STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

WASHINGTON TRUST BANK,

Plaintiff,

vs.

MARVIN R. ERICKSON, ET AL,

Defendants.

Case No. **CV 2011 3562**

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

This matter is before the Court on the "Plaintiff's Motion for Partial Summary Judgment" filed by plaintiff Washington Trust Bank (WTB) on February 28, 2012. On that same date, WTB also filed "Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment", an "Affidavit of Donna Martin in Support of Washington Trust Bank's Motion for Partial Summary Judgment", an "Affidavit of R. Wayne Sweeney Martin in Support of Washington Trust Bank's Motion for Partial Summary Judgment", and "Plaintiff's Submission of Certified Documents in Support of its Motion for Summary Judgment."

On March 14, 2012, defendants Marvin R. Erickson, his wife Sharon N. Erickson, and one of their children, Douglas M. Erickson as Trustee of the Saved B.C. Family Trust, u/a/d 12/23/09 (collectively Ericksons), filed "Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment" and an "Affidavit of Marvin

Erickson in Opposition to Plaintiff's Motion for Summary Judgment". On March 21, 2012, WTB filed "Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment." Oral argument on WTB's motion for partial summary judgment was held on March 28, 2012.

This lawsuit started on May 2, 2011, when WTB filed its Complaint seeking deficiency judgments against defendants Marvin Erickson, Sharon Erickson, and Douglas Erickson, as trustee of the Saved B.C. Family Trust, following trustee's sales of three properties. Between 2001 and 2003, WTB extended credit to Ericksons on several occasions, and in consideration of the extensions of credit, Ericksons executed and delivered to WTB promissory notes and deeds of trust. WTB alleges Ericksons breached each of the agreements entered into by the parties and in March 2011, WTB non-judicially foreclosed on the real properties securing the extensions of credit received. The amounts each property sold for at the trustee's sales resulted in a deficiency balance owing on each obligation. WTB alleges Ericksons fraudulently conveyed real and personal property assets to the Saved B.C. Family Trust (Trust) in early 2010.

On February 28, 2012, WTB filed its motion for summary judgment and supporting affidavits. WTB argues summary judgment in its favor is proper as to Count IV (Voidance and Recovery of Fraudulent Conveyance of Property Against Defendants Erickson, Defendant Trustee Pursuant to Idaho Code §§ 55-906 and 913(1)(a)) and Count V (Voidance and Recovery of Fraudulent Conveyance of Property Against Defendants Erickson, Defendant Trustee Pursuant to Idaho Code § 55-913(1)(b)). On March 14, 2011, Ericksons filed their memorandum in opposition to the motion for summary judgment and the affidavit of Marvin Erickson, arguing WTB is not entitled to summary judgment because WTB cannot demonstrate Marvin and Sharon Erickson

were insolvent at the time they transferred assets to the Trust. Defendants' Memorandum in Opposition to Motion for Summary Judgment, p. 5. In response, WTB argues no material facts would preclude partial summary judgment in this matter. WTB goes on to argue Marvin Erickson's affidavit seeks to improperly avoid summary judgment by creating the sham issue that Ericksons were not insolvent at the time of transfer to the Trust by contradicting previous testimony.

II. WTB's REQUEST FOR JUDICIAL NOTICE.

On March 21, 2012, seven days prior to oral argument, WTB filed "Plaintiff's Request for Judicial Notice." In that pleading, WTB:

> …requests pursuant to Rule 201, IRE, that the Court take judicial notice of the record in Case No. CV 10-6239, *Panhandle State Bank v. Ericksons* in this Court. This request is made for the purpose of impeaching the Affidavit of Marvin Erickson filed in this action on March 14, 2012.

Plaintiff's Request for Judicial Notice, p. 1.

In *Willie v. State*, 149 Idaho 647, 239 P.3d 445 (Ct.App. 2010), the Idaho Court of Appeals held: "Under I.R.E. 201(d), parties 'shall identify the specific documents or items for which the judicial notice is requested or shall proffer to the court and serve on all [parties] copies of such documents or items.'" WTB failed to specify any specific document(s) in the present case. Instead, WTB simply "…requests pursuant to Rule 201, IRE, that the Court take judicial notice of the record in Case No. CV 10-6239, *Panhandle State Bank v. Ericksons* in this Court." Plaintiff's Request for Judicial Notice, p. 1. No response was filed by Ericksons prior to hearing.

At the March 28, 2012, hearing, counsel for Ericksons did not object as to WTB's failure to identify specific individual documents from the earlier case, but instead, objected on relevance grounds. WTB's failure to identify specific documents was cured at the March 28, 2012, hearing. The Verified Complaint in Kootenai County Case No.

CV 2010-6239 was identified as Court's Exhibit 1, and the Order Granting Stipulation to Dismiss With Prejudice was identified as Court's Exhibit 2. At the March 28, 2012, hearing, counsel for WTB claimed that these documents impeach the Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment filed on March 14, 2012, in the present case, specifically Marvin Erickson's claims that he was meeting his financial obligations. The relevancy objection was taken under advisement until such time as the Court could read those documents.

