

CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO. KG, and WATERCREST PARTNERS, L.P.	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
v.	§	191ST JUDICIAL DISTRICT
	§	
TRA MIDLAND PROPERTIES, LLC, et al.	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

Consolidated with Cause No. DC-17-06190

RENATE NIXDORF GmbH & CO. KG, and WATERCREST PARTNERS, L.P.	§	IN THE DISTRICT COURT
	§	
Plaintiffs,	§	
	§	
v.	§	191ST JUDICIAL DISTRICT
	§	
TRA MIDLAND PROPERTIES, LLC, et al.	§	
	§	
Defendants.	§	DALLAS COUNTY, TEXAS

**PLAINTIFFS' MOTION FOR NEW TRIAL
BASED ON INCURABLE JURY ARGUMENT**

TO THE HONORABLE COURT:

Plaintiffs Renate Nixdorf GmbH & Co. KG and Watercrest Partners, L.P. move for new trial in the above-referenced cause, and respectfully show as follows:¹

¹ Plaintiffs file this Motion for New Trial subject to and without waiver of their previously filed Motion for Partial Judgment, Motion to Disregard Jury Findings, Motion for Partial Judgment Notwithstanding the Verdict, and Application for Attorney's Fees and Costs ("Mot. for JNOV") (June 15, 2023 (on file with Court)).

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INTRODUCTION

On March 8, 2024, the U.S. Court of Appeals for the Fifth Circuit ruled that during closing jury arguments in the *Clapper v. American Realty Investors* trial in Dallas federal court, attorneys Stephen A. Khoury and C. Gregory Shamoun had engaged in such outrageous, offensive, and “highly improper” conduct that a new trial was required. *See Clapper v. Am. Realty Invs., Inc.*, 95 F.4th 309 (5th Cir. 2024) (attached as Exhibit “A”). The *Clapper* Court observed that “[t]ogether,” Mr. Khoury and Mr. Shamoun had “employed nearly every category of what we have previously held to be improper closing argument.” *Id.* at 314. Among other things, they made numerous “personal attacks” on the plaintiff and opposing counsel, appealed to “local bias,” and argued matters not in evidence. *Id.* at 317. This improper conduct was “designed to bias the jury” against the plaintiff and “abandoned all ‘dignity, order, and decorum[,]’ which we have described as the ‘hallmarks of all court proceedings in our country.’” *Id.* at 316-17 (quotations omitted). The Fifth Circuit’s opinion was widely reported in the legal press.²

Of course, Mr. Khoury and Mr. Shamoun were also counsel in the 2023 jury trial in this matter and represented many of the same defendants they represented in the *Clapper* case. During the *Renate Nixdorf* trial, Mr. Khoury and Mr. Shamoun read directly from their *Clapper* playbook. The Court will recall how Mr. Khoury and Mr. Shamoun “launched a barrage of personal attacks” against Plaintiffs’ lead counsel, Todd Harlow. *See id.* at 315. These attacks began during voir dire, continued through closing arguments, and ranged from petty insults and school-yard-level taunting

² *See* Sam Skolnik, *Fifth Circuit Slams Texas Lawyers Over “Highly Improper” Attacks*, Bloomberg News (Mar. 8 2024, 2:24 PM), <https://news.bloomberglaw.com/business-and-practice/fifth-circuit-slams-texas-lawyers-over-highly-improper-attacks>; Krista Torralva, *Fifth Circuit Panel Decries “Rambo” Tactics in Reversal, Scathing Opinion*, Tex. Lawbook (Mar. 12, 2024), <https://texaslawbook.net/fifth-circuit-panel-decries-rambo-tactics-in-reversal-scathing-opinion/>; Debra Cassens Weiss, *Lawyers’ “barrage of personal attacks” on opponents began with tissue-box toss, appeals court says*, ABA J. (Mar. 14, 2024, 12:02 PM), <https://www.abajournal.com/news/article/lawyers-barrage-of-personal-attacks-on-opponents-started-with-tissue-box-toss-appeals-court-says>.

to outright accusations that Mr. Harlow was lying to the jury and thought the jury was “stupid.” This conduct got so bad that the Court reprimanded Mr. Khoury repeatedly, but neither his nor Mr. Shamoun’s conduct stopped. This conduct undoubtedly rose to the level of incurable jury argument—“strik[ing] at” the “impartiality, equality, and fairness” of a trial that is “the very core of the judicial process”—and requires a new trial. *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 681 (Tex. 2008).

But the misconduct extended much further. Again, the Court will recall how Mr. Khoury and Mr. Shamoun:

- denigrated Plaintiffs’ expert, Dr. Stephen Grace, as a “professional witness” who would say anything for money;
- denigrated Plaintiffs as wealthy parties who brought this lawsuit in bad faith;
- improperly asserted their personal opinions to the jury;
- falsely insinuated that the Court had treated them unfairly;
- and (in Mr. Khoury’s case) improperly, and repeatedly, referred in closing argument to evidence outside the record.

The cumulative effect of this conduct constitutes incurable jury argument. This Court should follow the lead of the Fifth Circuit and order a new trial.

ARGUMENT AND AUTHORITIES

I. The Court should grant a new trial because Mr. Khoury and Mr. Shamoun engaged in highly improper and incurable jury argument.

Mr. Khoury’s and Mr. Shamoun’s endless stream of insults, lurid insinuations of duplicity by Mr. Harlow, Dr. Grace, and Plaintiffs, and outright disregard for the Court’s rulings constitute incurable jury argument under Texas law and require a new trial.

A. Incurable jury argument requires a new trial.

A party seeking a new trial based on improper jury argument must demonstrate that an improper jury argument was made, the argument was not invited or provoked, and the argument was not curable by instruction, prompt withdrawal of the statement, or reprimand by the trial court. *Metro. Transit Auth. v. McChristian*, 449 S.W.3d 846, 854 (Tex. App.—Houston [14th Dist.] 2014, no pet.) (citing *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979)). Error as to an improper jury argument is generally preserved by a timely objection and request for a curative instruction or a motion for mistrial. *Phillips v. Bramlett*, 288 S.W.3d 876, 883 (Tex. 2009); *see also Nguyen v. Myers*, 442 S.W.3d 434, 442 (Tex. App.—Dallas 2013, no pet.). But such a complaint may also be asserted and preserved in a motion for new trial, even without an objection and ruling during the trial, where the argument is considered **incurable**. *See Living Ctrs.*, 256 S.W.3d at 680; *see also Nguyen*, 442 S.W.3d at 442 (citing TEX. R. CIV. P. 324(b)(5)).

Incurable jury argument is that which “strike[s] at the courts’ impartiality, equality, and fairness” because it “inflict[s] damage beyond the parties and the individual case under consideration if not corrected.” *Living Ctrs.*, 256 S.W.3d at 681. In other words, incurable argument threatens “the very core of the judicial process.” *Phillips*, 288 S.W.3d at 883. A jury argument is incurable when, “by its nature, degree, and extent,” the argument “constituted such error that an instruction from the court or retraction of the argument could not remove its effects.” *Living Ctrs.*, 256 S.W.3d at 680-81. Instances of incurable jury argument may include, but are not limited to, “unsupported, extreme, and personal attacks on opposing parties and witnesses”; the use of “epithets” like “liar,” “fraud,” and “faker,”; and the “injection of new and inflammatory matters.” *Id.* at 681; *In re Munsch*, 614 S.W.3d 397, 402 (Tex. App.—Houston [14th Dist.] 2020, no pet.); *see also Nguyen*, 442 S.W.3d at 442.

Incurable jury argument is determined “based on the record as a whole.” *Phillips*, 288 S.W.3d at 883. Courts will consider “[h]ow long the argument continued, whether it was repeated or abandoned and whether there was cumulative error.” *Reese*, 584 S.W.2d at 839-40. The Texas Supreme Court has made clear that incurable jury arguments “damage the judicial system itself” by impairing confidence in the system and that Texas courts should “countenance very little tolerance of such arguments.” *Living Ctrs.*, 256 S.W.3d at 681.

B. From beginning to end of the trial, Mr. Khoury and Mr. Shamoun engaged in multiple types of incurable jury argument.

While instances of incurable jury argument are generally “rare,” *Phillips*, 288 S.W.3d at 883, the *Clapper* opinion and the record in this case show that, for Mr. Khoury and Mr. Shamoun, trafficking in highly improper jury arguments is standard operating procedure. Throughout the *Renate Nixdorf* trial, these improper arguments fell into several categories, listed below. The cumulative effect of these arguments was incurable and requires a new trial.

1. Mr. Khoury and Mr. Shamoun made repeated personal attacks on Plaintiffs’ counsel.

From voir dire through closing arguments, Mr. Khoury and Mr. Shamoun engaged in a relentless campaign of “[u]nsupported, extreme, and personal attacks” on Plaintiffs’ lead counsel, Todd Harlow. *See Living Ctrs.*, 256 S.W.3d at 681. “[U]nsubstantiated attacks on the integrity or veracity” of opposing counsel are paradigmatic forms of incurable jury argument. *Phillips*, 288 S.W.3d at 883; *see also Amelia’s Auto., Inc. v. Rodriguez*, 921 S.W.2d 767, 773 (Tex. App.—San Antonio 1996, no writ) (“Unwarranted attacks against the integrity of opposing counsel are generally considered to be incurable.”). While some “hyperbole” is permissible, a lawyer may not attack “the professional ethics and integrity of opposing counsel.” *See Am. Petrofina, Inc. v. PPG Indus., Inc.*, 679 S.W.2d 740, 755 (Tex. App.—Fort Worth 1984, writ dism’d by agr.). For example, a lawyer may not “charge[] that [opposing] counsel was untruthful and was trying to

mislead the jurors with ‘corn pone,’ ‘snake oil,’ ‘another red herring,’ and ‘another untruth.’” *Id.* Yet Mr. Khoury and Mr. Shamoun did that—and so much more—here.

a. Unfounded attacks on Mr. Harlow’s integrity and character.

At every turn, Mr. Khoury and Mr. Shamoun attempted to smear Mr. Harlow as a dishonest lawyer who could not be trusted. One of their core trial theories was that Plaintiffs’ case was a lie foisted upon the jury by Plaintiffs and Mr. Harlow. During voir dire, for example, Mr. Shamoun declared: “The claims brought against us are fraudulent claims.” (Trial Tr. Day 1, Feb. 27, 2023, at 292:21-22, attached as Exhibit “B”.) He and Mr. Khoury variously labeled Plaintiffs’ arguments as “make-believe,” a “bill of goods,” a “sleight of hand,” “fantasy,” an attempt to “shake some money out of” defendants, and “hocus pocus,” among other epithets. (Trial Tr. Day 2, Feb 28, 2023, at 142:25, 165:11, 182:2-3, 119:24, 159:11, 163:25 respectively, attached as Exhibit “C”.)

And they repeatedly tied those accusations to Mr. Harlow personally. (Ex. C at 78:5-6 (“We do not ascribe to [Mr. Harlow’s] theory or his *false statements*.”) (emphasis added); *see id.* at 125:8-9 (“And we’re entitled to make a profit, but it’s nothing like Mr. Harlow distorted.”); *id.* at 163:23-25 (“Harlow said—I’m just gonna use his \$40 million number, which I think is hocus pocus.”).) Mr. Shamoun argued that anyone can pay a filing fee and “sue anybody for anything” (Ex. B at 293:20), and accused Mr. Harlow of “practic[ing] law” by coming to “the courthouse to buy a lotto ticket.” (Trial Tr. Day 11, Mar. 14, 2023, at 40:5-8, attached as Exhibit “D”; *see also* Trial Tr. Day 13, Mar. 16, 2023, at 104:24-105:1, attached as Exhibit “E” (“[Y]ou don’t need any facts before you sue people for fraud as long as you can hire a lawyer who will do it for you.”); Ex. B at 293:18-20 (“It’s \$268, . . . [a]nd a fine lawyer, a lawyer that will take your case. \$268 filing fee, you can sue anybody for anything.”).)

Similar examples abound. During opening statements, Mr. Khoury argued that Mr. Harlow “thinks we’re stupid or y’all [the jury] are stupid” to believe Plaintiffs’ damages theory. (Ex. C at

122:18-23.) It is, of course, improper for an attorney to suggest that opposing counsel “had questioned [the jury’s] intelligence.” *Press Energy Servs., LLC v. Ruiz*, 650 S.W.3d 23, 58-59 (Tex. App.—El Paso 2021, no pet.) (citing *Am. Petrofina*, 679 S.W.2d at 755). At closing argument, Mr. Khoury accused Mr. Harlow of “fool[ing]” certain witnesses and deceiving the jury. (Ex. E at 166:9-10 (describing witnesses who “were fooled by Harlow”); *see id.* at 165:19-23 (arguing that if the jury did not look at “all the things he [Mr. Harlow] didn’t show you,” then “you’re being misled”); *see also* Ex. D at 164:1-2 (“So you can tell the silver-tongued lawyer over there that he misled the jury.”).)

Mr. Khoury also insinuated that Mr. Harlow had a personal interest in the lawsuit because his former law firm was counsel in the underlying *Texas Horseshoe* case. (Trial Tr. Day 8, Mar. 9, 2023, at 221:6-222:6, attached as Exhibit “F” (describing settlement payment to “the law firm that Mr. Harlow worked for at the time”).) The Court rightly sustained Plaintiffs’ objection. (*Id.* at 221:25-222:1.) Nevertheless, Mr. Shamoun made a similar point during closing arguments: “Mr. Harlow’s law firm got \$1.5 million when he was representing Ross.” (Ex. E at 108:15-20.)

At one point, when Mr. Khoury examined Defendants’ corporate representative, Gene Bercher, and said “let me just go where Mr. Harlow took you,” Mr. Shamoun sarcastically added, “[y]ou might get arrested.” (Ex. D at 174:15-18.) This echoed Mr. Shamoun’s other sarcastic comments in front of the jury, such as:

MR. HARLOW: I appreciate that. Thank you, Mr. Shamoun.

MR. SHAMOUN: You’re so welcome, Todd.

(Ex. F at 66:13-15.) Mr. Shamoun later attempted to draw a contrast between himself and Mr. Harlow, piously telling the jury:

I grew up Catholic. . . . I believe in telling the truth and not misleading and not distorting whether you're a lawyer representing a plaintiff or a lawyer representing defendants.

(Ex. E at 81:6, 16-18.)³

b. “Harlow” and other epithets.

At other points, Mr. Khoury and Mr. Shamoun resorted to schoolyard insults and name-calling. Both lawyers delighted in referring to Mr. Harlow as “silver-tongued”—an obvious suggestion that he is a slippery, untrustworthy lawyer. During voir dire, Mr. Shamoun advised the jury panel that the Plaintiffs were “represented by this silver-tongued, fine, good-looking lawyer, Mr. Harlow.” (Ex. B at 293:11-12.) He then asserted that “a potential juror knows when a lawyer is leading them down a primrose path with a silk tongue”—another reference to Mr. Harlow. (*Id.* at 297:20-22.) During his examination of Mr. Bercher, Mr. Khoury similarly stated: “So you can tell that silver-tongued lawyer over there that he misled the jury.” (Ex. D at 164:1-2.)

Along with these smears, Mr. Khoury had another favorite tactic: to belittle Mr. Harlow in front of the jury by referring to him simply as “Harlow” rather than “Mr. Harlow.” For example, during his cross-examination of Dr. Grace, Mr. Khoury stated:

Q: And then Harlow, not to be denied, said, “Did you see any evidence of an actual pledge of the cash flow and equity in the properties to Pillar, the asset manager of TCI?” And you said, “No,” right?

A: Correct.

....

Q: And then you had a weekend to chat with Harlow, right? Y'all talked over the weekend, didn't you?

(Trial Tr. Day 10, Mar. 13, 2023, at 252:9-253:21, attached as Exhibit “G”.)

³ He then claimed to travel to Africa and build schools for poor children—matters outside the record—and asserted that it “[broke] my heart to smell all this money that is going around this courtroom.” (*Id.* at 95:3-20.)

Closing argument featured more of the same:

Who have you heard say that besides Harlow? . . . That's what Harlow says, but have you heard a witness get up on the stand and say that the money that is represented in the promissory note was not actually loaned?

(Ex. E at 157:1-2, 161:1-4.) Despite repeated objections by Plaintiffs and warnings from the Court, (see, e.g., Ex. C at 181:9-14), Mr. Khoury referred to counsel as “Harlow” no fewer than *nineteen times* in front of the jury. (See Ex. C at 148:22, 152:4 & 18, 163:23, 166:23, 170:24, 171:10, 180:12, 181:9; Ex. G at 203:10, 250:18, 252:9, 253:20, 257:1, 257:3; Ex. E at 157:2, 161:1, 166:10, 167:1.)⁴ Those gratuitous insults, combined with myriad smears from beginning to end of trial, were plainly designed to “encourage the jury to feel resentment” toward Mr. Harlow, which is also improper. *Press Energy Servs.*, 650 S.W.3d at 58-59.

c. The Court admonished Mr. Khoury but the improper conduct continued.

The attacks by Mr. Khoury in particular were so outrageous that the Court admonished him on multiple occasions. Even at opening statements, the Court told him: “Please stop attacking Mr. Harlow personally or addressing him about it personally.” (Ex. C at 181:12-14.) Midway through the trial, when Mr. Khoury falsely accused Mr. Harlow of misstating the contents of a deposition, the Court stated: “I’m very concerned about this that there were attacks on Mr. Harlow in front of the jury.” (Trial Tr. Day 6, Mar. 7, 2023, at 297:15-298:4, attached as Exhibit “H”.) Mr. Khoury had no excuse for doing so, the Court observed, because he “could have brought [the issue] up outside the presence of the jury,” but chose not to. (*Id.*) This conduct, the Court noted, “bothers me a lot.” (*Id.*)

⁴ Mr. Khoury engaged in similarly disrespectful behavior outside the presence of the jury as well. (Ex. I at 57:23-25 (“Your Honor, I wasn’t even permitted to get there before ‘Judge Harlow’ got up and stopped me.”); Ex. G at 311:7 (referring to counsel as “Harlow”).)

Near the end of trial, the Court also pointed out that Mr. Khoury had already “been admonished several times about the disrespect of calling opposing counsel ‘Harlow’ and not ‘Mr. Harlow.’” (Ex. E at 189:18-20.) Indeed, during his “whole closing [argument] that’s all [he] did.” (*Id.* at 189:22.) This “wasn’t a slip of the tongue” because it happened “over and over and over.” (*Id.* at 192:19-21.) Mr. Khoury's conduct was so egregious that the Court nearly held him in contempt of court. (*Id.* at 189:14-15, 191:3-9). But as the Court’s own comments reveal, no amount of admonishment was sufficient to stop the abusive conduct.

2. Similarly, Mr. Khoury and Mr. Shamoun made repeated, improper attacks on Plaintiffs’ expert witness.

Another favorite tactic of Mr. Khoury and Mr. Shamoun was to accuse Plaintiffs’ expert witness, Dr. Stephen Grace, of being a “professional witness” who will say anything for enough money. (Trial Tr. Day 9, Mar. 10, 2023, at 310:23, attached as Exhibit “I”.) During his cross-examination of Dr. Grace, Mr. Khoury asked:

So is there a point after which you received a certain amount of money, Mr. Grace, that the jury can just assume that you’re bought and paid for?

(Ex. G. at 255:12-14.) Despite Plaintiffs’ immediate objection—which the Court sustained—Mr. Khoury continued: “If they pay you enough money, will you just say anything?” (*Id.* at 255:15-20.) And: “Is there a certain amount of money that would cause you to say anything you’re asked, sir?” (*Id.* at 256:12-14.) Other questions were similar. (*See, e.g.*, Ex. I at 272:1 (“So y’all are hired experts for sale, right?”); *see* Ex. G at 163:9-10 (“Did you know he was paying half a million dollars for your services?”); *see also id.* at 45:1-2 (“If you would cede some of your fee to me, I might go try to find an answer for that.”).)

Mr. Khoury supplemented his improper questions with an appeal to local Texas bias:

And if you would, Dr. Grace, I mean, the only thing I know how to speak is Texas English. Is there something about my Texas English that you don't understand?⁵

(Ex. I at 253:1-4.)

He also attempted to intimidate Dr. Grace: repeatedly wagging his finger at the witness, standing too close to the witness stand, and generally “badgering” Dr. Grace. The Court sustained multiple objections to this effect:

MR. HARLOW: I would ask that counsel at least step back and not badger the witness while he’s asking these questions.

THE COURT: Okay. Sustained, Counsel.

MR. KHOURY: Now I'm the bad guy.

(Ex. I at 286:7-11; *see also id.* at 292:1-6 (the Court sustaining an objection after Mr. Khoury sarcastically called Dr. Grace “omnipotent” and “clairvoyant”); *id.* at 293:5-9 (“MR. HARLOW: I would also request that counsel please stop approaching and pointing his finger and badgering my witness. THE COURT: Okay. Mr. Khoury, I know you feel strongly, but please follow the rules.”); *id.* at 309:19-310:6 (“A. Let’s just say I can’t answer that question. Q. Because you didn’t look? A. I don’t have the information. Q. Because you didn’t look? A. No, I just don’t recall. Q. And you don’t care about the details? MR. HARLOW: Your Honor. Your Honor. Your Honor. THE COURT: Okay. Mr. Khoury, if you’re asking him a question, you’ve got to let him answer. THE WITNESS: Right. Q. (BY MR. KHOURY) You don’t care about the details, do you, Dr. Grace?”).)

Mr. Shamoun fully participated in creating this school-yard atmosphere. During his cross-examination of Dr. Grace, he managed to insult both the witness and the Court:

⁵ Similarly, during voir dire, Mr. Khoury emphasized how, in his view, things are supposed to work “in an American courtroom” and “in this country” (Ex. B at 251:15-23)—in contrast to Plaintiffs (originally from Germany and South Africa) and Mr. Harlow allegedly filing a “lotto ticket” lawsuit. (Ex. D at 40:5-8.) As the *Clapper* court noted, appeals to “local bias” are wholly improper. *Clapper*, 95 F.4th at 315-17.

MR. HARLOW: And, Your Honor, if he's [Mr. Shamoun] gonna talk to him [Dr. Grace] and hold the book, he needs to show it to the witness and let him look at it.

THE COURT: Okay. Not --

MR. SHAMOUN: I am not going to show him, the witness, this book right now, and he's [Mr. Harlow] not gonna tell me what I'm gonna do.

THE COURT: Okay, Mr. Shamoun. That's my decision, not yours. You need to back off.

(Ex. G at 173:14-22.) The following exchange even more vividly recalled the antics of a school-yard bully:

Q: Why are you laughing? Do you find this funny?

A: You were smiling.

Q: You find this funny?

A: You were smiling when you were walking around.

Q: Yeah, so you find this funny that my client's been sued for \$48 million? You find that funny?

MR. HARLOW: Your Honor, I object to that kind of badgering.

THE COURT: Okay. Okay. Sustained, Counsel.

(*Id.* at 174:18-175:2.) Finally, when Dr. Grace's testimony ended and the Court excused him, Mr. Shamoun groaned: "Make him go." (*Id.* at 266:18.)

This conduct was again reminiscent of the *Clapper* trial, where Mr. Khoury twice referred to the plaintiff's expert witness as a "paid prostitute." *Clapper*, 95 F.4th at 315. The main difference is that these insinuations occurred *far more frequently here* than during the *Clapper* closing arguments. Like the Fifth Circuit, this Court should not countenance counsel's improper argument. *See Living Ctrs.*, 256 S.W.3d at 681.

3. Mr. Khoury and Mr. Shamoun made repeated, improper attacks on Plaintiffs.

Mr. Khoury and Mr. Shamoun made similar accusations against Plaintiffs themselves. Mr. Khoury accused Warner Harmel, manager of Plaintiff Watercrest, of filing the lawsuit in bad faith: “And so what you did was, without knowing anything and making a bunch of wild assumptions, you, in bad faith, filed this lawsuit as a placeholder, right?” (Trial Tr. Day 5, Mar. 6, 2023, at 130:18-20, attached as Exhibit “J”; *see also id.* at 132:1-2 (“And you did it in order to abuse the process, didn’t you?”).) The Court sustained Plaintiffs’ objections to these improper questions. (*Id.* at 130:23-131:7.)

Both Mr. Khoury and Mr. Shamoun also highlighted Plaintiffs’ alleged wealth by, for example, emphasizing how much money Dr. Grace had been paid. (*See, e.g.*, Ex. G at 163:9-10 (“Did you know he was paying half a million dollars for your services?”).) *See Clapper*, 95 F.4th at 316-17. And as with Dr. Grace, Mr. Khoury and Mr. Shamoun engaged in serial badgering of Mr. Harmel and Mr. Nixdorf by, among other things, wagging fingers, getting too close to the witness, and verbally haranguing them. (Ex. H at 76:2-5 (“MR. GUY: “Your Honor, he’s entitled to approach the witness to give or receive documents back, and he needs to move away from the witness now-- MR. SHAMOUN: Okay. I’m moving.”); *see also* Ex. J at 137:3-17; Ex. H at 68:14-16, 87:11-22, 169:19-170:15).)

These improper tactics were not limited to the courtroom. As Mr. Harlow recounted to the Court, defense counsel said to Mr. Nixdorf—while Mr. Harlow was not present—“Got a surprise for you today.” (Ex. I at 59:11-13.) Mr. Khoury and Mr. Shamoun also apparently made inappropriate jokes about apartheid at the expense of one of the Plaintiffs, who is from South Africa. (*Id.* at 59:6-9.) Neither Mr. Khoury nor Mr. Shamoun denied doing so. These “improper ex parte communication[s]” were not only “abusive” (*id.* at 59:14) but also violations of

professional ethics. See TEX. DISC. R. PROF'L CONDUCT 4.02 ("Communication With One Represented by Counsel.").

4. Mr. Khoury improperly argued matters that had not been presented to the jury, with a materially adverse effect on the verdict.

Mr. Khoury made his string of outrageous misconduct even worse by commenting during his closing argument about deposition testimony that had not been presented to the jury. A lawyer must confine their arguments "strictly to the evidence and to the arguments of opposing counsel." TEX. R. CIV. P. 269(e). "Arguments referencing matters that are not in evidence and may not be inferred from the evidence are usually 'designed to arouse the passion and prejudices of the jury and as such are highly inappropriate.'" *Thompson v. State*, 89 S.W.3d 843, 850 (Tex. App.—Houston [1st Dist.] 2002, no pet.). Arguing matters "beyond the evidence presented in the case" is intended only to "inflame the jury" and is improper. *Lone Star Ford, Inc. v. Carter*, 848 S.W.2d 850, 853 (Tex. App.—Houston [14th Dist.] 1993, no writ).

Mr. Khoury flagrantly violated this rule. The Court will recall a critical fact issue from the trial: whether TCI—as owner of MRI—was liable for the fraudulent transfers at issue in this case. (See Verdict Q. 15(a) (on file with Court).) The jury found that Eric Brauss had transferred his interests in TRA Midland to MRI "with actual intent to hinder, delay, or defraud any creditor," and that MRI did not take these interests "in good faith and for reasonably equivalent value." (Verdict Q. 3, 7.) The jury further found that MRI was "responsible for the conduct of Eric Brauss," but TCI was not. (Verdict Q.15(a).)

One item of evidence on which Plaintiffs relied to prove that TCI controlled MRI—and thus was also responsible for the conduct of Brauss—was TCI's annual report on Form 10-K for the year ending in December 2007. That document (Exhibit 21.0) listed MRI as a wholly-owned subsidiary of TCI. This representation to the SEC and investing public was never disavowed.

Plaintiffs deposed Daniel Moos, TCI's CEO, and at trial read excerpts of that deposition to the jury. During that deposition (pages 47-49), Plaintiffs' counsel (Mr. Ray Guy) mistakenly referred to TCI's list of subsidiaries, including MRI, as being listed on "Exhibit 21 to the annual report ... *for the year ending December 31, 2008.*" (See Moos Dep., Jan. 18, 2021, at 47:11-49:22 (emphasis added), attached as Exhibit "K".) Plaintiffs later recognized this error. The Court will recall that the parties argued extensively before and during trial about which portions of Mr. Moos's deposition should be heard by the jury. (See Ex. C at 205-39.) But because of the error (i.e., referring to 2008 rather than 2007), Plaintiffs consciously omitted this passage from their deposition excerpts played at trial because it might confuse or even mislead the jury. (Compare Ex. K at 47:6-50:3 with Ex. H at 197:17-23.)⁶

Mr. Khoury knew this full well. Nevertheless, he discussed the omitted portion of Mr. Moos's deposition over Plaintiffs' objection during closing argument:

MR. KHOURY: If you have a question about whether these people really knew what they were talking about and whether most of it was guesswork, like when Mr. Moos was asked at page 47 in January of 2008, did MRI get money from TCI, he says, I have no knowledge.

If there is a question about what Moos thought the parent structure of these entities were, I will submit to you that *on page 47, line 19 of the deposition*, Mr. Moos was shown *the 2007 exhibits to the 10-K that showed MRI owned by TCI* but he was told, as Mr. Landess was and other witnesses that were *fooled by Harlow, that it was the 2008 10-K.*

MR. HARLOW: He's reading testimony that was not part of the trial. Now I know this is just stuff he's pulling out.

MR. KHOURY: I disagree.

(Ex. E at 165:24-166:14 (emphasis added).)

⁶ Plaintiffs continue to maintain that TCI in fact owned MRI in 2008. Plaintiffs adduced overwhelming evidence of this fact. They did not, however, include this Moos testimony specifically because it would have been misleading to characterize TCI's 2007 10-K as its 2008 10-K.

Mr. Khoury's argument was wholly improper. *First*, Mr. Khoury pointed to this specific passage of testimony, which was never played during trial, to accuse Mr. Harlow of dishonestly misconstruing the evidence when the opposite was true: Plaintiffs had omitted that testimony specifically because it would have been misleading for the jury to hear it.⁷ (*Compare* Ex. K at 47:6-50:3 *with* Ex. H at 197:17-23 (showing that pages 47-49 of the Moos deposition, specifically page 47, line 19, were not played at trial).) Rather than apologize for referring to evidence outside the record, Mr. Khoury doubled down. He responded to Plaintiffs' objection by saying "I disagree" in front of the jury—as if it were merely a matter of opinion whether the omitted testimony had been played at trial. (Ex. E at 166:14.) *See Lone Star Ford*, 848 S.W.2d at 853.

Second, Mr. Khoury used this misleading testimony to unfairly call Mr. Moos's credibility into question. Pointing to the same testimony, with Mr. Moos referring to TCI's **2007** 10-K as TCI's **2008** 10-K, Mr. Khoury argued that this testimony was proof Mr. Moos did not know what he was "talking about," and his testimony was "guesswork." (*Id.* at 165:24-166:3.)

Mr. Khoury then baselessly accused Plaintiffs—and Mr. Harlow in particular—of "fooling" Mr. Landess (another defense witness) by allegedly showing Mr. Landess TCI's **2007** 10-K and calling it TCI's **2008** 10-K. (*Id.* at 166:4-10.) This is simply false. At Mr. Landess's deposition, Plaintiffs' counsel (again, Mr. Guy, not Mr. Harlow) correctly referred Mr. Landess to TCI's 2007 10-K. (Trial Tr. Day 7, Mar. 8, 2023, at 245:24-246:8, attached as Exhibit "L" (questioning witness about the "Form 10-K filed with the SEC by TCI *for the year-ending December 31st, 2007*" (emphasis added)); *see also id.* at 248:8-249:1).)

⁷ Mr. Khoury also argued—again falsely—that Steven Shelley was referring to the 2008 10-K, even though Plaintiffs made clear *in front of the jury* that such questions of Mr. Shelley referred to the fact that TCI's 2007 10-K was issued in 2008. (Ex. H at 270:5-272:12.) The purpose of playing this testimony was to show that TCI publicly reported owning MRI as of December 31, 2007. Defendants' mortgage fraud on Arbor occurred on January 24, 2008.

Mr. Khoury’s reading of this deposition testimony was no accident. For Defendants, it was crucial to buttress their contention that TCI did not own or control MRI at the time of its mortgage fraud on Arbor, another Brauss creditor. Mr. Khoury obviously concluded that the best way to do so was to mislead the jury about the chronology of the Form 10-K by reading the outside-the-record Moos deposition excerpt and, once again, smearing opposing counsel (“Harlow”) as a dishonest lawyer who had “fooled” witnesses and therefore should not be trusted. (Ex. E at 165:24-166:14.) In so doing, Mr. Khoury hit on a remarkable trifecta of improper argument—arguing about testimony not in the record, misstating the content of that testimony, and attacking the integrity of opposing counsel. *See Phillips*, 288 S.W.3d at 883; *Lone Star Ford*, 848 S.W.2d at 853.

Unfortunately, this strategy seems to have worked. As noted, the jury found that TCI was not responsible for the conduct of Eric Brauss, even though the jury found that MRI was responsible for his conduct. (Verdict Q. 15(a).) Mr. Khoury’s incurable jury argument no doubt contributed substantially to that finding. *See Reese*, 584 S.W.2d at 839 (considering improper jury argument’s “probable effect on a material finding”). This argument went directly to an important, contested fact question at trial and was among the last things the jury heard on the topic. In view of the record as a whole, the argument was not only improper, but requires a new trial. *See id.*

5. Mr. Khoury and Mr. Shamoun improperly offered their personal opinions to the jury.

As he did in *Clapper*, Mr. Shamoun “injected his personal opinion into trial.” 95 F.4th at 316. Near the end of the trial, Mr. Shamoun argued: “And we’ve got to expect more as a society than a guy that’s coming in here paying a million dollars and can’t identify a single fact to support a claim. I hope and we pray that y’all feel the same way we do.” (Ex. D at 40:10-14.) Offering how Defendants “feel” and encouraging the jury to “feel the same way” is wholly improper. *See*

Clapper, 95 F.4th at 314 (“[A] new trial may be warranted when counsel interjects personal opinion into argument.”).

Mr. Khoury did the same. During his opening statement, Mr. Khoury personally vouched for Christine Brauss as an “honest” witness:

And Christine Brauss is going to be here, and quite frankly, she's one of the nicest ladies I've ever met. And one of most cordial and, I think, honest ladies I've ever met. And here's what she's gonna say to you.

(Ex. C at 159:15-17.) And at closing, he offered his opinion about the evidence: “I don’t know about you all, but I didn’t think that any of those gentlemen said anything definitive.” (Ex. E at 164:21-23.) These arguments, too, were improper. *See Thomas v. State*, 445 S.W.3d 201, 211 (Tex. App. —Houston [1st Dist.] 2013, pet. ref’d) (“Ordinarily it is improper for a prosecutor to vouch for the credibility of a witness during his argument.”).

6. Throughout the trial, Mr. Khoury falsely insinuated that the Court was treating Defendants unfairly.

Finally, Mr. Khoury repeatedly suggested to the jury that the Court was treating them less favorably than Plaintiffs’ counsel. During voir dire, for example, Mr. Khoury delivered supposedly “good news” to the potential jury members: that while “Mr. Harlow” got “an hour and a half,” “[w]e’re gonna have to split up our time.” (Ex. B at 248:14-18; *see also id.* at 249:5-7 (“Don’t hold it against me because I’m trying to do something quick within the time frame that the judge has given us. . . .”)). Similarly, when the Court informed Mr. Khoury that he was nearing the end of his allotted time for closing argument, he acted surprised and asked for more time, even though the Court had allocated two hours for each side. (Ex. E at 161:24-162:18.) Of course, there is nothing unusual or improper about the Court allocating time evenly among sides, even though one side may have multiple lawyers. Yet the clear implication of Mr. Khoury’s request was that the Court was treating him unfairly.

Then, when the Court informed him that he had exceeded his time, Mr. Khoury “refused to follow” the Court’s instructions and “kept talking over [the Court],” despite knowing the Court “was telling [him] it was done.” (*Id.* at 197:7-13.) The Court made its observations crystal-clear: Mr. Khoury’s conduct was “flat-out rude and disrespectful.” (*Id.* at 197:13)⁸

C. The conduct of Mr. Khoury and Mr. Shamoun was incurable and requires a new trial.

The arguments by Mr. Khoury and Mr. Shamoun were not only highly improper but, taken together, require a new trial.

1. Counsel’s misconduct permeated the entire trial.

First, this improper conduct was not “short in duration,” but pervaded the entire trial. *Cf.* *Jones v. Republic Waste Servs. of Tex., Ltd.*, 236 S.W.3d 390, 403-04 (Tex. App.—Houston [1st Dist.] 2007, pet. denied). The Texas Supreme Court has long instructed that the incurable nature of an improper argument may depend on “[h]ow long the argument continued,” and “whether it was repeated or abandoned.” *Reese*, 584 S.W.2d at 839-40. As the foregoing discussion demonstrates, the improper arguments by Mr. Khoury and Mr. Shamoun—viewed as a whole—were “repeated” for the duration of the trial.

2. Counsel’s misconduct was not invited or provoked by Plaintiffs.

Second, the record shows that none of these statements were invited or provoked by Plaintiffs. *Reese*, 584 S.W.2d at 839. As they did in *Clapper*, Mr. Khoury and Mr. Shamoun began the trial by insulting Mr. Harlow at every opportunity and repeated that pattern until the end. (*See* Part I.B.1, *supra.*) A review of the Court’s comments to counsel reveals nothing by Plaintiffs or

⁸ Outside the presence of the jury, the Court admonished Mr. Shamoun for similar conduct, when he asked the Court “to be equally fair as opposed to not being fair.” (Ex. C at 232:18-233:11.) The Court “[didn’t] appreciate the insinuation that I have picked sides” or “prejudged the case” and rightly “[took] offense at [Mr. Shamoun’s] tone.” (*Id.*)

their counsel to provoke Mr. Khoury’s use of “Harlow” or the myriad accusations of lying and duplicity. For example, the Court expressly noted that Mr. Khoury’s use of the demeaning “Harlow” reference was completely unprovoked and “unacceptable”:

You have been admonished several times about the disrespect of calling opposing counsel “Harlow” and not “Mr. Harlow.” I have specifically admonished you about this. Your whole closing that’s all you did. *He was polite and didn’t interrupt and object, but he shouldn’t have had to.*

....

I cannot adequately express how disappointed I am in your behavior.

(Ex. E at 189:18-24, 191:1-2 (emphasis added).)

In short, the myriad insults, unfounded attacks, and other misconduct that marked this entire trial were not accidents or provoked responses. Just as in *Clapper*, they were central features of Mr. Khoury’s and Mr. Shamoun’s trial strategy.

3. The cumulative effect of the misconduct by Mr. Khoury and Mr. Shamoun stuck at the heart of the judicial process and could not be “cured.”

Finally, even though Plaintiffs objected throughout the trial—and many objections were sustained—no amount of instruction by the Court could have cured this cascade of highly improper argument. The Court must consider the “cumulative nature of the improper remarks.” *Am. Petrofina*, 679 S.W.2d at 756,. That was the case in *Clapper*: “when examined in the aggregate,” Mr. Khoury’s and Mr. Shamoun’s “repeated improper statements including attacks against opposing counsel, references to Clapper’s wealth, matters not in the record, appeals to local bias, and suggestions of Clapper’s bad motives” required a new trial. 95 F.4th at 317.

And it was the case here as well. Mr. Khoury’s and Mr. Shamoun’s ceaseless insults and attacks on the integrity of counsel meet the bar for “incurable” argument. *See Phillips*, 288 S.W.3d at 883; *Am. Petrofina*, 679 S.W.2d at 755. The same is true for their improper, inflammatory

attacks on Plaintiffs' expert witness, Dr. Grace. *See Clapper*, 95 F.4th at 315. It is likewise true for Mr. Khoury's misleading closing argument about testimony not before the jury. *See Reese*, 584 S.W.2d at 839. "[E]xamined in the aggregate," this conduct, along with the other improper arguments and tactics employed by Mr. Khoury and Mr. Shamoun, likely caused the jury to reach "a verdict contrary to that to which [it] would have agreed but for such [improper] argument." *Phillips*, 288 S.W.3d at 883 (citations omitted). The jury's verdict therefore cannot stand. Like the Fifth Circuit, the Court must order a new trial and restore "the dignity, order, and decorum" that Mr. Khoury and Mr. Shamoun abandoned. *Clapper*, 95 F.4th at 317.

CONCLUSION AND PRAYER

For the foregoing reasons, Plaintiffs Renate Nixdorf GmbH & Co. KG and Watercrest Partners, L.P. respectfully request that the Court grant a new trial of this cause, and further request such additional relief to which they may be entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing document has been served upon all counsel of record at the courthouse on this the 23rd day of April, 2024.

/s/ Todd J. Harlow

TODD J. HARLOW

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EXHIBIT A

95 F.4th 309

United States Court of Appeals, Fifth Circuit.

David M. CLAPPER, individually; Atlantic Midwest, L.L.C., a Michigan limited liability company; Atlantic XIII, L.L.C., a Michigan limited liability company, Plaintiffs—Appellants,

v.

AMERICAN REALTY INVESTORS, INCORPORATED, a Nevada corporation; American Realty Trust, Incorporated, a Georgia corporation; Pillar Income Asset Management, Incorporated, a Nevada Corporation; Prime Income Asset Management, Incorporated, a Nevada corporation; Prime Income Asset Management, L.L.C., a Nevada limited liability company; EQK Holdings, Incorporated, a Nevada corporation; Basic Capital Management, Incorporated, a Nevada corporation; Bradford Phillips, Independent Executor of Gene Phillips Will and Estate, Defendants—Appellees.

No. 21-10805

FILED March 8, 2024

Synopsis

Background: Judgment creditor, who had prevailed on his underlying claims against judgment debtors, brought action against debtors for fraudulent transfers in violation of Texas Uniform Fraudulent Transfers Act (TUFTA) and doctrine of alter ego liability. Following jury trial, the United States District Court for the Northern District of Texas, [Brantley Starr, J.](#), denied creditor's motions for judgment as a matter of law and for new trial, granted debtors' motion for judgment on the verdict, and entered judgment in favor of debtors. Creditor appealed.

The Court of Appeals held that judgment creditor was entitled to new trial as a result of improper remarks that pervaded closing argument.

Reversed and remanded.

Procedural Posture(s): On Appeal; Judgment; Motion for New Trial.

*311 Appeal from the United States District Court for the Northern District of Texas, USDC No. 3:14-CV-2970, [Brantley David Starr](#), U.S. District Judge

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Shamoun & Norman, L.L.P., Farmers Branch, TX, for Defendant-Appellee Bradford Phillips, Independent Executor of Gene Phillips Will and Estate.

Before Richman, Chief Judge, and Higginbotham and Elrod, Circuit Judges.

Opinion

Per Curiam:

*312 David Clapper sued American Realty Investors, Inc., and other defendant entities, claiming that they transferred assets to avoid paying a judgment from a previous lawsuit in violation of the Texas Uniform Fraudulent Transfers Act (TUFTA) and the doctrine of alter ego liability. The jury rendered a verdict in favor of the Defendants on all claims. Clapper appealed, contending that Defendants' counsel made numerous improper and highly prejudicial statements in closing argument. Because we agree that the Defendants' counsels' closing argument irreparably prejudiced the fairness of the trial, we REVERSE the judgment of the district court and REMAND for further proceedings consistent with this opinion.

