

STATE OF MICHIGAN
IN THE SUPREME COURT

GLENN S. MORRIS,

Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants.

Supreme Court Docket No. _____

Court of Appeals No. 315742

Lower Court Case No. 09-01878-CB

Circuit Judge Christopher P. Yates

MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC,

Plaintiff/Appellee,

v

MORRIS, SCHNOOR & GREMEL, INC., a Michigan corporation; and CHARRON & HANISCH, P.L.C, a professional limited liability company, and DAVID W. CHARRON,

Defendants.

Supreme Court Docket No. _____

Court of Appeals No. 315702

Lower Court Case No. 09-11842-CB

Circuit Judge Christopher P. Yates

and

NEW YORK PRIVATE INSURANCE AGENCY, LLC,

Defendant/Appellant.

ORAL ARGUMENT REQUESTED

Attorneys for Potential Appellant New York Private Insurance, LLC

Mark A. Aiello (P43012)
Adam J. Wiener (P71768)
FOLEY & LARDNER LLP
500 Woodward Avenue, Suite 2700
Detroit, MI 48226
(313) 234-7100

Attorney for Morris, Schnoor & Gremel, Inc.

Earl E. Erland (P41917)
TWOHEY MAGGINI PLC
161 Ottawa Ave., NW, Ste 212
Grand Rapids, MI 49503
(616) 459-6168

Attorneys for Plaintiffs-Potential Appellees Glenn S. Morris and Morris, Schnoor & Gremel Properties, LLC

/ Stanley J. Stek (P29332)
Andrew T. Blum (P58881)
MILLER, CANFIELD, PADDOCK & STONE, PLC
99 Monroe Ave., NW, Suite 1200
Grand Rapids, MI 49503
(616) 454-8656

Attorneys for Charron & Hanisch, PLC

David W. Charron (P39455)
CH LAW, PLC
4949 Plainfield, N.W.
Grand Rapids, MI 49525
(616) 363-0300

PLAINTIFFS-POTENTIAL APPELLEES GLENN S. MORRIS AND MORRIS, SCHNOOR & GREMEL PROPERTIES, LLC'S OPPOSING BRIEF TO POTENTIAL APPELLANT NEW YORK PRIVATE INSURANCE, LLC'S APPLICATION FOR LEAVE TO APPEAL

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**COUNTER-STATEMENT IDENTIFYING THE JUDGMENT APPEALED FROM
AND THE RELIEF SOUGHT**

This case comes before this Court via Potential Appellant New York Private Insurance Agency, LLC's ("NYPIA") ill-supported Application for Leave to Appeal. After a 22 day bench trial, on March 26, 2013, the Final Judgments in these two related cases were entered by the Kent County Circuit Court, per Judge Yates, in favor of Plaintiffs/Potential Appellees Glenn S Morris and Morris, Schnoor & Gremel Properties, L.L.C. (collectively, "Morris Plaintiffs" and individually "Morris" and "MSG Properties") and against Appellant NYPIA. Potential Appellant NYPIA filed its Claim of Appeal of these Judgments. After brief and oral argument, the Court of Appeals in a 59 page well-reasoned Opinion affirmed the Circuit Court's Findings of Fact, Conclusions of Law and Final Judgments on May 29, 2014. (A copy of this May 29, 2014 Court of Appeals Opinion is attached as Ex. 1 to this Opposing Brief). On July 9, 2014, NYPIA filed its ill-supported Application For Leave To Appeal with this Court. (See NYPIA's July 9, 2014 Application For Leave To Appeal).

Potential Appellees Morris and MSG Properties respectfully request that this Court deny NYPIA's Application For Leave To Appeal because NYPIA has failed to show sufficient grounds for an appeal to this Court as required under Michigan Court Rule ("MCR") 7.302(B) and because both the Circuit Court and Court of Appeals have properly decided the issues before them.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

- I. **WHETHER POTENTIAL APPELLANT NYPIA'S APPLICATION FOR LEAVE TO APPEAL PRESENTS SUFFICIENT GROUNDS FOR APPEAL UNDER MCR 7.302(B) WHERE THE DECISION BELOW IS NOT CLEARLY ERRONEOUS AND WILL NOT CAUSE MATERIAL INJUSTICE, DOES NOT INVOLVE LEGAL/EQUITABLE PRINCIPLES OF MAJOR SIGNIFICANCE TO THE STATE'S JURISPRUDENCE, AND DOES NOT INVOLVE ANY REAL CASE CONFLICT?**

Potential Morris Appellees say: "NO."

Potential Appellant NYPIA says: "YES."

This issue was not before the Circuit Court or the Court of Appeals.

- II. **SINCE POTENTIAL APPELLANT NYPIA A) RECEIVED A MEANINGFUL OPPORTUNITY TO BE HEARD ON WHETHER IT ACTED IN GOOD FAITH AND TOOK FOR VALUE UNDER UFTA'S CLAWBACK REMEDY, AND B) IS UNABLE TO SHOW ANY ACTUAL PREJUDICE AS A RESULT OF ANY CLAIMED DEFECT IN NOTICE, DID BOTH THE CIRCUIT COURT AND COURT OF APPEALS ERR IN CONCLUDING THAT NYPIA WAS NOT DEPRIVED OF DUE PROCESS?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "NO."

The Kent County Circuit Court and Court of Appeals said: "NO."

Potential Appellant NYPIA apparently says: "YES."

- III. **SINCE NYPIA'S FILING OF A MOTION FOR RECONSIDERATION CURED ANY SUPPOSED NOTICE ISSUE THAT NYPIA MAY RAISE, DID THE COURT OF APPEALS ERR IN CONCLUDING THAT NO SUPPOSED DUE PROCESS VIOLATION REQUIRING REVERSAL WAS PRESENT IN THIS CASE?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "NO."

The Kent County Circuit Court and Court of Appeals said: "NO."

Potential Appellant NYPIA apparently says: "YES."

- IV. **SINCE THE COURT OF APPEALS PROPERLY CONCLUDED THAT NYPIA FAILED TO TIMELY RAISE ANY ARGUMENT UNDER MCR 2.205 AND MOREOVER NYPIA FULLY PARTICIPATED IN THE UFTA PROCEEDINGS, DID THE COURT OF APPEALS COMMIT ERROR IN REJECTING NYPIA'S MCR 2.205 ARGUMENTS?**

Plaintiffs/Potential Appellees Morris and MSG Properties say: "NO."

The Kent County Circuit Court and Court of Appeals said: "NO."

Potential Appellant NYPIA apparently says: "YES."

COUNTER-STATEMENT OF FACTS

These two related cases arise out of a fraudulent transfer of all of the assets of Morris, Schnoor & Gremel, Inc. ("MSG") perpetrated by MSG's owner R. Judd Schnoor ("Schnoor"), and MSG's attorney David W. Charron ("Charron") d/b/a Charron & Hanisch, PLC (C&H"), in which all of the assets of MSG were transferred to C&H and then to Appellant New York Private Insurance Agency ("NYPIA"), an entity created by MSG's accountant, Guy Hiestand ("Hiestand"), for the expressed purpose of receiving the fraudulently transferred assets.

Prior to December 2006, Morris and Schnoor had been business partners for years and had developed a significant property and casualty insurance business in West Michigan. (See July 25, 2011 Trial Transcript, Glenn Morris at p. 101, *et seq.*) The origin of this business was an insurance agency built by Morris' father, Jim Morris. (See July 25, 2011 Trial Transcript, Jim Morris at p. 10.) When Jim Morris sold his insurance agency to MSG he received a promissory note in the amount of \$200,000.¹ (See Plaintiffs' Trial Exhibit 6, Promissory Installment Note). When Andy Gremel ("Gremel") became affiliated with the business, the name of the agency became Morris, Schnoor & Gremel, Inc. even though Gremel did not have a direct ownership interest in MSG.² At that time, MSG was owned with Morris (or his trust) holding 50% of the stock and Schnoor (or his trust) holding 50% of the stock. (See July 25, 2011 Trial Transcript, Glenn Morris at p. 104.)

As of December 2006, Schnoor and Morris had also created a number of ancillary businesses.³ First, the office building in which MSG operated in Grand Haven was owned by another entity called Morris,

¹ This promissory note, which was in default, forms the basis of the UFTA claim asserted by Morris in this matter.

² Gremel's piece of the business was focused on life and health insurance plans and was structured in a separate corporate entity known as Andrew Gremel Associates, Inc. ("AGA") with 50% owned by MSG and 50% by Gremel. (See August 9, 2011 Trial Transcript, Larimore at p. 18.)

³ One of these related entities was Accurate Premium Financing, Inc. ("Accurate Premium") which was owned 10% by Hiestand, 45% by Schnoor and 45% by Dave Young ("Young") (See July 25, 2011 Trial Transcript, Glenn Morris at p. 117.)

Schnoor & Gremel Properties, LLC ("MSG Properties"). This was owned 33.33% by Morris, 33.33% by Schnoor and 33.33% by Gremel. (See July 25, 2011 Trial Transcript, Glenn Morris at p. 120.) The Grand Rapids operations of MSG eventually moved into a new office building located in Rockford owned by yet another related entity called The Promenade, LLC ("Promenade").⁴ Schnoor and Gremel, over Morris' objection, decided to have MSG Properties make a one million dollar loan to MSG to finance improvements at the Promenade office location. In return for the loan, MSG gave MSG Properties a promissory note for the amount loaned. (See Plaintiffs' Trial Exhibit 49).⁵

By the end of 2006, it became clear to Morris that the working relationship with Schnoor had deteriorated beyond recovery.⁶ Throughout these developments C&H (the law firm owned exclusively by Charron) served as legal counsel for Morris' various business interests, including MSG, AGA, MS&G, Inc., Accurate Premium, MSG Properties, and Promenade. Charron also had served as legal counsel for Morris, his wife's company C. Morris Investments and Schnoor personally. Hiestand served as the accountant for all of the entities from time to time and was the personal accountant for Schnoor. He also served as an owner in at least one of the entities, Accurate Premium. (See July 25, 2011 Trial Transcript, Glenn Morris at p. 117.)

As the Schnoor/Morris relationship deteriorated, Charron chose to side with Schnoor and Charron, thereafter, undertook an aggressive crusade working closely with Schnoor and his advisors and friends,

⁴ This entity was initially owned 30% by Morris (C. Morris Investments, LLC,) 30% by Schnoor, (Edna Curtis Investments, LLC,) 30% by Gremel, and 10% by Martin Carteng ("Carteng"). (See Trial Transcript, July 25, 2011 Glenn Morris at p. 124.)

⁵ MSG subsequently honored this promissory note and made payments on it to MSG Properties until the disputes between Morris and Schnoor heated up. (See Plaintiffs' Trial Exhibit 67) (showing the payments made by MSG). This promissory note, which was in default, forms the basis of the UFTA claim by MSG Properties in this matter.

⁶ Part of the breakdown stemmed from the improvement to the Promenade. After the cost of construction grossly exceeded the contract price, Schnoor declared \$1,409,000 of the construction costs should be designated as leasehold improvement and paid for by MSG and AGA. In order to cover these costs, Schnoor and Charron set up a loan structure in which MSG Properties was to loan its equity to MSG. Morris thought these costs should have been covered by the Promenade as the landlord. (See Trial Transcript, July 25, 2011, Glenn Morris at p. 128.)

Hiestand and George Larimore ("Larimore"), to ultimately cut Morris out of the picture and assure that neither Morris nor any related entity would receive any of the value of the original businesses.

THE STRATEGY TO "SCREW GLENN"

In their efforts to cut Morris out of the businesses and ensure he would not receive any value, an advisory council was created for Schnoor consisting of his friends Hiestand, Larimore and Charron, and Schnoor's son, Josh Schnoor (the "Council"). (See July 14, 2010 Hiestand Deposition at pp. 203-205; August 11, 2011 Trial Transcript, Young at p. 161; March 17, 2008 Schnoor Deposition at pp. 98-99; and July 14, 2008 Larimore Deposition at p. 26.) In addition to assisting Schnoor in responding to various pieces of litigation, the Council cooked up a complicated strategy to "screw Glenn."

