SUPERIOR COURT OF NEW JERSEY
LAW DIVISION – ESSEX COUNTY

TITAN MANAGEMENT, L.P.; PETER MOCCO AND LORRIANE MOCCO, ET AL	:	
Plaintiffs,	:	DOCKET NO. L-7709-13
vs.	:	
JAMES J. LICATA, ET AL	:	
Defendants.	:	

TRIAL COURT OPINION

JAMES S. ROTHSCHILD, JSC

JUNE 2, 2015

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SUPERIOR COURT OF NEW JERSEY

CIVIL DIVISION
ESSEX VICINAGE

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Introduction

On October 20, 1998, a company known as Titan Management, L.P. ("Titan") filed a Superior Court, Chancery Division, Essex County action against the real estate lender-developer James J. Licata and the real estate developer Peter Mocco. That suit triggered the filing of four more lawsuits in 1999 in Hudson, Morris, Somerset and Essex County Superior Courts, in both Chancery and Law Divisions. These suits involved Titan, Mr. Licata, Mr. Mocco, numerous entities controlled by Messrs. Licata and Mocco, several lenders to Mr. Licata, various lawyers who participated in the transactions between Mr. Mocco and Mr. Licata, and two title insurance companies. These suits did not come to trial in the intervening sixteen years because both of the principals[1] have filed numerous bankruptcy proceedings for themselves, their spouses and large numbers of entities they controlled. Further, one of the principals, Mr. Licata, has substituted counsel several times. (James Scarpone, counsel for Mr. Mocco, has stated that **twenty-five different law firms have represented Mr. Licata or parties aligned with Mr. Licata.**) This

[1] Both Mr. Mocco's wife, Lorraine, and Mr. Licata's wife, Cynthia, are named in the lawsuits since various documents list the two as owners or joint owners of either some of the properties in dispute or as owners and joint owners of the entities which own the properties in dispute. The court will continue to refer to Messrs. Mocco and Licata individually in describing the agreements and disputes between the two men, as the wives appear not to have been actively involved. Utilization of the wives' names, does not, with a few critical exceptions involving Ms. Licata, advance the analysis herein. When Mrs. Licata's role is different in any respect to that of Mr. Licata, the court will so indicate.

court has dealt with **over twenty law** firms on the case in the relatively short period of time it has been here. The undersigned believes **at least eighteen judges**[2] - - Federal and State - - have handled parts of this dispute (not counting the judges who handled the peripheral suit between companies which loaned money to Mr. Licata and the title insurer those companies utilized to insure the properties.)

The undersigned's immediate predecessor on these files, Judge Paul Vichness, determined that many, if not most, of the disputes centered on one central question - - the ownership of several pieces of valuable New Jersey real property as and between Mr. Mocco and Mr. Licata. He thereupon decided that the court should conduct an "ownership trial" prior to addressing the collateral non-ownership disputes. Accordingly, the court conducted the "ownership trial" commencing November 17, 2014. This opinion will serve to set forth the court's conclusions as to that trial. Before discussing the trial, however, the court must discuss the background of the dispute.

II. The Background

2. The Principals

Mr. Mocco has had a long career as a real estate developer, politician, and attorney. In the political realm, he served as Mayor of North Bergen from 1971 to 1979 and as a Hudson County Freeholder from 1974 to 1981. He has been a member of the New Jersey Bar since 1967, practicing very little.[3] Most of his efforts have been devoted to real estate development.

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[2] In alphabetical order, Hon. Colleen Brown, Garrett Brown, Claire Cecchi, Julio Fuentes, William Gindin, John Hughes, Kenneth Levy, Raymond Lyons, Roger Miner, Renna Raggi, Jed Rakoff, James Rothschild, William Sessions, Michael P. Shea, Alan Shiff, Paul Vichness, Maralyn Winfield, and James Zazzali.

[3] He was suspended from the practice of law in 1978 for one year for notarizing a falsified signature. See In re Mocco, 77 N.J. 625 (1987). Of course, the incident occurred so far in the past that the court did not consider it as affecting Mr. Mocco's credibility.

Mr. Licata is a 60 year old resident of Bradentown, Florida, who sometimes lives in Greenwich, Connecticut. Mr. Licata is an expert in securing financing for financially distressed parties.[4] Mr. Licata and his wife owned a company known as First Connecticut Consulting Group ("FCCG") which specialized in arranging financing and loaning money. That company is also a party herein. Mr. Licata is the debtor in a personal bankruptcy proceeding in Connecticut.

3. The Peripheral Actors

While the principal players in that dispute were Mr. Mocco and Mr. Licata, there were numerous peripheral actors who should be described. The most important of these peripheral players was Pieter J. deJong, Esq. Mr. deJong was an attorney who originally represented Mr. Licata, but who later worked for Mr. Mocco. He was involved in several of the most critical transactions in this case. Mr. deJong was disbarred in 2009 for stealing client funds and was indicted for these crimes in 2010. He was then convicted. Not surprisingly, as the former counsel for Mr. Licata pointed out in a pretrial brief, "The relationship between deJong and Mocco and Licata is filled with conflicts and deception".

Other than Mr. and Mrs. Licata and FCCG, the first named defendant in Mr. Mocco's Second Amended Complaint ("SAC")[5] is SWJ Holdings ("Holdings or SWJ"). The court sometimes denominates SWJ Holdings as "Holdings" because there is another entity known as

---

[4] Mr. Licata has had difficulty with the criminal law. He was indicted in March 2006 by the Federal Government. On September 28, 2007, he pleaded guilty to Count One of a Superseding Indictment which alleged that he engaged in a scheme to defraud a lender in or around 2001 by making material misrepresentations as to his financial condition when obtaining a $19 million loan. He was sentenced to one day of imprisonment and four years of supervised release, the first six months of which he was confined to his home. The court decided to allow evidence of the conviction, but not to utilize an event which happened in 2001 to materially affect its view of Mr. Licata's credibility, particularly since Mr. Licata has argued that his connection was "set up" by Mr. Mocco and his counsel.

[5] While Mr. Mocco was not the sole plaintiff named in the SAC - - the SAC lists 16 plaintiffs in total, including Mr. Mocco's wife and numerous entities controlled by Mr. Mocco - - for the purpose of this opinion it suffices to refer to Mr. Mocco as the plaintiff who filed the SAC.

SWJ Management ("Management") which claims to own certain of the assets at issue. Management is a debtor in a bankruptcy case filed in the Southern District of New York. In 2006, Holdings bought from Mr. Licata's Bankruptcy Estate the principal property which is in dispute between Mr. Mocco and Mr. Licata. Holdings asserts that its ownership is "free and clear" of Mr. Mocco's interest. Mr. Mocco claims that purchase was fraudulent, and has sued almost everyone involved with Holdings. Holdings defaulted on the purchase, was sued by the Trustees in Bankruptcy, and filed for bankruptcy sometime subsequent to the purchase; it has ceased operations. Mr. Mocco claims that the initials SWJ stand for its three members: **Stephen Podell** (the "S"), W**illiam Mournes** (the "W") and **James Licata** (the "J"). He has submitted to the court an email from Mr. Dale Schreiber, an attorney defendant herein who has now settled; the email states that Holdings was to be owned 1/3 by Mr. Licata, 1/3 by Mr. Stephen Podell, another defendant herein, and 1/3 by Mr. Mr. William Mournes, also a defendant herein. Mr. Licata has denied membership in Holdings.[6] Another individual, Mr. **Richard Annunziata**, has told the court that he owns 30% of Holdings. It is believed Mr. Annunziata is a friend of Mr. Licata or at least a person who bought an interest from Mr. Licata. See M 282. Mr. Annunziata also claims to own 100% of Management. To make the matter more uncertain, the Trustees in Bankruptcy for Mr. Licata and FCCG assert that the Holdings ownership is:

Podell	30%
Cobra/Ventura Equities, LLC (Mr. William Mournes)	59.3%
Payne Investments, LLC (Mr. Rich McCloskey)	10%

[6] As will be discussed subsequently, when Holdings purchased property allegedly owned by Mr. Licata's Bankruptcy Estate, the Bankruptcy Judge approved the sale, which he would not have done if he believed Mr. or Mrs. Licata had an ownership interest in Holdings.

G Triple S. LLC
(Mr. Shandon Gubler) .07%[7]

Stephen Podell, Esq. has been described as the 100% owner and "managing member" of SWJ. Mr. Podell is a New York City resident who was admitted to the practice of law in New York State in 1982. Mr. Podell practiced law in 1982 and then from 1993 through 1996 as an associate of the New York firm Podell, Rothman, Schecter & Bonfield. His registration status was changed to "suspended" because he stopped paying biennial dues commencing in 1996 when he ceased practicing law. He resigned from the New York Bar in May 3, 2005 when he decided not to practice any more. Mr. Podell, who is the son of a United States Congressman, has spent the bulk of his career as a real estate developer at various real estate development firms, including Tishman Speyer.

William Mournes is a Denville New Jersey resident who was allegedly a member of Holdings. Obviously, Mr. Mournes' alleged membership in Holdings conflicts with the claim that Mr. Podell was a "100% owner". Mr. Mournes, according to all concerned in the case, is an entrepreneur occasionally associated with Mr. Licata.

Defendant Cobra/Ventura Equities, LLC (Cobra") is a New Jersey limited liability company having business offices c/o Mr. Mournes in Denville. The SAC alleges that Cobra guaranteed Holdings' promissory notes given to purchase the Licata assets. As set out above, the Trustees in Bankruptcy claim, Cobra was an owner-investor in Holdings.

Dare Investments, LLC ("Dare") is a Utah limited liability company which claims to hold a first lien on assets acquired by Holdings, as a result of a $5 million loan by Dare to Holdings.

[7] As the case approached trial, a dispute arose as to who controlled Holdings. Another dispute arose over whether Mr. Annunziata still owns Management, since Management had debts to a third party, who sought to execute on Management's stock.

Daniel Shepro, Esq. is a partner in Shepro & Blake. Both Mr. Shepro and his firm are defendants in the SAC because they represented Holdings in relation to a transfer of certain properties from Mr. Licata's bankruptcy estate.

Herbert Blake is a resident of Connecticut who was once a Connecticut attorney. He is representing himself herein; opposing counsel informed the court that he is disbarred. He is named in the SAC because he allegedly provided financial and advisory services to Holdings and/or its principals.

Dale Schreiber, Esq. is a partner in Proskauer Rose LLP, ("Proskauer") (collectively, "the Proskauer Defendants"). The Proskauer Defendants were joined in this suit by Mr. Mocco because of work they did for Holdings. Mr. Schreiber and his law firm differ from Mr. Shepro and his firm because they worked for Holdings on the purchases of different properties. (Mr. Mocco asserted, however, that the Proskauer Defendants helped engineer a larger, more complex, conspiracy to help Mr. Licata defraud Mr. Mocco of much or all of his empire.) Mr. Mocco has now settled with Mr. Schreiber and Proskauer.

Centrum Financial Services, Inc., U.S. Bank, National Association and First Bank and Wells Fargo, N.A. (the Lenders") loaned $15 million to Holdings to finance Holdings' purchase of the properties involved in the 2006 Licata-Holdings sale from Mrs. Licata. Mr. Mocco, has asserted that the Lenders' mortgage securing the loans is invalid. The Lenders assert that Mr. Licata or his Bankruptcy Trustee or Mrs. Licata owned the properties in question and validly transferred them to Holdings, making the mortgages securing the loans valid.[8] **The Lenders actually became Mr. Mocco's real adversaries** when Mr. Licata's Trustees in Bankruptcy

[8] The SAC also named a title insurer - - Chicago Title Insurance Company ("Chicago") and its agent Horizon Title Agency, Inc. ("Horizon"). Chicago provided title insurance for the Lenders, with Horizon acting as its agent. During the trial, it became clear that Chicago had obtained an agreement from the Lenders in exchange for a payment or payments so that it, not the Lenders, would benefit from a victory by the Lenders herein.

compromised their claims with Mr. Mocco for $1,500,000, excepting the Lenders – Mocco dispute. Put differently, after that settlement, Mr. Licata ceased to be a party, and **the only parties left were Mr. Mocco and the Lenders**.

The SAC names two Connecticut attorneys who serve as Trustees for the Bankruptcy Estate of Mr. Licata and FCCG - - Ronald Chorches and Richard Coan, respectively. They are accused of no wrongdoing. They are named in the SAC because they purchased, as Trustees, all of Holdings' right, title and interest in the properties Holdings acquired from FCCG. Mr. Mocco later settled with the Trustees.

The SAC further names Sky Land Investments, LLC a Nevada limited liability company, and Gregory Crane a Connecticut attorney who is a principal and managing director of Sky Land. Mr. Crane owns and controls an Arizona corporation, American Management, which is the last corporation named in the SAC. Neither Mr. Crane nor the two corporations he apparently controls played a major role in the transactions which are the subject of the trial.

In addition to all the individuals and entities noted above, the SAC named a group of defendants called the Titan Defendants. The best description of the Titan Parties was provided by their counsel William McGuire of Tompkins, McGuire, Wachenfeld & Barry. The court will quote from Mr. McGuire's description of his clients:

> Who are the Titan Parties? Since the beginning of these proceedings, litigants on both sides of the aisle have referred to the following four groups collectively as the "Titan Parties":

- EMP Whole Loan I & EMP Whole Loan II ("EMP"): During the timeframe that is relevant to the claims and defenses involving the Titan Parties (roughly 1996 to 1998), EMP made mortgage-backed loans—usually on a short-term "bridge" basis pending the arrangement of longer-term financing. As alleged here, EMP funded mortgage-backed loans to various First

Connecticut and other entities.[9] These loans, in turn, helped Mocco emerge from a contentious bankruptcy in 1996.

- Broadview Funding Corporation: During the relevant timeframe, Broadview was a broker that specialized in the origination of mortgage-backed loans.

- Michael Vranos, Oliver Cojot-Goldberg, Andrew Vranos, and Ira Saferstein: These individuals were principals or employees of EMP and/or Broadview during the relevant timeframe. Each was allegedly involved in the transactions underlying the various loans and business dealings at issue in Mocco's lawsuit against the Titan Parties.

- Titan Management LP & Titan Funding LP ("Titan"): The named Titan entities did not exist in 1996 when the underlying loan transactions occurred. Responding to the Court's request, GHZ I LLC is the General Partner of Titan Management LP and Olivier Cojot-Goldberg is the managing member of GHZ I LLC. The limited partners of Titan Management LP are George Zettler, VC Investments LLC (of which Mike Vranos is managing member), Larry Penn, Mike Zaretsky, John Geanakopolos, and Broadview Funding Corporation (of which Ira Saferstein is president and Andrew Vranos is a shareholder).

Practically the only person who was involved in the relationship between Mr. Mocco and Mr. Licata **not** named in the SAC was the late **Alan J. Karcher**. (Presumably Mr. Karcher was not named because he died.) Mr. Karcher was a prominent New Jersey politician and lawyer who Mr. Mocco has described "as a Long-time friend and business associate of the Moccos." Mr. Karcher was given a 99% ownership interest in one of the critical properties in dispute in this case; according to Mr. Mocco, Mr. Karcher held title to that property as agent and nominee for the Moccos until he died late in 1998.

4. The Original Mocco Bankruptcy Proceedings

All the disputes between Mr. Mocco and Mr. Licata emanated from Mr. Mocco's bankruptcy, which he filed in 1994. New Jersey Bankruptcy Judge Raymond T. Lyons, who inherited the original Mocco Bankruptcy from Judge William Gindin, has explained the

[9] Mr. Mocco claims EMP charged him usurious interest rates and has otherwise defrauded him; he also asserts that EMP gave Mr. Licata "a kickback of approximately $2.3 million on one loan alone". EMP assert that Mr. Mocco is in default of a mortgage obligation. The EMP-Mocco dispute will be the subject of a separate trial.

evolution of the bankruptcy. He began by discussing the collapse of the New Jersey real estate market in 1989, leading to several bank failures and takeover by the Federal Deposit Insurance Corporation. He continued:

> And one of the things that happened in this whole fiasco was that the liquidators, the federal agencies ended up selling assets which included primarily loans, many loans secured by real estate and I believe that in this case First Union was the purchaser of one of the assets from one of the federal liquidators, the assets being loans to Mr. and Mrs. Mocco and their related entities.
>
> The docket sheet in this case as well as several reported opinions show that this was a hotly contested Chapter 11 case. There were many contested hearings involving use of collateral, use of rents of properties, disputes between the debtors and the City of Jersey City and the major dispute was between the debtor and the primary financier that was First Union.
>
> **An indication of how complicated and how hotly contested this case is is that the moving papers here when entered on the docket are in the neighborhood of 1,280 for docket entries. So this was a very large case. As the parties have noted there were over 20 days of contested confirmation hearings. That probably sets a record in this District.** And there were competing plans filed.
>
> **It appears that the resolution of the dispute between First Union and the debtors was only accomplished when Mr. Lacotta [sic] and his affiliated entities were brought on the scene and arranged financing to take out the position that was held by First Union**. And that also apparently was one of the factors which allowed for the disposition of one of the disputes between the City of Jersey City and the Mocco interests. And I believe that was before the District Court and managed by Magistrate Judge John Hughes.
>
> **So after two years of knock down, drag out fighting involving matters that went up on appeal to the District Court in the Third Circuit, finally there was a plan of reorganization that was approved by Judge Gindin in September 1996**. Now I came on the bench in April of 1999 and I inherited this case at that time. It was still an open case.
>
> But to my recollection the only reason it remained open was there was another dispute with the City of Jersey City involving tax appeals that had been tried by Judge Gindin [sic] and the only thing that needed to be accomplished in that adversary proceeding was agreeing on the form of final judgment because values ascribed to numerous properties had to be allocated, the resulting tax liability had to be calculated and payments that were made by the debtors had also to be allocated among the properties to come up with the final amount due. I guess interest had to be calculated as well. And neither the debtor

> nor the City of Jersey City could agree upon that so this adversary proceeding remained open for quite some time.
>
> Finally that was resolved and a judgment was entered and I believe it was the intention of the City to appeal in the federal system, take appeal to the District Court, and I assume that's happened. I'm not sure if I know that that's happened but I assume it has.
>
> In any event, once it appeared that everything that was needed to administer the case had been accomplished and there was only this one lingering adversary proceeding, the outcome of which would have no impact on the confirmed plan, I issued in an order to show cause why the Chapter 11 shouldn't be closed. And eventually in May of 2001 the case was ordered closed despite the fact that this tax appeal may linger on in the federal system...
>
> My point is this, that other than that tax appeal there have been no signs of activity in the Mocco case since I came on board in April of 1999 and I assume for quite some time prior to that.
>
> In April of 1999 the State Court litigation that Mr. Friedman made reference to was instituted by Peter Mocco, et al. against James Licata, et al. in the Superior Court Chancery Division in Essex County.

Judge Lyons then addressed the state court litigation, which hinged on **"an alleged agreement between the plaintiffs and the defendants which would call for re-conveyance of certain properties for a nominal consideration".** That document is what the parties called the "three page agreement". Judge Lyons chose not to address the legitimacy of the three page agreement because, as he stated, any decision on the three page agreement "will not change the result in the bankruptcy case". The legitimacy and meaning of the three page agreement was later addressed by a Vermont Bankruptcy Judge (see page 23, below) and is now up to this court. Specifically, the three page agreement is the primary document which the court must interpret in order to decide who owns a large group of properties known as the First Connecticut Holding Group IV.

Before discussing those properties, however, the court will briefly set out what it has learned about an even more valuable group of properties - - the so-called Schedule C properties.

5. The Properties

1. The Schedule C Properties[10]

Three of the properties in this case were referred to in Schedule C of a January 28, 1998 joint venture agreement (the "JVA") between Mr. Mocco and Mr. Licata. The parties herein generally refer to these three properties as the "Schedule C" properties.[11] The court will describe each of these properties separately.

The most valuable Schedule C property - - and the most valuable property ever owned by Mr. Mocco - - is known as the Liberty Harbor project, an 88 acre development in downtown Jersey City. Mr. Mocco began buying the land for the project in or around 1984. In February 2005, the Jersey City Redevelopment Agency ("JCRA") designated Mr. Mocco as the redeveloper of the Liberty Harbor project. Mr. Mocco originally owned a 19 acre parcel, while neighboring properties within the 88 acre project were owned at various times by others or the JCRA.

In 2004, the JCRA seized a 3.4 acre site at the front of Jersey Avenue owned by a family known as the Kerrigans so that the land could be used to augment the Liberty Harbor project. The JCRA paid the Kerrigans $1.2 million, but a jury in 2008 determined that the actual fair market value of this land was $18 million, which with interest had risen to $21 million. The Kerrigans sued Mr. Mocco, the JCRA and Jersey City which resulted in a 2012 settlement, to be paid by Mr. Mocco. The settlement called for Mr. Mocco to pay a total of $22.4 million, with an

[10] On the last business day before the scheduled January 2, 2014 trial date of this matter, Mr. Mocco and the Trustees entered into a $1,500,000 settlement wherein the Trustees sold to Mr. Mocco all of Mr. Licata's rights. See Section IV herein, which addresses Judge Shiff's decision to approve of the settlement. That ruling means that there is currently no dispute as to the Schedule C Properties. Nevertheless, the court has included the description of the Schedule C properties since, as a court of equity, it must consider all the dealings between Mr. Mocco and Mr. Licata.

[11] As will be discussed subsequently, at page 53 et seq., the JVA's Schedule A properties, "Existing Joint Venture Assets", and Schedule B properties "Pending Asset Acquisitions" were apparently of little value and were lost by Mr. Mocco to foreclosure; accordingly, they are not the subject of any dispute between Messrs. Mocco and Licata.

initial payment of $2.5 million by August 2, 2012 and yearly payments thereafter. The first payment have apparently been made.

The Kerrigan case was not Mr. Mocco's only Liberty Harbor lawsuit. In or about 1992, he sued the JCRA and the City of Jersey City, alleging that they breached the redevelopment agreement by failing and refusing to condemn two city blocks in Liberty Harbor. The JCRA counter-claimed that Mr. Mocco had breached the agreement by failing to proceed expeditiously, by placing an unauthorized mortgage (the Licata mortgage) on the 19 acre parcel, and by conveying an ownership interest in the project in violation of the redevelopment agreement. At the first trial, in Hudson County Superior Court, Mr. Mocco won a $6 million jury verdict, which the trial judge set aside. The second trial was before Chief Judge Garrett Brown of the United States District Court and a jury (when Mr. Mocco filed for bankruptcy protection in March 1994 the JCRA litigation was removed to Federal Court and stayed.)[12] The result of the second trial was a verdict denying the JCRA's request for terminating the redeveloper agreement, finding that both Mr. Mocco and the JCRA had breached the contract between them, and that Mr. Mocco had suffered no damages because he could still develop the land.