I

This appeal is part of a long-running series of litigation between the parties. In 1999, the Defendants sued David Clapper for breaching an agreement regarding the acquisition and management of various apartment complexes. In 2004, the Defendants prevailed at trial, and Clapper appealed. We reversed and remanded. In 2011, Clapper prevailed in a second trial and was awarded over \$70 million in damages. Finally, in 2016, following an appeal of the second trial, the district court again entered final judgment in Clapper's favor, this time for more than \$50 million.

In 2014, Clapper filed the instant lawsuit, claiming that a series of transfers beginning in 2010, on the eve of the second trial, violated TUFTA. For example, he claimed that one of the Defendants “exercised total domination and control” over two other Defendants, and that assets (mostly stock) were transferred between *313 the Defendants with the intent to “hinder, delay, or defraud” his efforts to collect on the judgment in violation of TUFTA. *See Tex. Bus. & Com. Code § 24.001*. Clapper also claimed that one of the Defendants violated Georgia and Nevada alter ego law because it had served for years as the alter ego of two of

the other Defendants, and that one individual, Gene Phillips, served as the alter ego of two of the Defendants.

After the judgment was entered in the second trial, Clapper filed a Turnover Motion to aid in collection. Shortly before the hearing on this motion, one of the Defendants filed for bankruptcy in Nevada, staying the turnover proceedings. The Nevada bankruptcy proceedings were dismissed for improper venue, and that same entity then filed for bankruptcy in Georgia. The case was transferred, because of improper venue, to the Northern District of Texas, where it was dismissed in 2014. The instant claim followed. Trial on Clapper's TUFTA and alter ego claims took place in May 2021. The jury ruled for the Defendants on both claims.

After the verdict, Clapper filed motions for judgment as a matter of law and for a new trial. The Defendants moved for judgment on the verdict. On July 14, 2021, the district court denied Clapper's motions and granted the Defendants' motion for a judgment on the verdict.

Clapper appealed, claiming that a new trial is warranted because: (1) the Defendants' attorneys made prejudicial remarks during closing argument; (2) the district court improperly excluded evidence; (3) the jury instructions were deficient; and (4) the jury's verdict was against the weight of the evidence.¹ The Defendants contest each of these arguments and maintain that they are entitled to judgment as a matter of law.

We review a district court's denial of a motion for a new trial for abuse of discretion. *Fornesa v. Fifth Third Mortg. Co.*, 897 F.3d 624, 627 (5th Cir. 2018).

II

A

We start, and end, with Clapper's first argument. A new trial is warranted when “improper closing argument irreparably prejudices a jury verdict.” *Baisden v. I'm Ready Prods., Inc.*, 693 F.3d 491, 509 (5th Cir. 2012) (quoting *Nissho-Iwai Co., Ltd. v. Occidental Crude Sales, Inc.*, 848 F.2d 613, 619 (5th Cir. 1988)). A jury verdict may be irreparably prejudiced in several ways.

For example, a new trial may be warranted when one party makes an “unsupported, irresponsible attack on the integrity of opposing counsel” or relies on “the identity of counsel as the basis” for its argument. *Bufford v. Rowan Cos., Inc.*, 994 F.2d 155, 157–59 (5th Cir. 1993) (holding that a new trial was warranted because defense counsel implied that plaintiff’s selection of legal counsel was indicative of a “copycat” lawsuit); *see also United States v. Barnes*, 979 F.3d 283, 299 (5th Cir. 2020) (“Attacking defense counsel was unwarranted, unprovoked, and irrelevant. The district court therefore correctly concluded that the prosecution’s remarks during rebuttal were improper.”). A new trial may also be warranted when counsel, in closing argument, argues the existence of material facts that are “false or without basis in the record.” *In re Isbell Recs., Inc.*, 774 F.3d 859, 872 (5th Cir. 2014); *314 *Edwards v. Sears, Roebuck & Co.*, 512 F.2d 276, 285 (5th Cir. 1975).

Appeals to local bias may also sufficiently prejudice the jury to warrant a new trial. *Whitehead v. Food Max*, 163 F.3d 265, 276–78 (5th Cir. 1998) (holding that a new trial was warranted because counsel made repeated references to the fact that the defendant corporation was a national, and not a local, corporation, and had its principal place of business in another state). We have also held that a new trial may be warranted when counsel interjects personal opinion into argument. *United States v. Delgado*, 672 F.3d 320, 336 (5th Cir. 2012) (en banc) (“The prohibition on giving personal opinions prevents a prosecutor from giving the jury the impression that he has superior knowledge of the facts based on private information not admitted into evidence.”).

In *Learmonth v. Sears, Roebuck & Co.*, we examined the impropriety of “conscience-of-the-community arguments,” which we described as “impassioned and prejudicial pleas intended to evoke a sense of community loyalty, duty and expectation.” 631 F.3d 724, 732 (5th Cir. 2011) (alteration omitted) (quoting *Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1238–40 (5th Cir. 1985)). These arguments evoke local biases that “prejudice the viewpoint of the jury against an out-of-state” party. *Id.* (quotation marks omitted) (quoting *Guar. Serv. Corp. v. Am. Emps’ Ins. Co.*, 893 F.2d 725, 729 (5th Cir.)). We have also remanded for a new trial when defense counsel painted the plaintiff as “a woman who had flouted respect for marriage vows, who had used illegal drugs, and who was trying to take advantage of the good people of rural northern Mississippi.” *Hall v. Freese*, 735 F.2d 956, 960 (5th Cir. 1984).

By contrast, “expressive language and a bit of oratory and hyperbole in arguments” does not require a new trial. *United States v. Boyd*, 773 F.3d 637, 645 (5th Cir. 2014) (quotation marks and citations omitted) (affirming where prosecutor remarked that the defendant’s legal theory was “one of the most preposterous things I’ve ever heard in my life” and “one of the dumbest things I have ever heard”). However, legitimate “oratory” and “hyperbole” can only extend so far. If closing argument crosses the line to impermissible prejudice, a new trial may be appropriate.

To determine if a new trial is warranted, the statements must be examined collectively and in the specific context of the trial at issue. *Nissho-Iwai Co., Ltd.*, 848 F.2d at 619 (“We examine the propriety of closing argument by reviewing the entire argument ‘within the context of the court’s rulings on objections, the jury charge, and any corrective measures applied by the trial court.’”). If the “tactics” used during trial, taken together, “tarnish the badge of evenhandedness and fairness that normally marks our system of justice,” then a new trial is warranted. *Bufford*, 994 F.2d at 158. This is especially the case when, as here, those “tactics” are used during closing argument, which often leaves an especially powerful impression on the jury. *See United States v. Okoronkwo*, 46 F.3d 426, 437 (5th Cir. 1995) (“[W]e do not wish to underestimate the value of closing argument, as it is the last impression a defendant makes upon the jury.”).

B

Here, the Defendants were represented at trial by Stephen A. Khoury and C. Gregory Shamoun. Together, they employed nearly every category of what we have previously held to be improper closing argument. These improper and highly prejudicial statements, examined in the aggregate *315 and in context, demonstrate the need for a new trial.

To start, they launched a barrage of personal attacks against Andrew W. Mychalowych, Clapper’s counsel. For example, while beginning his closing argument, Shamoun threw a box of tissues at Mychalowych, stating “I know y’all have a potentiality of crying, y’all might need Kleenex during my [closing.]” During his closing, Shamoun said that if Mychalowych had accused him of perjury in the street rather than the courtroom he would have “kicked his butt.” He then declared, “I don’t care if I was half blind and half-lame, I would have found the strength to whoop his a--.” He continued, explaining that if Mychalowych were his

child, he would have “spanked” him for asking so many leading questions. Shamoun also accused Mychalowych of attempting to “hide evidence” and called him an “embarrass[ment] for the profession.” Shamoun suggested that Mychalowych must think that each juror was “an idiot.” He called Mychalowych’s actions “low class,” “classless,” “ruthless,” and “disgusting.” Finally, Shamoun insisted that:

[Mychalowych] defied this judge. He defied the instructions of the Judge.... He treated us all here with disrespect. He tried to hide evidence.... Judge had to scold him. I have never seen anything like this in the over 30 years that I have practiced in this town. Never have I seen what y'all witnessed. I am embarrassed for the profession, ma'am. I'm embarrassed.

Khoury, for his part, implied that Clapper had paid a witness to testify, and referred to one of Clapper’s expert witnesses as a “paid prostitute from Michigan.” Khoury called Mychalowych a “dishonest broker” who was “deceitful and deceptive.” After calling Mychalowych dishonest, Khoury went on to say that “where I come from, we don’t listen to another germ that comes out of that person’s mouth.”

The Defendants provide a series of excuses for these remarks. They argue that Shamoun’s claim that he would have “kicked [Mychalowych’s] butt” was “hyperbolic” and directed at Mychalowych’s accusation of perjury. The accusation of perjury also purportedly prompted Shamoun to call Mychalowych’s actions “low class,” “classless,” “ruthless,” and “disgusting.” And the “spanking” remark was in response to Mychalowych’s repeated attempts to ask leading questions. According to the Defendants, the suggestion that Mychalowych attempted to hide evidence was not dishonest because the court issued a curative instruction regarding Mychalowych’s misrepresentation of an exhibit. This is what, Defendants argue, led Shamoun to say that he was an “embarrass[ment] for the profession.” Defendants also emphasized that Khoury immediately walked back his comment that Clapper paid a witness, calling it “not a reasonable deduction from the evidence.” Further, they argue that the comments do not warrant reversal because the court admonished Khoury for twice referring to Clapper’s witness as a “paid prostitute.” Likewise, the district court also

instructed the jury to focus only on evidence, not “lawyer argument.”

To the extent these excuses justify counsels’ remarks, they do not account for the personal attacks made against Clapper. Shamoun characterized Clapper as a “billionaire” with a 70-foot yacht who was going after the estate of defendant Gene Phillips, who had recently died and left behind a widow and six children. Khoury called Clapper a “financial pimple.” Shamoun suggested that Clapper’s case was “insulting to everybody’s intelligence” *316 and “insulting to everybody’s position as a juror.”

Shamoun also attempted to discuss during closing argument matters not before the jury by implying that the trial judge—whom he called “[t]he man up there with the robe”—had ruled that there was insufficient evidence for Clapper’s alter ego claim, even though it had yet to be submitted, and that a contrary finding would be “unheard of.”

Both Shamoun and Khoury attempted to appeal to the jury’s local bias as well. Together they mentioned several times that Clapper was from Michigan, while also suggesting that people from Michigan have lower moral standards.

Finally, Shamoun injected his personal opinion into trial when he stated that he hoped that anyone who could drum up a lawsuit like Clapper’s would “understand that they are going to meet their maker,” and that Clapper is not credible: “He can cry, cry like he did in the first trial, he can cry like he did here. I’m not going to tell you, I don’t like him because it don’t matter what I do or what I don’t. But he’s not a credible person.”

There is no doubt that these remarks, considered collectively, extend far beyond permissible hyperbole or “expressive language,” and were designed to bias the jury against Clapper and his counsel. Khoury’s and Shamoun’s improper statements pervaded closing argument. As noted above, they employed nearly every type of improper argument identified by our court, including highly improper and personal attacks against opposing counsel, remarks about Clapper’s wealth, a discussion of matters not in the record, insinuations that Clapper had lower moral standards because he was from Michigan, and suggestions of Clapper’s bad motives through counsels’ opinion. These attacks “unquestionably tarnish[ed] the badge of evenhandedness and fairness that normally marks our system of justice.” *Bufford*, 994 F.2d at 158.² And they extend far beyond mere “oratory” or “hyperbole.” See

*317 *Boyd*, 773 F.3d at 645; see also *Living Ctrs. of Tex., Inc. v. Penalver*, 256 S.W.3d 678, 682 (Tex. 2008) (remanding for a new trial after concluding that criticizing defense counsel and referring to the Nazis was “designed to turn the jury against opposing counsel and his clients”).

To be sure, we have often affirmed the denial of a motion for new trial where sparse prejudicial remarks, viewed in the context of the entire trial, were unlikely to inflame the passions of the jury. *E.g.*, *Learmonth*, 631 F.3d at 732; *Barnes*, 979 F.3d at 299. Though improper, the isolated remarks in those cases, when examined in the aggregate, did not affect the fairness of the trial. Not so here. In this case, repeated improper statements including attacks against opposing counsel, references to Clapper's wealth, matters not in the record, appeals to local bias, and suggestions of Clapper's bad motives, abandoned all “dignity, order, and decorum[,]” which we have described as the “hallmarks of all court proceedings in our country.” *Farmer v. Strickland*, 652 F.2d 427, 437 (5th Cir. Unit B 1981) (quotation marks omitted) (quoting *Illinois v. Allen*, 397 U.S. 337, 343, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)). These statements affected Clapper's “substantial rights” and warrant a new trial. *Edwards*, 512 F.2d at 286.

III

Having resolved the issue before us, we turn briefly to comment on civility in the practice of law. In the 1908 Canons of Professional Conduct—a precursor to the present-day Model Rules of Professional Conduct—the ABA stated that,

Nothing operates more certainly to create or to foster popular prejudice against lawyers as a class, and to deprive the profession of that full measure of public esteem and confidence which belongs to the proper discharge of its duties than does the false claim ... that it is the duty of the lawyer to do *whatever may enable him to succeed* in winning his client's cause.

AM. BAR ASS'N, CANONS OF PROFESSIONAL ETHICS, Canon 15 (1908) (emphasis added). Zeal for a client's cause, it continued, must be exercised “within and not without the bounds of the law.” *Id.*

Despite the ABA's admonition, improper litigation tactics took hold. By 1935, the Supreme Court, describing the role of the prosecutor, counselled that while a lawyer “may strike hard blows, he is not at liberty to strike foul ones.” *Berger v. United States*, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935). Our late colleague Judge Thomas M. Reavley, while practicing in rural East Texas in the late 1940s, encountered lawyers who “would not hesitate to employ foul means to serve their purposes.” Thomas M. Reavley, *318 *Rambo Litigators: Pitting Aggressive Tactics Against Legal Ethics*, 17 PEPP. L. REV. 637, 639–40 (1990). He specifically recalled that young lawyers “were verbally abused and even threatened with physical attacks[.]” promises for settlement were broken, and jury tampering ran rampant. *Id.* at 640–41.

Although the ABA twice drafted new model rules to guide professional conduct (once in 1969, and once in 1983), the late 1980s saw the rise of “Rambo” litigation tactics, a win-at-all-cost strategy that we described as bringing “disrepute upon attorneys and the legal system.” *McLeod, Alexander, Powell & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1486 (5th Cir. 1990).

The U.S. District Court for the Northern District of Texas, the very court from which this appeal is taken, took one of the first steps to mandate civility in *Dondi Properties Corp. v. Commerce Savings & Loan Ass'n*, 121 F.R.D. 284, 287 (N.D. Tex. 1988) (en banc) (per curiam). In *Dondi*, the judges sitting *en banc* observed that “valuable judicial and attorney time” was being “consumed in resolving unnecessary contention and sharp practices between lawyers.” *Id.* at 286. These ill-mannered “Rambo” tactics “threaten[ed] to delay the administration of justice and to place litigation beyond the financial reach of litigants.” *Id.* In response, the judges adopted a standard by which attorneys appearing in civil actions in the court must adhere. Several tenets of that standard bear repeating here:

- (C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.

....

(E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.

....

(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.

Id. at 287–88. Follow-on litigation, applying *Dondi*, condemned tactics almost identical to those present in this appeal. For example, the Northern District of Texas explained:

If opposing counsel's arguments are weak, they are to be challenged on the merits; the arguments can be characterized as wrong or incorrect without referring to them as “garbage” or “legal incompetence” or referring to the attorneys [as] “various incompetents,” “inept,” or “clunks.” Characterizing an attorney or firm as a “puppet” or “stooge” of another adds nothing to a determination of the merits of their arguments.

In re First City Bancorporation of Tex., Inc., 270 B.R. 807, 813 (N.D. Tex. 2001).

Following *Dondi*, lawyers across the country searched for the proper balance of civility and advocacy in the legal profession. In November 1989, a year after the opinion, the

Supreme Court of Texas and the Texas Court of Criminal Appeals issued the “Texas Lawyers' Creed: a Mandate for Professionalism” to eradicate “abusive tactics” that had become “a disservice to our citizens, harmful to clients, and demeaning to our profession.” See Eugene A. Cook, *The Search for Professionalism*, 52 TEX. BAR J. 1302, 1303 (1989) (reprinting the Texas Lawyers' Creed). The Creed demands courtesy, candor, and cooperation in all lawyer-to-lawyer dealings, *319 and prohibits unprofessional conduct in retaliation for other unprofessional conduct. That same year, three retired chief justices of the Texas Supreme Court founded the Texas Center for Legal Ethics, which promotes the values contained in the Texas Lawyers' Creed.

Following these advancements, we commended Texas's efforts “to instill a greater sense of professionalism among attorneys.” *McLeod, Alexander, Powel & Appfel, P.C.*, 894 F.2d at 1487. We do so again today. We recognize that such unprofessional practices as those that occurred in this case continue to appear in our courtrooms, despite many attempts to eradicate such practices. We remind all practitioners in our court that zealous advocacy must not be obtained at the expense of incivility. As Judge Reavley aptly explained, “Although earnest, forceful, and devoted representation is both zealous and proper, Rambo and kamikaze lawyers lead themselves and their clients to zealous extinction.” Reavley, *supra* at 646 (footnote omitted).

IV

For the above reasons, we REVERSE the decision of the district court and REMAND for further proceedings consistent with this opinion.

All Citations

95 F.4th 309

Footnotes

- 1 Because we agree with Clapper's first argument, we do not address whether the district court improperly excluded evidence, whether the district court made material errors in the jury instructions, and whether the jury's verdict was against the weight of the evidence.
- 2 The Defendants assert that Clapper must meet a higher bar here for a new trial because he failed to move for a mistrial in district court. See *Shipman v. Cent. Gulf Lines, Inc.*, 709 F.2d 383, 388 (5th Cir. 1983) (citation

omitted) (holding that arguments that are not objected to are reviewed only in “exceptional cases where the interest of substantial justice is at stake”). The serious nature of the argument in this trial, however, indicates that substantial justice requires a new trial, like in *Edwards*. There, we held that the interest of substantial justice demanded a new trial because counsel brought forth in closing argument damaging facts that were not in the record and made several emotional appeals regarding the death of a litigant. *Edwards*, 512 F.2d at 284–86; see also *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 778 (5th Cir. 2009) (“Improper argument may be the basis for a new trial where no objection has been raised only where the interest of substantial justice is at stake.” (alteration adopted) (citation and quotation marks omitted)); *Whitehead*, 163 F.3d at 278 (reversing judgment based on improper closing argument where appellant “fail[ed] to object to almost all of the statements now challenged”).

The Defendants also argue that a new trial is not warranted because this court is not required to consider unobjected to arguments. *Baisden*, 693 F.3d at 509. This is incorrect. We may grant a new trial, even when counsel fails to object in closing, if the closing argument “affect[s] the substantial right of the parties” by “seriously prejudice[ing] [Clapper’s] right to a fair trial” *Edwards*, 512 F.2d at 286. Further, the district court expressly directed the parties to forgo objections during closing argument, in favor of sidebar conferences.

Defendants argue that a new trial is not warranted because the district court issued curative instructions regarding the remarks and explained in its jury charge that argument from counsel is not evidence. The district court’s two curative instructions and charge regarding counsels’ remarks were not sufficient to overcome the severe prejudice resulting from the attorneys’ statements. The district court attempted to remedy the situation by instructing Mychalowych that he was permitted to “return the favor” after Khoury made an insulting remark. This was not appropriate here. Shortcomings at closing argument can be particularly damaging to the judicial process because closing argument often has a strong impact on the jury as it is the last thing that it hears. *Okoronkwo*, 46 F.3d at 437. Two curative instructions along with sidebar conferences were not enough to ensure that the jury’s verdict was not impermissibly prejudiced by counsels’ remarks.

Finally, Defendants contend that their prejudicial remarks were harmless because Clapper failed to establish an essential element of his claim, the valuation of the disputed properties. However, the trial record is replete with both parties’ valuation evidence. And Defendants previously made this argument in their motion for judgment as a matter of law, which the district court properly denied. This argument likewise fails.

EXHIBIT B

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 1

FEBRUARY 27, 2023

On the 27th day of July, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

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Certified Realtime Reporter
Registered Diplomate Reporter
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1 courtroom.)

2 THE COURT: Okay. Please be seated.
3 Go ahead and proceed.

4 JURY VOIR DIRE BY MR. KHOURY

5 MR. KHOURY: May it please the Court, Your
6 Honor, ladies and gentlemen. Good afternoon.

7 I introduced myself earlier. I'm Stephen
8 Khoury, and Ryan Seay and I are here representing three
9 LLCs in this business transaction that you-all who are
10 selected on the jury are gonna learn a lot about.

11 A lot of you that don't know things about
12 financial transactions and documents, if you're selected
13 on the jury, you're gonna hear a lot of it.

14 And I know that a lot of you are -- it's
15 late in the day, and I have good news for you: Not all
16 three lawyers left to talk are gonna get an hour and a
17 half like Mr. Harlow did. We're gonna have to split up
18 our time.

19 And I'm gonna try to be more brief than the
20 others because they're going to be doing some of the
21 interrogation. But I wanted to spend some time with you
22 giving you the perspective of what the law is that the
23 judge has talked to you about and how it applies to a
24 lawsuit where you're trying to find the truth. And what
25 you, as a juror, are going to be sworn to do in terms of

1 considering only the evidence that comes from the witness
2 stand or the documents in the law that the judge gives
3 you.

4 And before I start, and I do that, and if I
5 go quick and I'm hasty, please forgive me. Don't hold it
6 against me because I'm trying to do something quick
7 within the time frame that the judge has given us, and we
8 know it's late in the day, and we had a late start and
9 that sort of thing.

10 So let me first say I know we've asked you
11 a lot of questions. We're going to ask you more
12 questions about yourself. So I think it's only fair that
13 I introduce myself to you.

14 I was born and raised in Waco, Texas. Many
15 of my friends tell me that that's a disability that I'm
16 never gonna overcome. But nonetheless, after graduating
17 from Waco High School, I went to A&M, Texas A&M which
18 puts me not in favor of the judge.

19 [Laughter.]

20 MR. KHOURY: But after graduating from A&M
21 with a degree in zoology, I went to Baylor Law School,
22 and when I got ought of Baylor, I was privileged to work
23 for Mr. Henry Wade who was the DA in Dallas for
24 50-something years.

25 And when I was a government prosecutor, I

1 reasonable with you, which witnesses are being truthful.
2 Who's being evasive and who's testifying consistent with
3 their knowledge as opposed to trying to sell you a bill
4 of goods on facts they have no personal knowledge on.

5 And as the judge told you, the way that
6 that's going to be done is by having testimony come from
7 the witness stand where people get up and swear to tell
8 the truth and documents that are admitted because the
9 judge believed they were admissible under the law and
10 could be relied on. And that is all you can consider.

11 And some of you are very bright, and y'all
12 were quick on the uptake in terms of where you thought
13 certain things Mr. Harlow was bringing to your attention
14 were going.

15 But the judge is going to say that what
16 you're confined to rely on in this American courtroom is
17 sworn testimony and evidence that she puts in the record
18 because we don't guess our way to multimillion-dollar
19 judgments in this country based on what you feel, based
20 on what you think, or based on what you believe. In this
21 country, you only know what you can prove.

22 In an American courtroom, it's done with
23 rules. This ain't a talk show where people just keep
24 yelling, no matter what the topic. Here, you got to come
25 with competent evidence that is a preponderance of the

1 Eric Brauss, Christine Brauss, Gene Phillips, Matthias
2 Nixdorf, Warren Harmel?

3 Stephen Grace, has anybody heard of a
4 Dr. Stephen Grace? I see no -- no hands.

5 Gene Bertcher, Brad Phillips, Craig Landis,
6 Jason Ribelin, Ryan Phillips, Daniel Moos? Anybody heard
7 of those people, knowing anything about those people?

8 PROSPECTIVE VENIREPERSONS: (No response.)

9 MR. LAUTEN: Okay. I appreciate your
10 patience. Thank you all very much. I know it's been a
11 long day.

12 Thank y'all.

13 THE COURT: Okay. Mr. Shamoun.

14 JURY VOIR DIRE BY MR. SHAMOUN

15 MR. SHAMOUN: Y'all think he felt bad being
16 the third lawyer. God, I don't have a chance, but I'm
17 gonna try to be quick.

18 My name is Gregory Shamoun. I've been a
19 lawyer for 34 years. I represent a number of defendants,
20 and we don't know why we've been sued. But we do know
21 one thing: The claims brought against us are fraudulent
22 claims. There's no basis to have sued my clients. We
23 are not gonna settle with them. We're not gonna give
24 them a penny, okay? I don't care if it's 16 years or 60
25 years. We're not gonna give them \$40 million.

1 We don't know why we've been sued. We
2 didn't have any involvement in the transactions that took
3 place. My clients got money at the end of the sale of 21
4 apartment complexes in 2012, complexes that were in
5 Midland, Odessa, and Fairview.

6 Has anybody ever had the privilege to live
7 in an apartment in Midland, Odessa, or Fairview?

8 PROSPECTIVE VENIREPERSONS: (No response.)

9 MR. SHAMOUN: Okay. My clients were owed
10 money, and after the apartments sold in 2012, they were
11 paid. These two gentlemen over here represented by this
12 silver-tongued, fine, good-looking lawyer, Mr. Harlow,
13 filed lawsuits against my client claiming that we
14 defrauded them because we got money as a result of the
15 sale of the apartment complexes when my clients were owed
16 money.

17 So one would ask themselves: Where's the
18 fraud? It's \$268, Mr. Khoury. And a fine lawyer, a
19 lawyer that will take your case. \$268 filing fee, you
20 can sue anybody for anything. And you have to hire a
21 lawyer to defend yourself or pay a bunch of money to get
22 out of it or pay a lawyer to defend yourself.

23 I think the people that work for State
24 Farm, ma'am, sir, y'all have a -- a job, a duty when
25 y'all were adjusting and evaluating a claim to be fair.

1 I've represented a lot of people and
2 companies in this town for over 30 years: Jerry Jones,
3 Dallas Cowboys. I've been privileged to represent rich
4 people, and I have been privileged to represent poor
5 people. And they all deserve the best representation,
6 whether they're paying you by the hour or you've taken
7 their case on a contingency.

8 I'm gonna do the best I can to represent my
9 client. I am going be faithful. I am going to be
10 honest. I am not gonna sell you a bill of goods. I'm
11 not gonna tell you something I can't back up as a lawyer.
12 You know why, my mother used to always tell me I grew up
13 in Mississippi, and she used to always -- she's from
14 Texas. And she always said, "Gregory, oh boy, we grew up
15 poor." And she looked at us kids, there was five of us,
16 and she said, "I can tell you -- I can tell when you're
17 not telling the truth, Gregory." She could tell.

18 I think jurors -- I've been doing this a
19 long, long time. I think jurors know when a lawyer's
20 lying to them. I think a juror knows -- a potential
21 juror knows when a lawyer is leading them down a primrose
22 path with a silk tongue. I think they know.

23 And so I submit to each and every one of
24 y'all, hold Mr. Khoury, hold Mr. Lauten, and myself to a
25 standard of truth and honesty. I submit to you, every

REPORTER'S CERTIFICATE

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STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, Karen L. D. Schoeve, Deputy Official Court Reporter in and for the District Court of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

Day 1 cost: _____

WITNESS MY OFFICIAL HAND this the 27th day of February, 2023.

Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Texas CSR 3354
Expiration Date: 10-31-2023
Deputy Official Court Reporter
191st District Court
Dallas County, Texas
Dallas, Texas

EXHIBIT C

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 2

FEBRUARY 28, 2023

On the 28th day of February, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

A P P E A R A N C E S

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A P P E A R A N C E S (Continued)

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1 movement of money from MRI as lender to Midland Equity as
2 borrower.

3 MR. KHOURY: To which we object, Your
4 Honor.

5 We do not ascribe to his theory or his
6 false statements.

7 THE COURT: Okay. And I've -- and I've
8 noted that for the jury, so overruled.

9 MR. KHOURY: Thank you, Your Honor.

10 MR. HARLOW: I would ask, over the next two
11 and a half weeks, to look for any evidence that MRI
12 loaned \$28.5 million to Midland Equity.

13 I keep saying "Midland" all the time.
14 Midland Equity is the company that owned 19 percent of
15 TRA Midland. It's one of these entities right here
16 (indicating). Owned 19 percent. I'm going to talk about
17 this some more in just a second.

18 Now, because there was no actual loan of
19 money, in plaintiffs' view, the forgiveness of the loan
20 cannot be value received in return for the assignments.

21 In plaintiffs' view, if there was never an
22 actual loan of money, if there was no benefit of getting
23 the borrowed money, then how can you say forgiving that
24 debt is value?

25 In plaintiffs' view, forgiveness of a loan

1 finish at the -- after the commercial. And when he told
2 the story in the first part, you knew immediately what
3 the conclusion of the story was going to be.

4 Mr. Harvey was so good, and he
5 intentionally omitted and intentionally took out things
6 that he knew was the most meaningful, the most impactful,
7 and the most revealing so that when he came back after
8 the commercial, he told you the things that were most
9 important and most revealing and most salient to the
10 story. When you got through and you heard his
11 conclusion, it was nothing like you heard before the
12 commercial.

13 That's the power of not telling the whole
14 story. And I'm gonna bring you the "rest of the story"
15 today because there have been some shocking omissions
16 that I'm surprised were not told to you-all about this
17 transaction which informed a decision that fundamentally
18 undercuts everything Mr. Harlow tried to tell you about
19 the plaintiffs, and I'm gonna tell you about it.

20 This case, in my opinion, is a lawsuit
21 about the Nixdorfs and Watercrests trying to jump in
22 front of the line by, stunningly, making up stuff -- and
23 I'm gonna point out to you -- some of it you can't
24 characterize any way but **fantasy**. But they're trying to
25 jump the line by trying to set aside business

1 the collapse of the real estate business, and, there'll
2 be testimony, that affected my clients.

3 We're as big a real estate investor, with
4 hundreds of companies, than anybody, and it was a tough
5 time. But almost two years after we made our deal with
6 Mr. Brauss, almost two years after Midland Equity was
7 paying the note and the interest, almost two years after
8 75 percent of the profit was being paid to us and
9 25 percent profit being paid to Brauss, he comes to us
10 and needs more money.

11 And the deal you're gonna see was that in
12 exchange for giving him more money, we wanted all of his
13 interest that he had left. And the omission that is
14 disturbing to me was the impression that Mr. Harlow left
15 with you that in November of 2009, Mr. Eric Brauss and
16 his wife had 100 percent of TRA Midland to sell, because
17 that ain't true.

18 And it ignores -- either because he thinks
19 we're stupid or y'all are stupid -- that somebody isn't
20 gonna bring that up, but you can't get to the numbers
21 that Mr. Harlow tried to sell you as damages for his
22 client without ignoring a property right that my client
23 bargained for and got two years before this transfer.

24 And we will prove that to you.

25 Again, the most important evidence is at

1 some evidence as to maybe why they were looking the other
2 way and why they were sticking with this guy. But their
3 losses aren't our fault. This judgment that they talk
4 about getting against him and Ms. Brauss, those judgments
5 aren't against my clients. They aren't against any other
6 defendants here.

7 We took care of our business, and this is
8 America. And we're entitled to make a profit, but it's
9 nothing like Mr. Harlow distorted. Because first of all,
10 the \$40 million, if that's what it is -- and I'm going to
11 show you before I sit down and in this trial that that is
12 funny money.

13 But if the number was 40 million, did you
14 hear Mr. Harlow -- because I didn't, because he didn't
15 tell y'all -- we own 75 percent of it. He didn't tell
16 you that the net profit ought to be reduced by 75
17 percent, did he?

18 Or that maybe if the number's 40, which I
19 say is funny money, Eric's was only 25 of that. He
20 didn't tell you that because he didn't acknowledge the
21 fact that we're gonna show you in the documents of the
22 2008 transaction, where we took an ownership interest,
23 maybe not in his company, but for all the profit. And we
24 were paid that for two years until we took the rest of
25 it.

1 probably not too valuable to have the title in your name.
2 I guess it's nice. You could decide when you wanted to
3 sell them or not. But if you had title to a rent house
4 but you made an agreement with me that all the rent that
5 comes in, you got to pay me 75. And even when it sells,
6 the dirt sells, you got to give me 75. There wouldn't be
7 much benefit to owning the dirt, would there? But that
8 is how the transaction was left.

9 Can we show the first page of the profit
10 participation agreement so they'll know I'm not making
11 this up -- no, no. Sarah, going to the promissory note.
12 They may have seen that. But go to the promissory note
13 and go to the back page that shows that the promissory
14 note that was executed by Midland Equity.

15 DOCUMENT TECHNICIAN: (Complied.)

16 MR. KHOURY: In other words, Midland Equity
17 say, "I promise to pay \$28 million to MRI." That was
18 signed by Sue Shelton.

19 Please show me the signature line, Sarah.

20 DOCUMENT TECHNICIAN: (Complied.)

21 MR. KHOURY: And I thought I heard
22 something from Mr. Harlow. Yeah. I thought I heard
23 something from Mr. Harlow that said, you know, nobody in
24 management knew that this loan was made. It's kind of
25 **make-believe**.

1 repercussion because we had a contractual right to do it,
2 and Mr. Brauss was bound by it.

3 And no one in this courtroom, there's not
4 going to be a lawyer, a legal expert, or a judicial
5 opinion that's gonna come and say that these notes,
6 profit participation agreement, or pledge agreement are
7 ineffective and should be set aside. It's just not gonna
8 happen.

9 And you know what else? I'm gonna go out
10 on a limb because I'm gonna get into the judge's sphere.
11 And it's hard -- difficult to do that. You better be
12 careful as a lawyer saying what you think what the judge
13 gonna do.

14 But I have a hunch that there's not going
15 to be one question given to y'all in this fraudulent
16 conveyance case to determine whether a piece of property
17 was conveyed with intent to deprive a creditor.

18 There's not going to be any question about
19 was this pledge agreement valid; was this profit
20 participation agreement valid; was the promissory note
21 valid; or any of the other things that you were led to
22 believe somehow had a defect in them because Harlow says
23 we didn't do things the right way. We didn't play ball
24 with the lender like we should have. We committed all
25 this fraud.

1 to us for nothing if he was going to Brazil? Seems like
2 if you're going to Brazil, you'd want to take something
3 with you.

4 But Harlow says in one breath we paid him
5 nothing, but then because he can't run from the evidence,
6 he's got to admit we paid him about 400 -- \$4-1/2
7 million, plus we let him off the liability of the note,
8 plus we said -- remember he told you that Eric and
9 Christine had some liability under the Arbor note, that
10 it wasn't just nonrecourse? That they could have to pay
11 something? And we agreed to pay that note full stop,
12 even though he was still on it.

13 Banks don't let you off notes. Any of
14 y'all with any financial acumen at all know once a bank
15 gets you on a promissory note, they won't let you off.
16 They may add some more people to it.

17 But we agreed to pay it, and we forgave his
18 \$28 million. Harlow's words were EB and CB were, quote,
19 "personally on the hook."

20 And so we said to Mr. Brauss, "Well, we're
21 not gonna do it for free. So in exchange for giving you
22 this money and this consideration, you're gonna assign us
23 your GP interest in these companies that you own, and
24 we're gonna acquire your 25 percent."

25 And so the end result of the transaction in

1 somebody who was running and hiding and absconding when
2 he was here spending money with a representative and
3 giving everything he had to people that he owed.

4 But at least three creditors didn't go
5 along with trying to get a pro rata. They wanted to try
6 to do something else imaginative. They didn't want to
7 share and take all of his properties and sell them. And
8 two of those creditors are sitting right there.

9 They said, "No, we don't want any part of
10 that. We want to go it alone. We want to see who we can
11 sue and shake some money out of them."

12 So I think anybody who tries to argue to
13 you that Eric Brauss left the country and absconded has
14 some difficult evidence to overcome in that regard.

15 And Christine Brauss is going to be here,
16 and quite frankly, she's one of the nicest ladies I've
17 ever met. And one of most cordial and, I think, honest
18 ladies I've ever met. And here's what she's gonna say to
19 you. She's gonna say she separated from Mr. Brauss in
20 2007, a year before Brauss and Christine did our deal in
21 January of 2008.

22 And God bless her, it happens a lot. What
23 she said was is that they separated because Eric Brauss
24 was seeing other women. And that even after they
25 separated, they saw each other sometimes, not all the

1 you deduct 28 from the 40, what do you get? I've got
2 Waco mathematics challenging me here. 30 from 40 is 10,
3 so \$12 million. And what about if you paid Eric Brauss
4 4-1/2 million to get his other 25 percent?

5 If you had 12 left and you subtracted
6 4-1/2, you're at 7-1/2 now. Because we owned it a
7 hundred percent.

8 What world do you live in -- and I will
9 submit to you, ladies and gentlemen, that only -- only at
10 the courthouse do litigants come in here and have the
11 gall to want to take all the upside in a transaction and
12 not pay the bills. We all know if you buy something or
13 you sold it for 170, you're only required to pay tax on
14 the net after expenses. Only at the courthouse do
15 litigants come to try to sell that notion.

16 In the real world, we know we have to pay
17 expenses. And the courthouse is not the fantasy world;
18 it's the real world. And that's why his \$40 million
19 number is fantasy.

20 And you only get to 40 if you say they
21 don't got to pay back the 28 and they don't have to pay
22 back the 4-1/2.

23 Now, let me mention something else. Harlow
24 said -- I'm just gonna use his \$40 million number, which
25 I think is hocus pocus.

1 than it was worth. But Mr. Harlow wants you to think
2 this is another -- this courthouse litigation logic that
3 somehow we should have come in in November of '09 and
4 paid Mr. Brauss a hundred percent of something he only
5 owned 25 percent of.

6 You and I have a rent house. It's worth
7 \$400,000. I own 75 percent of it. It sells for a profit
8 of \$400,000. The 25 percent owner says look, I want all
9 of it. I'm not gonna give you any of it. How's that
10 gonna fly with you? It doesn't make good walking-around
11 sense. And it's a **bill of goods** that you're trying to
12 get sold because Mr. Harlow wants to send you down what I
13 call rabbit smear trails to get you to look away from the
14 legalistic issues, to try to believe that we did
15 something wrong in the Arbor transaction. When I say it
16 was brought up simply to try to inflame you to invalidate
17 an agreement that no judge, no court, no legal expert is
18 gonna say can be set aside, even if we defrauded Arbor.
19 You're not gonna hear it.

20 But we didn't defraud Arbor. And Arbor has
21 nothing to do with this case because the Arbor
22 transaction was a loan transaction. It was not a
23 fraudulent conveyance. The plaintiffs are gonna admit in
24 this case that they brought a fraudulent conveyance case
25 to set aside the transfer of business interests in

1 November of '09. Not the apartments. Please be clear on
2 this.

3 The apartments were owned by TRA Midland, a
4 Texas LLC, and in Texas we adhere to and we recognize
5 what we call the entity theory of ownership. You can
6 form an entity and let it own something and it owns it to
7 the exclusion of individuals. So the owner of the
8 apartments was TRA Midland.

9 Please go back to my ownership structure,
10 Sarah.

11 DOCUMENT TECHNICIAN: (Complied.)

12 MR. KHOURY: And all these businesses had a
13 little piece that ultimately was owned 100 percent by TRA
14 Midland. You remember?

15 So in November of 2009, the apartments were
16 not transferred. What was transferred were business
17 interests in all of the companies that may give you the
18 right to sell or control TRA Midland, but it was these
19 business interests that were sold, not property. And it
20 had nothing to do with a loan transaction.

21 Now, you'd rather be really disciplined now
22 and have, I think, legal training to keep up with a lot
23 of what Harlow was trying to sell, but let me just say it
24 this way: He was right. I'm gonna tell you that the
25 evidence in this case is gonna show that Arbor is not a

1 An offer was made to have somebody assume
2 the note, and that's what happened for the \$170 million
3 that was paid. But Arbor never foreclosed and Arbor
4 accepted the sale and permitted the assignment. And you
5 know what else the evidence is gonna show, that no
6 defendant dealt with or made any representations to
7 Arbor. I'm gonna repeat that. There is no evidence that
8 any defendant dealt with or made any misrepresentations
9 to Arbor in January of 2008. All the contact that
10 occurred between Arbor and the deal that we did with Eric
11 Brauss was between Eric Brauss and Ed Fishman. We didn't
12 have to contact or deal with Arbor. He was the one
13 signing the deed of trust.

14 Now, Mr. Harlow wants to make you
15 believe -- well, let me back up.

16 Were there any issues raised by Arbor?
17 Yeah. But the only issue claimed by Arbor that they said
18 was a violation of the deed of trust was the 2009
19 assignment of ownership interests. They never alleged
20 fraud in the down payment. They never alleged fraud
21 relating to Kondos being the guy there first. Nowhere in
22 Arbor records are you gonna see that we made any of those
23 representations.

24 But Harlow makes you think that they were
25 all over this promissory note thing and we had some

1 obligation to tell them what we did and that we never
2 gave him information. The e-mails are gonna show that
3 Jay LaJone sent the ownership structure that y'all saw
4 here today to Arbor and they weren't backing off. They
5 were saying, "No, we still think it's a violation." Jay
6 LaJone said, "I don't think it is." And the property was
7 sold and what the real evidence here is -- that you can
8 go away with is that Arbor was paid in full and suffered
9 absolutely no damages.

10 But Harlow wants to make you think that
11 somehow this is part and parcel --

12 MR. HARLOW: Your Honor, I'm sorry. I've
13 been listening to it for an hour and 45 minutes. The
14 constant ad hominem attacks and referring to me by name
15 is brutally improper. I've tried to be patient here.

16 THE COURT: Okay. I will -- I will sustain
17 that, Counsel.

18 MR. KHOURY: I'll withdraw it and apologize
19 to the Court, Your Honor.

20 Finally, I'm gonna go out on a limb and say
21 that you're not gonna be asked any questions in this
22 court to answer about whether or not a fraud was
23 perpetrated on Arbor, because it has nothing to do with
24 what the questions are going to be that you're asked to
25 answer on a fraudulent conveyance.

1 of this proves that TCI made the loan.

2 Well, let me just get to -- I know you're
3 getting tired. Let me get to why I think TCI making the
4 loan is no big deal. It is a big deal for them because
5 they have to argue that it somehow invalidates the
6 transaction or there was some payment back. There's not
7 gonna be any document that you see that says TCI loaned
8 the money. There's not going to be any witness that
9 testifies that TCI paid the money. You're gonna get some
10 of these jumps of logic by Dr. Grace that you can
11 disregard because it's not supported by the facts.

12 But Harlow said that one of the other
13 reasons is that the money was paid by Prime and received
14 back by Prime and Prime was the manager or advisor for
15 TCI. Mr. Harlow forgot to tell you that Prime was the
16 manager for 400 other companies. He didn't just take --
17 give money for TCI. They received money from 400
18 companies. How can Mr. Harlow pick out one of them and
19 say, "That's who the money came from" and "that's who the
20 money went back to" when no document shows it? It's a
21 leap in logic.

22 But let's say, for purposes of this
23 exercise, that TCI lent the money. Isn't TCI entitled to
24 get it back? Wouldn't TCI have a right to get a loan --
25 I mean a promissory note? Now, mind you, it would not

1 have been consistent with the sworn 10-Ks that said the
2 full purchase price was received. 147 with no obligation
3 to pay anything back, that would have been a
4 misstatement. That would have been characterizing the
5 transaction in a way that it didn't happen. If you had a
6 note that came back and you were telling the public they
7 got 147, you'd be lying to them. But these are audited
8 by CPAs.