In his affidavit in the present case, Marvin Erickson does not directly state that he was meeting his financial obligations. The closest Marvin Erickson gets to making such a statement is: "Clearly my wife and I did not transfer all of our assets to the Trust, and we retained more than enough assets to adequately manage our affairs." Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 8, ¶ 36. Marvin Erickson's affidavit in the present case states, "[w]hen we created and funded the Trust for our children, we were not in litigation or threatened with litigation by any other person or creditor." *Id.,* p. 7, ¶ 33. While the date the Trust was created is clear, the date the Trust was "funded" is less than clear. Marvin Erickson claims the The Saved B. C. Irrevocable Family trust was created on December 23, 2009 (*Id.*, p. 1, ¶ 2), and that initially the Ericksons' primary residence was transferred into the trust on January 18, 2010. *Id.,* p. 3, ¶ 10, Exhibit A. Marvin Erickson is vague as to when assets other than the primary residence were placed in the Trust, but it is clear such transfers occurred between January 19, 2010, and July 2010. *Id.,* p. 4, ¶ 13, ¶ 14, p. 6, ¶ 25.

What is clear is that at the time that the Ericksons were making substantial transfers of real and personal property into this Trust in early 2010, the Ericksons were at all times indebted to WTB in excess of $700,000.00. Plaintiff's Memorandum in Support of Motion for Summary Judgment, pp. 4-5; Affidavit of Donna Martin in

Support of Washington Trust Bank's Motion for Summary Judgment, p. 2, ¶ 4, Exhibit 2, 3, M-3 A-F, Exhibit 4, Exhibi M-4 A-D. Ericksons were indebted to WTB from 2001 on. *Id.,* Exhibit 7. These notes matured on February 1, 2010, without payment by Ericksons. *Id.,* pp. 2-3, ¶ 4. The deception by Marvin Erickson comes in his March 14, 2012, affidavit in the present case, where he states:

> My wife and I owed approximately $99,158 to Panhandle State Bank on a personal loan after the Trust was funded. We paid that loan in full in June of 2011.

Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 7, ¶ 30.

First, the claim by Marvin Erickson that "We paid that loan in full in June 2011" is *deceptive* because it ignores the fact that Ericksons had to be sued by Panhandle State Bank in order to get the Ericksons to pay that debt. On January 19, 2010, Ericksons executed a "second Change in Terms Agreement" with Panhandle State Bank, pursuant to which they would pay all interest and principal under that note on February 9, 2010, *after having been delinquent on that note from December 9, 2009, until February 9, 2009*. Verified Complaint for Breach of Contract and Avoidance and Recovery of Transfers, Kootenai County Case No. CV 2010 6239, pp. 2-3, ¶¶ 7-10. Then, the Ericksons couldn't make the February 9, 2010, payment, and on March 25, 2010, *having been delinquent on that note from February 9, 2010,* Ericksons secured another extension from Panhandle State Bank until May 9, 2010. *Id.,* p. 3, ¶ 11. On May 9, 2010, Ericksons were in default to Panhandle State Bank, and on June 1, 2010, Panhandle State Bank made demand for payment. *Id.,* p. 4, ¶¶ 12-15. On July 22, 2010, Panhandle State Bank had to file the lawsuit that, a year later, resulted in, as Marvin Erickson now states in the affidavit in the present case: "We paid that loan in

full in June of 2011."

Second, the above shows the *deception* in the following two claims by Marvin Erickson in the present case: 1) "When we created and funded the Trust for our children, we were not in litigation or threatened with litigation by any other person or creditor." (Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 7, ¶ 33), and 2) "Clearly my wife and I did not transfer all of our assets to the Trust, and we retained more than enough assets to adequately manage our affairs." *Id.,* p. 8, ¶ 36. At the time they funded the trust, the Ericksons might not have been in litigation, but they knew litigation was coming. The Ericksons had refinanced their note with Panhandle State Bank three times in four months, all at the same time they were giving substantially all their assets to this Trust for their children. They in fact are not "managing their affairs" when the Ericksons are in default on the Panhandle State Bank loan from December 9, 2010, through January 19, 2011, renegotiate and are again in default from February 9, 2010, through March 25, 2010, renegotiate and are again in default from May 9, 2010, until the settlement of litigation on July 25, 2011. At the time the Ericksons funded the Trust for their children in early 2010 they were indebted to MWB for over $700,000, they were indebted to Panhandle State Bank about $100,000, and the Ericksons obviously did not retain "…more than enough assets to adequately manage our affairs." As Ericksons funded the Trust for their children in early 2010, they managed to take their self-reported net worth of $10,836,235.00 in 2009 and turn it into a negative net worth of -$104,716.17 in 2010. Affidavit of Donna Martin in support of Washington Trust Bank's Motion for Summary Judgment, p. 4-5, ¶ 15, Exhibit M-1 and M-2.

Ericksons' relevance objection as to the documents WTB requests this Court take judicial notice of is overruled, and WTB's request for judicial notice is granted.

II. STANDARD OF REVIEW ON WTB'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

Summary judgment is appropriate "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). On November 9, 2011, this Court entered its Order Setting Court Trial, following hearing on WTB's objection to defendants' request for a jury trial set forth in their Answer. The Idaho Court of Appeals has set forth the proper standard of review for a motion for summary judgment in a matter to be heard by the Court as trier of fact in *P.O. Ventures, In. v. Loucks Family Irrevocable Trust,* 144 Idaho 233, 19 P.3d 870 (2007):

> When an action, as here, will be tried before the court without a jury, the trial court as the trier of fact is entitled to arrive at the most probable inferences based upon the undisputed evidence properly before it and grant the summary judgment despite the possibility of conflicting inferences. *Intermountain Forest Management,* 136 Idaho at 235, 31 P.3d at 923. Resolution of the possible conflict between the inferences is within the responsibilities of the fact finder. *Cameron v. Neal,* 130 Idaho 898, 900, 950 P.2d 1237, 1239 (1997). This Court exercises free review over the entire record that was before the district judge to determine whether either side was entitled to judgment as a matter of law and reviews the inferences drawn by the district judge to determine whether the record reasonably supports those inferences. *Intermountain Forest Management,* 136 Idaho at 236, 31 P.3d at 924.

