them on the -- it wouldn't really
24 work. So you have to reinstall things like PC
25 Anywhere, Office, stuff like that.

1 And then anything I was working on, I put
2 my clients directory back and all of the
3 subdirectories under it, and I'm -- I'm back to
4 work.

5 **Q. Okay. And then what did you do with the**
6 **old hard drive?**

7 A. I know I stored it in the safe, and I got
8 all the -- I got all the programs off of it.

9 **MR. CROW:** How do you get the programs off
10 of it if you can't boot it up?

11 **THE WITNESS:** Well, on the -- you found a
12 part of my procedure that I didn't mention. On the
13 ribbon cable that the hard drive hooks to inside
14 your machine, there's generally another slot on that
15 cable, and you can put that drive in as a secondary
16 drive and then copy everything off. So in other
17 words, for a time you have two -- both hard drives
18 are in the computer. Because a hard drive won't
19 boot into Windows does not mean it's not readable.
20 You can still read it.

21 **MR. CROW:** Thank you.

22 **THE WITNESS:** Sure.

23 **BY MS. MARSHALL:**

24 **Q. And I'm not sure whether you answered**
25 **clearly what you did with the old hard drive. Did**

1 **you save it, or did you throw it away?**

2 A. No, no, no, no. I didn't throw it away.
3 I, you know, got everything off it, and at some
4 point I would have formatted it.

5 **Q. Okay. You heard Mr. Rote talk about**
6 **developing reference documentation and manuals and**
7 **that sort of thing?**

8 A. Certainly.

9 **Q. Did he ask you to do that?**

10 A. Yes.

11 **Q. Did you?**

12 A. Not very much.

13 **Q. Okay. Explain to us why.**

14 A. It was the timing, that I just, you know,
15 couldn't get done. And in fact, Mr. Rote and I had
16 a couple conversations, and I think I've seen an e-
17 mail in this stuff somewhere that he was talking
18 about hiring a document writer to do that, and that
19 would have been welcome. I mean, that would have
20 been nice. I've worked with document writers before
21 at other companies, and they're surprising people.
22 You know, they can sit next to you, ask you some
23 questions. A lot of times they're -- when I say sit
24 next to you, they're sitting next to you to ask you
25 questions. They're not necessarily looking at your

1 have him call me. You know, I was trying to get
2 across to Tim the urgency of this guy's not picking
3 up the phone, you're going to have problems. But we
4 did talk of it. I probably did most of the talking.
5 Tim said he would have him call me. But, yeah, I
6 was -- I was kind of up about that. I was, like,
7 this is -- this doesn't make sense. This man needs
8 to be on the phone with me.

9 **Q. Okay. You mentioned the 120 gigabyte hard**
10 **drive.**

11 A. Um-hum.

12 **Q. That was the one that crashed --**

13 A. Yeah, right, right.

14 **Q. -- that there's been some testimony about.**
15 **Had -- had you done anything to make that hard drive**
16 **usable again?**

17 A. Oh, yes, I did. I had that hard drive --
18 you know, I think I already told you that I put it
19 in as a secondary drive in there and copied
20 everything I needed off it. And it sat there for a
21 while, because you copy everything you need off it.
22 And just from experience, you know, if you think you
23 have everything you need off it, and you disconnect
24 it, you put it in the box, within 10 minutes you're
25 going to go get that box, and you're going to bring

1 that hard drive back. You didn't realize something
2 that you -- you didn't realize --

3 **THE WITNESS:** I will.

4 A. -- you're going to realize something that
5 you -- you might still need off it. So I just left
6 it sit in the computer probably for -- could have
7 been weeks. When I was completely sure that I
8 really didn't need anything more off of that hard
9 drive, I took it out of the computer, I formatted it
10 so it could be used as a regular Windows drive if
11 ever needed again, and put it in a box, put it in a
12 fireproof safe, and that's where it sat until Tim
13 came over.

14 **BY MS. MARSHALL:**

15 **Q. Now, what does that mean? You formatted**
16 **it so it could be used again?**

17 A. Well, here's the thing. Without
18 formatting it, it can be used as a regular hard
19 drive, but it has an issue. We know there's an
20 issue on that hard drive. You know, you don't plug
21 a hard drive into a computer and boot up the
22 computer. When it used to be a bootable drive, it
23 would make the computer work all by itself and it's
24 going to go and crash on you, there's some file on
25 that hard drive that is causing some grief. And

1 rather than deal with it -- I already have replaced
2 my Windows hard drive. Rather than deal with it,
3 you reformat it, and that takes care of all those
4 issues. Now you can use it again for whatever you
5 want.

6 At the time, if this was now, I would have
7 thrown that hard drive in the trash. I would have
8 just thrown it away. But at the time, that was, I
9 would say, between a 400 and \$600 hard drive,
10 because 120 gig at that time was pretty big. That
11 was a -- that was a pretty -- pretty large hard
12 drive. It's not my hard drive. So, you know, if
13 our data -- my thinking at the time was if our data
14 requirements increased to where I need a lot more
15 space for something, we're planning to grow, you
16 know, maybe I would and whatever, here's a -- here's
17 a hard drive we've already paid for that I have,
18 so...