9 So Harlow says that if the money --

10 THE COURT: Wait.

11 MR. HARLOW: Can I at least get Mr.?

12 THE COURT: Please stop attacking

13 Mr. Harlow personally or addressing him about it
14 personally.

15 MR. KHOURY: All right.

16 Plaintiffs' counsel says that -- and what
17 Grace is gonna say is that this was a round-trip. That
18 the \$22 million was given by TCI to help buy the
19 apartments that the 10-K said were sold for 147. But
20 when the money came back, it paid off the \$22 million
21 loan so there was no loan owed by Brauss. Well, the
22 question was if there was no loan owed by Brauss, why was
23 he paying that loan for two years?

24 The other question becomes if the money was
25 lobbied by TCI, and the note was paid off at the closing,

1 then Brauss didn't pay the full purchase price, right.
2 Let me give you an example. And this is the sleight of
3 hand. I got a home I want to sell you for \$500,000 and
4 you agree to buy it but you say, "Khoury, I only got
5 100 -- I mean, I only got 400,000; I need \$100,000."
6 Well, the typical way in commerce to do it was I take the
7 man's 400 and he signs a promissory note to me to pay me
8 the 100. That's how it typically goes.

9 But you could do it the way this
10 transaction is set up. The guy could come to me and say,
11 "I got 400. I need another hundred to buy your house for
12 500." And I say, "Look, I'm gonna go to the bank and I'm
13 gonna bring \$100,000 cash and I'm gonna put it in your
14 hand." Now, you're gonna have that 500,000. But you're
15 gonna have to sign a note that you owe it to me. I'm
16 giving you all the cash to bring to the closing to give
17 to the title company to show that you paid the 500, but
18 100 of that is I just loaned it to you and you got to
19 sign a note.

20 What Mr. Grace says is when you go to
21 closing and that 500,000 is paid, that that note is paid
22 off. Now, I can suppose you could come to me and you
23 could say, "Khoury, thanks for loaning me that 100,000,
24 but instead of paying you the 500,000 for your house, I'd
25 like to take that hundred and pay your note off." I'd

1 MR. HARLOW: Your Honor, the Court made
2 some rulings on Motion in Limine during the course of
3 pretrial in this case, and one of those rulings was that
4 the plaintiffs in this case were not going to be allowed
5 to talk about the inability of Gene Phillips to qualify
6 for a government backed loan based on his long history of
7 defaults and his participation in the S&L crisis of the
8 1980s. And all of that meaning that because of all that,
9 Fannie would never agree to loan him money.

10 The Court decided I couldn't talk about
11 that. I played by those rules today. I did not tell
12 this jury that the reason why they had to have Brauss was
13 because there's no way Gene Phillips could get a loan on
14 his own.

15 THE COURT: Okay.

16 MR. HARLOW: It's a giant missing piece.
17 It's a missing piece of the puzzle in their minds. And I
18 didn't say anything about it because I've heard and
19 respected and have followed the Court's ruling.

20 Here's how I was rewarded by doing that.
21 And I'm not -- I'm not whining about the personal
22 attacks. That's whatever. I can deal with that. What
23 they have done in their own Opening Statement is they
24 have represented to this jury, all of which is completely
25 fact free, that Eric Brauss approached them needing to --

1 needing -- wanting to buy these properties for
2 \$147 million. George Kondos backed out of the deal. And
3 so he had to borrow the money to close the transaction.

4 No witness in eight years has ever said
5 that. There is no one who is going to get on the witness
6 stand and substantiate that because that's not evidence
7 in this case.

8 But they have given the jury the
9 impression, falsely, that Eric Brauss approached them
10 wanting to buy these properties when that's not what the
11 evidence in this case is, and that's not completely
12 inconsistent with plaintiffs' theory of the case.

13 Now, what the evidence is and what, at this
14 point, the Court has excluded and not allowed me to show
15 is the testimony of Daniel Moos, which I have on the
16 screen, and I know it's small.

17 So I'm gonna go to my clip report and
18 direct the Court to page 93, line 7 through 94, line 12.
19 And at the end of me talking, I'm gonna ask the Court to
20 allow me to play this during my clips tomorrow -- well,
21 when we get to Moos.

22 THE COURT: Okay.

23 MR. HARLOW: And I will note that they
24 never objected to this. There's a lot of lawyers in town
25 that would just say, "Well, you never -- they never

1 objected, so I'm just gonna go ahead and play it." I'm
2 bringing this to the Court voluntarily because --

3 THE COURT: I appreciate that. So
4 let's . . .

5 MR. HARLOW: I'm trying to play by the
6 Rules here. My question is -- this is Daniel Moos's
7 deposition. And just by way of a little background,
8 Daniel Moos was the CFO of TCI, an executive who was
9 involved in the sale. In January of 2008, he was the guy
10 at TCI who was involved in this transaction. Him and
11 Steven Shelley, the TCI guy who signed some of these
12 documents, both of whom were deposed. He was asked
13 whether or not Fannie Mae ever agreed to do a
14 transaction.

15 "Answer: I can't. Not with that
16 current -- not with a Fannie Mae loan.
17 No, I'm not aware if that transaction
18 occurred."

19 Meaning there wasn't any transaction
20 between TCI and Fannie, so they went directly to Fannie
21 and did some kind of a refire, something like that.

22 "Question: Why does that follow? Tell
23 me."

24 Here's the testimony of Daniel Moos, the
25 guy who knows.

1 "Answer: Fannie Mae wouldn't do --
2 wouldn't do business with TCI at that
3 time.

4 "Question: Okay. Do you know why
5 Mr. LaJone would have been proposing a
6 transaction in a way that Fannie Mae
7 wouldn't have approved?"

8 And I got to remind the Court there's a lot
9 of documents in this case that -- we're at the time
10 period now where Arbor has discovered the assignment of
11 the Brausses' interest and declared them at fault.

12 And the defendants in this case got
13 together, and they proposed, "Hey, wait a minute. Here's
14 what we'll do. We'll just insert a new subsidiary of TCI
15 to be the owner of TRA Midland." And Fannie rejected
16 that. They wouldn't do that deal.

17 There's a letter from Jay LaJone proposing
18 it. It got rejected, and they're talking about why.

19 And then Mr. Moos says:

20 "Answer: I don't know whether -- I don't
21 know whether or not Jay was privileged or
22 not to the knowledge about Fannie Mae's
23 position regarding TCI.

24 "Question: And tell us, if you would, why
25 it was, at least as you understood it,

1 that Fannie Mae would not do business with
2 TCI."

3 And here he says:

4 "Answer: When the gentleman who ran Fannie
5 Mae back during the savings and loan
6 debacle, he was with the government entity
7 that ran all the -- you know, detected all
8 the savings and loans. And -- and my
9 conversations with him given the size of
10 the loss that the savings and loan had,
11 you know, the entity -- I'm sorry. I
12 forget the name of that entity.

13 Whatever it was because of the amount of
14 the loss they took, they said they would
15 never do business with a company
16 associated with anyone in the family --
17 Phillips family, not only this
18 transaction.

19 By the way it changed last year. He
20 finally got Fannie Mae to do a loan with
21 him."

22 He tells us the reason why they needed
23 Brauss. The theory that they -- the jury has heard is
24 that Brauss approached them trying to buy the properties.
25 No one says that ever. What happened is TCI wanted money

1 from Fannie and couldn't get it because Gene Phillips was
2 a walking nightmare of a lending risk. So instead --

3 MR. LAUTEN: Who's gonna testify to that?

4 MR. HARLOW: Danny Moos.

5 THE COURT: Okay. Wait. Wait. Okay.

6 Wait. Let him finish his argument and -- and so I
7 understand what's going on.

8 MR. HARLOW: Danny Moos testifies to it
9 right here. So what did they need? They needed Brauss.
10 They testified again. They said, "Brauss didn't put up a
11 dime. Brauss didn't bring anything to this deal." Yeah,
12 he did. He brought a lending relationship. He brought
13 an opportunity that they had to have to get \$130 million.

14 So far, I can't put this before the jury,
15 and they have been allowed to give a false impression
16 based on no testimony because I'm trying to play by the
17 Rules, and they're not.

18 What I would request is that I be allowed
19 to play this deposition excerpt because what it does is
20 corrects a false impression that's being placed in the
21 jury's minds. And that includes statements like George
22 Kondos backed out of the deal. Brauss was desperate.
23 Brauss needed an investor. Brauss approached Southmark.
24 No one has said that. Ever. And I should be allowed,
25 Your Honor, to correct this misimpression.

1 And I want to add, before I turn it over to
2 what I'm sure is going to be a vigorous response, this
3 isn't the only violation of the Motion in Limine that's
4 happened just in Opening Statements.

5 Settlements were mentioned improperly. The
6 Court has ruled we're not supposed to talk about
7 settlements. Do they care about that? No. They blew
8 right through it.

9 MR. LAUTEN: That's not true.

10 MR. HARLOW: Statements were made --

11 THE COURT: Okay. Wait.

12 MR. HARLOW: Statements were made.

13 Matthias Nixdorf serially did loans with Brauss. Even
14 after Mr. Khoury's Opening Statement, even after Nixdorf
15 had concerns, he kept loaning money for two more years.
16 You plainly ruled, Judge, that they aren't supposed to do
17 it. All I ask is that the playing field be leveled.

18 I don't want to turn this into "Oh, gee.
19 They're violating the limine." I want a concrete,
20 legitimate way that we can somehow make sure that we are
21 fighting on equal footing in this case.

22 And this testimony from Daniel Moos, which
23 directly refutes statements made during Opening Statement
24 unsupported by the record in this case, is the way that
25 we request that you do that.

1 So for those reasons, we would request that
2 this excerpt of deposition testimony beginning on page
3 93, line 7 and -- and continuing down through 94 be
4 played for the jury. It's plainly relevant and be
5 allowed to play.

6 THE COURT: Wait. Just wait, please. I
7 need one at a time. Okay. Mr. Lauten.

8 MR. LAUTEN: First of all, Mr. Harlow just
9 said something that -- that's really astounding to me.
10 His entire Opening Statement, he said defendants. He
11 said defendants, defendants, defendants. When the true
12 facts are is that Triad, Regis, they're not on a single
13 document he showed in Opening.

14 Defendants filed this. Defendants filed
15 this, which is completely misleading. I took it the
16 entire time. And then I had to get up in Opening and
17 explain my clients have nothing to do with this, number
18 one.

19 Number two, he's spent the entire Opening
20 reversing the burden of proof saying that we had to
21 convince them of something.

22 THE COURT: Okay. And that was objected
23 to, and I corrected it.

24 MR. LAUTEN: And then he gave the jury
25 argument about the effect of their answer saying some of

1 these companies have no assets when he told us pretrial
2 the reason he wouldn't nonsuit some of these companies is
3 because he said he didn't know if they had assets giving
4 the effect of their answers.

5 I don't know if he's talking about me, but
6 I didn't talk about Fannie Mae. And I'm allowed to say
7 what I think the evidence is gonna show. If George
8 Kondos testifies to something differently, I'll be proven
9 wrong. If Eric Brauss testifies to something
10 differently, I'll be proven wrong.

11 He's made promises about what Arbor is
12 gonna say, which is interesting because they're not even
13 listed on his list. I think it's got to be a two-way
14 street about what we think the evidence is going to show.

15 MR. KHOURY: May I be heard, Your Honor?

16 THE COURT: Yes.

17 MR. KHOURY: This transcript says nothing.
18 It assumes nothing. Harlow says that this interrogation
19 proves that TCI was going to be the entity that did the
20 Arbor transaction. And I would say to the judge, where
21 does it say that?

22 There is no evidence in this transcript
23 that TCI was involved and decided not to be involved
24 because Arbor -- or Fannie Mae would reject Gene
25 Phillips. He built the straw man where none exist.

1 The testimony is -- and the reason that I
2 argued -- that they approached Southmark is because I
3 have an electronic journal that shows Southmark paid the
4 \$22 million at the closing. The fact that I argued that
5 MRI was an entity owned by Southmark is because we have
6 corporate resolutions that say Southmark is the sole
7 member.

8 The fact that Brauss came with 130 is
9 evidence by itself that they didn't have the 147. And
10 his own admissions are that \$22 million was wired to the
11 title company.

12 So for him to say that this proves that
13 Gene Phillips somehow got rejected as being the guy who
14 was gonna make the money, first of all, it doesn't say
15 that. And second of all, there's no evidence that TCI or
16 Gene Phillips was going to be the lender.

17 They've made up this thing about TCI, so --
18 and I proved it, and I proved it. And I argued it here
19 in the Opening that they show a graph where they believe
20 that TCI is the owner, somehow that means he lent the
21 money?

22 They show an '07 10-K where TCI is
23 supposed -- I mean, TCI is supposed to own MRI, even
24 though the next two years that's not on there? None of
25 these mean that money was lended or lent by TCI.

1 But, again, he wants to bring up some
2 amorphous smear of Gene Phillips when it doesn't relate
3 to what he's even trying to prove through hearsay. And
4 that is that somehow TCI was gonna do the loan but was
5 rejected, and Moos knows about it because Moos doesn't
6 say that. Go ahead.

7 MR. SHAMOUN: I'm waiting for her to tell
8 me I can't.

9 THE COURT: Y'all are talking over each
10 other and interrupting each other. That's what I'm
11 trying to stop, okay.

12 Mr. Shamoun.

13 MR. SHAMOUN: The purported deposition
14 transcript he wants to offer to the jury is rank hearsay,
15 offering to prove, according to him, the truth of the
16 matter asserted by somebody with Fannie Mae that the
17 REIT -- that they don't want to do this, that, or the
18 other. It's rank hearsay.

19 MR. HARLOW: He says, Your Honor, this is a
20 portion from later in the deposition --

21 THE COURT: Okay.

22 MR. HARLOW: -- "so did you attempt to
23 obtain loans, for example, TCI, since the government
24 refused to make until the point when Mr. Phillips ceased
25 to be involved in management?"

1 "Yes, that's correct. We were not having
2 success."

3 This is the person who was personally
4 dealing with the government, trying to get loans. And it
5 is our theory of the case -- I hate to beat a dead horse.
6 I know they don't disagree with it. No one's gonna
7 convince anybody they're right or wrong. What we're
8 talking about is evidence, what's admissible and what is
9 not.

10 The testimony of a person with firsthand
11 knowledge of the challenges this company faced, TCI,
12 and Mr. Moos --

13 THE COURT: And Mr. Moos was with what
14 company?

15 MR. HARLOW: TCI, one of the sellers in
16 this transaction. And it is plaintiffs' theory of the
17 case that TCI supplied the financing, the missing equity,
18 and did so in order to get \$130 million from Arbor that
19 they wouldn't otherwise be able to get.

20 This was never a situation where Brauss
21 wanted to buy some properties. Never did Brauss approach
22 and say, "Hey, I've got this portfolio. I want to buy
23 it." And they said, "Well, it's 147." And he said,
24 "Well, I don't have it."

25 Our theory is that none of that is true,

1 and there's no witness that has ever testified that it is
2 true. Our theory of the case is that this was set-up,
3 round-trip financing, to disguise TCI's involvement
4 because they couldn't do a direct loan. And I've got
5 testimony from a witness with firsthand knowledge that
6 that's the case and the reason why. Because Gene
7 Phillips has a long history, and there's a reason why the
8 government wouldn't -- that's my theory, I should be
9 allowed to present it, especially when they're telling
10 the jury a fantasy world of, "Oh, Brauss approached us
11 and he was desperate and needed investors."

12 So it's only fair, Judge, that you allow
13 this to be before the jury, too.

14 THE COURT: Wait. Okay. So, I mean,
15 Mr. Khoury, there were multiple statements made during
16 the defendants' opening that Brauss approached TCI about
17 this.

18 MR. KHOURY: Who?

19 THE COURT: I'm sorry, Brauss approached --

20 MR. KHOURY: MRI.

21 THE COURT: -- MRI, sorry. And, I mean, I
22 agree that there's -- my problem is there's -- y'all are
23 arguing there's no evidence of what Mr. Moos is saying,
24 but then there's no evidence supporting y'all's position
25 in this, either, that Brauss approached y'all. I mean --

1 MR. KHOURY: Well, that's not true.

2 THE COURT: Okay. What is there, because,
3 I mean --

4 MR. KHOURY: Your Honor, he signed a note
5 with MRI. We have an electronic --

6 THE COURT: Okay, but that doesn't say who
7 approached who, does it?

8 MR. KHOURY: It doesn't matter. That's a
9 reasonable deduction from the evidence --

10 THE COURT: Okay.

11 MR. KHOURY: -- that he needed financing
12 and that Southmark and MRI gave it. Harlow says nobody's
13 gonna testify to it. He just made his own deduction from
14 the evidence when he says, "We don't believe that he
15 approached anybody," and nobody's gonna say it for him
16 and nobody's gonna say it for us.

17 So now that we have both tried to argue
18 reasonable deductions from the evidence, which I say,
19 from our perspective, makes sense because we've got a
20 journal entry from Southmark, who paid 22. We've got a
21 promissory note that's signed by -- to MRI. That's
22 pretty good evidence that he got the money from
23 Southmark.

24 THE COURT: But that's not evidence of who
25 approached who and why.

1 MR. KHOURY: Well, that is --

2 THE COURT: That's my concern. Counsel,
3 you -- y'all talked -- y'all talked about that repeatedly
4 in the Opening, and that's my concern --

5 MR. KHOURY: May I say this?

6 THE COURT: Right. Okay.

7 MR. KHOURY: May I just say this? What
8 does that have to do with whether or not there's facts to
9 support TCI wanting to do the loan and being rejected by
10 Fannie Mae? That is made up.

11 THE COURT: Then why did you bring it up in
12 your Opening? I guess that's my --

13 MR. KHOURY: I didn't.

14 THE COURT: Okay.

15 MR. KHOURY: I didn't. I rebutted his
16 statement that TCI made a loan, and I said to the jury
17 there's no evidence that TCI made a loan.

18 MR. LAUTEN: That's correct.

19 MR. KHOURY: There's no money coming from
20 TCI. There's no document that shows money came. That's
21 what Grace wants to say because he's clairvoyant. But
22 we've got a right to argue, just like -- he says there
23 was; we say there wasn't. Now he's built a straw man to
24 come and try to say, well, some financing was trying to
25 get done with TCI, and they couldn't do it because of

1 Fannie Mae.

2 That's not what that -- Moos's testimony
3 says.

4 THE COURT: Okay. Wait. What --

5 MR. KHOURY: Nothing.

6 THE COURT: Okay. Wait. Wait. Wait.

7 Please go back to Moos's testimony and let me hear it, or
8 hand it to me. I can't read it up there.

9 MR. HARLOW: I can hand you my copy, but
10 we're all going to have to share the one on the screen
11 because --

12 THE COURT: Okay, that's fine.

13 MR. HARLOW: So we're on page 93.

14 THE COURT: Page 93?

15 MR. HARLOW: Yes.

16 THE COURT: Okay. Give me a second.

17 MR. HARLOW: There's more on 131 we talked
18 about before, where he flat-out says HUD wouldn't loan.

19 THE COURT: Okay, give me a second.

20 (Examined document.)

21 Okay. Let me give this back.

22 MR. HARLOW: I'll get it in just a second,
23 Judge. I want to show one more exhibit. This is a
24 letter that bears on the issue. I know. I know. I
25 know. I really appreciate this. July 13th of 2011,

1 Arbor's found out about the assignments. They declared a
2 default, everyone's lawyered up, and the letters start
3 flying back and forth.

4 This is Jay LaJone writing to Courtney
5 Davis Bristow, who's an attorney for Arbor, okay?

6 THE COURT: Okay.

7 MR. HARLOW: After the default was
8 declared, reference is made to a pre-negotiation
9 letter -- this is a proposal that Jay LaJone was making.

10 THE COURT: Okay.

11 MR. HARLOW: The existing borrower would
12 remain the same.

13 THE COURT: Existing borrowers --

14 MR. HARLOW: TRA Midland.

15 THE COURT: Okay.

16 MR. HARLOW: But the ownership structure
17 would be changed -- because at this point MRI is the
18 owner, and Arbor is mad about that.

19 THE COURT: Okay.

20 MR. HARLOW: The ownership structure would
21 be changed, such that Midland Apartments, Inc., a
22 wholly-owned subsidiary of Transcontinental Realty
23 Investors, Inc., TCI, would own 100 percent of the
24 membership interests of the borrower.

25 Let me translate. "Hey, I've got an idea.

1 We'll move MRI out. We'll put in something called
2 Midland Apartments, Inc., which is 100 percent owned by
3 TCI." Guess what Arbor said about that idea.

4 THE COURT: Okay.

5 MR. HARLOW: It went over like a lead
6 balloon. And why? Because they didn't want anything to
7 do with Gene Phillips or any Gene Phillips entity, as
8 Danny Moos testified to, and as he had personal knowledge
9 of. What we're talking about here is whether or not
10 evidence is probative of a fact or not and it's
11 admissible.

12 This is a very low bar I need to step over.
13 I don't need to prove it's gonna win my case for me. All
14 I have to show you, Your Honor, is that this testimony is
15 probative. It advances the plaintiffs' theory of the
16 case with sworn testimony from a witness with knowledge.
17 The only way to keep it out is if the probative value of
18 that evidence is substantially outweighed by the danger
19 of unfair prejudice.

20 It is not substantially outweighed by
21 anything, and it's certainly not unfairly prejudicial to
22 the defendants to let the jury hear what the witness who
23 actually knows has to say on this issue, considering they
24 themselves have injected into this case a notion,
25 unsupported by any testimony of any witness, that Eric

1 Brauss had an idea to buy these apartments in
2 January 2008.

3 So for these reasons, I would ask that the
4 Court allow me to just play a snippet of depo because it
5 bears directly on this issue, and it is really at this
6 point, given what's been said, my only way to fight back.

7 I cannot disabuse the jury of the notion
8 that Brauss wanted to buy these apartments without this.
9 I have no one who knows. Lord knows none of their people
10 are gonna admit it on cross. It's my only defense. And
11 they brought it up in a way that makes it so the only way
12 to make sure we are fighting fair, especially given that
13 this is probative evidence, is to please let it in.

14 That's all I have, Your Honor.

15 THE COURT: Okay.

16 Mr. Khoury.

17 MR. KHOURY: This letter is dated July the
18 13th, 2011.

19 THE COURT: Okay.

20 MR. KHOURY: The financing and the purchase
21 of the apartments was January 2008. This letter has to
22 do with allegations by Arbor that the ownership changed
23 and therefore was a default under the deed of trust.

24 This is an offer by Jay LaJone to try to
25 cure their problem --

1 THE COURT: Right.

2 MR. KHOURY: -- by putting another entity,
3 as the note signatory, owned by another public company.
4 I don't see any evidence where Arbor said up or down
5 about it, but it's irrelevant because it was being
6 offered to work out an alleged default.

7 This does not say that in 2008, in January
8 of 2008, TCI was trying to lend money for the purchase of
9 TRA Midland Apartments and was directed -- rejected by
10 Fannie Mae. And it doesn't say and nor does the
11 transcript say that Gene Phillips approached Brauss,
12 which their theory of the case, "Look, Brauss, I'd like
13 to be part of this, but Fannie Mae won't loan us any
14 money. So let's try" --

15 THE COURT: Let me -- I guess here's my
16 concern, Mr. Khoury, is you made unsupported statements
17 that Brauss approached them. Mr. Harlow wants to admit
18 evidence that, in fact, while it's not direct evidence,
19 that there at least can be led to the implication that it
20 was the opposite.

21 And I don't understand why that isn't fair.
22 If y'all brought -- I mean, that's my concern. Y'all
23 brought it up as an affirmative statement of fact that
24 Mr. Brauss approached them and when, in fact, I mean,
25 there may be some implications of the opposite.

1 So I guess I don't understand why -- it's
2 goose/gander rule. I don't understand this.

3 Wait. One at a time, guys.

4 MR. KHOURY: May I just address that?

5 THE COURT: Please.

6 MR. KHOURY: It's (cough distortion) that
7 now said it's unsupported that Brauss approached
8 Southmark when we have money being loaned by Southmark in
9 a journal, electronically. And we have Brauss signing a
10 promissory note.

11 Judge, I would say that's pretty good
12 evidence for me to say a reasonable deduction from the
13 evidence is Brauss came to them because he signed the
14 instruments affirming agreements with them. That's
15 number one.

16 THE COURT: I'm not denying he signed
17 agreements with them, but I'm saying who -- who initiated
18 the transaction and who went to who and why. That's the
19 difference to me.

20 MR. KHOURY: And I'll say to the Court, I
21 don't have any witness for that. And he doesn't have any
22 witness to say that for the Midland Apartments, that TCI
23 was going to be the conduit and was rejected because of
24 Fannie Mae. That's what he wants to try to tell them
25 through Moos.

1 THE COURT: Okay.

2 MR. KHOURY: But Moos doesn't say that.

3 THE COURT: What is your conclusion about
4 what Moos said?

5 MR. KHOURY: Well, Moos says there was at
6 some period of time a problem with TCI getting Fannie Mae
7 back loans.

8 THE COURT: Right.

9 MR. KHOURY: So because they had some
10 problem at some time, does that mean that TCI was
11 proposed by Gene Phillips in January of '08 to do this
12 deal? That is more testimony or a position that's not
13 supported by the evidence.

14 You talk about a claim that's not supported
15 by the evidence. At least I got a promissory note signed
16 by Brauss that shows he approached Southmark and MRI.

17 THE COURT: Okay.

18 MR. KHOURY: And, you know, I could say to
19 the Court, I won't say in the evidence or a reasonable
20 deduction that he approached them, but that doesn't --
21 that's contradictory to my evidence because I have a note
22 that he signed.

23 THE COURT: Okay, but I don't think -- how
24 does a note say who approached who and who initiated the
25 transaction?

1 MR. KHOURY: Does it matter, Judge?

2 THE COURT: Well, then -- okay.

3 MR. KHOURY: Does it matter who --

4 THE COURT: I don't know if it matters,
5 Counsel.

6 My concern is that you made that assertion
7 as a fact during Opening.

8 MR. KHOURY: And I said, "The evidence will
9 show."

10 THE COURT: Okay. And --

11 MR. HARLOW: It was a lot more than that,
12 Your Honor.

13 MR. KHOURY: What's he gonna say?

14 MR. HARLOW: Brauss was desperate.

15 MR. KHOURY: I -- I -- I didn't say that.

16 MR. HARLOW: He needed an investor. He was
17 looking for investors. He was looking for investors. He
18 didn't have the 147 million. These were all not -- these
19 were just representations.

20 MR. KHOURY: And what does that have to do
21 with whether or not --

22 THE COURT: Okay. But, Counsel, the
23 problem is if it is irrelevant and it doesn't matter, you
24 brought it up repeatedly in your Opening, and now we're
25 gonna leave this assertion of a fact, intent, or motive

1 or why this deal even came around as unapproached --
2 you're saying, "Well, then I just wanted to talk about it
3 in evidence." But then you're also leaving your
4 assertion in Opening there for the jury to believe that
5 that is what happened without anything contradicting it.

6 MR. KHOURY: Let me do it like this. Let
7 me accept now that that is what the evidence is gonna
8 show. Let's -- let's assume I agree with you.

9 THE COURT: Okay.

10 MR. KHOURY: That we are argued and we
11 think we can prove that Brauss approached us because he
12 signed a note.

13 THE COURT: Okay.

14 MR. KHOURY: What does that have to do with
15 whether or not the transcript in front of you says that
16 Gene Phillips and TCI were going to be the original
17 borrower -- lenders for the transaction in January
18 of '08? It does not say that.

19 THE COURT: Okay.

20 MR. KHOURY: That's a leap in logic by
21 Harlow.

22 THE COURT: Okay.

23 MR. KHOURY: He wants Danny Moos, who, by
24 the way, is suing TCI, ARI, and the rest of us.

25 He wants a vague comment about Danny Moos

1 saying that TCI had Fannie Mae problems when it's
2 irrelevant whether TCI had Fannie Mae problems or not.

3 You ruled earlier that the prejudice
4 outweighed. So I'm saying even if you -- even if we
5 agree that we have no evidence to say we were
6 approached --

7 THE COURT: Okay.

8 MR. KHOURY: -- how does that open the door
9 to him making up an allegation out of whole cloth from
10 deposition testimony that doesn't say Phillips or TCI
11 were gonna do the loan?

12 What it does is it gives him a chance to
13 come in and smear Phillips and TCI --

14 THE COURT: Okay.

15 MR. KHOURY: -- because they couldn't get a
16 loan from Fannie Mae.

17 Well, does that mean that TCI, under their
18 theory, lent the money anyway?

19 THE COURT: Okay.

20 MR. KHOURY: It -- it --

21 THE COURT: Just a second.

22 Mr. Lauten.

23 MR. LAUTEN: I just want to augment that,
24 Your Honor. Let's think about some of the rulings we've
25 gotten. You've allowed Mr. Harlow to argue repeatedly --

1 I think he said it 30 times -- that there was bank fraud
2 against Arbor. No designation of a single witness from
3 Arbor. No one is gonna come and say that. I have no
4 witness to cross-examine about that. They're not a party
5 to the suit. They're not an RTP. They don't even know
6 about this case. And he's being allowed to represent
7 that there's been a fraud on a bank when there's not even
8 a designation of someone to cross-examine.

9 But he's -- he's saying that he gets to
10 control what his deductions are before Opening, and we
11 can't draw our own inferences?

12 And I'm allowed to ask Christine Brauss on
13 the witness stand. She's been ordered to be here. I
14 want to ask her what she knows about her husband coming
15 here. We can't -- we can't put him on the stand.

16 THE COURT: Okay. Wait. Wait.

17 MR. KHOURY: I --

18 THE COURT: I -- wait. Wait.

19 I don't understand what you mean about her
20 husband coming here.

21 MR. LAUTEN: Well, you're -- everybody's
22 presupposing this case has already been tried. We don't
23 know what the evidence is going to be.

24 THE COURT: No, I'm not presupposing it's
25 already tried. That's why -- I -- I'm confused.

1 Mr. Brauss is -- is deceased, so I don't
2 understand what you meant about Christine Brauss --

3 MR. LAUTEN: In other words, I want to be
4 able to ask her, "Isn't it a fact, Ms. Brauss, that your
5 husband went and approached MRI and asked for a loan?"

6 She's either going to say, "Yes," "no," or,
7 "I don't know."

8 All the Opening is -- you instructed them
9 the Opening's not evidence; it's what we think it's gonna
10 show. We're allowed to ask her, "Did your husband
11 approach" -- all these question --

12 THE COURT: Well, there's a -- okay.
13 There's a difference between "isn't it correct that" and
14 "do you know" or "did he."

15 MR. LAUTEN: We don't know --

16 THE COURT: I mean, there's a big
17 difference.

18 MR. LAUTEN: And you know what, if we -- if
19 we represent something that's untrue, I'm sure Mr. Harlow
20 will have a field day in Closing.

21 MR. HARLOW: I'd rather have a field day
22 with the evidence, Your Honor. I really would.

23 MR. LAUTEN: Well, let's get Arbor down
24 here if we're going to do that.

25 THE COURT: Okay. Wait.

1 Okay. Mr. Shamoun?

2 MR. LAUTEN: Let's call Arbor.

3 MR. SHAMOUN: Judge, the sale of the
4 apartment complexes to Mr. Brauss in 2008 has not been
5 pled to be a fraudulent transfer at all, whatsoever.

6 In fact, the -- the sales price -- the
7 financing has not been alleged to be fraudulent in any
8 form or fashion.

9 I'm just asking you to be fair with us
10 and -- and if it's -- if you think it's fair to deny a
11 Motion in Limine about the Arbor fraud that he has just
12 pelted the jury with in Opening with zero --

13 MR. LAUTEN: No evidence.

14 MR. SHAMOUN: -- ability to follow that
15 up --

16 THE COURT: Okay. Wait. Please don't.
17 Don't. One at a time.

18 MR. SHAMOUN: And I just ask you to be
19 equally fair as opposed to not being fair.

20 MR. HARLOW: Yeah.

21 THE COURT: Okay. First of all,
22 Mr. Shamoun, I don't appreciate the insinuation that I
23 have picked sides --

24 MR. SHAMOUN: Okay.

25 THE COURT: -- or that I have prejudged the

1 case. I haven't. To be honest, I haven't, and I -- I --
2 to be honest, I take offense at your tone --

3 MR. SHAMOUN: Okay.

4 THE COURT: -- insinuating that I have.

5 I am trying to be fair, but I'm also trying
6 to follow the law, okay?

7 We may disagree what that is, but I'm
8 trying to do my job. You're doing your job. That's
9 fine. But I don't appreciate implications that I am
10 somehow choosing to unfairly benefit one party over the
11 other in making my ruling.

12 Okay. Mr. Harlow?

13 MR. HARLOW: I really don't want to repeat
14 myself, but what they said throughout -- a theme that ran
15 throughout everyone's Opening Statement today -- and I'm
16 not saying that this is outside the bounds or not, but
17 they kept saying, "Was this a fraudulent transfer or was
18 this a legitimate business deal?"

19 That's kind of their -- This was a
20 legitimate business deal between legitimate
21 businesspeople, and "Brauss approached us wanting to buy
22 these properties and lacking enough money, so we had to
23 advance him the funds because his investor backed out" is
24 on the legitimate business deal side of that ledger.

25 The other side of that ledger where the

1 plaintiffs live is this was never a legitimate business
2 deal. Brauss never approached them with an idea to
3 purchase these properties. Instead, TCI wanted to get
4 \$130 million out of Arbor and couldn't do it in a million
5 years because Gene Phillips was a walking kitchen fire.
6 That's the case we want to put on.

7 The difference is I have testimony from a
8 guy who was there who knows, who dealt with the
9 government and knows that Gene Phillips could not
10 qualify.

11 The question before the Court -- and I
12 appreciate that all you want to do is follow the law,
13 even more than you want to go home, and that's -- all I
14 have to do is step over a low bar here. Is this
15 testimony probative? Is the probative value
16 substantially outweighed by the danger of unfair
17 prejudice? Applying that, in light of all that's gone
18 forward, including and not limited to statements made in
19 Opening in violations of this Court's limine rulings
20 during Opening, all put together, the answer to that
21 question is, please, just let this in.

22 Thank you, Your Honor.

23 MR. KHOURY: May I just say this?

24 THE COURT: Very briefly, Counsel.

25 MR. KHOURY: If you take everything he said

1 as true with respect to Arbor, we have argued to the
2 Court, "So what?"

3 Because even if -- and this -- this fuels
4 his Arbor argument. So he made an argument that
5 somehow, the Arbor transaction is tainted by fraud.

6 THE COURT: Right.

7 MR. KHOURY: And he's got an expert to try
8 to support that.

9 Let's say that it's true. How would that
10 affect the transfer of ownership interest in November
11 of 2009?

12 What about a finding of fraud against us in
13 January of '08 -- and I'm saying let's say we're guilty.
14 What would -- what would -- what would, at that time,
15 inform whether or not a fraudulent transfer was made in
16 November of '09? Because he has not pleaded that the
17 loan transaction was a fraudulent conveyance in '08.

18 So please follow me here.

19 THE COURT: Okay.

20 MR. KHOURY: Because there's a disconnect
21 between -- I'm saying I'm gonna swear by God we're guilty
22 of fraud -- and you know I'm just being facetious.

23 THE COURT: I -- I -- it's -- I know.

24 MR. KHOURY: Let's say he's right. He's
25 built the straw man in front of this jury that we've

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STATE OF TEXAS)
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COUNTY OF DALLAS)

I, Karen L. D. Schoeve, Deputy Official Court Reporter in and for the District Court of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

Day 2 cost: _____

WITNESS MY OFFICIAL HAND this the 28th day of February, 2023.

Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Texas CSR 3354
Expiration Date: 10-31-2023
Deputy Official Court Reporter
191st District Court
Dallas County, Texas
Dallas, Texas

EXHIBIT D

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 11

MARCH 14, 2023

On the 14th day of March, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

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A P P E A R A N C E S (Continued)

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Certified Realtime Reporter
Registered Diplomate Reporter
Realtime Systems Administrator

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1 fact. Has no notes, no recordings, no report, no
2 nothing. Nothing. Relied exclusively on everything that
3 Mr. Harlow told him and believed that if there was
4 something relevant, Mr. Harlow would have given it to
5 him. That's not how we work, folks. That is not how we
6 practice law, and it's not how we use this honorable
7 judge's time and in this courthouse to buy a lotto
8 ticket. We're better than that. You've got to have more
9 than that when you sue somebody for fraud for nine years.
10 You got to bring more to the table than that. And we've
11 got to expect more as a society than a guy that's coming
12 in here paying a million dollars and can't identify a
13 single fact to support a claim. I hope and we pray that
14 y'all feel the same way we do.

15 That's my Opening Statement. I thank you
16 for your attention. I thank you for your dedication.
17 It's been a long time sitting in these chairs. And as a
18 society and as all miracles of God to which we all are in
19 our own different ways, we're here to listen to the
20 facts, judge the credibility of people who's honest with
21 them, who's misleading them. Who is here for secondary
22 gain and using the legal system, which is available for
23 anyone that wants to pay \$268 and sue people.

24 But what is right and what is wrong is for
25 each and every one of you-all to decide. And especially

1 Cheyenne. So you can tell the silver-tonged lawyer over
2 there that he misled the jury.

3 MR. HARLOW: Your Honor, couple things.

4 THE COURT: Okay. First of all -- okay.

5 MR. SHAMOUN: I'll rephrase.

6 MR. HARLOW: One, the sidebar.

7 The testimony regarding Cheyenne and Winter
8 Sun has nothing to do with a sale in February 2012.

9 THE COURT: Okay. So noted.

10 And, please, all counsel, watch the sidebar
11 comments, please.

12 MR. SHAMOUN: Yes.

13 Q. (BY MR. SHAMOUN) When you read it -- let me
14 know when you finish, Mr. Bertcher.

15 A. I read it to myself?

16 Q. Yes, sir. Are you done yet?

17 A. Just a minute.

18 (Examined realtime screen.)

19 A. Yes.

20 Q. (BY MR. SHAMOUN) Did you tell the jury that
21 there was an agreement between the private side and
22 Pillar -- Winter Sun and Pillar?

23 A. Yes.

24 Q. Okay. And if the proceeds of the sale of the
25 21 apartment complex was on the private side and the

1 You recall all that, right?

2 A. **Absolutely.**

3 Q. If it's believed that the -- the loan was
4 anywhere around 28 million, that would be more than the
5 total distributions that were paid of the defendants that
6 are left.

7 Do you agree with that?

8 A. **Yes, I do.**

9 MR. LAUTEN: All right. Pass the witness.

10 RE CROSS-EXAMINATION

11 BY MR. KHOURY:

12 Q. That Waco Public School mathematics program I
13 went to is looking better all the time, isn't it?

14 A. **Works for me.**

15 Q. You know, I don't have anything substantively
16 with your testimony, but let me just go where Mr. Harlow
17 took you.

18 MR. SHAMOUN: You might get arrested.

19 Q. (BY MR. KHOURY) Is there anything wrong with
20 making money?

21 A. **Not that I'm aware of, no.**

22 Q. I mean, this is America, right?

23 A. **It certainly -- it certainly is, yes.**

24 Q. We don't begrudge people who have the good
25 fortune to make money in America, do we?

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STATE OF TEXAS)
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I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

Day 11 cost: _____

Time used today:

Plaintiffs: 00:56 / Defendants: 1:48

Cumulative time:

Plaintiffs: 18:09 / Defendants: 18:42

WITNESS MY OFFICIAL HAND this the 13th day of March, 2023.

_____/s/
Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Texas CSR 3354 - Expiration Date: 10-31-2023
Deputy Official Court Reporter
191st District Court - Dallas County, Texas
Dallas, Texas

Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Deputy Official Court Reporter

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1 Now, Mr. Harlow mentioned that I got a
2 little upset and the sheriff stood up the other day when
3 I objected to Mr. Harlow questioning Mr. Bertcher. And
4 I did. I did get upset.

5 And I apologize to everybody for getting
6 upset. Why did I get upset? I grew up Catholic.
7 I went to Mass every Sunday. I still do. I go to
8 confession. I'm not perfect.

9 My uncle is a Monsignor. I go to Mass
10 every Sunday at Perkins Chapel. And I try to better
11 myself as a person, as we all do. I went to Dallas
12 Baptist University and got a master's in finance.
13 I grew up in Mississippi. Brothers, doctors; sisters,
14 nurses; older brother, engineer.

15 And as I told you all in voir dire,
16 I believe in telling the truth and not misleading and
17 not distorting whether you're a lawyer representing a
18 plaintiff or a lawyer representing defendants.

19 I believe in the judicial system. I was raised right,
20 as my momma would say. You were raised right.

21 And counsel even today in his closing
22 statement said: And Gene Bertcher testified that
23 pursuant to a TCI advisory agreement, that the money
24 that was deposited with Pillar as a result of the sale
25 was distributed pursuant to a management agreement

1 We'll give it to charity first before we write a check
2 to Mr. Harmel's company and Mr. Nixdorf's company.

3 I have spent a lot of time in very poor
4 places in this world. I have taken my son who has
5 joined me here to Africa on four different occasions.
6 And we, as a family, build schools, libraries and
7 provide water wells for people in different parts of the
8 world that have to walk for miles just to get a bucket
9 of water.

10 And all the money -- and I get emotional
11 about it because I've been around really poor people.

12 And the smell of money in this room.
13 I mean, the money on the lawyers, the money on the
14 million dollars for Dr. Grace and the money it takes to
15 defend this case, my word, the money can be used in a
16 whole lot better places than here.

17 And it offends me because I've seen how
18 poor people really live. And it breaks my heart to
19 smell all this money that is going around in this
20 courtroom.

21 However, 10 of you all must agree.
22 I believe, in my heart, that we have objectively
23 presented this case truthfully to you all.

24 And I believe, in my heart, it's right and
25 just for at least 10 of you all to answer the questions

1 with the assignor.

2 "Answer: That's correct.

3 "Question: That company didn't have
4 anything to do with Watercrest, no representations, no
5 warranties, no money owed, no contracts, no dealings.

6 "Answer: Correct."

7 MR. SHAMOUN: Watercrest - no funds and no
8 facts."

9 Now, this slide is for the purpose of the
10 evidence that Watercrest and Mr. Nixdorf's company made
11 no payments on any notes of the apartments.

12 "Question: You made no payments.

13 "Answer: Right.

14 "Question: And you have no judgment
15 against that company that owns the apartment?

16 "Answer: That's correct.

17 "Question: You have to facts or evidence
18 that my client participated in any fraud in November of
19 2009, do you?

20 "Answer: Triad.

21 "Question: Regis Realty?

22 "Answer: No, not for those."

23 MR. SHAMOUN: See, I guess, in the world
24 of Watercrest and Mr. Nixdorf, you don't need any facts
25 before you sue people for fraud as long as you can hire

1 a lawyer who will do it for you.

2 Mr. Harmel, you haven't told the jury how
3 much money you recovered from other people on this
4 judgment.

5 Do you remember when Mr. Harlow got
6 through with Mr. Harmel on direct examination and
7 Mr. Harmel told you guys how much he thought the
8 judgment was?