144 Idaho 233, 237, 19 P.3d 870, 874.

III. ANALYSIS OF WTB'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

In its memorandum in support of motion for partial summary judgment, WTB argues the Ericksons' transfers of real and personal property to the Trust were fraudulent under I.C. § 55-913 because substantially all of Marvin and Sharon Erickson's assets were transferred to an "insider", namely, their son as trustee of the Trust. Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, p.

7. As further evidence of the fraudulent nature of the transfers, WTB notes its claims against Ericksons arose *before* the Ericksons made these transfers to their son as trustee, that Ericksons did not receive "reasonably equivalent value" for the properties they transferred to the Trust, and Ericksons were insolvent at the time of the transfers or became insolvent as a result of the transfers. *Id.,* pp. 8-10. Finally, WTB argues Ericksons transfers of property to the Trust were constructively fraudulent under I.C. § 55-914. *Id.,* p. 11.

Ericksons dispute the facts as alleged by WTB. Ericksons claim the Trust was created and funded because of the poor health Marvin Erickson found himself in beginning in 2008. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 2. The Ericksons claim the Trust was a matter of estate planning and was funded to "simply [sic] the administration of their estate and for the benefit of their six adult children." *Id.* Ericksons state that all of their obligations to WTB at the time the Trust was created and funded were current. *Id.* The gist of Ericksons' argument in opposition to the motion for summary judgment is that Ericksons were not insolvent at the time of the transfer to the Trust and did not become insolvent as a result of the transfers to the Trust; Ericksons urge the Court to consider the validity of the transfers to the trust in light of their solvency. *Id.,* p. 5. In the Affidavit of Marvin Erickson filed on March 14, 2012, Marvin Erickson testifies that he and Sharon Erickson transferred their primary residence to the Trust and assigned the Trust a promissory note for $230,000 in exchange for permission to continue to live there. Affidavit of Marvin Erickson, p. 3, ¶ 10. Marvin Erickson goes on to testify that after WTB began its non-judicial foreclosure proceedings, the Trust deeded the promissory note for $230,000 and "secured collateral property" back to him and Sharon Erickson. *Id.,* at ¶

12. Marvin Erickson testifies that after transferring real and personal property to the Trust, he and his wife retained sufficient assets to meet living expenses and financial obligations, assets in excess of $1 million. *Id.,* p. 4, ¶ 14. Finally, Erickson testifies the financial statements (referenced in the Donna Martin Affidavit) which were prepared by Sharon Erickson and bears both Sharon's and Marvin's signatures, were "not intended to be comprehensive", but were merely intended to provide WTB a "general overview of our financial situation." *Id.,* p. 8, ¶ 37. Marvin Erickson states: "The information provided in this affidavit regarding our assets, debts and net worth in 2010 is more complete and accurate than the 2010 financial statement, Exhibit M-2, attached to Ms. Martin's affidavit."

In response, WTB argues Ericksons have not controverted the essential material facts that: (a) Ericksons were insolvent at the time of the allegedly fraudulent transfers; (b) WTB's claims on outstanding promissory notes arose before the allegedly fraudulent transfers; (c) the transfers consisted of virtually all of Ericksons' assets, (d) the transfers were made to an insider, and (e) Ericksons did not receive equivalent value for the transfers. Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 3. WTB contends Marvin Ericksons' "self-contradiction" with regard to the $1,000,000.00 in assets omitted from financial statements provided to the bank creates a "sham issue" and is a mere attempt to create an issue of fact by asserting facts which contradict Ericksons' own previous factual assertions. *Id.,* p. 6. WTB urges the Court to reach its own conclusions based on the most probable inferences to be drawn from the evidence and find Ericksons' current contradictions are an attempt to avoid summary judgment. *Id.,* p. 7. WTB also moves the Court to take judicial notice of *Panhandle Bank v. Erickson,* a Kootenai County case assigned to this Court, in which

Marvin Erickson's testimony, found in his March 14, 2012, Affidavit, is contradicted. Plaintiff's Request for Judicial Notice, p. 1.

At this summary judgment juncture, the Court is mindful of the standard of review to which this Court is held. The Idaho Supreme Court has held that at summary judgment, it is improper for the trial court to grant judgment when the affidavits reveal a conflict as to the issues of fact or when the pleadings, affidavits and depositions raise a question as to the credibility of witnesses. *Micro Mobile Sales & Leasing v. Skyline Corp.,* 97 Idaho 408, 411, 546, P.2d 54, 57 (1975). However, where the court, as in the present case, will sit as the trier of fact at the court trial, the court may rule on a motion for summary judgment and draw probable inferences because the court itself would be responsible for resolving conflicting inferences at trial. *Riverside Dev. Co. v. Ritchie,* 103 Idaho 515, 519, 650 P.2d 657, 661 (1982). "Conflicting evidentiary facts, however, must still be viewed in favor of the nonmoving party." *Banner Life Ins. Co. v. Mark Wallace Dixson Irrevocable Trust,* 147 Idaho 117, 124, 206 P.3d 481, 488 92009), citing *Argyle v. Slemaker,* 107 Idaho 668, 670, 691 P.2d 1283, 1285 (Ct.App. 1984). In *Argyle,* the Idaho Court of Appeals held that findings based on conflicting evidence may be made at summary judgment where "the evidence is entirely confined to a written record, there is no additional, in-court testimony to be obtained, and the trial judge alone will be responsible for choosing the evidentiary facts he deems most probable." 107 Idaho 668, 670-71, 691 P.2d 1283, 1285-86. *Argyle* provides the admonition that a witness credibility determination shall not be made by the Court on summary judgment if credibility can be further tested by testimony in court at trial: "Such a determination should not be made on summary judgment if credibility can be tested by testimony in court before the trier of fact." 107 Idaho 668, 670, 691 P.2d 1283, 1285.