19 **MS. MARSHALL:** I have a -- give me exhibit
20 -- was that Exhibit 23? Exhibit 23 is another
21 streamline CD. It's a DVD, I guess it is. And I'd
22 like -- basically, it is a video. There's a dispute
23 as to whether it's admissible or not. Mr. -- I
24 would like Mr. Zweizig to authenticate it.

25 **MR. CROW:** Yes, I understand.

1 of firewalls and passwords?

2 A. I do.

3 Q. Those sorts of things. And you're
4 familiar with anti-virus programs?

5 A. Yes, sir.

6 Q. Spyware?

7 A. Yes, sir.

8 Q. Things of that sort? And you, I assume,
9 exercise your best judgment in putting all of those
10 things in place on behalf of Northwest Direct when
11 you were the IT director?

12 A. When I was there, they had some -- some
13 issues with it starting out. But generally, yes.

14 Q. You understood that was part of your job?

15 A. At the center level, it was to implement
16 remotely. But the responsibility of it, you know,
17 would fall under my purview, sure.

18 Q. Okay. Well, let's just talk about your --
19 your computer for a moment.

20 A. Okay.

21 Q. That was the Sony Vaio.

22 A. Okay. Yes, sir.

23 Q. First of all, when did -- what's your
24 recollection as to when that was placed into
25 service?

1 A. I don't remember. I've tried to think of
2 that answer in preparation. I -- I don't know.

3 **Q. But initially --**

4 A. There may be a bill for it around
5 somewhere.

6 **Q. Initially you were in the Delaware office**
7 **when that was in place, correct?**

8 A. That's true, sir.

9 **Q. Okay.**

10 A. Yes.

11 **Q. And when it was there, did you -- did you**
12 **have a password on it?**

13 A. I believe I would have.

14 **Q. Well, that's just common sense, correct?**

15 A. Yeah.

16 **Q. Never would leave it --**

17 A. I'm sorry. When you said that, I was
18 trying to think of the password. Yes, I'm sure I
19 would have a password.

20 **Q. I'm not asking you for the password.**

21 A. I know you're not.

22 **Q. Okay.**

23 A. I'm sorry.

24 **Q. So the purpose of a password is to prevent**
25 **unauthorized access, correct?**

1 A. Yes, sir.

2 Q. Okay. So do you have any reason to
3 believe that Mr. Bower, who you have testified
4 earlier worked in the Delaware office with you, that
5 he would have somehow been able to access that
6 computer while it was under your care and protection
7 and password protected?

8 A. I -- I can't completely answer that. I
9 wasn't there at the computer the whole time.

10 Q. The answer is no, you don't have any
11 evidence of that?

12 A. The answer is, I can't answer that.

13 Q. Okay. Now, the Sony Vaio you testified
14 initially had the 120-gig hard drive in it, correct?

15 A. Yes, sir.

16 Q. Okay. And then there's been testimony
17 about some sort of event that resulted in the 60-gig
18 hard drive being placed into service --

19 A. Yes, sir.

20 Q. -- somewhere around March 12 of 2003,
21 correct -- May 12, 2003; is that correct?

22 A. That is correct.

23 Q. Okay. Now, at the time that the -- well,
24 do you recall, first of all, when you moved the
25 machine from the Delaware office to your home?

1 A. I don't. I don't recall when I started
2 working in -- I mean, I was there in my home a year.
3 I don't recall exactly when that was, I'm sorry.

4 Q. Okay. Once you moved into your home
5 office, I assume you continued to employ basic
6 common sense security precautions regarding access
7 to Northwest Direct's computer and its data,
8 correct?

9 A. Yes, sir.

10 Q. Okay. That would have included password
11 protection at a minimum, correct?

12 A. Yes, sir.

13 Q. Firewall?

14 A. Yeah. I mean, that came through a -- a
15 network hub that -- yeah, certainly Windows firewall
16 was on the machine, and that's what I believe I used
17 at the time.

18 Q. And you've testified that you -- you've
19 lived with Ms. Ware for quite some time, your
20 fiancée?

21 A. Yes, I have.

22 Q. Okay. You didn't allow her access to that
23 machine, did you?

24 A. No.

25 Q. Okay. You understood that machine had

1 **sensitive customer information on it?**

2 A. It had customer information on it. The
3 sensitivity is not a huge issue. We -- we didn't
4 have any accounts that had actual credit card
5 numbers. These credit card numbers would be
6 encrypted when sent to us. And when the -- when the
7 credit card numbers would go back, it was a
8 proprietary logarithm that the -- each client would
9 have to be able to decrypt them so that a
10 representative never saw it. And I could never tell
11 what it was. Nobody could tell what it was. So
12 there were names and addresses. There were things
13 like that, and Social Security numbers.