The JCRA litigation was potentially important herein because of certain statements Mr. Mocco and his counsel made to the court, which positions could be considered inconsistent with the positions he asserts herein. When Mr. Mocco filed for bankruptcy protection and the JCRA litigation was stayed, the JCRA remained active as a creditor in the Moccos' bankruptcy. In that capacity, it supported the plan of the largest creditors, First Fidelity/First Union, to divest Mr.

[12] Presumably, Judge Garrett Brown is not related to Vermont Bankruptcy Judge Colleen Brown, who also presided over an important trial in this matter. The two Judge Browns were addressing different properties and mortgages. Judge Colleen Brown was dealing with the Holding Entities Properties and the loan from EMP collateralized by shares in the Holding Entities, (see p. 21 et seq.) Judge Garrett Brown was dealing with the 19 acre Liberty Harbor trust and a loan originally made by the Howard Savings Bank (later acquired by First Union) and a related mortgage on the 19 acre Liberty Harbor tract. That mortgage was never assigned to EMP.

Mocco of the 19-acre Liberty Harbor parcel. To avoid being divested of the 19-acre parcel, Mr. Mocco proposed two alternative plans. One was to give the parcel to the holder of the debt in exchange for an $8 million credit. The other was for Mr. Mocco to develop the parcel and pay the mortgage in its full principal amount with 9% interest. First Union refused to support either plan. It did agree to sell all the Mocco loans to Licata's entity, FCCG.

Once FCCG owned the debt, no one could oppose the plan. Judge Gindin thereupon confirmed the plan, stating in his Order that "the mortgage granted to [FCCG]… shall be first mortgages."

When the stay was lifted, the JCRA litigation resumed before United States Magistrate Judge John J. Hughes. In those proceedings, Mr. Mocco's counsel, Mr. Scarpone, assured the court that:

> " [FCCG] bought First Union's position"
>
> …..
>
> "Your Honor, **I know of no contracts [between Mr. Mocco and First Connecticut]**"

Mr. Mocco certified:

> "Debtor Peter Mocco remains liable for the full debt and First Connecticut holds a mortgage on the property as collateral security"
>
> …..
>
> **"No other 'contract' or document setting forth the agreement between the Debtors and First Connecticut exists… No other contract exists".**

Mr. Mocco testified that :

> "[Licata/FCCG] brought the loan from First Union"
>
> …..
>
> The amount due on the loan at the time of trial in 1997 was "in excess of 13 Million"

"They [FCCG] - - at the end of the year, if I pay it [the interest], then of course it's marked paid. If I don't pay it, they take the outstanding amount of interest for that year, and they put it into the principal amount of the mortgage that's due and owing."

…..

My arrangement is that I'm to develop the property and when I develop the property, that's when we've going to pay the mortgage off.

Judge Brown thereupon entered an Amended Final Judgment by Consent establishing that the FCCG mortgage remained valid. Mr. Scarpone then wrote counsel to the JCRA on November 20, 1998 that "[T]he mortgage held by First Connecticut Casualty Group is a first mortgage is the principal amount of $8 million plus accrued interest. Peter [Mocco] has requested that First Connecticut provide a calculation of the current indebtedness…"

The next development on the Liberty Harbor mortgage was somewhat difficult to understand: Mr. Mocco drafted a Discharge of Mortgage, which was executed by Mr. Licata and filed on or about February 19, 1999, despite the fact that Mr. Mocco never paid Mr. Licata one penny on the $13 million plus mortgage. Obviously, the JCRA litigation suggests judicial estoppel issues; these will be addressed subsequently.[13]

Mr. Mocco, who remained relentlessly aggressive and litigious, also engaged in litigation over his Liberty Harbor property taxes. The result of that litigation was that Jersey City agreed to reimburse Mr. Mocco for over $1 million on tax payments he made on the Liberty Harbor

[13] Mr. Mocco's assertions that he owed FCCG a mortgage debt were apparently made to convince the Federal Court that he had not given up an **ownership** interest in the 19-acre parcel which would have violated the JCRA agreement. He now claims the mortgage amount was relevant only to help the Federal Court determine how much the JCRA would have to pay him if the Court determined that the agreement was terminated. (The formula was the amount Mr. Mocco paid for the property in 1985 plus the value of any improvements or remediations Mr. Mocco made - - and the mortgage secured money was borrowed prior to the bankruptcy to find the clean-up of the property, he asserts.) In fairness to Mr. Mocco, he asserts that the discharge of the FCCG mortgage was of no real consequence because he still owed EMP the full amount of the loans and continued to pay it until he replaced it with longer term financing.

land. (Mr. Mocco testified that his taxes were raised because he "was on the wrong side of an election"; the winner, he claimed, wanted to throw him out and put in someone else.)

The Liberty Harbor project opened in 2007 with just short of 700 homes and some street level retail businesses. As of 2012, 650 units were occupied, according to Mr. Mocco. Mr. Mocco says that the project now has 8,000 residential units, as well as commercial and retail space. The final goal, according to Mr. Mocco, is for there to be as many as 10,000 residential units spread over 80 acres. The JCRA Executive Director Bob Antoniullo has publicly disagreed with Mr. Mocco's assertions. The Jersey Journal has quoted him as saying "Since 1983, Mr. Mocco has "constructed 325 units and a beer hall". He went on to say "Nobody has been given more by the City of Jersey City for less than Peter Mocco and has done so little with it". See the Jersey Journal July 19, 2012.

The value of the Liberty Harbor project in 1999, as opposed to the value today, was of importance to the case because one of the major disputes herein was whether Mr. Mocco agreed to exchange of 50% interest in the Liberty Harbor project in 1999 for Mr. Licata's release of a $6.437 million mortgage held by Mr. Licata. (As set out above, Mr. Mocco testified at a prior hearing that as of 1997 the total amount due FCCG in connection with the mortgage, including interest, totaled approximately $13 million.) Thus, the value of the Liberty Harbor project in 1999 could have established either that Mr. Mocco would never have reasonably made that exchange or that, based on 1999 values, the exchange could reasonably have been made.[14]

The Proskauer Defendants have carefully addressed this issue. This court will quote at length from that portion of the Proskauer Defendants' brief discussing the value of Liberty Harbor:

[14] The issue became of less importance when the Licata Bankruptcy Trustees settled Mr. Licata's claims against Mr. Mocco for $1,500,000 on the eve of this trial.

The only possible relevant values for the Liberty Harbor project are those Mocco obtained through 1999 when he agreed to give Licata an interest in the Liberty Harbor project. These include the values of the 19-acre Liberty Harbor parcel and/or entire Liberty Harbor project as of (1) 1996 when Licata purchased the Liberty Harbor Mortgage Loans and, in doing so, allowed Mocco to avoid losing the 19-acre Liberty Harbor parcel and (2) 1999 when Licata discharged, at Mocco's request, the Liberty Harbor $6.437 Million Mortgage Loan (including all accrued interest and penalties, which, as Mocco testified, totaled approximately $13 million in early 1997). Numerous documents produced in this litigation demonstrate that during that relevant time period, the value of the Liberty Harbor properties was not worth the purported "hundreds of millions of dollars" Mr. Scarpone claims it is worth today, but rather was exponentially less. These include:

1.) A First Union internal document that indicates an appraised value for the 19-acre Liberty Harbor parcel as of November 25, 1990 of $8,350,000.

2.) A September 8, 1993 appraisal of 75.5 acres of waterfront property in Jersey City, New Jersey, which included the 19-acre Liberty Harbor parcel, that valued the entire 75.5 acres at $27,200,000.

3.) An October 23, 1993 appraisal of the 19-acre Liberty Harbor parcel that valued the property at $960,000.

4.) An October 5, 1994 appraisal of the 19-acre Liberty Harbor parcel that valued the property at $10,300,000. (Proskauer Defendants note that the $10,300,000 appraisal assumed satisfactory remediation of the contaminants on the property; without remediation they argued, the property would be worth less.)

5.) An April 5, 1995 appraisal of the 19-acre Liberty Harbor parcel that valued the property at $142,875.

Furthermore, Mocco's own testimony demonstrates that he believed the property was worth little prior to 1999.

1.) In January 14, 1997 testimony, Mocco stated that, as of that date, Liberty Harbor was "[a]bsolutely not" valuable and "was more valuable in [19]87."

2.) In a September 7, 1999 Certification, Mocco requested that Licata post a bond in the amount of "$30 million because the actions of [Licata] are threatening to totally destroy the project." Surely, if Mocco believed that the project could be "totally destroyed" he was asking for a bond in the amount of the total value of the project, as developed, and not merely of the vacant land.

3.) In a May 31, 2001 Certification, Mocco stated that, in 1994, “his ultimate ability to develop Liberty Harbor was speculative. . .” and that, in 1996, the fair market value of Liberty Harbor was only $3,500,000.

> These documents and testimony demonstrate two unequivocal facts that contradict Mocco’s argument that he believed the property was worth hundreds of millions of dollars in 1999: (1) numerous appraisals of the property prior to 1999, and at least as recent as 1995, estimated that the property was valued at most at $10,300,000, and as little as $142,875, and (2) Mocco believed in 1997 that the property could not be developed and, therefore, was worthless and that in late 1999, the total value of the developed project was not worth more than $30 million.

Mr. Mocco has not submitted documentation as detailed as that submitted by the Proskauer Defendants on this issue.

Fulton’s Landing is a 100+ unit apartment house located at 149 Essex Street, Jersey City, New Jersey. It is also one of the three Schedule C properties. In 2002, Mr. Licata’s claim to Fulton’s Landing was dismissed by Hon. Kenneth Levy, who was overseeing these cases prior to Judge Vichness. Thereafter, Mr. Mocco sold Fulton’s Landing to Pulte Urban Renewal, LLC for $7 million on May 5, 2004.

The Atrium at Hamilton Park (“the Atrium”) a 110 unit assisted living facility is located at 350 Ninth Street, Jersey City, New Jersey. It is the third of the three Schedule C Properties. Mr. Licata allegedly obtained an interest in the Atrium by virtue of the JVA, just as he allegedly obtained an interest in the other two Schedule C properties.

2. The Holding Entities Properties

The other disputed properties between Mr. Mocco and Mr. Licata - - and the only properties now at issue in the dispute between Mr. Mocco and the Lenders - - are the properties owned by what the parties herein call the “Holding Entities”[15]. The Holding Entities were

[15] The Holding Entities, despite their name, bear no relationship to SWJ Holdings, denominated as “Holdings” herein.

formed in 1996 in connection with a Chapter 11 plan of reorganization of Mr. and Mrs. Mocco, who were emerging from the three year long bankruptcy case discussed above. The Holding Entities themselves can be divided into two groups. One group consisted of the five Holding Entities which were the subject of a United States Bankruptcy Court decision by Bankruptcy Judge Colleen A. Brown, dated July 27, 2004. Judge Brown was ruling on a motion by Mr. and Mrs. Mocco to dismiss the five Chapter 11 cases of FCCG, filed by Mr. Licata in Connecticut. [16]

The five Holding Entities at issue in the Vermont Decision were: FCHG II, III, X, XI, and XIII. FCHG II owned Jersey City, New Jersey property known as the Hamilton Park Health Care Center. FCHG III owned Jersey City, New Jersey property where a self-storage business is located. FCHG X and FCHG XI both own Jersey City, New Jersey rental housing. FCHG XIII owns a development site in Sayreville, New Jersey.

One Holding Entity was only peripherally discussed in the Vermont proceedings: FCHG IV. FCHG IV is of critical importance to this case because, as will be discussed subsequently, it is the only property on which the Lenders advanced money. FCHG IV was formed on September 12, 1996. On April 18, 1997 a Certificate of Amendment to the Certification of Formation was filed for FCHG IV. That document listed 13 properties which were owned by FCHG IV:

199-201 Warren Street and 30 Morris Street, Jersey City, New Jersey
89-95 Wayne Street, Jersey City, New Jersey
492-500 Jersey Avenue (a/k/a) 100 Mercer, Jersey City, New Jersey
512 Jersey Avenue, Jersey City, New Jersey
514 Jersey Avenue, Jersey City, New Jersey
112 Sussex Street, Jersey City, New Jersey

[16] As set out above in note 12, page 12, Judge Brown is a Vermont Bankruptcy Judge. She heard the case because the Connecticut Bankruptcy Court did not have a schedule which could accommodate the trial. Her decision will be referred to as the Vermont Decision. Her decision was affirmed by the United States District Court for the District of Vermont on March 28, 2006. That decision was affirmed by the United States Court of Appeals for the Federal Circuit on November 15, 2007. The three decisions will be referred to together as the "Vermont Decisions".

211 Washington St/213 Washington St (a/k/a) 99 Sussex St, Jersey City, NJ
4304 Smith Street, North Bergen, New Jersey
4306 Smith Street, North Bergen, New Jersey
4307 Smith Street, North Bergen, New Jersey
4308 Smith Street, North Bergen, New Jersey
4312 Smith Street, North Bergen, New Jersey
4313 Smith Street, North Bergen, New Jersey[17]

Two weeks later, on April 29, 1997, a similarly named document listed only nine properties: the first seven on the above list, as well as "4306-4312 South Street, North Bergen, New Jersey (numbers 9 and 12 above) and 4307-4313 Smith Street, north Bergen, New Jersey (numbers 10 and 13 above.) The court is uncertain as to what happened to the two omitted properties: 4304 and 4308, Smith Street, North Bergen, New Jersey.

Two months later, in May and June 1997, the properties owned by First Connecticut Entities V, VIII, IX, and XII were transferred to FCHG IV to facilitate a loan refinancing from Trans Atlantic, an affiliate of Deutsche Bank. FCHG IV thus became the owner of 89-95 Wayne Street, 492-500 Jersey Avenue, 512 Jersey Avenue, 514 Jersey Avenue, 112 Sussex Street, Jersey City, New Jersey, 211-213 Washington Street, all in Jersey City, and two North Bergen properties: 4306-4312 Smith Street and 4307-4313 Smith Street.[18]

The corporate documents evidencing ownership of FCHG IV are Byzantine, inconsistent, and difficult to understand. FCHG IV was formed on September 12, 1996. There were two "original issues" membership certificates: (1) certificate #1, representing a 50% ownership interest in Mr. Licata, and (2) certificate #2, representing 50% ownership interest in Mrs. Licata.

[17] Mr. Mocco's interrogatory answers also list 30 Morris Street, Jersey City, New Jersey. The difference is not material to the court's opinion herein.
[18] Mr. DeJong discussed the transfer of properties into FCHG IV at pp. 115-117 of his Vermont testimony on day one of the proceedings there.

On April 12, 1997 and April 29, 2007 Certificates of Amendments to the Certificate of Formation of FCHG IV were filed in Trenton. Both documents listed Pieter de Jong as the Registered Agent and both documents reflecting changes in the corporate power to comply with limitations imposed by the Trans Atlantic loan. The only difference between the two Amendments is the very slight difference in the description of the properties owned, discussed above.

On April 29, 1997, an Operating Agreement lists **Alan C. Webber**, a Licata employee as the 99% owner and FCHC as a 1% owner. It is signed by Mr. Webber.

A September 1, 2001 document signed by Mr. Mocco acknowledges the two original certificates, but goes on to address the following:

(a) Certificate no. 3 issued May 30, 1997 granting a 99% interest to Mr. Webber.

(b) Certificate no. 4 issued the same day granting a 1% interest to First Connecticut Holding Corporation IV;

(c) Certificate no. 5 issued July 29, 2008 for a 99% interest to Mr. Karcher; that statement is conditioned by the notations "original/assigned" as well as "original must be signed by James J. Licata as president of First Connecticut Holding Corporation IV, the managing member".

(d) The document goes on to state that "Certificate 6 in Book issued to Lorraine Mocco 9-1-01 pursuant to August 25, 1998 and August 30, 2001 instruction letter from Peter Mocco.[19]

(e) The document notes that certificates 7 through 15 are in blank.

The above described document lists three Unit Powers:

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[19] The actual certificate, signed by Mr. Mocco, list Mrs. Mocco as a 100% owner.

(a) Mr. and Mrs. Licata, who assigned their respectively shares "in conjunction with a pledge of these shares to EMP Whole Loan".[20]

(b) Mr. Licata, who assigned his 50% interest to Mr. deJong on July 30, 1998.

(c) Mrs. Licata, who assigned her 50% interest to Mr. deJong on August 17, 1998.

It was obvious from the above confusing and inconsistent documents that a trial would be needed to determine who actually owned FCHG IV.

G. The Vermont Decisions

Not surprisingly, during the seventeen years this dispute has remained in the New Jersey Superior Court, other courts have addressed aspects of the dispute. The first Judge to address the Mocco-Licata ownership issue was Vermont Bankruptcy Judge Brown. (Mr. Licata had filed a Bankruptcy in Florida which was transferred to Connecticut; the Connecticut Bankruptcy docket was overly crowded, leading to the transfer of the trial to Vermont.) At issue were 21 petitions Mr. Licata had filed for various FCHG entities. The Moccos moved to dismiss all 21; Mr. Licata consented to dismissal of 15 which had no assets and one (XXIII) which went to secured creditors in exchange for $110,000 to the bankruptcy estate. This left five entities subject to the motion: II, III, X, XI, and XIII. Mr. Licata was unable to explain why he did not file for FCHG IV; the only logical reason was attorney error, as he seemed to imply.

Judge Brown began by setting out her task in the first sentence of her July 27, 2004 Opinion:

> Peter and Lorraine Mocco have filed a Motion to Dismiss the chapter 11 cases of First Connecticut Holding Group LLCs II, III, X, XI and XIII (collectively, "the LLCs"), asserting

[20] The court assumes these assignments were to enable EMP to take the shares if FCHG IV defaulted on the loan.

> that they - not James Licata- owned these LLCs on the date of the bankruptcy filings, and therefore James Licata's filing of these cases is without legal effect

After explaining that she conducted an eight day trial with eight witnesses, including Messrs. Mocco and Licata, and over 85 exhibits, she made a finding important herein, **"The Court finds that Peter Mocco was a more credible witness than Licata on all issues."**

Judge Brown then set the stage for the relationship between Messrs. Mocco and Licata by explaining Mr. Mocco's rather desperate financial condition in 1996:

> It was in May of 1996, when Mocco owned all the properties that were later placed in the LLCs, that Mocco met Licata and the events were put into motion that led to the instant controversy. At that time, Mocco had been in a chapter 11 reorganization case for approximately two years. He was desperately trying to have a plan of reorganization confirmed. However, one of Mocco's major secured creditors, First Union Bank ("First Union"), [they were owed approximately $44 million] opposed his proposed Fourth Amended Plan of Reorganization (hereinafter, "the Plan") and in fact, had taken the rather unusual step of filing a competing plan. Mocco determined that the only way for him to get his Plan confirmed was to buyout First Union's claim.

The Vermont Decision went on to discuss the original Mocco-Licata agreement:

> Mocco met Licata through a third party. Licata represented himself as a workout specialist who had extensive experience providing financially distressed parties with what he termed "hard money." After their initial meeting, Mocco executed a consulting agreement with Licata and his company, First Connecticut, under which Mocco agreed to pay First Connecticut a $200,000 consulting fee**… Importantly, under the terms of the consulting agreement, Licata was acting as Mocco's agent and First Connecticut was to find and secure a bridge loan for Mocco using the Hamilton Park Health Care Center property ("Hamilton Park") as collateral for the loan. It is critical to what later transpired that under the terms of the consulting agreement Mocco would retain ownership of the Hamilton Park property in this transaction.**

Judge Brown then explained how Mr. Licata planned to help Mr. Mocco in Mr. Mocco's struggle to keep his creditors at bay:

> From his discussion with First Union, Licata learned, first, that First Union required $22 million in immediate cash to satisfy its $44 million claim and, second, that **First Union did not want to deal with Mocco**. Based upon these discussions, concluding that this deal could be consummated, and perceiving Mocco to be in desperate straits, First

> Connecticut agreed to lend Mocco short-term money to purchase First Union's claim. **According to Licata, he told Mocco that First Connecticut had its own funds that it could lend Mocco, but not enough to cover the full $22 million. However, the evidence demonstrated that what First Connecticut actually had was a $16 million line of credit with EMP Whole Loan I ("EMP") which Licata planned to draw upon in order to make the loan. Mocco would have to raise the difference, about $6 million, plus pay all closing expenses. Mocco soon discerned that he would have to pledge other properties he owned to generate the $6 million he needed to acquire the First Union claim. Mocco pledged his personal residence, the property known as A-I Storage, a town house development, a condo complex and raw land in Sayerville, New Jersey, as well as other parcels in order to get this cash. What Mocco did not know was that, in its role as lender, First Connecticut would charge Mocco significant loan fees in addition to the consulting fees.** However, it appeared that Mocco would be able to raise the necessary $6-plus million (that ultimately totaled $10.6 million …. that the deal would go forward, and that First Union would finally be out of Mocco's bankruptcy case.
>
> They hit the first bump in the road when EMP placed restrictions on First Connecticut's use of the $16 million, namely, that EMP would not advance this money to First Connecticut if that company was going to loan it to a debtor. **EMP required that any loan of these funds be made to a bankruptcy-remote entity.[21] According to Licata, EMP instructed First Connecticut to: (1) set up limited liability companies ("LLCs") and transfer ownership of Mocco' s properties into the LLCs to circumvent this restriction; and (2) to name Licata and his wife, Cynthia, as the owners of the LLCs, to ensure that the LLCs would be true "bankruptcy-remote entities."**

The next part of Judge Brown's Opinion addressed a document critical to the case before her, and equally critical to this case: the "3-page Agreement". She wrote:

> Mocco did not want to transfer ownership of his properties into the LLCs, but he was desperate to have First Union's claim bought out so that he could have his Plan confirmed and he could get on with his life. Knowing the precarious situation Mocco was in, the "EMP boys" (as Licata calls them) made their squeeze-play; they informed Licata that Mocco had to put up an additional $5 million for EMP to use for its various investment projects as a condition of EMP making the loan to First Connecticut. Having run out of options, Mocco resignedly agreed to "invest" the $5 million in EMP. However, Mocco was nervous about the many new requirements and changes in the terms of the financing and adamantly wanted to make clear that ownership of the properties being placed in the LLCs would revert to Mocco once the bridge loan was refinanced and replaced with long-term debt. **To address these concerns, Mocco drafted an agreement between himself and Licata, specifying that Licata was taking title to the properties as a nominee only.**

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[21] Judge Brown was accurately summarizing the testimony, but did not mention that EMP insisted on the "bankruptcy-remote" position because **its** lender, CF First Boston, insisted on it.