9 I don't know why Mr. Harlow thought I
10 wasn't going to ask the man how many people he sued and
11 got money from to offset the amount of money he claims
12 Christine Brauss owes him. I guess, he didn't want to
13 be transparent.

14 And I go why not? Why didn't you tell us?
15 Why didn't you tell the jury?

16 And he said, I wasn't asked.

17 Now, Mr. Harmel has no personal knowledge
18 of anything. I want to ask you a question. And I
19 listed all the people I represent.

20 "Question: For the record, would it be
21 fair to say, and isn't it true, ladies and gentlemen of
22 the jury, I have no personal knowledge of any facts to
23 support my lawsuit against those named defendants?

24 "Answer: No personal knowledge.

25 "Question: Am I correct?

1 did they take from Mr. Brauss?

2 Mr. Brauss is accused of hindering and
3 delaying and defrauding his creditors, but he freely
4 gave Mr. Nixdorf all of his ownership interest in the
5 entities that had properties that Mr. Brauss wanted.

6 He didn't take any of them with him. He
7 gave them to him because, I assume, Mr. Nixdorf's
8 company was a creditor, just like Mr. Khoury's
9 companies. They were creditors too. Nine years of
10 litigation based on no personal knowledge.

11 "Question: As you sit here under oath you
12 have no facts or evidence that Mr. Brauss did not
13 receive 2.9 million in payment, do you?

14 "Answer: I have no personal knowledge.

15 "Question: As you sit here under oath
16 you have no evidence that Mr. Brauss did not receive
17 1.5 million to release a claim against it in the Ross
18 litigation where we showed a settlement statement
19 from a title company that Mr. Harlow's law firm got
20 \$1.5 million when he was representing the Ross.

21 "Answer: I have no personal knowledge.

22 "Question: You have no facts or evidence
23 that Mr. Brauss didn't receive indemnity or he was taken
24 off the 130 million loan. You don't have any facts or
25 evidence to dispute that, do you?

1 Who have you heard say that besides
2 Harlow? And I didn't see Mr. Harlow get up on the
3 stand.

4 And if you're true to your oath and you're
5 going to be gauged by the testimony that comes from the
6 witness stand, then ask yourself, all these allegations
7 of wrongdoing, including the allegation that somehow
8 my client violated the deed of trust when the
9 assignments occurred in November, who have you heard say
10 that? That that was a violation of the deed of trust?

11 But even if it was, who said that that
12 conveyance somehow was intended to beat Arbor out of
13 their money? As Mr. Lauten just said, it basically
14 shored the right that they were going to get their money
15 when Brauss was exited and a solvent party came in.

16 But Mr. LaJone didn't admit under the
17 withering cross-examination by Mr. Harlow that he did
18 something wrong when he prepared the assignments and had
19 them executed by these parties.

20 He told you, I think truthfully, that he
21 was aware that Arbor may take some different position.

22 Man, we do that every day in my business.
23 It's hard to get lawyers to get on the same page and
24 agree to what the law is. You all saw that in this
25 case.

1 But if it was going to be something to
2 show you, we don't have any testimony except what
3 Mr. Harlow keeps haranguing through lawyer talk that
4 something went wrong.

5 Now, again, what does that have to do with
6 defrauding Arbor? This whole issue is irrelevant
7 collaterally to what you've been asked to find.

8 You're not being asked to find if there
9 was any damages caused by Arbor. We know that they
10 weren't damaged. You're being asked to find what
11 Brauss's actual intent to hinder or delay a creditor was
12 on November of '09.

13 And I would submit to you, ladies and
14 gentlemen, despite all these things that you can look
15 at, none of them are persuasive on the issue of trying
16 to prove that either Mr. Brauss or any of the defendants
17 were trying to harm Arbor.

18 And then I would submit to you that
19 everything that happened after that, in regards to all
20 of the allegations that LaJone was dragging his feet and
21 not being truthful and not giving documents over to a
22 lender who is making some noises that they're going to
23 take the property.

24 And make no mistake. If Mr. LaJone was
25 wrong, either in '08 or November of '09, the only party

1 that was going to be harmed by that was going to be my
2 client. Arbor wasn't going to be harmed.

3 If they were right, they would have sold
4 150, 160 million piece of property to pay a 130,000
5 loan. And what you do when you're a lender and go to
6 foreclosure, is you bid a debt that you gave, like a
7 million, 30.

8 I would submit to you, it's a reasonable
9 deduction from the evidence that there wasn't going to
10 be a lot of creditors at the foreclosure steps of the
11 courthouse in Pecos County looking to buy more than what
12 the lender was going to bid.

13 And if the lender bought it for its debt,
14 130 million, you know what happens to our equity? It
15 gets flushed down the toilet because the title goes to
16 the lender, and then the lender has the property and it
17 turns around and it sells it for the 170 million.

18 Who comes out like a bandit in that deal?
19 So the whole issue about any missteps that would have
20 occurred would never have harmed Arbor, it would have
21 only have harmed us, is it reasonable to say that a
22 reasonable deduction from the evidence is that we
23 intentionally did something to try to defraud a creditor
24 when those same actions, if we were wrong, would likely
25 strip us of the equity that was ultimately gained?

1 It doesn't make sense.

2 And you've got to look at this evidence in
3 relationship to what the realities are.

4 And I would say to you that all this
5 conduct in 2011 by Mr. LaJone and all this stuff about
6 him trying to work out with TCI in trying to get a
7 resolution and all these allegations that he was
8 dragging his feet and trying to defraud Arbor, it
9 doesn't have anything to do with the judge's question:
10 Did Eric Brauss transfer property with intent to delay
11 or defraud a creditor, quote, at the time of November
12 the 10, 2009 transfers.

13 Remember in voir dire I told you about
14 somebody trying to collect a note from you and then in
15 the lawsuit to try to collect the note they allege you
16 got suspended from college for drinking in the dorm?

17 Man, that's got nothing to do with the
18 question the judge asked you. And we have heard all of
19 this. These accusations when it doesn't have anything
20 to do with at the time of the transfer.

21 Again, I want to say to all of you that
22 these agreements were effective. The PPA, the pledge
23 agreement and the promissory note. And you haven't
24 heard one party come here and say that the promissory
25 note was an unperformed promise.

1 That's what Harlow says, but have you
2 heard a witness get up on the stand and say that the
3 money that is represented in the promissory note was not
4 actually loaned? Not one person.

5 You've got a signed promissory note by the
6 party to be charged. In Texas, the presumption is that
7 the note is valid when it's signed by the party to be
8 charged until somebody else, who has standing, can set
9 it aside.

10 Well, who has standing to set aside the
11 promissory note? Not Mr. Nixdorf or Mr. Harmel. The
12 party who signed the note could go to the courthouse and
13 file a lawsuit and say this promissory note is invalid.
14 I didn't get the money. That's called standing. You
15 got standing to complain because it's your instrument.

16 But I took great pains with Dr. Grace to
17 say was there ever any action filed by anybody to set
18 this promissory note aside? We know that at least
19 22 million was loaned because a note was signed for it.

20 And you all saw with your own eyes from a
21 witness who got up on the stand and swore by God that
22 the accounting records effective and entered January
23 of '08 showed you all that a loan was made.

24 **THE COURT:** Two minutes, Counsel.

25 **MR. LAUTEN:** How much?

1 THE COURT: Two.

2 MR. KHOURY: And I'm through?

3 THE COURT: And you're through.

4 MR. KHOURY: Judge, I was under the
5 understanding that we had three and a half hours before
6 we started.

7 THE COURT: Two total, Counsel. Each side
8 got two hours, so you've got two minutes left.

9 MR. KHOURY: Your Honor, we had three and
10 a half hours left.

11 THE COURT: Okay, Counsel. You can't have
12 had that because each side was given two hours total.

13 MR. KHOURY: Well, Your Honor, I would
14 then just respectfully ask for some dispensation here
15 because I was going by the clock.

16 THE COURT: Okay. Counsel, the defendants
17 started at 11:35 and you have two hours. I mean, that's
18 two hours. I don't know what the misunderstanding is.

19 MR. KHOURY: Again, ladies and gentlemen,
20 the answer to the question of was there any value for
21 any of this stock has to be zero. Because there's
22 absolutely no evidence in the record from any expert
23 hired by the plaintiff what those values were.

24 And with respect to the other question
25 concerning the equity in the properties, I would submit

1 And for him to tell you that you have a
2 right to extrapolate from the price the property sold
3 for is asking you to do something that you had no expert
4 testimony telling you or guiding you as to how to do.
5 So he would be asking you to put in a number that was
6 not supported by the evidence.

7 THE COURT: Time, Counsel. Thank you.

8 MR. KHOURY: Your Honor, may I have five
9 minutes to conclude --

10 MR. HARLOW: Respectfully, Your Honor --

11 MR. KHOURY: -- and then give him that
12 extra time?

13 Because I was under a misimpression,
14 Your Honor --

15 THE COURT: Counsel, I will give you five
16 minutes. Counsel, I will give you five extra minutes.

17 Mr. Khoury, we have to finish.

18 MR. KHOURY: This whole notion, and I had
19 them highlighted about what Mr. Moos and Mr. Shelley
20 said in terms of this circular payback and then who lent
21 the money, I don't know about you all, but I didn't
22 think that any of those gentlemen said anything
23 definitive. Most of it was I don't know.

24 Mr. Shelley said when asked, where did
25 MRI get the 28.5, he said at page 56, which wasn't

1 played to you, I assume.

2 MR. HARLOW: Your Honor, if it wasn't
3 played during the trial --

4 MR. KHOURY: It was played by you.

5 THE COURT: Counsel --

6 MR. KHOURY: He didn't play it during his
7 closing argument is what I meant.

8 THE COURT: Counsel, that was not clear
9 from your statement.

10 MR. KHOURY: He said, I assume the
11 contribution was made through its parent.

12 He said, do you know where they got the
13 money? Answer, no.

14 So then we went again with the marshaling
15 question. So is it possible given the fact that you're
16 a TCI Prime exec, is it possible that the 28 came from
17 TCI?

18 Sure.

19 Now, I'm not going to get to read all the
20 things he didn't show you, but I would submit to you
21 that if you try to remember about what Shelley or Moos
22 said, just by the blurbs that he put up here and cut
23 off, that you're being misled and so ask for these.

24 If you have a question about whether these
25 people really knew what they were talking about and

1 whether most of it was guesswork, like when Mr. Moos was
2 asked at page 47 in January of 2008, did MRI get money
3 from TCI, he says, I have no knowledge.

4 If there is a question about what Moos
5 thought the parent structure of these entities were,
6 I will submit to you that on page 47, line 19 of the
7 deposition, Mr. Moos was shown the 2007 exhibits to the
8 10-K that showed MRI owned by TCI but he was told, as
9 Mr. Landess was and the other witnesses that were fooled
10 by Harlow, that it was the 2008 10-K.

11 MR. HARLOW: He's reading testimony that
12 was not part of the trial. Now I know this is just
13 stuff he's pulling out.

14 MR. KHOURY: I disagree.

15 THE COURT: Okay. Counsel?

16 MR. KHOURY: And then he says: So do
17 we understand your answer that if we're running the
18 properties, that Phillips Enterprises were running the
19 apartment complexes itself in May of 2011?

20 He says, well, if they're still under the
21 TCI chain.

22 He's saying if they're under the TCI
23 chain, but the lawyer letters between LaJone and the
24 lawyers from Arbor and they're trying to work this out
25 says that they're trying to change the ownership to TCI.

1 So why would Harlow try to sell you on the
2 notion that TCI still owns MRI in 2011 when Mr. LaJone's
3 letters are telling all that wants to read it that
4 they're trying to change ownership the TCI?

5 And I brought that out to you, and you
6 know that. So listen to the evidence.

7 The last thing I've got to tell you,
8 Mr. Harlow said in 15 and 16 that you've got to consider
9 undercapitalization and things like that to determine
10 whether there's alter ego.

11 It's not in the judge's instructions
12 in 15 or 16. And the judge tells you that you can't
13 consider any of the failure to do corporate formalities
14 as evidence to try to answer this question yes.

15 And I would submit to you that if you
16 eliminate all the stuff we heard for a million dollars
17 from Dr. Grace about corporate formalities, there is no
18 evidence to support any finding that these entities are
19 the alter ego of Brauss.

20 And the last thing I'm going to leave you
21 with is the statement made by Mr. Harlow that there's a
22 question in there for you all to answer about whether or
23 not Christine Brauss and Eric Brauss were owners of
24 TRA Midland in February of 2012.

25 And he admitted that because of the

1 The jury charge you should fill out is the
2 one that has original on it. It does have the
3 corrections about the conditioning language, et cetera.

4 I'll ask you to step down and begin
5 deliberating.

6 MR. SHAMOUN: Judge, before? The two
7 alternates?

8 THE COURT: I know, Counsel.

9 All rise for the jury.

10 (The jury was excused.)

11 THE COURT: I need all counsel in here,
12 please. I want all counsel in here, please.

13 Please be seated.

14 Mr. Khoury, you are as I will say
15 perilously close to being held in contempt of court.

16 While I am generally laid-back, I do expect courthouse
17 etiquette to be followed.

18 You have been admonished several times
19 about the disrespect of calling opposing counsel
20 "Harlow" and not "Mr. Harlow."

21 I have specifically admonished you about
22 this. Your whole closing that's all you did. He was
23 polite and didn't interrupt and object, but he shouldn't
24 have had to.

25 Second, I'm not sure what misunderstanding

1 because I am angry. I cannot adequately express how
2 disappointed I am in your behavior.

3 So please explain to me why I shouldn't
4 hold you in contempt, first, for your flagrant disregard
5 for courtroom etiquette after I had admonished you
6 several times about it, as well as your flat-out
7 disrespect for this court by refusing to obey the time
8 limit and then to continue talking over me when I told
9 you time was up.

10 MR. KHOURY: Well, Judge, I'm going to
11 have to say that I didn't get the two-hour deal.

12 THE COURT: Okay.

13 MR. KHOURY: And so I'm sitting up here in
14 a \$40 million case. And I stayed up almost all night
15 working on the answer. And so when you give me two
16 minutes, I guess the surprise that I had, the concern
17 overwhelmed me.

18 I've got a client sued for \$40 million.
19 How do I implore the court to try to give me an
20 opportunity to do it?

21 Now, I asked Kaylee Vanstory on our side
22 yesterday before I left here how much time we had. She
23 told me three hours and 30 minutes, and that was a
24 number that I was going on for the 22 hours. I didn't
25 hear you say all we had was two hours. So that's why

1 I had the reaction I did.

2 And if I was more zealous with the court
3 than I should have been, then I apologize to it.

4 I wasn't doing it, Your Honor, because I'm
5 intentionally trying to disrespect you. I'm doing it to
6 adequately represent my client and not have my thing
7 truncated to the point where my closing statement
8 doesn't mean anything.

9 I don't mean any disrespect to Mr. Harlow
10 when I call him "Harlow." I think the record reflects
11 now -- I'll challenge the court reporter to let us see
12 this when we get through -- Your Honor, that there may
13 have been times. Maybe it's a subliminal, unconscious
14 thing where I called him "Harlow."

15 And I'll guarantee you if the court looks
16 at the record, you can see that I addressed him
17 Mr. Harlow as well.

18 THE COURT: At the very end.

19 I'll get the record if you want, but over
20 and over and over, it wasn't once or twice. It wasn't a
21 slip of the tongue. At the very end, you started saying
22 Mr. Harlow, but until then it wasn't. Especially since
23 it's something you'd been admonished by me several times
24 on.

25 MR. KHOURY: To which then I'll plead

1 THE COURT: I do expect an apology to him.
2 You have used up any latitude with this
3 court at this point. Okay? Like I said, you're an
4 experienced trial attorney and it's things I have
5 admonished you on repeatedly.

6 And I understand you're frustrated. I get
7 it. And your misunderstanding about time, I don't know.
8 But I do know when I gave you five extra minutes which
9 was a courtesy, in my opinion, you asked can I at least
10 have five minutes, and then you refused to follow it and
11 you kept talking over me and you knew I was speaking and
12 you knew I was telling you it was done. That's just
13 flat-out rude and disrespectful.

14 Okay. I will accept your apology, but
15 understand enough.

16 And yes, I do expect you to apologize to
17 Mr. Harlow. Like I said, it is rude and disrespectful.

18 Outside of this courtroom you do what you
19 want. Inside this courtroom there are rules, and there
20 are etiquette, and there's courtesy that we expect. And
21 it's the things we show to the jury.

22 And I'm sorry. When you do that in front
23 of a jury, it's flat-out disrespectful. It's showing
24 that you do not respect him as an attorney.

25 You may disagree with him all you want.

1 That's fine. That's your job. I have no problem with
2 that. But it's demeaning and disrespectful. I'm ending
3 it at that.

4 I do expect you to apologize.

5 MR. KHOURY: Let me say on the record that
6 I apologize to Mr. Harlow as addressing him as "Harlow"
7 during court. To me, it's not a moniker of disrespect.

8 To the court, you have your rules.
9 You told me about it. I probably didn't follow it
10 100 percent, but it wasn't because of disrespect for the
11 court.

12 THE COURT: Okay. And now we wait.

13 (Break taken between 2:36 and
14

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18 Reporter's note:

19 (Jury deliberated between 2:36 and 5:20.)
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EXHIBIT F

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 8

MARCH 9, 2023

On the 9th day of March, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

A P P E A R A N C E S

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A P P E A R A N C E S (Continued)

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1 paper?

2 MR. HARLOW: Yeah, we need a lot more
3 paper. The trouble is . . .

4 MR. KHOURY: What is it?

5 MR. HARLOW: It's an e-mail that's not in
6 evidence that I need to approach and show the witness.

7 Do we have another copy?

8 MR. SHAMOUN: Can y'all give him one,
9 please? Kaylee, can you take care of that?

10 MR. KHOURY: Which one is it?

11 MR. HARLOW: The Defendants' Exhibit 28.

12 MR. SHAMOUN: Do you want mine?

13 MR. HARLOW: I appreciate that. Thank you,
14 Mr. Shamoun.

15 MR. SHAMOUN: You're so welcome, Todd.

16 MR. HARLOW: At last.

17 If I may approach, Your Honor?

18 THE COURT: You may.

19 Q. (BY MR. HARLOW) Handing you Mr. Shamoun's --

20 MR. SHAMOUN: Shamoun.

21 MR. HARLOW: Shamoun. Did I say something
22 different?

23 MR. SHAMOUN: "Shaa-moun."

24 MR. HARLOW: Oh.

25 Q. (BY MR. HARLOW) Mr. Shamoun's copy of

1 A. Correct.

2 MR. KHOURY: Skip down to the next section
3 and blow it up for me right here.

4 DOCUMENT TECHNICIAN: (Complied.)

5 MR. KHOURY: Yes, thank you.

6 Q. (BY MR. KHOURY) And it shows that that same
7 1.9 was paid on or around August the 11th through the
8 19th.

9 Do you see that?

10 A. You're talking about the settlement amount
11 to --

12 Q. Yeah.

13 A. Yes.

14 Q. And do you see on the top line, it says,
15 \$1.9 million "Settlement Amount" paid "to Lynn Tillotson
16 Pinker & Cox."

17 Do you see that?

18 A. I do.

19 Q. It's a law firm, isn't it?

20 A. Yes.

21 Q. It happens to be the law firm that Mr. Harlow
22 worked for at the time, right?

23 MR. HARLOW: Whoa, Your Honor. May we
24 approach on that? That's not --

25 THE COURT: Okay, Counsel. I'm gonna

1 sustain the objection. We had this discussion before.

2 MR. HARLOW: Your Honor, may we approach on
3 that?

4 THE COURT: Okay.

5 (Bench conference outside the hearing of
6 the jury.)

7 Q. (BY MR. KHOURY) The point of the matter is
8 this is real money being paid, isn't it?

9 A. Yes.

10 Q. Now, let me ask you something. When we talked
11 about the Profit Participation Agreement?

12 A. Yes.

13 Q. If it was implied or asserted in this case that
14 the 1.9 million was Brauss's money or TRA Midland's money
15 and he could do with it what he wanted, and if somebody
16 asserted that this TRA Midland money, since it was
17 Brauss's money, could not be the basis of some
18 consideration paid by somebody else as consideration for
19 this settlement, would that be a correct assertion?

20 MR. HARLOW: Your Honor, objection to the
21 leading nature of that question.

22 THE COURT: Sustained, Counsel.

23 MR. KHOURY: I asked a question.

24 THE COURT: Okay, Counsel. And it was also
25 a leading question. Please.

REPORTER'S CERTIFICATE

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STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, Karen L. D. Schoeve, Deputy Official Court Reporter in and for the District Court of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

Day 8 cost: _____

Time used today:

Plaintiffs: 3:25 / Defendants: 2:06

Cumulative time:

Plaintiffs: 13:28 / Defendants: 11:44

WITNESS MY OFFICIAL HAND this the 9th day of March, 2023.

_____/s/
Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Texas CSR 3354 - Expiration Date: 10-31-2023
Deputy Official Court Reporter
191st District Court - Dallas County, Texas
Dallas, Texas

Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Deputy Official Court Reporter

EXHIBIT G

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 10

MARCH 13, 2023

On the 13th day of March, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

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A P P E A R A N C E S (Continued)

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1 Q. If you would cede some of your fee to me, I
2 might go try to find an answer for that.

3 A. (Laughed.)

4 All I can say is what I can say.

5 Q. And you saw in this letter where, in addition
6 to being released of \$1.5 million in debt, Mr. Brauss
7 and/or his entities was released from the \$22 million
8 note, right?

9 A. I just -- I would have to refresh myself on
10 that correspondence. Sitting here, I'm just not
11 recalling all of the details.

12 Q. And Mr. Brauss and Christine Brauss were
13 relieved of any personal liability under the Arbor note,
14 correct?

15 A. I just -- I just would need to relook at the
16 papers. I'm sorry.

17 Q. Well, is it -- the next paragraph, D -- E says
18 that, doesn't it?

19 A. (Examined exhibit.) What's the date on this
20 letter?

21 Q. It's undated, Mr. Grace.

22 A. I'm just trying to put -- I'm trying to put it
23 in context.

24 Q. Well, let's move on.

25 Do you recall being in this courtroom when

1 Mr. Nixdorf had an idea what your opinions were going to
2 be or not?

3 A. I -- I think that he would have -- I'm --
4 this -- this is a presumption on my part -- have the
5 presumption that we were finding merit in the lawsuit as
6 they had filed it. That's how I think I would put it.

7 Q. Yes. Did he ask you the questions?

8 A. I can't recall if he did.

9 Q. Did you know he was paying half a million
10 dollars for your services?

11 A. I -- I knew -- well, the -- the clients were --
12 were paying, yes.

13 Q. And he never asked you a question?

14 A. A question in kind of what context? I mean, I
15 just --

16 Q. The context of you billing him a half a million
17 dollars, Dr. Grace. Do you ever recall him ever asking
18 you any questions?

19 A. No, other than in when we were in joint
20 discussions, is the only time I've been with him.

21 Q. Do you ever recall him asking you any
22 questions?

23 A. No, other -- you know, as part of the group of
24 us talking about particular issues, I don't think I ever
25 had a one-off conversation with him.

1 Q. Is it your testimony today that this book
2 establishes the methodology for what you did in this
3 case?

4 A. What we do --

5 Q. Please. Are you telling us that this book that
6 you cite establishes the methodology that you, as an
7 expert, used in this case? And I just want a "yes,"
8 "no," or "I don't understand your question, Mr. Shamoun."

9 A. That's not what I'm going to say.

10 Who are the authors of that book in there.

11 MR. SHAMOUN: Judge, I respectfully need
12 your help here. I object; nonresponsive.

13 THE COURT: Okay.

14 MR. HARLOW: And, Your Honor, if he's gonna
15 talk to him and hold the book, he needs to show it to the
16 witness and let him look at it.

17 THE COURT: Okay. Not --

18 MR. SHAMOUN: I am not going to show him,
19 the witness, this book right now, and he's not gonna tell
20 me what I'm gonna do.

21 THE COURT: Okay, Mr. Shamoun. That's my
22 decision, not yours. You need to back off.

23 If you want him to -- if you want him to
24 discuss the book, you need to at least show him the book
25 that you're holding that you expect him to give answers

1 on.

2 MR. SHAMOUN: Okay.

3 Q. (BY MR. SHAMOUN) Do you have this book in your
4 office that you were gonna give me free?

5 A. I do -- well, I was gonna give you a copy of
6 it, not the original. We have one or two originals
7 that's all. But we can give you a copy of it.

8 Q. You know what's in it, don't you?

9 A. I don't know it by memory. I'd have to look
10 through it to point to the -- some of the things that we
11 have included in our methodology.

12 Q. So do you rely upon this book in establishing
13 the methodology that you utilized in this case?

14 "Yes" or "no"?

15 A. I think -- I would say yes.

16 Q. (Approaching the witness.)

17 A. (Laughed.)

18 Q. Why are you laughing? Do you find this funny?

19 A. You were smiling.

20 Q. You find this funny?

21 A. You were smiling when you were walking around.

22 Q. Yeah, so you find this funny that my client's
23 been sued for \$48 million? You find that funny?

24 MR. HARLOW: Your Honor, I object to that
25 kind of badgering.

1 THE COURT: Okay. Okay. Sustained,
2 Counsel.

3 Q. (BY MR. SHAMOUN) Read, Dr. Grace, any sentence
4 in that book that you rely upon that gives you the
5 methodology that you used in this case to -- what is it,
6 "I was hired to determine the merit of the plaintiffs'
7 claim."

8 Show me one sentence in that book that
9 supports the methodology of how you opine as to the
10 merits of a lawyer's claim they filed against a
11 plaintiff. One sentence.

12 A. No, I'll find that. I'll be glad to find that,
13 yeah.

14 Q. Oh, please.

15 THE WITNESS: Your Honor, is it fair to
16 read the people who put this book together?

17 MR. SHAMOUN: Judge.

18 THE COURT: Okay. I'll -- just answer the
19 question that was asked. Your attorneys -- plaintiffs'
20 attorney can ask you questions later, okay?

21 THE WITNESS: Sure.

22 THE COURT: Just answer the questions asked
23 if you can.

24 A. (Examined book.) Let me -- are we ready to
25 start?

1 yet. So I'll give him an opportunity.

2 So overruled at this point.

3 Counsel?

4 Q. (BY MR. HARLOW) Doctor, without describing the
5 content of that document, what about that document was
6 important to you?

7 A. It was --

8 MR. KHOURY: Your Honor, to which we object
9 to him testifying about a document that's not in
10 evidence. And Harlow knows this is excluded.

11 THE COURT: Okay. Stop. You've made the
12 objection. Okay.

13 I'll overrule.

14 I'll let him answer that question.

15 Q. (BY MR. HARLOW) What was it about that
16 document that was important to you?

17 A. Right, they -- to me --

18 Q. Without describing the -- I know. You can't
19 describe the content.

20 I'm asking a very specific question: What
21 about that document was important to your analysis?
22 Where did it fit that made it important to the opinions
23 you're giving this jury in this case?

24 A. In simple terms, what I saw is a -- and having
25 been familiar with a lot of lending situations and

1 you understand we're getting testimony from the court
2 reporter every day, don't you?

3 A. I'm aware of that.

4 Q. And you can see this as I go along. So I'm not
5 taking you by surprise, sir.

6 Let me just give it to you and I'm gonna
7 kind of look along with you because I realize I don't
8 have but two pages.

9 A. Sure.

10 Q. Could you move those over a little bit.

11 A. All right.

12 Q. And then at line 15, Mr. Harlow says, "On the
13 subject of the source of financing, I want to go to, if
14 we could, Plaintiffs' Exhibit 7."

15 MR. KHOURY: Can you put that back up?

16 DOCUMENT TECHNICIAN: (Complied.)

17 Q. (BY MR. KHOURY) Plaintiffs' Exhibit 7 is the
18 same one Harlow showed you a minute ago, isn't it?

19 A. Let me see. Oh, that letter. All right.
20 Thank you.

21 Q. No -- 7, yeah, about the sources of Pillar,
22 right? And --

23 A. I need to look at it to see it. I'm sorry.

24 Q. Well, it's on your screen right here.

25 A. Oh. Well, that's what I was looking at, okay.

1 not clear to me at all what he was saying about the flow
2 of events, and I did not feel it merited more
3 consideration than that."

4 Did I read that right?

5 A. Exactly what's there.

6 Q. Then you say that "It was not explaining what
7 was happening. That was what I -- no, I read this a long
8 time ago."

9 And then Harlow, not to be denied, said,
10 "Did you see any evidence of an actual pledge of the cash
11 flow and equity in the properties to Pillar, the asset
12 manager of TCI?"

13 And you said, "No," right?

14 A. Correct.

15 Q. And then he moved on to Exhibit 34.

16 But just a minute ago, when he asked you
17 about Plaintiffs' 7, you went into this long explanation
18 about how the monies were flowing from the public
19 companies and TCI and being paid back at closing.

20 A. Yes, that's correct.

21 Q. Something that's not in the 10-K, right?

22 A. That's correct.

23 Q. And something that you didn't know about on
24 Friday, right?

25 A. Let's say I was continuing to ponder.

1 Q. I said that's something you didn't know on
2 Friday.

3 A. What was it are you saying that I didn't know?

4 Q. Exhibit 7.

5 A. No, I knew Exhibit 7.

6 Q. But what you said on Friday was, "It wasn't
7 clear to me, and I didn't feel it merited much
8 consideration," right?

9 A. Right. There was testimony that I
10 considered -- or even in this court that helped me
11 understand how this works.

12 MR. KHOURY: Objection; the answer is
13 nonresponsive, Your Honor.

14 THE COURT: Okay.

15 Overruled.

16 Q. (BY MR. KHOURY) You said on Friday it wasn't
17 clear to you and you did not feel that it merited more
18 consideration, correct?

19 A. That's what I said.

20 Q. And then you had a weekend to chat with Harlow,
21 right? Y'all talked over the weekend, didn't you?

22 A. We talked, and I worked.

23 Q. And all of a sudden, you got a new
24 understanding that really merited some consideration that
25 you've testified to today, right?

1 Q. Then you said, "I didn't feel," on Friday,
2 "that it merited more consideration than that."

3 But today it merited more consideration
4 than that, correct?

5 A. In my testimony today, as opposed to Friday.

6 Q. Right. And then on Friday you said to me,
7 "This was not explaining what was happening," correct?

8 A. That's right. That's right.

9 Q. And today you spent a lot of time trying to
10 tell the jury what you thought 7 was happening, right?

11 A. That's right.

12 Q. So is there a point after which you received a
13 certain amount of money, Mr. Grace, that the jury can
14 just assume that you're bought and paid for?

15 MR. HARLOW: Oh, my God.

16 Objection, Your Honor.

17 THE COURT: Sustained, Counsel.

18 A. (Laughed.)

19 Q. (BY MR. KHOURY) If they pay you enough money,
20 will you just say anything?

21 MR. HARLOW: Your Honor, I object to that
22 characterization --

23 MR. KHOURY: I'm not --

24 MR. HARLOW: -- and the harassment of this
25 witness. That is uncalled for.

1 THE COURT: Okay. Sustained.

2 Counsel, there are different ways of asking
3 that.

4 MR. KHOURY: I don't know of anything more
5 direct, Your Honor, that I have a right to impeach this,
6 and that is --

7 THE COURT: Okay. And, Counsel, I am
8 sustaining the objection.

9 There are different ways of asking that,
10 and if you want to, that's fine. But I sustained the
11 objection.

12 Q. (BY MR. KHOURY) Is there a certain amount of
13 money that would cause you to say anything you're asked,
14 sir?

15 MR. HARLOW: Your Honor, I object.

16 THE COURT: I'll overrule.

17 Just let him answer.

18 MR. HARLOW: Oh, my God.

19 A. No, there's no amount.

20 Q. (BY MR. KHOURY) That doesn't look like that to
21 you? Your performance here doesn't look like that to
22 you?

23 A. My work is to keep working on the problem.
24 This is a complex situation, and I drew on the testimony,
25 went back and pondered this, the mechanics of it --

1 Q. And you talked to Harlow, didn't you?

2 A. Not until I had figured this out.

3 Q. But you talked to Harlow, didn't you?

4 MR. HARLOW: Your Honor, if he's going to
5 refer to me by name, could he at least put a "Mr." in
6 front of it? I find this entire line of questioning
7 completely offensive.

8 THE COURT: Sustained.

9 Q. (BY MR. KHOURY) You talked to Mr. Harlow,
10 didn't you?

11 A. Right. We knew we were going to be here today.

12 Q. Right.

13 MR. KHOURY: Thank you, Your Honor.

14 THE COURT: Okay.

15 Mr. Lauten?

16 RE-CROSS-EXAMINATION

17 BY MR. LAUTEN:

18 Q. Dr. Grace, do I understand your website
19 correctly that at any one time, y'all are engaged in over
20 100 cases as testifying experts in your company; is that
21 correct?

22 A. That's in total since our inception.

23 Q. How many cases right now is your company, in
24 total, been engaged to be testifying experts in?

25 A. At the moment, two cases. This case and one

1 A. (Laughed.) I think everyone's been attempting
2 to do their job.

3 Q. Do you believe that it is within the province
4 of these fine people, who are on their third week, to
5 determine whether or not you are credible? Is that their
6 job, to determine whether or not what you have provided
7 to them is credible?

8 A. You tell me what a jury does. I've been in
9 front of them 10 times out of 160 cases.

10 MR. SHAMOUN: That's all I have. Thank
11 you.

12 THE COURT: Okay.
13 Counsel?

14 MR. HARLOW: I'm tempted.
15 Nothing further from Plaintiffs.
16 You're done, Dr. Grace.

17 THE COURT: You may step down.

18 MR. SHAMOUN: Make him go.

19 Okay, Mr. Shamoun, please. Silence.

20 Okay. Counsel, do you have any further --
21 another witness you're gonna call at this time?

22 MR. HARLOW: Your Honor, we have designated
23 a whopping one-minute long video deposition clip from
24 Gene Bertcher. I don't believe there's any counter on
25 it. I haven't heard back. So if there's any counter,

1 proceeds of the entity.

2 But 24.0008 says that, number one, if you
3 have a judgment, it's a remedy. It's not a cause of
4 action section; it's a remedy.

5 THE COURT: Right.

6 MR. KHOURY: If you have a judgment, it's
7 telling Harlow, if you're successful and get a judgement
8 against us then what you can go sell is the asset
9 transferred or its proceeds. But the asset transferred,
10 Your Honor, are assignments.

11 THE COURT: Okay.

12 MR. KHOURY: Business interests, not the
13 apartments.

14 THE COURT: Okay.

15 MR. KHOURY: So if he -- if the ownership
16 interest still existed -- if the business interest still
17 existed -- and I guess they do because they're in the
18 hands of MRI. He could go levy and execute on those
19 interests or the proceeds of those interests. Those
20 interests have never been sold again. We bought them.

21 THE COURT: Okay. Okay.

22 MR. KHOURY: And so he's using words that
23 are not in the statute to try to get to the distribution
24 of sales of apartments three years later, when the
25 apartments were not the asset transferred because

REPORTER'S CERTIFICATE

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STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, Karen L. D. Schoeve, Deputy Official Court Reporter in and for the District Court of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

Day 10 cost: _____

Time used today:

Plaintiffs: 00:42 / Defendants: 3:55

Cumulative time:

Plaintiffs: 17:13 / Defendants: 16:54

WITNESS MY OFFICIAL HAND this the 13th day of March, 2023.

_____/s/
Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Texas CSR 3354 - Expiration Date: 10-31-2023
Deputy Official Court Reporter
191st District Court - Dallas County, Texas
Dallas, Texas

EXHIBIT H

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 6

MARCH 7, 2023

On the 7th day of March, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

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1 A. This was discovered way after the judgment.

2 Q. It may be, but you knew that Sue Shelton was
3 the representative for Brauss's companies during the
4 Texas Horseshoe case?

5 A. I knew that background.

6 Q. And she hired Larry Friedman, a lawyer, to
7 represent all of Brauss's companies, right?

8 A. Yes.

9 Q. And I don't care when it was, in the next ten
10 years, you, as the corporate representative of the
11 plaintiff in this case, came to understand that Sue
12 Shelton was the person and/or lady that was running
13 Brauss's business, right?

14 MR. GUY: I do have to object to him
15 pointing to the witness, Your Honor -- pointing at the
16 witness.

17 THE COURT: Okay. I'll overrule.

18 MR. KHOURY: I don't mean any disrespect.

19 THE COURT: Stop. I'll overrule.

20 Please answer the question.

21 Q. (BY MR. KHOURY) You came to find out that she
22 was involved as the person running his business, right?

23 A. Well, I can admit that I hired lawyers to find
24 out what's right or wrong, and I don't have personal
25 knowledge of -- knowledge about that.

1 Nixdorf parties are, does it not?

2 MR. GUY: Your Honor, he's entitled to
3 approach the witness to give or receive documents back,
4 and he needs to move away from the witness now --

5 MR. SHAMOUN: Okay. I'm moving.

6 THE COURT: So -- so noted.

7 MR. SHAMOUN: And he's right.

8 Q. (BY MR. SHAMOUN) I want you to highlight where
9 it identifies the Nixdorf Parties, please, sir.

10 A. (Complied.) I think I got that right.

11 MR. SHAMOUN: May I approach, Judge?

12 THE COURT: You may.

13 A. (Handed document back.)

14 Q. (BY MR. SHAMOUN) Thank you, sir.

15 MR. SHAMOUN: Well, may I approach again?

16 THE COURT: Yes, you may.

17 Q. (BY MR. SHAMOUN) I'd like for you, sir --
18 (handed document to witness.)

19 See on page 17?

20 A. Yes.

21 Q. Go to page 17, first paragraph, "The Plaintiff
22 Intervenors."

23 MR. SHAMOUN: Can you highlight that on the
24 screen, Sarah. "The Plaintiff" in the first paragraph.

25 DOCUMENT TECHNICIAN: (Complied.)

1 Q. In other words, Renate Nixdorf proved up its
2 claim in the Horseshoe litigation, correct?

3 A. Yes.

4 Q. How much was it?

5 A. I can't -- I don't -- I can't say that number.
6 I don't know.

7 Q. Well, why not? The ladies and gentlemen of the
8 jury might want to know how much was Renate Nixdorf suing
9 for in the Horseshoe litigation. You don't know?

10 A. I right now can't say anything to that, yes.

11 Q. So would it be fair, "Ladies and gentlemen of
12 the jury, I sit here on behalf of Renate Nixdorf in this
13 lawsuit, having been filed for over nine years, and I
14 can't tell the ladies and gentlemen of the jury the value
15 of Renate Nixdorf's claim"? Is that fair?

16 MR. GUY: This is argument, and it's
17 badgering the witness.

18 THE COURT: I'll sustain that one, Counsel.

19 MR. SHAMOUN: Sustained. What's the
20 objection?

21 THE COURT: Badgering the witness,
22 et cetera.

23 MR. SHAMOUN: All right. I'll do it this
24 way.

25 Q. (BY MR. SHAMOUN) Is it fair to say,

1 A. Before the judgment? No, after the judgment.

2 Q. But in the last ten years you haven't looked?

3 A. No.

4 Q. What about Brazil? Did you ever look?

5 A. No, I didn't.

6 Q. No?

7 A. No. Brazil, no.

8 Q. The man could have gone to Brazil, could be
9 buying real estate right and left, correct?

10 A. I can't tell you.

11 Q. Yes, sir. But you think he's dead, don't you?

12 A. I was told. I don't know.

13 Q. Yes.

14 A. That's what I was told.

15 Q. Yeah. No confirmation that Eric Brauss is even
16 dead, is there?

17 A. Well, I think there was an official paper by
18 someone, but I can't recall.

19 Q. Sir, you can buy a death certificate in Brazil
20 for \$125. Did you know that?

21 MR. GUY: Objection.

22 THE COURT: Sustained.

23 MR. GUY: There's not any basis for that
24 question.

25 THE COURT: Sustained, Counsel.

1 I'm going to instruct the jury to disregard
2 that.

3 Counsel, that's a fact that's not in
4 evidence, and unless you have a sponsoring witness, we're
5 not going there.

6 Q. (BY MR. SHAMOUN) Do you have a sponsoring
7 witness he's dead?

8 A. Excuse me?

9 Q. Do you have a sponsoring witness that Eric
10 Brauss is dead?

11 MR. GUY: Objection; badgering the witness.

12 MR. SHAMOUN: No, I'm not, Your Honor.

13 THE COURT: Okay. I'll sustain the
14 objection.

15 Move on, Mr. Shamoun.

16 Q. (BY MR. SHAMOUN) You have no personal
17 knowledge he's dead, correct?

18 A. I do not.

19 MR. SHAMOUN: Pass the witness.

20 MR. LAUTEN: I don't have anything, Your
21 Honor.

22 THE COURT: Okay.

23 Counsel?

24 MR. GUY: Nothing further, Your Honor.

25 THE COURT: Okay.

1 whether the amount of \$22-1/2 million or
2 \$28-1/2 million and change, from MRI to
3 Midland Equity? And I'm talking about a
4 check, a wire transfer, some other actual
5 evidence of a transfer of funds, something
6 besides a promissory note.

7 "Answer: I don't recall. I recall the
8 transaction. I don't recall this
9 promissory note at the top of my head.

10 "Question: Do you know whether Midland
11 Equity ever had its own bank account or
12 brokerage account?

13 "Answer: Not that I'm aware of.

14 "Question: Did MRI ever have a bank or
15 brokerage account?

16 "Answer: No, I don't recall.

17 "Question: Mr. Moos, in January of 2008,
18 did MRI, in fact, get money -- again,
19 whether it was \$22-1/2 million or
20 \$28-1/2 million -- from TCI?

21 "Answer: I have no knowledge.

22 "Question: Let's go, Cole, to Exhibit
23 Number 11.

24 "Document Technician: (Complied.)

25 "Question: Exhibit 11, Mr. Moos, is a

1 proper objection.

2 MR. SHAMOUN: Okay. Then I'll sit down.

3 THE COURT: Okay.

4 Mr. Harlow?

5 MR. HARLOW: I think he's made his speech,
6 Your Honor. We had a whole hearing on objections. We
7 had a whole hearing on exhibits. The exhibit's admitted.
8 The jury's aware that they would hear during the course
9 of this trial that because this was issued in March
10 of 2008, they would sometimes hear this referred to as
11 the 2008 10-K. I made that very clear.

12 THE COURT: Counsel, I'm going to overrule
13 the objection at this time. So if you'll finish showing
14 it.

15 MR. KHOURY: Note our exception, Your
16 Honor.

17 THE COURT: I've noted your exception, and
18 I overruled it.

19 MR. SHAMOUN: Mine too.

20 THE COURT: Yes, sir.

21 (Video testimony playback resumed.)

22 "Question: I'm going to clean up and show
23 you what may be the last exhibit I have.

24 I know how upset you are to hear that,

25 Steven.

1 This is another exhibit related to TCI's
2 2008 10-K. This is Schedule 21.0 to
3 Transcontinental Realty Investors, Inc.,
4 2008 10-K.

5 Do you see that document?

6 "Answer: Yes.

7 "Question: Did you have any role in
8 providing information to accountants or
9 attorneys regarding TCI's affiliated
10 entities which TCI then used to compile
11 and disclose to the investing public the
12 entities that it owned back in 2008?

13 "Answer: No.

14 "Question: So, here, on this document,
15 there's -- as you see, it's a list of all
16 the different entities and what TCI owns,
17 right?