14 **Q. The question is, it had customer**
15 **information?**

16 A. It had customer information.

17 **Q. And for some of your banking clients, it**
18 **had -- it had some additional information beyond**
19 **just name and phone number, correct?**

20 A. Not really, no. Social Security number
21 was not there, no.

22 **Q. Well, in any event, I take it you**
23 **understood that preserving the integrity of that**
24 **data was important to Northwest Direct?**

25 A. Certainly.

1 Q. And I think you've testified, but I just
2 want you to confirm, did you ever use the Sony Vaio
3 computer either when it had the -- the 120-gig drive
4 or the 60-gig drive, did you ever use that for your
5 own personal entertainment purposes?

6 A. No, sir.

7 Q. So by that I mean, more specifically,
8 videos and music.

9 A. No, sir.

10 Q. Okay. Did you ever use it for doing any
11 of your eBay work?

12 A. No.

13 Q. You're sure of that?

14 A. Yeah. I mean, you know, if I had checked
15 to see if something's, you know, sold or something
16 like that, I may have gone onto it to look at an
17 eBay page. But no, for posting auctions and things
18 like that, no, certainly not.

19 Q. Okay. So not on a regular basis; just
20 once or twice?

21 A. Well, okay. You're saying to do my eBay
22 business. It's just like saying you're checking
23 your e-mail or checking to see if something was --
24 was sold, or, you know -- I mean, at work, I mean, I
25 had looked at the Internet to check to status of

1 something maybe, to see if anything had been sold.

2 **Q. Well, you had a separate personal computer**
3 **in your office?**

4 A. I did, correct.

5 **Q. Okay. Was that a laptop?**

6 A. At the time, I believe it was.

7 **Q. Okay. And is that -- is that the machine**
8 **you used primarily for your eBay business?**

9 A. Yeah, yeah. I would have.

10 **Q. So the -- whatever you might have done on**
11 **the -- on the company computer would have been a**
12 **very small percentage of what was actually done on**
13 **your eBay business; is that correct or --**

14 A. I -- I -- I somewhat object to you trying
15 to classify me taking a look and seeing how
16 something was going as doing part of my eBay
17 business. This is not out of the realm of what I
18 think somebody would do in their own office at work
19 or something like that.

20 **Q. Okay. Well --**

21 **MR. CROW:** If you listen to the question
22 and answer it, we'll get done a lot sooner.

23 **THE WITNESS:** I'm sorry. Okay.

24 **BY MR. CLIFF:**

25 **Q. Just set aside the word business, okay?**

1 A. Okay.

2 Q. I understand you're saying, well, you sold
3 some suntanning lotion for your brother, and you
4 sold a few pants or whatever --

5 A. Right.

6 Q. -- guitar equipment.

7 A. Um-hum.

8 Q. My question right now is focused on the
9 fact that you did your primary eBay posting, let's
10 just call them that --

11 A. Okay.

12 Q. -- on your own personal computer.

13 A. All of them on my own personal computer,
14 yes.

15 Q. But you also went on -- when you went
16 online, you went to eBay sites to do some things,
17 whatever those things were, on the Northwest Direct
18 computer, correct?

19 A. It's possible, yeah.

20 Q. But that was an occasional usage compared
21 to the amount of time you spent working on your
22 personal computer for your eBay --

23 A. Yeah. We're -- we're talking seconds,
24 yes.

25 Q. Okay. And how many transactions are you -

1 - do you recall doing in that fashion on the
2 Northwest Direct computer?

3 A. Transactions. I don't recall.

4 Q. Okay. Now, I want to talk a little bit
5 about -- well, first of all, are you acquainted with
6 the concept of file sharing as it's used, for
7 instance, with videos and used on the Internet?

8 A. More now than then.

9 Q. Okay. But you've heard of companies like
10 Napster and --

11 A. Sure.

12 Q. -- that sort of thing?

13 A. Um-hum.

14 Q. And you're aware of that -- you've
15 probably heard of the litigation regarding copyright
16 infringement issues regarding Napster, that sort of
17 thing?

18 A. Certainly.

19 Q. You understand that those services worked
20 by allowing one computer user access to another
21 person's computer to essentially retrieve files from
22 -- from the remote computer; is that correct?

23 A. Yeah.

24 Q. Okay. So it's like it goes -- information
25 goes into a central repository and people login to

1 that to get it? One user can actually access
2 another user's computer directly through that
3 service; is that correct?

4 A. I understand, yes. And what you're saying
5 is correct, right.

6 Q. Okay. Now, did you ever utilize any sort
7 of file sharing service utilizing the Northwest
8 Direct computer, either when it had the 120-gig
9 drive or the 60-gig drive?

10 A. No.

11 Q. You understood that had you done so, that
12 would have opened -- potentially opened up Northwest
13 Direct's computers to access by outside individuals
14 by using that service; is that correct?

15 A. I imagine it would. You've described
16 accurately how it works.

17 Q. Okay. In fact, if you don't designate the
18 specific files to share, isn't it possible that at
19 times a user of one of those file sharing services
20 can get access to the entire hard drive?

21 A. I don't know if that's possible. I just -
22 - I can't speak to that.

23 Q. Okay. Now, I want to talk about Mr.
24 Rote's visits to New Jersey. How many times did he
25 visit you in New Jersey? We've heard testimony

1 **about two.**

2 A. Yeah. And I'm trying to think if there
3 was one other than that. Delaware, yes. Jersey, I
4 believe two. I mean, Delaware, maybe once or twice.