A. The Promenade. The initial phase of this strategy to "screw Glenn" started with his involvement in Promenade. In December 2006, Charron, on behalf of Promenade, sent out a capital call mandating that each of the three partners make a capital contribution of \$67,500 and that Carteng as a 10% partner put in \$22,500, no later than December 31, 2006. (See Plaintiffs' Trial Ex. 55; 12/13/06 Letter from C&H.) After manipulating Morris into paying the \$67,500 capital call, he was advised that actually he had been expelled from the company as owner a few days before the call was due. (See Plaintiffs' Trial Exs. 83-85; 7/9/07 Letter from C&H and 7/9/07 Resolutions.) When told in January 2007 that he had been removed as a partner even before the capital call was made, he demanded that his capital payment be returned. It was not returned, and as of today has still not been returned to him. (See July 26, 2011 Trial Transcript, Glenn Morris at p. 66.) As a result, by the first part of 2007, Morris was cut out of Promenade not only with nothing to show for it but he was defrauded into paying the entity an additional \$67,500 which Schnoor immediately passed on to his construction company, Accurate Construction.

B. Andrew Gremel & Associates ("AGA").

In another of their initial acts, the Council decided to wipe out any value MSG and Andy Gremel had in a company called Andrew Gremel Associates ("AGA") and move \$750,000 of AGA's assets to Josh

Schnoor for next to nothing. At the time, AGA was owned 100% by MSG, having recently bought out Gremel's 50%. Under this plan, a company called TIA2K was created and used to approach Mercantile Bank, the bank with which AGA held a \$125,000 line of credit that was secured in all of the assets of AGA. (See Plaintiffs' Trial Exs. 164, 169, Advisory Council Emails.) TIA2K borrowed \$78,000 from the related entity Accurate Premium Financing, Inc. which was owned by Hiestand, Schnoor and Young to provide a loan to TIA2K to negotiate a settlement of this line. (See Ex. 5, Hiestand 7/14/10 Dep. Trans. at pp. 159-160.) A check for \$78,000 was cut from Accurate Premium Financing to TIA2K with no formal documents but an oral understanding that TIA2K or AGA would pay it back and give Accurate Premium Financing a security interest in all of the AGA assets. Armed with the cash from Accurate Premium Financing, TIA2K then, instead of simply using it to advance to AGA and settle out the bank debt to leave AGA operations stronger (which would have preserved the integrity of Morris' security interest), approached Mercantile Bank and purchased for TIA2K the bank position for \$78,000 including the right to receive the \$125,000 from AGA and a security interest in all AGA assets.

Once TIA2K had acquired the bank position, TIA2K then declared the AGA debt it had purchased from Mercantile Bank in default and proceeded with an Article 9 foreclosure by TIA2K and a private sale. The buyer which was created for this private sale of all of the assets of AGA was a new entity created by the Council known as MSG Benefits, Inc. ("MSG Benefits"). Josh Schnoor was the 100% owner of MSG Benefits. MSG Benefits purchased 100% of the assets of AGA which TIA2K had seized in foreclosure of the bank debt that it had purchased from Mercantile Bank. MSG Benefits paid \$78,000 for all of the assets and paid that consideration by assuming the obligation of TIA2K to Accurate Premium Financing (the Hiestand and Schnoor controlled entity.) Larimore and Charron then papered the transaction with a note from Accurate Premium Financing to MSG Benefits for \$78,000 and secured in the assets of MSG Benefits. The end result was that this valuable piece of MSG was transferred to Schnoor's son Josh for no consideration to MSG. This highly sophisticated transaction demonstrated to the Council, including

Hiestand, that they were able to essentially transfer a \$750,000 asset out of MSG with \$0.00 coming into MSG and for nothing more than a borrowed \$78,000 from the related entity of Accurate Premium Financing. The end result of this scheme was to isolate this portion of the original asset base from Morris and Morris' related entities. It also gave Hiestand, Charron and Schnoor the model/formula that they would subsequently use to transfer all of MSG's remaining assets to NYPIA. (For general discussion of TIA2K see August 9, 2011 Trial Transcript, George Larimore at p. 18, *et seq.*; August 11, 2011 Trial Transcript, Young at p. 179.)

C. Morris, Schnoor & Gremel, Inc. Given the issues between Morris and Schnoor, Morris concluded that the only effective way to move forward was to completely separate from Schnoor. (See July 26, 2011 Trial Transcript, Glenn Morris at pp. 70-71.) On April 17, 2007, he advised Schnoor in writing of his determination to dissolve MSG. (Plaintiffs' Trial Ex. 69, 4/17/07 Letter.) When Schnoor refused Morris' proposed settlement agreement to resolve the separation, Morris filed a Complaint for Judicial Dissolution. Schnoor responded arguing that since Morris had submitted a settlement offer to dissolve he was now obligated under the parties' Stock Purchase Agreement to sell his interest in MSG to him. (See July 26, 2011 Trial Transcript, Glenn Morris at p. 75.)

On August 10, 2007, the Circuit Court ruled that the Stock Purchase Agreement applied to the settlement proposal from Morris and that the 50% ownership held by Morris must be sold to Schnoor for the value stated in the parties' last annual meeting minutes of \$2.5 million (total value of \$5.0 million). (Judge Trusock's August 10, 2007 Specific Performance Opinion and Order.) The court-ordered sale required Schnoor to make a down payment of \$235,804 to Morris and sign a promissory note in the amount of \$2,264,196. (See Plaintiffs' Trial Ex. 130; Stock Closing Statement.) The promissory note obligated Schnoor to make monthly payments to Morris in the amount of \$45,091.74, beginning on December 25, 2007. (See Plaintiffs' Trial Ex. 124; Promissory Note.) Morris was to retain a secured interest in what was to be a 50% block of the stock of MSG, but not in its assets. *Id.* Notably, the stock sale did not prevent

Morris from competing in the insurance industry with Schnoor and MSG. Once the sale was closed, as he had promised, Morris promptly began to operate his own insurance agency that competed directly with MSG.

Although Schnoor made a few belated monthly payments and even though the Circuit Court refused to excuse non-payment (See January 16, 2008 Order Denying Schnoor's Preliminary Injunction Motion), Schnoor simply ceased making payments in April of 2008. However, before Schnoor ceased payments on the note, the Council⁷ had determined to give Schnoor an alleged security interest in all of the assets of MSG, even though there is no evidence that any actual funds were advanced by Schnoor. (See Plaintiffs' Trial Ex. 133, 171, and 182 (documenting this alleged security interest)). On May 22, 2008, with Schnoor in solid control of MSG, the Council also followed the TIA2K plan and determined to create for C&H another alleged security interest in all the assets of MSG purportedly for future attorney fees. (See Plaintiffs' Trial Exhibit 250).⁸ Because Schnoor stopped paying, Morris obtained a court order directing Schnoor to resume making payments on the promissory note. (See July 24, 2008 Circuit Court Order.) Despite this Circuit Court Order, Schnoor still refused to make required payments so, on August 20, 2008, the Circuit Court commenced a hearing to determine whether Schnoor should be held in civil contempt for failing to comply with the Circuit Court Order. In this multi-day contempt hearing, the value of MSG was a

⁷ In a far ranging memo authorized by Larimore in January 2008 he described at length to Schnoor and Charron his thoughts on how "to screw Glenn." The objective of all of the scheming was to make "Judd judgment proof or at least make any judgment meaningless or worthless." (See Plaintiffs' Trial Ex. 172; 1/12/08 email.)

⁸ In June 2008, Larimore again reviewed the strategy to "screw Glenn." This time he recommended to the advisory council that they set up a "transfer by MSG of substantially all its business . . ." The concept was to get all the assets into the new LLC's and then move forward "without third party interference." He also affirmed "We need to get Glenn out of MSG, Inc . . ." Mr. Charron's response was intriguing. In emails subsequently obtained by use of the crime fraud exception to confidentiality, he first expressed he was perplexed by Larimore's proposal because it would still leave Glenn with some possible value. His retort: "You'll have to illuminate me about why we are creating new wealth for Glenn." And then he noted "Until we have shored up our damage claims against Glenn, we need to leave the liability in MSG wherever possible." And then this: "We probably need to create at least one more entity which captures new client work and is totally Glenn resistant. . . I would kill MS&G, Inc." Finally he urged that the organizational changes be made "now." (See Plaintiffs' Trial Ex. 260; 6/2/08 and 6/3/08 emails.)

key issue as to whether Schnoor could make the Court-ordered payments so, his accountant, Hiestand was present in the courtroom to actively assist Schnoor in the defense. In fact, Hiestand was involved in the preparation of many of the contempt hearing exhibits used by Schnoor to establish the value of MSG. Moreover, when Schnoor became confused as to some of the valuation questions on the stand, the record reflects that he met with Hiestand over one of the hearing breaks to be educated on the financial documents. (See September 2, 2008 Judd Schnoor Contempt Hearing Transcript at p. 132.) Schnoor and Hiestand presented the value of the MSG assets as \$3,273,005 net of the debt to Morris; an amount which greatly exceeded the amount Hiestand and NYPIA "paid" for these same assets just a few months later. (See Plaintiffs' Trial Ex. 328.)

While Schnoor claimed he lacked the financial ability to pay, the real story involves a far more strategic basis to stop paying. As Charron stated in April 2008 to the Council, "There are things we really need to do before MSG does not make the next payment on the Morris note." (See Plaintiffs' Trial Ex. 235; 4/25/08 email.) By June 2008 the Council had everything in place to "screw Glenn." The plan devised by the Council was given the operative term "nuclear option."⁹ (See, e.g. Plaintiffs' Trial Ex. 363; 10/17/08 email.) By September 2008, when the Council realized they could not negotiate away the claims of Morris and a damage remedy seemed probable in the contempt hearing, Charron declared that the nuclear option started to look pretty good. (See Plaintiffs' Trial Ex. 327; 9/16/08 email.) By September 24, 2008 Charron sought a Council meeting to coordinate the "nuclear option." (See Plaintiffs' Trial Ex. 330; 9/24/08 email.) By October 1, he declared that he was ready "to launch." (See Plaintiffs' Trial Ex. 334; 9/30/08 to 10/2/08 emails.)

While the Circuit Court wrestled with the contempt, the Council worked behind the scenes to transfer the assets of MSG to a friendly buyer to make sure that Morris would get nothing. As originally

⁹ The "nuclear option" involving MSG was essentially a remake of the TIA2K scheme used to transfer all of the assets of AGA out of MSG and from Morris' reach. However, TIA2K was not needed this time in light of the alleged security interest held by Charron in all the assets of MSG.

contemplated, it was intended that Schnoor would foreclose on his own lien and sell all the assets of MSG to a newly created company owned by his son Josh Schnoor and others. (See Plaintiffs' Trial Ex. 303 (email sent by Charron to Schnoor in which Charron referred to the payment of \$14,000 by Schnoor as a "down payment on an asset sale if needed" and presaging a transaction in which Schnoor could "conduct a UCC sale of your lien against all of the assets of MSG to the new company."))(See also Plaintiffs' Trial Ex. 310).

By September of 2008, while the contempt hearing against Schnoor was winding down, the asset-transfer process began in earnest. However, because the Circuit Court issued a "no asset transfer" Order on August 22, 2008, it was apparently concluded that Schnoor himself could not transfer all of the assets and that, instead, Charron's alleged security interest would be used. Hiestand, acting for Schnoor, began to seek out possible "friendly buyers" for the MSG assets.¹⁰ As even Hiestand admitted, he was the person

¹⁰ In his testimony, Hiestand described what he meant by the "friendly buyer" concept. As Hiestand testified:

Q. So did you have any discussions with Judd or Josh in that timeframe such that before you signed on the dotted line committing to a five-year lease, that you had some assurances from them that they were going to remain with the agency?

A. I don't recall any assurances, no, I don't. I made an assumption.

Q. The assumption was they were going to stay?

A. The assumption I had is that I had seen the letter that Dave Charron had given Judd before he was going to call the assets saying find a friendly buyer if you want to continue.

So --

Q. You were a friendly buyer?

A. I think Judd figured I would be a more friendly buyer -- well, actually, I think he thought Dave would be a good friendly buyer.

Q. If Dave didn't work, you were going to be the friendly buyer?

A. Well, then somebody else. I had no anticipation of getting that involved.

Q. But I understand, though, at the point that you did get involved in the form of New York Private Insurance, you acquired all the assets, you acquired the assets you stated without the benefit of a noncompete from either Judd or Josh.

Right?

