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UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

In Re:  
  
COURT REPORTING INSTITUTE, INC.,  
  
Debtor.

NO. 06-14202

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BANKRUPTCY ESTATE OF COURT  
REPORTING INSTITUTE, INC., by and  
through Michael B. McCarty, Bankruptcy  
Trustee,  
  
Plaintiff,

Adversary No. 07-01167

MEMORANDUM IN RESPONSE TO  
SECOND MOTION FOR SUMMARY  
JUDGMENT

vs.

ALLEN JANISCH, a single man; and KAI  
MOLDSKRED and JOYCE MOLDSKRED,  
husband and wife, and the marital community  
comprised thereof,  
  
Defendants.

COMES NOW Defendants Kai & Joyce Moldskred, here in after "Moldskred", by and through their attorney of record, Jeffrey B. Wells, and in response to the second motion for summary judgment of Court Reporting Institute, Inc., here in after "CRI", presents this memorandum.

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## FACTUAL BACKGROUND

As set forth in the Declaration of Kai Moldskred, he is a long-term friend of Alen Janisch, the sole shareholder and officer of the Debtor, Court Reporting Institute, Inc. hereinafter CRI. Defendant Kai Moldskred loaned funds to CRI and Alen Janisch over an extended period of time, providing both long-term and short-term financing.

As set forth in the Declaration of Kai Moldskred, he made long-term loans to CRI and Alen Janisch as far back as January 8, 1988. On May 22, 1996, all of the outstanding notes which at that time totaled \$165,710.09 as of December 31, 1995 were restructured at Alen Janisch's request whereby he became solely liable for the notes. However, all of the funds loaned had been paid over to and used by the Debtor CRI who was the original borrower of the funds. Payments on the notes continued over the years either from Alen Janisch and/or CRI.

The other form of financing provided by Kai Moldskred to Alen Janisch was short-term financing. On December 29, 2005, Kai Moldskred loaned Alen Janisch a total of \$150,000 through two payments, one a transfer in the amount of \$101,300 from his Washington Mutual account and second, a check in the amount \$48,700 from his BECU account. Kai Moldskred received repayment for this loan from Alen Janisch on January 2, 2006 with a check of \$50,000 and \$100,000.

Kai Moldskred entered into the \$150,000 loan transaction with Alen Janisch in good faith and with full confidence that Alen Janisch and CRI could repay the money loaned. Kai Moldskred's confidence was subsequently supported by the 2005 audited financial statements and accompanying documents which indicated that for 2005 CRI had a net income of \$302,914, had a cash balance of \$434,328 and had owner's equity of \$273,954. Kai Moldskred was also given financial reports showing CRI had a net income for the first 4 months of 2006 of \$119,528. Thus it was his expectation that CRI would earn \$300,000 plus for 2006 just as it had for 2005.

What lead to CRI's demise was a negative Seattle Times article published at the end of March, 2006 which by the summer of 2006 lead to a drastic reduction in the number of students.

1 Enrollment decreased from approximately 400 to 300, and led to the closure of the school on August  
2 21, 2006.

3 SUMMARY JUDGMENT AND BURDEN OF PROOF

4 The court in Agricultural Research and Technology Group Inc., 916 F.2d 528,533 (9<sup>th</sup>  
5 Cir.1990) stated:

6 The party moving for summary judgment bears “the initial  
7 responsibility of informing the district court of the basis for its motion ... “  
8 Celotex Corp. v. Catrett, 477 U.S. 317, 323, 91 L. Ed 2d 265, 106 S. Ct. 2548  
9 (1986). The moving party must point out why no genuine issue of material  
10 fact exists for trial. Celotex, 477 U.S. at 322. In meeting this burden, the  
11 moving party need not negate the opponent’s claim. *Id.* at 323.

12 Once the moving party meets this burden, the non-moving party must  
13 designate “specific facts showing that there is a genuine issue for trial.” *Id.* At  
14 324. In cases where the non-moving party bears the burden of proof at trial  
15 with respect to a material fact, the party opposing the motion is required “to  
16 make a showing sufficient to establish the existence of an element essential to  
17 that party’s case, and on which that party will bear the burden of proof at  
18 trial.” *Id.* at 322. A mere scintilla of evidence is not sufficient to with stand  
19 the motion. Anderson v. Liberty Lobby, 477 U.S. 242, 252, 91 L. ED. 2d 202,  
20 106 S. Ct. 2525 (1986).

21 The question is therefore whether a reasonable jury could find that the  
22 party which bears the evidentiary burden at trial with respect to a claim or  
23 defense proved its case “by the quality and quantity of evidence required by  
24 the governing law . . .” *Id.* at 254. All reasonable inferences from the evidence  
25 are drawn in favor of the non-moving party. *Id.* at 255.