5 Q. Okay. But to your -- your home office,
6 **how many times did he visit?**

7 A. Two.

8 Q. Okay. **First one was on or about May 8,**
9 **2003; is that about right?**

10 A. It sounds about right.

11 Q. Okay.

12 A. I know it was the middle of May, yeah.

13 Q. Well, there's Exhibit 1, Page 24. Why
14 **don't we go to that to make sure we're -- we've got**
15 **our times straight.**

16 A. I did something wrong. Exhibit 1.

17 Q. **Exhibit 1. That's the very first e-mail?**

18 A. I went to Exhibit 24, I'm sorry. Okay.

19 Q. Okay. Looking at that, should we -- just
20 **looking at the top there, there's an e-mail dated**
21 **May 6, 2003?**

22 A. Yes, sir.

23 Q. **And Mr. Rote is replying to your last**
24 **message to him in which you're -- you're saying that**
25 **it's not a good time for him to visit, essentially.**

1 **And he just says, see you Thursday at 9 a.m.; do you**
2 **see that?**

3 A. He does, yes.

4 **Q. Okay. So Thursday would be -- this was**
5 **Tuesday, May 6. Can we conclude safely that**
6 **Thursday would have been the 8th of May?**

7 A. I would agree with that, yes.

8 **Q. So did the meeting go as planned around 9**
9 **a.m.?**

10 A. Well, I don't -- I don't know what time
11 the meeting was.

12 **Q. Well, it was in the morning sometime?**

13 A. I -- I believe it was.

14 **Q. Okay. But in any event, he didn't show up**
15 **on the 7th unexpectedly, or --**

16 A. No, no, no. It was the day it was
17 supposed to be. I just don't remember if it was in
18 the morning or not. It very well may have been.

19 **Q. And you have testified that while he was**
20 **there, there was this computer event that you've**
21 **described as the blue screen of death?**

22 A. I believe we both testified to that, yeah.

23 **Q. Well, actually, Mr. Rote testified to**
24 **something different, didn't he, that you were typing**
25 **away on the keyboard as if the keyboard had been**

1 **connected? The computer just froze; do you recall**
2 **his testimony?**

3 A. Oh, okay. I was fixated on the blue
4 screen, but yeah.

5 **Q. That was -- I'm sorry. Is it possible**
6 **that Mr. Rote's recollection was correct, that**
7 **that's how it happened, that it froze up as opposed**
8 **to the blue screen?**

9 A. Oh, he said there was no blue screen? I'm
10 sorry. I missed that. No, that's impossible.

11 **Q. Okay. And you were at the time trying --**
12 **you were demonstrating to Mr. Rote some of your**
13 **programming skills, correct?**

14 A. We didn't get that far.

15 **Q. Well, you were sitting down doing what?**

16 A. I was basically showing him how things
17 were organized. I think I might have PC Anywhere'd
18 into a center to show something, how it was
19 organized there. I don't really remember. I just
20 remember we didn't get that far, got the blue
21 screen, and it destroyed the day. It was a very
22 stressful day for me.

23 **Q. Okay. And you testified that that**
24 **computer never worked again, correct?**

25 A. That hard drive never worked again. The

1 computer with a new hard drive worked fine. To be
2 clear and answer your question, we did not get to
3 looking at code. It didn't happen.

4 **Q. Okay. But the 120-gig drive failed at**
5 **that point and never worked again, correct?**

6 A. Yes, sir.

7 **Q. Okay. And you testified that after maybe**
8 **a week or two -- I don't recall -- some period of**
9 **time you somehow plugged -- plugged -- I didn't**
10 **quite understand this. You plugged a ribbon into**
11 **the back of that drive --**

12 A. Okay.

13 **Q. -- and somehow extracted some information**
14 **from it. How did you do that when it didn't work?**

15 A. Okay. Yeah, there's no problem. I can
16 clear that up. What happens is, your -- I don't
17 know if anybody's seen the inside of a computer.
18 But there's a ribbon cable that goes into your hard
19 drive in the computer. The ribbon cable that goes
20 to your hard drive comes down to another connector
21 identical to that one that's connected to that hard
22 drive. You connect that to a second hard drive,
23 your power supply will have extra power leads to be
24 able to do that. You could put two hard drives on
25 one ribbon cable in the computer. And when you go

1 into Windows Explorer, you will see the new hard
2 drive. I'm -- to answer you the rest of the way,
3 because a hard drive won't boot into Windows does
4 not mean that it's unreadable. So that it can be
5 read by normal means most likely. It can be damaged
6 farther than that, but this one wasn't.

7 **Q. Okay. So at the time that this event**
8 **happened, whatever it was, that hard drive had**
9 **information on it, including program files and**
10 **things that you had drafted, for instance, like for**
11 **Allstate Motor Club, whoever your customers were at**
12 **the time that you were working for? You had written**
13 **programs that were on that hard drive, correct?**

14 A. Certainly, sir.

15 **Q. Okay. And it's your contention, I**
16 **believe, that you were able to retrieve those files**
17 **from the hard drive and put them on the new --**

18 A. The other hard drive, yes, sir.

19 **Q. And did you do that you're saying for all**
20 **of the program files?**

21 A. I don't think -- I don't know if I said
22 that. Because I may have gotten some from
23 Dyersville, I may have gotten some from Eugene. You
24 know, just -- just depends. I could have gotten
25 them from the hard drive.