A. Yes.

responsible for performing all of the investigation and contacting the potential friendly buyers. He initially contacted Young, one of Schnoor's long-time friends and business associates to be the buyer. Ultimately, Young advised Hiestand that he would not screw Glenn. (See August 11, 2011 Trial Transcript, Dave Young at p. 223.) Despite the urging of Hiestand and the assurance by Charron that he would defend Young in the inevitable fraudulent transfer claims, Young steadfastly refused.¹¹ (See Plaintiffs' Trial Ex. 307, 343, 346, 349, 355-357, 359.) In addition to refusing, Young has testified that he pointedly told Hiestand that the Charron dictated "price" was way too low and would almost certainly be the subject of litigation.¹² (See August 11, 2011 Trial Transcript, Young at p. 222.)

With this new twist, Charron and Hiestand had to quickly come up with an alternative friendly buyer. At the last minute NYPIA was created with Hiestand and his client and friend William Woodworth ("Woodworth") serving as the NYPIA owners. (See Plaintiffs' Trial Ex. 395.) Moreover, as the Circuit Court subsequently found after trial, NYPIA "was created and controlled in substantial part by Guy Hiestand." (See December 27, 2012 Circuit Court Opinion at p. 12). Moreover, and not surprisingly, the Circuit Court also found that NYPIA and Hiestand fit the "friendly buyer" concept to a "T". (See December 27, 2012 Circuit Court Opinion at pp. 6, 7). On the same date NYPIA was created, the trigger was pulled on the "nuclear option" selling 100 percent of the assets of MSG which C&H had seized on October 18, 2008, valued at over \$2.7 million, in exchange for \$100,000 cash and an unsecured and non-personally

July 14, 2010 Deposition Testimony of Hiestand Which Was Made Part of the Trial Record at p. 172. Hiestand also admitted that the beauty of this process would be that the promissory note debts to Glenn and Jim Morris and MSG Properties would be eliminated. (July 14, 2010 Hiestand Deposition at p. 217; February 23, 2011 Hiestand Deposition at pp. 91-92.)

¹¹ Charron advised Young that C&H would give the new entity "a discount" on the obligation once "the smoke cleared." (See Plaintiffs' Trial Ex. 359; 10/16/08 email.)

¹² C&H and Fifth Third Bank would be paid off as secured creditors, (See Plaintiffs' Trial Ex. 398), leaving Morris and those associated with him high and dry. Indeed, the asset purchase agreement of November 7, 2008, between C&H and NYPIA laid out this very transaction, (see Plaintiffs' Trial Ex. 397), and the bill of sale signed on November 21, 2008, memorialized the transaction in which C&H sold all of the assets of MSG to NYPIA for \$395,000. (See Plaintiffs' Trial Ex. 415). NYPIA paid C&H approximately \$100,00 in cash, (see Plaintiffs' Trial Ex. 418), and gave C&H a promissory note for \$295,000. (See Plaintiffs' Trial Ex. 416.)

guaranteed note for another \$295,000. This note, true to Charron's word to the friendly buyer back in September, was then discounted by \$100,000 and paid off once the agency contingency payments were received by NYPIA in February 2009. (See Plaintiffs' Trial Ex. 359.) (The insurance company contingency payments were historically paid to MSG in the first part of every year and could be as much as \$500,000. The right to these payments was one of the assets transferred to NYPIA as a part of the alleged "sale.")

Even though there was a Circuit Court Order in place which specifically precluded the transfer of MSG's assets without the Circuit Court's approval, the alleged "transfer" was not disclosed to the Circuit Court or counsel for Morris. After the secret transfer of all of MSG's assets was uncovered in January 2009 (later confirmed in an Evidentiary Hearing on February 9, 2009) and with all of the assets of MSG gone and Morris' security in the stock of MSG rendered worthless, Schnoor filed personal bankruptcy to discharge his debt to Morris. (See February 9, 2009 Hearing Transcript at p. 4.)

Morris and MSG Properties concluded that the alleged transfer bore the classic framework of a fraudulent transfer.¹³ It was also certainly a violation of the Circuit Court's August 22, 2008 no asset transfer order. As a result, both Morris and MSG Properties filed suit, alleging that NYPIA, Charron, C&H, and MSG were liable for violations of the UFTA, conversion, a commercially unreasonable sale under Article IX, and common law fraud.¹⁴ Eventually, after a series of summary disposition hearings, the Circuit Court dismissed Charron as a defendant in the current cases and dismissed the claims for a commercially unreasonable sale and conversion on standing grounds along with the common law fraud claim. The

¹³ The Circuit Court after 22 days of trial agreed that the transfer was a classic fraudulent transfer in violation of Michigan's version of the Uniform Fraudulent Transfer Act. (See December 27, 2012 Opinion, at p. 10)(chronicling why it was a classic fraudulent transfer and bore numerous badges of fraud).

¹⁴ Morris filed a motion for an order to show cause why parties should not be held in contempt against all of the same parties including NYPIA in the original case in which the no transfer order had been issued. This motion was first filed with the Circuit Court in October 2009. Immediately, NYPIA filed an appearance to contest the claims that NYPIA had been knowingly involved in the transfers which were in direct violation of the Circuit Court's order of August 22, 2008. NYPIA briefed and orally argued against the motion. Later in 2010, when the contempt motion against NYPIA was again noticed up, NYPIA again briefed the motion and argued in opposition. Even after the Circuit Court entered the Order to Show Cause against NYPIA they filed a motion to dismiss that Order.

Circuit Court also dismissed NYPIA from any direct liability for alleged direct UFTA violation but within weeks expressed to counsel for NYPIA that in so doing that the NYPIA/MSG assets were still potentially subject to enforcement remedies including a UFTA clawback remedy should the Circuit Court determine that C&H and NYPIA were found to not be good faith transferees who took for value. (See March 19, 2010 Hearing Transcript.)

In that hearing in these UFTA cases at which NYPIA attended even though the direct claims against it had been dismissed, the Circuit Court highlighted that the dismissal of the direct claims previously alleged against NYPIA did not mean that the Circuit Court might not later determine that the assets of NYPIA could be the subject of remedies for a UFTA violation including the imposition of liens and possible clawback judgments. (See March 19, 2010 Hearing Transcript; See also May 28, 2010 Hearing Transcript at p. 11.) Indeed, in the course the hearing NYPIA's counsel declared that if NYPIA was still exposed to possible clawback remedies even after the direct claims had been dismissed that he would consider filing a motion for summary disposition on behalf of NYPIA as a non-party and would be filing Affirmative Defenses to the claims that the NYPIA assets remained exposed to a possible remedy judgment. (See March 19, 2010 Hearing Transcript at p. 73.) **On April 14, 2010, NYPIA in fact filed Affirmative Defenses in these cases as a non-party responding to the claims that their assets remained subject to remedy enforcement and asserting that it took in good faith and for value. (See April 14, 2010 Affirmative Defenses).**

Starting on June 28, 2011 the Circuit Court held a lengthy twenty-two (22) day bench trial in which it critically considered the remaining claims and defenses, including NYPIA's affirmative defense that it allegedly was a good faith transferee for value, as well as the contempt charges. The two UFTA cases and the contempt charges in the dissolution case were all tried together because all three matters involved the same operative facts, same parties and similar legal issues. (See NYPIA's December 9, 2009 Brief in Opposition to Order to Show Cause for Contempt) (where NYPIA stated that Morris' "claims in the 2009

litigation...could provide Morris with the same relief he now seeks through contempt proceedings...) In the opening statements which were held a month before the first witnesses were called, the Morris Appellees openly articulated the claim that ultimately a remedy judgment should be entered against NYPIA as the subsequent transferee of the fraudulently transferred assets since they had not taken in good faith or for value. (See June 28, 2011 Trial Transcript at pp. 116-125) NYPIA in their opening arguments disputed these claims. (See June 30, 2011 Trial Transcript at p. 31.) During the course of this twenty-two (22) day trial, the Circuit Court heard from numerous witnesses produced by NYPIA, Charron, C&H and the Morris Appellees. (See Trial Transcripts of numerous fact witnesses from both sides over the twenty-two (22) day trial). In particular, the Circuit Court received testimony from NYPIA's two principals, Woodworth and Hiestand, NYPIA's bookkeeper Laura Fett ("Fett"), NYPIA's former bookkeeper Tina Dickerman ("Dickerman"), NYPIA's bankers Michael Hay ("Hay") and Ed Ryan ("Ryan"), other NYPIA employees like Josh Schnoor, Judd Schnoor, Tyler Velting ("Velting"), and even the alleged "seller" of the assets, Charron, attorneys in the office of C&H, Young and others. NYPIA counsel was present for each witnesses' testimony and was afforded a full opportunity to cross examine or direct examine the witness, which opportunity counsel utilized to the fullest. NYPIA also produced their own valuation expert witness, Thomas Vereecke ("Vereecke"), to testify to the value of the assets transferred in a further attempt to argue to the Circuit Court that NYPIA was a bona fide purchaser and took in good faith and for value. (See October 5, 2011 Trial Transcript, Verecke at p. 52, *et seq.*; October 10, 2011 Trial Transcript.) NYPIA also cross examined at length the Morris Appellees' valuation expert, Wayne Walkotten. (See October 3, 2011 and October 5, 2011 Trial Transcripts.) Throughout the lengthy trial, NYPIA attempted to portray the fraudulent transfer to NYPIA as somehow being an "above board", arm's length, bona fide transaction. (See also December 27, 2012 Circuit Court Opinion at p. 21)(noting that the "issue of MSG's value was front and center at trial"). In addition, hundreds of trial exhibits which totaled thousands of pages were

admitted into evidence and NYPIA was afforded the opportunity to voir dire and object to every exhibit offered, which opportunity it exercised during the trial. (See the Various Trial Exhibits).¹⁵

After the proofs, the Circuit Court asked for closing arguments and afforded the parties and NYPIA an opportunity to submit written briefs on any issues they wished to address. However, he alerted the parties including NYPIA that the first issue he wanted to make sure everyone addressed in closings was the appropriateness of entering a clawback remedy against NYPIA. (See October 19, 2011 Trial Transcript at p. 153.) In closing arguments held a month or so later with NYPIA counsel attending and participating, the Circuit Court was urged to determine that the transfers were in violation of UFTA and that a clawback remedy against NYPIA should be entered. (See December 1, 2011 Trial Transcript at 105-110, 155.)

On December 27, 2012, the Circuit Court issued a twenty-four (24) page written Findings of Fact and Conclusions of Law ("Findings and Conclusions"). (See December 27, 2012 Finding of Facts, Conclusion of Law, and Verdicts) ("December 27, 2012 Opinion"). See *Id.* The Circuit Court expressly found that NYPIA was not a good faith transferee for value and, thus, a clawback remedy against NYPIA and in favor of both Morris and MSG Properties would enter. (See December 27, 2012 Circuit Court Opinion, at pp. 23 and 24).

On January 16, 2013, NYPIA filed a Motion for Reconsideration of the Circuit Court rulings determining that clawback remedies should enter against NYPIA in which it argued that entering remedies against it denied it Due Process. The Circuit Court denied this Motion for Reconsideration in a written Opinion issued on February 5, 2013. On March 26, 2013, the Circuit Court entered its Final Judgments in the two cases, including a Money Judgment in the amount of \$1,495,234.04 in favor of Appellee MSG Properties against Appellant NYPIA and a Money Judgment in the amount of \$67,541.81 in favor of Appellee Morris against Appellant NYPIA. (See Final Judgments Dated March 26, 2013). On April 10,

¹⁵ In light of NYPIA's complete involvement in the 22-day trial, NYPIA's appellate argument based on alleged Due Process is particularly specious.

2013, NYPIA filed Claims of Appeal from the Circuit Court's Final Judgments. (See NYPIA's Claim of Appeal).

After receiving briefing and hearing oral argument on May 29, 2014, the Court of Appeals issued an extensive and well-reasoned fifty-nine (59) page Opinion rejecting NYPIA's arguments in their entirety. (See May 29, 2014 Court of Appeals Opinion). Importantly, for purposes of NYPIA's present Application, the Court of Appeals in its Opinion examined in great detail the various alleged Due Process arguments which NYPIA is again asserting in its Application and rejected them in their entirety. (See May 29, 2014 Opinion, at pp. 25-30). In particular, the Court of Appeals described NYPIA's asserted arguments in the following manner:

NYPIA argues that as a non-party, it lacked proper notice and an opportunity to be heard based on reassurances by the trial court that it was defending itself only in the contempt proceeding and not under the allegations made pursuant to the UFTA. NYPIA asserts the error of the trial court's ruling is further substantiated by its dismissal from the 2009 proceedings involving the UFTA claims, following the successful outcome of its motions for summary disposition. In response to Morris and MSG Properties, NYPIA disagrees that any deficiency in notice was cured by the motion for reconsideration and that it cannot demonstrate prejudice.