18 "Answer: Yes.

19 "Question: A lot of different companies.
20 And you get down to the section involving
21 LLC interests. Do you see that?

22 "Answer: Yes.

23 "Question: Including direct and indirect
24 ownership through subsidiaries. And then
25 you see Midland Residential Investment,

1 LLC, they're listed as being 100 percent
2 owned by TCI.

3 "Answer: Yes.

4 "Question: Is that accurate, as far as you
5 know?

6 "Answer: I don't have any reason to doubt
7 it.

8 "Question: I'll ask you this: Did TCI
9 take care to try to be as accurate as
10 possible in its representation to the
11 investing public?

12 "Answer: I think so, yes.

13 "Question: I understand that you're not
14 with the company anymore and you left back
15 in 2018, but before you left -- all right.
16 This lawsuit that we're talking about
17 today got filed in 2013. All right.
18 So during the five-year time period
19 between the filing of the lawsuit and you
20 leaving the company in April, were you --
21 were you ever asked to locate, gather or
22 produce documents in this litigation?

23 "Answer: I don't specifically remember
24 being asked, but I wouldn't be surprised
25 if I had been.

1 MR. KHOURY: We are --

2 THE COURT: Wait. Stop.

3 The first objection is really that's not
4 what the witness is being misled as to what this document
5 is, et cetera. Now you're on a different argument which
6 is --

7 MR. KHOURY: I'll wait.

8 THE COURT: -- "now we have a right to
9 introduce an additional document to rebut that," but you
10 don't have -- you don't have a witness on the stand, you
11 don't have anybody talking about it, so, I mean, I think
12 that that's -- that's a different issue. I'm concerned
13 right now about this issue.

14 MR. KHOURY: Okay.

15 THE COURT: That y'all were very vocal in
16 front of the jury that -- and I'm very concerned about
17 this that there were attacks on Mr. Harlow in front of
18 the jury, "As an officer of the court, he's affirmatively
19 misleading and he knows it." That -- I'm -- okay.

20 Y'all had this deposition in advance.
21 Y'all knew if there was an alleged misstatement or
22 whatever. Y'all could have brought it up outside the
23 presence of the jury. No one did. And then to make
24 attacks on him -- on an attorney in front of the jury
25 that they are affirmatively misleading the jury bothers

1 me a lot. And that's one of my concerns -- I mean,
2 that's part of my concern is -- I mean, okay, so
3 Mr. Khoury, you're arguing that this didn't have to be
4 objected to. Why didn't -- why not? What's the issue?

5 MR. KHOURY: Well, I only have to object to
6 form.

7 THE COURT: Okay.

8 MR. KHOURY: I have to object to leading,
9 but I don't have to object when I -- he's gotten up ten
10 times in this lawsuit and said, "We're putting a document
11 in front of the jury that we're misleading them on." And
12 so I've got a right --

13 THE COURT: No, it says your clients are
14 misleading them. I haven't taken any of that -- and I
15 may be wrong. And if you can point it out to me, I would
16 listen, because I take attacks, especially in front of
17 the jury --

18 MR. KHOURY: I wasn't as hard on him,
19 maybe, as other counsel, but Todd knows what he's doing.
20 And he did it three times. And when we were in documents
21 before this court to get them preadmitted. I brought
22 this same thing up to you. And it's still --

23 THE COURT: Okay. And I'm sorry, I don't
24 remember. It's been a long time.

25 MR. KHOURY: And that these documents

REPORTER'S CERTIFICATE

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STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, Karen L. D. Schoeve, Deputy Official Court Reporter in and for the District Court of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

Day 6 cost: _____

Time used today:

Plaintiffs: 2:19 / Defendants: 2:53

Cumulative time:

Plaintiffs: 6:06 / Defendants: 7:50

WITNESS MY OFFICIAL HAND this the 7th day of March, 2023.

/s/
Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Texas CSR 3354 - Expiration Date: 10-31-2023
Deputy Official Court Reporter
191st District Court - Dallas County, Texas
Dallas, Texas

EXHIBIT I

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 9
MARCH 10, 2023

On the 10th day of March, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

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A P P E A R A N C E S (Continued)

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1 if it's a consultant, a secret consultant for plaintiffs,
2 to disclose to us those people to whom he relied upon in
3 giving his opinions. And he testified -- he testified,
4 Judge, that he relied and had other people working with
5 him but he was the ultimate decision-maker.

6 THE COURT: Okay.

7 MR. SHAMOUN: And he hadn't disclosed it.
8 We object.

9 THE COURT: Okay, Counsel. My problem
10 is --

11 MR. SHAMOUN: Yes, ma'am.

12 THE COURT: -- that, to me, this is almost
13 the same situation as an attorney hires Mr. Lauten.
14 Okay. Well, he's got paralegals that do things,
15 et cetera, okay, but the ultimate work -- ultimate
16 opinion is his.

17 Nobody has asked Dr. Grace -- he listed
18 three people, what their -- who they are and what they
19 did. That matters dramatically. If they went through
20 documents and created indexes, that's not something an
21 expert relies on, right. I mean, it's only if
22 somebody --

23 MR. KHOURY: Your Honor, I wasn't even
24 permitted to get there before "Judge Harlow" got up and
25 stopped me.

1 THE COURT: Okay.

2 MR. HARLOW: -- calling him practiced. And
3 as long as the jury's not here, let me expand that, Your
4 Honor.

5 THE COURT: Okay.

6 MR. HARLOW: I want there to be a record of
7 the treatment my clients have received from opposing
8 counsel during breaks in this case. Jokes about
9 apartheid are ridiculous and way over the top.

10 THE COURT: Okay.

11 MR. HARLOW: I've got a real problem with
12 it. Telling my client this morning when I'm not around,
13 "Got a surprise for you today." I consider that to be an
14 improper ex parte communication. It's abusive. I can
15 take it. They've been abusing me since this trial
16 started, but when it expands to my clients --

17 THE COURT: Okay.

18 MR. HARLOW: -- and then it expands to the
19 witness, I want it stopped.

20 THE COURT: Okay. I agree. Please do not
21 say anything -- and, Counsel, I guess -- I mean, this is
22 one of my concerns is why was the subpoena given to
23 Dr. Grace directly and not to Mr. Harlow? I mean,
24 because that seems to me not proper procedure.

25 MR. HARLOW: To harass him, Your Honor. We

1 Q. (BY MR. KHOURY) And if you would, Dr. Grace, I
2 mean, the only thing I know how to speak is Texas
3 English. Is there something about my Texas English that
4 you don't understand?

5 A. I think not. You have to remember, I'm an
6 economist. So I tend to be clarifying, making
7 assumptions about things. That's my normal mode of
8 operation that I carry over. So I may be impairing our
9 communications.

10 Q. Well, I'm going to be, then, as detail oriented
11 as -- I'm going to try to be as detail oriented as you,
12 okay?

13 A. Sure.

14 Q. Do you have an accounting degree?

15 A. No.

16 Q. But you employ CPAs at your firm, don't you?

17 A. They're members of our board of advisors. They
18 are former senior executives who earned the CPA, the
19 chief accounting officer -- they're on our board of
20 advisors, not employees.

21 Q. They're not employees that do accounting work
22 for the law cases that you get hired for.

23 A. They do. They do that work.

24 Q. Okay.

25 A. They're capable of getting into numbers. We

1 Q. So y'all are hired experts for sale, right?

2 A. We assist in commercial litigation, yes.

3 Q. And part of that requires that you be paid for
4 your testimony, right?

5 A. Normally that's the case.

6 Q. And you entered into a fee agreement in this
7 case with Mr. Todd Harlow's firm, didn't you?

8 A. Correct.

9 Q. And you were -- there's a contract that states
10 that you're going to be paid for every hour, every
11 minute, every second you work on this case, right?

12 A. That's -- firms such as ours bill in that
13 manner. You would be familiar with that.

14 Q. It's kind of like Pillar. That's how y'all pay
15 the bills, isn't it?

16 A. I'm not sure I understand.

17 Q. You've gotta make money to pay the bills,
18 right?

19 A. You have to -- if you're gonna have an ongoing
20 operation that focuses on earning revenue, yes.

21 Q. And your clients are lawyers, aren't they?

22 A. Sometimes directly companies bring us in. But
23 mostly lawyers.

24 Q. Mostly lawyers call you up and say, "I need you
25 in a court case to give an opinion," right? How do you

1 instead of coming in like God Almighty thinking "I know
2 everything," right?

3 A. No.

4 Q. That'd have been more --

5 A. That's not where I came from.

6 Q. Would that be more probative to this jury?

7 MR. HARLOW: I would ask that counsel at
8 least step back and not badger the witness while he's
9 asking these questions.

10 THE COURT: Okay. Sustained, Counsel.

11 MR. KHOURY: Now I'm the bad guy.

12 Q. (BY MR. KHOURY) Now, let me ask you, sir,
13 isn't it true that my clients -- strike that.

14 Isn't that true that the defendants in this
15 case, TCI, ARI, and IOT, prepare and file their own
16 10-Ks?

17 A. Those 10-Ks contain very --

18 Q. Would you answer --

19 A. -- difficult language about Gene Phillips that
20 tells me that would not come from your people.

21 MR. KHOURY: Your Honor.

22 MR. LAUTEN: Nonresponsive.

23 THE COURT: Okay. I'll --

24 MR. KHOURY: This is gratuitous.

25 THE COURT: Okay. I will sustain the

1 Q. And so you know with your omnipotence and your
2 clairvoyance that this was a fraud?

3 MR. HARLOW: Your Honor, I object. The
4 witness neither testified that he was omnipotent nor
5 clairvoyant.

6 THE COURT: Okay. Sustained.

7 MR. KHOURY: I'm gonna object that he
8 maligned my client and said that it was not what it
9 purports to be.

10 Q. (BY MR. KHOURY) Is that what you're telling
11 the jury, that the initial minutes that were dated
12 November of 2007 showing that Southmark was the sole
13 member of MRI, are you saying, sir, that that is
14 manufactured fraud? Are you saying that?

15 A. I have not testified on that, but what I have
16 seen concerns me greatly.

17 Q. I didn't ask you about your concern.

18 A. Okay. I'm not --

19 Q. Before we got into your clairvoyance, I asked
20 you, sir, isn't that true you saw documents in this case
21 that you're looking at as an expert, that revealed a date
22 on them of November of '07 saying that Southmark was the
23 sole member of MRI, right?

24 MR. HARLOW: Your Honor, if I might have a
25 moment, again, to lodge an objection.

1 THE COURT: What's the objection?

2 MR. HARLOW: The witness has not testified
3 that he is clairvoyant and he's mischaracterizing the
4 testimony.

5 I would also request that counsel please
6 stop approaching and pointing his finger and badgering my
7 witness.

8 THE COURT: Okay. Mr. Khoury, I know you
9 feel strongly, but please follow the rules.

10 Q. (BY MR. KHOURY) You saw such a document?

11 A. I've seen a lot of UWCs. A lot of them.

12 Q. It's not a UWC. What's a UWC?

13 A. Unanimous written consent. That's the document
14 I'm talking about.

15 Q. And it was 20 or 30 pages?

16 A. I don't think so. I saw one front and back
17 that was undated and it wasn't certified.

18 Q. Well, I'm going to show it to you -- I'm going
19 to show it to you on Monday. But for purposes of this
20 examination right now, you confess and admit to this jury
21 that you saw a document, whatever acronym or initials you
22 want to put on it, that showed -- and it was dated
23 November of '07 that said Southmark was the sole member,
24 correct?

25 A. Let's -- let's take the document out and look

1 A. That's real helpful. Thank you.

2 Q. But it's the truth, too, ain't it?

3 A. I think those add up to 147, that's right.

4 Q. And that's what your high-powered auditors say
5 that the public companies received that year for this
6 sale, correct?

7 A. You're recalling it -- I haven't seen it in a
8 long time, but you're recalling it better.

9 Q. And you put a lot of stock in those public
10 auditors, don't you?

11 A. I do.

12 Q. Yes, sir, you do.

13 A. I do.

14 Q. And tell the members of the jury in the year
15 2008, whether there was a bigger transaction that
16 occurred for these three public companies than the sale
17 of apartments that yielded and caused them to receive
18 \$147 million.

19 A. Let's just say I can't answer that question.

20 Q. Because you didn't look?

21 A. I don't have the information.

22 Q. Because you didn't look?

23 A. No, I just don't recall.

24 Q. And you don't care about the details?

25 MR. HARLOW: Your Honor. Your Honor. Your

1 Honor.

2 THE COURT: Okay. Mr. Khoury, if you're
3 asking him a question, you've got to let him answer.

4 THE WITNESS: Right.

5 Q. (BY MR. KHOURY) You don't care about the
6 details, do you, Dr. Grace?

7 A. I disagree with that.

8 Q. You tell them -- you care about telling a story
9 about how credentialed you are and how everybody ought to
10 believe you because you work for the Arrows and the
11 Rockets and you built Greenway Plaza and you did all this
12 other stuff that you -- that's part of your schtick when
13 you get up on the stand, right?

14 How many times you testified --

15 A. You're saying --

16 Q. -- at the courthouse, sir?

17 A. I'd have to go back through the cases and add
18 it up. I suspect the low 20s.

19 Q. You've been deposed 50 times?

20 A. 50, 60 times, maybe, yes.

21 Q. This is not your first rodeo, is it?

22 A. Nor yours.

23 Q. You're practiced, a professional witness,
24 aren't you, sir?

25 A. You're trying to get up here and share the

1 REPORTER'S CERTIFICATE

2 STATE OF TEXAS)
)
 3 COUNTY OF DALLAS)

4 I, Karen L. D. Schoeve, Deputy Official Court
 5 Reporter in and for the District Court of Dallas County,
 6 State of Texas, do hereby certify that the above and
 7 foregoing contains a true and correct transcription of
 8 all portions of evidence and other proceedings requested
 9 in writing by counsel for the parties to be included in
 10 this volume of the Reporter's Record, in the above-styled
 11 and numbered cause, all of which occurred in open court
 12 or in chambers and were reported by me.

13 I further certify that this Reporter's Record
 14 of the proceedings truly and correctly reflects the
 15 exhibits, if any, admitted by the respective parties.

16 Day 9 cost: _____

17 Time used today:

18 Plaintiffs: 3:03 / Defendants: 1:15

19 Cumulative time:

20 Plaintiffs: 16:31 / Defendants: 12:59

21 WITNESS MY OFFICIAL HAND this the 10th day of
 22 March, 2023.

23 /s/

24 Karen L. D. Schoeve, CSR, RDR, CRR, RSA
 25 Texas CSR 3354 - Expiration Date: 10-31-2023
 Deputy Official Court Reporter
 191st District Court - Dallas County, Texas
 Dallas, Texas

EXHIBIT J

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 5

MARCH 6, 2023

On the 6th day of March, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

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A P P E A R A N C E S (Continued)

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1 A. Yes.

2 Q. And would you agree with me, sir, that one day
3 before the four-year anniversary of these assignments,
4 your lawsuit was brought?

5 A. That's the day shown on the timeline, yes.

6 Q. One day. Is there a reason, sir, why you and
7 Mr. Nixdorf waited until the four-year statute of
8 limitations to file this lawsuit?

9 A. I think it ties in with when we saw the
10 assignments.

11 Q. But you waited almost exactly four years to
12 bring this lawsuit, didn't you?

13 A. That's what this shows, yes.

14 Q. And you would have lost your right to do so had
15 you not brought it on the 8th of November, wouldn't you,
16 sir?

17 A. Yes.

18 Q. And so what you did was, without knowing
19 anything and making a bunch of wild assumptions, you, in
20 bad faith, filed this lawsuit as a placeholder, right?

21 A. I disagree.

22 MR. HARLOW: Objection; argumentative.

23 THE COURT: Okay. Counsel, I'll sustain
24 the objection in bad taste. That's --

25 Q. (BY MR. KHOURY) So you could put a place

1 setter out there and save the statute from eliminating
2 your right to bring the lawsuit so you could start trying
3 to conjure up a bunch of evidence to see what you could
4 make to make it go, didn't you?

5 MR. HARLOW: Objection. Again, it's
6 argumentative and badgering this witness.

7 THE COURT: Okay. Sustained, Counsel.

8 Q. (BY MR. KHOURY) But you knew about the
9 assignments in the receivership case, didn't you? Isn't
10 that what you told this jury?

11 A. The receiver had been told about them and he
12 accepted them at that time.

13 Q. I'm not talking about the receiver. I'm
14 talking about you.

15 A. I did not see them at that time.

16 Q. But you became aware of them, right?

17 A. I became aware of them as focused on my
18 properties with Brauss, not these other properties.

19 Q. But in the receivership, you became aware of
20 them, and the receivership ended sometime in '10 and
21 started in December of '09, armed with that knowledge,
22 you and Mr. Nixdorf waited almost until the nanosecond
23 ran where the statute of limitations ran on this case,
24 didn't you?

25 A. So.

1 Q. And you did it in order to abuse the process,
2 didn't you?

3 A. No.

4 Q. And you did it in order to see what you could
5 dig up to make your case as opposed to having any
6 good-faith facts to do it in the first place, right?

7 A. I disagree.

8 MR. KHOURY: Pass the witness, Your Honor.

9 THE COURT: Okay.

10 MR. HARLOW: I get the brief redirect.

11 THE COURT: That's fine. Let's go ahead.

12 REDIRECT EXAMINATION

13 BY MR. HARLOW:

14 Q. Mr Harmel, you heard a series of questions from
15 the defendants about what a receiver did and did not do
16 in the Texas Horseshoe case. Do you know whether a court
17 appointed postjudgment receiver had any authority to
18 bring fraudulent transfer claims like the ones we're
19 bringing here today?

20 A. I don't believe he did.

21 Q. Do you know, based on your own personal
22 dealings of involvement, whether the receiver had
23 sufficient funds to fund a fight like this one?

24 A. Absolutely not.

25 Q. Do you know whether or not all of the Brauss

1 MR. HARLOW: Calls for speculation.

2 THE COURT: Okay. I'll overrule that one.

3 Q. (BY MR. KHOURY) You're more than willing
4 to testify to the limitations of the receiver when
5 Mr. Harlow asked you the question, and I got just
6 as big a law license as he's got. But when I ask you the
7 question about the expansive nature of receiverships, you
8 toe the company line.

9 Now, is that being fair to this jury, sir?
10 Is that being fair to this jury?

11 A. I'm telling you what I know. I'm not an expert
12 on receiverships.

13 Q. Then don't offer yourself as an expert on it.

14 A. And I'm not doing that.

15 MR. HARLOW: Objection, Your Honor.

16 THE COURT: Okay. Sustained. Sustained.
17 Counsel.

18 MR. KHOURY: That's all I had, Your Honor.

19 THE COURT: Okay, Counsel, anything?

20 MR. HARLOW: Nothing further from

21 plaintiffs.

22 Thank you for all your time this morning,

23 Mr. Harmel.

24 THE WITNESS: Thank you.

25 MR. SHAMOUN: Judge, may we take a break?

REPORTER'S CERTIFICATE

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STATE OF TEXAS)
)
COUNTY OF DALLAS)

I, Karen L. D. Schoeve, Deputy Official Court Reporter in and for the District Court of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all portions of evidence and other proceedings requested in writing by counsel for the parties to be included in this volume of the Reporter's Record, in the above-styled and numbered cause, all of which occurred in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of the proceedings truly and correctly reflects the exhibits, if any, admitted by the respective parties.

Day 5 cost: _____

Time used today:

Plaintiffs: 2:06 / Defendants: 3:02

Cumulative time:

Plaintiffs: 3:48 / Defendants: 5:24

WITNESS MY OFFICIAL HAND this the 6th day of March, 2023.

_____/s/
Karen L. D. Schoeve, CSR, RDR, CRR, RSA
Texas CSR 3354 - Expiration Date: 10-31-2023
Deputy Official Court Reporter
191st District Court - Dallas County, Texas
Dallas, Texas

EXHIBIT K

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.) IN THE DISTRICT COURT
KG, and WATERCREST)
PARTNERS, L.P.)
)
Plaintiffs,)
)
v.) 191ST JUDICIAL DISTRICT
)
TRA MIDLAND PROPERTIES,)
LLC, et al.)
)
Defendants.) DALLAS COUNTY, TEXAS

Consolidated with Cause No. DC-17-06190

RENATE NIXDORF GmbH & CO.) IN THE DISTRICT COURT
KG, and WATERCREST)
PARTNERS, L.P.)
)
Plaintiffs,)
)
v.) 191ST JUDICIAL DISTRICT
)
TRA MIDLAND PROPERTIES,)
LLC, et al.)
)
Defendants.) DALLAS COUNTY, TEXAS

ORAL DEPOSITION OF

DANIEL MOOS

APPEARING REMOTELY FROM

MANDEVILLE, LOUISIANA

JANUARY 18, 2021

ORAL REMOTE AND VIDEOTAPED DEPOSITION OF

DANIEL MOOS, produced as a witness at the instance of
the PLAINTIFF, and duly sworn, was taken in the

Page 2

1 above-styled and numbered cause on January 18, 2021,
 2 from 10:04 a.m. to 2:13 p.m., before Jannet Solorzano,
 3 CSR, appearing remotely from Dallas County, in and for
 4 the State of Texas, reported by machine shorthand, at
 5 the location of the witness in Mandeville, Louisiana,
 6 pursuant to the Texas Rules of Civil Procedure and the
 7 provisions stated on the record or attached hereto.

Page 3

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 37 Mr. Cole Bartelt

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1 THE VIDEOGRAPHER: Good morning. We are
 2 now on the record. Participants should be aware that
 3 this proceeding is being recorded, and as such, all
 4 conversations held will be recorded unless there is a
 5 request and agreement to go off the record. Private
 6 conversations and/or attorney-client interactions should
 7 be held outside the presence of the remote interface.
 8 For the purpose of creating a witness-only
 9 video recording, the witness is being spotlighted or
 10 locked on all video screens while on speaker view. We
 11 ask that the witness do not remove the spotlight setting
 12 during deposition as it may cause other participants to
 13 appear on the final video rather than just the witness.
 14 For anyone who doesn't want the witness's video to take
 15 up the large part of your screen, you may click the
 16 gallery view button in the upper right-hand corner of
 17 the remote depo interface.
 18 This is the remote video-recorded
 19 deposition of Daniel Moos being taken by counsel for the
 20 plaintiff. Today is Monday, January 18th, 2021. The
 21 time is now 4:05 p.m. in the Greenwich Mean Time Zone.
 22 We are here in the matter of Renate Nixdorf GmbH & Co.
 23 versus TRA Midland Properties, LLC.
 24 My name is Cole Bartell, remote video
 25 technician on behalf of U.S. Legal Support located in

Page 6

1 Dallas, Texas. I'm not related to any party in this
2 action nor am I financially interested in the outcome.
3 At this time, will the reporter, Jannet
4 Solorzano, on behalf of U.S. Legal Support, please enter
5 the statement for remote proceedings into the record.
6 THE REPORTER: The attorneys participating
7 in this deposition acknowledge that I am not physically
8 present in the room and that I will be administering the
9 oath remotely.
10 Counsels and their parties have no
11 objections to this manner of reporting.
12 Please state your agreement by stating your
13 name on the record and who you represent.
14 MR. GUY: Ray Guy here joined by Todd
15 Harlow representing the plaintiff, Renate Nixdorf. We
16 agree.
17 MR. DONOHUE: Mike -- Michael Donohue with
18 Friedman & Feiger here on behalf of defendants. That's
19 agreed.
20 MR. JOHANSEN: Mark Johansen, Reed Smith,
21 on behalf of the witness, Daniel Moos, and we agree.
22 P R O C E E D I N G S
23 DANIEL MOOS,
24 having been first duly sworn, testified as follows:
25

Page 7

1 EXAMINATION
2 BY MR. GUY:
3 Q. Good morning, Mr. Moos.
4 A. Good morning.
5 Q. For the record, again, I'm Ray Guy here
6 representing the plaintiff, Renate Nixdorf.
7 Are you represented by counsel here today?
8 A. Yes, I am.
9 Q. Thank you.
10 Mr. Moos, you've been deposed a number of
11 times, have you not?
12 A. Yes, I have.
13 Q. Including at least twice in this case as a
14 representative of an organization?
15 A. Only once that I'm aware of in this case.
16 Q. Okay. All right. Do you understand that today
17 you're being deposed as Daniel Moos, individual, as
18 opposed to -- as a representative of an organization?
19 A. Let me look at the deposition request. It --
20 it was explained to me that it was in capacity in my
21 role at Pillar income. Because I have no individual --
22 I'm not a plaintiff.
23 Q. You -- you're not a party to this case,
24 obviously. But you -- I'm going to be asking you
25 questions about your individual knowledge today. And if

Page 8

1 you have any questions about that, you can -- you can
2 consult with your attorney.
3 What -- what did you do to prepare for your
4 deposition today?
5 A. The only thing I did was reread the deposition
6 that was taken on June 9th of 2020.
7 Q. And was that your deposition as a
8 representative of Vistas At Vance Jackson?
9 A. That's correct.
10 Q. Okay. All right. Did you review any documents
11 besides reading the deposition transcript?
12 A. I did not.
13 Q. All right. I'm going to try to speed this
14 along and get you out of here in a reasonable period of
15 time. So let me just go through some name conventions
16 because there are a number of entities that are players
17 in this case. And if any of this confuses you or if you
18 need to have me use some different terminology, please
19 let me know. But, for example, a company called TRA
20 Midland Properties, LLC, I'm going to just call TRA
21 Midland.
22 A. Okay.
23 Q. Tacco Financial Incorporated, I'm going to call
24 Tacco. And if I happen to mean Tacco Universal, I'll
25 also specify separately.

Page 9

1 A. Okay.
2 Q. Company called Midland Equity, LLC, I'll call
3 Midland Equity.
4 A. Okay.
5 Q. Midland Residential Investment, LLC, I'll be
6 referring to as MRI.
7 A. Okay.
8 Q. Transcontinental Realty Investors Incorporated,
9 I'll refer to as TCI.
10 A. All right.
11 Q. Income Opportunity Realty Investors
12 Incorporated, I'm going to be calling IORI.
13 A. Okay.
14 Q. Now, I will try to say that slowly and not
15 stutter as I trip through it.
16 Company called American Realty Investors
17 Incorporated, I'm going to be referring to as ARI.
18 There may be some documents that call it ARL by sticker
19 symbol, but I'm going to be calling it generally ARI.
20 And if that causes confusion, just ask me to restate the
21 question.
22 Will you do that?
23 A. Yes, I will.
24 Q. Pillar Income Asset Management, I'll be
25 referring to as Pillar. And then another company, Prime

Page 10

1 Income Asset Management Incorporated or Prime Income
2 Asset Management LLC, as the context requires, I'll be
3 referring to as Prime, and again, the differentiation is
4 important, I'll refer to either Prime Incorporated or
5 Prime LLC; is that fair?
6 A. Okay.
7 Q. Are you currently employed, Mr. Moos?
8 A. Yes, I am.
9 Q. Who are you employed with?
10 A. Victory Abode Apartments is the -- the name of
11 the corporate entity.
12 Q. Victory Abode Apartments?
13 A. Yes.
14 Q. And what kind of company is that?
15 A. It's a real estate company joint venture
16 running apartment buildings, Class A apartment
17 buildings.
18 Q. Any particular locale?
19 A. There's Southeast and Southwest United States.
20 Q. Okay. And how long have you been employed with
21 Victory Abode Apartments?
22 A. Directly with Victory Abode since -- part time
23 from November of 2018, full time since August of 2020.
24 Q. Okay. Until August of 2020, you were the chief
25 executive officer and president of Pillar, were you not?

Page 11

1 A. That's correct.
2 Q. And you were terminated from that position on
3 or about August of 14th of 2020?
4 A. Correct.
5 Q. Were you told a reason for your termination?
6 A. Restruct- -- it was different strategy that the
7 Phillips family wanted to pursue.
8 Q. Okay. Before that termination, is it correct
9 that you had been employed at Pillar or a predecessor
10 company since the spring of 2007?
11 A. Yes.
12 Q. And you have filed suit here in Dallas against
13 Prime and Pillar and others; is that correct?
14 A. That's correct.
15 Q. I may, from time to time, refer to the original
16 petition and request -- request for disclosure that your
17 lawyers have filed against Prime and Pillar and others
18 as your petition.
19 Would that be sufficient for you to know
20 what I'm referring to?
21 A. Yes.
22 Q. Okay.
23 MR. GUY: And, Cole, you might go ahead and
24 pull up Tab 20 which is going to be that one. Don't put
25 it on the screen just yet.

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1 (Exhibit No. 20 marked.)
2 Q. (BY MR. GUY) Mr. Moos, briefly, what is the
3 extent of your education post-high school?
4 A. I have undergraduate from the University of
5 Houston and then I have an MBA from the University of
6 Dallas.
7 Q. All right. Do you have any professional
8 certifications or licenses?
9 A. No.
10 Q. Okay. And would you briefly describe for me
11 your employment history up until March or April of 2007.
12 A. Yes. I'll work backwards in 2007.
13 Q. Surely.
14 A. Coming to Prime, I was an officer executive at
15 U.S. Bank Corporation for a couple of years. Prior to
16 that, I was chief operating officer and chief financial
17 officer of a company called today on the New York stock
18 exchange, it's called SuitePort Technologies.
19 Q. And does that take you back to your MBA?
20 A. No. I lived in Cleveland, Ohio for several
21 years and I worked at, you know, Sherwin-Williams,
22 another public called LDL Phone Tell. Just a number of
23 different public companies from graduate school to --
24 to -- moving to New Orleans and working for Precor.
25 Q. All right. Mr. Moos, according to your

Page 13

1 petition, and again, if it matters, Cole can pull it up
2 on the screen for you.
3 But you were hired in March of 2007 as the
4 chief executive of Prime; is that correct?
5 A. I'm sorry. It was chief operating officer of
6 Prime and then I was later promoted --
7 Q. Chief operating officer?
8 A. Yeah. And then I was later promoted to chief
9 executive officer several years later.
10 Q. That's a good clarification.
11 Do you recall when the promotion to CEO
12 took place?
13 A. No, I don't exactly. It's probably three or
14 four years after.
15 Q. All right. Who hired you at Prime?
16 A. Gene Phillips made the -- I don't know at the
17 time before I got there if -- and who he talked to
18 anybody else. But Gene Phillips is the one who made me
19 the job offer and hired me.
20 Q. All right. What was the business of Prime in
21 2007 when you were hired?
22 A. We managed the portfolio of companies that were
23 either publicly traded companies where the Phillips
24 family had majority control or they were private
25 companies owned by the Phillips family. And my role was

Page 14

1 to manage the assets within those portfolios.
2 Q. All right. And just to clear up one thing,
3 did -- did you get a paycheck from Prime and then it was
4 your -- your compensation and then partialled out among
5 the various entities within Prime had advised your
6 agreements?
7 A. No. My income was always paid through Prime.
8 Actually, just to be -- to absolutely be clear, there
9 was a payroll processing company originally called
10 National Payroll, then later called Barrington. So we
11 physically got our checks through an entity. And that's
12 so we could consolidate healthcare benefits and
13 everything. But Prime was considered -- or Pillar was
14 considered my employee.
15 Q. All right. And that -- and that unduly
16 complicated things with that question. So I'll move on
17 with that.
18 Were you hired for positions at any other
19 companies at the same time you joined Prime in 2007?
20 A. Yeah. I -- I effectively, over the several
21 years, you know, as things came up, became the managing
22 partner or CEO or president of virtually all the
23 entities in the various corporations and things. If you
24 can appreciate real estate, single-purpose entities were
25 required by lenders. So in many of those cases I became

Page 15

1 the -- the officer of the single-purpose entities, as
2 well, and companies in between that and Pillar or TCI.
3 Q. All right. So would it be correct that when
4 you were hired in March of 2007 as the COO of Prime, did
5 you also become the COO of TCI?
6 A. Yes. And -- and IRA and IOT simultaneously.
7 Q. Okay. You're referring to what I call IORI as
8 IOT; is that correct?
9 A. Yes, sorry.
10 Q. I will try to --
11 (Simultaneous crosstalk.)
12 (Audio distortion.)
13 A. -- with IOT and then they changed it.
14 Q. (BY MR. GUY) Okay. We'll -- we'll -- we'll
15 understand that either IOT or IORI were the same entity.
16 So you -- and did you exceed to the
17 position of CEO for all of those companies at roughly
18 the same time as you became the CEO of Prime?
19 A. Yes.
20 Q. Okay. And, again, you're hiring for those
21 positions at ARI and TCI and IOT or IORI.
22 Was that all -- also done by Gene Phillips?
23 A. No. For the public corporations, there were
24 independent board of directors. And the independent
25 board of directors had to vote and appoint me to those

Page 16

1 positions.
2 Q. All right. And according, again, to your
3 petition, and, again, in fairness, if you need to see
4 it, we can put it on the screen, you became the chief
5 executive officer of Pillar in April of 2011; is that
6 correct?
7 A. If that's what's in the petition, yes, that's
8 correct.
9 Q. All right. Again, any time you need to see it,
10 I'm happy to pull it up.
11 A. No. I take -- you know, for the purpose of
12 this deposition, if it's -- if -- if we miss a date, it
13 was certainly unintentional and part of my call.
14 Q. All right. You also allege in that petition
15 that in April of 2011 -- and I'm pointing here, "Pillar
16 assumed all of Prime's employment contracts."
17 Is that true that Pillar assumed your
18 employment contract in April of 2011?
19 A. Yes.
20 Q. Did you get a new contract or did you get a
21 document stating that Pillar had assumed the obligation
22 to employ you and -- and compensate you?
23 A. Yes, and as did all the employees in the
24 company. It was something we did for every employee.
25 Q. All right. So is it correct to say that in

Page 17

1 April of 2011, you took on the same responsibilities for
2 Pillar as you had had for Prime; is that correct?
3 A. No. My duties were expanded.
4 Q. How so?
5 A. I -- I took on additional responsibilities in
6 other departments that I wasn't involved with prior.
7 During -- a little bit more from -- there were -- prior
8 I was virtually operating through the CEO before I
9 started to get involved in -- (inaudible) --
10 (Technical interruption.)
11 Q. (BY MR. GUY) Okay.
12 A. -- in public relations -- past public
13 relations.
14 Q. Okay. We lost a bit of your answer to some
15 background noise.
16 Would you go through it one more time
17 briefly, the additional responsibilities you took on?
18 A. Yeah. They predominantly all -- as operating
19 officer, only the operating employees were reporting to
20 me as chief executive officer. Everyone in the company
21 began to work for me, which included finance departments
22 and the legal department. So it was -- it was a --
23 broad overall.
24 Q. Okay. Does Prime still exist?
25 A. Legally, it might be. But as of my termination

Page 18

1 day, I am not aware of anything that Prime was actively
2 doing.
3 Q. All right. So would it be correct that you may
4 have still been an officer of Prime up to August of
5 2020, but you didn't know of any particular operations
6 that it had?
7 A. No.
8 Q. Okay. So in -- in essence, I guess the next
9 question is, was there any business for Prime after --
10 let me go back a step.
11 MR. GUY: Cole, if you would pull up
12 Exhibit No. 1, Tab 1, and turn to Page 2.
13 (Exhibit No. 1 marked.)
14 THE VIDEOGRAPHER: You said Page 2?
15 MR. GUY: Yes. I'm not seeing anything on
16 the screen yet. All right.
17 Q. (BY MR. GUY) Reading, this is from a Form 8-K,
18 an SEC Form 8-K filed by TCI in -- looking for the date
19 on here. On -- in -- of April of 2011. And it says
20 that on April the 26th of 2011, effective April 30th of
21 2011, that certain advisory agreement dated October
22 the 26th, 2003, but effective as of July 1, 2003,
23 between TCI and Prime, was terminated by mutual
24 agreement.
25 Can you tell me why the advisory agreement

Page 19

1 between TCI and Prime was terminated in April of 2011?
2 A. The actual date is -- is -- would have been the
3 date that occurred. The primary reason was on -- if
4 you -- you noticed, Prime had started in 2003. I joined
5 in late 2007. What I did not know and only learned
6 several years later, that Prime had actually entered
7 into several loan agreements, a whole bunch of various
8 projects and assets. And Prime became a defendant in a
9 whole bunch of lawsuits.
10 And so Prime's reputation was tainted
11 because -- I'm not saying they did anything wrong or
12 adopted anything wrong, I'm just saying Prime -- any
13 time Prime was googled, it -- all these lawsuits would
14 pop up. So for me, a marketing perspective and coming
15 out of what we hoped at the time was the recession of --
16 we felt it was best to -- to rebrand.
17 And we rebranded everything Pillar. And
18 the intent was meant for Pillar never ever to enter into
19 direct loan agreements, you know, on real estate
20 transactions.
21 Q. Do you recall in general the nature of those
22 lawsuits against Prime, the type of allegations?
23 A. Yeah. There was -- a couple of them were --
24 were nonsense lawsuits, you know, numbnuts, what I'd
25 call, you know, someone who'd trip and fall in an office

Page 20

1 building. But the big one was there were some land
2 owned in Mercer Crossing and -- and unbeknownst to me,
3 Prime had been the guarantor on that loan. And so when
4 the -- the banks sued for deficiency, the entity was
5 a single-purpose entity, but Prime was a guarantor and I
6 think it was Bank of America was -- was being highly
7 aggressive and trying to collect the moneys.
8 Ultimately, I settled it, but it was pretty ugly for a
9 while.
10 Q. Did Prime ever file for bankruptcy protection?
11 A. No, not -- not -- again, not -- not that I'm
12 aware of.
13 Q. All right. Do you recall in what
14 jurisdiction -- or jurisdictions those lawsuits were in?
15 A. That one would have been in Dallas County
16 court.
17 Q. All right. According to this same exhibit on
18 the same page, on April the 30th of 2011, TCI entered
19 into a new advisory agreement with Pillar?
20 A. Yes, sir.
21 Q. At the same time, did -- and it also says that
22 ARI and IORI, what you've called IOT, also signed
23 advisory agreements with Pillar.
24 Was the reason for changing from Prime to
25 Pillar the same for ARI and IORI as it was for TCI?

Page 21

1 A. Yes.
2 Q. Okay. You -- were you an officer or employee
3 of any other companies besides Prime, Pillar, ARI, IORI,
4 and TCI?
5 A. Yes. As I indicated, one point, I think we had
6 256 entities and I would have been somehow, someway
7 involved with those entities.
8 Q. All right.
9 A. And, again, really -- this is on the real
10 estate side of the company. I had nothing to do with
11 Mr. Phillips and his private companies. But anything
12 that touched the public companies, I would have been
13 a -- the officer or director of those public companies.
14 Q. Were you ever --
15 A. Companies --
16 Q. I'm sorry.
17 A. Companies within the public food chain.
18 Q. Understood. Okay.
19 Were you ever an officer or an employee of
20 MRI?
21 A. Not that I recall.
22 Q. Were you ever an officer or employee of TRA
23 Midland?
24 A. Not that I recall.
25 Q. Okay.

Page 22

1 MR. GUY: Cole, if you would pull up the
2 Exhibit No. 2 and go to the second page.
3 THE VIDEOGRAPHER: You want me to drop
4 these in the chat as well, the ones that you use?
5 MR. GUY: What is that? What do you mean
6 by that?
7 THE VIDEOGRAPHER: So everyone else can
8 have access to them as well.
9 MR. GUY: I'm fine with that, yes.
10 THE VIDEOGRAPHER: Is there a specific page
11 you want me to go to in this document?
12 MR. GUY: You go into Tab 2 which is --
13 should be a long summary -- this is different --
14 that's -- you got Tab 1 up there now. Go to Tab 2. I
15 think we may have had a mistake in -- in the -- in the
16 exhibit number.
17 Is this Tab 2 that you have?
18 THE VIDEOGRAPHER: It's Exhibit 2. I don't
19 know if it's Tab 2.
20 MR. GUY: Okay. Then someone -- then
21 there's been a mistake here. I'll just have to do
22 without the exhibit then.
23 Q. (BY MR. GUY) Mr. Moos, what was going to be
24 Exhibit 2 was a loan summary from the company called
25 Arbor dated as November the 24th of 2010. And if you

Page 23

1 had seen it on the screen, you would have seen that
2 Arbor listed as the contact for TRA Midland, Daniel Moos
3 as the CEO.
4 As of November of 2010, were you, in fact,
5 the CEO of TRA Midland?
6 A. If that's what the -- the loan document said,
7 then -- then yes, I'm just -- so long ago. I don't
8 remember TRA Midland.
9 Q. All right. Is -- do you have any idea of when
10 it was that you succeeded to the position of CEO in TRA
11 Midland?
12 A. It would have occurred sometime as I mentioned
13 earlier, after I joined the company all the time when
14 there was a reason, whether there was refinancing or
15 restructuring or something with a property, then they
16 would have popped my name in as the officer.
17 Q. Okay. But you don't recall what would have
18 been the event that would have caused that to happen?
19 A. No. You would have to --
20 Q. All right.
21 A. -- the department should have a record of the
22 date. They would have put me in as the officer.
23 Q. All right. Mr. Moos, in the years -- again,
24 I'm moving this along as quickly as possible. I'm going
25 to try to go through a few facts that I think may not be

Page 24

1 contested, and just ask if I got this right. And then
2 we'll get on to some things right there. I'm going to
3 be needing information from you.
4 But if -- is it correct that in January
5 of 2008, you were the president and at least the chief
6 operating officer, if not the chief executive officer,
7 of PCI and ARI and IORI?
8 A. Correct.
9 Q. And then on January the 25th of 2008, is it
10 correct that those three companies sold 21 apartment
11 complexes?
12 A. I'm not sure of the date, but I do remember
13 the -- the sale, the apartment complexes.
14 Q. All right. And the information I have
15 indicates that 14 of those complexes were sold by TCI.
16 The rest of them, six by IORI, and one by ARI.
17 Does that sound consistent with your
18 memory?
19 A. Yes.
20 Q. Okay. And the sale was to TRA Midland; is that
21 correct?
22 A. I -- without the document in front of me, I'm
23 assuming that -- that is accurate.
24 Q. Okay. And the --
25 MR. GUY: Cole, see if you can pull up

Page 25

1 Tab 7. We'll see if we have all of our -- our documents
2 misnumbered here. That may call some complications.
3 (Exhibit No. 7 marked.)
4 THE VIDEOGRAPHER: When you are referring
5 to Tab 7, is that Exhibit 7 just to -- so I --
6 MR. GUY: Exhibit 7, yes.
7 THE VIDEOGRAPHER: Okay.
8 MR. GUY: Yes.
9 I'm afraid we may be off by one based on
10 what happened a moment ago.
11 THE VIDEOGRAPHER: I don't know if this is
12 correct here.
13 MR. GUY: That is correct, Tab 7.
14 Can you blow it up a little bit just so we
15 can see the larger -- the numbers?
16 Q. (BY MR. GUY) All right. Mr. Moos, can you see
17 those numbers on the screen?
18 A. Yes.
19 Q. All right. This is a -- a -- a document
20 entitled "Summarized Sources and Uses, West Texas
21 Transaction" and there are different pages, succeeding
22 pages that have different individual page descriptions.
23 This particular document reflects that the total
24 purchase price for the sale of those companies was
25 \$147,850,000.

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1 Is that consistent with your memory?

2 A. Yes. It was a lot in that transaction. I do
3 recall that, yeah. Not -- not to the penny, but on the
4 macro basis, that sounds accurate.