1 Q. Okay.

2 A. I would think if I had at least a copy of
3 something I was working on locally, I would have
4 certainly got it from that hard drive.

5 Q. Okay. And then after a period of a couple
6 weeks or so, you put that 120-gig drive in the box?
7 You put it in the fireproof safe; do you recall
8 that?

9 A. Yes, sir.

10 Q. Okay. But it's still your firm
11 recollection that that's what you did with it?

12 A. Yeah. I don't remember how long exactly
13 after, but yes.

14 Q. Okay. But you didn't use it personally, I
15 take it, for anything of any sort?

16 A. No. It sat in the box.

17 Q. And I think it was your testimony that you
18 reformatted it before you put it in the safe; is
19 that correct?

20 A. At some point.

21 Q. And from that point on, it would have been
22 completely empty; is that right?

23 A. Reformatting it, as we should all know by
24 now, doesn't remove the data from it completely. If
25 you want to, you know, forensically try and do so.

1 And there's -- there's tools out there that you
2 don't need to be a forensic expert that can get data
3 back off of the formatted drive.

4 **Q. So in other words, a forensic expert could**
5 **-- could take that drive that's been reformatted and**
6 **fairly quickly pull up enough information to**
7 **determine when files were created, when they were**
8 **last accessed, that sort of thing?**

9 A. I don't know -- I've seen recovery things
10 that even I've tried to do myself, like on a USB
11 drive or something like that. Sometimes when you
12 recover things, some of that information goes
13 missing. So as far as what information you can pull
14 off of that, I would have -- I would rather you ask
15 an expert that because it's not always the same.

16 **Q. So certainly, for instance, if a program**
17 **file was on there and it was missing one piece, you**
18 **wouldn't necessarily put that program file back into**
19 **service for a client, would you?**

20 A. No, not --

21 **Q. That would be too dangerous, wouldn't it?**

22 A. Yeah, yeah, yeah. You wouldn't want to do
23 that.

24 **Q. Okay.**

25 A. Yeah.

1 Q. You'd be better off to just write the
2 thing from scratch than doing that, correct?

3 A. Not -- no, not necessarily. That's --
4 okay. I think that's -- no.

5 Q. Well, if I have a choice between putting
6 it into the hands of a client that's going to use it
7 to potentially have a catastrophic failure of some
8 sort --

9 A. What you're saying is just not quite
10 right.

11 Q. Okay. Well, we'll get back to some of
12 that in a bit. In any event, what -- what I
13 understand is that you reformatted this 120-gig
14 drive, it went into the safe, and it stayed there
15 for the duration of your employment, correct?

16 A. Just about, a couple days, you know.

17 Q. And you handed it over to Mr. Rote when he
18 came out in November of 2003, correct?

19 A. Yes, sir.

20 Q. Okay. And during that time, you made no
21 use of it whatsoever?

22 A. Yes, sir. You're correct, sir.

23 Q. Okay. Now, let's talk about the November
24 13 visit. You recall Mr. Rote told -- obviously he
25 informed you he'd be coming out to New Jersey to

1 pick up the equipment personally; do you recall
2 that?

3 A. He did.

4 Q. And you've seen some e-mails regarding the
5 logistics of that?

6 A. Yes, sir.

7 Q. In that discussion, he explained that he
8 wanted to come out and pick up the files personally,
9 and that he didn't want to risk another crash of the
10 system?

11 A. I remember him saying that in an e-mail,
12 yes.

13 Q. And he directed you to make a list of the
14 files transferred to the Eugene server, and he had
15 made that request previously; do you recall that
16 testimony?

17 A. Do you have an exhibit for that?

18 Q. Yeah. Let's look at Exhibit -- Page 94 of
19 Exhibit 1. Actually, well, that's the first request
20 so we'll do that -- we'll go there first.

21 A. Yeah. Okay. He did not ask me for a
22 list. That's what I -- that's why I didn't remember
23 when you said that.

24 Q. Well, okay. Maybe there's a distinction
25 here. But on October 29, he says, "I need all

1 processing applications you used for all clients
2 copied to the directory here in Eugene called PAPPS
3 before 8 a.m. Pacific tomorrow."

4 A. Yes, sir.

5 Q. Did you read that?

6 A. Yes.

7 Q. Okay. Did you reply to this e-mail in any
8 fashion?

9 A. No.

10 Q. Okay.

11 A. And I wouldn't have.

12 Q. Okay. So you didn't send Mr. Rote a
13 response to the effect, already done, here it is.

14 Here's where you find this -- this file?

15 A. You mentioned security before, okay?

16 Q. The answer is, you did not, correct?

17 A. Correct, with an explanation.

18 Q. Well, your attorney can let you --

19 A. May I explain?

20 Q. Your attorney can let you draw the
21 explanations.

22 A. Okay.

23 Q. I just want to verify right now --

24 A. That's fine.

25 Q. -- that you did not respond.

1 A. By e-mail, no.

2 Q. Okay. And we have seen a great number of
3 exchanges by e-mail, and you -- you're not able to
4 produce a single e-mail in which you ever directed
5 Mr. Rote to a specific location of any specific
6 programming file, are you?