(See May 29, 2014 Court of Appeals Opinion, at p. 25). In response, the Court of Appeals expressly rejected these arguments and concluded that no Due Process violation was present with regard to NYPIA. (See *id* at pp. 25-30). As an initial matter, the Court of Appeals noted that "Due Process is a flexible concept, the essence of which requires fundamental fairness." See *id* at p. 25. After noting this flexibility, the Court of Appeals further stated that:

"Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). "The opportunity to be heard does not mean a full trial-like proceeding, but it does require a hearing to allow a party the chance to know and respond to the evidence."

See *id* at pp. 25-26. After setting forth this well-established legal framework for examining Due Process claims, the Court of Appeals rightfully concluded that no Due Process violation was present. As the Court stated:

NYPIA was not deprived of due process. NYPIA appeared and participated in the hearings pertaining to the imposition of a restraining order of the profit-sharing distributions, and its concerns were specifically addressed by the trial court. Counsel for NYPIA called witnesses for this proceeding. Morris filed a motion with the trial court seeking to designate NYPIA as a real party in interest regarding MSG's counterclaims in the 2007 action, or alternatively to be named as a counterplaintiff.

NYPIA participated in various discovery motions and expressed concerns regarding the impact of the litigation on NYPIA.

On more than one occasion, NYPIA appeared in the trial court and sought clarification of its role in the litigation as it progressed. While acknowledging NYPIA's non-party status, the trial court indicated that the "clawback" provision of the UFTA had the potential to impact NYPIA. The trial court expressed hesitancy in definitively stating that NYPIA was out of the proceedings. NYPIA continued, through summary disposition motions, to challenge its liability under the UFTA. The trial court specifically recognized the necessity of inclusion of NYPIA and the provision of notice as matters proceeded to trial. NYPIA subsequently received a notice of a pretrial scheduling conference. NYPIA participated in pretrial hearings...

NYPIA was a full and involved participant during the 23 days of trial that ensued, calling and cross-examining witnesses, making opening and closing arguments, and providing a trial brief. In addition to contesting any liability due to lack of notice in the 2007 case, NYPIA also argued its status as a good faith transferee as preclusive of any determination of its involvement in a fraudulent transfer of MSG's assets. NYPIA was also integrally involved in several post judgment proceedings through the filing of objections and in seeking reconsideration of the trial court's ruling.

Further, the substance of the trial and various proceedings focused on (a) the knowledge of and violation of the order precluding the transfer of MSG's assets, and (b) the purposeful and fraudulent activities engaged in to consummate the asset transfer and avoid obligations to Morris and MSG Properties. NYPIA's defense included arguments that it had no knowledge of the injunctive order and that it could not be liable under the UFTA because it was a good faith transferee for value. While its trial brief focused on the contempt proceedings, NYPIA acknowledged having "submitted prior pleadings involved in the 2009 and the instant cases and incorporates herein the factual matters and legal arguments set forth." In addition, NYPIA's counsel often led cross-examination of the witnesses and conducted the direct examination of Vereecke to determine the valuation of

MSG's assets at the time of transfer to NYPIA. Such testimony directly pertains to the validity of whether the transfer was for value and is irrelevant with regard to the existence of notice of the injunctive order.

While there is certainly confusion in the lower court record about the precise role and status of NYPIA during the course of the proceedings, the trial court did indicate the importance of NYPIA's participation and explained its position regarding possible remedies under the UFTA, including a clawback provision, which could establish the liability of NYPIA. NYPIA was a fully engaged participant in a multitude of hearings before, during, and after trial, involving the briefing and argument of issues pertaining to the claims of fraud. The arguments and evidence proffered by NYPIA encompassed both lack of knowledge of the injunctive order and its status as a good faith transferee for value of the assets. As such, the requirements of due process were met.

(See *id* at pp. 26-27). Thus, the Court of Appeals carefully examined the Due Process arguments which are against being raised by NYPIA and rejected them in their entirety. Moreover, the Court of Appeals further held that alternatively any purported deficiencies in supposed notice were cured by NYPIA's filing of a post-trial Motion for Reconsideration. As the Court of Appeals noted:

Alternatively, Morris and MSG Properties contend that NYPIA's motion for reconsideration after trial served to cure any purported deficiencies in notice. Although NYPIA disputes this assertion, this Court has stated:

Under MCR 2.119(F), a trial court has discretion to grant rehearing or reconsideration of a decision on a motion. "The rule allows the court considerable discretion in granting reconsideration to correct mistakes, to preserve judicial economy, and to minimize costs to the parties." *Koki v Bling*, 241 Mich App 655, 659; 617 NW2d 368 (2000). The trial court may even give a party a second chance on a previously decided motion. *Id.* Additionally, in *Bolton [v Fenton Twp]*, 272 Mich App 456,] 463-464; 726 NW2d 733 [(2006)], this Court determined that any error by a court in granting summary disposition sua sponte without affording a party an adequate opportunity to brief an issue and present it to the court may be harmless under MCR 2.613(A), if the party is permitted to fully brief and present the argument in a motion for reconsideration. [*Al-Maliki*, 286 Mich App at 486.]

NYPIA did file a motion for reconsideration following the conclusion of trial asserting a deprivation of due process in terms of its ability to assert a "good faith" defense under the UFTA, which was denied by the trial court. As such, NYPIA was afforded an additional opportunity to set forth its arguments on this issue.

(See *id* at pp. 27-28).¹⁶

Despite the Court of Appeals' well-reasoned affirmance of the Circuit Court's Judgments Against Potential Appellant NYPIA, NYPIA filed its Application For Leave To Appeal with this Court on July 9, 2014. In this Application, NYPIA set forth various alleged issues which it mistakenly claims justify review by this Court.¹⁷ Since none of the alleged grounds claimed in the Application actually merit this Court's review, Morris and MSG Properties file this Answer in opposition to NYPIA's ill-supported and meritless Application.

LAW AND ARGUMENT

A. THIS COURT SHOULD DENY NYPIA'S APPLICATION FOR LEAVE TO APPEAL BECAUSE NYPIA HAS FAILED TO DEMONSTRATE SUFFICIENT GROUNDS FOR AN APPEAL TO THIS COURT AS REQUIRED UNDER MCR 7.302(B).

Despite its affirmative obligation to show that one of the grounds set forth in MCR 7.302(B) justify granting the Application, Potential Appellant NYPIA does not cite to, let alone, discuss this Court Rule at any point in its Application or how it is supposedly satisfied in this case. However, NYPIA's fundamental omission is hardly surprising since none of the listed bases set forth in MCR 7.302(B) are present in this case. First, and perhaps most importantly, the Court of Appeals decision is well-reasoned and correct. As such, NYPIA is simply unable to show under MCR 7.302(B)(5) that the decision was somehow "clearly erroneous and will cause material injustice." Moreover, for that same reason, NYPIA is unable to show that

¹⁶ As a component of its well-reasoned Opinion, the Court of Appeals also rejected NYPIA's meritless joinder argument under MCR 2.205. (See May 29, 2014 Opinion, at pp. 28-30)(rejecting this ill-supported argument both on the merits and based on NYPIA's untimely assertion of it).

¹⁷ Specifically, Potential Appellant NYPIA formulated these questions presented for review as follows:

1. Did the Circuit Court and the Court of Appeals err by entering and affirming judgments against non-party Appellant New York Private Insurance Agency, LLC ("NYPIA") in contravention of NYPIA's due process rights under the United States and Michigan Constitutions by (a) entering judgment against NYPIA in cases to which it was not a party; (b) entering judgment for causes of action on which NYPIA already prevailed on summary disposition; and (c) entering judgment when the court lacked authority to do so against a non-party?

NYPIA answers "yes."

(See NYPIA's Application For Leave, at p. vii). As noted, however, in their Counter-Statement of Questions Presented For Review, Potential Appellees Morris and MSG Properties do not agree with this formulation of the questions presented.

the Court of Appeals' decision in any way conflicts with another decision of this Court or the Court of Appeals as required under MCR 7.302(B)(5). Third, NYPIA is unable to show that any legal principles of major significance to the state's jurisprudence are present in its Application as required under MCR 7.302(B)(3). The Court of Appeals (in its well-reasoned Opinion) correctly applied well-established equitable and legal principles which have long existed in Michigan jurisprudence. Since these principles are well-established, no legal issues of any major significance to the state's jurisprudence exist.¹⁸ Since NYPIA has failed discuss, let alone, demonstrate sufficient grounds for granting an Application to this Court under MCR 7.302(B), this Court should deny NYPIA's Application For Leave To Appeal in its entirety.

B. NYPIA WAS NOT DEPRIVED OF ANY DUE PROCESS RIGHTS.

1. Standard Of Review In The Unlikely Event That The Application Were To Be Granted.

While the legal aspects of NYPIA's Due Process contentions are reviewed *de novo*, any alleged procedural errors are reviewed on an actual prejudice/harmless error basis.¹⁹ *In re Rood*, 483 Mich 73, 93; 763 NW2d 587 (2009); See *Department of Community Health v Risch*, 274 Mich App 365, 379 (2007) (alleged hearing violations resulted in harmless error); *People v Truong*, 281 Mich App 325, 332-333, fn 2 (1996) (a party must show actual prejudice); *Feaster v Portage Public Schools*, 210 Mich App 643, 655-656 (1995), *overruled on other grounds*, 451 Mich 351 (1996) (because alleged procedural errors "would not have altered the outcome", no violation of Due Process was present); *People v Mack*, 2004 WL 959998, *2 (Mich Ct App May 4, 2004) (attached hereto as Ex. 2) (prejudice to the defense must be shown to establish a Due Process deprivation); *Bay Home Medical & Rehab, Inc v Department of Treasury*, 2005 WL 658828, *1 (Mich Ct App March 22, 2005) (attached hereto as Ex. 3) ("mere violation of a procedural rule does not constitute a Due Process error" if the error is harmless); *Wetsman v Fraser*, 2012 WL

¹⁸ The other listed grounds of MCR 7.302(B) are also clearly not implicated in any manner by this case. First, there is no legislative act involved in this case, MCR 7.302(B)(1). Moreover, since neither the state nor a state actor is in any way being sued, MCR 7.302(B)(2) is also not implicated in any manner.

¹⁹ See, e.g., *Midland Cogeneration Venture v Naftaly*, 489 Mich 83, 89 (2011); *Harvey v State of Michigan*, 469 Mich 1, 6 (2003); and *Dorman v Township of Clinton*, 269 Mich App 638, 644 (2006).

4210413, *8 (Mich Ct App Sept 20, 2012) (attached hereto as Ex. 4) (the whole record must be examined in a Due Process context); *In The Matter Of KEG and AG*, 2012 WL 1192746, fn 3 (Mich Ct App April 10, 2012) (attached hereto as Ex. 5) (Due Process claim cannot be maintained without showing actual prejudicial impact). See also MCR 2.613(A). Moreover, in addressing whether a Due Process deprivation is present, a reviewing court must be mindful that Due Process is a very flexible concept and take into consideration the particular circumstances of each case. See, e.g., *In re Brock*, 442 Mich 101, 111 (1993); *In The Matter of DCH*, 2010 WL 3239113, *2 (Mich Ct App August 17, 2010) (attached hereto as Ex. 6); *Woods v Federal Home Loan Bank Board*, 826 F2d 1400, 1410-1411 (5th Cir 1987). Finally, in addressing whether a Due Process deprivation is present, a court must be mindful not to exalt “form” over “substance” and that “the purpose of procedural Due Process is to discover the truth.” *Rozman v Elliott*, 335 F Supp 1086, 1104 (D Neb 1971).

2. NYPIA Was Not Deprived Of Due Process Because It Received Notice That A Remedy Could Be Enforced Against It, Had A Meaningful Opportunity To Be Heard On The Issues And Claims And, Regardless, Is Unable To Show Any Actual Prejudice.