5 Q. All right. Do you -- do you know who prepared
6 this particular document?

7 A. It would have been somebody in the accounting
8 staff at the time. I don't know the date. Do you have
9 something that says the date that it would have been
10 done?

11 Q. I do not know -- and I know it is not dated and
12 it doesn't tell whether it's prepared in advance of or
13 in reflection of the transaction regarding -- taking
14 place, so the answer is I don't know for sure.

15 But it would have been some time, I
16 believe, around January of 2008?

17 A. Okay. At the time, whoever would have been the
18 head -- running capital markets, traditionally in the
19 company, somebody in -- would have been running the
20 capital markets department when these loans involved and
21 closings. There was somebody in the capital markets,
22 slash -- the capital markets group. I think at that
23 point, Steven Shelly was hooked up with -- it would
24 involve in this process. So it may have been Steven
25 Shelly who would have done this.

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1 Q. All right.

2 A. This is a typical form I would have seen. And
3 it would have been --

4 Q. Okay.

5 A. -- by somebody in capital markets.

6 Q. All right. We're just looking at the first
7 page of this -- of this multipage exhibit. But I'm
8 going to refer you down to a line near the bottom that
9 says "cash to sellers" and it reflects something over
10 \$1.7 million to ARI, more than \$19 million to IOT or
11 IORI, and \$25 and a half million to TCI for a total of
12 more than \$46 million to the sellers.

13 Do those numbers seem consistent with your
14 memory of -- of the cash iterated by this particular
15 January 2008 transaction?

16 A. Yes.

17 Q. And above that, on the sources, you say it
18 reflects a loan from Arbor in the amount of
19 \$130,587,800.

20 Do you see that?

21 A. Yes.

22 Q. And also on -- on line for Midland Residential
23 loan as a source of cash, \$22,500,000.

24 Is that consistent with your memory of --
25 of that transaction?

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1 A. Yes.

2 Q. Okay. And then stepping ahead -- I'll come
3 back to these in more detail -- but is it correct that
4 in November of 2009, the ownership interest in TRA
5 Midland were assigned to MRI?

6 A. I don't recall what entities, but I recall the
7 transaction and if -- if this document reflecting that,
8 I'm not going to argue with you over that. Then that
9 will be accurate.

10 Q. That's fair. And I'll come back to a document
11 that does that. I'm just trying to go through and see
12 how much we can get in a quick summary.

13 A. Okay.

14 Q. And then just to take it one more step for this
15 broader view, is it correct that in February of 2012,
16 TRA Midlands sold the apartment complexes to a company
17 called Midland Investors?

18 A. I remember the resale and I think that's around
19 the time that the properties were sold to a third party.

20 Q. And do you recall that that sale generated more
21 than \$40 million in cash for the sellers after the
22 payoff of loans and expenses?

23 A. That sounds about the right amount of money.

24 Q. And is that \$40.7 million was sent to and
25 received by Pillar?

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1 MR. JOHANSEN: Objection, form.

2 A. Yes. It would have been Pillar -- Pillar --
3 yes. We've talked about that. Pillar would have been
4 the cash manager, so yeah, all the cash would have gone
5 to Pillar.

6 THE REPORTER: I'm sorry, who just
7 objected?

8 MR. GUY: Say again?

9 MR. JOHANSEN: I -- I objected to form.

10 THE REPORTER: Sorry. Okay.

11 MR. JOHANSEN: Thank you.

12 THE REPORTER: I couldn't see the pictures.

13 MR. JOHANSEN: Thank you.

14 Q. (BY MR. GUY) All right. All right. Let's --
15 we'll come back to do some more specifics then. Let's
16 go back to the January 25th, 2008 sale in which three
17 companies of which you are the president and either
18 chief operating or chief executive officer collectively
19 sold the 21 apartment complexes.

20 Do you recall how that sale came about?

21 A. No. At that time in the company, I had no
22 involvement in the -- the acquisition and sales side of
23 the business. That -- that was not my role. I -- I
24 would not have -- had any knowledge as to who negotiated
25 the sale, how the sale was negotiated and all that.

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1 My -- my role was really to make sure that the
2 documentation and the disclosures and the title company
3 insurance, that all of that would have been done
4 correctly. But I was not involved in the negotiation
5 side.
6 Q. All right. So -- so you did not negotiate the
7 sale for any of the sellers?
8 A. No. I -- I would not have nego- -- I -- I was
9 aware of it and because, you know, discuss cash -- my --
10 one of my jobs was projecting cash flows -- cash-out
11 flows of the companies. But I did not negotiate by
12 sales.
13 Q. All right.
14 MR. GUY: Cole, see if you can pull up
15 Exhibit 27.
16 (Exhibit No. 27 marked.)
17 THE REPORTER: And, Mr. Ray, I have all of
18 these exhibits ahead of time. I just want to make sure
19 you are marking them as well as we go in the depo.
20 MR. GUY: Yes, indeed.
21 THE REPORTER: Thank you.
22 MR. GUY: All right. That is the correct
23 document.
24 Q. (BY MR. GUY) Exhibit 27, Mr. Moos, is
25 the document entitled "Transcontinental Realty Investors

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1 Incorporated, American Realty Investors Incorporated,
2 Income Opportunity Realty Investors Incorporated,
3 Summary of Proposed Sale of 21 Apartments Properties to
4 TRA Midland Property, LLC and Related Accounting
5 Treatment."
6 Do you know who prepared this document?
7 A. Yes, it would have been -- well, the
8 individual, I have to go back to the charts at the time.
9 So it would have been one of the gentleman, there was a
10 lady as well, working for us in the capital markets
11 department. And whoever it was responsible in capital
12 markets department would have written up -- because
13 that -- this document would have then been used to get
14 board approval since it was attached to the public
15 companies.
16 Q. You've made some references to the capital
17 markets department.
18 Just for clarification, what were the
19 responsibilities of that particular department?
20 A. Capital markets were responsible for all -- all
21 transactions that included lenders. There was any
22 lender on either side. New lenders in this case, if --
23 if Arbor was coming in to the transaction as a lender,
24 then Arbor would have been involved or if we were
25 selling the asset off and had a -- pay off lenders, they

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1 would have also been involved in the -- the payoff.
2 MR. GUY: Cole, if you would blow up the --
3 so that we see the second full paragraph on that page
4 beginning "the collective sales price." A little more.
5 Okay.
6 Q. (BY MR. GUY) This particular paragraph that
7 I'm referring to, the second full paragraph on the first
8 page of Exhibit No. 27.
9 Mr. Moos, r- -- does refer to the first
10 loan mortgage provided by Arbor Commercial Funding, and
11 goes on to say -- near the end of the third line, "A
12 secondary note payable to Midland Residential
13 Investment, LLC, the sole member of which is Highland
14 Realty Services Incorporated," which it says in a
15 parenthetical, "is a party unrelated to ARL" which I'm
16 calling ARI, "IOT," which I've been calling IORI, "and
17 TCI?"
18 First of all, was Highland Realty Services
19 Incorporated indeed unrelated to ARI and IOT and TCI?
20 A. I -- I don't -- I have no knowledge that they
21 were related to -- they were -- there were two
22 Highlands, if I recall. One Highland had mortgages and
23 a bunch of buildings and there's some lawsuits later,
24 you know, involved in the process. And then there was
25 another Highland that, from time to time, did business

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1 with the company. But I have no -- I -- I personally
2 don't know who owns Highland Capital -- or, I'm sorry,
3 Highland Realty. It was the Highland Capital is the one
4 that we had lawsuits with. I -- I don't know who owned
5 Highland Realty Services. I -- I don't have any
6 knowledge.
7 Q. Okay. So are you referring to Highland
8 Capital, the management which was a Dallas-based --
9 A. Yeah. That's right. That's the one that I
10 know we have. And I don't know if they're related or
11 not related. But that's the only personal knowledge I
12 know about a Highland Realty. It's -- it's -- I don't
13 know that they're related to ARI or IOT or TCI, but
14 that's just my knowledge today. I don't know.
15 Q. Well --
16 A. I would have to go back and look at the files
17 to determine.
18 MR. JOHANSEN: Danny, just answer his
19 question. You've answered it.
20 THE WITNESS: Okay.
21 Q. (BY MR. GUY) Okay. And I would say that if,
22 in fact, any of these entities had lawsuits with
23 Highland Capital management, they would not be the only
24 ones.
25 A. Yeah.

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1 Q. So -- so you don't know who the stockholders --
2 for example, who the owners of Highland Realty Services
3 Incorporated were?
4 A. You say were -- you know, at -- at the time,
5 it's -- it's possible that someone knew or I know, but I
6 don't -- honestly, I don't recall today. If you have a
7 document to show me, I can tell you, but I don't recall
8 off the top of my head who -- who owned that.
9 Q. And I do not have a document which is why I'm
10 asking. But it's understandable if you don't recall.
11 And I'll ask one more question in the same vein.
12 Do you know of any relationship between
13 Highland Realty Services Incorporated and a company
14 called HRS Holding?
15 A. No.
16 Q. All right. And then the next paragraph, the
17 third full paragraph on that page, and I'll start with
18 the second line, there's -- there's a statement that
19 says, "The Midland Residential note is secured by a
20 cross-collateralized second-lien deed of trust
21 subordinate to the Arbor loan."
22 I'll ask, first of all, Mr. Moos, have you
23 ever seen that deed of trust?
24 A. No. But the one thing I do recall, Arbor was a
25 pretty sophisticated lender. And I remember

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1 negotiations with Arbor and I know there was Fanny May
2 or -- I don't -- I don't know whether they resold the
3 paper or whether they secured ties. But Arbor was a
4 pretty sophisticated group. So I'm assuming that this
5 was permitted by that, they -- they should have a whole
6 host of information.
7 Q. Well, that was going to be my next question.
8 Do you know whether the loan agreement with
9 Arbor would have permitted a junior cross-collateralized
10 deed of trust?
11 A. No, not without reading the document. But I --
12 I do know, like I said, the Arbor people were pretty
13 darn sophisticated. And often when there was secondary
14 deeds of trust or cross-collateralized, would
15 have thought they would have been new CC filings. I --
16 I know from my perspective I would not have -- not have
17 held information from Arbor.
18 Q. I understand.
19 In the -- still, in the third full
20 paragraph in the sixth line down, the statement says,
21 "Midland equity will, in turn, loan the \$22,500,000 to
22 the downstream entities who will ultimately loan TRA
23 Midland the funds." And I'll stop there.
24 Do you know whether that ever happened?
25 A. No. I don't have any knowledge of that.

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1 MR. HARLOW: (Inaudible) -- calendar.
2 MR. GUY: Yes, thank you.
3 Q. (BY MR. GUY) Sorry about that.
4 And then finally, if you would --
5 MR. GUY: Cole, turn to the last page of
6 that document. Yes. And blow it up just a little bit.
7 Q. (BY MR. GUY) The -- the last page is entitled
8 "West Texas Transaction Closing Receipts and
9 Disbursements Chronology." In the first step in that
10 chronology is, "Midland Residential wires
11 22,500,000-dollar loan proceeds to the Title Company for
12 the benefit of TRA Midland." And I'll stop the quote
13 there.
14 Do you know whether that happened?
15 A. No. I would have to see the actual title
16 documents to know.
17 Q. In fact, isn't it true that amounts
18 approximating that 22.5-million-dollar number were wired
19 to the closing agent by Prime?
20 A. You know, I honestly don't -- can't tell you
21 that. I don't recall.
22 Q. Would you have known in January of 2008 of a
23 22-and-a-half-million-dollar -- or let's say excess of
24 20-million-dollar wire from Prime to a closing agent?
25 A. No.

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1 MR. JOHANSEN: Objection, form.
2 A. What I did -- what I did see is I get a end
3 of day cash summary that would show moneys going in and
4 out. But I -- I didn't necessarily always see the
5 details at that time in the company. That wasn't my
6 role.
7 MR. GUY: Okay. Cole, pull up Exhibit 28,
8 if you would, please. Blow up the top part of the page,
9 if you would.
10 (Exhibit No. 28 marked.)
11 Q. (BY MR. GUY) Mr. Moos, this is a Texas
12 Franchise Tax Public Information Report for a company
13 called HRS Holdings Incorporated. And then down towards
14 the bottom of the page --
15 MR. GUY: Drop it down a little bit, Cole,
16 if you would.
17 Q. (BY MR. GUY) -- under name of owner, it lists a
18 company called Tacco Financial Incorporated.
19 I will ask one more time, do you know the
20 relationship between Highland Realty Services and this
21 company HRS Holdings, LLC?
22 A. Are you talking about which company
23 relationship?
24 Q. Again, just one more thing to ask about the
25 relationship, if any, between HRS Holdings, LLC, which

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1 is the subject of this franchise tax information report,
2 and Highland Realty Services?
3 A. No. Nothing -- the names of the people, but I
4 don't know the relationship.
5 Q. Okay. All right.
6 MR. GUY: Let's go back, Cole, to
7 Exhibit No. 4.
8 (Exhibit No. 4 marked.)
9 Q. (BY MR. GUY) Mr. Moos, Exhibit No. 4 is a
10 company agreement for TRA Midland dated as of
11 January 17th of 2008 which is roughly a week before the
12 date of the sale of the properties from TCI and ARI and
13 IORI.
14 MR. GUY: And if we could, Cole, turn to
15 Page 11. And in particular, to Paragraph 4.01.
16 Q. (BY MR. GUY) Mr. Moos, Paragraph 4.01 of this
17 company agreement recites that "Contemporaneously with
18 the execution," by the member of TRA Midland of this
19 document, "the members have made the Capital
20 Contributions describe for those members in Exhibit A."
21 And to see that number, we need to turn to the very last
22 page, Page 32.
23 MR. GUY: Cole.
24 Q. (BY MR. GUY) Page 32 reflects that a company
25 called TRA Apartment West Texas, LP, has contributed

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1 \$22 and a half million to TRA Midland. Is it member
2 contributions? I guess the question is, do you know,
3 Mr. Moos, whether TRA Apartment West Texas did, in fact,
4 attribute \$22 and a half million to capitalize TRA
5 Midland?
6 A. I have no knowledge whether -- at this point
7 whether it did or didn't. I don't recall.
8 Q. Okay. All right.
9 MR. GUY: Cole, go back, if you would, to
10 Page 31 and this is where I'm going to ask you to do a
11 split screen. Put the signature page on one side of the
12 screen. And then go to -- go to Exhibit No. 5 and turn
13 to Page 31 of Exhibit No. 5. And put those two up
14 together.
15 (Exhibit No. 5 marked.)
16 Q. (BY MR. GUY) Mr. Moos, any time you need a
17 break, just let me know. We can -- this is not an
18 endurance contest.
19 A. Just switching out. So that's okay. I'm not a
20 coffee drinker. Diet Cokes, get my caffeine.
21 Q. That's a pretty substantial soda that I saw.
22 That should keep you going for a while.
23 A. There was a deposition once where you could see
24 the Wendy's. They were hassling me because it was in
25 the screen. I said the Wendy's was paying me to

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1 advertise their product, so --
2 Q. Wherever you could get it. That's good.
3 A. Well, thank you for the \$10, though. I -- I
4 will make a contribution to St. Jude.
5 Q. Okay. That should cover a couple of sodas, at
6 least. That's good.
7 A. That -- that money will go to St. Jude's.
8 Q. Okay. What I'm showing on the screen with
9 Cole's kind help is the signature pages for Exhibits 4
10 and 5.
11 A. Yeah.
12 Q. Both of which -- and I'll show you the first
13 page of Exhibit 5 in just a moment. These are both a
14 company agreement for TRA Midland.
15 MR. GUY: And, Cole, if you'll blow up the
16 right one just a little bit, make them roughly the same
17 size.
18 Q. (BY MR. GUY) And I'm showing you these --
19 A. Yeah.
20 Q. -- Mr. Moos, just to give you my observation
21 that the two signature pages look exactly the same. If
22 you look at where the loops drop below the line in each
23 place, it looks like this is simply perhaps one
24 original, one photocopy signature page, just so you can
25 see that.

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1 MR. GUY: And then, Cole, you could do
2 away with -- the one on the left, Exhibit 4, and let's
3 go to the last page of -- Page 32 of Exhibit 5.
4 Q. (BY MR. GUY) This page is now on the screen,
5 it's the last page, Page 32 of Exhibit 5 is Exhibit A to
6 the second version of this company agreement for TRA
7 Midland. And it reflects a capital contribution by TRA
8 Apartment in West Texas of, this time, \$28,574,317.33?
9 A. Yeah. I see that.
10 Q. So my question, Mr. Moos, is do you know why
11 two otherwise apparently identical company agreements
12 for the same company reflect two significantly different
13 numbers for the initial capitalization?
14 A. No, I -- I have no idea why that should have
15 occurred. This trans- -- I'm just curious.
16 Didn't this transaction flow through a
17 title company? Again, I wasn't involved -- that's --
18 time of the company and that stuff, but I just seem to
19 recall everything went through title companies.
20 Q. Well, you will see documents in a few moments
21 that do reflect that there was a title company involved,
22 yes?
23 A. Right.
24 Q. I promise to get to those.
25 A. Okay.

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1 Q. So let me just ask again, do you know whether
2 TRA Apartment West Texas did, in fact, contribute either
3 \$22.5 million or just over \$28.5 million to capitalize
4 TRA Midland?
5 A. I have no knowledge.
6 Q. This number on Exhibit A of Exhibit 5 is an --
7 an unusual number. \$28,574,317.33.
8 Over the course of your career, have you
9 ever seen a company, whether a corporation or an LLC or
10 otherwise, capitalize with something other than a round
11 number?
12 A. It's rare. I wouldn't say I've never seen it.
13 It's rare.
14 Q. All right.
15 MR. GUY: Cole, let's go to Exhibit No. 6.
16 (Exhibit No. 6 marked.)
17 Q. (BY MR. GUY) Mr. Moos, this is a pleading
18 filed in this case. It's actually a discovery document,
19 TRA Midland's objections and responses to our client's
20 first set of interrogatories. It's a fairly brief set
21 of interrogatory answers and it's not signed off on by
22 anybody. This goes back to 2014.
23 Do you recall whether as of 2014 you would
24 have had any role in providing the information that's
25 set forth in these responses and interrogatories?

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1 A. I -- I remember the lawsuit and we had a
2 process internally when there were lawsuits to make sure
3 that we turned over -- relevant documents to our legal
4 department and certainly didn't destroy documents.
5 Q. All right. But you don't recall whether you
6 had a role to get the information?
7 A. Sorry?
8 Q. Okay.
9 MR. GUY: Cole, turn to Page 3, if you
10 would, top of the page.
11 Q. (BY MR. GUY) This is in response to a question
12 asking the -- the defendant to "Describe the source of
13 funds TRA Midland used to acquire the Apartment
14 Complexes," and this is referring to January 2008
15 transaction.
16 And the answer is, "TRA Midland used an
17 FNMA-backed loan to acquire the Apartment Complexes and
18 its member, TRA Apt" -- "TRA Apartment West Texas, LP,
19 contributed additional funds toward the purchase."
20 And I guess my question would be, do you
21 know where TRA Apartment West Texas got the -- in these
22 words, additional funds that it contributed?
23 A. No, I don't -- I don't recall. So -- but this
24 does go back to what I said earlier. So I guess Arbor
25 did put in a funded-back loan. That's what I recall.

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1 No, I don't know where the funds came from.
2 Q. There was one additional part to --
3 MR. GUY: If you go back to the previous
4 page, Cole, at the bottom of the page.
5 Q. (BY MR. GUY) The last sentence of
6 Interrogatory No. 3 asked to include "a description of
7 any involvement of Gene Phillips or any Gene
8 Phillips-affiliated entity in the acquisition." This is
9 in the acquisition of the apartment complexes by TRA
10 Midland from ARI, TCI, and IORI. The response on the
11 next page doesn't address that part of the question.
12 So I guess my question to you is, was there
13 any involvement by Gene Phillips or any Gene
14 Phillips-affi- -- affiliated entity in the acquisition
15 of the properties by TRA Midland in January of 2008?
16 A. At the time I joined the company, I was not
17 involved in any of this -- acquisitions of purchases.
18 My recollection would be in -- Gene would have been
19 aware of any transaction, you know. That -- that was
20 what the man lived for. He loved doing transactions.
21 And I don't mean that in a negative way. He, you know,
22 made millions and millions of dollars in whatever he --
23 transactions was -- was his lifeblood. That's what he
24 loved to do. So I --
25 Q. All right.

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1 A. -- I would assume he knew he was involved in
2 this transaction.
3 Q. All right. Do you know whether he was involved
4 in the transaction from the acquisition side as well as
5 from the seller side?
6 MR. JOHANSEN: Objection, form.
7 A. I -- I know that he was involved in the
8 transaction. I can't -- if -- if we were acquiring the
9 asset, I would assume he was on the acquisition side.
10 Q. (BY MR. GUY) Okay.
11 MR. GUY: Cole, let's go on back to Exhibit
12 No. 7 which we referred to a moment ago.
13 Q. (BY MR. GUY) Referring again to the first page
14 of this accounting document, the -- the page is entitled
15 "Summarized Sources and Uses," and it's again referring,
16 I believe it's clear, to the January 2008 transaction.
17 Again, there's a reference -- under the sources to the
18 Midland Residential loan in the amount of 22,500 --
19 \$22 million, rather, 500,000.
20 Have you ever seen any evidence that
21 Midland Residential, MRI, actually did fund
22 \$22.5 million or \$28.5 million to or for the purchaser
23 of the complexes?
24 A. I -- I can't answer the question. I don't know
25 firsthand. I do recall the -- the loan with Arbor and

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1 Arbor was a sophisticated group and they would have
2 required the equity. But I don't have any knowledge
3 of -- you know, where that -- how that equity came
4 about.
5 Q. All right. And would it be correct that you
6 also are not aware of whether any representations by
7 the -- the acquirers to the source of that equity were,
8 in fact, correct?
9 A. I have no -- no direct knowledge, no.
10 Q. Okay. And --
11 MR. GUY: Then, Cole, if you would turn to
12 Exhibit No. 8.
13 (Exhibit No. 8 marked.)
14 Q. (BY MR. GUY) Mr. Moos, this is a promissory
15 note that in January of 24th of 2008 in the amount of
16 \$28,574,000 and change with Midland Equity, promising to
17 pay for the MRI that -- that amount.
18 Again, my question is, have you ever seen
19 actual evidence of funding of a loan, whether the amount
20 of \$22 and a half million or \$28 and a half and change
21 from MRI to Midland Equity, and I'm talking about a
22 check, a wire transfer, some other actual evidence of a
23 transfer of funds, something besides a promissory note?
24 A. I don't recall. I recall the transaction. I
25 don't recall this promissory note at the top of my head.

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1 Q. Do you know whether Midland Equity ever had its
2 own bank account or brokerage account?
3 A. Not that I'm aware of.
4 Q. Did MRI ever have a bank or brokerage account?
5 A. No, I don't recall.
6 Q. Mr. Moos, in January of 2008, did MRI, in fact,
7 get money, again, whether it was \$22 and a half million
8 or \$28 and a half million from TCI?
9 A. I have no knowledge.
10 MR. JOHANSEN: Objection, form.
11 Q. (BY MR. GUY) And do you know whether TCI
12 actually owned MRI in January of 2008?
13 A. Unless you have some documents you can show me,
14 I don't recall.
15 Q. That's fair. Let's go through some of those.
16 MR. GUY: If you would, Cole, pull up
17 Exhibit 9.
18 (Exhibit No. 9 marked.)
19 Q. (BY MR. GUY) Mr. Moos, Exhibit 9 is actually a
20 document that was Exhibit 21 to the annual report on
21 Form 10-K for TCI for the year ending January --
22 December 31st of 2008. And I will show you that
23 document in a moment just to show you where it came
24 from.
25 A. Okay.

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1 Q. This is a list of subsidiaries of
2 the registrant which was the TCI -- what I've been
3 called TCI, Transcontinental Realty Investors.
4 MR. GUY: And, Cole, if you would, turn to
5 Page 4. And then blow up about the bottom third of the
6 page, if you would.
7 A. I see the residential investments on them.
8 Q. (BY MR. GUY) You do see that? Okay.
9 In fact, as of December 31st of 2008, was
10 Midland Residential Investment, LLC or MRI a 100 percent
11 owned subsidiary of TCI?
12 MR. DONOHUE: Objection, form.
13 Please slow down. From this document, it
14 appears that...
15 Q. (BY MR. GUY) All right. And just to secure
16 Mike's objection, for me, this document from any other
17 source refreshing your memory, do you know whether or
18 MRI was at December 31, 2008 a wholly-owned subsidiary
19 of TCI?
20 A. If this is the same document that was filed
21 with the SCC, which it appears to be, the best of my
22 knowledge, it would have been accurate at the time it
23 was filed.
24 Q. Okay. And just to make sure I understood, you
25 said it was an accurate description as opposed to

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1 inaccurate?
2 A. An accurate. Yes, accurate.
3 Q. Thank you. Thank you for the clarification.
4 And just to close the loop on this one.
5 MR. GUY: Cole, if you'll pull up
6 Exhibit 10.
7 (Exhibit No. 10 marked.)
8 Q. (BY MR. GUY) This is, in fact -- Exhibit 10
9 is, in fact, the annual report on Form 10-K to the SEC
10 for TCI for -- effective December 31 of 2008. This is
11 the filing to what Exhibit 9 was appended as an exhibit.
12 And just so that you know --
13 MR. GUY: Cole, if you can, turn to -- this
14 may be a little bit hard. Page 109. I'm not making his
15 job easy. My cocounsel is laughing at me appropriately.
16 Q. (BY MR. GUY) Can you see your signature there
17 on the signature page for the 10-K form?
18 A. Yes.
19 Q. Okay. Would you have reviewed the substance of
20 this Form 10-K before it was filed and with your
21 signature?
22 A. Yes.
23 Q. Including Exhibit 21, which reflects MRI as a
24 100 percent owned subsidiary of TCI?
25 A. Yes.

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1 Q. Okay.

2 MR. GUY: Let's go, Cole, to Exhibit

3 No. 11.

4 (Exhibit No. 11 marked.)

5 Q. (BY MR. GUY) Exhibit 11, Mr. Moos, is a

6 document -- if you were to look at the bottom of the

7 page, it includes a document, a control number,

8 indicating it was produced by the defendants in this

9 case from their files. It's entitled "Midland Ownership

10 Structure" as of January 21, 2008. And at the bottom of

11 the chart --

12 MR. GUY: If you'll move it up just a

13 little bit, Cole.

14 Q. (BY MR. GUY) -- you will see that the ultimate

15 owned entity is TRA Midland, the owning equity -- owning

16 entity of the 21 properties. And then back up at the

17 top of the page, this document reflects TCI, top

18 right-hand corner, TCI, Transcontinental Realty

19 Investors, as the 100 percent owner of Midland

20 Residential Investment, LLC.

21 First of all, do you know who would have

22 prepared this particular ownership chart?

23 A. One of two places, corporate legal department

24 client at the time for the law firm that would have

25 handled the -- the paperwork, the internal law firm. It

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1 was in internal. It would have been a company that did

2 work for public companies, the TCI law -- law firm.

3 Q. And you're familiar with ownership charts at

4 this time, are you not?

5 A. Yes.

6 Q. From TRA Midland, if you work your way up and

7 then to the right on the chart through the intervening

8 entities, is it correct that according to this chart,

9 the ultimate owner of TRA Midland was Midland Equity,

10 and then on -- on the one hand, and then Eric and

11 Christine Brauss for the remaining portions of it?

12 A. That's what the document reflects.

13 Q. All right. Do you have any reason to believe

14 this document was incorrect as of January the 21st of

15 2008?

16 A. No.

17 Q. Okay.

18 MR. GUY: Cole, I'm going to make you go

19 back to Exhibit 8 for just a moment.

20 Q. (BY MR. GUY) We're back to the promissory

21 note, the 28.574-million-dollar promissory note,

22 Mr. Moos.

23 MR. GUY: And then, Cole, go to the bottom

24 of that first page, if you would.

25 Q. (BY MR. GUY) Do you see, Mr. Moos, the footer

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1 on the bottom left-hand side of the first page?

2 A. Yes.

3 Q. And is it correct, in your knowledge, that the

4 purpose of a footer is to indicate where the electronic

5 version of this document can be found, whether it's on a

6 company server or an individual's hard drive?

7 A. Yes.

8 Q. Do you recognize this particular form of

9 footer?

10 A. I've seen it on -- like you said, several

11 documents that come out of the -- the legal department,

12 or the --

13 Q. All right.

14 A. Or one of the law firms we use.

15 Q. All right. The -- the footer identifies this

16 document with TCI, does it not? At two specific

17 references to TCI?

18 A. Yes, it does.

19 Q. And what, if anything, does this footer tell

20 you with respect to whether TCI was involved in the

21 acquisition of the properties in January of 2008?

22 MR. DONOHUE: Objection, form.

23 That means nothing.

24 A. Whoever created that document used that footer.

25 I can't say firsthand whether TCI prepare it or didn't

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1 prepare it. But whoever did prepare it put the footer

2 on it.

3 Q. (BY MR. GUY) And let me show you one more.

4 MR. GUY: Would -- Cole, go to Exhibit

5 No. 12.

6 (Exhibit No. 12 marked.)

7 Q. (BY MR. GUY) Exhibit 12, Mr. Moos, is a pledge

8 and security agreement with assignment of rights, also

9 from January of 2008. The date is not filled in. And

10 it refers to the note -- the 28.574-million-dollar note

11 that we just showed you. And it refers in the beginning

12 of paragraph number one, quote, As collateral security

13 for the complete payment and -- prompting complete

14 payment and performance when due of all sums due under

15 the note, et cetera. The footer, again, at the bottom

16 of the page includes the two references to TCI.

17 Do you see that?

18 A. Not yet. You have to raise the page up a

19 little bit.

20 Q. We're getting there slowly. I got ahead of

21 myself.

22 A. Okay.

23 Q. Yes, I see that.

24 A. All right. So if I could just sum up, I'll

25 give you a preamble to this one.

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1 The annual report for TCI on the Securities
2 and Exchange Commissions Form 10-K for 2008 says that
3 MRI was owned 100 percent by TCI. Second, an ownership
4 chart from the defendant's files reflects that as of
5 January of 2008, MRI was 100 percent owned by TCI.
6 Third, a January 2008 promissory note evidencing
7 \$28 1/2 million owe -- owed by another company to MRI
8 refers to TCI. And then fourth, the pledge and security
9 agreement for that same time period for that same
10 28.574-million-dollar debt also refers to TCI.
11 What, if anything, does that tell you, as
12 to whether or not in January of 2008, MRI was or was
13 not, in fact, a wholly-owned subsidiary of TCI?
14 MR. DONOHUE: Objection, form.
15 MR. JOHANSEN: Objection, form.
16 A. I'm not a legal lawyer. I can't tell you the
17 legal ramifications involved with what you showed me.
18 Q. (BY MR. GUY) I'm not asking you for legal
19 ramifications.
20 I'm just asking for you, as a business
21 person, what you would conclude from seeing these five
22 different references to TCI in connection with the
23 transaction and, in particular, a loan between MRI and
24 another company.
25 MR. DONOHUE: Objection, form.

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1 MR. JOHANSEN: Objection, form.
2 A. No. I just don't have a good answer for you.
3 I don't know the -- what it all means.
4 Q. (BY MR. GUY) Is -- I'm just -- okay. We will
5 move on.
6 MR. GUY: Okay. Let's take about a
7 five-minute break, if we could. Let's go off the record
8 for about five minutes.
9 THE WITNESS: Okay.
10 THE VIDEOGRAPHER: We're going off the
11 record at 5:15 p.m. GMT time.
12 (Break from 5:15 p.m. to 5:26 p.m.)
13 THE VIDEOGRAPHER: We're back on the record
14 at 5:26 p.m. GMT time.
15 MR. GUY: All right. Cole, if you would
16 pull Exhibit 2 up, the new one.
17 (Exhibit No. 2 marked.)
18 Q. (BY MR. GUY) This is the exhibit -- Exhibit 2,
19 Mr. Moos, is the one that I was trying to show you
20 earlier when we had some confusion with respect to the
21 document. This is a -- a loan management report from
22 Arbor with respect to -- the -- the loan in question and
23 it's dated as of a date in 2010, I believe. If I'm
24 looking for it. Yeah. November 24th of 2010.
25 MR. GUY: Let's turn to the -- the second

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1 page of the report, Cole. Specifically down just past
2 the -- the middle of the page, sponsors, commitment and
3 capabilities.
4 THE VIDEOGRAPHER: Okay.
5 MR. GUY: Blow it up just -- there it is.
6 That's fine.
7 Q. (BY MR. GUY) On the fifth line of the segment
8 that's marked "sponsors, commitment, and capabilities,"
9 Arbor recites that -- and I'm going to quote here,
10 "Additionally, there is another limited partner, George
11 Condose, who within TRA Midland Investors, LP."
12 Let me just ask, first of all, Mr. Moos, do
13 you know whether George Condose ever was a limited
14 partner within TRA Midland?
15 A. I don't know George Condose. I couldn't answer
16 that.
17 Q. All right. It goes on to say, again, Arbor
18 summarizing its knowledge of this particular loan.
19 Mr. Condose, at the time of origination, reported a net
20 worth in excess of \$100 million. He invested
21 \$23,870,000 into the ownership of the borrower,
22 effectively 100 percent of the hard equity in the
23 transaction.
24 First of all, did I read that correctly?
25 A. Yes.

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1 Q. Do you know whether George Condose, in fact,
2 did invest \$23,870,000 into TRA Midland?
3 A. I don't know. I don't have any knowledge of
4 that.
5 Q. The documents I showed you earlier, the
6 promissory note and such, the company agreement for TRA
7 Midland reflected instead TRA Apartment west Texas
8 investing either \$22 and a half million or
9 \$28.574 million.
10 Do you have any idea of which one of those
11 would be correct?
12 A. No, I don't.
13 Q. They can't both be correct, can they?
14 A. I -- I don't -- doesn't seem to be. But I -- I
15 don't know.
16 Q. You made references which were certainly
17 understandable that Arbor was a sophisticated entity.
18 Is it possible for a borrower to
19 misrepresent facts to a lender and get away with it?
20 MR. JOHANSEN: Objection, form.
21 MR. DONOHUE: Objection, form.
22 A. Well, just -- you know -- we all know what
23 happened in the 2007-2008 economic crash -- or 2008
24 economic crash. Apparently, a lot of lenders made some
25 stupid mistakes. Unfortunately, it wasn't my company.

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1 But I'm surprised, that's all. Arbor, I always thought,
2 was a pretty sophisticated shop.
3 Q. (BY MR. GUY) Well, are you aware of anyone
4 telling Arbor about the existence of a 28,574,000-dollar
5 loan from MRI?
6 A. I had no direct dialogue with Arbor that I
7 recall.
8 Q. Having been a business person who's involved in
9 loan transactions for a number of years, would you
10 expect that Arbor -- to be told if there were a loan in
11 that amount junior to the Arbor loan?
12 MR. JOHANSEN: Objection, form.
13 A. I have no knowledge of what Arbor was told or
14 not told.
15 Q. (BY MR. GUY) Well, but, again, I'm talking
16 about whether Arbor should have been told whether there
17 was, in fact, a loan -- a junior loan in the amount of
18 \$28.5 million.
19 As a good business practice, should Arbor
20 have been told about the existence, if there was one, of
21 a junior loan in that amount?
22 MR. DONOHUE: Objection, form.
23 MR. JOHANSEN: Objection, form.
24 A. I would -- I would assume the lender would have
25 asked that. That's all I could do. It's an assumption.

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1 Q. (BY MR. GUY) Understood.
2 All right.
3 MR. GUY: Let's turn, if we could, to
4 Exhibit 13, Cole.
5 (Exhibit No. 13 marked.)
6 Q. (BY MR. GUY) Exhibit 13 is a four-page
7 document from the defendant's files, Mr. Moos, and each
8 page is a wire transfer request.
9 MR. GUY: Cole, if you would, just page
10 through the four pages so Mr. Moos can see all four of
11 them, the headings and such.
12 Q. (BY MR. GUY) Mr. Moos, each of these four
13 pages, each of which reflects -- reflects a different
14 wire transfer request, reflects as the payor, P-I-A-M-I.
15 Would that be Prime Income Asset Management
16 Incorporated?
17 A. Yes, that -- that's what it -- my historical
18 knowledge, that's what it would have represented.
19 Q. And two of these wire requests are dated
20 January the 21st of 2008 and then two are dated January
21 the 25th of 2008. I will tell you again that the
22 transaction, the sale of the Midland apartment -- I'm
23 sorry, of the 21 apartments to TRA Midland closed on
24 January the 25th of 2008 and the description in each of
25 these four wire requests includes the term "Midland

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1 apartment" or "Midland transaction."
2 So -- and, again, you were the president
3 and either CEO or COO of -- of Prime in January of 2008;
4 is this correct?
5 A. Yes.
6 MR. GUY: Go back to the first page, if you
7 would, Cole.
8 Q. (BY MR. GUY) And just for the record, again,
9 Prime was the asset manager for the sellers, TCI, ARI,
10 and IORI in January of 2008, was it not?
11 A. Yes.
12 Q. Okay. First page reflects a request for a wire
13 transfer in the amount of \$2,615,600 to an account of
14 Today Financial, LLC for -- and that's quoting your rate
15 lock, period, close quote.
16 Do you know the purpose of that wire?
17 A. Rate lock would have been tied to the Arbor
18 loan.
19 Q. All right. My question is: Why would the
20 asset manager for the sellers be sending \$2.8 million to
21 lock in a rate for the financing of the transaction?
22 Wouldn't the financing and the rate lock had been the
23 problem and responsibility of the buyer?
24 MR. JOHANSEN: Objection, form.
25 MR. DONOHUE: Objection, form.

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1 A. I -- I don't recall at the time whether this
2 property -- Prime did manage assets other than the
3 public company assets that I was responsible for. I --
4 I don't know whether or not Prime, at the time, was the
5 asset manager or cash manager for those properties.
6 Q. (BY MR. GUY) All right. Well, let's turn to
7 the second page. The second wire transfer request still
8 dated on the 22nd of January 2008, three days before the
9 transaction, the description is, "Midland Apartment's
10 legal fee or DLA Piper," which is a law firm.
11 Do you happen to recall which side of the
12 transaction, if either, DLA Piper represented?
13 A. I don't ever recall them representing Pillar or
14 Prime, so I'm -- my assumption is it's -- they never
15 represented Pillar or Prime.
16 Q. They did not represent Pillar or Prime?
17 A. No.
18 Q. And, again, do you have any idea why Prime
19 would be wiring \$5,000 to a law firm that would
20 represent the other side of the transaction?
21 A. It may have been -- I don't know firsthand.
22 There could have been a management contract or cash
23 manager contract between Prime and -- and the West Texas
24 properties.
25 Q. All right. The third and the fourth pages

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1 reflect wires as of January the 25th -- or rather,
2 request for wires as of January 25th of 2008 to
3 Commonwealth Land Title.
4 You asked earlier if there was a title
5 company. Does this answer your question?
6 A. Yes.
7 Q. This would appear to be the closing agent for
8 the transaction. And if you add the numbers up of the
9 two wires, the combined total is \$19,130,305.56.
10 Again, from Prime Income Asset Management
11 Incorporated to Commonwealth Title -- Commonwealth Land
12 Title, do you know what was the purpose of those wires
13 in that amount?
14 A. No, I do not.
15 Q. Just to -- scroll down a little bit more.
16 Prime was the advisor for the sellers. The
17 buyer for the complex is TRA Midland, was the party that
18 needed to come up with the purchase price.
19 So do you know why the advisor for the
20 sellers wired almost \$20 million to the closing agent
21 and another \$2.6 million to lock in a rate for the loan?
22 A. I don't know.
23 Q. Mr. Moos, did the sellers, TCI, ARI, and IORI,
24 or any of them, provide seller financing for TRA
25 Midland's purchase of the properties?

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1 A. Unless you have -- I don't recall. I mean, if
2 you're going to show me other documents that show me
3 something different, all I can tell you is I just don't
4 recall.
5 Q. All right. And I -- I'll try to do that. But
6 I'll just say, given what you have seen so far, again,
7 money coming almost \$20 million to the closing agent
8 from the advisor for the sellers, do you draw any
9 conclusion from that as to whether or not the sellers
10 provided seller financing for a part of this
11 transaction?
12 MR. DONOHUE: Objection, form.
13 A. I have no way to draw that conclusion.
14 Something happened but I can't tell you what.
15 Q. (BY MR. GUY) And with respect to that
16 something, can you think of any other reason why Prime
17 would wire almost \$22 million in connection with this
18 January the 25th of 2008 apartment sale?
19 MR. DONOHUE: Objection, form.
20 A. Was there a -- no, I don't know. I -- just
21 speculating. I don't want to do that. I don't know.
22 Q. (BY MR. GUY) I understand.
23 And then just to close the loop, do you
24 know what Commonwealth did with the -- say, roughly
25 \$20 million when the sale closed, where the -- where the

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1 money went?
2 A. No. I assume it would be on the closing
3 statement that would show where the wire -- who they
4 wired money to.
5 Q. All right.
6 MR. GUY: Let's go to Exhibit 15, Cole.
7 (Exhibit No. 15 marked.)
8 Q. (BY MR. GUY) Mr. Moos, what's on the screen
9 now is Exhibit 15. It's a document entitled "Profits
10 Participation Agreement between Midland Equity and MRI."
11 Let me ask you, first of all, have you ever
12 seen this document before?
13 A. Unless my signature is on it, I don't -- I
14 can't answer that. I've seen similar documents, though.
15 Q. I don't believe your signature is on this
16 document. I would represent to you otherwise. By
17 virtue of this document, it appears that MRI assigned
18 profits to Midland Equity.
19 And if you look at Paragraph A on the first
20 page, it recites that -- recites MRI's ownership of
21 companies related to TRA Midland and its entitlement to
22 75 percent of the profits from the apartment complexes.
23 And then goes on in Paragraph B to recite that Midland
24 Equity has loaned MRI \$28.574 million.
25 Did I read -- have you seen that?

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1 A. I've seen -- I'm seeing that now. I didn't see
2 it previously.
3 Q. I understand. Okay. That's -- that's fine.
4 And then if you look down near the bottom
5 of the page.
6 MR. GUY: Cole, if you pick it up a little
7 bit, Paragraph 1.01.
8 Q. (BY MR. GUY) And I'll summarize, but you may
9 want to take just a moment to read the first sentence of
10 that.
11 Under Paragraph 1.01, MRI as -- transfers
12 to Midland Equity -- it's actually the other way around.
13 Midland Equity transfer to MRI 100 percent of the net
14 proceeds from any sale or exchange of the complexes.
15 And we've talked about the idea that MRI
16 has loaned money according to the documents, at least,
17 to Midland Equity. The assignment of profits, and you
18 could read through it for yourself, it is not limited to
19 the amount of the loan. So if the complex is ever sold,
20 this document would appear to read the MRI had to pay
21 any profits, including over and above the amount of the
22 debt to Midland Equity.
23 I guess my question is: Have you ever seen
24 a document -- an arrangement like this before?
25 MR. JOHANSEN: Objection, form.