7 A. No. And that point with an explanation, I
8 have provided an e-mail that shows that I sent him
9 the files directly at one point.

10 Q. Well, we'll talk about that. You're
11 talking about way back in 2002?

12 A. That's fine, sir.

13 Q. April of 2002?

14 A. That's fine, sir.

15 Q. Okay. That was the last -- that's the
16 last documented transmission we have of these
17 programs that Mr. Rote was telling you that he was
18 needing you to send him, correct?

19 A. I understand. In answer to your question,
20 I believe there are two or three instances of the
21 PAPPS e-mail where Mr. Rote asked me to transfer
22 files. There are no e-mails in existence in reply
23 to that for a reason, but yes.

24 Q. Okay. Thank you. Now, going to Exhibit
25 1, Page -- I believe we now have to go to 251, if

1 **I'm not mistaken.**

2 A. Just --

3 **MR. CROW:** Before you go any further,
4 maybe -- can we take a look at Exhibit 110?

5 **MR. CLIFF:** Exhibit 110, yeah.

6 **MR. CROW:** I believe I understood you to
7 say the last time you sent any programs was on May
8 8, 2002. Exhibit 110 would suggest programs and
9 forms on May 11, 2003. Did I misunderstand what you
10 were saying?

11 **MR. CLIFF:** You're right. I might -- I
12 see that on the date.

13 **BY MR. CLIFF:**

14 **Q. So let's -- let's go ahead and talk about**
15 **that.**

16 A. I'm sorry. Can you give me the exhibit
17 number again, please.

18 **Q. It's Exhibit 110.**

19 A. Okay.

20 **Q. And I was thinking of the --**

21 **MR. CROW:** Okay. I just want to make
22 sure.

23 **MR. CLIFF:** Thank you for clarifying that.

24 A. 110.

25 **BY MR. CLIFF:**

1 Q. Yes.

2 A. Yes, sir.

3 Q. So that was a situation -- first of all, I
4 don't -- can you show me where the attachment would
5 be? Is there -- I don't see a copy of an attachment
6 here, like a zip file of any sort.

7 A. Okay. The way that I preserved the e-
8 mails between Mr. Rote and myself was, I did a sort
9 by my name in the inbox -- I'm sorry. I did a sort
10 by my name on the inbox and sent folder. Then I did
11 a sort by Tim's name on the inbox and the sent
12 folder. So I was looking for e-mails between myself
13 and Tim, and I preserved those e-mails.

14 This e-mail here, it's to Brett and Tim.
15 The only reason that I even have this -- I wouldn't
16 have had this if Tim didn't say thanks. The only
17 reason that I have this is because after he says
18 thanks, it becomes one of those between-Tim-and-me
19 scenarios. So there is saying thanks for an e-mail
20 that had the attachment as an acknowledgement that,
21 you know, that he got it, I would think. But that's
22 why you don't see that.

23 Q. Thank you for clarifying that.

24 A. Sure.

25 Q. So at this point, this was for current

1 forms and programs for work that has been requested.

2 So Mr. Rote had been requesting this, and you were
3 responding to that back in May of 2003?

4 A. That's true. This is the only time that
5 Mr. Rote had requested this this way. He requested
6 that they be zipped up and sent to him and to Brett.

7 Q. Okay. So you understood that, and you
8 were able to honor that request at that time, and
9 this was before -- well, already -- obviously, back
10 in May of 2003?

11 A. Okay. I --

12 Q. Did you ever respond to Mr. Rote in a
13 similar fashion on any of the other occasions in
14 which he was requesting you provide these programs
15 --

16 A. No, I -- I've already answered no with an
17 explanation, and my attorney will give me an
18 opportunity, I imagine.

19 Q. Okay. Now, turning back to Exhibit 251.

20 MR. CROW: Exhibit 251?

21 BY MR. CLIFF:

22 Q. I'm sorry, Exhibit 1, Page 251.

23 A. Okay.

24 Q. Mr. Rote on that occasion proposed that
25 one -- one option would be to transfer the computer

1 files without having to physically do it?

2 A. Um-hum.

3 Q. Okay. "Just to minimize your time with
4 me, by copying the entire contents of your hard
5 drive and transferring it to the Eugene server."
6 Okay.

7 Now, you didn't -- you didn't do that, did
8 you?

9 A. I may have talked to Tim about this. I
10 don't know. But I think -- isn't there an e-mail
11 answering this saying something about there is no
12 transfer?

13 Q. Right, the following page.

14 A. Okay.

15 Q. You told Mr. Rote there is no transfer?

16 A. Um-hum.

17 Q. Okay. So you understood that he was
18 coming out to preserve -- because he was concerned
19 about the integrity of the data that you had in your
20 possession, correct?