NYPIA contends that the Circuit Court deprived it of Due Process rights afforded a party under the Michigan and United States Constitutions when it entered the clawback remedy against the transferred assets by way of a money judgment against NYPIA. At its core, NYPIA's argument hinges on the claim that once the Circuit Court dismissed the directly pled claims against NYPIA, it was precluded from entering any clawback remedy against NYPIA or its assets received as a result of a fraudulent transfer. This assertion fails for multiple reasons. First, as both the Court of Appeals and the Circuit Court noted, NYPIA had an extensive opportunity to be heard on these issues even after NYPIA was dismissed as a party, and, in fact, actively litigated the claims that its assets remained subject to a possible clawback remedy throughout the 22 days of trial. Second, NYPIA was given repeated notice before and during the trial that a clawback remedy of some sort might be imposed against it or its assets. Third, even if NYPIA had an arguable Due Process claim, the fact that NYPIA was afforded the opportunity to file a motion for

reconsideration cures any supposed procedural defects. Fourth, and critically, NYPIA did not meet its burden of showing actual prejudice as a result of any alleged lack of notice or opportunity to be heard. For these reasons, which are discussed more thoroughly below, this Court should reject NYPIA's Application and should conclude that the Court of Appeals properly affirmed the Circuit Court's decision and should deny NYPIA's Application in its entirety.

a. **NYPIA Had A More Than Adequate Opportunity To Be Heard.**

At its heart, NYPIA's main argument throughout its Application is that somehow it did not have an adequate opportunity to be heard on the UFTA clawback remedy. (See, e.g., NYPIA's Application). However, when read in light of the actual record in this case and well-established precedent, NYPIA's main argument is simply meritless and frankly is directly contradicted by the actual record itself.²⁰

This Court and the Court of Appeals have repeatedly examined the "touchstone" of any Due Process challenge; **the opportunity to be heard**. For example, in *Bay Home, supra*, the Court of Appeals explored whether the Tax Tribunal's grant of a motion without the benefit of a response brief and before the time for filing a response brief had expired violated Due Process. The *Bay Home* court began by setting forth the standards which govern Due Process claims and, in particular, noting Due Process is a flexible concept and merely requires the opportunity to be heard. *Bay Home, 2005 WL 658828, at *1*. Since the Circuit Court eventually gave the petitioner an opportunity to be heard, the Court of Appeals concluded that a Due Process claim could not be maintained.²¹

Similarly, in *Hicks v Ottewell, 174 Mich App 750, 757-758 (1989)*, the Court of Appeals reiterated that the touchstone of Due Process is the opportunity to be heard. In *Hicks*, the defendants argued that the

²⁰ Thus, as discussed *infra*, it is hardly surprising that both the Circuit Court and the Court of Appeals expressly rejected this particular argument.

²¹ See also *Reid v Williamstown Township, 2007 WL 4179347, *2 (Mich Ct App Nov 27, 2007)* (attached hereto as Ex. 7); *Neuzil v Astrue, 2013 WL 2445212, *6 (MD Tenn June 5, 2013)* (attached hereto as Ex. 8); *United States v Tisdale, 952 F2d 934, 941 (6th Cir 1992)*; *Raab v Blakely, 370 Fed Appx 303, 2010 WL 925845 (3d Cir March 16, 2010)* (attached hereto as Ex. 9).

imposition of monetary sanctions without advance notice violated Due Process. In the course of rejecting this contention, the Court of Appeals stated:

Lastly, defendants argue that the district court erred by failing to give advance notice of the charges against them and, as a result, the sanctions were imposed without due process of law. We disagree. MCR 2.114 does not provide a procedure to be followed before sanctions can be imposed. However, the fundamental requirement of due process is the opportunity to be heard at a meaningful time in any meaningful manner.

In this case, defendants were given ample opportunity at the hearing to question witnesses and present their arguments and were, therefore, not prejudiced by a lack of notice.

Id. at 757-758. As a result of this opportunity to be heard, the Court of Appeals affirmed this aspect of the trial court's decision and found no deprivation of Due Process.²²

Like the cases discussed above, NYPIA was clearly provided an opportunity to be heard on the clawback remedy claims and thus no Due Process deprivation is present. As its main assertion, NYPIA contends that it allegedly did not have the opportunity to defend against the possibility that under Uniform Fraudulent Transfer Act ("UFTA") remedies could be asserted against either it or its assets if it was not a subsequent good faith transferee for value.²³ However, both the Circuit Court and the Court of Appeals carefully examined this NYPIA Due Process argument and specifically rejected it. (See Ex. 10, December 27, 2012 Findings at p. 16 and fn 13). (See May 29, 2014 Court of Appeals Opinion, at pp. 25-27). **In particular, the Circuit Court expressly found that Due Process was satisfied with regard to a clawback theory since it provided NYPIA with "notice and an opportunity to be heard" on these**

²² NYPIA's attempts to distinguish this precedent are simply unavailing. As these cases demonstrate, the touchstone of Due Process is an opportunity to be heard. Here, as discussed in this section, NYPIA was not only given the opportunity to be heard on the UFTA clawback but they actively litigated the issue. Moreover, there can be no doubt that the UFTA clawback was always present as a basis – and remained active, a fact which NYPIA's own actions in filing its Affirmative Defenses specifically to this UFTA clawback demonstrated and which the Circuit Court noted before eventually imposing the UFTA clawback after NYPIA actively litigated it.

²³ As discussed below in section 6 of this Response Brief, from the outset it was clear the Plaintiffs were requesting a clawback form of remedy under UFTA against NYPIA as the subsequent transferee of all the MSG assets.

claims and that **"NYPIA fully participated in the trial."** *Id.*, at fn 13 (emphasis added). Later, the Circuit Court again addressed NYPIA's Due Process argument and again rejected it on NYPIA's Reconsideration Motion:

NYPIA argues that, as a non-party, it "was deprived of due process in the instant proceedings as it never had a reason, and consequently an opportunity to assert defenses to the 'good faith' and equivalent value under UFTA, MCL 566.31, et. seq., which is the lynchpin of the court's holding." ...**Here, however, non-party NYPIA was permitted to fully participate in the trial by cross-examining and calling witnesses, making legal arguments, and introducing exhibits. Moreover, the Court explained to all those who were involved in the trial that a clawback remedy involving NYPIA was a possibility. In sum, NYPIA was afforded notice and an opportunity to be heard on the UFTA claims.**

(See Ex. 10, Circuit Court's February 5, 2013 Order Denying Motion for Reconsideration of Holding at p. 2) (emphasis added). Moreover, the Court of Appeals itself examined on appeal NYPIA's assertion that predominates its Application that it somehow did not have an alleged adequate opportunity to be heard on the UFTA clawback remedy and expressly rejected this assertion. (See May 29, 2014 Court of Appeals Opinion, at p. 27). After noting that "Due Process is a flexible concept" in civil cases, the Court of Appeals then examined NYPIA's contention in light of the actual record in this case. After carefully scrutinizing the **voluminous** record in this case, the Court of Appeals found that NYPIA not only had an opportunity to be heard on the UFTA clawback remedy, but was in fact actually heard since NYPIA actively litigated the UFTA clawback remedy. (See May 29, 2014 Court of Appeals Opinion, at pp. 27). As the Court of Appeals stated in summarizing the voluminous record:

NYPIA was a full and involved participant during the 23 days of trial that ensued, calling and cross-examining witnesses, making opening and closing arguments, and providing a trial brief. In addition to contesting any liability due to lack of notice in the 2007 case, NYPIA also argued its status as a good faith transferee as preclusive of any determination of its involvement in a fraudulent transfer of MSG's assets. NYPIA was also integrally involved in several postjudgment proceedings through the filing of objections and in seeking reconsideration of the trial court's ruling.

Further, the substance of the trial and various proceedings focused on (a) the knowledge of and violation of the order precluding the transfer of MSG's assets,

and (b) the purposeful and fraudulent activities engaged in to consummate the asset transfer and avoid obligations to Morris and MSG Properties. NYPIA's defense included arguments that it had no knowledge of the injunctive order and that it could not be liable under the UFTA because it was a good faith transferee for value. While its trial brief focused on the contempt proceedings, NYPIA acknowledged having "submitted prior pleadings involved in the 2009 and the instant cases and incorporates herein the factual matters and legal arguments set forth." In addition, NYPIA's counsel often led cross-examination of the witnesses and conducted the direct examination of Vereecke to determine the valuation of MSG's assets at the time of transfer to NYPIA. Such testimony directly pertains to the validity of whether the transfer was for value and is irrelevant with regard to the existence of notice of the injunctive order.

While there is certainly confusion in the lower court record about the precise role and status of NYPIA during the course of the proceedings, the trial court did indicate the importance of NYPIA's participation and explained its position regarding possible remedies under the UFTA, including a clawback provision, which could establish the liability of NYPIA. NYPIA was a fully engaged participant in a multitude of hearings before, during, and after trial, involving the briefing and argument of issues pertaining to the claims of fraud. The arguments and evidence proffered by NYPIA encompassed both lack of knowledge of the injunctive order and its status as a good faith transferee for value of the assets. As such, the requirements of due process were met.

(See *id.*, at p. 27). Moreover, both the Circuit Court and Court of Appeals determinations that NYPIA was given an opportunity to be heard and in fact was heard on the UFTA clawback remedy are amply supported by the trial record in this matter. Over the 22 days of trial, the Circuit Court heard testimony from the two principals of NYPIA: Woodworth and Hiestand. (See Trial Testimony of Woodworth and Hiestand). Both testified through their direct testimony and cross-examination on the topics of the value of the MSG assets transferred as well as whether NYPIA acted in good faith in the receipt of these assets. (See *id.*) In fact, despite the overwhelming evidence presented by Morris and MSG Properties to the contrary, one of NYPIA's positions at trial, on which it repeatedly offered evidence, was that the transfer to NYPIA was a bona fide arms-length transaction and how the "deal" was arrived at. (See also October 4, 2011 Trial Testimony of Hiestand, at pp. 41-61.) NYPIA also offered the testimony of: Schnoor; Josh Schnoor; its bookkeeper, Fett; its former bookkeeper, Dickerman; its bankers, Hay and Ryan; Larimore; and even the alleged "seller", Charron, on these same topics. (See Trial Transcripts of These Witnesses' Testimony).

Moreover, NYPIA aggressively cross-examined Young, Jim Morris, Morris, and Wayne Walkotten ("Walkotten") on the real value associated with the MSG assets. In addition, NYPIA was afforded the opportunity to offer exhibits on these valuation and good faith questions. (See *id.*)²⁴ Over the 22 days of trial, NYPIA also offered its own "expert witness", Thomas Veerecke, on the MSG asset valuation question so as to demonstrate that the "transaction" was allegedly for value and made in good faith. In fact, Veerecke's valuation was so central to NYPIA at trial that Veerecke's opinions were one of NYPIA's three main arguments set forth in its trial brief. (See NYPIA's July 25, 2011 Trial Brief, at pp. 12-14). Moreover, Mr. Veerecke was used to support its defense that it was a bona fide purchaser who took for value and in good faith.²⁵ When read in the voluminous record in this case showing that NYPIA not just had an opportunity to be heard on the UFTA clawback, but NYPIA actually litigated whether, as a subsequent transferee of all of the assets of MSG, it was a bona fide purchaser taking in good faith and for value, Both the Circuit Court and the Court of Appeals correctly determined that NYPIA did not suffer from any alleged Due Process violation. As a result, this Court should deny NYPIA's alleged Due Process arguments set forth in its Application.

b. NYPIA Received More Than Adequate Notice For Due Process Purposes In This Case.

In its Application, NYPIA also argues that somehow it allegedly lacked notice that a clawback remedy might be imposed by the Court before it was actually imposed by the Court. (See NYPIA's Application). However, NYPIA's assertions that it was not on notice that the assets it received through the fraudulent transfer would potentially be liened, clawed (taken) back or that a money judgment for the true

²⁴ In fact, the Circuit Court gave NYPIA unlimited opportunities to present whatever evidence and arguments it wished on the UFTA components.