In the present case, the only credibility dispute raised by Marvin Erickson's affidavit is whether the Ericksons were rendered insolvent by the transfer of the vast majority of their assets to this trust. Ericksons create the credibility dispute by providing on one hand signed "Personal Financial Statements" which declare their "net worth" to be $10,836,235.00 in 2009, yet somehow a negative net worth of -$104,716.17 the very next year in 2010 (Affidavit of Donna Martin in Support of Washington Trust Bank's Motion for Summary Judgment, p. 4, ¶ 16, Exhibit M-1, M-2), and on the other hand providing the Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, in which at least Marvin Erickson now claims they had a "net worth" of $1,114,036.00 in 2010. Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 4, ¶ 14. All other relevant facts are undisputed.

No doubt Marvin Erickson has submitted wildly conflicting testimony, signing his name at one time to a document given to Panhandle State Bank espousing a negative net worth of -$104,716.17 in 2010, yet now in the throes of this litigation and confronted with summary judgment that 2010 net worth somehow improved to $1,114,036.00. This is over a $1.2 million turn of good fortune. While it would make infinite common sense to conclude that Marvin Erickson has lost all credibility by giving such wildly divergent opinions on their net worth, such is not the case at summary judgment. WTB argues that "…Ericksons cannot create a genuine issue of material fact by impeaching themselves." Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 8, *citing Barlow's Inc. v. Bannock Cleaning Corp.,* 103 Idaho 310, 314, 657 P.2d 766, 770 (Ct.App. 1982). That is not really what *Barlow's* says. In *Barlow's,* the Idaho Court of Appeals wrote: "We hold that the personal representative's self-contradictory and unsupported allegation, that all work was completed by October 1, 1978, did not raise a genuine issue as to when the work was actually done." *Id.* Even

when a party or a witness submits conflicting testimony, testifying one way at one point in time and another way at a later point in time, the Idaho Supreme Court more recently than the *Barlow's* case, has made it clear that this Court is not free to find that witness not credible, at least at the summary judgment juncture. *Stanley v. Lennox Industries, Inc.,* 140 Idaho 785, 788, 102 P.3d 1104, 1107 (2004). Essentially, case law tells the trial court that either version of Marvin Erickson's testimony could be true, and that discernment of the "true" version, must be ferreted out in the crucible of trial. WTB argues that Marvin Erickson's contradictory statements between he and his wife's 2010 financial statement and his March 14, 2012, affidavit: "…a party cannot create an issue of fact by making factual assertions that contradict its own prior factual assertions." Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 6. Then, WTB argues: "In *Tolmie Farms, Inc. v. J.R. Simplot Co., Inc.,* the Idaho Surpeme Court agreed with a Ninth Circuit case that "the purpose of summary judgment is served by a rule that prevents a party from creating sham issues by offering contradictory testimony.' 124 Idaho 607, 610, 862 P.2d 299, 302 (1993) (emphasis added)." *Id.* Again, this is not completely accurate. The Idaho Supreme Court wrote: "While we *may* agree that the purpose of summary judgment is served by a rule that prevents a party from creating sham issues b offering contradictory testimony…" 124 Idaho 607, 610, 862 P.2d 299, 302. Also, *Tolmie Farms* concerned discrepancies between an affidavit and sword deposition testimony, and in the present case, Marvin and Sharon Erickson's financial statement was not signed under oath. In any event, *Stanley v. Lennox* is the most current status of the law regarding inherently contradictory testimony. *Stanley* tells this Court to wait until trial to determine which of Marvin Erickson's wildly divergent statements regarding his net worth in 2010, should be

believed. In any event, as shown below, this factual "dispute" in Marvin Erickson's own testimony, makes no difference on summary judgment. Even taking the version of Marvin Erickson most favorable to the Ericksons, that is, that they had a net worth in 2010 of $1,114,036.00 instead of negative net worth of -$104,716.17, WTB is still entitled to summary judgment. This is due to the statutory language in the Uniform Fraudulent Transfers Act, specifically "substantially all" in I.C. §55-913(e), and the definition of "insolvency" found in I.C. § 55-911.

Thus, it is only Ericksons' net worth which really is a disputed issue of fact at this point. For example there is no dispute that the massive transfers of wealth were to an insider, the Ericksons' son. There is no dispute that the transfer was substantially all of the assets of the debtor. Even a net worth of $1,114,036.00 in 2010 (as opposed to a negative net worth of -$104,716.17), is a reduction of 89.715% of their $10,836,235.00 net worth in 2009. There is no dispute that the Ericksons did not receive "reasonably equivalent value" of these assets transferred to their son in trust. Indeed, Ericksons received no value.