21 A. I understood that's what he was saying.
22 It didn't make a lot of sense, but I understood
23 that's what he was saying. And I have two different
24 strings to this e-mail.

25 Q. I want you to focus on Exhibit 252.

1 A. Okay.

2 Q. You told him -- and I am sorry, Page 252.

3 All the -- all the data that -- however you
4 pronounce it -- that exists on this computer also
5 exists in either Dyersville or Eugene.

6 A. Okay, right.

7 Q. Now, you understand the difference between
8 data and programming, correct?

9 A. May I have an opportunity to --

10 THE COURT REPORTER: I'm sorry. Between
11 data and what?

12 MR. CLIFF: Programming.

13 A. Programming and data.

14 BY MR. CLIFF:

15 Q. Yes. So you were telling Mr. -- Mr. Rote
16 was saying I want your programs, among other things,
17 and your response was all the data that you knew
18 exists in these locations, correct?

19 A. That is what I said.

20 Q. Okay, thank you.

21 A. With an explanation.

22 Q. Okay. Now --

23 A. Would you --

24 MR. CROW: No. You answered the question.

25 THE WITNESS: Okay.

1 BY MR. CLIFF:

2 Q. You agree that Mr. Rote did not come to
3 your house to physically pick up the -- the
4 equipment that you've discussed until November 13;
5 is that correct?

6 A. Yes. Yes, sir, that's correct.

7 Q. Okay. And I assume it's your testimony
8 that you did not delete any files from any of the
9 equipment you had in your possession; is that
10 correct?

11 A. That's also correct.

12 Q. Okay. And at that time, you didn't, for
13 lack of a better term, re-reformat the 120-gig
14 drive, correct?

15 A. Correct, sir.

16 Q. Okay. And the e-mails that you sent and
17 received related to Northwest Direct, both when you
18 had the -- the 120-gig drive in the machine, and
19 also when you had the 60-gig drive, those were all
20 sent and received on -- on the Sony Vaio machine; is
21 that correct?

22 A. That is correct. Yes, it is.

23 Q. So when the -- when the 120-gig drive
24 failed, you would have lost access to those e-mails,
25 correct?

1 A. It depends what I did. I know I was asked
2 that before. If I copy the entire PST file over,
3 then I wouldn't have. So...

4 **Q. Well, sir, you testified in your -- do you**
5 **recall testifying in your deposition --**

6 A. Yeah. I know I was asked about that
7 before. And I -- I think I may not have -- because
8 I've -- if I import the whole PST file over, then I
9 would not have lost it. And I don't think I did any
10 because our e-mails do go back from pretty much the
11 time of my employment.

12 **Q. Well, that's my point, Mr. Zweizig. You**
13 **testified in your deposition that you -- and correct**
14 **me if I'm wrong --**

15 A. No, I know -- I know -- I know that's what
16 you're talking about, um-hum.

17 **Q. I'm going to refer you to it -- that you**
18 **lost -- that your e-mails were not saved anywhere**
19 **else but on the local machines. And --**

20 A. Yeah.

21 **Q. -- that loss of the 120-gig drive resulted**
22 **-- would have resulted in the loss of all of the e-**
23 **mails, correct, that were on the drive at that**
24 **point?**

25 A. Right. Mr. --

1 Q. Okay. In fact, I have an alternate
2 explanation here, and I'm going to ask you this
3 right now.

4 A. Okay, sir.

5 Q. Isn't it true that the 120-gig drive
6 didn't really fail; that there was an incident that
7 you quickly discerned hours after Mr. Rote left your
8 house, that it was still a workable drive, and you
9 could still get the e-mails off it; isn't that true?

10 A. Hours after he left my house, no, that's
11 not -- that's not -- that's not true.

12 Q. Okay. Let's just say days after he left
13 your house.

14 A. What I'm saying -- what I'm saying to you
15 is, I understand the exchange that Mr. Edelson and I
16 was having -- was having. If you read that, I think
17 I say something like, you know, I guess they would
18 have been lost or something. I'm telling you at
19 that time I didn't think it out enough, and it's
20 just -- it's not representing what we have because I
21 actually do have the e-mails from the beginning of
22 my employment --

23 Q. Well, that's very clear. First the 25
24 pages of --

25 A. Yeah.

1 Q. -- Exhibit 1 --

2 A. Right.

3 Q. -- are e-mails that would have been on the
4 120-gig drive, correct?

5 A. Okay. Yes, you --

6 Q. Okay. And you've -- you've produced them,
7 and your explanation was the 120-gig drive had
8 failed. Now we have this ability to plug a ribbon
9 into the back of this 120-gig drive and extract --

10 A. Right.

11 Q. -- the -- even though you can't get
12 Windows working --

13 A. That is correct, sir. Yes, that is --
14 that is entirely possible, and that happens in the
15 world, yes.

16 Q. But in fact, isn't it true that you -- you
17 accessed the 120-gig drive after Mr. Rote left, and
18 you used it for your own purposes?

19 A. No.

20 Q. And you had the e-mail on it, and you
21 could access it, and that's what you copied the e-
22 mails off of when you made your CD before turning it
23 over to Mr. Rote, correct?