²⁵ In light of all the evidence presented on these issues, it is hardly surprising that the Findings of Facts and Conclusions of Law expressly stated: "The issue of MSG's value was front and center at trial." (See December 27, 2012 Circuit Court Opinion at p. 21).

value of the assets might enter under UFTA, is unsupportable.²⁶ In fact, the Circuit Court has twice examined and rejected this Due Process notice argument. (See December 27, 2012 Findings at p. 16 and fn 13); (See February 5, 2013 Order at p. 2).²⁷ As these various opinions make clear, the record amply supports the Circuit Court's determination that NYPIA was on notice from the outset of these cases of the possibility of a clawback remedy of some sort. (See *id.*) NYPIA acknowledged even before the direct claims were dismissed that it knew it faced the possibility of some form of clawback remedy if it was found to not have acted in good faith in receiving the assets. (See NYPIA's June 11, 2009 Summary Disposition Brief at p. 6) (requesting that NYPIA be dismissed on the direct claims but then noting that "even assuming

²⁶ Under Michigan's version of the UFTA, a trial court has express authority via a so-called "clawback" remedy to void a fraudulent transfer to a subsequent transferee who did not take in good faith and for value. See e.g. MCL 566.221. Moreover, a trial court is given the authority to lien, take back, or enter a money judgment for the true value of the fraudulently transferred assets once it is determined that a fraudulent transfer was present and neither the first transferee (i.e., C&H) nor the subsequent transferee (i.e., NYPIA) took in good faith and for value. See *id.*

²⁷ Moreover, it is worth noting that the Court of Appeals agreed with the Circuit Court that NYPIA was given sufficient notice of the clawback remedy being argued against NYPIA and its' assets in this matter. (See, e.g., May 29, 2014 Court of Appeals Opinion, at pp. 26-27). As the Court of Appeals stated:

On more than one occasion, NYPIA appeared in the trial court and sought clarification of its role in the litigation as it progressed. While acknowledging NYPIA's non-party status, the trial court indicated that the "clawback" provision of the UFTA had the potential to impact NYPIA. The trial court expressed hesitancy in definitively stating that NYPIA was out of the proceedings. NYPIA continued, through summary disposition motions, to challenge its liability under the UFTA. The trial court specifically recognized the necessity of inclusion of NYPIA and the provision of notice as matters proceeded to trial. NYPIA subsequently received a notice of a pretrial scheduling conference. NYPIA participated in pretrial hearings.

* * * * *

While there is certainly confusion in the lower court record about the precise role and status of NYPIA during the course of the proceedings, the trial court did indicate the importance of NYPIA's participation and explained its position regarding possible remedies under the UFTA, including a clawback provision, which could establish the liability of NYPIA. NYPIA was a fully engaged participant in a multitude of hearings before, during, and after trial, involving the briefing and argument of issues pertaining to the claims of fraud. The arguments and evidence proffered by NYPIA encompassed both lack of knowledge of the injunctive order and its status as a good faith transferee for value of the assets. As such, the requirements of due process were met.

See *id.*

lack of good faith on New York's behalf, that Morris is a secured party or lien holder on the assets New York purchased from MSG.") Thus, even in its very first summary disposition brief, NYPIA expressly admitted to the Circuit Court that it was on notice that it was and still would be potentially subject to a clawback remedy if (a) it was found to be a subsequent transferee who did not take in good faith or for value, and (b) its immediate transferor (C&H) too was subsequently found to not be a good faith transferee. Even after the direct claims against NYPIA were dismissed, NYPIA was repeatedly put on notice that the ongoing proceedings could still result in a remedy against NYPIA pursuant to the remedy provisions of UFTA. On March 17, 2010, Morris filed what was termed Plaintiff's Brief in Response to Motion for Protective Order which was served on counsel for NYPIA and C&H. This was **after** the direct claims against NYPIA had already been dismissed. (See Plaintiff's March 17, 2010 Brief).²⁸ The brief reiterated that, even though NYPIA had been dismissed as a party against whom direct liability claims had been asserted, NYPIA or its assets remained subject to a clawback remedy since it did not take the assets' in good faith. (See *id.* at pp. 13-14). The Circuit Court then held a lengthy hearing at which counsel for NYPIA was not only present but at which NYPIA's counsel actively and extensively participated. (See March 19, 2010 Hearing Transcript). During the course of this hearing, NYPIA, the Plaintiffs, and the Circuit Court discussed at length that while NYPIA had been dismissed as party on the direct claims and was technically a non-party, NYPIA still remained subject to a possible clawback remedy against it or its assets if it were shown that the transfers were fraudulent and the transferees (i.e., C&H and NYPIA) took the assets without good faith. (*Id.* at pp. 25-26, 31-36, 51-58, 71-74). In addition, the Circuit Court stated that it intended to have discovery conducted on the underlying transfers and the elements of the clawback claims: good faith and the value of the MSG assets at the time of transfer. (*Id.* at pp. 51-54) (noting that discovery would be conducted on all aspects of the case, including NYPIA's alleged affirmative defense of

²⁸ A cursory review of this Response Brief demonstrates that it was filed to prevent the artificial limiting of discovery to exclude discovery relating to these UFTA remedies, including the clawback remedy.

being a supposed "good faith transferee for value").²⁹ The Circuit Court also stated that it would try both the underlying fraudulent transfer components as well as the clawback issues like NYPIA's supposed "good faith" in one trial proceeding. (*Id.* at p. 54). As the Circuit Court stated:

"[W]hat I want to do is set a discovery deadline, get discovery finished, and then try whatever needs to be tried and be done with all this. I mean I know you don't want to be in court for two more years."

(*See id.* at p. 54) (emphasis added). (*See id.*, at pp. 74-75) (noting that his "goal was to get these cases closed" and indicating that is why it set the cases' parameters regarding discovery and trial on the clawback remedy in the manner that it did). Thus, at this hearing, the Circuit Court gave even further notice to NYPIA that it faced potential clawback remedies.³⁰

Similarly, NYPIA's own pleadings after it was dismissed, further demonstrate that NYPIA absolutely knew it was still subject to potential clawback remedies. In response to the filing of Amended Complaints by Morris and MSG Properties authorized by the Circuit Court in the March 19, 2010 hearing and after the direct claims against NYPIA had been dismissed, NYPIA filed what it termed its Affirmative Defenses asserting its factual and legal defenses to the asserted clawback claims:

Now comes, New York, Defendant, by its attorney, David C. Gerling, P.C., and pursuant to MCR 2.111(F), asserts the following affirmative defenses as to Plaintiff's claims of recovery of New York's property in the above cause.

²⁹ Subsequent to the Circuit Court's decision to allow discovery on all of these elements, it is worth noting that NYPIA was a significant part of the discovery process which followed. NYPIA's two principals, Hiestand and Woodworth, were deposed along with many of its employees like Fett, Schnoor, and Josh Schnoor, as well as its alleged expert on valuation, Vereecke. (See Proofs of Service for Deposition Notices for Hiestand, Woodworth, Fett, Schnoor, Vereecke, and Josh Schnoor, and others as well as Notices of Hearings and proceedings all provided to NYPIA.) In addition to this deposition discovery, and because of the Defendants' repeated failure to produce emails which were relevant to the fraudulent transfers, the Circuit Court ultimately ordered a court appointed forensic computer expert inspection of NYPIA's computer system which produced many of the key emails regarding the transfers in this case. (See May 26, 2010 Order Regarding Computer Inspection).

³⁰ Counsel for NYPIA even indicated that NYPIA might eventually file a motion to have the equitable clawback remedy against NYPIA dismissed, presumably once discovery was completed. (*See id.*, at pp. 73-75). No such motion was filed.

(See NYPIA's April 14, 2010 Affirmative Defenses) (emphasis added.) In these Affirmative Defenses, NYPIA alleged that clawback remedies should not enter against it because "it acted in good faith". (See *id.* at p. 3). Thus, NYPIA further demonstrated it knew the case continued to litigate the clawback remedy claims and it intended to present defenses to those claims.

NYPIA's notice that it faced potential clawback remedies continued at trial. During opening statements, counsel for Morris and MSG Properties again declared that they were seeking clawback remedies against NYPIA and its assets if the Circuit Court found that fraudulent transfers were present. (See June 28, 2011 Trial Transcript, at pp. 120-127).³¹ Not surprisingly, over the next 22 trial days, whether NYPIA was a bona fide purchaser taking in good faith and for value in an arms-length transaction was front and center in the cases. (See December 27, 2012 Circuit Court Opinion at p. 21) (stating that "[t]he issue of MSG's value was front and center at trial.")³² (See also 12/1/2011 Closing Statement of NYPIA, at pp. 141-151) (NYPIA's counsel summarizes the alleged "evidence" which he claimed showed NYPIA was a bona fide purchaser for value who took in good faith.) Immediately following the close of proofs, all counsel, including counsel for NYPIA, engaged in a lengthy discussion with the Circuit Court on "four great unanswered questions" that the Circuit Court asked be the focus of closing statements. (See October 19, 2011 Hearing Transcript at p. 153.) In particular, the Circuit Court stated that "Number One" was the extent, if any, to which he could reach back/clawback the assets of NYPIA as a remedy under the facts of the cases and the law. *Id.* Given the clear direction, counsel for Morris and MSG Properties in closing addressed the type of clawback remedies that the Circuit Court should employ and how the evidence showed that NYPIA did not take in good faith and for value. (See December 1, 2011 Trial

³¹ NYPIA's counsel, in his opening statement hinted at his recognition about the applicability of a clawback remedy and the Circuit Court discussed with him that in the event NYPIA could show it acted in good faith and was a bona fide purchaser for value, NYPIA would not face any liability of any sort, including on a clawback theory. (June 30, 2011 Trial Transcript of NYPIA's Opening Statement at p. 31).

³² See also Discussion of the 22 days of trial from Subsection A's Opportunity To Be Heard which is expressly reincorporated herein.

Transcript, at pp. 105-110, 155). As noted earlier, counsel for NYPIA then argued to the contrary in his closing statements. (See December 1, 2011 Trial Transcript at pp. 121-122.) When read in light of this, the record below demonstrates that NYPIA repeatedly received notice that the current proceedings could well result in the Circuit Court imposing a clawback remedy³³ against NYPIA or its assets. As a result, this Court should reject NYPIA's argument to the contrary³⁴ and should deny NYPIA's Application in its entirety.

c. **Regardless Of Whether The Notice Was Sufficient Or Not, This Alleged Deficiency, If Any, Was Certainly Cured When NYPIA Filed Its Motion To Reconsider.**

As its next argument in support of its alleged Application, NYPIA argues that the Court of Appeals somehow clearly erred³⁵ in concluding alternatively that the Motion For Reconsideration filed by NYPIA cured any alleged Due Process notice issue. (See NYPIA's Application, at pp. 23-24). However, NYPIA's argument ignores well-established precedent not just from the Michigan Court of Appeals, but also from other appellate courts. Through a series of decisions, both the Court of Appeals as well as appellate courts from other jurisdictions, have repeatedly held that the motion to reconsider process like that filed in this

³³ According to current precedent, clawback is a remedy against a subsequent transferee and not a cause of action. See *Americorp Financial Group, Inc v Powerhouse Licensing LLC*, 2007 WL 189374, *5 (Mich Ct App Jan 25, 2007) (attached hereto as Ex. 11). As this Court stated:

Section 8 provides that where a transfer is voidable under the act, a judgment may be entered against the first transferee or any subsequent transferee other than a subsequent transferee who took in good faith for value. MCL 566.38(1)(b). **The statute does not create an independent claim against subsequent transferees, but merely allows relief from subsequent transferees under those conditions if the plaintiff prevails on a claim created under the act.**

See, *id* (emphasis added).

³⁴ While NYPIA has cited some cases for the proposition that joinder and a party's status affects Due Process, all of those case are easily distinguishable. In those cases, contrary to here, the parties were not served with process, did not participate in the discovery process as NYPIA did, did not, as NYPIA did, receive notice of potential remedies against them, did not file pleadings acknowledging they faced potential liability under UFTA clawback as NYPIA did, and, most importantly, did not participate in a lengthy trial as NYPIA did.

³⁵ Of course, pursuant to MCR 7.205(B)(5), NYPIA must show not only legal error, but that the Court of Appeals' decision is "clearly erroneous" and will result in "manifest injustice."

case is more than ample to cure any alleged Due Process notice issue in the civil litigation context.³⁶ In *Boulton v Fenton Township*, 272 Mich App 456, 463-464 (2007), a plaintiff argued on appeal that the trial court committed a Due Process violation which required reversal when it *sua sponte* granted summary disposition in favor of the defendant without giving plaintiff an opportunity to brief the issue. In response, this Court concluded that even if an alleged Due Process notice error might have initially been present, the plaintiff's opportunity to file a motion to reconsider in which it set forth its response argument, negated and cured any alleged violation. As the Court of Appeals stated:

In any event, after the trial court granted defendant summary disposition, plaintiff filed a motion for reconsideration in which he fully briefed and presented his arguments regarding the trial court's authority to enter judgment, the applicability of MCL 600.2966, and the constitutionality of MCL 600.2966. The trial court's lengthy opinion indicates that it carefully reviewed plaintiff's arguments and considered them. Therefore, because plaintiff was ultimately given the opportunity of a full hearing, it is not inconsistent with substantial justice to allow the trial court's ruling to stand.