26 The defendants have asserted a defense to the voidability of the transfer of \$150,000 under  
27 11 USC § 550(b)(1). The burden of proving the elements of Section 550(b) falls on the transferee  
28 as a defense. In re Dala Lease Financial Corp., 176 Bankr. 285 (Bankr. S.D. Fla. 1994). However,  
all reasonable inferences from the evidence which defendants present with regard to their defense  
are drawn in favor of them.

The Seventh Circuit Court of Appeals in Bonded Financial Services, Inc. v. European  
American Bank, 838 F. 2d 890, 898 (7<sup>th</sup> Cir. 1988) discussed how defendants duty to establish no  
knowledge of voidability of the transfer is different than establishing no notice of voidability. The

1 court stated:

2 No one supposes that “knowledge of voidability” means complete  
3 understanding of the facts and receipt of a lawyer’s opinion that such a  
4 transfer is voidable; some lesser knowledge will do. (Citations omitted.)  
5 Some facts strongly suggest the presence of others; a recipient that closes its  
6 eyes to the remaining facts may not deny knowledge. (Citation omitted). But  
7 this is not the same as a duty to investigate, to be a monitor for creditors’  
8 benefit when nothing known so far suggests that there is a fraudulent  
9 conveyance in the chain. “Knowledge” is a stronger term than “notice”,  
10 (citation omitted). A transferee that lacks the information necessary to  
11 support an inference of knowledge need not start investigating on his own.

8 SECTION 550(b)

9 11 USC § 550(b) states:

10 (b) The trustee may not recover under section (a)(2) of this section  
11 from –

11 (1) a transferee that takes for value, including satisfaction or securing  
12 of a present or antecedent debt, in good faith, and without knowledge of the  
13 voidability of the transfer avoided; or

13 (2) any immediate or mediate good faith transferee of such transferee.

14 The court has ruled in the prior summary judgment that defendant Moldskred has established  
15 that they gave value running to Janisch under 11 USC § 550(b)(1) and that the remaining issues are  
16 whether Moldskred acted in good faith and without knowledge of the voidability of the transfers  
17 avoided.

18 Plaintiff has argued that defendants Moldskred did not act in good faith or without  
19 knowledge of the voidability of the transfer because Kai Moldskred knew the money was to be used  
20 to increase the capital account of Alen Janisch in CRI so the company could reduce the reporting  
21 requirements to the Department of Education. Plaintiff argues such knowledge is in and of itself  
22 proof that Kai Moldskred can not claim good faith or lack of knowledge of the voidability of the  
23 transfer. Defendant Moldskred denies this. For the reasons state below, Defendant Moldskred  
24 believes they have satisfied and established the elements of good faith and lack of knowledge of  
25 voidability.

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## GOOD FAITH

There are some schemes which are so inherently fraudulent that knowledge of the scheme belies any assertions of good faith. One court has found that knowledge of a Ponzi scheme indicates a lack of good faith by a transferee In re: Independent Clearing House 77 Bankr. 843, 861 (D. Utah 1987).

The question becomes therefore whether the belief on the part of Kai Moldskred that the money loaned would be used to increase Alen Janisch's capitol account for reporting requirements to the Department of Education rises to the same level as knowledge of a Ponzi scheme.

The declaration of Kai Moldskred and Bill Hanlin indicates that Kai Moldskred's belief that the \$150,000 loan would be used by Alen Janisch to increase his capital account in CRI is not inherently knowledge of a fraudulent scheme.

The short-term loans by Kai Moldskred and others to CRI at the end the calendar year had dated back to 1998. Kai Moldskred was aware that CRI's financial statements were audited each year and its books subject to review at any time by the US Department of Education. Kai Moldskred therefore believed there was nothing untoward about this practice since it had past inspection year after year with the audited financial reports.

William Hanlin states, "Government requirements for a certain level of capital to be held by a business have never required that such businesses have that level of capital each and every day of the year." Mr. Hanlin further states that "the financial statements of CRI had been subject to a Department of Education field audit for 2001 and 2002, and 2002 and 2003, and was found to be in compliance."

The evidence indicates nothing inherently fraudulent. Rather the evidence suggests that the financial practices of CRI and Alen Janisch passed both the auditor's review and the field audits by the Department of Education. The evidence all indicates that Kai Moldskred was operating in good faith in his dealings with Alen Janisch and through Janisch, CRI.