The reason the dispute of Ericksons' net worth in 2010 does not preclude summary judgment, is the statutory framework of the Uniform Fraudulent Transfers Act. Idaho Code § 55-906 deems every transfer of property made with the intent to delay or defraud a creditor, as void against all creditors of the debtor. More specifically, Idaho Code § 55-913(1)(a) states any transfer made, whether before or after a creditor's claim arose, is fraudulent if the debtor made the transfer with actual intent to hinder, delay or defraud a creditor of the debtor. While "intent" is subjective and difficult to determine, I.C. § 55-913(2) provides some objective help. Non-exclusive factors to consider in determining whether there was actual intent to hinder, delay or defraud a creditor include whether:

a) the transfer was to an insider

b) the debtor retained possession of the property after the transfer

c) the transfer was disclosed or concealed

d) the debtor was threatened with suit before the transfer was made

e) the transfer was of substantially all assets of the debtor

f) the debtor absconded

g) the debtor removed or concealed assets

h) the value of consideration received by the debtor was reasonably equivalent to the value of the asset transferred

i) the debtor was insolvent or became insolvent shortly after the transfer was made

j) the transfer occurred shortly before or after a substantial debt was incurred; and

k) the debtor transferred essential assets of a business to a lienor who transferred the assets to an insider.

I.C. §§ 55-913(2)(a)-(k). WTB states factors (a), (d), (e), (h), (i), and (j) are present in the instant matter, but WTB only addresses (a), (e), (h) and (i) in its briefing on summary judgment. Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, p. 7, *et seq.*

Regarding I.C. §55-913(a), "the transfer was to an insider", Ericksons concede the transfer was to an insider. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 5.

Regarding I.C. §55-913(e), "the transfer was of substantially all assets of the debtor", Ericksons concede to having transferred "a significant portion of their assets to the Trust", but argue the Affidavit of Marvin Erickson properly sets forth the remaining

assets retained, which exceed $1 million. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, p. 6. The evidence in this regard is conflicting, and, absent making an arguably improper credibility determination as to the testimony of Marvin Erickson, the Court pursuant to *Argyle* must first decide whether the evidence is entirely confined to a written record and whether there is no additional, in-court testimony to be obtained. 107 Idaho 668, 670, 691 P.2d 1283, 1285. It is clear that this Court alone will be responsible for choosing the evidentiary facts it deems most probable both at summary judgment and at any possible future trial, but it is not clear whether the evidence presently before the Court is the entirety of what will be presented. *Id.* But even viewed in the light most favorable to the Ericksons, that is considering Marvin Erickson's "new and improved" net worth of $1,114,036.00 in 2010, this Court finds the Ericksons managed to get rid of "substantially all of their assets" by funding this Trust. The Court looks at this two ways and comes to the same conclusion. The first is to view this as the statute views it, as what was *transferred:* "the transfer was of substantially all assets of the debtor." I.C. §§ 55-913(2)(e). The Ericksons, in the best case, transferred 89.715% of their 2009 net worth of $10,836,235.00. Nearly 90% is "substantially all" of the Ericksons' assets. The other way to look at it is what *is left*, in other words, what *remains* as assets of the debtor. Clearly this is the heart of Ericksons' argument. Ericksons admit they gave away 90% of their assets to this trust, but now claim they still had over a million dollars in assets remaining, enough to pay their bills. Marvin Erickson states in his affidavit: "When my wife and I conveyed some of our assets to the Trust, we retained other assets sufficient to manage our living expenses and other financial obligations." Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 4, ¶ 13. The problem is, Marvin Erickson's figures don't add up. Marvin Erickson on March 14,

2012, claims a negative net worth of $32,620 existed on the "4 acreage parcels on Canfield Mt." (Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 4, ¶ 14), when Donna Martin's affidavit show that *what actually occurred* as a result of the foreclosure sale which had occurred a year before Marvin Erickson authored his affidavit in this litigation, produced a negative value of $251,036.34. Affidavit of Donna Martin in Support of Washington Trust Bank's Motion for Summary Judgment, p. 3, ¶¶ 5, 6, , Exhibit 3, 4, Exhibit 2-4. Thus, Marvin Erickson retrospectively creates a $218,416.34 error in his affidavit. The negative value of $251,036.34 is not an estimate by WTB; it is historically what occurred a year before Marvin Erickson came up with his figures in his affidavit. It gets worse. In Marvin Erickson's March 14, 2012, affidavit, he does not appear to list the debt shown in Donna Martin's Affidavit as Exhibit 7, and he does not appear to list the fact that the sale of the property securing that debt was $193,582.67 short of paying off that debt. Finally, in Marvin Erickson's March 14, 2012, affidavit, he does not appear to list the debt shown in Donna Martin's Affidavit as Exhibit 11, and he does not appear to list the fact that the sale of the property securing that debt was $33,927.73 short of paying off that debt. Add all these up, and Marvin Erickson in his affidavit appears to have overestimated his net worth by $478,546.74. Thus, Marvin Erickson's "new and improved" net worth of $1,114,036.00 in 2010, was actually only $635,489.30. While that is a substantial amount of money to most people, it is only a very small amount of *what is left* of Ericksons' substantial assets a year before. The most important uncontroverted fact is that *what is left* ($635,489.30) obviously was not enough for the Ericksons to pay their bills as they became due, because they in fact did not pay their bills to WTB as they became due. The proof is in the pudding. Marvin Erickson's claim in his affidavit, "When my wife and I conveyed some of our assets to the Trust, we

retained other assets sufficient to manage our living expenses and other financial obligations." (Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 4, ¶ 13), is patently false. The fact that Marvin Erickson's claim is patently false has nothing to do with a credibility determination and it has nothing to do with this Court choosing which of Marvin Erickson's statements to believe. The fact that the Ericksons did not, after the transfer to their son's Trust, have sufficient funds to pay their bills as they became due is borne out by the fact that they did not pay their bills as they became due. Thus, whether the Court looks at this from the perspective of the statutory language ("the transfer was of substantially all assets of the debtor", I.C. §55-913(e)), or from the perspective placed on this by Ericksons that *what was left* of their assets after the transfer was sufficient to pay their bills, subsection (e) has been met in WTB's favor.