Id. at 463-464.

Similarly, in *In re Moon Estate*, 2011 WL 254934, *6 (Mich Ct App Jan 27, 2011) (attached hereto as Ex. 12), the Court of Appeals reiterated that a party's ability to file a Motion to Reconsider cures any alleged Due Process error in the civil litigation context:

Moreover, to the extent that the probate court may have violated appellant's procedural due process rights by raising an issue *sua sponte*, any error was rendered harmless by appellant's opportunity to address the issue in her motion for reconsideration. *Maliki v. LaGrant*, 286 Mich.App. 483, 485-86, 781 N.W.2d 853 (2009).

Id. See also *Hansa Consult of North America, LLC v Hansaconsult Ingenieurgesellschaft MBH*, 163 NH 46, 57; 35 A3d 587 (NH 2011); *In re John Bartle*, 560 F3d 724, 730 (7th Cir 2009); *Fadayiro v Ameriquest*

³⁶ See also *Great Lakes Division of National Steel Corp v City of Ecorse*, 227 Mich App 379, 406; 576 NW2d 667 (1998) (holding that a filing of a rehearing motion in a post-Tax Tribunal decision context and the Tax Tribunal's consideration of that motion demonstrates that Due Process was satisfied) and *Douglas v Global Vision Communications, LLC*, 2013 WL 1007721, *4 (Mich Ct App March 14, 2013) (attached hereto as Ex. 13) (holding that the plaintiff's ability, even if unexercised, to file a motion to reconsider in the trial court more than satisfied Due Process).

Mortgage Co, 2007 WL 141912, *2 (ND Ill Jan 17, 2007) (attached hereto as Ex. 14) (all holding that the motion to reconsider process cures any alleged notice error).

Thus, even if this Court were to find the initial notice to NYPIA was technically deficient, this Court should still conclude that the Court of Appeals correctly followed this well-established precedent when it concluded that any alleged notice issue was cured by the filing of NYPIA's Motion for Reconsideration. As the Court of Appeals rightly concluded, NYPIA had the opportunity to file and, in fact, did file a Motion to Reconsider after trial which the Circuit Court carefully considered. (See NYPIA's January 16, 2013 Motion to Reconsider). (See May 29, 2014 Court of Appeals Opinion, at pp. 27-28). Putting aside the fact that NYPIA had every opportunity to present its UFTA remedy defenses at trial and in fact did so at trial over the 22 day period, the filing of this Motion to Reconsider gave NYPIA every opportunity to raise any and all supposed evidence and testimony it wanted on the UFTA issue for a "second bite at the apple."³⁷ See *Boulton, supra*, *Moon Estate, supra*, *Hansa Consult, supra*, and *In re Bartle, supra*. Thus, the Motion to Reconsider process eliminated any alleged Due Process notice error. *Id.*³⁸ As such, this Court is given further reason to reject NYPIA's Application based on the motion to reconsider process being utilized in this case.

Moreover, NYPIA's attempts to distinguish this well-established precedent are simply meritless. As its main argument to distinguish this well-established precedent, NYPIA erroneously claims that this precedent was supposedly distinguishable because NYPIA allegedly "had no ability to take discovery or participate in the trial of the UFTA claims." (See NYPIA's Application, at p. 24). However, this assertion is patently false and directly contradicted by the factual record in this case. As both the Circuit Court and the

³⁷ As discussed in detail in subsection d, it is also worth highlighting that NYPIA at no point has ever offered or pointed to any evidence or testimony it would have otherwise offered on the UFTA question since it was given every opportunity to present its case over the 22 days of trial in this matter. (See Subsection d of this Brief). As such, NYPIA suffered no actual prejudice from the supposed notice issue.

³⁸ This is especially true in light of NYPIA's inability to point to any actual evidence or testimony it would have otherwise offered.

Court of Appeals expressly determined, contrary to NYPIA's apparent contention, NYPIA actively participated in the discovery process and in fact was expressly included at pretrial hearings, including discovery hearings. (See, e.g., May 29, 2014 Court of Appeals Opinion, at p. 27). (See also March 19, 2010 Hearing Transcript, at pp. 51-54, (noting that discovery would be conducted on all aspects of the case, including NYPIA's alleged affirmative defense of being a supposed "good faith transferee for value" and that once discovery was completed, that it intended to try both the underlying fraudulent transfer components and the clawback issues like NYPIA's supposed good faith in one trial proceeding) and the Discussion of the Actual Discovery which was summarized at footnote 29 of this Brief.) Moreover, and perhaps most importantly, as both the Circuit Court and Court of Appeals correctly determined, NYPIA actively participated in the trial. (See Circuit Court's December 27, 2012 Findings of Fact, at p. 16 and fn 13) (See Circuit Court's February 5, 2013 Order Denying Motion for Reconsideration) (both discussing NYPIA's extensive participation in the UFTA case trial). (See May 29, 2014 Opinion, at pp. 26-27). As the Court of Appeals notably stated:

NYPIA was a full and involved participant during the 23 days of trial that ensued, calling and cross-examining witnesses, making opening and closing arguments, and providing a trial brief. In addition to contesting any liability due to lack of notice in the 2007 case, NYPIA also argued its status as a good faith transferee as preclusive of any determination of its involvement in a fraudulent transfer of MSG's assets. NYPIA was also integrally involved in several postjudgment proceedings through the filing of objections and in seeking reconsideration of the trial court's ruling.

Further, the substance of the trial and various proceedings focused on (a) the knowledge of and violation of the order precluding the transfer of MSG's assets, and (b) the purposeful and fraudulent activities engaged in to consummate the asset transfer and avoid obligations to Morris and MSG Properties. **NYPIA's defense included arguments that it had no knowledge of the injunctive order and that it could not be liable under the UFTA because it was a good faith transferee for value.** While its trial brief focused on the contempt proceedings, NYPIA acknowledged having "submitted prior pleadings involved in the 2009 and the instant cases and incorporates herein the factual matters and legal arguments set forth." **In addition, NYPIA's counsel often led cross-examination of the witnesses and conducted the direct examination of Verecke to determine the valuation of MSG's assets at the time of transfer to NYPIA. Such testimony directly**

pertains to the validity of whether the transfer was for value and is irrelevant with regard to the existence of notice of the injunctive order.

While there is certainly confusion in the lower court record about the precise role and status of NYPIA during the course of the proceedings, the trial court did indicate the importance of NYPIA's participation and explained its position regarding possible remedies under the UFTA, including a clawback provision, which could establish the liability of NYPIA. NYPIA was a fully engaged participant in a multitude of hearings before, during, and after trial, involving the briefing and argument of issues pertaining to the claims of fraud. **The arguments and evidence proffered by NYPIA encompassed both lack of knowledge of the injunctive order and its status as a good faith transferee for value of the assets. As such, the requirements of due process were met.**

(See May 29, 2014 Opinion, at p. 27) (emphasis added). When read in light of this, NYPIA's attempts to distinguish the Motion to Reconsider precedent on the alleged basis that it was not a "participant" at trial is particularly a red herring and must be rejected.

Moreover, NYPIA's second asserted basis in the Motion to Reconsider section of its Brief to request relief from this Court is as specious as its first one. In essence, NYPIA tries to argue that the Court of Appeals "only relied on MCR 2.119(F) for its holding". (See NYPIA's Application, at p. 24). However, as even a cursory review of the Court of Appeals' Opinion demonstrates, it did not just rely on MCR 2.119(F) alone but also two Court of Appeals' cases which expressly discussed alleged due process notice questions. Thus, this argument, too, does not withstand any actual scrutiny.

Finally, NYPIA's attempted citation of the *Growney* and *Nelson* decisions (see NYPIA's Application, at p. 24), do not change this result since both are easily distinguishable from this case. First, with regard to the *Growney* decision, it is worth noting that this 9th Circuit decision's reasoning has been expressly rejected by other federal courts. See, e.g., *Spiller v Ella Smithers Geriatric Center*, 919 F2d 339, 346 and fn 8 (5th Cir 1990) (rejecting the reasoning of *Growney's* Due Process Discussion); *Williams v United States*, 215 BR 289 (D RI 1997) (noting that the *Growney* Due Process decision is not in accordance with 1st Circuit precedent which the court found to be well-reasoned). Second, putting this rejection issue aside, the *Growney* decision is also distinguishable on several key bases. First, in striking contrast to this case

(i.e., in which a UFTA clawback remedy was not just noted but actively litigated by NYPIA through its filing of Affirmative Defenses, participation in discovery, and full participation of NYPIA in the 22 days of trial and then its basis was discussed at length in the Circuit Court's December 27, 2012 Opinion prior to NYPIA's filing of its Motion to Reconsider), the 9th Circuit in *Growney* noted that both the attorney in *Growney* as well as the panel were unable to "determine specifically, either before or during the subsequent hearing, the grounds on which the district court was relying in imposing the Rule 11 sanctions". See *Growney, supra*, at p. 836. Since neither the panel nor the attorney in *Growney, supra*, were able to determine the basis for the sanctions and then, to make matters worse, the district court on reconsideration placed the burden of disproving the need for sanctions on the attorney (see *id.* at p. 837), it is hardly surprising that the 9th Circuit under these egregious and radically different facts held that the motion to reconsider did not cure any alleged issue. Thus, the *Growney* case is easily distinguishable from this case.

Moreover, NYPIA's citation of the *Adams* case throughout its Application does not change this result. (See NYPIA Application, at pp. 16-19, 24). In *Adams, supra*, the Supreme Court found a Due Process violation because of the unique facts present in *Adams, supra*. In *Adams, supra*, after receiving a judgment for attorney fees against a corporation, the defendants moved to amend their third-party complaint to add an individual shareholder as a third-party defendant and then simultaneously impose liability against him in an individual capacity without any opportunity of any sort to defend against the claims. Here, in striking contrast to the *Adams* case in which no opportunity to defend was provided, NYPIA filed a set of affirmative defenses specifically to the UFTA clawback remedies, participated in discovery, and actively litigated the UFTA transfer claim. Thus, NYPIA was not only afforded an opportunity to defend against the UFTA clawback remedy, it actually did so. Thus, the *Adams* case is clearly distinguishable from this case on this key fundamental basis. As such, this Court is given even further reason to reject NYPIA's ill-supported Application.

All in all, then, when examined in light of these well-established precedent that was properly applied by both the Circuit Court and the Court of Appeals, NYPIA is simply unable to meet its heavy burden of showing that the Court of Appeals decision was in any way in error, let alone was clearly erroneous as required in order to consider granting the Application under MCR 7.302(B)(5).

d. Since NYPIA Has Not Demonstrated Any Actual Prejudice, This Court Should Also Reject Its Application On This Basis As Well.

NYPIA's Application also suffers from another fundamental flaw which requires its rejection. At no point in its Application or frankly any of its Briefing to the Court of Appeals or to the Circuit Court did NYPIA mention let alone specify in any detail, what particular piece of evidence it would have offered or what witness it would have called if the alleged Due Process notice "violation" had not occurred. Such generic assertions of a supposed Due Process deprivation are insufficient. Instead, appellants alleging Due Process deprivation are obligated to demonstrate actual prejudice. See, e.g., *Risch, supra*, at 379; *Truong, supra*, at pp. 332-333 and fn 2. See also MCR 2.613(A).³⁹ In this sense, a party alleging it has been denied Due Process must affirmatively show what evidence or testimony it would have offered or arguments it would have put forth had the alleged Due Process notice deprivation not occurred. For example, in *In re Bartle*, 560 F.3d 724 (7th 2009), the Seventh Circuit Court of Appeals assumed for purposes of the appeal that the plaintiff had been erroneously deprived of both notice and an opportunity to respond but noted that this was not the end of the inquiry:

Despite that opportunity, Bartle did not indicate to the district court what argument or evidence he would have presented in opposition to the government's motion. Even in his briefing to this court he has not done so. Instead, he has characterized his appeal as presenting a purely procedural argument. But

³⁹ See also, *Amouri v Holder*, 572 F3d 29, 36-37 (1st Cir 2009); *In re John Bartle, supra*, at 730; *Widie v United States Department of Justice*, 2013 WL 1834673, *2 (D Me May 1, 2013) (attached hereto as Ex. 15); *In re Stewart*, 2009 WL 1649731, *3 (E D La June 10, 2009) (attached hereto as Ex. 16); *In the Matter of Sawyer*, 161 NH 11, 17 (NH 2010) (attached hereto as Ex. 17); *Washington v Harris*, 259 Ga App 705 (Ga Ct App 2003); *Realty v Pickett*, 963 SW2d 308, 313 (Mo Ct App 1998) (attached hereto as Ex. 18) (all holding that an individual or entity must show actual prejudice in order to create a basis for prevailing on a Due Process claim).

procedures do not exist for their own sake; they exist to protect the parties' rights. We cannot say that Bartle's substantial rights were affected by an erroneous deprivation of an opportunity to be heard on the government's motion to dismiss when he has not set forth what he would have brought to the court's attention in opposition to that motion. It would be inconsistent with Rule 9005 and Rule 61 to reverse without such a showing.