> Although he is an attorney, Mocco did not create a legally sophisticated or complex document. The agreement was in plain English and only three pages long. The first two pages describe Licata's responsibilities and the third page describes Mocco' s responsibilities. Significantly, Licata signed the 3-page agreement at the bottom of the second page. Conversely, although he drafted it and insisted that Licata sign it, Mocco never signed the 3-page agreement. While it is not dated, both Licata and Mocco testified that Mocco presented it and Licata signed it on or about September 25, 1996. The timing is important as this was the same day the properties were transferred into the LLCs, and just one day before the acquisition financing closed and the final hearing was held confirming Mocco's Plan. **Of particular significance, the agreement made clear that: (l) First Connecticut was acting as Hamilton Park's nominee and consultant; (2) the properties transferred to First Connecticut would be reconveyed to Mocco for $1 when the acquisition financing was replaced with permanent financing; and (3) if and when the property would be transferred back to Mocco was within Mocco's sole discretion**. Several witnesses confirmed that the 3-page agreement was intended specifically to accomplish these three objectives. See, e.g., Tr. *2110104* at pp. 121-22 (Mocco); Tr. *2/2/04* a.m. at p. 29 (de j*ong);* Tr. *2/19/04* at pp. 32-33 (Opert). In stark contrast, however, Licata testified that he believed the 3-page agreement was "a non-binding gentlemen's agreement." Cf., Tr. *2/4/04* p.m. at pp. 163-64 (Licata); Tr. *2/9/04* p.m. at pp. 187-89 (Licata). **The Court finds Licata's testimony on this point to be both disturbing and disingenuous.**

This court will not address the next two pages of Judge Brown's opinion which discuss the legal issue of whether Mr. Licata was holding Mocco's property in a mere nominee, since this section of this court's opinion is designed to address the **factual** background of the case, not to set forth a legal analysis. Suffice it to say, her view of the case law, as applied to the facts, convinced her that Mr. Licata was only a nominee. She further found that the 3-page Agreement was valid and enforceable, partially because Mr. Mocco contributed so much money to the properties that he could successfully prove promissory estoppel.[22]

The Judge then discussed the Escrow Agreement between Mr. Mocco and Mr. Licata:

> On September 25, 1996, Mocco's properties were transferred to the LLCs so the collateral could be held in the form required by EMP. Once the properties were in the bankruptcy-remote LLCs and the certificates of ownership for each LLC (that were issued to Licata and his wife) were pledged to EMP (together with unit powers), EMP loaned First Connecticut the money necessary for First Connecticut to buy out First Union's claim in

[22] For example, Judge Brown found that Mr. Mocco contributed over $10 million to FCCG towards paying off the $22 million needed to buy out First Union and made another $5 million available to FCCG to finance joint ventures between himself and FCCG.

Mocco' s bankruptcy case. This was the backdrop which necessitated the creation of the third and final contract between Mocco and Licata.

In May 1997, Mocco and Licata entered into an Escrow Agreement, naming Pieter de Jong, Esq. as their Escrow Agent. See Ex. -8. The stated purpose of the Escrow Agreement was to "provide for the orderly transition of title" to the properties held by the LLCs back to Mocco… Under the Escrow Agreement, once EMP released its lien on the ownership interest in the LLC holding each parcel of real property, EMP was to convey ownership of that parcel to the Escrow Agent; upon EMP's conveyance of the ownership shares to the Escrow Agent, the Escrow Agent was authorized to issue replacement shares to Mocco or his designee... In conjunction with the execution of the Escrow Agreement, Licata (and his wife) granted de Jong a limited power of attorney "for the sole, exclusive and restricted purpose to enable the grantee [EMP] to endorse and surrender to the [LLC] for which it pertains, member/shareholder share certificates" issued to him. ... Licata also signed an Authorization Statement, dated June 2, 1997, instructing EMP to deliver the membership certificates to de Jong... At Mocco' s request, Licata re-executed the 3-page agreement at the time the parties executed the Escrow Agreement. It is not clear why the parties executed the Escrow Agreement and re-executed the 3-page agreement at this time, but neither Licata nor Mocco deny that they did so, and the Court concludes that their reason for doing so is irrelevant.

Having examined the Escrow Agreement together with the record before it, the Court finds, contrary to Licata's claim, the conditions of the Escrow Agreement were met such that de Jong, in his capacity as the Escrow Agent, was required to issue documents of ownership to Mocco or his designee. EMP had released the "ownership shares" of the respective LLCs, the Licatas had executed and delivered irrevocable Limited Powers of Attorney to de Jong granting de Jong the authority to issue replacement shares to the person or entity Mocco would designate, and Mocco designated the person or entity to whom he wanted replacement shares issued. Thus, all conditions precedent had been satisfied and de Jong was bound by the Escrow Agreement to issue the replacement ownership shares.

Judge Brown next went to her conclusions as to who owned the properties in question. She held that (1) documentary evidence demonstrated Mr. Mocco’s ownership; (2) Mr. Mocco’s conduct demonstrated his ownership[23]; and (3) the sworn schedules evidenced Mr. Licata’s lack of ownership. Accordingly, she found that Mr. Mocco owned the properties.

[23] In this regard, Judge Brown found that Mr. Mocco serviced the EMP loan at all times by wiring the funds to FCCG which re-wired them to EMP. Specifically, she found that “**the record is unequivocal that no funds for the EMP debt service ever came from the resources of either Licata or First Connecticut”.**

Judge Brown then found that Mr. Licata had filed the Chapter 11 proceeding for the LLC's in bad faith. While that ruling is not controlling herein, it is instructive to note that she found that none of the LCC's ever had either employees or bank accounts or any financial difficulties. After the finding concerning Mr. Licata's bad faith, Judge Brown had to address Mr. Mocco's alleged bad faith. Her conclusion has been so vehemently contested herein that it must be quoted in full:

> Licata argues that even if this Court finds that he did not own the LLCs at the time of filing and even if it appears that he may not have filed the cases in good faith, Mocco' s Motion to Dismiss should be denied because of Mocco' s bad faith. Alternatively, Licata asserts that to the extent Mocco did own the properties at some relevant point in time, Mocco' s ownership was revoked by the state court in September 2001, about ten months before Licata filed his own and the LLCs' bankruptcy cases. The Court finds no merit in either argument.
>
> (1) Mocco's Alleged Bad Faith
>
> **Licata vigorously argues that great weight should be given to the fact that at the final confirmation hearing neither Mocco nor his attorneys disclosed to the bankruptcy court Licata's identity as the nominee owner of the LLCs, the relationship between Licata and the lender, nor the existence of the 3-page agreement**. Licata insists that Mocco's failure to disclose this information, particularly the failure to disclose the 3-page agreement, constitutes such outrageous bad faith that it should bar Mocco from the relief he seeks herein, regardless of whether he owned the LLCs on the date Licata filed each LLC into bankruptcy. First, the Court finds this is not the proper forum and Licata is not the proper party to raise Mocco' s alleged bad faith for not disclosing the 3-page agreement in his personal bankruptcy case. Licata suffered no injury from the nondisclosure; he benefitted from it. See generally, Hirsh v. Arthur Anderson & Co., 72 F.3d 1085 (2d Cir. 1995) ("where creditors have ... a claim for injury that is particularlized as to them, they are exclusively entitle to pursue that claim, ... "). Second, the Court is persuaded by Mocco's *in pari delicto* rebuttal to this argument: Licata is equally culpable for the non-disclosure of the 3-page agreement as Mocco is. As a party to the 3-page agreement, Licata could have informed the bankruptcy court of its existence, but he did not. See generally, Pinter v. Dahl, 486 U.S. 622, 632, 108 S. Ct. 2063,2070 (1988) ("The equitable defense of *in pari delicto,* which literally means 'in equal fault,' is rooted in the common-law notion that a plaintiff s recovery may be barred by his own wrongful conduct. "). Third, even if this Court found Licata had standing to raise the issue of Mocco' s bad faith at this time, having reviewed the transcript of the confirmation hearing, see Ex. D-I0, the Court would find, on the merits, that **Licata's argument takes the statements of Mocco's counsel out of context and that there was no fraud perpetrated on the bankruptcy court by Mocco' s failure to disclose the 3-page agreement.**
>
> **Licata also vehemently argues that Mocco's failure to sign the 3-page agreement is another indicia of Mocco's bad faith. However, as noted above, this Court finds that there was no legal benefit lost by virtue of Mocco's failure to sign that agreement: he acted as if he was**

bound by it and he fulfilled his obligations under it. Licata has failed to demonstrate how Mocco's failure to sign the agreement establishes fraudulent intent or bad faith by Mocco.

ii. The State Court Order Directing Turnover of Ownership Documents to a Receiver

Licata's assertion that the New Jersey state court order directing Mocco to surrender the LLCs' certificates to a state court receiver effected a revocation of Mocco's ownership is also without merit. The tone and content of the state court order patently communicates that the state court's rationale for demanding the title documents be turned over to a receiver was to maintain the *status quo* and prohibit the property from being encumbered or transferred. The order provided, *inter alia:*

> 4. Peter Mocco and Lorraine Mocco shall, within seven (7) days (i.e., on or before September 14, 2002) physically deliver to Dennis Drasco, Esquire, the originals of all materials delivered to them by Pieter deJong on or about September 1, 2001. Those materials consist, in general, of unit powers, units of interests in LLCs and replacement units for the "Holding Entity" LLCs referenced in the Mocco Complaint in Action No.2. Mr. Drasco shall hold these materials until further Order of the Court, and shall provide copies of such material to counsel for the Licata parties.
>
> 5. Pending further order of this Court, or should the Bankruptcy Court assume jurisdiction of this matter, the order of the Bankruptcy Court, no party or any affiliate of a party shall transfer, lien, or encumber any interest in any of the Holding Entity LLCs or any properties owned in the name of any such Holding LLCs. The Order set forth in this paragraph does not apply to the property known as the Atrium.

Peter Mocco *et al.,* v. James Licata *et al.,* No. ESX-C-397-99, Order (N.J. Super. Ct. Ch. Div. (Essex) Sept. 21, 2001) (Levy, 1.), Ex.3. Licata's insistence that this order has an impact on ownership is unfounded. The critical issue raised by this order is who owned the property at the time of its entry, that is to say, what was the *status quo* that the order sought to preserve. **This Court finds that Mocco was the owner of the property at the time the state court entered its order**. While it is true that the New Jersey state court very deliberately restricted Mocco' s - as well as Licata's - ability to manipulate legal title to the property, its order preserved the title to the property as it existed as of that date. As is clear from its order, if the matter were brought within the jurisdiction of the bankruptcy court, the New Jersey Superior Court would make no determination regarding the ownership of properties until after the bankruptcy-related issues were resolved by the bankruptcy court. Thus, but for the bankruptcy issues raised, the state court would have proceeded in the fall of 2001 to determine who owned the properties. In July 2002, while the state court, Mocco, and Licata were waiting for the bankruptcy court's ruling, Licata personally filed for bankruptcy protection and, in September 2002, he caused the LLCs to file for bankruptcy protection. As a result of these bankruptcy filings, this Court, rather than the New Jersey state court, will determine ownership. And, as a result of the state court's order, title to the properties have remained undisturbed while this Court has considered and determined the ownership of the LLCs.

> For the reasons set forth above, this Court finds that Licata has failed to prove Mocco acted in bad faith or that Mocco's conduct warrants denial of the Motion to Dismiss.

On March 28, 2006, Vermont District Court, Chief Judge William Sessions, III, issued a 25 page Opinion affirming Judge Brown's Opinion. On November 15, 2007, Judges Roger Miner and Reena Raggi of the United States Court of Appeals in the Second Circuit, joined by District Court Judge Jed S. Rakoff, affirmed in an eight page Opinion. This court sees no reason to discuss these Opinions since, except for certain differences in style and emphasis,[24] neither depart from Judge Brown's Opinion.

F. The 363 Sale Order and its Aftermath

What happened after Judge Brown's Decision is as important to the ownership issue of the FCHG IV properties as the Vermont Decisions. The Lenders' Brief on a previous Motion and Cross Motion for Summary Judgment contains a detailed - -if not over detailed - - chronology of the more than three years of maneuvering by those parties who wished to acquire whatever property they believed Mr. Licata still owned. At that point, FCHG IV was a part, but not the predominant part, of Mr. Licata's claimed assets; the Liberty Harbor mortgage was the major asset. Since the great bulk of what the Lenders wrote consists of quotations from court orders and transcripts, this court will utilize the Lenders' Brief with two minor exceptions. The court has eliminated: (1) argumentative material and (2) superfluous material.[25] More importantly, the court has interspersed in this section quotations from the transcripts of the

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[24] To give one example, the District Court addressed the argument that Mr. Mocco violated the 3-page agreement by not maintaining FCCG in a "tax neutral position", concluding that the argument "borders on the absurd". To this extent, the District Court emphasized a point not emphasized by Judge Brown or the Circuit Court, but this type of difference between the various Opinions does not affect this court's decisions herein.

[25] The court has not employed quotation marks indicating that it used excerpts from the Lenders' Brief because it has made numerous minor changes and some critical additions.

Connecticut Bankruptcy Court proceedings which appear to put the meaning of the court orders in a somewhat different light.

(1) The 2004-2006 Time Period (Up to the Sale)

After Judge Brown's Decision was issued in 2004, Mr. Licata undertook to sell whatever assets he thought he owned (including, but not limited to, claims to FCHG IV and the Federal appellate rights to the FCHG entities involved in the Vermont Decisions). The original proposed sale was apparently for $5 ½ million, but it was not clear to this court (and was not clear to Connecticut Bankruptcy Judge Shiff) precisely what was being sold. See the transcript of the April 12, 2005 Court proceedings:

> THE COURT: Have you seen the final contract?
>
> MR. HOOPES: There is not a final contract.
>
> **THE COURT: So there isn't one, so you don't know what that's going to say.**
>
> MR. HOOPES: Well, I know what we know it has to say. It basically has to say that we get five and a half million dollars cash. We make no representations for warranties and we get five and a half million in cash.

Holdings (which, as set out above, was most likely controlled by Mr. Licata's associates), the Licatas, and various Bankruptcy Entities ultimately entered into a First Amended Asset Purchase Agreement dated May 18, 2005 (the "FAAPA"). That document stated that the Licatas, the First Connecticut Entities, and their respective bankruptcy estates agreed to sell and transfer certain "Acquired Assets" to Holdings free and clear of all liens, claims and encumbrances.

On June 21, 2005, Holdings was the successful bidder at an auction for the Acquired Assets and, later that day, the Connecticut Bankruptcy Court ("the Court") conducted a hearing regarding the pending sale (the "Sale Hearing"). The successful bid was $8,950,000.00. On the

same day Court approved the FAAPA with the consent of all parties, and entered the "Order Authorizing and Approving (1) Asset Purchase Agreement, (2) Sale of Acquired Assets of the Debtors Free and Clear of Liens, Claims, and Encumbrances to SWJ Holdings LLC, (3) Assumption and Assignment to SWJ of Certain Executory Contracts and Unexpired Leases, and (4) Certain Related Relief" (the "Sale Order"). The purpose of the Sale Order, according to the Lenders, was to approve the FAAPA and to permit the sale of the "Acquired Assets" being sold under the FAAPA, free and clear of liens, claims and encumbrances pursuant to 28 U.S.C. § 363.

The transcript of the June 21, 2005 proceeding demonstrates some uncertainty amongst counsel and the Court as to how to phrase the order. At the minimum, Mr. Goldman, who was local counsel to Mr. Mocco, Mr. Brody, who was counsel for the Creditors' Committee, as well as the Court, appeared to believe that Mr. Mocco was not giving up any rights:

> THE COURT: That would do it, but I think I ought to see what the objections are. As to the Mocco's, there is - Is there something left? What is the objection?
>
> **MR. GOLDMAN: Well, Your Honor, the thrust of the objection is that the Mocco's want to make it clear that all of their claims and counterclaims, setoffs, recoupments are going to be preserved and be litigated in any post-closing litigation that is pending -- there is currently litigation pending in the New Jersey Superior Court -- or that any other litigation that's initiated .** We also wanted to make clear that any assumptions and assignments are not going to preclude the Mocco's from asserting breaches of the contracts that are listed for assumption and assignment and in which the Mocco's have an interest. The order, as it's currently phrased, should be read to do that, and we think it's inappropriate for an order to do that . And those are the basic thrusts of what our objections say.
>
> We were in the process of trying to work them out with the purchaser when the matter was called, so, although they haven't yet been worked out, I think we would be amenable to working out some language that might address our concerns. Although - -
>
> THE COURT: Yes, it seems to me that this is a sale under 363. It's free and clear of any interest, with all interests to attach to the proceeds. That's how I understood the setup for the sale. Am I incorrect about that?
>
> MR. SCHRIEBER: That is correct, Your Honor.

THE COURT: Well, if that's the case, then is the order that approved the sale would be under 363(f), where the interests are attached to the proceeds subject to litigation post-closing. As to whether that litigation will be resolved in this Court or another court isn't the issue . **All – your concern is that all of -- all of your rights and defenses are not waived and not eliminated by any assumption or assignment.**

MR. GOLDMAN: As well as the -- as well as the sale because we have -- obviously we have ownership interests in the assets that they claim are owned by the debtors.

THE COURT: Any rights that you have, if there are any rights that you have, are preserved so that we could transfer the property to a debtor in exchange for dollars and subject to further order of the Court. That's the way I understand 363 works. That's the way it has worked here for some decades. So, if you have a different view or you're concerned that there is a different view l let me know.

MR. GOLDMAN: I think it's a matter of clarifying that for -- in the order and to add language that would basically say that l which I'm not sure is in there now.

THE COURT: Well, if it isn't ~- if it's a sale under 363(f) ,I believe that the language of the statute takes care of that. If you want the -- an express statement to that effect l let me see if anybody opposes that.

MR. BRODY: Your Honor, if I may?

THE COURT: All right.

MR. BRODY: Alan Brody for the creditors committee. Your Honor , the debtor is selling whatever interest it has, if it has any interest in the assets that are listed in the schedules.

To the extent it does not have an interest does not own part or all of the assets l that's not being sold. So what we mean by that Your Honor is -- and I think this is what Mr. Goldman was looking for - - we're not creating any substantive rights. To the extent that an asset is transferred to the purchaser, the only asset they can – only the debtor's interests in that asset are being transferred. To the extent that Mr. Mocco or anybody else claims an ownership in the assets, that ownership is preserved; the ownership interest is preserved. There's no transfer of that asset over somebody else's ownership interest.

THE COURT: You ought to be able to work out language that takes care of that. paper.

MR. GOLDMAN: Judge, excuse me. I agree with what

MR. BRODY: Yes.

MR. GOLDMAN: Mr. Brody just said.

MR. BRODY: We don't

MR. GOLDMAN: We'll just have to put it down on

THE COURT: I think you ought to do that.

MR. BRODY: Your Honor, we can work that out

THE COURT: That's a --

MR. BRODY: because there's no -- that interest, that ownership interest, since it's not being transferred, does not attach --

THE COURT: All right. Let's- -

MR. BRODY: -- to the proceeds.

At that point, Mr. Schreiber interjected his views and the Court answered:

MR. SCHREIBER: There has been an issue… about assumed contracts, and the captor [sic] of two classes of assets has been challenged -- or, the characterization of two classes of assets have -- have been challenged. The first is the so-called joint venture agreement between Mr. Licatta and Mr. Mocco, … and certain operating agreements that may or may not exist with respect to certain limited liability entities that Mr. Macco appears to have formed relating to what the Licatta interests say are joint venture assets . And we have made a suggestion in our papers that we defer dealing with that issue for a period of 60 days after the closing under the APA. We have made that suggestion because the APA gives SWJ, as the purchaser, the option to acquire interests short of assumption, and we have provided Your Honor with case law that permits that.

THE COURT: I think it'll acquire interests, but any challenge to that interest, any rights that Mocco claims he has, are preserved. The transfer, whether it's an assumption, an assignment or some other kind of transfer, they don't lose their rights by virtue of the sale.

MR. SCHREIBER: But they do -- they do not lose whatever rights they have in that asset. However, the sale would be free and clear of encumbrances, subject to defenses.

THE COURT: That's right. So long as any and all interests, rights, claims are preserved and they be prosecuted against the dollar amount that is collected, or,

if it isn't property of the estate, then it's off this Court's jurisdiction, and the bottom line is that all rights are preserved.

MR. SCHREIBER: Yes. I don't think there's an issue of principal [sic]

THE COURT: All right.

MR. SCHREIBER: -- on that subject.

Later in the proceedings, the Court interjected "**Mocco's going to be in the same position after the sale as they were before the sale insofar as whatever rights, if any, they have".**

In entering the Sale Order, the Court found and determined that, among other things:

i. "[t]he statutory predicates for relief sought . . . are sections 105(a), 363(b), (f), (m), and (n), 365, and 1146(c) of the United States Bankruptcy Code . . . (the 'Bankruptcy Code'), and Rules 2002, 6004, 6006, 9014, and 9019 of the Federal Rules of Bankruptcy Procedure (the 'Bankruptcy Rules')."

ii. "good, sufficient, and appropriate notice" of the Motion, the Sale Hearing, and the Transactions, including the sale of the Acquired Assets, was provided to all interested parties, and all interested parties had a reasonable opportunity to object or be heard with respect to the same.

iii. "[e]ach Seller (i) has full corporate power and authority to execute the [FAAPA] and all other documents contemplated thereby and the Sale of the Acquired Assets . . . and all of the other Transactions have been duly and validly authorized by all necessary corporate action of each of the Sellers, (ii) has all of the power and authority, including corporate power and authority necessary to consummate the Transactions, (iii) has taken all action, including corporate action necessary to authorize and approve the Asset Purchase Agreement and all other documents contemplated thereby and the consummation by such Debtors of the Transactions, and (iv) other than the consent of this Court, no consents or approvals are required for the Debtors, the Sellers, or the Purchaser to consummate the Transactions."

iv. "[t]he Debtors have demonstrated and proven . . . good, sufficient, and sound business purpose and justification for the Sale and other Transactions contemplated by the [FAAPA] . . . pursuant to section 363(b) of the Bankruptcy Code."

v. “the Purchaser [Holdings] is a good faith purchaser under section 363(m) of the Bankruptcy Code and, as such, is entitled to all of the protections afforded thereby. The Purchaser will be acting in good faith within the meaning of section 363(m) of the Bankruptcy Code . . . in closing the Transactions.”

vi. “[e]ach entity with a security interest in the Acquired Assets or the Assumed Contracts has consented to its sale, is deemed to have consented to its sale, or could be compelled in a legal or equitable proceeding to accept a money satisfaction of such interest, or the Sale otherwise satisfies the requirements of section 363(f) of the Bankruptcy Code.”

vii. “[t]he transfer of the Acquired Assets and the Assumed Contracts to the Purchaser [Holdings] will be a legal, valid, and effective transfer of such assets and contracts and will vest the Purchaser [Holdings] with all right, title, and interest of the Sellers to such assets, and contracts free and clear of all claims and interests, including, without limitation, those . . . that purport to give to any party a right or option to effect any forfeiture, modification, right of first refusal, or termination of the Sellers’ or the Purchasers’ interest in such assets or contracts, or any similar rights.”

viii. “[e]xcept for the Assumptions … the Sellers may sell the Acquired Assets free and clear of all claims, liens, encumbrances and interests of any kind or nature whatsoever because, in each case, one or more of the standards set forth in section 363(f)(1)-(5) of the Bankruptcy Code has been satisfied. Those non-debtor parties with claims or interest in the Acquired Assets who did not object, or who withdrew their objections, to the [FAAPA] or the Motion are deemed to have consented to such sale pursuant to sections 363(f)(2) and 365 of the Bankruptcy Code. Those non-debtor parties with claims, liens, encumbrances and interests in the Acquired Assets who did object fall within one or more of the other subsections of sections 363(f) and 365 of the Bankruptcy Code and are adequately protected by having their claims or interests, if any, attach to the cash proceeds, of the Transactions ultimately attributable to the property against or in which they claim an interest with the same validity, force, and effect which they now have, subject to any claims and defenses the Debtors may possess with respect thereto . . . .”)