Idaho Code § 55-913(h) requires the Court to consider whether the value of what was transferred is indicative of the actual value of the transferred assets. Ericksons argue "love and affection" is sufficient consideration in this regard. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, pp. 6-7. Ericksons cite *Hendrickson v. Helmer,* 7 F.Supp 627, 628 (D.Idaho 1934), for the proposition that "love and affection" is "valid consideration for the purpose of making a gift to a spouse or a child." *Id.,* p. 6. That statement ignores the context of *Hendrickson* and the important "predicate" within which that quote is given. The following quote from Hendrickson provides that context and predicate:

> If a transfer of property by a husband to his wife is made in good faith and not to defraud existing creditors of his, under the laws of Idaho the consideration for 'love and affection' and for the purpose of making her a gift is valid and the validity of such as fraudulent conveyance against creditors does not depend upon subsequent events. *Gooding Milling Co. v. Lincoln County State Bank,* 22 Idaho, 468, 126 P. 772; *McMillan v.*

McMillan, 42 Idaho, 270, 245 P. 98.

7 F.Supp 627, 628. Thus, Ericksons' reliance on *Hendrickson* is misplaced, as in this case, WTB was at the time of the transfers an existing creditor who is now claiming the Ericksons' transfer to their son's Trust was not made in good faith and was made in an effort to defraud WTB as an existing creditor. Ericksons argue that I.C. § 55-908 "…expressly states that a transfer cannot be adjudged fraudulent solely on the ground that it was not made for valuable consideration." *Id.,* p. 7. By omitting the word "a" from the actual statutory language, Ericksons seem to recognize "love and affection" has no "value" in the eyes of the law. The actual language of the pertinent portion of that statute reads: "…the question of fraudulent intent is one of fact, and not of law; nor can any transfer or charge be adjudged fraudulent solely on the ground that it was not made for a valuable consideration." I. C. § 55-908. WTB notes that I.C. § 55-912(1) explicitly *excludes* promises of support from its definition of "value." Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 4. Supporting WTB's contention that the UFTA does not consider "love and affection" as "value" is the logical inability of weighing any value of love and affection against the value of tangible assets which were transferred. A treatise on the subject states:

> For purposes of determining whether a transfer is fraudulent, a reasonably equivalent value sufficient to constitute consideration does not include intangible, non-economic benefits, such as love and affection, or the preservation of marriage. Thus, in particular a conveyance or transfer in consideration of natural love and affection, as in the case of a conveyance to wife or child, is merely voluntary, and is void where the attending circumstances are such as to render a voluntary conveyance void. This is so even where the expressed consideration is of a small amount of money and love and affection.

37 CJS *Fraudulent Conveyances* § 1000 (2012). WTB also notes the *Hendrickson* case cited by Ericksons was not decided under the current UFTA. Indeed, the Uniform

Fraudulent Transfer Act, I.C. §§ 55-910 to 55-920, came into being in 1987, fifty-three years after *Hendrickson* was decided. For the above reasons, this Court finds as a matter of fact that "the value of consideration received by the debtor was [**not**] reasonably equivalent to the value of the asset transferred", a fact which supports WTB's claim for partial summary judgment.

Regarding I.C. § 55-913(i) "the debtor was insolvent or became insolvent shortly after the transfer was made", the Court obviously has to determine Ericksons' solvency or insolvency. Much of the parties' argument focuses on this question. The affidavit of Donna Martin (Vice-President in the Special Assets Department of WTB in Spokane, WA) references the Personal Financial Statements of Ericksons for 2009 and 2010. Affidavit of Donna Martin in Support of Washington Trust Bank's Motion for Summary Judgment, p. 1-3, ¶¶2-4. On March 20, 2009, both Marvin and Sharon Erickson signed a Financial Statement listing a net worth of $10,836,235.00. *Id.,* Exhibit M-1. One year later, on March 18, 2010, both Marvin and Sharon Erickson signed a Financial Statement listing a **negative** net worth of -$104,716.17. *Id.,* Exhibit M-2. In his Affidavit, dated March 14, 2012, Marvin Erickson states Sharon Erickson prepared the financial statements only to provide WTB a "general overview of our financial situation", but that the statements were not intended to be comprehensive. Affidavit of Marvin Erickson , p. 8, ¶ 37. Marvin Erickson now claims that at the time the transfers to the trust were effected, he and his wife actually had a net worth of approximately $1,114,036.00. *Id.*, p. 4, ¶ 14. Logically, Marvin Erickson signing his name in 2010 to a WTB bank document claiming a negative net worth of -$104,716.17 at that time, and now, signing his name to a sworn affidavit in this litigation where he claims a net worth of $1,114,036.00 in 2010 (a $1.2 million discrepancy), and blaming it all on his wife Sharon who only prepared the financial statements to provide WTB a "general overview