1 KNOWLEDGE OF THE VOIDABILITY

2 As with the question of good faith, plaintiff argues that Moldskred’s belief that the funds  
3 loaned to Alan Janisch would be used to increase his capital account in CRI indicates Kai  
4 Moldskred’s knowledge of the voidability of the repayment.

5 Such an assertion of a factual conclusion on a single opinion assumes factual determinations  
6 which the court cannot make on a summary judgment motion. This impossibility became apparent  
7 in Judge Steiner’s ruling in a case involving similar issues, In re Video Depot, LTD, 186 B.R. 126  
8 (W.D. Wash 1995). In that case a habitual gambler, Arlynn, the president of the debtor, made sixty  
9 trips to the Las Vegas Hilton between 1985 and 1990. The casino had given Arlynn a credit limit  
10 of \$75,000 for each trip. Arlynn always paid his account in full before the beginning of the next trip.

11 In preparation for his last trip and because he had an outstanding balance, Arlynn had  
12 the debtor issue its check to U.S. Bank for a cashiers check payable to the Las Vegas Hilton in the  
13 amount of \$65,000. The cashier’s check identified the purchaser as “Video Depot LTD.” Arlynn  
14 gave the certified check of \$65,000 together with him own certified check for \$10,000 to the casino  
15 and gambled away the money. This was the first and only time Arlynn had given the casino a  
16 certified check in his 5 years of gambling at the Hilton Las Vegas.

17 Judge Steiner stated in his opinion at page 129:

18 When the matter initially came before this Court on the trustee’s motion for  
19 summary judgment, the Court held that the Hilton was placed on inquiry  
20 notice by the payment of Arlynn’s personal debt by a corporate check, citing  
21 Nordic Village, 915 F. 2d 1049 (6<sup>th</sup> Cir. 1990). The BAP disagreed, ruling  
22 that this knowledge of the source of funds was insufficient in and of itself to  
23 prompt an investigation. Additionally, the BAP ruled that if the Court found  
24 after trial that the Hilton had sufficient knowledge to compel an inquiry, the  
25 trustee would then be required to establish that an investigation would have  
26 revealed the voidability of the payment, citing Kupetz v. Wolf, 845 F. 2d 842  
(9<sup>th</sup> Cir. 1988), and Lippi v. City Bank, 955 F. 2d 599 (9<sup>th</sup> Cir. 1992).

27 Not only is there a need for a trial in the present case to show whether Kai Moldskred needed  
28 to inquire further into the finances of CRI but also to show whether that investigation would have

1 revealed the voidability of the payment.

2 The voidability of the transfer between CRI and Alen Janisch is presumably based upon  
3 lack of consideration and CRI's insolvency. It is not based upon any specific finding of the  
4 status of Alen Janisch's capital account. Therefore it is an open question as to whether such an  
5 inquiry, based upon a loan supposedly used to boost a capital account, would reveal insolvency  
6 and lack of consideration. The declaration of Kai Moldskred and Bill Hanlin put into serious  
7 question whether that answer, even after a trial, will be answered in the affirmative.

8 Kai Moldskred indicates he had been told that CRI was profitable. In addition to being  
9 told that by Alen Janisch, he had received audited financial statements which indicated that CRI  
10 was profitable. The transactions themselves had no financial impact on CRI. Furthermore Kai  
11 Moldskred indicates that he was aware of the US Department of Education's oversight and the  
12 audits and therefore believed there was nothing wrong with the financial stability of CRI.

13 Bill Hanlin indicates that according to CRI's auditors, CRI was profitable and had no  
14 concerns at the start of 2006 that it had any financial problems. Mr. Hanlin therefore indicates  
15 that inquiry into the financial status of CRI and the financial health of the company as of the date  
16 of the transfer of the \$150,000 would not have revealed any knowledge as to the voidability of  
17 the transferred funds.

#### 18 SUMMARY

19 Defendant Moldskred has presented specific and detailed facts surrounding their good faith  
20 and lack of any knowledge of the voidability of the \$150,000 transfer. They have also presented  
21 evidence that further inquiry would not have lead to knowledge of the voidability of the \$150,000  
22 transfer. The Defendants have met the burden of presenting facts in support their defense under  
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1 section 550(b), especially when all inferences are to be construed in their favor for the purposes of  
2 summary judgment. The summary judgment should and must be denied so this matter can go to trial

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4 DATED this 14<sup>th</sup> day of August, 2008.

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/s/ Jeffrey B. Wells

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Jeffrey B. Wells, WSBA #6317

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Attorney for Defendants

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MEMORANDUM IN RESPONSE TO SECOND MOTION FOR  
SUMMARY JUDGMENT - 8

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