Having found each of the foregoing as a predicate to the entry of the Sale Order, the Court ordered that:

i. "[a]ll objections to the entry of [the Sale Order] or the relief provided [in the Sale Order] and in the Motion that have not been withdrawn, waived, or settled, and all reservations of rights included therein, are hereby denied and overruled on the merits with prejudice."

ii. "[t]he [FAAPA], and all of the terms and conditions thereof, the Sale, and all other Transactions are hereby approved in all respects."

iii. "[p]ursuant to sections 105(a) and 363(f) of the Bankruptcy Code, the Acquired Assets (and good, clear, and marketable title thereto) shall be transferred, conveyed, and assigned to the Purchaser upon consummation of the Transactions . . . as set forth in the [FAAPA] free and clear of all Encumbrances, liens, claims, liabilities, causes of action, pledges, offsets, set-offs, recoupments, right, title and interest of any kind, type, description, or nature whatsoever (collectively, the 'Interests'), except for the Assumptions, and except for the Assumptions, all such Interests of any kind, type, description, or nature whatsoever to attach to the net cash proceeds of the Transactions ultimately attributable to the property against or in which the holder of an Interest claims or may claim an Interest in the order of their priority, with the same validity, force, and effect which they now have, subject to any claims and defenses the Debtors may possess with respect thereto."

iv. "[e]xcept as expressly permitted or otherwise specifically provided by the [FAAFA] and/or this Order, all persons and entities . . . holding Interests of any kind or nature whatsoever against or in the Debtors, the Acquired Assets, or the Assumed Contracts . . . arising under or out of, in connection with, or in any way relating to, the Debtors, the Acquired Assets, the Assumed Contracts, the operation of the Debtors' business and/or affairs and prior to the Closing Date, or the transfer of the Acquired Assets or the Assumed Contracts to the Purchaser [Holdings], hereby are forever barred, estopped, and permanently enjoined from asserting against the Purchaser, its designee or successors or assigns, property, or assets, such persons' or entities' respective Interests. No such persons or entities shall assert against the Purchaser or its successors in interest any liability, debt, claim, or obligation relating to or arising from ownership or operation of the Acquired Assets or any liabilities calculable by reference to the Debtors or the Sellers of the Debtors' or the Sellers' assets or operations."

v. "[t]he transfer of the Acquired Assets and the Assumed Contracts to the Purchaser [Holdings] pursuant to the Asset Purchase Agreement constitutes a legal, valid, and effective transfer, assignment, and

conveyance of such assets and contracts, and shall vest the Purchaser with all right, title (which shall be good, clear, and marketable), claim and interest of the Debtors and their estates in and to such assets and contracts free and clear of all Interests . . . of any kind or nature whatsoever." and

vi. "[t]he transactions contemplated by the [FAAPA] are undertaken by the Purchaser [Holdings] in good faith, as that term is used in section 363(m) of the Bankruptcy Code . . . . Accordingly, the reversal or modification on appeal of the authorization provided herein to consummate the Transactions shall not affect the validity of the Transactions as to the Purchaser, except to the extent that such authorization is duly stayed pending appeal prior to such consummation."

The Sale Order encompassed the "Acquired Assets," as defined in the FAAPA. Paragraph 1.1 of the FAAPA, in turn, defined the Acquired Assets, and identified each of those assets on Exhibits A and A-1 to that document. Exhibit A to the FAAPA defines Acquired Asset No. 8 as Mr. Licata's "Ownership interests in First Connecticut Holdings Group LLCs and other related business entities as set forth on attached Schedule A…." Schedule A to Exhibit A to the FAAPA includes FCHG IV as an Acquired Asset. (Footnote 2 discloses Mrs. Licata's contention that she, and not Mr. Licata, is a 100% owner and member of that entity; any dispute between Mr. and Mrs. Licata is not directly relevant to this court's task, except insofar as the Lenders state that they acquired FCHG IV from Mrs. Licata.) Mr. Mocco has admitted that he was aware that FCHG IV was included in the FAAPA and Sale Order, and that this entity was going to be sold to a third-party purchaser in accordance with the terms set forth in those documents.

The Lenders argue that the parties apparently contemplated and understood that the FAAPA and Sale Order would have the legal effect of transferring 100% of the membership interests in FCHG IV to Holdings "free and clear" of any competing claims, including those that had been asserted by the Moccos. Mr. Mocco was aware, they assert, that Mrs. Licata had

claimed a 100% interest in FCHG IV at that time, but did not challenge or otherwise object to the sale of that asset. The Moccos neither sought a stay or appeal of the Sale Order nor sought to enjoin or prevent the asset sale encompassed by the Sale Order. The parties were aware of the Vermont litigation prior to the asset sale, but neither the Moccos, nor any other party, ever identified that litigation as a basis to prevent or impair the sale.

On July 8, 2005, the Moccos filed a motion seeking the entry of an Order clarifying the "intent and scope of the Sale Order vis-à-vis the claims of the Mocco Parties" -- i.e., that their claims would survive the Sale Order, and that Holdings would be deemed to have purchased the Acquired Assets subject to their claims. On July 19, 2005 the Connecticut Bankruptcy Court denied the Moccos' motion.

Holdings did not timely consummate the asset purchase contemplated in the FAAPA. As a result, the Court entered a Consent Order on October 12, 2005 to, among other things, extend the contract period and increase the purchase price. Throughout this period, the Moccos were represented by both same counsel representing them here, Mr. Scarpone, and local Connecticut counsel (Pullman & Comley), both of whom attended the Sale Hearing and objected (at least initially) to the proposed Sale Order. On November 16, 2005, the Connecticut Bankruptcy Court entered an Order (the "November 16, 2005 Order") approving an alternative sale to EAM in the event that Holdings did not close by November 25, 2005. The November 16, 2005 Order defined "Enterprise Asset Management, Inc. or its designee" as the Purchaser, and separately defined Holdings. Paragraph 17 of the November 16, 2005 Order provided as follows:

> In the event *the Purchaser [i.e., EAM,* the prospective purchasing known as Enterprise Asset Management*]* acquires the Acquired Assets pursuant to the Amended FAAPA, notwithstanding anything to the contrary contained in this Order and the Sale Order,: (i) this

> Order and the Sale Order are not intended to adjudicate or resolve any of the claims, defenses or issues that have been and continue to be disputed between the Moccos and their affiliated entities (the "Mocco Parties"), and James and Cynthia Licata and their affiliated entities (the "Licata Parties"); (ii) *the Purchaser [i.e., EAM]* is acquiring all claims, defenses and interests of the Licata Parties subject to all existing claims, defenses and interests of the Mocco Parties; and (iii) **to the extent that *the Purchaser [i.e., EAM]* and the Mocco Parties continue to be in disagreement as to their respective claims, defenses and asserted interests in the various entities and properties set forth in the FAAPA . . . , those disputes shall either be resolved in the pending State Court proceedings or the proceedings now on appeal to the United States District Court for the District of Vermont, however this Order shall not prohibit any party from bringing any proceedings or motions before this Court which may properly be venued in this Court.**[26]

The November 16, 2005 Order also provided that if EAM failed to provide written notice to counsel for the Debtors and the Creditors' Committees by November 30, 2005 of its intention to proceed with a purchase of the Acquired Assets, the proposed alternative sale would be terminated.

EAM did not provide notice of its intent to consummate a purchase transaction, and did not purchase the Acquired Assets. Therefore, the condition precedent set forth in Paragraph 17 (EAM's acquisition of the Acquired Assets) was never satisfied, and the balance of Paragraph 17 of the November 16, 2005 Order became a nullity, according to the Lenders. The limiting language that appeared in Paragraph 17 of the November 16, 2005 Order did not appear in the June 21 Sale Order that governed the terms and conditions of Holdings' purchase. The Lenders argue that the "carve out" of the Moccos' claims set forth in Paragraph 17 of the November 16,

[26] The Lenders quoted the above provision, emphasizing primarily the reference to EAM, since EAM did not purchase the assets, allowing the Lenders to argue that Paragraph 17 is not controlling. The court is not convinced that EAM's decision not to purchase, and SWJ's decision to step in and purchase, should somehow lessen Mr. Mocco's rights. Since Mr. Mocco did not give up his rights with EAM purchasing, it makes no sense, absent proof to the contrary, that Mr. Mocco would give up his rights merely because the name of the purchaser changed. This court has chosen to emphasize the highlighted language because it appears most relevant to the current dispute.

2005 Order only applied if EAM consummated an asset sale under the terms of the November 16, 2005 Order, but not if an asset sale were consummated by another purchaser, such as Holdings. The Moccos did not appeal the November 16, 2005 Order, move for reconsideration of the November 16, 2005 Order, or seek any other relief or review relative thereto.

On March 8, 2006, the Court had another hearing concerning a proposed order to modify the terms of payment of the sale. At that hearing, Mr. Scarpone explained that he wanted the order to make clear that the Moccos were not losing any rights. He stated as follows:

> **But I do want to make it clear, and I'd like to add one sentence to the order, and that is something that we had dealt with before in the old orders and that is that all rights of the Mocco parties to and in the assets being , sold shall not be affected by this sale and shall be determined in future litigation in a non-bankruptcy forum. I would like that added to the order.**

Mr. Schreiber objected, but the Court appeared to side with Mr. Scarpone:

> **MR. SCHREIBER: That's objectionable to SWJ, Your Honor.**
>
> **THE COURT: That may be, but SWJ has little standing here and I'm going to find out whether or not this is going to be approved or not approved. And it seems to me all during the many hearings that we had it appeared to me that everybody agreed that any rights that anybody had was going to be reserved unless specifically covered by the order itself. That's how I understand it.**
>
> **And if that's been changed -- I don't have the text of what you've worked out. My first thought before the lunch break was that everybody have an opportunity to read what was going to be submitted to the court, but Mr. Scarpone, that point is noted. Anything else?**
>
> **MR. SCARPONE: That's it, Judge.**
>
> **THE COURT: All right.**
>
> **MR. SCARPONE: I just wanted to add that one sentence to the order. It essentially picks up the point that as Your Honor just recognized, has been discussed many times before.**

An issue then arose as to whether the new order would change anything stated in the previous order. The Judge appeared to think it would not:

THE COURT: The point I want to be sure of is that what I have as an amendment does not erase what has been agreed upon by everybody in the June order, which was extended by the February order. What rights were reserved remain reserved. So if that is the only reason why it should be styled as a new order, it seems to me if you're only amending it to put a different number next to the dollar sign and a different date, if that's all you're doing, then I don't see that this is anything more than a difference without a distinction. Does anybody have a different view?

MR. BAINTON: Yes, Your Honor. If I might, in response to Mr. Scarpone, I'm reading from Your Honor's November 16 order. At the last page, page 14 it says "This order and the sale order are not intended to adjudicate or resolve any of the claims, defenses or issues that have been and continue to be disputed between the Mocco's and their affiliated entities, which is defined then as the Mocco parties and James and Cynthia Licata and their affiliated entities, which is defined as Licata Parties. Subparagraph 2. "The purchaser is acquiring all claims, defenses and interests of the Licata parties, subject to all existing claims, defenses and interests of the Mocco parties in subparagraph 3 to the extent that the purchaser and the Mocco parties continue to be in disagreement as to the respective claims, defenses and asserted interests in the various entities and properties set forth in the FAAPA as Exhibit A, those disputes shall be resolved in the pending state court proceedings, or the proceedings now on appeal to the United States District Court for the District of Vermont. However, this order shall not prohibit any party from bringing any proceedings or motions before this court which may be properly venued in this court" Your Honor, the parties and the Court have spent a lot of time. This is but one example, but it responds to Mr. Scarpone's point crafting orders. And the only thing we're changing is the price, the terms of payment, because there's $5.4 million in his trust account and a note, and the date of closing. And our concern is that having spent all of this time crafting these very precise orders and these very precise agreements, we don't suddenly wing it. And that's why, given the amount of time that we've spent, we've styled this as an amended order so that we can incorporate and have the benefit of, without further expense to the estates, all of the hard work that's been done by the parties and the Court previously.
Well, is there any text in that proposed order that says that all of the provisions of the June 21, 2005 order are –

MR. BAINTON: Yes, Your Honor.

THE COURT: -- in place, except as herein specifically stated.

MR. BAINTON: Yes, I believe so, sir. That's certainly the intention and I believe it's there.

MR. GROSSMAN: If it's not Your Honor, it will be there.

MR. BAINTON: We're changing but two little things and thats all were trying to do. That's why we want to keep all the hard work we've done in place.

THE COURT: I think that that is something that is a good thing to do. I'm not going to go backwards or sideways on this thing. I'm either going to grant it or not and what is before me to grant is a motion to amend in those specific ways and everything else, as the record will now show, is to be in place and enforceable and I think I said before and I'm saying it again now, any rights that anyone has, that entity will continue to have, except as specifically stated otherwise in this order.

MR. GROSSMAN: Your Honor is 100 percent correct. The only change in the June 21 order is exactly what we said; the price and the date .

THE COURT: All right. Now, Mr. -- the SWJ people, Mr. Schreiber, has said well, that is unacceptable to me. Now, he if says that isn't acceptable to him that's the end of it.

MR. SCHREIBER: I didn't say that.

THE COURT: Oh, somebody said

MR. SCHREIBER: No, no. What I said was that the proposed new language that Mr. Mocco wants to put in is unacceptable. effect.

THE COURT: Well, the new language is to that

MR. SCHREIBER: No, no.

THE COURT: Whatever rights he - -

MR.SCHREIBER: No.

THE COURT: Hold on. The effect of what he said, if I understand what he said, and he'll correct me if I'm misstating him, is that he wants to make sure that he still has whatever rights he might have to defend his clients.

MR. SCHREIBER: Your Honor, in recital G of the June 21st order we dealt with this issue. Post the entry of Q that order Mr. Scarpone made a motion to Your Honor to change that language, which Your Honor turned down. This is just yet another attempt to change the impact of a 363(f) sale. And that is what we find unacceptable. Recital Q, pages 8 and 9 of the recital order states what the reserve Mocco positions are. And this was a negotiated provision.

THE COURT: I should think that they'd reserve all of -- whatever rights they might have. That's what he's been asking to do and I think that it's understood that he will be able to do it.

MR. GROSSMAN: Your Honor, subject –

MR. SCHREIBER: May I finish please? Subject to 363(f) provisions of the June 24 order.

THE COURT: Not subject to anything. I'm telling you, sir, I wanted to make -- I can say this any more clearly. Whoever has a right will continue to have that right after this order is entered, if it is entered.

MR. SCHREIBER: That is acceptable. That's fine.

THE COURT: Except as specifically written down in the order itself that would be in conflict with that.

MR. SCHREIBER: Your Honor and myself are on the same page.

MR. SCARPONE: Your Honor, might I just say so am I.

THE COURT: All right. So let's go to the next step -- question.

MR. SCARPONE: The only -- Mr. Bainton I think read it -- we dealt with this before. My only point, Your Honor, was that when Mr. Daugherty starts raising the question of whether this is a new order that somehow supercedes all the prior deals or just an amendment, I have to bring this up. I'm in agreement with Mr. Grossman. This is an amendment.

THE COURT: All right. Everybody is agreeing with everybody here and we're in good shape so far. Now, let's get to the --

MR. SCARPONE: I didn't say I was in agreement with Mr. Schreiber.

THE COURT: Well, we're doing the best we can.

MR. BAINTON: Your Honor, just for the record, so we don't get confused in the dates, the main order, the one that preserves all the rights I just read, is dated November 16, 2005. There's been some talk about a -- the document from which I read is dated November 16,2005.

THE COURT: All right.

MR. BAINTON: Signed by Your Honor.

THE COURT: Now, what I think is going to take care of the new order – new proposed order or an amendment of the old order, or orders, plural, and adopt the view that this is an amendment to the old orders changing only what is specifically in it. Everything else in the old orders cumulatively are adopted and are part of the amended order.

On March 8, 2006, the Court entered an Order Modifying Terms of Payment of Purchase Price under First Amended Asset Purchase Agreement and Subsequent Orders of the Court. The Lenders argue that terms of the asset sale, as memorialized in various Orders and the FAAPA, made clear that all assets sold pursuant thereto were sold free and clear of any liens, claims or encumbrances that were asserted, or could have been asserted, by the Moccos, and limited and confined the Moccos' claims, if any, to the proceeds of the sale transactions. The Moccos did not appeal the March 2006 Order, or seek any other relief relative thereto.

When it became clear that a second closing was going to occur immediately following the asset sale in which SWJ was going to convey the membership interests in FCHG IV to Mrs. Licata, the parties prepared a Transfer, Settlement and Release Agreement ("TSRA") that was appended to the FAAPA. In the TSRA, Mrs. Licata agreed to relinquish any interest that she had asserted in the Licata and First Connecticut bankruptcies to certain entities in exchange for Holdings' agreement to transfer to her a 100% interest in FCHG IV after the sale. The TSRA was disclosed to the Connecticut Bankruptcy Court, as well as to all counsel of record (including the Moccos' counsel), when the Court entered the Sale Order approving the FAAPA.

On March 13, 2006, the Acquired Assets identified in the FAAPA were sold and transferred to Holdings. On the same date, Holdings executed a Membership Interest Power, through which Holdings transferred to Mrs. Licata one hundred percent (100%) of the membership interests in FCHG IV in exchange for Mrs. Licata's release of her interest in another First Connecticut entity. On March 31, 2006, Mrs. Licata executed a General Power of Attorney in favor of defendant Mr. Shepro that endowed him with the authority to close title on behalf of FCHG IV.

On or about May 26, 2006, FCHG IV sold the Mortgaged Property to Holdings for $31.2 million and executed a Quitclaim Deed (the May 26, 2006 Deed). The May 26, 2006 Deed was executed by Shepro, as attorney-in-fact for Mrs. Licata in her capacity as FCHG IV's sole member. The May 26, 2006 Deed was recorded on June 2, 2006 in the Office of the Hudson County Register of Deeds.[27]

Centrum advanced a purchase money mortgage loan in the original principal amount of $15 million (the "Loan") to Holdings to finance its purchase of the Mortgaged Property. A portion of the Loan proceeds were escrowed to satisfy certain liens upon the title, and a portion of the Loan proceeds were deposited into several reserve accounts. Mrs. Licata financed $22,950,833.50 of the remaining purchase monies by accepting a promissory note for this sum, together with a pledge of collateral security.

The Loan was evidenced by three Commercial Mortgage Notes dated May 25, 2006, each in the original principal amount of $5 million (for a total of $15 million), executed in favor of Centrum (together, the "Notes"). Each of the Notes was secured by a corresponding Commercial Mortgage, Security Agreement and Assignment of Leases and Rents (the "Mortgages") executed by Holdings in favor of Centrum in the original principal amount of $5 million (for a total principal indebtedness of $15 million) encumbering the Mortgaged Property. Pursuant to an Intercreditor and Mortgage Parity Agreement that was simultaneously executed, the Mortgages are of equal amount and priority, and are senior (in equal parts) to all other liens and encumbrances upon the title.

[27] Mr. Mocco assets that the **$31,200,000** price was so disproportionate to the earlier price - - see on page 29 herein the **$5,500,000** sales price for **all** of Mr. Licata's claims of which FCHG IV was but a small part - - that it should have raised a red flag.

Centrum assigned two participating interests in the Loan and Loan Documents, each in the original principal amount of $5 million, to First Mutual and U.S. Bank, pursuant to Assignments of Mortgage dated May 25, 2006 and recorded in the Office of the Hudson County Register on June 2, 2006. Centrum assigned the final participating interest in the Loan and Loan Documents, also in the original principal amount of $5 million to Wells Fargo pursuant to an Assignment of Mortgage dated December 29, 2006 and recorded in the Office of the Hudson County Register on March 25, 2008. Each of the Lenders presently hold the Loan and Loan Documents in equal proportion and priority. The Loan matured on December 1, 2006, and Holdings failed and refused to satisfy all sums due thereunder. Accordingly, Holdings is in default under the terms of the Loan and Loan Documents.[28]

(2) The 2013 Developments

Almost seven years later, on April 2, 2013, the parties entered another appearance before Judge Shiff. Mr. Rendina, counsel for Holdings, explained the purpose of the hearing, which was a dispute over whether or not Holdings could sell the assets free and clear of all encumbrances, as opposed to the position of Mr. Mocco that the rights of the parties would be adjudicated in New Jersey:

> MR. RENDINA: Well, 363, a sale that is the crux of this matter, came before Your Honor and that is really where it began, and that's why we believe that pursuant to the court's order that if there are any issues, that we should present these issues before Your Honor.
>
> THE COURT: What -- you say there's a court order from this court.
>
> MR. RENDINA: Your order authorizing approval of the asset purchase agreement that was back in November of 2005 -- November 16th, 2005. And the heart of that matter, Your Honor, is that that sale that was named to SJW Holdings at the time was to be made pursuant to 363(f), that it's free and clear of all encumbrances. **The parties that are here before you representing**

[28] Mr. Mocco claimed these transactions netted the Licatas "in excess of $2,000,000", and later, $1,200,000". The correct figure is probably $2,100,000 to $2,200,000 and the correct payee is **Mrs. Licata**, not "**the Licatas**".

Mocco, they are claiming ownership to this property and the only ownership that Mocco may be able -- Mocco's party may be able to claim are to the assets of the 363 sale, not to the actual property itself. And those claims are to be made from the proceeds of the sale. Anything less would void or leave question to any future 363 sales, or any 363 sales that preceded anywhere in the union. So that is really the heart of the matter here today, Your Honor, is that our purpose here is focused -- is singular and does not relate to the other issues that I'm sure are going to be raised in a few minutes, but the issue of –

THE COURT: The caption of what you've got here that relates to an objection to a motion to expedite a contempt in violation of a court order. That's -- Mr. Cohen -- it's his motion. It's his objection, right?

MR. COHEN: Yes, Your Honor. This is a -- the crux of the objection is that there's an automatic stay in place by virtue of the cases pending before Judge Winfield in New Jersey.[29] In addition, Judge Winfield, has entered an injunction that essentially directs the parties to address the issues as to ownership of the relevant properties in conjunction with New Jersey litigation that's been pending for many, many years. Really, Your Honor, we're here in what appears to be an effort to do an end run around the proceedings that are pending before Judge Winfield and Judge Winfield's prior injunction order.