of our financial situation", and that the statements were not intended to be comprehensive, is essentially a euphemistic admission by Marvin Erickson that he and his wife **lied** to the bank in 2010. Although Marvin Erickson now under oath essentially admits to such a lie and a fraud upon WTB in 2010, this Court cannot at this juncture discount the averments in his affidavit in this case. While Marvin Erickson's credibility is certainly shot for purposes at trial, the question remains: at the present time on summary judgment, which of Marvin Erickson's statements is the truth…that he had $1.14 million or that he was in the hole $104,716.17? Again, these conflicting statements by Erickson cannot result in this Court making a witness credibility determination when such a credibility determination can be further tested by testimony in court. *Argyle,* 107 Idaho 668, 670, 691 P.2d 1283, 1285. However, a debtor is also deemed insolvent per the UFTA when he or she generally is not paying their obligations as they become due. I.C. § 55-911(2). That section reads: "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." Ericksons have not contested that WTB's promissory notes matured on February 10, 2010, and were not paid by Ericksons at that time. Plaintiff's Reply Memorandum in Support of Motion for Partial Summary Judgment, p. 7. It is important to keep in mind the uncontroverted fact that well before the Ericksons transferred substantially all of their assets to their son's Trust the Ericksons had not been paying their debts as they became due. On May 10, 2007, Ericksons borrowed $116,000.00 from WTB; which was to be paid in full plus interest on February 10, 2008. Affidavit of Donna Martin in Support of Washington Trust Bank's Motion for Summary Judgment, Exhibit 4. On September 25, 2008, Ericksons borrowed $93,960.00 from WTB; which was to be paid in full plus interest on August 10, 2009. *Id.,* Exhibit M-4A. On August 10, 2009, Ericksons borrowed $84,564.00 from WTB, that was to be paid in full plus interest on

February 10, 2010. *Id.,* Exhibit M4-B. That was the note that was defaulted upon. Prior to that time, instead of defaulting, the Ericksons renegotiated the debt with WTB. As the above sequence shows, while Ericksons made some progress on the original $116,000.00 debt, the Ericksons on two occasions prior to February 10, 2010, were not able pay the full amount plus interest on the due date, thus meeting the definition of I.C. § 55-911(2): "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." At the time of the transfer by Ericksons to their son via this Trust, it does not matter if the note at issue had actually become due. That is, it matters not if the due date of February 10, 2010, had passed or not, at the time Ericksons made the transfer to their son via this Trust. This is because what is important under the Uniform Fraudulent Transfers Act is whether a claim existed at the time of the transfer. *Dunham v. Dunham*, 128 Idaho 55, 57, 910 P.2d 169, 171 (Ct.App. 1995), citing I.C. §§ 55-913(1) and 55-914(1). In that case, the Idaho Court of Appeals wrote: "A 'claim' is defined as a 'right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.'" *Id.,* citing I.C. § 55-910(3). Additionally, Marvin Erickson also admits to owing over $289,501.00 in unsecured credit card debt which was "settled and satisfied." Affidavit of Marvin Erickson in Opposition to Plaintiff's Motion for Summary Judgment, p. 6, ¶ 27. The language used, "settled and satisfied", differs from language indicating payment of debts and a reasonable inference can be drawn from the evidence that unsecured credit card debt was not paid. This inference is supported by the fact that one year prior the Ericksons' credit card debt was $135,606.89. Exhibit M-1 to the Affidavit of Donna Martin. The liabilities listed by Marvin Erickson in his March 14, 2012, Affidavit match those disclosed to WTB in 2010. Ericksons have not disputed the annual

income of approximately $27,000 in 2010. The only reasonable inference this Court can reach at this time is that sales of various assets as set forth in the affidavit of Marvin Erickson having taken place *after* funding of the Trust, could not have enabled Ericksons to generally pay their debts as they became due *at the time* the Trust was funded.

Regarding Idaho Code §55-913(j), "the transfer occurred shortly before or after a substantial debt was incurred", the parties disagree as to whether WTB's claims against Ericksons existed at the time of the transfers. WTB argues Ericksons were indebted when the transfers were made, as evidenced by unsatisfied promissory notes dating back prior to 2010. Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, p. 8. Ericksons state they were "…current on all of their financial obligations to Washington Trust Bank" when the trust was created and transfers were made. Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, pp. 2-3. As shown above, that is simply not true. Ericksons were not in "default" on the then applicable note (as it came due on February 10, 2010), but the Ericksons had twice before failed to pay the total amount of the previous notes plus interest by the due date on the then-applicable notes. Most importantly, Ericksons' argument fails in light of the Uniform Fraudulent Transfer Act (UFTA) definition of "claim":

> Mean[ing] a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.

I.C. § 55-910(3). Whether or not Ericksons were "current" on their obligations to WTB, WTB still had a "claim" within the meaning of the UFTA.

On balance, the Idaho Code § 55-913(1)(a)-(k) factors weigh heavily in favor of WTB having demonstrated Ericksons intended to hinder, delay or defraud the Bank. Two of the factors are neutral. In evaluating these factors, the Court notes subsection

(k) ("the debtor transferred essential assets of a business to a lienor who transferred the assets to an insider") has no applicability as no transfers were made to intermediaries. Likewise, subsection (b) ("the debtor retained possession of the property after the transfer") is a neutral factor as Ericksons attempted to transfer their residence to the Trust in consideration of a promise that the Trust would provide living quarters, assigning the Trust a promissory note worth $230,000, but the residence and note were later deeded back to Ericksons. Affidavit of Marvin Erickson, p. 3, ¶¶ 10-12.