24 A. There's an awful lot of pieces of what you
25 said that just can't possibly make sense.

1 Q. Okay.

2 MR. CROW: Is your testimony that you did
3 not use the 120-gigabyte drive for your own
4 purposes?

5 THE WITNESS: My testimony is that.

6 BY MR. CLIFF:

7 Q. And that's the main thing I wanted to get
8 across. Well, let me get into some more specifics.
9 And I'm honestly not doing this -- I may not -- I'm
10 not trying to make you uncomfortable, but I...

11 I'm going to read some -- some -- some
12 names of songs and videos. And frankly, I'm going
13 to leave out some of the -- the names that we really
14 don't need to hear at this point. I'll just -- I'll
15 represent --

16 A. Okay.

17 Q. -- to them being pornographic. But for
18 starters, Joe Jackson, Stepping Out, an MPG file;
19 does that sound familiar?

20 A. No.

21 MS. MARSHALL: If you're reading from an
22 exhibit, could I ask that the --

23 MR. CROW: I don't believe he is reading
24 from an exhibit.

25 MR. CLIFF: This is not -- I'm not making

1 this an exhibit at this time. It's not -- I'm
2 getting his testimony. And if you --

3 **MR. CROW:** He's asking him for his
4 recollection concerning some music, as I understand
5 it.

6 **BY MR. CLIFF:**

7 **Q. The Clash, Rock the Casbah; does that**
8 **sound familiar? Is that something you might have**
9 **had on that drive?**

10 A. No.

11 **Q. Okay. Hitchhiker's Guide to the Galaxy?**

12 A. No.

13 **Q. Part 2?**

14 A. No.

15 **Q. American Juniors?**

16 A. I don't even know what that is, no.

17 **Q. Okay. Battlestar Galactic?**

18 A. No.

19 **Q. Behind the Scenes Demolition Derby?**

20 A. No.

21 **Q. Blair address to Congress. I assume**
22 **that's Tony Blair's address to Congress.**

23 A. I don't know. No.

24 **Q. Does that sound familiar? Are these**
25 **things you're familiar with?**

1 A. No, they're not.

2 Q. Okay. Okay. I'm just going to reference
3 this one by name. Deep Throat, Deep Throats Again
4 and Again?

5 A. No, sir.

6 Q. Devils Island, Hell on Earth?

7 MS. MARSHALL: Pardon me?

8 BY MR. CLIFF:

9 Q. Devils Island?

10 A. No, sir.

11 Q. You've testified you don't recall these
12 things. I'm giving you some specifics to perhaps
13 refresh your recollection.

14 A. Okay.

15 Q. Okay. Now, you're denying that --

16 A. Yeah.

17 Q. -- you know anything about them?

18 A. I mean, some -- some of the things that
19 you're reading are familiar to me in the world, and
20 some of them are not even familiar that way.

21 Q. Okay. In any event, if we were to go down
22 this list -- Lost in Space?

23 A. No, sir.

24 Q. Okay.

25 A. I've seen the expert reports also.

1 Q. Okay. So in any event, it's your
2 testimony that during the time period between May 12
3 -- well, I think you said it was a couple weeks
4 there, so -- so sometime in late May, from that time
5 on until November -- until you turned over the
6 computer, this hard drive was in -- was in a safe, a
7 fireproof safe?

8 A. Yes, that's correct.

9 Q. Well, we don't need to go through all of
10 those. Now, just going back to the e-mails for a
11 minute, were you aware that -- you heard Mr. Rote's
12 testimony that he accessed the -- the 60-gig drive,
13 the Sony Vaio computer that you turned over, went
14 back to his hotel room, and he accessed it, and
15 there were no e-mails on it; do you recall that
16 testimony?

17 A. He accessed it, and I -- I don't recall
18 that testimony specifically, but okay.

19 Q. Okay. Were you aware of the -- the
20 contention that there were no e-mails found on your
21 -- no PST files found on your 60-gig hard drive?

22 A. I am aware of that.

23 Q. Okay. Do you have any explanation for
24 that?

25 A. I believe that in one of the expert

1 reports -- if I should be talking about what expert
2 reports say -- that something about repeated use of
3 the computer or somebody installing Office, and I
4 have had experience with this before. If you make a
5 fresh Office install, and you're not careful, you
6 will very quickly overwrite the PST files that
7 contains all the e-mails, your calendar, I believe
8 your to-do list, it encompasses all of that, and it
9 will be gone quickly.

10 **Q. And -- well, in fact, before you turned**
11 **over that computer, you set up a new user called**
12 **Northwest Employ, and you had a -- isn't it true**
13 **Outlook user; do you recall that?**

14 A. I didn't, no.

15 **Q. You don't recall doing that?**

16 A. No, I don't.

17 **Q. So you didn't do that?**

18 A. No, I didn't.

19 **Q. Okay.**

20 **MR. CROW:** The question again?

21 **BY MR. CLIFF:**

22 **Q. Did you set up a new user on Outlook on**
23 **the 60-gig hard drive while it was installed in the**
24 **Sony Vaio? And to be more specific, at about 27**
25 **minutes after midnight the morning before you handed**