THE COURT: So it's Judge Winfield's order that is the subject of this contempt. Is that correct or not correct? I don't –

MR. COHEN: I'm not clear what order is the subject of the contempt, but I am certainly clear that there's an automatic stay in place by virtue of the First Connecticut –

THE COURT: Well, there was a foreclosure proceeding and SWJ is the – I know it's here to say that there was a foreclosure -- SWJ defaulted on a sale. There was a foreclosure as a result of that. So far is that correct?

MR. COHEN: That's my understanding. Yes, that's correct.

THE COURT: And I don't know whether SWJ has standing any longer. But in any event, this is a New Jersey case.

MR. COHEN: I agree, Your Honor, and Judge Winfield has said that it's a New Jersey case and has directed the parties to the pending state court litigation that's now before the district court, and it's been pending for many years and it's trial ready.

THE COURT: Before the district court or the bankruptcy court?

---

[29] Judge Novalyn Winfield is a United States Bankruptcy Judge in New Jersey. She was handling a proceeding for FCHG IV which Mr. Mocco had filed in her court. She later briefly handled a bankruptcy proceeding for Holdings.

MR. COHEN: No. Well, the -- Judge Winfield in her injunction order essentially directed the parties to complete the litigation that's pending currently in the New Jersey District Court, subject to possible remand, but it's trial ready.

THE COURT: You're talking about the United States District Court.

MR. COHEN: Yes.

. . . .

MR. SCARPONE: Judge, Mr. Cohen's correct. What they are asking **Your Honor to do is to hold me and my clients in contempt for doing what Judge Winfield said we should continue to do and Judge Winfield enjoined them from interfering with it. So then they -- after losing there, after Judge Winfield rules, they come up here and ask Your Honor to hold us in contempt. It is a direct interference with Judge Winfield's order. It also violates the stay, because they're moving against First Connecticut IV, which is in bankruptcy in a Chapter 11 before Judge Winfield, and then there is the separate litigation over the ownership dispute that Mr. Cohen just identified. And the thing that amazes me, Judge, is that you told them repeatedly -- "them," meaning their predecessors in interest; not Mr. Rendina, nor his client. They're new entrants; new arrivals on this scene. But Your Honor told their predecessors in interest six years ago, or actually seven years ago, that Mocco's rights were being preserved. That the litigation would go forward with the dispute over ownership, but it would go forward in another court. Not here. You told them all of that, but somehow or other Mr. Rendina and his client don't bother to read that. And they only -- they looked at some language about free and clear of liens and don't bother to read what Your Honor said. So that's why we're here.**

MR. RENDINA: Your Honor, if I may, I don't agree with Mr. Scarpone's characterization.

THE COURT: Well, what's wrong with what he said? Why isn't that so? Explain to me.

MR. RENDINA: I think we need to rewind this and go back to the 363 sale. The 363 sale gave the purchaser, which was SWJ Holdings, the right over that property. And that is a pure and clean title once it leaves the court.

THE COURT: That's being litigated in New Jersey.

MR. RENDINA: No, Your Honor. What's being litigated in New Jersey is who –

THE COURT: Who owns title to the property that had been sold by the trustee to SWJ, and I ordered the parties to the New Jersey State Court

action to return to New Jersey to determine who owns title. Now you've come here and you tell them they're in contempt -- of whose order are they in contempt of?

MR. RENDINA: Well, Your Honor, this property was sold by Your Honor – by this court –

THE COURT: But it didn't go through.

MR. RENDINA: It did go through. SWJ Holdings paid $5 million for it. He -- subject to that, he ended up paying $383,000 in transfer taxes and a day later the Mocco group files lawsuit in New Jersey claiming that they own the property. If that order is proper -- I mean, is true, then what happens is they basically disregarded your November 16th 363 sale order. It basically said that that order doesn't -- isn't valid. The only thing that can be sold at a -- that anybody can lay claim to in a post-363 sale, is the -- are the assets. The New Jersey court may make a determination that that 363 property belongs to Mocco, but if it does,all he's going to be able to do is attach to the assets that came from the sale on November 16th in this court.

THE COURT: **Are you not defying a New Jersey judge's order**?[30]

MR. RENDINA: Excuse me, Your Honor?

THE COURT: **Are you not defying a New Jersey judge's order?**

MR. RENDINA: We don't believe that we're defying that order, Your Honor, because that property was not properly listed on the bankruptcy in that jurisdiction That property does not belong to Mocco, therefore, it should not have been on their -- on their Chapter 11 bankruptcy petition. They can list property of the debtor, but they can't list property of another person, and that is in violation of federal law and I don't believe that they have any claim to that property assets. They own an asset claim to it. And if New Jersey says okay, you own the property, they can turn around and say well, then we're entitled to the assets from the 363 sale. Otherwise what it does, Your Honor, is it lays waste to your 363 sale. It basically says that –

THE COURT: But there is -- I'm believing it's correct, although it's seven or eight years ago, that the –

MR. RENDINA: November 16th, 2005, I believe.

THE COURT: Well, then it's even older.

[30] Possibly, Judge Shiff was referring to a September 21, 2001 order of Judge Kenneth Levy, to be discussed subsequently herein. It is also possible he was referring to Judge Winfield's more recent stay order.

MR. RENDINA: That's really the heart –

THE COURT: SWJ defaulted, after which the trustee foreclosed on the property.

MR. RENDINA: And then it was abandoned, I believe, back to SWJ.

THE COURT: Maybe. You need to -- are you finished?

MR. RENDINA: Yes, Your Honor.

MR. MILTENBERGER: Your Honor, after the trustees foreclosed on SWJ we took title -- we purchased the assets back at the foreclosure sale. They have not been abandoned. We are in New Jersey involved in the First Connecticut Holding Group IV bankruptcy case involving the ownership litigation in the district court. This is -- these are things that these bankruptcy estates own. We don't believe that SJW Management owns anything.

THE COURT: But that's going to be determined by the court in New Jersey.

MR. MILTENBERGER: By the court in -- well, the court in New Jersey will determine it vis-a-vis the Mocco's. We filed and adversary proceeding in this court to prevent SJW Management from giving up the assets that we believe are owned by us. And I think –

THE COURT: Which court is going to determine who owns the assets?

MR. MILTENBERGER: In the first instance, Your Honor, it's either going to be the United States District Court for the District of New Jersey, where the case is currently pending. **There is a motion for remand on file. The case may go back to the Superior Court of New Jersey. But that is the court that's going to determine whether or not the Mocco parties, or the bankruptcy estates own a variety of assets, including the interest in First Connecticut Holding Group IV.**

THE COURT: When you say bankruptcy estates, you're talking about the New Jersey bankruptcy and the bankruptcy -- one of the First Connecticut cases that's still left here.

MR. MILTENBERGER: The bankruptcy estates that I'm referring to are the bankruptcy estate of First Connecticut Consulting Group and the bankruptcy estate of James Licata.

THE COURT: Those are two –

MR. MILTENBERGER: Two Connecticut bankruptcy estates –

THE COURT: And then there's the Holdings case, which is in New Jersey.

MR. MILTENBERGER: Correct. And if -- the Holdings case was filed and then the ownership litigation was removed to federal court. If the trustees prevail in the ownership litigation, then I believe the First Connecticut Holdings Group case will be dismissed, because it would be filed –

THE COURT: Well, in any event, I can't see where there's any contempt of any order of mine. And I think that what it's -- **another court is dealing with the ownership, the title to the subject property. Is that correct?**

MR. SCARPONE: That's correct.

MR. COHEN: That's correct, Your Honor.

MR. RENDINA: Your Honor, then what title was transferred at the 363 –

THE COURT: I suggest either you try to do there search and figure it out yourself, or get another lawyer who will do it for you. But I'm not going to answer questions. I make orders. But don't seek this court's advice as to what you should do in representing your client. **The trustee's objection is sustained and it seems to me that if what is happening is indeed an attempt to -- an end run around a New Jersey court's order …**

. . . . . .

G. The Effect of the JVA on Liberty Harbor Ownership

As set out above, Liberty Harbor is by far the most valuable property Mr. Mocco ever owned. Nevertheless, neither the Vermont Decisions nor the 363 Sale - - the two most heavily litigated matters during this fifteen year dispute - - touched on Liberty Harbor (except to the extent that Mr. Mocco asserts that the "nominee" ruling of Judge Brown also applies, albeit indirectly, to Liberty Harbor).[31] The Liberty Harbor battle centered on the JVA. A well-written

[31] Mr. Scarpone wrote an inter-office memo that stated "The Land in question before Judge Hughes was Liberty Harbor and the three page agreement does not and never did apply to it". The reason Mr. Scarpone exempted Liberty Harbor from the effect of the three page agreement is that the Licatas were never listed as owners of Liberty Harbor.

explanation of the JVA – Liberty Harbor controversy has been given the court by the Proskauer Defendants:

> The crux of the ownership dispute between Mr. Mocco and Mr. Licata concerning the Liberty Harbor Property is as follows: Mr. Mocco claims that he and only he is the sole owner of the liberty Harbor Property. Mr. Licata claims, however, that he acquired an interest in the Liberty Harbor Property as follows:
>
> (1) In 1996, in connection with the Moccos' emergence from their bankruptcy, Nr. Licata's company, First Connecticut Consulting Group, Inc., (FCCG"), purchased and was assigned a mortgage loan encumbering a portion of the Liberty Harbor Property ("Liberty Harbor Mortgage"), which secured two outstanding loans in original principal amounts of $6.437 million (the $6.437 Million Mortgage Loan") and $977,708.70 (the "$977,708.70 Mortgage Loan") (collectively, the "Liberty Harbor mortgage Loans") owed by Mr. Mocco;
>
> **(2) In 1997, after his emergence from bankruptcy and in a plenary action against the New Jersey Redevelopment Agency, which had then and continues to have jurisdiction over the Liberty Harbor Property, Mr. Mocco admitted in sworn testimony before the United States District Court for the District of New Jersey that the outstanding principal and interest he owed FCCG under the Liberty Harbor Mortgage Loans at the time was in excess of $13 million;**
>
> (3) **Mr. Licata and Mr. Mocco entered into a joint venture, which was memorialized by the JVA in early 1998;**
>
> (4) In 1999, FCCG discharged for no cash consideration the Liberty Harbor Mortgage and at least the outstanding principal, accrued interest, and fees due FCCG under the $6.437 Million Mortgage Loan;
>
> **(5) Mr. Licata asserts that the discharge by FCCG constituted a capital contribution by Mr. Licata to the joint venture between Mr. Licata and Mr. Mocco; and**
>
> (6) **Mr. Licata asserts that in exchange for that contribution (and other contributions Mr. Licata made to the development of the Liberty Harbor Property), (a) the Liberty Harbor Property became joint venture asset under the JVA or under a separate joint venture between Mr. Licata and Mr. Mocco, or (b) Mr. Licata or FCCG became a joint fee owner of the Liberty Harbor Property.**[32]

[32] The Proskauer Defendants note, correctly, that Mr. Licata made similar claims on the less-valuable Schedule C properties - - the Atrium and Fulton's Landing. The differences are that Mr. Licata made no allegation of a mortgage release arrangement on the Atrium, and the Fulton Landing's dispute is complicated by the fact that Mr. Mocco sold that property almost ten years ago.

Not surprisingly, Mr. Mocco disagrees. He writes:

13. The Mocco/Licata Joint Venture Agreement provides, in pertinent part, as follows:

WHEREAS, monies from each Joint Venturer (their "Capital") has heretofore been invested in the acquisition of certain assets, which assets are listed on Exhibit "A" annexed hereto and made a part hereof (the "Existing Joint Venture Assets")"

WHEREAS, there are other assets owned by one Joint Venturer which the Joint Venturers wish to have included among the Joint Venture Assets, upon and to the extent the Joint Venturers arrive at a separate written agreement regarding the inclusion of those assets, which other assets are listed on Exhibit "C" annexed hereto (the "Additional Existing Assets").

WHEREAS, the Joint Venturers intend to make additional acquisitions of assets in the future as part of this Agreement (the Asset Acquisitions");

WHEREAS, Existing Joint Venture Assets, Pending Asset Acquisitions and Asset Acquisitions, and the Additional Existing Assets (to the extent the Joint Venturers arrive at an agreement for the Additional Existing Assets) shall hereinafter collectively be referred to as "Joint Venture Assets"; and …

14. Exhibit C to the Joint Venture Agreement lists as "Additional Existing Assets" the Schedule C Properties: "Liberty Harbor Site, Jersey City, New Jersey", "Fulton's Landing, Jersey City, New Jersey", Assisted Living Facility, Jersey City, New Jersey".

15. The Schedule C Properties had long been owned by the Moccos and the Moccos had expended significant money in their development even prior to the Joint Venture.

16. Unlike the "Existing Joint Venture Assets" listed on Exhibit A and the Pending Asset Acquisitions listed on Exhibit B of the Joint Venture Agreement, which were all distressed residential properties in Essex County, the "Additional Existing Assets" (or Schedule C Properties) were prime development sites in Jersey City with values far in excess of all the Exhibit A and Exhibit B properties combined:

17. The Joint Venture Agreement provides:

> 8.1.3. Except for the Existing Joint Venture Assets and the Pending Asset Acquisitions, no other asset acquired by either Joint Venturer, or his affiliate shall be deemed to be a Joint Venture Asset unless such asset is (i) acquired in the name of the Joint Venture with the **written consent of both Joint Venturers**, (ii) is acquired with the capital of the Joint Venture, (iii) is acquired in the name of one Joint Venturer with the capital of the other Joint Venturer, or (iv) **except as otherwise specifically agreed to in writing by the Joint Venturers**.

18. The required additional agreement was never executed or even drafted.

19. Pieter de Jong, the attorney who drafted all the joint venture agreements and other legal documents, has confirmed in sworn testimony that no such document exists.

20. Mocco also confirmed in sworn statement that no such document exists.

21. **Licata has never produced any such document, has consistently relied upon a tortured interpretation of other provision in the Joint Venture Agreement as the basis for his ownership claim (which, by logical extension, is confirmation that no such writing exists), and has diligently avoided the issue of a separate writing when testifying under oath.**

A trial was originally sought necessary in order to determine the parties' actions and intent regarding this matter. In particular, the court wanted to know if the mortgage was real or part of a Mocco-Licata mechanism to hold off creditors. If the mortgage was real, what consideration did Mr. Licata receive for his discharge of the mortgage? Mr. Licata contends the consideration was a one half interest in Liberty Harbor. The court wanted to know if a person as tough as Mr. Licata give up a $13 million mortgage for nothing. Put differently, what, if anything, did Mr. Licata contribute to Liberty Harbor and/or Mr. Mocco and what, if anything, did the parties agree Mr. Licata should receive for his contributions to Mr. Mocco's empire, especially Liberty Harbor, since Mr. Licata did not contribute for charitable reasons or because he wanted to help Mr. Mocco. What, if anything, came of Mr. Mocco's informal offer to make Mr. Licata a 25% owner of Liberty Harbor.[33] All of these questions - - and, indeed, the whole Liberty Harbor ownership issue - - became moot in some respects when Judge Shiff ruled in October 2014 that the Trustees possessed Mr. Licata's claims to Liberty Harbor, and could sell

[33] The reference is to a tape recorded conversation between the two on which Mr. Mocco implied that he might make Mr. Licata a 25% owner of Liberty Harbor. The tape recordings were made by Mr. Mocco because he began to distrust Mr. Licata. (He also taped Mr. deJong since he wanted to be sure Mr. deJong was not helping Mr. Licata.) Although Mr. Mocco and Mr. Licata referred to the tapes in their testimony, the court does not believe any of the tapes are evidential since there is no proof as to their authenticity or chain of possession. The transcript of tapes were supplied to the court by Mr. Mocco. The court has read the transcripts and will refer to them on occasion as being illustrative, but will **not** make any decision based on them.

those claims, together with any other claims possessed by Mr. Licata, for $1,500,000, see footnote 10, page 10 and Section IV of this opinion. [34]

H. The Proposed Mocco-Licata Accounting

The court initially believed that it could not properly understand the relationship between Messrs. Mocco and Licata without understanding how much each contributed to their various ventures. Despite 15 years of litigation, the record shows very little useful information in that regard. Mr. Blake submitted a detailed list of Mr. Licata's alleged contributions, approximately $27 million of which were loan guarantees and approximately $4-5 million of which were allegedly payments. Ehrenkrantz Sterling & Co., LLC, accountants who worked on a portion of the Mocco-Licata war in 2000, reported that "Mr. Licata has provided us with schedules that total almost **$50,000,000** of "disbursements made by Mr. Licata on behalf of the joint venture properties." On the other hand, the accounting firm stated that "we have not verified these amounts. Mr. Licata was to provide us verification of all disbursements made by him to either purchase or support the joint venture projects. We contacted Mr. Licata and his attorney for that information. We never received a response".

Mr. Schafhauser, on behalf of the Lenders, submitted a June 15, 2001 certification from Mr. Licata wherein he explains certain of the financial details of the early Mocco-Licata relationship. Attached to that certification is a Job Ledger purportedly detailing some aspects of the financial relationship between himself and Mr. Mocco in 1996 and 1997.

On the other hand, Mr. Scarpone on behalf of Mr. Mocco wrote that:

> It is and has, since the start of this litigation, been the Mocco position that Licata contributed no money at all. We have never seen any checks, wire transfer, ledger sheets,

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[34] The court used the words "in some respects" because, as a court of equity, it must consider all the dealings between Mr. Licata and Mr. Mocco, even though another court - - in this instance the Connecticut Bankruptcy Court - - determined that certain of those dealings justified a $1,500,000 settlement.

> or anything else that would evidence a payment or contribution by Licata or FCCG as opposed to a pass through to or form EMP.[35]

Indeed, not only does Mr. Scarpone contend that Mr. Licata contributed nothing to the various ventures, but he claims that "we are excluding discussion of Licata's misappropriation of funds and assets of Mocco/Licata Joint Venture…" He goes on to state that:

> Substantial additional payments were received by Licata/FCCGT. In the Vermont trial Mr. Opert who, in 1996, was second in command at FCCG, testified to more than $4 mil. That FCCG made from the Mocco transaction. Of this, the largest part was a $2.3 mil payment to FCCG by EMP. The $2.3 mil represented approximately half of the points and prepayment penalties EMP charged when (in mid-November of 1996) Mocco refinanced the Hamilton Park Health Care Center and paid $14.7 mil to EMP. EMP then credited only $10 mil of that $14.7 mil as repayment of the principal. This $2.3 mil payment to Licata was both hidden from Mocco and unlawful.

One reason an accounting would have been useful is that, if Mr. Licata made contributions, it would seem likely that there were some promise to Mr. Licata that he would receive a share of the Liberty Harbor Project. The likelihood that this is true is buttressed by a transcript of a taped telephone conversation between Messrs. Mocco and Licata wherein Mr. Mocco told Mr. Licata that he had informed a third party "First Connecticut and I are joint venturers [sic]. So everything that I own …" Mr. Licata then told Mr. Mocco that he told a third party "I'm involved with Peter Mocco on a lot of things. We're going to develop Liberty Harbor", to which Mr. Mocco answered "Yeah". Mr. Licata explained on what he told the third party, "We're building some buildings together and a whole bunch of things" to which Mr. Mocco answered "Yeah".

It is possible that, if Mr. Licata made contributions, he did so because of his share in the Schedule A, Existing Joint Venture Assets", and Schedule B "Pending Asset Acquisitions" Properties. However, the court has received little or no information as to whether the Schedule

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[35] Neither the Blake submission nor the Licata certification contains checks or wire transfers.

A or Schedule B assets were valuable enough to justify Mr. Licata's contributions. All it knows about their value is Mr. Mocco's claim that the Schedule A and Schedule B properties "were all distressed residential properties in Essex County" which were worth far less than the Schedule C properties. Schedule A itself lists 23 properties, 10 in East Orange, 3 in Orange, 2 in Newark, 2 in Elizabeth, and 5 with addresses that appear to be Newark, but are not completely enough identified for the court to be certain. Schedule B does not list any specific properties. The court is informed that Mr. Mocco managed the Schedule A properties and lost them to foreclosure in or around 2000.

While the first trial was directed solely to the ownership issues, the court determined that it could not easily establish who owns the properties without understanding who contributed what to the various properties, and to the joint venture. Therefore, the court decided that it wanted evidence as to who paid what to fully understand what each party believes the relationship with the other party was. The Trustees agreed to ask Judge Shiff to appoint an accountant to work simultaneously with the trial proceedings and submit his or her final product to the court. Judge Shiff graciously agreed to do so. Remarkably, both Mr. Mocco and the Lenders objected to the appointment of an accountant. Mr. Mocco claimed that nothing new was needed than the Ehrenkrantz accounting (even though it was now a decade old). The Lenders claimed that Mr. Licata did so much to save Mr. Mocco in 1996 that no accounting was ever needed. This court did not agree with either litigant, and regrets that no one came up with the funds to produce an accounting. [36]

<u>This Court's Pre-Trial Decisions</u>

[36] The history of the proposed, failed, accounting is provided if any reviewing court believes it should have been presented with more information about the financial dealings between Mr. Mocco and Mr. Licata.

Prior to trial, the court had to address the contention by the Moccos that it should give collateral estoppel, res judicata, or law of the case status to the Vermont Decisions. This court declined to do so for three reasons. First, Judge Vichness had declined to do so, on three separate occasions, and this court could not find clear error in those decisions. Second, the Lenders had not participated in the Vermont trial - - indeed the Lenders had no interest in the Vermont trial because they did not loan the money to SWJ until after the Vermont decision. And third, the Vermont Decision only addressed FCHG II, III, X, XI, and XIII - - not IV.[37]

Having made this decision, the court did acknowledge that five Federal Judges had written 54 pages of thoughtful decisions after an eight day trial with 85 exhibits and eight witnesses, including Messrs. Mocco and Licata. This acknowledgment caused the court to deny the Lenders' motion to exclude evidence of the Vermont Decisions. To totally ignore those decisions would be an unthinkable violation of the doctrine of **judicial economy** under these circumstances. Thus, the court ruled that Mr. Mocco could introduce the three Vermont Decisions as Exhibits P-1, P-2, and P-3, the transcript as P-4, and the 85 exhibits as P-5 (or whatever numbering system the parties agree upon.) The court determined that if Mr. Mocco could demonstrate that the facts which compelled the Vermont Judges to decide that he owned the other five FCHG entities compelled a conclusion that he owned FCHG IV, he would have carried his burden as to FCHG IV. At that point, the Lenders would be allowed to demonstrate either that (a) Judge Brown's conclusion was wrong or that (b) there were enough differences between FCHG IV and the other five entities to justify a different result.[38]

[37] This court did not give a fourth reason to deny the Moccos' motion - - that Judge Brown ruled as she did because of Mr. Licata's bad faith, not because she believed the Moccos owned the properties - - since a fair reading of her opinion leads to a conclusion that she **did** believe that Moccos owned the property.