Of the remaining nine Idaho Code § 55-913(1)(a)-(k) factors, three tip in favor of Ericksons. Subsections (c), (d) and (f) weigh in favor of Ericksons as the transfer was not concealed, no evidence of threat of suit is before the Court (although as noted *supra*, WTB had a "claim" within the meaning of the UFTA), and Ericksons did not abscond. Even if the Court were to place these three factors on a scale, the Ericksons would still lose on the UFTA claim, and WTB would win. But simply because the Ericksons did not abscond, did not conceal, and were not threatened with a lawsuit at the time they made the transfer, those factors do not really mitigate against the six factors that weigh in WTB's favor. In other words, the Ericksons do not get to place the fact that they didn't abscond on their side of the scale to offset the fact that they transferred substantially all of their assets to their son in Trust, which goes on WTB's side of the scale. Erickson's not absconding is not a mitigating factor, it is simply an aggravating factor under I.C. § 55-913(1)(a)-(k) that is not present.

Six of the remaining nine Idaho Code § 55-913(1)(a)-(k) factors clearly tip in favor of WTB.

Ericksons conceded they transferred assets to an insider in the meaning of subsection (a).

Subsection (e) weighs in favor of WTB regardless of whether the Court looks at this from the perspective of the statutory language ("the transfer was of substantially all assets of the debtor", I.C. §55-913(e)), or from the perspective place on this by Ericksons that *what was left* of their assets after the transfer was sufficient to pay their bills. Subsection (e) has been met in WTB's favor. That finding has nothing to do with the Court's inability to make a credibility finding as to Ericksons' conflicting testimony on assets per *Argyle.* That is because even taking Marvin Ericksons most recent testimony that they had over $1 million in assets in 2010, this Court finds that the Ericksons transferred "substantially all" of their assets to this Trust.

Subsection (h) is met because "love and affection" is not adequate consideration for a ten million dollar exchange. "Love and affection" is not "the value of what was transferred" under that subsection, to wit: the approximately ten million dollars of transferred assets. Transferring significant assets for "love and affection" is not "value" as the term is defined by the UFTA.

Subsection (g) ("the debtor removed or concealed assets") weighs in favor of WTB. This is because the March 14, 2012, affidavit of Marvin Erickson, while calling into question whether substantially or significantly all of Ericksons' assets were transferred, necessarily leads to the reasonable inference that the disclosure of assets made by Ericksons to WTB in 2010 was made to conceal assets.

Subsection (i) "the debtor was insolvent or became insolvent shortly after the transfer was made" weighs in favor of WTB because Ericksons may be deemed insolvent under the language of I.C. § 55-911(2): "A debtor who is generally not paying his or her debts as they become due is presumed to be insolvent." The evidence is undisputed that the Ericksons on two occasions prior to February 10, 2010, were not

able pay the full amount plus interest on the due date, thus meeting the definition of insolvency under I.C. § 55-911(2).

Subsection (j), "the transfer occurred shortly before or after a substantial debt was incurred", is met. The transfer to the Trust in early 2010 occurred after a substantial debt was incurred because Ericksons' debt to WTB occurred in 2008 and was renegotiated three times due to Ericksons' inability to meet the terms of prior promissory notes. Ericksons' claims that they were "…current on all of their financial obligations to Washington Trust Bank" when the trust was created and transfers were made (Defendants' Memorandum in Opposition to Plaintiff's Motion for Summary Judgment, pp. 2-3) is without merit. The Ericksons had twice before failed to pay the total amount of the previous notes plus interest by the due date on the then-applicable notes. Ericksons' argument fails in light of the Uniform Fraudulent Transfer Act (UFTA) definition of a "claim" under I.C. § 55-910(3), as set forth above. WTB's claim predated the transfer to the Trust.

For the reasons stated above, the Court finds the elements of I.C. § 55-913 for "actual" fraudulent transfers has been established by WTB. Under I.C. § 55-913(1), this Court finds the claim of WTB "…arose before or after the transfer was made" by Ericksons to the Trust. Under I.C. § 55-913(1)(b), the transfer was made by Ericksons "with actual intent to hinder, delay, or defraud" WTB, because the factors enumerated under I.C. § 55-913(2)(a)-(k) weigh heavily in favor of WTB and against Ericksons.

Alternatively, WTB has also proven this transfer by Ericksons to this Trust for their son was a "constructive" fraudulent transfer under I.C. § 55-914, which provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for

the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

I.C. § 55-914(1). The above factual analysis for "actual" fraud applies to these "constructive" fraud elements. WTB's claims against Ericksons predated Ericksons' transfers to the Trust in early 2010. Ericksons did not receive "reasonably equivalent value in exchange for the transfer", and the debtor became "insolvent at that time or the debtor became insolvent as a result of the transfer."

IV. CONCLUSION AND ORDER.

For the reasons stated above,

IT IS HEREBY ORDERED the Ericksons' objection as to relevance of the documents to which WTB requests this Court take judicial notice is overruled, and WTB's request for judicial notice is granted.

IT IS FURTHER ORDERED WTB's motion for partial summary judgment against the Ericksons is GRANTED; WTB is granted summary judgment on its claims of fraudulent conveyance.

Entered this 15th day of April, 2012.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of April, 2012, a true copy of the foregoing was mailed postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	Fax #	Lawyer	Fax #
R. Wayne Sweney	664-4125	Scott L. Poorman	772-6811

_____
Jeanne Clausen, Deputy Clerk