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1 A. Since -- since, not before. You said since.
2 Yeah. I'm seeing -- I think I'm seeing this particular
3 document for the first time. But I -- this concept is
4 something that had -- has been used to the company in
5 other transactions.
6 Q. (BY MR. GUY) And to correct my misstatement,
7 it's the other way around. Midland Equity would be
8 required to pay over any profits from the sale or
9 exchange of the -- of the complexes to MRI, not the way
10 I stated a moment ago. So I apologize for any
11 confusion.
12 A. Okay.
13 Q. So if -- just as I -- as I understand, on a
14 quick reading of this document, if Midland Equity were
15 to pay off the loan in its entirety and then sell the
16 complexes and make a profit doing so, Midland Equity
17 would still have to pay over all profits to MRI even
18 though Midland Equity no longer owed MRI any money.
19 Are you saying that that is a type of
20 arrangement that was done within the company from time
21 to time?
22 A. Hybrids like this that exist today -- and the
23 reason I'm saying this is because they exist today.
24 There are transactions like that that exist today.
25 Q. What would be the circumstances under which a

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1 transaction like that would be done, where in essence,
2 the borrower relinquished any profits from the ownership
3 of the properties, not just to secure the amount of a
4 loan?
5 A. I'll give you an example because, again,
6 it's -- it's in public records. A subsidiary of TCI
7 would make a loan into a new development project to
8 provide the equity for the developer to build the
9 project and put in 100 percent. And if the developer,
10 you know, for some reason didn't pay back the loan or
11 defaulted it on the -- under the loan, the project
12 screwed up, TCI or TCI subsidiary would have to write to
13 100 percent of the proceeds and the -- the developer
14 would have ended up with nothing. So I've seen that
15 language in other transactions that have been done.
16 Q. Well, the example I -- pardon me, I didn't mean
17 to interrupt you.
18 A. Okay. Go on.
19 Q. Were you finished?
20 A. Yeah.
21 Q. Okay. The -- the sum and conveniences of this
22 electronic form of the transaction, I'm glad they would
23 still do them, but it makes it more difficult for us --
24 for deposition.
25 In the example I was giving you a moment

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1 ago, it did not necessarily involve a default?
2 A. Okay.
3 Q. In essence, Midland Equity was relinquished --
4 relinquishing any profits from the sale or exchange of
5 the property not limited to the amount of a loan, not
6 limited to pay off of the loan, not limited to security
7 for the loan.
8 Have you ever seen that type of -- of
9 transaction, other than in this particular profits
10 participation agreement?
11 A. No. I -- the ones that I'm familiar with had
12 some mechanism to assure that the lender, TCI in this
13 case, it was TCI making -- making loan, had the ability
14 to recoup all of its costs. The loan amount, legal
15 fees, yadda yadda yadda, everything you could possibly
16 recover upon a sale. So this seems to be a little bit
17 broader.
18 Q. Right.
19 In essence, this makes MRI effectively the
20 equity owner of the property and not just a lender,
21 doesn't it?
22 A. I'm not a lawyer so I can't make a legal
23 opinion of what -- what was legally correct or not.
24 Q. I understand.
25 Before I get away from this, and let me

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1 just ask, do you know whether in actuality, a loan from
2 MRI actually did finance a capital contribution by TRA
3 Apartment West Texas? In other words, did -- did
4 28.574 million or whatever amount of money was loaned by
5 MRI made its way down through the ownership chain to TRA
6 apartment in West Texas?
7 A. I have no knowledge of that.
8 Q. All right.
9 MR. GUY: Cole, let's go back to
10 Exhibit 11, the ownership chart.
11 Q. (BY MR. GUY) I showed you this earlier,
12 Mr. Moos. Looking -- this -- this was the ownership
13 chart as of January 21st of 2008.
14 Are you aware that on November the 10th of
15 2009, the next year, the ownership interest in the
16 various entities, which would include TRA Apartment, GP;
17 TRA Investment, GP; TRA Apartment Investment, GP; TRA
18 Apartment Investment, LP; TRA Midland Investor, GP; and
19 Midland Equity, LLC, all of those ownership interests
20 were assigned by Eric Brauss and Christine Brauss to
21 MRI? Are you aware of that?
22 A. No.
23 Q. I could show you the assignments there under
24 Exhibit 14. But I think I'll -- I'll try not to bother
25 you with that again.

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1 Well, yeah. Let's do it.
2 MR. GUY: Turn to Exhibit 14, if you would,
3 please, Eric -- please, Cole.
4 (Exhibit No. 14 marked.)
5 Q. (BY MR. GUY) The pages of Exhibit 14, we could
6 scroll through them if we needed to, but these are
7 basically the assignments of stock or assignments of
8 membership interests or limited partnership interest,
9 all of them dated November the 10th of 2009 from
10 either -- from -- from different entities, all of them
11 to MRI.
12 A. Okay.
13 Q. First of all, let me just ask, are you aware
14 that on the day after these assignments, November
15 the 11th of 2009, Eric Brauss left the United States,
16 never to return?
17 A. Yeah, I -- I -- I knew about Eric leaving and
18 I -- I guess the assumption that he died in -- was it
19 Brazil was he in? Or Argentina. I don't remember which
20 country it was.
21 Q. I've heard Brazil, I believe.
22 Do you -- can you describe for me the
23 relationship, if any, between Gene Phillips and Eric
24 Brauss preceding November of 2009?
25 A. I knew they knew each other and I knew they did

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1 business together. I -- I can't answer anything as far
2 as our personal relationship. My knowledge of Gene
3 Phillips was business -- was business, and friendship
4 and business didn't necessarily coincide.
5 Q. Do you know whether Gene Phillips and Eric
6 Brauss did business before -- before -- let's say before
7 the January of 2008 sale of the properties to TRA
8 Midland?
9 A. If I'm looking at the document correctly, it
10 seems like Sue signed for Eric. I mean, I remember Sue.
11 We weren't friends or anything. I met Eric but we
12 weren't friends or anything like that. But I can't tell
13 you that -- one way or another what's accurate on this
14 document or not.
15 Q. You mentioned Sue Shelton who does sign as
16 attorney, in fact, for Eric, but you mentioned her name
17 in particular.
18 What's the significance of her in
19 connection with these signatures?
20 A. It just seems that I see her signature that --
21 you know, which Eric -- if I'm looking at this document,
22 that doesn't seem to be Eric's signature since Eric --
23 Q. Well, you're correct.
24 (Simultaneous crosstalk.)
25 (Audio distortion.)

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1 A. -- Shelton.
2 Q. (BY MR. GUY) Was Sue Shelton associated
3 with Gene Phillips or any of these entities?
4 A. No, I don't -- I don't think. We knew her but
5 I -- I don't -- prior to this or even to this day, I
6 don't recall.
7 Q. How did you know her?
8 A. Eric would have been in the -- you know -- it
9 was pretty common practice, you know, when people came
10 to visit Gene. You know, we -- great real estate mind,
11 very wealthy individual. People would come over to the
12 office and see him. I housed in the same building with
13 Gene, you know, pretty close. So Eric would have come
14 over. I think my biggest thing was I don't recall a lot
15 about Eric. I just remember him, you know, his car. I
16 would have liked to ride in his car. Okay? That's all
17 I can tell you. I never did business with him, but I
18 would like to ride in one of his cars.
19 Q. I have to ask the follow-up question.
20 What kind of car did he have that you would
21 have enjoyed riding in?
22 A. One of them, I think, was a Bentley. I
23 couldn't recall. It was either Bentley or a
24 Rolls-Royce. I'm pretty sure it was a Bentley.
25 Q. All right. Did you have any involvement in the

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1 negotiation or preparation of any of these assignments
2 that are included within Exhibit 14?
3 A. No.
4 MR. GUY: Go to the bottom of that first
5 page, if you would, Cole. Just blow up the footer, if
6 you would.
7 Q. (BY MR. GUY) And once again, your -- Mr. Moos,
8 we have a footer that identifies PCI in connection with
9 these assignments. Each -- each page would include a
10 footer with TCI.
11 As of November of 2009, was TCI the owner
12 of MRI which was the asset for each of these sets of
13 interests?
14 A. Again, I don't -- from this, I don't think so.
15 Q. You don't think so?
16 A. I don't -- I don't know. I -- I don't know.
17 Q. So you don't know, not that you don't think so?
18 A. Yeah. I don't -- I don't -- I don't know. We
19 would have to go back to remember we were looking
20 earlier at the SCC filings. So we would have to -- my
21 knowledge would be whatever was on the SCC filings, the
22 list of companies we owned of TCI --
23 Q. All right.
24 A. -- would have been on that schedule.
25 Q. I'll -- I understand that. That's fine.

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1 Let's go on for a few more moments and then
2 we'll take a -- a brief lunch break.
3 I'm going to ask you about a -- a
4 deposition you gave before. You mentioned earlier that
5 you testified back in June as a company representative
6 for Vistas At Vance Jackson, and this is not a memory
7 contest, but you were asked about an interrogatory
8 response for Vistas At Vance Jackson which you signed
9 on. And there's a statement in the interrogatory
10 responses that says that MRI, which purchased the
11 Brauss's interest, also paid reasonably equivalent value
12 for those interests. This is referring to the
13 November 10th, 2009, transactions. And again, the
14 interrogatory answer, about which Mr. Harlow asked you
15 in the deposition, was MRI, which purchased the Brauss's
16 interest, also paid reasonably equivalent value for
17 those interests.
18 And you were asked the basis for that and
19 your answer was, "At the time we did the interrogatory,
20 my staff and people advising us, Attorney, we looked at
21 all this and we're comfortable with that. That's why I
22 stated it."
23 Just a couple of quick follow-up questions.
24 Do you, today, remember what you or your staff looked at
25 that told you that MRI in November of 2009 paid

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1 reasonably equivalent value for the Brauss's interest in
2 this company that were assignment pursuant to
3 Exhibit 14?
4 A. Yes, I'll take you through the -- the process.
5 Q. Please.
6 A. I -- I would have had nothing to do with the --
7 the negotiations. Within the company, we had
8 external -- we had internal brokers. Internal brokers,
9 Mr. Phillips, and/or the members of his family would be
10 involved in buying and selling of assets. My job -- and
11 because I had a financial background -- would be to go
12 look at the trailing NOIs of the properties, look at
13 the cap rates of the properties. And we would then
14 verify in our opinion as to whether or not it was a --
15 it -- it was a fair transaction for us, either buy or
16 sale.
17 And so my answers to that was the same
18 answer today. Mathematically, it would have seen --
19 put -- put aside your questions about how money got
20 moved because I -- the economics would have appeared
21 accurate to me at the time. I would not have signed off
22 on it. Doesn't mean it still won't happen because it
23 would have gone to a board of directors and they make
24 whatever decision they want. But it went to a board of
25 directors and they approved it.

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1 Q. So if I correctly heard your answer, you said
2 you wanted to ensure that it was a fair transaction.
3 You said for "us."
4 Does that mean for the company that you
5 represented either as president, chief executive
6 officer, chief operating officer, whatever?
7 A. Yes.
8 Q. You wouldn't have been concerned with whether
9 there's a fair transaction for the other side of the
10 transaction, would you?
11 A. No. I mean, I can honestly tell you that
12 that's -- you know -- I don't know economics. Sometimes
13 we go out with the good prices and sometimes we bought
14 stuff, not so good prices, you know. Hindsight is
15 always 20/20.
16 Q. All right. Well, in 2009, the Brausses, Eric
17 and Christine Brauss, were the sellers, the transferors
18 of the interests in these entities.
19 MRI was the buyer?
20 A. Right.
21 Q. And would it be correct to say that in a
22 buy-and-sell transaction, the buyers' economic interest
23 isn't paying as little as possible in order to acquire
24 the -- the subject matter of the transaction?
25 A. Historically, that -- that's usually what

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1 buyers and sellers try to do.
2 Q. So in November of 2009, would it be correct to
3 say that MRI didn't care whether it paid reasonable
4 equivalent value, MRI wanted to pay as little as
5 possible; is that correct?
6 MR. JOHANSEN: Objection, form.
7 MR. DONOHUE: Objection, form.
8 A. There was a -- yes, I -- we would want to pay
9 as little bit as possible. But with the -- you know,
10 senior lenders and other buyers, lenders and everything
11 involved, it has still worked economically. And if I'm
12 looking at the Arbor loans that were being put in the
13 bag, you know, you'd have to go back and look at what
14 Arbor's appraised values were. So it appeared to me
15 that it would be -- been reasonable on both sides. I --
16 that -- that's my business knowledge. It would seem to
17 have been reasonable if -- if Arbor was doing their
18 homework.
19 Q. (BY MR. GUY) Mr. Moos, do you know what
20 consideration Eric or Christine Brauss received for
21 these transfers in 2009?
22 A. No, I have no knowledge.
23 Q. And so you don't know -- you don't know whether
24 they received adequate consideration for the transfers
25 or not, do you?

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1 A. I have no knowledge.
2 Q. And do you know whether Arbor, as the first
3 secured lender, had any knowledge of these assignments
4 when they took place in November of 2009?
5 A. I have no knowledge. Not saying -- I don't
6 have any knowledge.
7 Q. Okay. Was Midland Equity in default of its
8 debt to MRI in November of 2009?
9 A. Unless you're showing me a document that
10 indicates, I would have known that. No, I don't. I --
11 Q. All right. Let's go to Exhibit 16.
12 Mr. Moos, Exhibit 16 is a letter agreement
13 on the letterhead of MRI addressed to Eric Brauss and
14 Christine Brauss.
15 Let me ask, first of all, do you have any
16 knowledge of this particular letter of agreement?
17 (Exhibit No. 16 marked.)
18 A. Am I -- I can't see the whole thing. Am I a
19 signatory or carpen- -- or --
20 Q. (BY MR. GUY) You are not a signatory. No,
21 you're not. The signatories are Craig Landess for MRI
22 and I don't see -- and Christine and Eric Brauss on --
23 on the other side.
24 A. Yeah. No, I have not seen this, no.
25 Q. All right. Of -- it's not dated.

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1 Do you have any idea of why it was not
2 dated?
3 MR. JOHANSEN: Objection, form.
4 A. No, I don't have any knowledge.
5 Q. (BY MR. GUY) Just so that you know, the
6 defendants claim that this particular agreement was
7 signed in August of 2009.
8 Let me just ask, do you have any objective
9 evidence that this particular document was, in fact,
10 signed in August of 2009?
11 A. No, I have no knowledge.
12 Q. And I'm probably going to be belaboring this a
13 little bit just to -- to tie down some points, if I
14 could. But if you look at Paragraph 3A, it refers
15 payments to be made to Christine Brauss totalling a
16 million dollars.
17 Do you have any knowledge of whether those
18 payments were ever made?
19 A. No, I don't.
20 Q. And then if you look at Paragraph 3B.
21 MR. GUY: Give him a moment, if you could,
22 Cole. And then let him look at Paragraph 3C in the next
23 page. All right. Go ahead.
24 Q. (BY MR. GUY) Paragraph 3B and 3C refer to a
25 700,000-dollar loan to Today Realty Investors and

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1 800,000-dollar additional advance made under a loan to
2 Today McKinney Ranch to LP.
3 And my question is, do you know whether
4 either the 700,000-dollar loan or the 800,000-dollar
5 advance were ever made?
6 A. No, I don't.
7 Q. Paragraph 3C, likewise, mentions as the lender
8 for the 700,000-dollar loan and the 800,000-dollar
9 advance the -- and I'm quoting here, Brauss interest
10 lender, close quote.
11 Do you know who or what the Brauss interest
12 lender was?
13 A. No, I don't.
14 Q. Okay. And, again, have you ever seen any
15 evidence that either such loan was funded?
16 A. No.
17 Q. Paragraph 3B refers to a put call.
18 Do you know whether it exists or ever
19 existed?
20 A. No, I don't.
21 Q. And similarly --
22 MR. GUY: Go to Paragraph 37C, if you
23 would, Cole.
24 Q. (BY MR. GUY) There's a reference to a
25 non-recourse guaranty.

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1 Do you know whether that was ever -- well,
2 let me strike that question.
3 MR. GUY: Turn if you would, Cole, to what
4 looks like -- it is the fifth page of the document.
5 Q. (BY MR. GUY) There it is.
6 Take a moment to look at it. This is a
7 signature by Gene E. Phillips as a personal guarantor of
8 the obligation to purchase Christine Brauss's interest
9 in TRA Apartment Investment, LP for a million dollars.
10 Do you know why Gene Phillips would have
11 been signing as the personal guarantor of that
12 obligation?
13 A. No, I don't.
14 Q. Okay. And then let's take one more document
15 before we take a brief break for people to get some
16 sustenance.
17 MR. GUY: Turn, if you would, to Exhibit
18 No. 17, please, Cole. Blow it up a little bit.
19 Q. (BY MR. GUY) Exhibit 17 is a set of journal
20 entries from the general ledger for Highland Realty
21 Services Incorporated.
22 Do you normally prepare these entries?
23 (Exhibit No. 17 marked.)
24 A. I think this would have come from Craig
25 Landess's department.

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1 Q. (BY MR. GUY) Okay. The date is November the
2 10th of 2009.
3 MR. GUY: Go ahead and show him the second
4 page, if you would, Cole.
5 Q. (BY MR. GUY) That was, in fact, the date of
6 the assignment that I referred to a few moments ago.
7 And Page 2, the company for the entry is -- is MRI. And
8 it shows a credit, \$200,000, Samuel Rosensweig, NP which
9 I think must be no payable assigned from CB.
10 Would CB would be Christine Brauss?
11 A. It's what it appears to be, yes.
12 MR. JOHANSEN: Objection, form.
13 Q. (BY MR. GUY) Who is Samuel Rosensweig?
14 A. Never heard of him.
15 Q. So you don't know the meaning of "assigned from
16 Christine"?
17 MR. JOHANSEN: Objection, form.
18 A. No.
19 Q. (BY MR. GUY) Do you have any personal --
20 A. I understand the word "assigned" but I don't
21 know who Samuel Rosensweig is.
22 Q. All right. And do you have any knowledge of
23 whether these journal entries accurately reflect the
24 accounting treatment of transactions on or about
25 November the 10th of 2009 involving Christine Brauss?

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1 A. No, I don't know if it's accurate or not.
2 MR. GUY: All right. Let's go off the
3 record for a moment.
4 THE VIDEOGRAPHER: We're going off the
5 record at 6:05 p.m. GMT time.
6 (Break from 6:05 p.m. to 6:41 p.m.)
7 THE VIDEOGRAPHER: We're going back on the
8 record at 6:41 p.m. GMT time.
9 Q. (BY MR. GUY) Mr. Moos, we're resuming.
10 MR. GUY: And I'm going to ask the -- our
11 videographer to put Exhibit 21 on the screen, if we
12 could.
13 THE VIDEOGRAPHER: And you said Exhibit 21,
14 I'm sorry?
15 MR. GUY: Exhibit 21, yes.
16 (Exhibit No. 21 marked.)
17 Q. (BY MR. GUY) Mr. Moos, this is an e-mail
18 exchange between Jay LaJone and Alan Steinmetz. You are
19 one of the CC recipients on pieces of the chain. I'm
20 going to ask Cole to go to the second page and let you
21 read from the first e-mail in the message forward and
22 let you kind of get a sense of it.
23 MR. GUY: Go to page 2, Cole. All right.
24 And give him time to read that over and digest it, then
25 we'll go back to the first page.

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1 THE WITNESS: Okay.
2 MR. GUY: All right. Go back to the first
3 page and let him see that one, if you would, Cole. This
4 would be easier if we weren't doing this remotely.
5 A. Yeah, I've read that page.
6 Q. (BY MR. GUY) All right.
7 MR. GUY: Let's go back to the second page
8 then, and I'll work back up, Cole.
9 Cole, you got it, second page?
10 THE VIDEOGRAPHER: Did you say go to the
11 second page, I'm sorry?
12 MR. GUY: You go to the second page.
13 THE VIDEOGRAPHER: Okay.
14 MR. GUY: Show that first conversation, the
15 one that takes place at 12:47 p.m.
16 Q. (BY MR. GUY) All right. First of all,
17 Mr. Moos, who did Jay LaJone represent, as far as you
18 know, in May of 2011?
19 A. It would have been the -- the enterprises. I
20 recall just the Phillips enterprises.
21 Q. All right. Fair enough.
22 Including TCI and Pillar regularly?
23 A. Yes.
24 Q. All right. Do you know in what capacity he was
25 e-mailing Mr. Steinmetz on May the 25th of 2011?

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1 A. No, I don't recall.
2 Q. And can you tell from the context here that
3 Mr. Steinmetz represented Arbor Financial?
4 A. Yes.
5 Q. And Arbor, at that time, still had the loan
6 outstanding owed by TRA Midland; is that correct?
7 A. At that time, I believe that's correct.
8 Q. What do you recall of the -- the conversation?
9 Mr. -- Mr. LaJone begins the e-mail exchange by saying,
10 "Danny Moos and I appreciate your conversation with us."
11 What do you recall about that conversation,
12 either independently or -- or with your memory refreshed
13 here?
14 A. No. I -- without notes, I -- from my file,
15 I -- I couldn't tell you what this is about unless -- I
16 don't recall the conversation.
17 Q. Do you recall there being a conversation in
18 which Arbor, having recently learned about the
19 assignment of November 2009, raised concerns about those
20 assignments?
21 A. I -- I remember having a conversation with
22 Arbor where they inquired -- you know, whether there
23 were concerns or not. I can't -- I can't define the
24 conversation. I just know they had questions.
25 Q. Okay. And that -- my question may have

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1 overstated things a bit.
2 The -- am I correct that at sometime at --
3 or shortly before this May the 25th, that Arbor had
4 learned for the first time about the assignments from
5 Eric and Christine Brauss into MRI?
6 MR. DONOHUE: Objection, form.
7 MR. JOHANSEN: Objection.
8 A. I have no knowledge what Arbor knew and when
9 they knew it.
10 Q. (BY MR. GUY) All right. Do you have any other
11 memory about that particular call?
12 A. No, I do not.
13 Q. Okay. Was there a decision within the Phillips
14 entity, the Phillips enterprises, to keep the existence
15 of the November 2009 assignment unknown to Arbor?
16 A. I -- I was not ever a part of any of that
17 discussion.
18 Q. Okay. And, again, at this time, the properties
19 in question were owned by TRA Midland which was
20 ultimately owned by Midland Equity which was the
21 recipient of a loan for MRI.
22 As of this date, May the 25th of 2011, what
23 was your connection with any of those entities?
24 A. I mean, I -- you -- you'd have to look at the
25 corporate documentation. I -- I couldn't tell you off

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1 the top of my head. I -- from an asset management
2 standpoint, those properties -- I was aware that we
3 would -- we were running the properties and operating
4 the properties and I was doing monthly -- doing -- doing
5 my job on a monthly basis, sometimes weekly basis,
6 understanding the correct operations in the
7 department -- each departments in that portfolio.
8 Q. So if I understood your answer, you said, "We
9 were running the properties," would that mean Pillar or
10 the other -- some of the Phillips enterprises were
11 running the apartment complexes as of May of 2011?
12 A. If they were still under the TCI chain, yes,
13 that would be correct. That -- I don't remember the
14 date we -- you showed me earlier that the properties
15 were sold to a third party. But up to that point, they
16 were -- we were operable.
17 Q. Yeah. The properties were sold to Midland
18 Investors in 2012.
19 A. Okay, yeah. So at this time, yes, they would
20 be part of our portfolio, and we're actively managing
21 them.
22 Q. Okay. Still looking at the first e-mail in
23 this chain, Mr. LaJone says, and I'm quoting here on the
24 second line, "Pursuant to the attached Note, Midland
25 Residential is obligated to pay cash it receives from

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1 the properties to Pillar." And I'll stop it there.
2 I have not seen the note and it was not
3 produced with this e-mail.
4 Do you recall seeing the note that he
5 refers to when you received this e-mail?
6 A. No.
7 Q. Have you ever seen a note that, again, in the
8 words of this e-mail, obligated MRI to pay cash it
9 received from the properties to Pillar?
10 A. Not -- not trying to be confusing here. Unless
11 it's something you -- you've shown me, either in this
12 deposition or the first deposition, I -- I don't -- I
13 have not seen anything else.
14 Q. All right. And -- and to be fair, no, we have
15 not shown it to you because we have not seen that
16 document either.
17 And, again, just to close the loop, have
18 you seen any other document that would have created an
19 obligation for MRI to pay cash from the properties to
20 Pillar?
21 A. There is a document called a cash management
22 agreement. And I think you referred to that in an
23 earlier question when you were showing the -- the change
24 from Prime to Pillar. There is a cash management
25 agreement that all the entities that were in the public

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1 companies, which this would have been in TCI, there
2 would have been a cash management agreement covering how
3 all the assets were done. But wouldn't have
4 necessarily -- wouldn't have been done by a note. It
5 would have just been a cash management intermediary,
6 giving Pillar the ability to handle cash, or if all the
7 properties, it would have been TCI.
8 Q. All right. You were the CEO, I believe, of
9 Pillar by this time, and would have -- Pillar had taken
10 over management and advisory responsibilities from Prime
11 in a month earlier.
12 Would it be correct that you would have
13 been aware in May of 2011 that Pillar was receiving
14 funds from TRA Midland's apartment complexes?
15 A. Pillar's organizations through the property
16 managers would have made sure that Arbor, as an example
17 of the first mortgage company, would have been getting
18 their payments. The bills would have been paid at the
19 property level. Rents would have been collected from
20 tenants. So from that standpoint, from an operational
21 standpoint, I would have been 100 percent familiar where
22 money coming in from tenants and money going out to pay
23 bills and paying the mortgage.
24 MR. GUY: Turn, if you would, Cole, to the
25 last page of that Exhibit No. 21.

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1 Q. (BY MR. GUY) The last page is a Midland
2 Residential Investment, LLC organization chart as of
3 April the 1st of 2011 reflecting that MRI was owned
4 by -- 100 percent by HRS Holdings, which was itself
5 owned 100 percent by Tacco Financial, Inc., which was
6 itself owned 100 percent by D. Tackett.
7 Was this organization chart accurate as of
8 April 1st of 2011, as far as you know?
9 A. I have no knowledge of the document.
10 Q. Do you know who D. Tackett was?
11 A. No, I've never met him. Not to my knowledge,
12 I've never met him.
13 Q. If, in fact, this was the proper -- the correct
14 ownership of MRI as of that date, why would Pillar be
15 receiving cash flow from the investments from the -- the
16 complexes?
17 A. As I indicated, I did not know about the note
18 and I -- I would have just been making the distributions
19 based on the cash management agreement that Pillar would
20 have had with the property.
21 Q. So your knowledge would have been limited to
22 cash was coming into Pillar, and Pillar was obligated to
23 manage the cash for different entities within the
24 Phillips enterprises?
25 A. That's correct.

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1 Q. Do you know whether D. Tackett is a real
2 person?
3 A. You know, I -- I've heard the name, you know,
4 but I -- I don't know the person. Unlike Eric who I had
5 no business association with, I knew who Eric was and I
6 met him. But I -- I don't ever recall ever meeting a
7 D. Tackett. I don't eve know who he is.
8 Q. So just to, again, close the loop, you don't
9 know whether this ownership chart on the last page of
10 Exhibit No. 21 was or was not accurate as of the date
11 that Mr. LaJone forwarded it to Mr. Steinmetz?
12 A. As I said, I don't know whether exactly or not
13 that's correct.
14 Q. Okay. Do you know about a -- a person named JT
15 Tackett?
16 A. No, I don't know if it's the same person. I
17 only heard the name Tackett. I don't know if it's the
18 same individual or -- or -- I'm writing myself a note
19 'cause I'm curious, too. No, I don't know who Tackett
20 is, whether it's the same person or not.
21 MR. GUY: Cole, let's go ahead and go to
22 Exhibit 22.
23 (Exhibit No. 22 marked.)
24 Q. (BY MR. GUY) Mr. Moos, I'm showing you
25 Exhibit 22, which is a June 17, 2011 letter on the

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1 letterhead of Winstead, a law firm here in Dallas but
2 from a -- signed by Courtney Davis Bristow of that firm.
3 Just for background, this is a letter being
4 written on behalf of attorneys representing Fannie Mae.
5 And if -- if you want to take time to look through it,
6 you can. But I tell you that it reads as if Fannie Mae
7 has learned recently of the Brauss transfers and
8 demanded cure of the breach.
9 MR. GUY: And then we can go on, Cole, to
10 Exhibit No. 23.
11 (Exhibit No. 23 marked.)
12 Q. (BY MR. GUY) Exhibit 23 is a letter to
13 Ms. Bristow, apparently a response letter, dated July
14 the 13th of 2011, providing information including three
15 particular documents, including a chart which was not
16 attached to this production.
17 Read for me just silently, if you would,
18 the full paragraph under the indentations, and then I'll
19 ask you a question or two about it.
20 A. Okay.
21 Q. This photograph proposes a transaction in which
22 the ownership interest of the borrower, which was TRA
23 Midland, would be owned by Midland Apartments
24 Incorporated, which according to Mr. LaJone, would be a
25 wholly-owned subsidiary of TCI?

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1 A. Okay.
2 Q. My question is: Did that transaction ever
3 happen?
4 A. I -- I can't -- I -- not with that current --
5 not with a Fannie Mae loan. No. I'm not aware if that
6 transaction occurred.
7 Q. Why does that follow? Tell me.
8 A. Fannie Mae wouldn't do -- wouldn't do business
9 with TCI at that time.
10 Q. Okay. Do you know why Mr. LaJone would have
11 been proposing a transaction in a way that Fannie Mae
12 wouldn't have approved?
13 A. I -- I -- I don't know that -- whether or not
14 Jay was privileged or not to the knowledge about Fannie
15 Mae's position regarding TCI.
16 Q. And tell us, if you would, why it was, at
17 least, as you understood it, that Fannie Mae would not
18 do business with TCI.
19 A. When the -- the gentleman who ran Fannie Mae
20 back during the savings and loan debacle, he was with
21 the government entity that ran all the -- you know,
22 detected all the savings and loans and -- and my
23 conversations with him, given the size of the loss that
24 the savings and loan had, you know, the -- the entity
25 like the FTICF -- I'm sorry, I forget the name of that

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1 entity.
2 Q. Either FFTILC or later, there was an -- a
3 successor entity.
4 A. Yeah, I think it's -- whatever entity it was,
5 they -- because of the -- the amount of loss they took,
6 they -- they said they would never do business with a
7 company associated with anyone in the Phillips family --
8 Q. All right.
9 A. -- which --
10 Q. So not only this transaction --
11 A. By the way, it changed last year. I got Fannie
12 Mae to do -- to do a loan with us directly.
13 Q. Good for you.
14 A. It took about ten years.
15 Q. Okay. A long process.
16 Do you know if Midland Apartment
17 Incorporated was ever formed?
18 A. I -- I don't know.
19 Q. All right.
20 A. It -- Jay says it is here. It may have been,
21 but I -- I'd have to see it.
22 MR. GUY: Cole, let's pull up Exhibit 18.
23 (Exhibit No. 18 marked.)
24 Q. (BY MR. GUY) Exhibit 18 is an e-mail message
25 from Jay LaJone to Mark Dioguardi and Scott Knauer, who

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1 I understand represented Midland Investors, which was
2 the potential and ultimate purchaser of the complexes in
3 2012.
4 A. Okay.
5 Q. Take a look -- if you read through it, if you
6 would, just to become familiar with it.
7 A. Okay. I see that.
8 Q. All right. First of all, do you know why
9 Mr. LaJone was sending this particular e-mail message to
10 Mr. Dioguardi and Mr. Knauer?
11 A. Well, I -- I know, in and around that time, it
12 was an effort to sell the properties. There was --
13 there had been a strategic decision that we were going
14 to shift the company away from owning certain types of
15 assets, and we wanted to just focus on Class A office
16 billings and Class A apartment buildings, and there was
17 just strategic decision to sell off anything but Class A
18 assets. So that -- this portfolio would have been part
19 of that.
20 Q. In -- in the third line of Mr. LaJone's e-mail,
21 the full paragraph, he -- he described -- he, first of
22 all, identified MRI as Midland, but what he says is,
23 "The MRI," and I'm quoting here, "has pledged
24 100 percent of the cash flow and equity in the
25 properties to Pillar Income Asset Management

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1 Incorporated, the asset manager for Transcontinental
2 Realty Investors," which I've been calling TCI. "Pillar
3 currently uses such cash flow for the benefit of TCI.
4 An application is pending with FNMA to transfer the
5 ownership of Midland Residential, LLC to TCI."
6 First of all, have you ever seen a document
7 that evidences that pledge by MRI of all of the cash
8 flow and equity to Pillar?
9 A. I don't recall ever seeing that, no.
10 Q. Okay.
11 A. That, I do -- as I did -- said, there would --
12 there would have been a cash management agreement and --
13 perhaps Jay's confused when he -- what -- in his
14 wording, but it would have been a cash management
15 agreement.
16 Q. Well, he goes -- he says, of course, in the --
17 the -- the last sentence I read, "Pillar currently uses
18 such cash flow for the benefit of TCI."
19 Would there be any reason for that to be
20 the case other than the TCI was the ultimate owner,
21 directly or indirectly, of the apartment complexes at
22 that point?
23 MR. DONOHUE: Objection, form.
24 A. Yeah, I -- I can only go by what he's saying
25 there. I'm assuming Jay, at the time, that's what he

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1 thought was accurate.
2 Q. (BY MR. GUY) All right. Would -- to your
3 knowledge and your memory, what was the relationship of
4 TCI to CRA Midland and the apartment properties in
5 October of 2011?
6 A. Not trying to be cute with you. Okay? Just
7 being candid. I don't recall exactly, but if we look at
8 the -- the Q filing, let's say, from June 30th or
9 September 30th of 2011, it would -- whatever we
10 represented it on TCI's Q report would -- would be
11 what -- what the relationship was.
12 Q. All right. As per his last sentence of that
13 full paragraph before he says, "An application was
14 pending with FNMA," Fannie Mae, "to transfer the
15 ownership of MRI to TCI."
16 Was that true as of October 2011?
17 A. I -- I don't know if there was an -- for me,
18 personally, I don't know if there was an application. I
19 know there was a -- a dialogue about establishing a
20 relationship with -- with Fannie Mae, and that
21 conversation, I was having personally with Fannie Mae,
22 including going up to their offices in Washington,
23 meeting with Dallas people. We were trying to establish
24 a relationship with Fannie Mae.
25 Q. But again, didn't you just tell me that TCF --

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1 that Fannie Mae would not have approved the ownership --
2 the ultimate ownership of the property by TCI?
3 A. Yeah. I did -- I didn't mean -- the -- I --
4 and I didn't mean to refer that I ever stopped trying,
5 and that's why I made the comment --
6 Q. Yeah.
7 A. -- that I ultimately did get them to do it. So
8 I -- I never ever stopped trying to get them to do
9 business with us all for 12 years.
10 Q. All right.
11 MR. GUY: Pull up, if you would, Cole,
12 Exhibit No. 19.
13 (Exhibit No. 19 marked.)
14 Q. (BY MR. GUY) This is another e-mail message
15 from Mr. LaJone in October of 2011 to two attorneys who,
16 I understand, represented other parties who were suing
17 Eric and/or Christine Brauss.
18 Looking at the last paragraph of
19 Mr. LaJone's e-mail, he says to Mr. Palter and Ms. --
20 and Ms. Eisensiat, "As I explained over the telephone,
21 the property is currently under contract to sell, and we
22 have a pending request to our lender with approval of
23 the transfers."
24 Do you know what "contract to sell" he was
25 referring to?

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1 A. I -- I -- I do know the contract was back to
2 the strategy. There was a decision to sell off this
3 West Texas portfolio. And I don't recall who the
4 contract was with, but it may have been a couple of
5 contracts until we finally got it sold. But it was an
6 active effort to sell the property.
7 Q. All right.
8 MR. GUY: And, Cole, if you pull up Exhibit
9 No. 29.
10 (Exhibit No. 29 marked.)
11 Q. (BY MR. GUY) Exhibit 29, Mr. Moos, is yet
12 another Midland Ownership Structure reflecting the
13 overall ownership of TRA Midland with the 21 complexes.
14 And if you move up to the far right upper
15 part of the screen, it reflects MRI being owned
16 100 percent by HRS Holdings, which was itself owned
17 100 percent by Tacco Financial.
18 First of all, do you know who would have
19 prepared this ownership chart?
20 A. The -- the formatting and everything, I -- no.
21 I don't know who personally did it. Typically, it would
22 have come out of the legal department.
23 Q. It would have come out of what, I'm sorry?
24 A. It would come out at the legal department.
25 Q. Okay. And do you know who owned Tacco

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1 Financial Incorporated as of December 31st of 2011?
2 A. I knew the entity existed, but, no, I don't
3 know who -- who owns it.
4 Q. So Tacco Financial was not part of the Phillips
5 Enterprises or any -- or it wasn't a company with which
6 you were affiliated as of December of 2011?
7 A. I -- I -- I don't recall ever being affiliated
8 with Tacco, but I could be wrong. I --
9 Q. If Tacco Financial was the ultimate owner
10 through the intermediate -- or HRS Holdings of MRI, how
11 was it that Mr. LaJone, on behalf of the Phillips
12 entities, was negotiating a sale of the properties to
13 somebody else?
14 MR. JOHANSEN: Objection, form.
15 A. Yeah. I -- I -- I don't know who prepared this
16 document or what the legal ownership is. I -- I'd have
17 to go back to the -- or what would have been filed to
18 county records as to who the owners of the property
19 were. And I -- that would be the legal ownership. I
20 don't know what this form is.
21 Q. (BY MR. GUY) Well, the legal owner,
22 apparently, was TRA Midland.
23 My question is, again -- and I don't think
24 the property records reflect who the owner of Tacco
25 Financial was.

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1 A. You're saying above --
2 Q. Do you have any -- I'm sorry?
3 A. Yeah. To -- to my knowledge, I thought they
4 were owned by TCI, but I -- we'd have to go back to
5 the -- the Qs and Ks to answer that.
6 Q. All right. Let's skip ahead.
7 MR. GUY: Cole, pull up Exhibit No. 25.
8 (Exhibit No. 25 marked.)
9 Q. (BY MR. GUY) And while he's doing that,
10 Mr. Moos, I'm going to be focusing on the February of
11 2012 transaction. And without getting into transaction
12 documents and such, I'm going to focus on the funds
13 arising from it.
14 First of all, do you recall that, in
15 fact -- TRA Midland was, in fact, sold in early 2012?
16 A. Yes, I -- I recall that -- not the exact date,
17 but in and around that time frame, I do remember the
18 sale.
19 Q. What we are looking at -- and pardon me for my
20 scratchy throat here, we're looking at -- in --
21 Exhibit 25 is supplemental responses to interrogatories
22 filed by Pillar Income Asset Management, Inc. in this
23 case.
24 MR. GUY: And if you'll turn, Cole, to the
25 second page.

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1 Pardon me.

2 Q. (BY MR. GUY) This interrogatory, which was
3 sent by our folks, requests information concerning
4 Pillar's distribution of proceeds from the sale of the
5 apartment complexes to Midland Investors in February
6 of 2012. And the response says that "On the day of the
7 transaction, February 17, \$40,697,825.25 was deposited
8 into Pillar's bank account," with TRA Midland being the
9 seller of the properties.

10 So just take me through what may be a very
11 obvious answer, how is it that Pillar receives the
12 deposit of 40-plus-million dollars of the proceeds from
13 the sale?

14 A. It -- it was my understanding from meetings
15 that I was in on the Asset Management side that Pillar
16 was the active manager that -- of the properties. So
17 there was a property management company and then there
18 was an asset management company. Pillar was the asset
19 manager, and as part of that, managed all the cash for
20 the property. So upon a sale, it would have been
21 logical that the funds would have all gone to Pillar
22 on -- on -- because it's with the cash management
23 agreement.

24 Q. And am I correct that Pillar was only an asset
25 manager or cash manager for companies within the

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1 Phillips Enterprises?

2 A. No. No. We -- from time to time -- not -- not
3 as a normal cause of business, but from time to time, we
4 wouldn't -- Pillar had matched someone off properties
5 for other people for various reasons.

6 Q. But do you -- correct me if I recall your
7 answer being that as of February of 2012, your
8 understanding was that TCI was the ultimate owner of the
9 apartment complexes?

10 MR. DONOHUE: Objection, form.

11 A. No. I -- I -- I -- I apologize. I meant to
12 say that if you go back and look at the K, you know,
13 and -- K or Q reportings of TCI, if -- if these -- this
14 portfolio is listed as a TCI asset on -- on that, then
15 it would be on -- then I'm certain it was owned by TCI.
16 If it's not on that Q or K, then TCI would not have been
17 the owner and Pillar was just the -- either way, Pillar
18 was managing -- the part I'm sure of, Pillar was
19 managing from an asset standpoint.

20 Q. (BY MR. GUY) And that -- go ahead. I'm sorry.

21 A. Yeah. So for the ownership, the -- we would
22 need to go back to look at the Qs and Ks to see -- I
23 would have been certain if it was owned by TCI or ARI,
24 it would have been recorded in -- on the Qs or Ks.

25 Q. And that is useful because Exhibit 1, which was

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1 the form 8-K for -- for TCI, and then in the 10-K for
2 the end of 2001 -- 2008, rather, does reflect that TCI
3 was the -- the 100 percent owner of MRI.

4 Their response that I'm referring to in
5 Exhibit No. 25 goes on to identify transfers from Pillar
6 out of those 40-something million dollars to
7 27 different recipients.

8 MR. GUY: And, Cole, you could show him
9 the -- the third page of the response, as well, which
10 shows still a few other recipients.

11 A. Hold on one second. I'm going to just use the
12 restroom. I'll be back in two seconds.

13 MR. GUY: All right. Let's -- let --
14 we'll -- we'll stay on the record briefly.

15 THE WITNESS: Okay. Thank you. I'm back.

16 MR. GUY: Not a problem.

17 Q. (BY MR. GUY) My question is, of these
18 approximately 27 different recipients of funds from
19 Pillar on dates from February the 17th to February the
20 20th of 2012, why were the funds transferred in that way
21 to these particular recipients?

22 MR. JOHANSEN: Objection, form.

23 A. I -- I can't answer why. I know why each of
24 the -- you know, I'm 90 percent certain I recall every
25 one of the items on here, but I -- I can't answer as to

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1 why the -- that process.

2 Q. (BY MR. GUY) You say you recall 90 percent of
3 the -- of the transaction on here.

4 Does that mean you -- you recall the reason
5 or just the recipient?

6 A. The -- the -- in -- in the cases, the -- the
7 reason and the recipient in most cases.

8 Q. All right. Can we go through these? And can
9 you tell me -- let's start with the -- the first on
10 February the 17th.

11 MR. GUY: Go back to the previous page,
12 Cole.

13 Q. (BY MR. GUY) Can we briefly go through it and
14 you tell me the reason for the -- for the distributions
15 to each of these that you happen to recall?

16 A. Yeah. There were funds sold to some entity
17 within the chain of companies owned to PlainsCapital. I
18 can't -- American Realty Investors and
19 Transcontinental -- I -- I don't -- you know -- we know
20 what those companies are. I'm assuming it was that
21 treasure at the time, it was putting money and operating
22 accounts.