[38] Mr. Mocco argues that this court has no right, jurisdictionally, to hold that Judge Brown's decision was wrong. He goes so far as to say that only the United States Supreme Court may do so, since the United States Court of Appeals has already affirmed Judge Brown. While Mr. Mocco is arguably correct as to FCHG VI, VII, X, XI, and

The next pre-trial decision facing the court was whether to preclude Mr. Mocco from asserting ownership of FCHG IV by virtue of the 363 sale. The court declined to do so because of the transcripts quoted above. Those transcripts demonstrated that Judge Shiff never intended that his orders divested Mr. Mocco of ownership. Indeed, he several times stated that ownership would be determined **by this court**. The Lenders' argument that "the Connecticut Bankruptcy Court explicitly recognized that FCHG IV was part of the Debtors' Estate" is difficult to credit: Judge Shiff was recognizing that a **claim** to FCHG IV, **not ownership** of FCHG IV, was part of the Debtor's Estate. If Judge Shiff believed the history of FCHG IV made it so different from FCHG II, III, V, XI, and XIII as to compel a different result, he would have explained why, either orally or in writing. Judge Shiff was the Bankruptcy Judge assigned to the Licata case. To believe that he would have **ignored** the opinion of another Bankruptcy Judge in the **same case** - - let alone District Court and Second Circuit affirmances - - makes no sense. The Bankruptcy Trustees for FCHG and Mr. Licata, both of whom are experienced Connecticut bankruptcy attorneys, have stated that "the only fair interpretation of Judge Shiff's comment is that Judge Shiff did not intend his sale order to preclude any parties' right to assert an ownership interest over the assets at issue in this case". Counsel for the Creditors' Committee, another experienced Connecticut Bankruptcy attorney, agreed. Judge Shiff's statements - - as well as the common sense observation that Mr. Mocco and his shrewd, able attorneys would **never** have given up their claims to ownership of FCHG IV for **no consideration** - - compel the conclusion that this court is not barred from determining ownership of FCHG IV.

XIII, he is **not** correct as to FCHG IV. Not only does this court have the power to hold that FCHG IV's history makes it different from FCHG II, III, X, XI, and XIII, it may say that Judge Brown's **reasoning** as to Mr. Licata's nominee status and the effect of the **3-page Agreement** was incorrect. That the parties would be left with inconsistent rulings which would be unfortunate, but that is a necessary result of a situation wherein different judges tried different matters.

The court is aware of case law which gives primacy to court orders over judicial pronouncements. See, e.g., New Castle County v. Hartford Accident & Indem. Co., 933 F.2d 1162, 1204 (3rd Cir. 1991) (citing Murdaugh Volkswagen v. First National Bank of South Carolina, 741 F.2d 41 (4th Cir. 1984) ("Courts must speak by orders and judgments , not by opinions, whether written or oral, or by chance observations or expressed intentions made by courts during, before or after trial, or during argument. When the terms of a judgment conflict with either a written or oral opinion or observation, the judgment must govern."). On the other hand, every party in this case **knew** Judge Shiff **wanted this court to adjudicate ownership**. That the Lenders and their allies cleverly drafted the orders to try to eliminate Mr. Mocco's rights does not eviscerate Judge Shiff's intent.

The court's decision on this issue was influenced by Judge Learned Hand's classic admonition that " [t]here is no surer way to misread any document than to read it literally", Guiseppi v. Walling, 144 F.3d 608, 624 (2d Cir. 1944) (Hand, J.), which admonition has been noted approvingly by the New Jersey Supreme Court. See Ruig v. Kelsey, 135 N.J. 500, 515 (1994).

While this court made its decision on the effect of the 363 sale independently it does note that Judge Vichness ruled similarly. See his comment at the November 15, 2006 hearing that Judge Shiff had replied when asked what the SWJ principals were getting for their money, "… that's not my problem. They want to put the money up and, ultimately, **[if] Mr. Mocco is correct, if he owns all this, they put the money up and they get nothing for their money. If we're going to preserve the Mocco claim in all this property, we're not doing away with [it] by this sale."** Further, Judge Vichness specifically addressed the argument set out20 above: that the court orders which **could** be read to nullify Mr. Mocco's claim "trumped" the court colloquy

and Judge Shiff's intent. He stated that this court orders could not be read to obliterate Mr. Mocco's claims, but even if the orders did not specifically save Mr. Mocco's claims, **"if that makes it ambiguous … then you go to the Legislature history, the discussions about the purpose of the paragraph".** This court would vacate Judge Vichness' rulings if it believed he were incorrect, but Judge Vichness was not incorrect.

At the pretrial conference wherein the court announced its ruling as to the effect of the 363 sale, Mr. Paul Schafhauser, on behalf of the Lenders, and Mr. Kerry Flowers, on behalf of Mr. Licata, argued that two cases, In Re Gucci, 126 F. 3d 380, 387 (2d Cir. 1997), and In Re Forman, 07-27514 (R.G.), a 2011 decision by Judge Gambardella, mandated a different result. Gucci involved a §363 sale challenge by four unsuccessful bidders. The Bankruptcy Court authorized the sale, and the District Court affirmed. The Circuit Court held that the challenge could not succeed unless the challengers could prove that the winning bidder (Gucci) acted in bad faith. Unfortunately for the challengers, they presented "less a claim of fraud, collusion or unfair advantage in the bidding process and more an attack on [Gucci's] general business practices." On that standard, the Circuit found the challenge not to be meritorious. The case is even less helpful to the Lenders because the Court of Appeals, in defining the phrase "good-faith purchaser," referred to 3 Collier on Bankruptcy p. 363 at 363-64 (15th rev.ed. 1997) and stated that "most courts have adopted a traditional equitable definition: one who purchases the assets for value, in good faith and **without notice of adverse claims**". No one could have had more notice of adverse claims than SWJ.

The court's decision that the §363 sale did not foreclose Mr. Mocco from asserting ownership in FCHG IV was based on Judge Shiff's expressed intent to allow the Trustees to sell whatever rights Mr. Licata had in FCHG IV and to allow this court to decide the extent of those

rights. Nothing advanced by Mr. Schafhauser (or anyone else) has convinced the court that it has misread Judge Shiff's intent. If the court is incorrect, the Appellate Division will presumably so state.[39]

Judge Gambardella's Forman order is also unhelpful to the Lenders. She authorized a 363 sale in a contested intra-family dispute "with valid liens, claims, interests, and encumbrances to attach to the proceeds." The court records revealed that debtor's brother had been battling this matter for a long time, and the court decided, after two hearings, to enjoin him from contesting any matter "pertaining to the sale of the real property and/or the real property itself, with respect to any issues **already considered** by the Court . . . ." Judge Shiff **could** have ruled similarly to Judge Gambardella if Judge Shiff believed Mr. Mocco had already been given his day in court and had no valid claim, but Judge Shiff did not do so; rather, he ruled that this court would decide who owned the property, and that the plaintiffs were buying the Licata claims, not the property.

The next pre-trial decision facing the court was the motion to reconsider Judge Vichness' ruling not to allow H. Glenn Tucker, Esq. to testify as an expert for the Lenders. This court denied the motion because the original decision was not clearly wrong, as Mr. Tucker merely provided legal analysis, a function reserved to the court. Nevertheless, the court found Mr. Tucker's expert opinion to be so well written that it could be considered an additional brief on behalf of the Lenders and could be used to that extent.

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[39] The fact that the Lenders apparently knew of the first two Vermont decisions is not unrelated to this court's decision to allow Mr. Mocco to claim ownership rights to FCHG IV. §363's finality provision is only available "to an entity that purchased . . . such property in good faith." If a party having no relation to Mr. Mocco or Mr. Licata bought FCHG IV in a §363 sale, this court **might** have ruled differently. Since the Lenders knew of the Vermont decisions, they arguably are not in good faith as defined by §363(m) and, if not, may not use their status to bar Mr. Mocco's claims. See Section VI A herein. And see Section VI B herein, wherein the court distinguishes between "good faith" in the colloquial sense and "good faith" in the legal sense.

This court also determined, pre-trial, to deny, without prejudice, a motion by the Bankruptcy Trustee to preclude the plaintiffs from disputing (a) the terms of Mr. and Mrs. Mocco's Fourth Amended Plan of Reorganization, and (b) the terms of the Stipulated Judgment in Liberty Harbor North, Inc. v. City of Jersey City. Similarly, the court denied, pre-trial, without prejudice, the Lenders' motion to preclude the plaintiffs from asserting an ownership interest in FCHG IV in light of the plaintiffs' representations to the Bankruptcy Court and the binding effect of the Plan of Reorganization and Confirmation Order in the Moccos' 1996 Bankruptcy Proceedings. Similarly, the court denied, without prejudice, the Proskauer Defendants' motion to bar any evidence or testimony that the Liberty Harbor mortgage did not exist during the time period between the confirmation of the Moccos' Bankruptcy Plan in 1996 and the debt's discharge on or about February 19, 1999. The court's reasoning on all these motions was the same: neither Mr. Mocco nor Mr. Licata will be barred by their prior inconsistent statements, positions and court successes and failures, but both will be forced to explain their past positions and will be judged on how they justify their current positions in light of their past positions.[40]

The court denied all these motions without prejudice because it believed that difficult questions of judicial estoppel need to be resolved after a full factual inquiry. In particular, the court needed to learn (1) **what** Mr. Mocco and Mr. Scarpone (and Mr. Licata) told the court and First Union, and whether the court and First Union (and, later, EMP) knew of Mr. Licata's alleged "nominee" status[41]; (2) what Mr. Mocco and Mr. Licata gained from any non-disclosure;

[40] One of these rulings - - that concerning Liberty Harbor - - became moot when Judge Shiff later ruled that the Trustees owned Mr. Licata's claims as to Liberty Harbor and could validly compromise those claims by selling them to Mr. Mocco. See Section IV of this Opinion.

[41] The court can find no record that either First Union or the court knew of the three page agreement; indeed, Mr. Scarpone wrote an inter-office memorandum indicating that even **he** did not know of it for some time.

(3) what, if anything, did Mr. Mocco gain from telling the court and the JCRA that no other contracts existed between Mr. Mocco and First Connecticut when, in fact, this was untrue, and what, if anything, he gained by telling the court and the JCRA that FCHG had a mortgage on which at least $13 million was owed when the mortgage was soon to be discharged; (4) what Mrs. Licata gained by signing a property settlement agreement in which she claimed she did not have an interest in FCHG IV or any Mocco related entities, and (5) what, if anything, the Licatas gained by not telling the Bankruptcy Court about Ms. Licata's interest on Holdings. The answers to these questions were necessary to determine if either party could be judicially estopped or if the parties were in pari delicto. To aide a reviewing tribunal, the court has attached to this portion of its opinion a chart setting out the major alleged inconsistencies of both the Moccos and the Licatas.[42]

Another pretrial motion, or more accurately, motions, faced by the court concerned the Proskauer Defendants, who moved for a protective order to keep from having to answer various Requests for Admissions. The motion was granted in part and denied in part. Thereafter, the Proskauer Defendants settled.

The next issue to be decided was whether the ownership trial should be held before a judge or jury since (a) Mr. Mocco originally sought a jury trial and (b) a quiet title action, which is the claim against the Lenders, requires a trial by jury in New Jersey. Judge Vichness ruled that there was no right to a jury trial, and this court was reluctant to reverse him, unless he clearly erred, which the court does not believe he did. In any event, after discussion as to the difficulties

[42] The Lenders point out that **they** are not guilty of any wilful inconsistencies. The court agrees. The most that can be said of the Lenders is that they were not as careful as they could have been; they never misled any court.

of having a jury hear these issues, and the possibility of severing the quiet title action, the Lenders agreed to waive their jury trial demand, as did Mr. Mocco.

The court then heard Mr. Flowers' motion to be relieved as counsel to Mr. Licata. Regretfully, due to the importance of this matter to Mr. Licata and the court's concern that a lay person could not effectively represent himself in such a complex trial, the court denied the motion. (Subsequently, Mr. Flowers became ill, the court reconsidered its refusal to grant his motion, and another lawyer, Bruce Duke, Esq., took over as counsel to Mr. Licata.)

The court was next presented with a motion to be relieved as counsel by Francis Rupp, Esq.; Mr. Rupp had represented Mr. Podell, Mr. Mournes and Cobra/Ventrua Equities. Since these three parties had taken conflicting positions, R.P.C. 1.7 mandated the grant of his motion.[43]

Soon thereafter, the Proskauer Defendants settled with Mr. Mocco. That settlement did not affect the critical issue before the court: the proper ownership of the properties.

On the last business day before the scheduled January 2, 2014 trial date, the Moccos announced that they reached a $1,500,000 settlement with the Trustees and asked the court to adjourn the trial until the Connecticut Bankruptcy Court decided whether to approve of the settlement. The court consented to do so. During the next year, Judge Shiff heard testimony and argument as the fairness of the settlement. On October 9, 2014, Judge Shiff issued an Order and Opinion approving the $1,500,000 settlement between the Trustees and Mr. Mocco. (Mr. Licata's counsel, Mr. Duke, has informed the court that the order is on appeal, but no decision has been reached.) The relevant portions of Judge Shiff's opinion will now be discussed.

IV. Judge Shiff's Opinion on the Settlement

[43] Additionally, none of the three parties represented by Mr. Rupp planned to participate in the ownership trial, and none have paid Mr. Rupp for over three years.

Judge Shiff's opinion begins with a procedural history which this court will not repeat. It will, however, quote Judge Shiff's statement as to what properties or assets were subject to the proposed $1,500,000 sale:

> The intangible properties (hereafter, collectively referred to as the "Assets") which are the subject of the instant Amended 9019 Motion are:
>
> > (a) interests in the assets of the Joint Venture Agreement ("JVA") between Licata and Mocco;
> >
> > (b) membership interests in various limited liability companies;
> >
> > (c) **interests in various 1st CT LLCs; [FCHG IV]**
> >
> > (d) claims for fees; and
> >
> > (e) claims against EMP, Cynthia Licata, Mocco, Pieter de Jong , and others.

The Judge then discussed Mr. Licata's objections to the proposed sale and the Trustees' arguments in rebuttal:

> Licata, a chapter 7 debtor with no standing, see infra at 10-11, is the only party who objected to the Amended 9019 Motion. (See ECF No. 2470.)
>
> At a September 23, 2014 hearing ("September Hearing") on the Amended 9019 Motion, Licata argued that the Trustees were settling with Mocco for a "mere pittance" because the real property related to certain of the Assets are worth hundreds of millions of dollars. To substantiate that claim, Licata relied on an opinion letter of a real estate broker.
>
> The Trustees challenged Licata's claim with the argument that their chances of success in the NJ Ownership Dispute are greatly diminished in light of Judge Rothschild's comment to the parties that he will give considerable weight to the evidence presented in the 1st Vermont Trial, in which Bankruptcy Judge Brown found Mocco to be a more credible witness than Licata and further found that, at all times, Licata was merely Mocco's nominee. In other words, contrary to Licata's claim, he was not the owner of the properties in certain of the 1st CT LLCs. Knowing that Mocco has already succeeded once against Licata (regarding claims to other properties in other LLCs), the Trustees believe that there is a strong probability of the same outcome in the NJ Ownership Dispute. (See id.) The Trustees also argued that Licata grossly inflated the value of the Assets since none of the three auctions to sell the Assets produced a successful result. Moreover, having reviewed the Claims Registers in the Cases and having taken into account duplicative claims, the Trustees contend that both estates are insolvent. (See id.)

Further, the Trustees endorsed the following argument by Mocco's counsel at the September Hearing, i.e., Licata has grossly overvalued the underlying properties, especially as to a certain 19-acre parcel of land, which is part of Liberty Harbor and which is alleged to be one of the JVA assets supposedly included within the Assets. In particular, anyone seeking to acquire an interest in that parcel must first secure the approval of the Jersey City Development Agency, which has a joint interest in Liberty Harbor. Moreover, that parcel is land-locked, contaminated, undeveloped, and will require tens of millions of dollars in site work, which is not scheduled to begin for another five-to-seven years. (See id.)

After Judge Shiff set out the standards pursuant to which Bankruptcy Courts must address motions to confirm settlements, he came to his conclusions:

A. Licata's Objections

"[A] Chapter 7 debtor is a 'party in interest' and has standing to object to a sale of the assets, or otherwise participate in litigation surrounding the assets of the estate, only if there could be a surplus after all creditors' claims are paid". Desormes v. Charlotte School of Law (In re Desormes), 497 B.R. 390, 395 (D. Conn. 2013) (further citations omitted) (emphasis added). As noted, Licata, a chapter 7 debtor, is the only party who objected to the Amended 9019 Motion. His attempt to establish a colorable basis for standing to object is unavailing. To do so, he would have had a proffer evidence that after the sale of the Assets and payment in full to the holders of allowed unsecured claims, there would then be a surplus for him. His only proffer to support that scenario was a real estate broker's opinion letter, which was both vague and of insignificant probative value. Moreover, as Licata's counsel acknowledged, taking evidence on a Rule 9019 motion is not required. See In re SageCrest II, LLC, No. 08-50475, 2010 WL 1981041, at *5, slip op. (Bankr. D. Conn. Mau 18, 2010), aff'd 2011 WL 134893 (D. Conn. Jan. 14, 2011). Rather, the Court needs only to "'canvass the issues' to determine if the 'settlement falls below the lowest point in the range of reasonableness.'" WorldCom, 347 B.R. at 137 (quoting In re Teltronic Serv., Inc., 762 F.2d 185, 189 (2d Cir. 1985).

The record demonstrates that there are approximately $120 millions of unsecured claims. There is nothing in the record to suggest that the sale of the Assets will generate enough money to satisfy those claims. Those findings warrant the conclusion that Licata has no pecuniary interest in these Cases and, therefore, no standing to object.

B. The Amended 9019 Motion is Fair and Equitable

> The Trustees have persuasively argued that the likelihood of their success in the NJ Ownership Dispute is greatly diminished because Judge Rothschild has indicated he will consider all the evidence introduced in the 1st CT Vermont Trial. (See Sept. 23, 2014 Audio File, ECF No. 2474.) The operative facts underlying Judge Brown's 1st CT Vermont Decision and, in particular, her conclusion that Licata was always Mocco's nominee and not the owner of properties in certain 1st CT LLCs, see 1st CT Vermont Decision, 2004 WL 1676211, at *15, and her finding that Mocco was more credible than Licata, see id. at *2, support the Trustees' assertion that the NJ Ownership Dispute is likely to be decided in favor of Mocco, and not the Trustees, for whom Licata was to be their primary witness. This is especially so given that the 1st CT Vermont Decision was affirmed not only by the district court, see In re First Connecticut Consulting Group, Inc., 340 B.R. 201 (D. Vt. 2006), but also by the Second Circuit, see In re First Connecticut Consulting Group, Inc., 254 Fed. App'x 64 (2d Cir. 2007).
>
> Moreover, approval of this proposed settlement will eliminate the Trustees from complex and protracted litigation. Further, no creditors, who are the only parties with the right to do so, have objected. Finally, the Court is satisfied that this proposed settlement is the result of arm's-length negotiations between competent and experienced counsel. Thus, having presided over this case for more than 12 years, as well as many related cases, and having considered the relevant Iridium Factors, the Court find the proposed settlement falls within the range of reasonableness, and is fair and equitable.

At the end of his opinion, Judge Shiff added that his Order was not intended to foreclose the Lenders from arguing that they possessed a valid lien:

> **IT IS FURTHER ORDERED that the instant settlement is between Mocco and the Trustees only. That is, neither this Memorandum and Order, the Settlement Agreement, nor the settlement memorialized thereby, in any way releases, discharges, modifies, collaterally estops, binds, or otherwise impairs the rights of the Lenders and/or Chicago Title Insurance Company, including, without limitation, any and all claims, causes of action, defenses and counterclaims in the NJ Ownership Dispute, and this Memorandum and Order shall be without prejudice to the rights of the Lenders and/or Chicago Title Insurance Company in the NJ Ownership Dispute with all such rights preserved and reserved.**

The effect on this trial of the settlement, and Judge Shiff's approval of same, is clear:

1. Mr. Licata has no ownership interest in the property in question.
2. No properties or claims to properties other than FCHG IV are involved any further in this case, as Mr. Licata's rights to them have been sold by his Trustees in Bankruptcy for $1,500,000.

3. The Lenders (or Chicago as the Lenders' subrogees, see note 8, pages 6-7) still have the right to assert the validity of their lien on FCHG IV, and Mr. Mocco still has the right to assert that the Lenders' lien is invalid.

VI. The Trial[44]

A. Bruce Berreth

Since the court determined that Mr. Mocco bore the burden of proof in his battle with the Lenders, he presented the first witness. His initial witness was Bruce Berreth, the long-time President of Centrum, the Seattle, Washington based "hard-money lender" which made the critical loan to enable SWJ to purchase FCHG IV. Mr. Berreth, a lawyer for over 30 years, has been Centrum's President for approximately a quarter of a century.

Centrum originally had a partner for the loan, a company called Avator. Avator withdrew; its reasons for withdrawing will be discussed subsequently. Centrum also had three banks from which it obtained financing: Wells Fargo, First Mutual, and U.S. Bank. Those entities are not relevant herein.

Early in his testimony, Mr. Berreth admitted that Centrum will not benefit financially if the Lenders prevail herein. While the court had ruled that it would not compel disclosure of the confidential Centrum – Chicago settlement, Mr. Berreth's answer confirmed what everyone in the case all assumed: in return for a payment or payments from Chicago, Centrum gave to Chicago its rights to receive any money in this case, making Chicago the real party in interest herein for at least some purposes. See footnote 8, page 6 supra.

[44] The court will discuss every witness who testified. It will not discuss, and, with a few critical exceptions, will not even summarize, the documents admitted into evidence because (a) they are too numerous to adequately discuss or summarize, and (b) there is little this court can add about the documents which a reviewing tribunal would find useful. The court will, when discussing the witness testimony, organize its analysis by subject matter, rather than dividing the discussion into direct and cross examinations.

Mr. Berreth was then asked a series of questions concerning the loan in question. It would not benefit either the parties or a reviewing tribunal to recap that testimony. Rather, the court will summarize the principal focus of that testimony: the arguably "loose" or less than thorough due diligence which accompanied the loan, and the reasons therefore.

Mr. Berreth was extensively questioned as to why he did not check on the type of things lenders typically insist on knowing when making an eight figure loan: (1) what is the exact amount of the mortgage owed; (2) what were the rent rolls; (3) what is the insurance situation; what does an M.A.I. appraisal say about the value of the property, etc. His testimony did not answer the question as to whether he did not do what many would consider customary due diligence because the people he was loaning the money to wanted to hide the loan from the one person who knew all the answers - - Mr. Mocco.