Id. at 730.

Similarly, in *Sawyer, supra*, the New Hampshire Supreme Court assumed that the notice provided was not adequate but noted that despite this supposed potential inadequacy, the defendant did not make out a Due Process claim since he failed to show any actual prejudice based on specific evidence he otherwise would have presented:

Even assuming, *arguendo*, that the defendant is correct that the petition did not adequately apprise him of the alleged abuse prior to the hearing, he will not prevail on his due process claim absent a showing of actual prejudice. *McIntire v. Woodall*, 140 N.H. 228, 230, 666 A.2d 934 (1995). The defendant has failed to make such a showing. At the hearing, the plaintiff testified to the specific dates of the alleged abuse. Thereafter, the defendant filed a motion for reconsideration in which he alleged a due process violation. However, he made no showing as to how not knowing the specific dates prior to the hearing caused him actual prejudice. The defendant did not present any evidence to indicate that he in fact had a time-based defense which he would have presented had he known the alleged dates prior to the hearing.

Id. at 17 (emphasis added). As a result, the Court in *Sawyer, supra*, affirmed the trial court's decision.

Like the appellants in *Bartle* and *Sawyer*, NYPIA has never pointed to any specific testimony or specific documentary evidence that it would otherwise have offered if the supposed procedural notice "deprivation" had not occurred. Of course, it would have been difficult for NYPIA to offer more witnesses than its two principals Hiestand and Woodworth, its major employees, Judd Schnoor, Josh Schnoor, Velting, Fett, and Wills, its banker, its attorney Charron, attorneys from C&H, George Larimore and its expert witness Vereecke. Thus, NYPIA has failed to meet its burden of demonstrating any actual prejudice as required under current precedent. Thus, this additional fundamental flaw further justifies the denial of NYPIA's Application.

C. THE COURT OF APPEALS DID NOT ERR, LET ALONE CLEARLY ERR, WHEN IT ADDRESSED NYPIA'S MCR 2.205-BASED ARGUMENTS.

As its final argument, NYPIA argues that the Court of Appeals somehow erred with regard to its discussion and decision regarding MCR 2.205 and its alleged application in this case. However, NYPIA's assertions are again meritless. In its well-reasoned Opinion, the Court of Appeals carefully examined the various NYPIA arguments and rejected them. As the Court of Appeals stated:

NYPIA also challenges the failure to join it as a party defendant or necessary party in the UFTA claims that proceeded to trial. "Under MCR 2.205(A), persons must be joined if 'their presence in the action is essential to permit the court to render complete relief. . . .' The purpose of the rule is to prevent the splitting of causes of action and to ensure that all parties having a real interest in the litigation are present." *Mason Co v Dep't of Community Health*, 293 Mich App 462, 489; 820 NW2d 192 (2011). In general, the "[j]oiner of parties is appropriate in situations in which their respective rights and obligations arise out of the same contract, transaction, occurrence or like circumstances, and any questions of law or fact is common to the claims of them all." *Yedinek v Yedinek*, 383 Mich 409, 416; 175 NW2d 706 (1970). The essential inquiry under MCR 2.205(A) is whether a party's presence in the litigation was necessary to render complete relief. See, e.g., *Gordon Food Serv, Inc v Grand Rapids Material Handling Co*, 183 Mich App 241, 243; 454 NW2d 137 (1989), and *Williams & Works, Inc v Springfield Corp*, 76 Mich App 541, 550; 257 NW2d 160 (1977).

NYPIA was initially a defendant in the 2009 lower court cases. Despite the grant of summary disposition in favor of NYPIA, the trial court engaged in several discussions with NYPIA's counsel regarding the potential remedies under the UFTA's "clawback" provision and the impact on NYPIA. The complexity of this apparent dissonance is within the language of the UFTA. Specifically, MCL 566.38 addresses the recovery of judgment under the UFTA and provides in relevant part:

(1) A transfer or obligation is not voidable under section 4(1)(a) against a person who took in good faith and for a reasonably equivalent value or against any subsequent transferee or obligee.

(2) Except as otherwise provided in this section, to the extent a transfer is voidable in an action by a creditor under section 7(1)(a), the creditor may recover a judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less. The judgment may be entered against either of the following:

(a) The first transferee of the asset or the person for whose benefit the transfer was made.

(b) Any subsequent transferee other than a good-faith transferee who took for value or from any subsequent transferee. [Emphasis added.]

The provision permits recovery from NYPIA as a "subsequent transferee" if it is demonstrated that NYPIA does not qualify as "a good-faith transferee who took for value." MCL 566.38(2)(b).

Our Supreme Court has discussed the implications of the UFTA in the context of divorce actions in *Estes v Titus*, 481 Mich 573, 586-587; 751 NW2d 493 (2008). In that matter, the Court noted:

The UFTA specifically provides for avoiding a fraudulent transfer or attaching a particular fraudulently transferred asset. Relief under the UFTA determines only the creditor's right to fraudulently transferred property. The court in a UFTA action would transfer directly to the creditor any property interest that would have been awarded to the debtor . . . but for the parties' fraud. [Footnotes omitted.]

"It is well established that a grantee who receives property or money without giving fair consideration to the fraudulent grantor is subject to having the conveyance set aside and to any other remedies normally available to the defrauded creditor." *Kelley v Thomas Solvent Co*, 722 F Supp 1492, 1499 (WD Mich, 1989).

This Court addressed the issue of joinder under the UFTA with reference to debtor transferors in *Mather Investors, LLC v Larson*, 271 Mich App 254, 259-260; 720 NW2d 575 (2006). Specifically, "the UFTA clearly does not contain any language requiring joinder of the debtor transferor. . . . The dispositive inquiry is whether the circumstances of the individual case permit complete adjudication without joining the debtor transferor." *Id.* at 259. In addition:

First, a "debtor" under the UFTA "means a person who is liable on a claim." MCL 566.31(f). A claim need not be reduced to judgment or undisputed. MCL 566.31(c). However, the transferor must actually be liable for the claim to be a "debtor." Indeed, the remainder of the UFTA appears to presume that liability has already been established. A claim under the UFTA cannot proceed otherwise. Furthermore, the UFTA only permits voiding a transaction upon action by the creditor, not by the transferee. See MCL 566.37(1)(a); 566.38(2). [*Id.*]

MCL 566.37(2) permits, "If a creditor has obtained a judgment on a claim against the debtor, the creditor, if the court so orders, may levy execution on the asset transferred or its proceeds." As such, the subsequent transferee is not a necessary party to a recovery, as the action pertains to the recovery of the fraudulently transferred asset and needs only the establishment of the creditor's right to recovery. Any alleged unfairness to the subsequent transferee is alleviated by provisions in the UFTA, as contained in MCL 566.38(1), which provides that "[a] transfer or obligation is not voidable . . . against a person who took in good faith

and for a reasonably equivalent value or against any subsequent transferee or obligee." Had NYPIA not had a role to play in the ultimate fraud premised on the asset transfer not being "for a reasonably equivalent value," the referenced clawback provision of the UFTA would be inapplicable.

This Court has also previously determined that the burden falls upon a defendant to object when a plaintiff fails to comply with the requirements of MCR 2.205. *United Services Automobile Ass 'n v Nothelfer*, 195 Mich App 87, 89; 489 NW2d 150 (1992). Any such objection must be timely made at the risk of being waived. *Id.* Although NYPIA questioned its role and potential liability, it did not object to its non-party status. Further, NYPIA was originally a defendant in the 2009 actions. Based on NYPIA's full participation in trial and other proceedings to demonstrate its status as a good-faith transferee and failure to object or appeal its non-party status, its allegation of error on appeal regarding a violation of MCR 2.205 is not timely and is without merit.

(See May 29, 2014 Court of Appeals Opinion, at pp. 28-30) (emphasis added). Moreover, NYPIA's Application does not change this well-reasoned result. Instead, NYPIA's arguments ignore and do not really in any way address the Court of Appeals' well-reasoned conclusions that NYPIA did not timely raise and object to its non-party status under MCR 2.205 and as such waived any supposed rights there. As such, the Court of Appeals correctly determined that joinder issue. This is especially true since, regardless of how NYPIA was denominated, as the Court of Appeals correctly pointed out, NYPIA filed affirmative defenses in this case, was involved in the discovery process, and fully participated in the 22 days of trial and the determination of its status as a good faith transferee. (See May 29, 2014 Court of Appeals Opinion, at pp. 25-30).^{40 41}

⁴⁰ As a component of its Application, NYPIA also argues that this Court's decision in *Teamsters v Gen Cty Bd of Cmm's*, 401 Mich 408; 258 NW2d 55 (1977) somehow justifies granting the Application regarding party status. However, the *Teamsters* decision is easily distinguishable from this case. In striking contrast to this case in which a final judgment had not been entered ending the UFTA case against all parties (and thus the overall UFTA case was still ongoing), in *Teamsters*, the trial court had entered a judgment which had ended the litigation entirely. As this Court stated in discussing the situation in *Teamsters*, *supra*:

We agree with appellants' contention that the lawsuit filed on October 15, 1974 came to an end with the summary and accelerated judgment entered on January 10, 1975.

* * *

CONCLUSION AND RELIEF REQUESTED

During a 22-day bench trial, overwhelming evidence was presented of a concealed scheme to fraudulently transfer all of the assets of MSG to NYPIA. NYPIA was afforded every opportunity to defend against a clawback remedy applicable under UFTA and show that it took the assets in good faith and for value. However, as both the Circuit Court and Court of Appeals concluded, the evidence was overwhelming against NYPIA on these issues. (See Circuit Court's December 27, 2012 Opinion and May 29, 2014 Court of Appeals' Opinion). Almost certainly recognizing this overwhelming evidence, NYPIA at no point in its Application ever really genuinely disputes the evidence offered against it and instead tries to mint out of whole cloth alleged Due Process and joinder arguments. Since none of NYPIA's arguments set forth in its Application withstand any actual scrutiny, this Court should conclude that NYPIA has not met its heavy burden under MCR 7.302(B) of demonstrating that this Court should grant its Application. As a result, this Court should deny NYPIA's Application in its entirety.

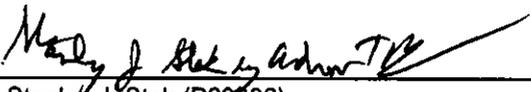
... Since the accelerated and summary judgment ended the initial lawsuit, it was error for the trial judge to order a subsequent restoration to duties based on an order in the initial lawsuit.

See *Teamsters*, *supra*, at 410. Thus, the *Teamsters* decision is easily distinguishable from this case and can hardly justify granting NYPIA's Application.

⁴¹ In the highly unlikely event that this Court were to grant NYPIA's Application and then subsequently conclude that both the Circuit Court and Court of Appeals somehow erred, NYPIA's proposed remedy of vacating the Judgments is simply inappropriate. Instead of vacating the Judgments, this Court should, in this unlikely event, merely reverse the Judgments and remand for further proceedings in the Circuit Court which would allow the Circuit Court to order NYPIA to be once again a party and allow a rotation back to their original date as a defendant.

Respectfully submitted,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.
Counsel for Plaintiffs/Appellees

By: 
Stanley J. Stek (P29332)
Andrew T. Blum (P58881)
99 Monroe Avenue NW, Suite 1200
Grand Rapids, MI 49503
(616) 454-8656

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