23 I -- I don't recall Scott Long, Bob Shaw
24 was -- was -- had loans out to the companies that would
25 have been payment to Bob Shaw. Winter Sun was a private

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1 company. I don't know anything about that. H198, I'd
2 have -- I'd have to go back and see, but again, it
3 was -- it was companies with assets owned by TCI.
4 I don't recall Chicory Court, Triad Realty
5 Services, you know. Cross County Mall is a property
6 owned by TCI. PlainsCapital Bank was a major lender.
7 Sunchase American was property management company. I --
8 we already testified about Longfellow Arms in the prior
9 depositions.
10 Do you want to skip down?
11 MR. GUY: Go to the next page, if you
12 would, Cole.
13 A. Don Carter was a -- a lender to the company or
14 the enterprises. Ryan Phillips had a loan that he had
15 made to the company at that time. Pillar -- Pillar
16 account, assuming that's for working capital. Winter
17 Sun was a privately owned company. Stellar Aviation,
18 there's an airplane that was used and the bills for the
19 airplane was paid through Stellar Aviation.
20 PlainsCapital -- I -- I don't know why -- I -- I'm not
21 certain why we keep seeing it on those different dates.
22 Okay. Transcontinental, same thing.
23 Winter Sun, I -- I already indicated it was a private
24 company. BB&T, had a -- a loan out -- no, that's just a
25 working capital account. Regis Realty. Regis Realty,

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1 it's like Pillar, but it was a management company for
2 the commercial side of the business. American Bank of
3 Commerce was a bank we do business with. I already
4 indicated about Winter Sun and previously testified
5 about Vistas at Vance Johnson. I think it's Jackson,
6 but maybe I'm wrong. I think -- I actually think it was
7 Vistas at Vance Jackson, not Vistas at Vance Johnson,
8 but I could be wrong.
9 Q. (BY MR. GUY) I think you're maybe right.
10 Let's go back to the very first entry
11 you've made.
12 You said PlainsCapital Bank was a major
13 lender to whom? Who was the borrower for whom
14 PlainsCapital was the major lender?
15 A. We -- we had land loans out with PlainsCapital,
16 and the land loans, I -- I think the bank, though they
17 may have been several single-purpose entities and
18 several parcels of land, it would not have been unusual
19 at the time, but they were commingled into a single
20 operating account loan. And it could have been, you
21 know, several, several parcels of land owned by several,
22 several different entities.
23 Q. In some of the responses you gave me as you
24 went down to 27 entries, you mentioned that some of
25 these company had loans out to a different company.

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1 As far as you know, did any of the 27
2 recipients identified on Pages 2 and 3 of Exhibit
3 No. 25, did any of them have loans pending and
4 outstanding to TRA Midland?
5 A. Not -- I -- I don't recall.
6 Q. Was the answer likely no, that none of these
7 companies actually had loaned money to TRA Midland?
8 MR. DONOHUE: Objection, form.
9 A. The -- the way that cash management agreement
10 worked when there was excess cash at a property, it
11 would -- well, I guess, swept into Pillar, when the
12 property needed cash, money would come from Pillar to
13 the property. So indirectly, it's possible that any of
14 those West Texas properties that needed working capital
15 or capital improvements, they would have flow through
16 Pillar.
17 So, you know, I'll -- I'll just use it as
18 an example. Don -- Don Carter, it's possible that Don
19 Carter lent money to -- he didn't lend 6 million at one
20 time. Let's say he lent the half a million dollars.
21 That half a million dollars could have very possibly
22 been needed because one of the properties in West Texas
23 had roof damage and needed to be -- roof needed to be
24 fixed, and that's where the source of the capital came
25 to fix the roof.

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1 Q. (BY MR. GUY) Okay. I have not seen any
2 evidence that Don Carter loaned money to TRA Midland.
3 Have you ever seen any document that would
4 indicate that?
5 A. As I said, I never would have gone direct.
6 Everything was through Pillar. So I -- you're
7 absolutely correct. I would -- would be shocked to see
8 a loan directly from Don Carter to the property because
9 that was not our motive operandi, we always operated the
10 same way. Everything flowed through Pillar.
11 Q. I understand that, Mr. Moos, but it's now
12 almost nine years after this transaction took place, and
13 after these transfers took place, and as referenced to
14 the Exhibit 25, can you tell me any benefit that TRA
15 Midland received from any of these transfers of funds
16 reflected on Pages 2 and 3 of this exhibit?
17 MR. JOHANSEN: Objection, form.
18 A. No -- no, I mean, I -- I'm not saying they
19 didn't -- don't take me wrong. I don't recall. That's
20 the better answer, I'm not going to speculate. I -- I
21 don't recall.
22 Q. (BY MR. GUY) Okay. Let's turn to Exhibit 20,
23 which is the petition I referred to earlier that
24 you've filed in your litigation with Prime and Pillar
25 and others.

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1 I'm just going to ask you about some
2 statements within it, and your lawyer is here, and he
3 will make sure that I don't stray you into privileged
4 territory, because I have no intention of doing that.
5 Exhibit 20 is a petition that was filed on
6 your behalf, looks like on November the 25th of 2020, in
7 the district court here in Dallas, Texas, 160th District
8 Court.
9 MR. GUY: Let's turn, if we would, Cole, to
10 Page 3.
11 Q. (BY MR. GUY) Paragraph 11 says, "The late Gene
12 Phillips founded the real estate portfolio that
13 eventually became Transcontinental Realty Investors,
14 Inc. or TCI."
15 And that statement is true, is it not?
16 A. Yes.
17 Q. And then in Paragraph 13, you identify four
18 companies, Pillar, Prime, TCI, and ARL as the Phillips
19 entities. You make that a defined term.
20 And then in Paragraph 15, you state that
21 Gene Phillips, and I'm quoting here, "passed away in
22 2019, significantly altering the control and management
23 of the Phillips entities," and I'll stop the quote
24 there.
25 In what way, Mr. Moos, did Gene Phillips'

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1 passing alter the control and management of Pillar and
2 Prime and TCI and ARI?
3 A. Up -- up to that point, I -- I would talk with
4 Gene Phillips, you know, in a fairly regular basis, we
5 would have conversations. And after his passing, I
6 received a letter from the trustees of the May Trust,
7 which asked me to cooperate and insist Brad Phillips,
8 and Brad took the letter to mean that he was in control
9 of making more of the decisions.
10 Q. All right. And for the record, what is the May
11 Trust?
12 A. The May -- when you go up -- the -- it's what
13 we -- inside the Phillips entities, we call the -- the
14 top layer. The May Trust is a trust that Gene
15 established decades ago for his six children. And in
16 the public side, that -- they control about
17 80-plus percent of the public companies, and then they
18 have probably dozens of other private companies that
19 roll into -- ultimately roll into the May Trust as well.
20 MR. GUY: Cole, let's go to Page 8 of
21 Exhibit 20.
22 Q. (BY MR. GUY) On Page 8, in Paragraph 38, you
23 refer to an assertion by Brad Phillips that you assigned
24 your Class B interest in a company called BAC of --
25 of -- assigned, rather, your interest in that company.

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1 And you say, "These past assertions are categorically
2 false."
3 And you go on, in Paragraph 39, to speak of
4 a document that Brad Phillips claims to be in possession
5 of to demonstrate the assignment, and you say, "Upon
6 information and belief, Brad Phillips created this
7 document and did so without Moos's knowledge or
8 consent."
9 Mr. Moos, do you know of any other
10 documents falsely created at any time during your tenure
11 with any of the Phillips Enterprises?
12 MR. DONOHUE: Objection, form.
13 MR. JOHANSEN: Objection, form.
14 A. Created by who?
15 Q. (BY MR. GUY) Anyone.
16 MR. JOHANSEN: Objection, form.
17 MR. DONOHUE: Same objection, form.
18 A. I'll answer the question by saying there was
19 always give-and-take and lively discussions, so it would
20 not be unusual for someone to have created a document
21 and bring it to me, or in this case, to Gene Phillips,
22 in some cases, and ask us to execute the document. And
23 it ultimately never got executed, and it would never
24 have gotten executed for one or two reasons. One would
25 be the person preparing it had misinformation or wrong

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1 information, or we didn't agree with -- or we
2 just didn't agree with what it was.
3 So -- so there would be a distinction here
4 between what was executed and what wasn't executed. But
5 it's a lively organization and we always debated things
6 internal, Gene and I did. Post-Gen, that's a different
7 story.
8 Q. (BY MR. GUY) All right. My question may have
9 been a bit inartful, so let me see if I can rephrase it.
10 A. Sure.
11 Q. I -- I'm not referring to drafts put together
12 for a consideration and for potential execution that
13 were never executed.
14 During your tenure with any of the Phillips
15 companies, Prime, Pillar, TCI, ARI, IORI, any of the
16 others from 2007 on, were you aware of any documents
17 that were created and -- or a signature was forged, a
18 document that reported to be a binding executed document
19 that really was not so because it had not been executed
20 by the person who was supposedly the -- the one giving
21 out his or her rights?
22 MR. JOHANSEN: Objection.
23 A. Yeah. I'm not -- I'm not going to talk about
24 my personal situation and the documents you're showing.
25 I -- I'm not comfortable discussing that here. But I --

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1 I -- I'm not aware of any -- anything that I'm aware of,
2 personally, that was ever forged. I'm -- I'm not
3 talking about my action here, this lawsuit, but I'm not
4 aware of anything else that was ever a forged
5 signature --
6 Q. (BY MR. GUY) Understood.
7 (Simultaneous crosstalk.)
8 (Audio distortion.)
9 A. -- (inaudible).
10 Q. (BY MR. GUY) And I would not ask you to cite
11 any positions that might conflict with your lawsuit.
12 A. Yeah.
13 Q. Are you aware of any documents that were
14 falsely backdated to your tenure with any of the
15 Phillips entities?
16 A. Never falsely.
17 Q. All right. Tell me what you mean.
18 How can a document be backdated but not
19 falsely?
20 A. I know situations where, you know, a -- a
21 document was -- was lost, and we -- we created the
22 document using the date, but we put on there that this
23 was a recreation from the date it was done. Or we use a
24 document and we would say on the document it had an
25 effective date to a prior date. And we disclose that --

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1 that, "Hey, here's the document that" -- you know,
2 "document was missing or loss." Usually, in most cases,
3 it was done with the consent of all parties. I -- I'm
4 not aware of anything -- you know, if I was involved, it
5 was a consent with all parties.
6 Q. All right.
7 MR. GUY: Cole, let's go to Exhibit No. 3.
8 Q. (BY MR. GUY) And while he's getting it on the
9 screen, Mr. Moos, Exhibit 3 is going to be the report on
10 Form 10-K to the Securities and Exchange Commission for
11 the year ending December 31st of 2008 for ARI.
12 (Exhibit No. 3 marked.)
13 MR. GUY: And I ask you to turn, Cole, if
14 you would, to Page 3. And go down and blow up the next
15 to the last paragraph on that page, if you would, Cole.
16 Q. (BY MR. GUY) Roughly halfway down in that next
17 to the last paragraph on Page 3 of the 2008 ARI 10-K,
18 the statement is made referring to Gene Phillips, "While
19 Mr. Phillips is not an officer or director of ARI" -- I
20 think it says "ARI" here, "he does regularly consult
21 with executive officers and directors of ARL in
22 rendering advice and input with respect to investment
23 decisions affecting ARL, Prime" -- "together with its
24 subsidiary" -- "of ARL," excuse me, and I'll stop the
25 sentence there.

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1 Was that sentence true as of December 31st
2 of 2008?
3 A. In 2008, it was accurate. It subsequently
4 changed, but in 2008, that was true.
5 Q. This is a document containing excerpts from
6 that 10-K. It's not a full copy of the 10-K.
7 MR. GUY: I'll ask you, Cole, to turn to
8 the page that has 64 at the bottom. It's several pages
9 into this short -- documents.
10 THE VIDEOGRAPHER: You said to the 64 at
11 the bottom, the number 64?
12 MR. GUY: Sixty-four at the bottom, yeah,
13 you're -- you're getting closer.
14 Maybe the exhibit does have the entire
15 thing. Go to 64. Maybe -- it looks like I have
16 excerpts and you have the full thing.
17 THE VIDEOGRAPHER: I only have --
18 MR. GUY: Yeah, keep going.
19 THE VIDEOGRAPHER: -- 25 pages, but keep
20 going, though?
21 MR. GUY: Keep going. There you go. There
22 you go. One more page.
23 Q. (BY MR. GUY) We're now in Page 64. And
24 under Note 13, Advisory Agreement, which speaks of the
25 day-to-day operations of ARL being performed by Prime,

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1 The second sentence under the heading -- the second
2 paragraph, rather, under the heading, "Advisory
3 Agreement," contains the statement, "Mr. Phillips is not
4 an officer or director of Prime, but serves as a
5 representative of the Trust," meaning the May Trust, "is
6 involved in regular consultation with the executive
7 officers and directors of Prime, and has significant
8 influence over the conduct of Prime's business including
9 the rendering of advisory services and the investment
10 decisions for Prime and for ARL."
11 And I won't ask you to refer to it and take
12 more time, but that exact same language appears on
13 Page 89 -- Page 99, rather.
14 So is it true, as stated in this Form 10-K,
15 Mr. Moos, that in 2008, Gene Phillips had significant
16 influence over the conduct of Prime's business?
17 A. Yes, that's true. And like I said, it changed
18 several years later. But at that time, it was true.
19 Q. And since the date of the operations of ARL
20 were, according to this document, performed by Bryan,
21 would the same be true of ARL, that Gene Phillips, in
22 2008, had significant influence over the decisions of
23 ARL?
24 A. Yes.
25 Q. And would the same have been true in 2008 with

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1 respect to TCI, which also had an advisory agreement
2 with Prime?
3 A. Yes.
4 Q. And also for IORI?
5 A. Yes.
6 MR. GUY: Cole, if you would, go to
7 Exhibit 32.
8 (Exhibit No. 32 marked.)
9 Q. (BY MR. GUY) Mr. Moos, you may or may not have
10 seen this. This is a March 3rd of 2014 order by a
11 bankruptcy judge, Harlin Hale, dismissing a bankruptcy
12 case filed on behalf of American Realty Trust, which
13 I'll call ART, distinguished from ARI.
14 First of all, what was ART? What was
15 American Realty Trust?
16 A. I remember this bankruptcy pretty well,
17 unfortunately. It -- it was an entity that was
18 established to effectuate the bankruptcy process.
19 Q. All right. Did you testify at the hearing on
20 the motion to dismiss the ART bankruptcy filing?
21 A. Yes, I did.
22 Q. On Page 2 --
23 MR. GUY: Turn to that, if you would, Cole.
24 Q. (BY MR. GUY) Second full paragraph, it looks
25 like it's already highlighted. That's a mistake, but

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1 the paragraph that's been highlighted says -- it's
2 Judge Hale, actually, saying, "Gene Phillips, a local
3 real estate investor and former banker and insurance
4 company owner, controls at least three publically-traded
5 entities: ARI, TCI, and Income Opportunity Realty
6 Investors, Inc."
7 Do you agree, Mr. Moos, that until he died,
8 Gene Phillips controlled ARI and TCI and IORI?
9 A. No.
10 MR. JOHANSEN: Objection, form.
11 A. No, I don't -- I don't -- I don't --
12 MR. DONOHUE: Same objection, form.
13 A. I don't agree with that until he died.
14 Q. (BY MR. GUY) Okay. Was there a day after
15 until which he did, in fact, control or had impact on
16 the major decisions of -- or rather, controlled these
17 three public entities?
18 A. Sometime in or around -- after I become the CEO
19 of the company in -- and a year or two into that, Gene
20 stepped out of having any control. In other words,
21 he -- no one in the company was permitted to do anything
22 in the public companies without my consent. He -- he
23 always had an opinion, and I actually admired -- the
24 guy's a genius, smart guy. We didn't know his degree,
25 but sometime or in around the, let's say, 2/15, 2/16

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1 period, he relinquished day-to-day management and --
2 and/or control -- and/or control with private to the
3 public companies.
4 Q. So does that mean that -- that -- you're
5 testifying that Gene Phillips controlled ARI, TCI, and
6 IORI up until 2015 or 2016?
7 A. Somewhere --
8 MR. JOHANSEN: Objection, form.
9 A. -- in that time frame, and -- and I can't give
10 you the exact date, but it had happened a little bit of
11 time by 2/15, 2/16. I -- I don't really -- he knew
12 about everything that was going on, never kept any
13 secrets from them. He was highly engaged. I thought he
14 was one of the smartest men that I've ever had the
15 pleasure to work with in my career. Just absolutely a
16 brilliant person.
17 But we couldn't successfully get out of the
18 hole that had been dug financially with the real estate
19 collapse with -- with Gene, and this bankruptcy case,
20 you know, was evidence of that, and my comment about
21 Fannie and Freddy Mac. So the changes had occurred.
22 And we didn't ask about --
23 (Simultaneous crosstalk.)
24 (Audio distortion.)
25 A. -- we didn't ask about that.

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1 Q. (BY MR. GUY) Okay. Judge Hale went on to
2 define that -- and -- and he -- he -- first of all, he
3 defined ARI and TCI and IORI as the Pillar entities.
4 And he actually entered a finding that, quote, The
5 Pillar entities are heavily intertwined, and I'll stop
6 the quote there.
7 Do you agree with that finding by
8 Judge Hale?
9 A. Not -- not completely. You know, there was
10 testimony given and some things -- I mean, Judge Hale is
11 a very, you know, smart guy, smart -- smart judge. I
12 don't -- I don't agree with all of his findings, you
13 know, but some of it was accurate, some of it wasn't
14 accurate. We opted -- we could -- not -- we could have
15 appealed. We opted not to appeal it.
16 Q. We have not yet discussed the company called
17 EQK Holdings.
18 You were an officer of EQK, were you not?
19 A. Yeah. And it would have fallen in the same
20 general concept of what we just talked about with ARI,
21 TCI, and these others that over time, you know, Gene had
22 stepped away from that as well.
23 Q. And the -- the -- the records I've seen
24 indicate that you were a director and president since
25 April of 2007, treasurer since November -- since

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1 September of 2009, and secretary since March of 2010.
2 Does that sound consistent with your
3 memory?
4 A. Yes, it does.
5 Q. And was EQK Holdings a subsidiary of ART?
6 A. I -- I don't know. I don't remember where it
7 goes off.
8 Q. Okay. And American Realty Trust, ART, that was
9 the subsidiary of ARI, was it not?
10 A. At -- at one time, but for the bankruptcy --
11 and -- and again, we had legal advice. We never wanted
12 the bank -- you know, to deal with lenders and still
13 coming through, on this case, Clapper lawsuit. I
14 don't -- I was nothing -- I had nothing to do with the
15 original origins of the Clapper lawsuit. So I -- I
16 don't know where it all came from. This lawsuit, my
17 understanding, comes back 15-plus years.
18 Q. Do you recall a 73-million-dollar judgment
19 being recovered on -- on behalf of a group called The
20 Atlantic Parties against American Realty Trust and
21 another entity called ART Midwest?
22 A. Well, recovered means in the terms of money,
23 no. Never been any money --
24 Q. Entered. Forgive me, that's a good
25 clarification.

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1 Entered or rendered.
2 A. Yeah, there was a judgment -- they -- they did
3 obtain a judgment, yes.
4 Q. On Page 3 of this same exhibit, Exhibit 32,
5 Judge Hale found that several weeks before the trial of
6 that case involving The Atlantic Parties, ART -- and
7 here's -- quoting here, "Entering the several
8 transactions that left ART without any significant
9 assets." And among those transactions that he recites
10 was a transfer of 922,737 shares of TCI owned by ART to
11 ART subsidiary, EQK Holdings, or what he called an
12 alleged credit on a 5.9-million-and-change debt that ART
13 supposedly owed to EQK. This was in January of 2011.
14 At that time, you were the president and
15 CEO of ART's parent company, and you were the president
16 of EQK Holdings.
17 Mr. Moos, were you involved in the
18 transaction that Judge Hale described here?
19 A. Probably would have been, yes.
20 Q. Where ART transferred more than 900,000 shares
21 of TCI stock to its subsidiary, EQK?
22 A. It -- it -- it sounds -- it sounds like it
23 occurred -- I -- I knew about it, yes.
24 Q. Judge Hale says that transfer was in return for
25 the cancellation of a 5.9-million-dollar company --

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1 intercompany debt, that he refers to as a supposed
2 intercompany debt.
3 What, if anything, do you know about that
4 supposed intercompany debt?
5 A. Okay. If you look at the public companies'
6 balance sheets, you will see long before I got to the
7 company and -- and after I was terminated, there is
8 intercompany obligations shown on the financial records,
9 and soon -- at some point, because TCI is owned -- does
10 have some public shareholders, sooner or later, the
11 companies are going to have -- the family is going to
12 have to figure out how to deal with that.
13 Q. Mr. Moos, was the reason for this transaction
14 actually to dispose of a valuable asset before a
15 potential multimillion dollar judgment against ART?
16 MR. DONOHUE: Objection, form.
17 MR. JOHANSEN: Objection, form.
18 A. No, I -- that -- that's not -- I -- I had
19 lawyers involved and I -- and in doing the transaction,
20 the lawyers that would have been representing the
21 company would not have been lawyers involved in -- in
22 the lawsuit. And so they -- I -- I don't necessarily
23 believe they were related. We did have an effort --
24 a -- conscious efforts, from my vantage point,
25 there's -- always to make the balance sheet.

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1 Remember, my job was to go out and find
2 money and raise capital, get HUD to do business with us,
3 Fannie, Freddy, which, as I said before, got both
4 Fannie and Freddy to do loans with us. My goal was
5 always to -- to present the very, very best balance
6 sheet and -- that I could for the public companies. So
7 that would have been my motive operandi for doing
8 whatever the judge is referring to. That's why I said I
9 don't agree with everything he said.
10 Q. (BY MR. GUY) Understood.
11 Judge Hale goes on to describe another
12 transaction a week later in which American Realty Trust
13 sold its ownership interest in the subsidiary, EQK,
14 which, of course, now held more than 900,000 shares of
15 ticket -- TCI spot to the parent, ARI, in return for
16 10,000 shares of EQK preferred stock.
17 Do you recall that transaction?
18 A. And -- and again, I know the path you're going
19 down, and let me -- you know, I'm just being straight up
20 honest person, you know. I -- justice needs to be
21 justice served, you know, regardless.
22 What -- the -- an opportunity presented
23 itself where after all these years of coming through a
24 horrible recession, that if we could free up some stock,
25 we could use that stock to leverage, leverage a few --

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1 when the family owned the stock, people wouldn't lend
2 money to the company, it wouldn't, you know, take the
3 stock that's collateral. There is a mechanism that --
4 because of my reputation, that we would be able to get
5 loans from institutions, with me as the guarantor,
6 pledging company stock, which -- which did occur.
7 And so all what you're talking about, the
8 moving of the stock, I -- I don't believe it had
9 anything to do with disenfranchising Clapper at all. It
10 had to do more with the intent the company needed
11 capital, wanted to grow, and we would try to free up
12 stock that I -- we could go out. You go look at the
13 history, I was successful in doing that. There are
14 loans out there that stock was pledged out, and my name
15 is still guarantor in a bunch of that stuff even though
16 I'm not an officer anymore.
17 Q. All right. Just a couple more.
18 Judge Hale also found that the preferred
19 stock -- the referred stock of the EQK didn't exist
20 until after that transaction was documented.
21 As the president of EQK, were you aware of
22 the timing of the issue until the referred stock that
23 ostensibly was the consideration for ART sale of EQT --
24 EQK?
25 A. No. I would have --

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1 MR. DONOHUE: Objection, form.
2 A. -- relied on our both internal and external
3 lawyers working on the corporate side, our corporate
4 lawyers. More like a guy like -- the name is Steve
5 Metzger, he was our SCC corporate lawyer. Luke Warner,
6 who's our general counsel. I would have relied on those
7 people, you know -- yeah, when the -- that this referred
8 stock to do, and I wouldn't have done it myself. I've
9 been aware of the dates.
10 Q. (BY MR. GUY) I understand you testified
11 earlier that you never backdated documents.
12 Let me just ask, were you asked to backdate
13 any documents to cover up any kind of a transfer of
14 asset out of ART?
15 MR. JOHANSEN: Objection, form.
16 MR. DONOHUE: Same objection.
17 A. That -- that's -- I made that comment. That
18 was not one of the things that I -- I recall ever being
19 asked to do through others, but that's not one I was
20 asked to do.
21 Q. (BY MR. GUY) Okay. So, again, do I understand
22 you were asked to backdate documents, but you declined
23 to do so on occasion?
24 A. No.
25 MR. DONOHUE: Objection, form.

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1 A. My --
2 MR. GUY: I'm -- I'm asking for
3 clarification.
4 A. Yeah. And I'll repeat what I said, and I'm
5 sorry if I wasn't clear. A clerk, somebody would bring
6 a document to me, and I'm looking at a document, and I'm
7 saying, "Hmm" -- and some of this is true. I traveled a
8 lot. It could have been a document that had been laying
9 in my office for a couple of weeks, sometimes a couple
10 of months, or some had a long date on it. I --
11 I wouldn't sign it. I make them go back and change the
12 date. So, again, it was a -- it was a mistake or an
13 error, not an attempt to defer to somebody.
14 MR. GUY: All right. Let's go off the
15 record for about five minutes, if we could.
16 MR. JOHANSEN: Okay.
17 THE VIDEOGRAPHER: We're going off the
18 record at 7:50 p.m. GMT time.
19 (Break from 1:50 p.m. to 2:02 p.m.)
20 THE VIDEOGRAPHER: We're going back on the
21 record at 8:02 p.m. GMT time.
22 Q. (BY MR. GUY) Mr. Moos, I appreciate your
23 patience. I have just a few more questions for you. I
24 wanted to go back to --
25 MR. GUY: Cole, if you would put Exhibit 32

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1 back on the screen, which is, once again, this ruling on
2 motion to dismiss and convert by Judge Hale. And turn
3 to Page 11. Page 11.
4 Q. (BY MR. GUY) Near the bottom of the page in
5 the paragraph that would carry over to the next page,
6 Judge Hale made reference to transfers and he says, in
7 the second line of the paragraph, "Numerous documents
8 relating to these transactions are dated and sometimes
9 even notarized on dates before they were approved. For
10 one certain transaction, the transfer of ART Edina,
11 notarized documentation shows that this entity was
12 transferred for consideration of \$5,993,055 on
13 December 31, 2010, but it appears that, in fact, this
14 transaction was not even proposed to Debtor's Board of
15 Directors until March 3, 2011, at a price of 2,000" --
16 "\$993,055." I'll stop the quotation there.
17 Mr. Moos, what involvement did you have, or
18 what knowledge do you have of this transfer of ART Edina
19 and Judge Hale's findings there?
20 MR. JOHANSEN: Objection, form.
21 MR. DONOHUE: Objection, form.
22 A. I -- I don't -- I -- I recall reading this
23 document, but I -- I don't recall what the judge is --
24 was referring to. I -- I did indicate before, sometimes
25 the company used to process that, you know -- it's

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1 something on an effective date, but I'm -- I -- I'm not
2 alluding that. I don't know. I'd have to see the --
3 the documents to give you a real answer.
4 Q. (BY MR. GUY) You don't have any knowledge of a
5 falsified notarization involving the transfer of ART
6 Edina?
7 A. If I remember the -- I mean, I was sitting in
8 the courtroom, and I heard the testimony of the young
9 lady who was the notary. And I recall from her
10 testimony was -- she was sloppy -- her testimony was she
11 was sloppy in the way she notarized her book, you know,
12 how a notary asked to notarize something and put it in a
13 book, and that it was notarized in the right dates, but
14 she didn't record it properly. That's what I remember
15 her testifying.
16 Q. Do you recall anything about the transactions
17 being proposed to the board of directors at a price of
18 2.9 million, and only later changed, month and half
19 later, to 5.9 million?
20 A. No, I -- I -- I don't recall being involved
21 with the board on that at all.
22 Q. And finally, on the next page, Judge Hale
23 refers to the ART Edina transaction as, quoting here,
24 "not the only occurrence of backdating."
25 Now just to ask again.

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1 Does that refresh your memory as to other
2 instances of backdating a transaction from dates that
3 have made them occur to appear effective before they
4 actually were approve?
5 A. Yeah, I --
6 MR. JOHANSEN: Objection, form.
7 And -- and, Ryan, are you referring to
8 something that goes to the next page?
9 MR. GUY: Yes. I'm sorry.
10 You could go to the next page, if you
11 would, Cole.
12 MR. DONOHUE: Object to form, also, on the
13 last question.
14 MR. GUY: Okay. First sentence of the
15 first full paragraph on Page 10, my apologies.
16 Q. (BY MR. GUY) So there's been an objection to
17 form, but you may answer the question subject to that
18 objection, Mr. Moos.
19 A. Yeah. There is nothing that I knowingly would
20 have been involved with.
21 Q. You've made reference to the SNL prices a few
22 moments ago.
23 Do you recall which Phillips entity or
24 entities defaulted on loan obligations during our
25 preceding what's been called as the SNL prices?

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1 A. Yeah. My knowledge comes from the fact that I
2 was working for U.S. Bank prior to joining the company,
3 and I had the opportunity to read the credit files that
4 U.S. Bank had, though I wasn't involved in the lending
5 side, and I didn't know Gene Phillips until like a month
6 or two -- even knew about him until a month or two after
7 I -- before I came to work for the company. It -- it
8 had a long dissertation about what had happened. It was
9 Southmark Corporation and the savings and loan -- I
10 think it was -- it was Sanchez-Santos Savings. And the
11 reason I remember that is because I had lived in Houston
12 and I remember Sanchez-Santos Savings.
13 So that was the -- that was the transaction
14 that caused the -- the loss to -- federal government --
15 the bail on it. I think at the time, 400 million was
16 the highest bail out -- bail out -- the highest amount
17 of insurance claim that had ever been on our financial
18 institution. I think I --
19 Q. You made reference to a long process of
20 obtaining approval for government bank transactions.
21 In 2008, was it still the government's
22 position that it would not loan money to TCI, for
23 example?
24 A. Yeah. The -- we ran into a problem with Hud.
25 And -- and again, this has all been publicly talked

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1 about and published. There was a process -- that would
2 have been me, where they used to borrow money from the
3 Hud, and it would be 19.9 percent entities, so you
4 didn't have to disclose who the owners were.
5 And I actually went to Hud and
6 self-reported the company, with consent of the board of
7 directors, when I effectively took over the real
8 management of the company. And I -- I self reported to
9 Hud. Collections of the sanctions were nothing more
10 than a slap on the wrist.
11 And then a couple of years later, it become
12 the largest insured lender in the Hud world, over
13 \$800 million worth of line of credit with Hud. I got
14 Fannie to do business with us. I got Freddy to do
15 business with us. That was all after, you know,
16 Mr. Phillips was gracious enough to turn over the
17 control of the company to me.
18 Q. Okay. So is that referring to the time frame
19 you were testifying to earlier, 2015 or 2016, when you
20 said, I think your words were, "Gene stepped away"?
21 A. Yes. It's somewhere in that -- and again, it
22 happened over -- you know, he's a smart guy and he's
23 always -- he and I always talked -- brilliant guy.
24 Mr. Phillips was a smart guy, and I -- as a matter of
25 fact, the Sunday night before he died, he and I talked.

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1 I didn't -- I didn't know he was dying. You know, we
 2 talked regularly, but he never forced a decision on me
 3 on that period.
 4 Q. So I understand -- and again, just so that I
 5 understand --
 6 (Simultaneous crosstalk.)
 7 (Audio distortion.)
 8 A. -- and went forward until the day he died.
 9 Q. (BY MR. GUY) All right. And I know that it
 10 had to be difficult.
 11 So did you attempt to obtain loans for, for
 12 example, TCI, since the government refused to make up
 13 until the point when Mr. Phillips ceased to be involved
 14 in management?
 15 A. Yes. The -- that's correct. And we -- we were
 16 not having success.
 17 Q. All right. And I asked you a few moments ago
 18 about something and your answer made some reference to,
 19 "I'd have to look at my notes."
 20 Do you have personal notes or desk files
 21 that have not been produced in this case?
 22 A. Let me -- let me say this to you, that --
 23 when -- I was locked out of my office by Brad Phillips,
 24 and it came as a surprise this happened. Then -- then
 25 my lawsuit was filed. So my lawsuit was filed after

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1 that. So he had already made a decision to lock me and
 2 my associates out of the offices. And there are still
 3 boxes and boxes and boxes of stuff and -- like, for
 4 example, in preparation of this deposition, I would have
 5 normally gone back and rechecked to see if there was
 6 other information. And I -- I -- I don't have that
 7 luxury because my records and everything are all locked
 8 up.
 9 Q. Who else was locked out of their offices, if
 10 anyone, besides you?
 11 A. Well, my executive assistant, though, you know,
 12 they since let her go back in to pick up -- print
 13 something. And just her and I, because by that point,
 14 all of the other employees had been moved from having
 15 worked for me. So the only person -- I worked for the
 16 joint venture. So that's -- the joint venture doesn't
 17 own the office building so they -- we were able to walk
 18 me out of the building.
 19 Q. As far as you know, does Gene Bercher still
 20 work for the enterprises?
 21 A. I -- I -- I think he's a consultant. He may be
 22 paid, but I -- I -- yeah, I think he's still around.
 23 MR. GUY: Mike, this is the first we've
 24 heard of these files. So let me just say, for the
 25 record, be sure to notice or preserves, and we can talk

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1 about those later on. But let's not -- not have those
 2 destroyed and -- while we're trying to determine where
 3 those might be or what's in those files.
 4 And with that, I'll pass the witness.
 5 MR. DONOHUE: We'll reserve questions until
 6 time of hearing or trial.
 7 MR. JOHANSEN: No questions here.
 8 MR. GUY: Mr. Moos, thank you for your
 9 time.
 10 I'm happy to go off the record, Cole.
 11 THE WITNESS: Okay. Thank y'all.
 12 THE VIDEOGRAPHER: This concludes the
 13 videotaped deposition of Daniel Moos. We're going off
 14 the record at 8:13 p.m. GMT time.
 15 (Deposition concluded at 2:13 p.m.)
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CHANGES AND SIGNATURE

1 WITNESS NAME: DANIEL MOOS DATE: JANUARY 18, 2021

2 PAGE LINE	CHANGE	REASON
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1 I, DANIEL MOOS, have read the foregoing
deposition and hereby affix my signature that same is
2 true and correct, except as noted above.
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4
5 _____
DANIEL MOOS
6
7 THE STATE OF _____)
8 COUNTY OF _____)
9
10 Before me, _____, on this day
11 personally appeared DANIEL MOOS, known to me (or proved
12 to me under oath or through _____)
13 (description of identity card or other document) to be
14 the person whose name is subscribed to the foregoing
15 instrument and acknowledged to me that they executed the
16 same for the purposes and consideration therein
17 expressed.
18 Given under my hand and seal of office this
19 _____ day of _____, _____.
20
21
22 _____
23 NOTARY PUBLIC IN AND FOR
THE STATE OF _____
COMMISSION EXPIRES: _____
24
25

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1 That the deposition transcript was submitted on
2 _____ to the witness or to the attorney
3 for the witness for examination, signature and return to
4 me by _____;
5 That the amount of time used by each party at the
6 deposition is as follows:
7 Mr. Ray Guy - 03:08:22
8
9 That pursuant to information given to the
10 Deposition officer at the time said testimony was taken,
11 the following includes counsel for all parties of
12 record:
13 Mr. Ray Guy & Mr. Todd J. Harlow, Attorneys for
Plaintiff
14
15 Mr. Michael Donohue, Attorney for Defendant
16
17 Mr. Mark Johansen, Attorney for Mr. Daniel Moos
18
19 I further certify that I am neither counsel for,
20 related to, nor employed by any of the parties or
21 attorneys in the action in which this proceeding was
22 taken, and further that I am not financially or
23 otherwise interested in the outcome of the action.
24 Further certification requirements pursuant to Rule
25 203 of TRCP will be certified to after they have
occurred.

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1 CAUSE NO. DC-13-13354
2 RENATE NIXDORF GmbH & CO.) IN THE DISTRICT COURT
KG, and WATERCREST)
3 PARTNERS, L.P.)
4)
Plaintiffs,)
5 v.) 191ST JUDICIAL DISTRICT
6)
TRA MIDLAND PROPERTIES,)
7 LLC, et al.)
8)
Defendants.) DALLAS COUNTY, TEXAS
9
Consolidated with Cause No. DC-17-06190
10 RENATE NIXDORF GmbH & CO.) IN THE DISTRICT COURT
KG, and WATERCREST)
11 PARTNERS, L.P.)
12)
Plaintiffs,)
13 v.) 191ST JUDICIAL DISTRICT
14)
TRA MIDLAND PROPERTIES,)
15 LLC, et al.)
16)
Defendants.) DALLAS COUNTY, TEXAS
17
18 REPORTER'S CERTIFICATION
19 VIDEOTAPED ORAL REMOTE DEPOSITION OF DANIEL MOOS
JANUARY 18, 2021
20
21 I, Jannet Solorzano, Certified Shorthand Reporter
22 in and for the State of Texas, hereby certify to the
23 following:
24 That the witness, DANIEL MOOS, was duly sworn by
25 the officer and that the transcript of the oral
deposition is a true record of the testimony given by
the witness;

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1 Certified to by me this _____ day of
2 _____, 2021.
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Jannet Solorzano, Texas CSR 9183
Expiration Date: 11/30/2021
Firm Registration No. 343
US Legal Support
8144 Walnut Hill Lane
Suite 350
Dallas, TX 75231
Phone: 214-741-6001

1 FURTHER CERTIFICATION UNDER RULE 203 TRCP
2 The original deposition was/was not returned to the
3 deposition officer on _____;
4 If returned, the attached Changes and Signature
5 page contains any changes and the reasons therefor;
6 If returned, the original deposition was delivered
7 to _____, Custodial Attorney;
8 That \$ _____ is the deposition officer's
9 charges to Mr. Ray Guy, for preparing the original
10 deposition transcript and any copies of exhibits;
11 That the deposition was delivered in accordance
12 with Rule 203.3, and that a copy of this certificate was
13 served on all parties shown herein on and filed with the
14 Clerk.
15 Certified to by me this _____ day of
16 _____, 2021.
17
18
19
20

21 _____
Jannet Solorzano, Texas CSR 9183
22 Expiration Date: 11/30/2021
Firm Registration No. 343
US Legal Support
23 8144 Walnut Hill Lane
Suite 350
24 Dallas, TX 75231
Phone: 214-741-6001
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EXHIBIT L

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CAUSE NO. DC-13-13354

RENATE NIXDORF GmbH & CO.
KG, and WATERCREST PARTNERS,
L.P.,

Plaintiffs,

vs.

TRA MIDLAND PROPERTIES, LLC,
et al.,

Defendants.

§ IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
§ 191st JUDICIAL DISTRICT

REALTIMED TRIAL - DAY 7

MARCH 8, 2023

On the 8th day of March, 2023, the following proceedings came to be heard in the above-entitled and numbered cause before the HONORABLE GENA N. SLAUGHTER, Judge presiding, held in Dallas, Dallas County, Texas:

Proceedings reported by stenographic machine shorthand.

A P P E A R A N C E S

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A P P E A R A N C E S (Continued)

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Karen L. D. Schoeve
Certified Realtime Reporter
Registered Diplomate Reporter
Realtime Systems Administrator

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1 A. Yes.

2 Q. Looking at the left side of that demonstrative,
3 we see TCI, correct?

4 A. Yes.

5 Q. TCI had publicly traded stock?

6 A. Yes.

7 Q. Owned approximately 80 percent by ARI, but the
8 other 20 percent, anybody could go buy their stock over
9 the counter, right?

10 A. I don't know for sure, but I think yes.

11 Q. Okay. As a public company, TCI was required to
12 file reports with the Securities and Exchange Commission,
13 correct?

14 A. Yes.

15 Q. Again, to try to speed this process along,
16 Mr. Landess, I'm gonna try not to hit you with a bunch of
17 documents. If I ever ask you a question for which you
18 would like to see the document that memorializes the
19 answer, just tell me so and I'll show you the document.
20 And if, on the other hand, you tell me "Mr. Guy, I could
21 look at the document and read it but that won't refresh
22 my memory," I'll move on. Fair enough?

23 A. Yes.

24 Q. With earlier witnesses, we have seen an annual
25 report on Form 10-K filed with the SEC by TCI for the

1 year-ending December 31st, 2007. It was prepared and
2 filed, I believe, sometime early, perhaps in the spring
3 of 2008. And in one of the schedules to that annual
4 report, MRI is listed as a wholly-owned subsidiary of
5 TCI.

6 Do you have any personal knowledge of that
7 particular document or whether it's correct or not?

8 A. No.

9 Q. Okay. Then I'll just move on from there.

10 And, likewise --

11 MR. GUY: Okay, Amy. One more time,
12 Plaintiffs' Exhibit 6. I don't mean to be getting my
13 exercise this way. And go to the -- mostly to the top
14 third of the page, if you would.

15 DOCUMENT TECHNICIAN: (Complied.)

16 Q. (BY MR. GUY) Plaintiffs' 6 is an ownership
17 chart produced by the defendants in this case from their
18 files, and Plaintiffs' Exhibit 6 reflects Midland
19 Residential Investment, LLC, as being 100 percent owned
20 by TCI, Transcontinental.

21 Do you see that?

22 A. Yes.

23 Q. Okay. Have you seen this document before?

24 A. I don't remember seeing it, but I'm not saying
25 I haven't.

1 THE COURT: Okay. Yeah. Repeat that.

2 MR. KHOURY: Your Honor, I'm gonna object
3 to him mischaracterizing what he claims I said during
4 Opening. That's not -- that's not within this man's
5 knowledge.

6 THE COURT: Okay. I sustained it, and I've
7 said he needs to rephrase it.

8 Q. (BY MR. GUY) As far as you know, Mr. Landess,
9 was the 2007 annual report on 10-K filed with the SEC by
10 TCI ever corrected to reflect that MRI was not actually
11 100 percent owned by TCI?

12 A. I don't know that. I've never seen the
13 2007 10-K, that I recall.

14 Q. One more question: Cheyenne, and later Winter
15 Sun, does provide cash management and accounting services
16 for Southmark, correct?

17 A. Yes.

18 Q. There never has been a 10-K report for
19 Southmark that listed MRI as being owned by Southmark,
20 has there?

21 A. That's correct.

22 Q. Okay. So in 2008 -- for the 2008 10-K and the
23 2009 10-K and the 2010 10-K that we've been told for TCI
24 does no longer list MRI as 100 percent owned, likewise,
25 Southmark has never filed a 10-K listing MRI as its

1 wholly-owned subsidiary, correct?

2 MR. SHAMOUN: Your Honor, I object; assumes
3 facts not in evidence that they're a publicly traded
4 company to require --

5 THE COURT: Okay. So what's the fact
6 that's not in evidence?

7 MR. SHAMOUN: That it's required to have a
8 10-K.

9 MR. GUY: Your Honor --

10 THE COURT: I'll sustain. I'll let you lay
11 a predicate with that, okay?

12 MR. GUY: All right.

13 Q. (BY MR. GUY) Do you know whether Southmark
14 Corporation is, in fact, required to file reports with
15 the Securities and Exchange Commission, including the
16 annual report on Form 10-K?

17 A. So I know very little about that, but I do
18 know, since I've been with Cheyenne or Winter Sun, that
19 Southmark was delisted long ago. And I understood, but I
20 don't know, that 10-Ks -- filings weren't done and
21 weren't required. And I could be wrong about that, but
22 that was my understanding.

23 Q. The delisting occurred in 2015. Did it not?

24 A. I don't know.

25 MR. SHAMOUN: Object, Your Honor; 1996, and

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Filing Description:
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