Mr. Berreth did testify that Centrum's status as to "hard money lender" gave it a business model different from a traditional bank: it loaned money more quickly, at higher interest rates, and, therefore, little or no reliance on M.A.I. appraisals. On the other hand, since Centrum is a Seattle, Washington based lender, quite a distance from Hudson County, New Jersey, where the property at issue is located, and had never heard of Centrum or Mr. Licata, it did not have the usual reasons to forego extensive due diligence: knowing the borrower from past experience ("we have loaned to him for 15 years and he has paid back every penny") or knowing the real estate from past experience ("we had loaned money in that area of downtown Seattle for 10 years and knew the rent rolls, vacancies, zoning problems, etc. very well.")

Mr. Berreth was asked about M 189, a May 22, 2006 e-mail from Mr. Berreth indicating that he had some real concerns about Mr. Mocco's claims. Not surprisingly, Mr. Berreth answered that he was relying on Horizon to handle this issue. As he wrote on M 189: "I am not

sure what title issue may exist err Peter Mocco [sic]… You will get a clear policy, but I will expressly review this with David Cohn [a Horizon title officer].”

On the subject of due diligence - - or the lack thereof - - Mocco’s counsel brought to Mr. Berreth’s and the court’s attention paragraph 5 of a September 21, 2001 order of Judge Kenneth F. Levy, the Superior Court Judge who handled this case for a brief period of time before Judge Vichness. That paragraph read as follows:

> Pending further order of this Court, or should the Bankruptcy Court assume jurisdiction of this matter, the order of the Bankruptcy Court, no party or any affiliate of a party shall transfer, lien, or encumber any interest in any of the Holding Equity LLCs or any properties owned in the name of any such Holding LLCs. The Order set forth in this paragraph does not apply to the property known as the Atrium.[45]

Mr. Berreth did not indicate any remembrance of that order. Not surprisingly, the next witness, Horizon Title searcher David J. Cohn, was also asked about that order; Mr. Cohn also indicated he was not familiar with same.

Mr. Berreth’s inability to clearly explain these lapses from usual business practices could arguably be due to the eight years which have elapsed since the loan was made, but even this excuse would be difficult to credit since Mr. Berreth has testified about the loan history and reasons for the loan at several intervening depositions, including once in Centrum’s litigation with Chicago. He also testified that this was a relatively large loan for Centrum, which should have led to **greater** diligence. Since Mr. Berreth is clearly an intelligent man, and appeared to be honest - - he had little or no reason to be dishonest since Chicago, not Centrum, would benefit by a Centrum win herein - - the most logical explanation for **why** Centrum made the loan despite a lack of solid due diligence is that someone wanted the loan to be made for reasons unconnected

[45] Judge Levy was referring to Mr. Mocco’s Bankruptcy when he used the phrase Bankruptcy Court, since the Licata Bankruptcy case had not yet been filed. This is a distinction without a difference, however, since the court assumes that **any** Bankruptcy Judge with jurisdiction over the property could allow it to be sold.

to the credit worthiness of the loan. That person could well be Mr. Licata and/or David J. Cohn of Horizon, as Horizon was paid fees of over $250,000.[46] Mr. Berreth struck the court as someone who, while untainted by any wrongdoing, relied almost exclusively on Horizon, and its parent Chicago, and may have been one of several victims of Mr. Licata.

Mr. Berreth's testimony of how Centrum dealt with the loan **after** it was made and SWJ defaulted almost immediately thereafter was somewhat surprising. Despite his position as President of Centrum and his training as a lawyer, he acted quite unaggressively toward SWJ. He took no action against SWJ for some time, instead focusing his attention on a claim against the title insurers. This testimony lent some weight to Mr. Mocco's assertion that the Lenders never relied on anything Mr. Mocco did or did not do.[47]

Later in the case it became apparent that Mr. Berreth "hedged" his bet to some extent. He insisted to Horizon that the "bankruptcy exclusion" which SWJ had in its title policy **not be put in his policy**. Whether this demonstrated serous concern by Mr. Berreth about the possible litigation problems the Lenders faced, or was merely a case of him being a duly caution lawyer – executive, is not clear.

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[46] Two documents disagree as to whether the exact amount was $218,656 or $209,656. The latter figure is apparently more accurate. See M 162. Subsequently, when Mr. Cohn testified, Mr. Mocco presented a document showing that Horizon billed $41,087.50 on another Licata - bankruptcy matter, and added oe other fee, for a total of slightly over $270,000. He also presented a document showing a $50,000 payment to Horizon, but that wire transfer may have been solely in accordance with Horizon's status as an escrow agent.

[47] Centrum's lack of aggressiveness versus its borrower, SWJ, was surprising. That lack of aggressiveness may be relevant herein to demonstrate whether there was something suspicious about the loan. There is a related aspect which is even more puzzling: Mr. Podell personally guaranteed the $15,000,000 loan but, until recently, Centrum made no effort to collect, even though Mr. Podell's family work history might indicate that he is not necessarily impecunious. See page 5 above. Unfortunately, Mr. Berreth did not know a great deal about the reasons for this unusual aspect of the loan history.

Mr. Berreth, on cross examination, testified that any seeming lack of due diligence was explained by the nature of Centrum's business. Centrum as a relatively small business with a few employees and two owners, Joseph Edmonds and his son, Derek. Derek personally inspected the properties and valued them at $25,000,000 which was arguably quite accurate because, after the loan, an M.A.I. appraiser hired by a bank involved in the loan, valued the properties at $27,000,000. Since the Edmonds family would lose some of their own money if Centrum did not get repaid, Mr. Berreth was able to convincingly state that the loan was not dishonestly made, even if there was not the type of due diligence one might expect of an eight figure loan.

B. David J. Cohn

Mr. Mocco's second witness was David J. Cohn, a very experienced title searcher and officer. He testified for nine days. Mr. Cohn stated that he graduated from Temple University. He testified that he had an unblemished 35 year record in the title business. Mr. Cohn is no longer employed, having retired in 2007 to take care of his wife, who was then in the late stages of Alzheimer's disease. Prior to that time, he was working for Horizon. He was the principal title searcher when the loan in question was made. Horizon which is no longer in business, acted on behalf of Chicago. It became clear early in the trial - - and even prior thereto - - that Mr. Mocco believes Mr. Cohn was paid or convinced by Mr. Licata and/or Mr. Licata's associates to deliver a "clean" title report to induce Centrum to make the loan.

Mr. Cohn admitted Horizon was named as a defendant herein. (He was not personally named.) More importantly, he testified that Mr. Mournes, who was discussed earlier at page 5 herein, was an acquaintance of his. While it was not clear that Mr. Mournes brought Mr. Cohn

into the Mocco-Licata dealings, it did appear that Mr. Mournes did have some substantial involvement.

Mr. Cohn, on cross examination, was asked about Mr. Mournes. He met Mr. Mournes through a mutual acquaintance. He understood that Mr. Mournes was a real estate investor, both nationally and internationally. Mr. Mournes, he explained, was charming and persuasive, and usually spoke of deals involving many millions of dollars. Mr. Mournes was also apparently an acquaintance of Dino Cancellieri, the President of Horizon, and sent some business to Mr. Cancellieri.

Also on cross examination, Mr. Cohn said he never received any money from Mr. Mournes, nor does he know of anyone at Horizon who benefited monetarily from the association with Mr. Mournes on any else in Mr. Licatas's group of supporters.

Horizon did a title search on a personal residence mortgage on Mr. Mocco's residence in late 2004 or early 2005. The mortgage in question was listed alternatively, as $250,000 and $4,500,000; the actual amount is not important herein. The mortgage was apparently, or at least allegedly, owned by FCHG and to be transferred to Cobra, a Licata entity, or to be owned by Mr. Licata.

Mr. Mournes, individually, and on behalf of Cobra, wrote Mr. Cohn on February 23, 2005 that Horizon would be held harmless from any claim, concerning the mortgages on the Mocco residence. See M 132. That document was one of the most extraordinary the court has ever seen, particularly since Horizon billed its client for its work. Not surprisingly, Mr. Mocco claimed the document demonstrated that Mr. Cohn **knew** Mr. Licata was engaged in a fraud - - presumably a fraud on the Bankruptcy Court. Mr. Cohn, in his direct examination, stated at least three times that he did not ask for M132. As to whether he discussed M132 with Mr. Mournes,

he said that he did not remember, even though M132 states that it was written "as per our discussion and agreement…" Mr. Cohn did testify that he probably spoke with his boss, Mr. Cancellieri, concerning M132 because he discussed the Mocco-Licata matter with Mr. Cancellieri and Frank Tortora, Esq., a principal of Horizon, every week.

Mr. Mocco asserts that the purpose of the proposed loan was to help Mr. Mournes and/or Mr. Licata and/or Cobra capitalize on, or sell, Mr. Licata's claims to Mr. Mocco's property M 132, he says, shows that Mr. Cohn **knew** there was a real problem with the loan.

As to M 132, counsel for the Lenders pointed out that the indemnification covered neither Centrum nor Chicago, and that Mr. Cohn never asked for M 132. Counsel for Lenders, on cross examination, asked Mr. Cohn if the document was related to the $15,000,000 loan; the answer was "No", since the document only related to Mr. Licata's mortgage on the Mocco residence.

Counsel confronted Mr. Cohn with a second suspicious document: M 250. This document, a Chicago Title policy, stated that Chicago had conducted due diligence to verify that the amount due on the FCHG IV mortgage was no less than $15,000,000. Counsel argued that the statement by Chicago could only have been made to make the mortgage more "marketable" to any prospective purchaser of the mortgage. Mr. Cohn was forced to admit that they could not remember ever putting similar language in a title policy - - although he said he had seen similar language in the past. (He also admitted to confirming in the title policy for the mortgage Mrs. Licata had on the Mocco residence as being at least $4,000,000, which was a similarly unusual statement.)

Mr. Cohn was also confronted by documents which indicated that he, or his title searchers, knew of the recorded stale lis pendens filed by the Moccos on the FCHG IV

properties. As Mr. Mocco explained on page 15 of his post-trial brief, “Mr. Cohn, in his testimony, grudgingly admitted that the reports he received from his title searchers would and did show that lis pendens had been filed on the Mocco home, the Sayreville property and the FCHG IV properties. The multiple lis pendens were filed on behalf of Licata and EMP as well as Mocco… All these notices of lis pendens referenced the same pending litigation, i.e., the five consolidated cases before this Court”. Mr. Cohn admitted that there was enough information available to him, through the recorded lis pendens, and Judge Shiff’s orders, that there was a possible cloud on the title to the FCHG IV properties. In fairness to Mr. Cohn, he said he discussed these matters almost daily with Mr. Cancellieri and Mr. Tortora, but relied on the lack of a recorded suit in Hudson County to approve of the title policy.

Counsel for Mr. Mocco asked Mr. Cohn about M 190, a document which indicated that he believed the first mortgage on the property in question was in the approximate amount of $6,500,000. In M 190 Mr. Cohn wrote, “As to the GMAC mortgage and condo lien please be advised that **at this point in time there does not exist any written correspondence**. Everything that has been done to this point has been verbal.” Mr. Cohn admitted that this was unusual. He also admitted that he wrote in M 190 “As there was no written correspondence in the GMAC and condo lien matter, **we thought it was better explained verbally than in a letter, which we attempted to set up, but was not happy with the ‘sound’ of it,** and thought it would cause more problems than would help. Hence, the proposal for phone response, if necessary, where reaction would be ameliorated.” Not surprisingly, the court found this to be somewhat troublesome.

Mr. Cohn was then asked about M 197, a “confidentiality agreement” signed at the closing of the Centrum loan. He admitted that the document was somewhat unusual but firmly

stated that it did not mean anything because the mortgage and deed had to be recorded in public records. On cross examination, Mr. Cohn was asked again about M 197; he indicated that the first signatory, Mr. Podell, was an employee of Tishman Speyer, a major real estate company, and that there was nothing extraordinarily unusual about M 197; he also reiterated that there would still be public recordation.

Mr. Mocco's counsel then asked Mr. Cohn about M 201, which was a letter to Mr. Cohn from Mr. Duval, an attorney who sometimes worked for Licata entities. In that document, Mr. Duval stated that the exclusion of the Vermont bankruptcy case from the policy would be omitted to Centrum, but not the buyers, SWJ. Mr. Cohn tried to explain why there was a difference.

Mr. Cohn could not explain the same difference in treatment between Centrum and SWJ, when asked about M 239, a letter he sent after the closing asking that the policy be changed as to Centrum "**only**" (emphasis original). (The policy item changed was Item 18, which exempted the Vermont Bankruptcy.) Mr. Cohn was instructed to send M 239 by Mr. Concellieri or Mr. Trotora. Once more, the court could not find any easy explanation for M 201 or M 237, except for Centrum's negotiating leverage.

Clearly, Mr. Cohn was doing a large amount of work for Mr. Licata and/or his associates - - Mr. Mournes, Mr. Podel, Mr. Schreiber amongst others - - at least as early as February 2005, over a year before the loan at issue herein. Equally clearly, he learned that Mr. Licata was involved in the Connecticut Bankruptcy Court proceeding. He apparently knew that Mr. Licata's primary adversary in the Bankruptcy Court was Mr. Mocco. Whether he knew that the loan in

question was planned absent M. Mocco's knowledge (surreptitiously, Mr. Mocco claims) is less clear.

Mr. Cohn admitted that he had received a February 23, 2006 letter from Mr. Scarpone to the counsel for the Licata Creditors Committee asserting Mr. Mocco's and Mr. Scarpone's views concerning the EMP mortgage on certain properties owned by the Moccos. Obviously, he was more than aware of the contentious nature of the Mocco-Licata relationship. In fairness to Mr. Cohn, he consulted with Mr. Schreiber concerning the mortgage.

Mr. Cohn further admitted that at least one critical order in the Connecticut Bankruptcy proceeding "should have been in the file" but was apparently not. This led to an admission that he could have obtained copies of other important orders.

Mr. Cohn was shown a document - - M 254 - - which indicated that Cobra, "represented by" Mr. Mournes was to wire $80,000,000 to Horizon to help find a real estate mega deal. Both Mr. Cohn and Mr. Cancellieri signed that document in September 2006. Mr. Mocco's counsel suggested that his document was evidence of an attempt by the Licata interests to influence Mr. Cohn, Mr. Cancellierei and Horizon to work with them. Mr. Cohn did not remember any specific detail of M 254.

In his direct examination, Mr. Cohn was shown documents indicating that he had billed for extensive title work on the Mocco-Licata title relationship for at least eighteen months. He worked on an attempted transfer of a mortgage on Mr. Mocco's residence, and a transfer of a $15,000,000 mortgage on a Sayreville, New Jersey property owned by Mr. Mocco, in addition to the loan in question in this lawsuit. These transactions could be viewed as violative of the Bankruptcy Court rule that no property or asset could be transferred out of a Bankruptcy Estate without a Court order. Mr. Mocco's counsel used this fact to argue that Mr. Cohn must have

known of the contentious bankruptcy proceedings and could only have approved of any title policy - - absent clear proof a Bankruptcy Court approval - - because he was acting on behalf of the Licata investors. Counsel further stressed that due diligence would have required Mr. Cohn to contact the Moccos, before approving of these title or mortgage transactions, and Mr. Cohn admitted he never spoke to Mr. Mocco.

When the questioning arose concerning Pieter deJong, Mr. Cohn denied having any extended conversation about the FCHG properties. His testimony was somewhat difficult to credit because he was confronted by a note which seemed to indicate that Mr. deJong told Mr. Cohn that a Vermont Court had held that Mr. Licata's interest was as a nominee, not an owner, of the FCHG properties. See M 138. It could be, as Mr. Cohn claimed, that Mr. deJong merely told him to check the deeds. Mr. Cohn testified that he **did** check the deeds and found clear ownership in Mr. Licata. He also testified that he read part of Judge Colleen Brown's decision, but noted that it did not specifically address FCHG IV. (As will be discussed subsequently, there may arguably be questions as to Mr. deJong's credibility.)

Mr. Cohn was questioned on the subject of how and when title searchers should handle a lis pendens, and, more particularly, an allegedly "stale" lis pendens (a lis pendens more than five years old). He said that in regard to a stale EMP lis pendens, and a stale Licata lis pendens on the Mocco residence, he inquired as to whether there was a lawsuit or foreclosure pending. In the EMP insurance, he said that he asked Mr. Schreiber for advice and reassurance. This subject matter was relevant to the property in question in this case because there was several stale lis pendens filed in regard to the FCHG IV property, which lis pendens did not preclude Mr. Cohn from giving a clear title report nor cause Mr. Cohn to find out if the action was still pending.

When Mr. Cohn said he normally is not concerned with a stale lis pendens, Mr. Mocco's counsel confronted him with M252, Section ¶707 of the Handbook of New Jersey Title Practice, Third Edition (Revised September 2005) authored by Lawrence Joel Fineberg, A.B. J.D. CTP, a lawyer who apparently worked for Chicago. Mr. Fineberg wrote in that section of his book, that title searchers are bound by actual notice, as well as constructive notice, but cautioned that they would still be bound by the actual upper court records. Mr. Cohn was also asked about Section 7504, wherein Mr. Fineberg stated that even stale lis pendens should **still** cause a title searcher to examine the "papers filed in the lawsuit… in order to determine whether the case is still pending, or whether it has been concluded in a satisfactory fashion". There were documents indicating that Mr. Cohn and Mr. Fineberg communicated with each other about the case. Mr. Cohn did admit that he has used Mr. Fineberg's book, sometimes called "the Bible" in the title world in New Jersey.

Mr. Cohn stressed that he relies in his work on deed registries. Thus, even if he knew, for example, of the United States Attorney's indictments against Mr. Licata, he still would have issued the title policy if the deed record was clean. In this regard, he exhibited a somewhat narrow view of his role as a title searcher. The court was slightly surprised by his answer, but did not view the answer as indicating dishonesty. Upon being questioned, Mr. Cohn indicated that Mr. Mournes, Mr. Licata, Mr. Podell, and Mr. deJong, among others, misled him. (He did not indicate if Mr. Schreiber misled him.)

In counsel's questioning of Mr. Cohn, a great deal of time was devoted to the title work on the transfer of the mortgage on Mr. Mocco's residence. Somewhat surprisingly, Mr. Cohn said that he did not know if the Mocco family lived in the house. He also said that he wrote that "the mortgagor has no apparent unforeseeable defense, offsets and counterclaims with respect to

the obligation secured by the subject mortgage", but does not remember what due diligence he did in order to make that statement.

Mr. Cohn was then asked again about the proposed "mega" transaction involving Mr. Mournes. In that transaction, Horizon Title was to obtain $80,000,000 as an escrow agent for a brief period of time. The $80,000,000 was to come from a $400,000,000 mega transaction. Mr. Cohn testified that he eventually began to view the $80,000,000 or $400,000,000 deal as almost a joke. This court **cannot** conclude that either Mr. Cohn or Mr. Canellieri did anything dishonestly based on a promise to receive some or all of the $80,000,000. The evidence on the transaction was far too fragmentary and inconclusive to even hint at there being a real chance of the $80,000,000 ever being seen.

On the subject of what Mr. Cohn knew when he approved of the title, he did say that he utilized a searcher to examine the Hudson County records. The searcher, he said, knew of the lis pendens that had been filed.

After Mr. Cohn's cross examination, counsel for Mr. Mocco showed Mr. Cohn a printout indicating that as of May 2006, there were open judgments against Mr. Mournes of $6,164,788.95, and over $4,000,000 against Mr. Podell, a personal guarantor. (This was only the New Jersey list of open judgments against Mr. Podell; since he was a New York resident, that total judgments could have been much greater.) "What was Mr. Cohn thinking?" seemed to be the implication counsel was trying to convey.

Mr. Cohn was also asked why he agreed to a confidentiality provision concerning the mortgage transfer on the Mocco residence. He denied that he agreed to any confidentiality to keep Mr. Mocco from learning about the transfer. He also said that the confidentiality agreement was, more or less, a joke because he had a duty to publicly record the mortgage transfer.

In August 2006, Horizon issued yet another policy on the property in question, backed up by a quit claim deed from Mr. Licata. See M 202 and L 131. The policy was for $15,000,000. Mr. Cohn stated that he had approved of his policy, despite the owner - - in the case Cynthia Licata - - stating that she did not certify that she necessarily owned the property. He said that this type of policy, supported by a quit claim deed, is not usual in large commercial transactions.

Mr. Cohn did testify that he relied on attorneys, including Daniel Shepro, an attorney who represented the Licata interests. This brought into play M 175, which contains a long e-mail from Mr. Shepro, sent to another lawyer and copied to Mr. Cohn, Mr. Shepro wrote, among other things:

1. The FAAPA has a Schedule A entitled, "James J. Licata ownership interests in various entities". Listed are the various LLCs including LLC IV. There is a footnote no. 2 that Cynthia Licata claims 100% ownership. **There are other footnotes referring to Mocco's motion to dismiss chapter 11 proceedings of other LLCs and indicate that the membership certificates are being held by Dennis Drasco, in trust, under an order of Judge Levy. (Drasco may be hold the LLC IV certificates.)**

2. In the March 2005 Debtors' application for an Order (A) Approving sale of assets …, in par. 42, the Debtor warns: Here, the requirements of Section 363 (f) are satisfied because to the extent any party assets a lien in the Assets, this Court or any court of competent jurisdiction could compel such a party to accept money in satisfaction of such interest. **In addition, the Debtors' interest in a proportion of the Assets is in bona fide dispute"**. (This puts parties on notice that if they have claimed ownership "interests" vs the debtor, they must prove their interest and seek compensation in money as the asset is being sold.

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4. **As noted in no. 1 above, LC IV is listed in Ex. A of the FAAPA as Licata's asset to be sold. Thus Licata claims to own LLC IV, and per the footnote, so does his wife, and perhaps Mocco could make a claim of ownership.**

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> Does it not seem QED, what is demonstrated is proved, that Jim Licata claimed ownership as did his wife (100%) and perhaps others, but even if Jim Licata was wrong, those claiming (title)interests are ordered to look to money in the estate and lose their right to their ownership interest. It is not just assets that Licata owned confirmed after litigation, it is assets which he claimed to own too. **As a result SWJ claims it acquired good title to the membership of LLC IV and it, under contract disclosed to the court and parties, gave it to Cynthia Licata. This would make the history of LLC IV irrelevant for present title purposes.**

Counsel for Mr. Mocco also showed Mr. Cohn M 171, a May 3, 2006 e-mail from Aegis Frumento, a Duane Morris and longtime lawyer for the Licata interests who worked with Mr. Shepro , a partner at Shepro & Black, who also represented the Licata interests. Mr. Frumento wrote "One thing he [Mr. Duke] suggested they might do is increase the loan amount and **buy additional insurance in light of this litigation risk**." Mr. Cohn did not seem fazed by that somewhat unusual document.

Why did Mr. Cohn not directly contact the first mortgagee? When asked this question, he answered that Horizon generally did so, but does not know if GMAC was directly contacted in this case by Horizon.

Mr. Cohn was asked about M 187, a series of somewhat acrimonious e-mails involving the broker Sal Pappalardo and Centrum's attorney Kenneth R. Sauter, Esq., from May 17, 2006. Mr. Cohn had been copied on these e-mails. This exchange could have alerted everyone involved of several serious problems - - but, on the other hand, Mr. Sauter did have answers to almost every problem raised.

On cross examination, Lenders' counsel pointed out a critical document - - L 285 - - which was a March 8, 2005 e-mail from Mr. Schreiber to Mr. Cohn stating that "We won before Judge Shiff and are ready to close". The court hardly thinks Mr. Schreiber "won". See pp. 38-

42 supra. In any event, the court can easily see how a non-lawyer like Mr. Cohn may have been impressed by the assurance of Mr. Schreiber, a partner at a "Top Ten" law firm, assuring him that "We won" and are ready to close.

On cross examination, Mr. Cohn explained that he worked from 1970 to 1981 as a title searcher and then had his own title searching agency from 1982 to 2000. He had no suits or claims against him during the 30 year period. At Horizon, he worked for Mr. Cancellieri and Mr. Tortora, the President and Vice President, respectively. Mr. Cancellieri was a "hands on" boss, in charge of both what cases to take in and how much to charge (a subject generally governed by the State rules and Regulations). Mr. Cohn had little authority, other than in technical matters. He earned approximately $1,000 to $1,200 per week, with periodic raises and one leased car.

Also on cross examination, Mr. Cohn said that the $15,000,000 Centrum loan was a "big loan" and he wanted to see something of record if there were a problem. He explained, however, that N.J.S.A. 2A:15-11 stated that "No notice of lis pendens shall be effective after five years from the date of its filing". (In this case, of course, the lis pendens were older.)

In this case, Mr. Cohn used companies called Action Title Research and Data Trace Abstractor Services. He believe those companies were reliable. He said that there was no unexplained adverse records in Hudson County on the FCHG IV properties. D 229, shown to Mr. Cohn on cross examination, demonstrates that he and his title searchers conducted a serious, detailed title search. The same could be said of the equally exhaustive D 230 and 231.

Mr. Cohn explained that the title work for FCHG IV was run from November 2004, because he had a prior search covering the period up to November 1, 2004. The prior search had been run because it had ordered prior to November 1, 2004 (usually within a month or two of

that date). Mr. Cohn testified that he was given the assignment by Mr. Cancellieri, who presumably received the order from Mr. Mournes. What was the purpose of the search? Mr. Cohn did not know, but believed that the prospective purchaser was SWJ Holdings.

Interestingly, November 1, 2004 was exactly five years after the lis pendens. It would have shown the November 1, 1999 notice of pendens filed by the Moccos. The update did not show the notice of lis pendens (nor any mortgages that could have been filed in the update period). The searcher, according to Mr. Cohn, probably decided the notice of lis pendens had expired since they were not renewed and were therefore "stale".

Was Mr. Cohn aware by 2006 that Mr. and Mrs. Licata did not **own** the properties? Yes, he admitted (although he did not know the Moccos owned the properties). He knew there was a Bankruptcy proceeding in which Mr. Licata was the debtor and Mr. Mocco an adversary; he spoke to Mr. Tortura about the bankruptcy, but did not contact Mr. Mocco or Mr. Mocco's attorney, Mr. Scarpone.

On cross examination, counsel for the Lenders asked Mr. Cohn about D 263, the Continuing Guaranty signed by Mr. Podell. Presumably, D 263 indicates that the $15,000,000 loan, backed by a mortgage and personal guaranty, appeared to Mr. Cohn as a typical, legitimate real estate transaction. The court cannot disagree with that position - - except for the fact that Mr. Podell may have been impecunious.

On cross examination, Mr. Cohn stated that if he had known more about the lis pendens notices, he would have recommended cancellation of the title policy approval. He stated that his cautious nature would have compelled him to do so. The "fault", if any, lay with the title searchers he had hired - - and he believed he hired savvy searchers. **The searchers never informed him sufficiently of the lis pendens.**

The court can conclude as follows concerning Mr. Cohn's honesty in this matter. Mr. Cohn was to some extent a "gullible dupe" of Mr. Licata and his associates who wanted him to issue a title report for Horizon that would cause Chicago to issue a policy that would enable Centrum to loan approximately $15,000,000 to a Licata entity (SWJ), thereby enriching Mr. Licata and his associates. His actions could be characterized as negligent, as opposed to fraudulent, despite the very persistent efforts of Mr. Mocco's able counsel. There was **insufficient proof addressed at this trial** - - either through his testimony or any of the documents admitted - - **that Mr. Cohn acted in a knowing, fraudulent manner**. The subject matter at issue - - who owned FCHG IV - - was enormously complex, and the people who Mr. Cohn turned to for advice were very persuasive advocates for the Licatas' position.

It was abundantly clear that Mr. Cohn was terribly impressed by Mr. Schreiber's position as a partner in a "Top Ten" law firm. He was also impressed by Duane Morris partner Aegis Frumento, as well as Centrum's lawyer Kenneth Sauter, and he had no reason not to trust the lawyer, Frank Tortora of Horizon, or Gordon Duval, Armando Molino and Daniel Shepro, other lawyers on the transactions. One could also include Bruce Berreth, although Mr. Berreth was not as intimately involved in the details of the transaction.[48] For a non-lawyer like Mr. Cohn to believe the Licata people, and six seemingly reputable lawyers, cannot, in the absence of more proof than Mr. Mocco assembled, cause a reasonable fact finder to characterize Mr. Cohn as someone who committed a fraud.

The amount of fees paid to Horizon (approximately $270,000, see note 39, page 66 above) does not indicate that Mr. Cohn was dishonest. This is so because (a) there is no proof as

[48] Katherine Windler, a lawyer for Avatar, a potential lender with Centrum, apparently had doubts about the transaction. Whether these doubts had any bearing on Avatar's decision not to invest is unclear. Her alleged doubts do not concern the court because Mr. Cohn did not rely on anything she said. (Parenthetically, her doubts proved to be correct.)

to whether the fees were a significant portion of Horizon's revenue, (b) there was no proof of what percentage of the $270,000 went to Horizon and what percentage went to Chicago, and (c) Mr. Cohn was a **salaried employee**, not an owner of Horizon.[49] In addition, Mr. Mocco claims that Mr. Cohn's dishonesty was demonstrated by his or Horizon not charging the Licatas for another transaction. How is it possible that Mr. Cohn could be dishonest both because he charged the Licatas and their Centrum **too much** and **too little?** The answer is that it is not possible.

There are several documents, discussed above, that were so unusual that they raised suspicion as to Mr. Cohn's honesty in this transaction. While the court was not 100% satisfied as to Mr. Cohn's answers concerning those documents, it cannot conclude, given the absence of any other evidence as to Mr. Cohn's dishonesty, that he was a knowing participant in any illegal Licata conspiracy.

One way to assess Mr. Cohn's testimony is to take into account that he testified for the better part of nine days, the majority of which time was spent being exposed to the withering examination of Mr. Mocco's counsel, Mr. Scarpone. Mr. Scarpone is a very tough, very experienced trial lawyer whose principal client is Mr. Mocco. Mr. Scarpone knew every document in this case since he has been working on it on and off for 16 years and, indeed, actually authored some of the critical documents. Mr. Scarpone did a thorough, superb job but never raised any serious doubts as to Mr. Cohn's honesty. Put bluntly, a great lawyer, extremely motivated and superbly well prepared, tried to prove that Mr. Cohn was bribed. He failed.

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[49] While there was some testimony that Mr. Cancellieri, the owner of Horizon, was a friend and/or acquaintance of Mr. Licata, and a friend and/or acquaintance of Mr. Mournes, there was **no testimony** indicating any dishonesty on his part, although counsel for Mr. Mocco continued to imply that there must have been dishonesty.

In addition to call the hard evidence supporting Mr. Cohn's honesty, or lack of dishonesty, the court had ample opportunity to observe Mr. Cohn testifying. He appeared to be an honest, mid-level salaried title searcher who approached his craft year after year in a rather narrow methodical search the County record style. He was somewhat confused by the Mocco-Licata machinations, relying on others when matters got overly complex. There was nothing to suggest Mr. Cohn being overly close to Mr. Licata or his associates or benefitting financially from Mr. Licata or his associates. That he could have been more careful does not prove or even suggest that he was dishonest. His demeanor was calm, straight forward, and non-evasive. He cannot be convincingly accused of dishonesty.

On the sub-issue of the communications between Mr. deJong and Mr. Cohn, the court begins with the observation that, standing alone, Mr. Cohn is a more credible person than Mr. deJong. Mr. Cohn has never violated the law, as far as the court can tell, while Mr. deJong is a disbarred ex-convict who was suspended from the practice of law five times and simultaneously represented two men whose interest became diametrically opposed. On the other hand, Mr. Cohn does not deny that he spoke to Mr. deJong and M 138 indicates that they did speak. In sum, while Mr. Cohn is a more credible witness, the court believes Mr. deJong that he did try to warn Mr. Cohn.

C. Brian Opert

Mr. Mocco next called Brian Opert, a real estate veteran who has worked since 1990 in real estate finance specializing in mortgage brokerage. He worked at First Connecticut from 1994 to September 1996, as Executive Vice President. His job there was to manage the lending side of the company. The principals of the company were Mr. Licata and another gentleman,

who died around six months after Mr. Opert joined the company. Mr. deJong had a desk at First Connecticut, although he was paid as an attorney, not as an employee.

The company specialized, at that time, in the heavily discounted mortgage business - - an important area in the industry because so many mortgages were at 30%-40% discounts. More specifically, the company sub-specialized in quickly buying, on behalf of principals, distressed mortgages. Its modus operandi was to suggest a discounted sum to a bank and tell the bank it could put down an immediate deposit and could close within 30 days, with no contingencies.

Mr. Opert described how First Connecticut got involved with Mr. Mocco, who had a real estate empire with approximately $60,000,000 to $65,000,000 with debts of approximately $42,000,000. Mr. Opert stressed that First Connecticut was a lender of money on this transaction, not an owner. First Connecticut di not usually have the money itself. Rather, it worked with more entities which to obtain a line of credit to finance the lending. The company or companies First Connecticut used for this transaction were Titan and EMP, discussed earlier at page 7 herein, and Ellington, a company related to Titan and EMP. With that financing in place, First Connecticut contacted Mr. Mocco's creditor, First Union, to buy the First Union $42,000,000 mortgage for $22,000.000.

At a helicopter flight to the Bankruptcy Court confirmation hearing in Trenton, an Ellington officer told Mr. Opert that Ellington wanted a "nominee" for Mr. Mocco's property because Mr. Mocco had been a bankrupt. Several lawyers were told of the "nominee" suggestion in the corridor of the Courthouse in Trenton. No one appeared to have problems with the suggestion.

Mr. Opert testified that he did almost all the work on the re-financing with First Union and Mr. Mocco. The re-financing succeeded. Mr. Opert testified that the re-financing yielded First Connecticut a profit of $4,568,183.69, of which he was supposed to receive a 5% commission. Mr. Opert testified that Mr. Licata never paid him the 5%.

Parenthetically, Mr. Opert testified that Alan C. Webber (see page 19 herein), another Licata employee, worked with him on the transaction; he believed Mr. Webber was similarly unpaid.

On cross examination, Mr. Opert admitted that before the re-financing was consummated, Mr. Mocco was in danger of losing his empire, primarily because of the First Union debt. He went on to say that banks generally do not want to deal directly with creditors; First Connecticut normally acted as to "straw", to use Mr. Opert's phrase. In some respects, he testified, First Connecticut could be characterized as a "consultant" to debtors like Mr. Mocco.

Mr. Opert came across as a generally, but not totally, credible fact witness. He admitted that Mr. Mocco paid for his travel from New Orleans to the Vermont trial and will be paying for his travel from New Orleans to Newark, and his hotel accommodations here. He also indicated that he was not sure of his testimony as to the date he left First Connecticut. (He originally though it was September 1996, but it could have been 1998.) He further admitted that he filed a claim in the Licata bankruptcy for over $2,000,000 and was not paid. Finally, he admitted that the claim included an assertion that he should have received "a share of tax shelters in Licata

acquisitions" including Hamilton Park, a property Licata was only acting as a nominee for! None of these issues, while troublesome, materially diminished his credibility in the court's view.[50]

D. Peter Mocco

The fourth witness called by Mr. Mocco's counsel was Mr. Mocco himself. [51] Mr. Mocco graduated from St. Benedicts Prep in Newark in 1960, Villanova in 1964, and the Fordham Law School in 1967. From 1969 to 1981 he was a politician, serving two terms as Mayor of North Bergen and two terms as a Hudson County Freeholder. In or around 1981, he became a real estate developer, capitalizing on the aftermath of the then latest real estate recession. As he explained, the recession created an opportunity or "vacuum" for a real estate entrepreneur such as himself.

Mr. Mocco began in Middlesex County and then Jersey City. He competitively bid for a 167 unit townhouse project known as Village Townhouse Estates. That entity was part of both Mr. Mocco's Bankruptcy and Mr. Licata's recent Bankruptcy. Mr. Mocco also bought and developed a 13-14 unit property in Jersey County known as 110 Newark Street, which was originally a dilapidated, run down building. These properties were both in downtown Jersey City, also known as the Historic District, or Districts. In the early and middle 1980's, Mr. Mocco specialized in historic rehabilitation in that area.

The properties in FCHG IV were all in the Jersey City historic districts, except for the 34 unit Bergenwood Commons in North Bergen. See Escrow Agreement signed by the Licatas and

[50] Mr. Opert was not asked about Mr. Licata's lawsuit against him. Obviously, if the allegations of that suit were true, his credibility would be diminished.
[51] Mr. Mocco began his testimony before Mr. Cohn concluded his, since Mr. Cohn became ill during his testimony. Nevertheless, the court has not split up its discussion of Mr. Cohn's testimony since to do so would have been unnecessarily confusing.

the Moccos in 1967, L-058, M8 herein. Mr. Mocco pledged several of the properties listed in M8 to EMP in 1997. Exhibit A to M8 lists numerous properties; only the properties owned by FCHG V, VI, VII, VIII, IX, and XII were the properties being refinanced at the time by Transatlantic. (FCHG X and XI were not considered appropriate for the refinancing.)

Mr. Mocco then explained how the properties came to be listed as being in separate FCHG entities. EMP had asked that they all be separate, bankruptcy remote entities in 1996.[52] Yet in 1997, Transatlantic did **not** want separate entities. Transatlantic wanted there to be one bankruptcy remote entity. (Transatlantic then loaned $6,000,000, which was used primarily to partially pay off EMP.) Mr. Mocco testified that he and his wife are the only people who owned, controlled, and paid the mortgage in all these properties, since the mid 1980's.

While Transatlantic indicated that it wanted one bankruptcy remote entity, Mr. deJong realized that this typographical error listed in footnote 44 caused Roman Numeral IV to still be unused. (See footnote 49 above.) Thus, Mr. deJong, in connection with a search lawyer, decided to use FCHG IV as the vehicle owning the bulk of the properties. The property in FCHG II - - the real estate at Hamilton Farms - - was not included in FCHG IV because it was used in 1996 to pay down the one year 12% to 15% EMP bridge loan, which had been used to pay down First Union.[53] The property in FCHG III - - the real estate beneath A-1 Self Storage - - was also used to pay down the previous loan, and not included in FCHG IV.

[52] Mr. Mocco testified that there was a typographical error which caused the properties to be listed as being owned by FCHG II, III, V, etc. rather than FCHG II, III, **IV**, V, etc. His explanation seemed logical and cannot be seriously disputed. There is no other conceivable explanation.
[53] In 1997 Mr. Licata was listed as the owner of FCHG II, but Mr. Mocco testified that he was merely nominee. The same is true of FCHG III, according to Mr. Mocco.

Counsel then asked Mr. Mocco about M1. He testified that all the certifications in M1 were prepared similarly: FCHG II, III, IV, X, XI, and XII.[54] Mr. Mocco testified that, according to EMP, the entities owning the properties had to be bankruptcy remote. Mr. Mocco stated that he preferred Mr. Karcher to be the owner of the properties but EMP and Mr. Licata wanted Mr. Licata to be so listed. Mr. Mocco then testified that Mr. Licata has a poor credit history, and Mr. Licata's role had to be assumed by his employee Alan Webber. He also said that EMP insisted that another entity, called First Connecticut Holding Corporation V, hold 1% of FCHG IV to prevent a bankruptcy filing.

There was a limited amount of testimony about the Hope Six Project, a project in Newark which Mr. Licata developed and which later became insolent. Mr. Mocco testified that Mr. Licata took the Hope Six Project "for himself and that then cut me out". During the Licata Bankruptcy, Newark's Housing Authority, the City of Newark, and a bank paid the Trustees approximately $750,000 to $800,000 to free themselves from Mr. Licata's interest; Mr. Mocco also agreed to give up any interest he had in Hope Six, and to give up any money Hope Six received from public sources.

Mr. Mocco was then asked about the Transatlantic financing in 1997, which had a ten year balloon. He anticipated refinancing in 2007. But in 2007, Transatlantic, which was now part of GMAC, put Mr. Mocco in default. Mr. Mocco was not able to refinance because his title was "totally fucked up" by the Licatas and Centrum. Accordingly, he has paid the Transatlantic-GMAC mortgage at the original rate of 6%, plus another 6% "default rate". No one, he said, has ever made a mortgage payment but him and his wife. Mr. Mocco also said he and his wife paid

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[54] As set out above, the Vermont Decisions discusses FCHG II, III. X, XI and XII in exhaustive detail, but do not discuss FCHG IV. Also as set out above, FCHG IV was not included in the Vermont Decision because FCHG IV was not listed at that time as an asset of Mr. Licata, presumably because of attorney error.

all the insurance on the property, and that the insurance carrier used by Centrum and/or Chicago-Horizon never contacted him - - even though it is customary for a new buyer or financier to ask about the current policy (and to inspect the property).

As set out above, the Centrum transaction occurred in May of 2006. Mr. Mocco learned about the filing of the deeds by the Licata interests on the Liberty Harbor property from a title searcher in August 2006. Mr. Mocco immediately asked for a title searcher to check **all** his properties - - and simultaneously asked Mr. Scarpone to write the August 17, 2006 letter to Mr. Cancellieri of Horizon, M205 herein. Mr. Mocco's title searchers immediately found the FCHG IV filings, which were, by then, several months old. He said that no one had asked him about his rent rolls, estoppel certificates, assignments of leases, etc. Obviously, he was greatly perturbed by what he considered to be unethical conduct.

Mr. Mocco then testified that 37 of the 40 units in the Condominium Associations' portfolio are owned by his interests. (He and his wife rent out the 37 units. The other three are owned by purchasers.) There is an office for the Condominium Association, so that prospective renters know whom to contact. All the tenants know whom to contact. Indeed, one building has a sign indicating it is a building housing the Condominium Association. Thus, a new financier could have contacted the Condominium Association.

As to GMAC, Mr. Mocco testified that he been paying the principal and interest; no one else has contributed. GMAC's lien, with default interest, is now $6,000,000. Mr. Mocco could not refinance and pay off the loan because of the Centrum and Licata mortgages.[55]

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[55] Mr. Mocco's counsel asserts that principal and interest, plus penalties, equals $1,359,327.38.A rough "ballpark" estimate, according to Mr. Mocco's counsel, would be that Mr. Mocco has been paying approximately $18,000 per month **more** than if he could have refinanced in 2007. In addition, Mr. Mocco cannot refinance the FCHG

As to Mr. Mocco's tenants, Mr. Mocco testified that no one ever told them to pay rent to Centrum or any of Mr. Licata's entities in 2006 when the Centrum transaction occurred. In 2013, Mr. Annunziata (see above) and others physically tried to take over buildings by knocking on doors and telling tenants to pay them. They were told to pay to a company called SWJ Management witch had acquired title from Mr. Podell. Judge Winfield then issued an order to keep Mr. Annunziata from so acting.

Mr. Mocco further testified that no one contacted GMAC before the Centrum transaction. He said that GMAC was in constant contact and dialogue with his offices. Yet in the 2006 time frame he never heard from GMAC of any interest of anyone trying to buy or refinance his property.

Mr. Mocco testified that he owns a 193 unit project in Jersey City (30 of which are completed, the rest being built); a 173 unit in Jersey City; a 142 unit development in Jersey City; a 130 unit condominium and a 187 unit condominium in Jersey City; several rental units in Jersey City, the Jersey City nursing home, the assisted living facility, the self-storage unit, a 36 unit loft project, a 400 unit project subject to approvals, a 65 unit project on Newark Avenue in Jersey City, a 187 unit project, vacant properties, residential properties, a large assemblage in North Bergen, and vacant land in North Bergen and Sayreville. He said that ninety (90%) percent of his net worth is real estate. Later on, during cross examination, Mr. Mocco was shown L 219 which indicated a $507,586,025 net worth as of September 30, 2005, **99% of which was in real estate.** He testified that he has never sold a property.[56] He is a "buy and hold" investor.

properties; he believes the larger rent roll would allow him to refinance at around $12,000,000, freeing up capital for his Liberty Harbor development. This court leaves to the Federal Court, where the case is pending, the question of whether anyone owes Mr. Mocco for this loss.

[56] On cross examination, he admitted to a sale of one property to Mr. Karcher although the sale appears to have been so structured that Mr. Mocco would eventually get the property back - - which he did.

Indeed, Mr. Mocco testified that he does not even like to sell condominium units, although he must do so to pay off his lenders.

The court's impression of Mr. Mocco on this matter was that he is not a rich man who happens to own some real estate, together with his stocks, bonds, bank accounts, etc. Rather he is a man who has tried, with extraordinary vigor, to assemble a real estate empire. He is clearly not a man who would easily and readily grant to Mr. Licata, or to anyone else, any property in his empire. (When called back to testify on the last day of trial, as a rebuttal witness, Mr. Mocco explained that he is a builder-owner, not a trader: "I have seven children who I would not get rid of ; I feel almost the same way about my properties; I build, own and manage; and almost never sell.)

Mr. Mocco was then asked about Anthony Montefeuri, the attorney who represented him in a dispute with Jersey City and the Redevelopment Agency in the early 1990's, prior to Mr. Mocco's Bankruptcy. Mr. Mocco had won that trial, with a judgment of $6,000,000, but an appeal, and then his Bankruptcy, caused a retrial in which Mr. Montefeuri worked for Mr. Mocco. Eventually, Mr. Montefeuri began to do some work for Mr. Licata, as well. (Mr. Montefeuri worked with Aegis Framento, Esq., for some time: Mr. Framento was one of the lawyers working on the transaction in question herein.) Mr. Mocco did not remember calling Mr. Montefeuri to set up the meeting or re-meeting with Mr. deJong. He said, instead, that after hearing his tape recordings, he remembered the escrow agreement and called Mr. deJong himself.[57]

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[57] The court does not believe the differences in remembrance as to how the Mocco-deJong meeting was set up are significant. Memories may dim over several years.

Mr. Mocco's recollection of the Mocco-deJong meeting or re-meeting, do not differ markedly from Mr. deJong's memory - - although Mr. Mocco did remember more anger on Mr. deJong's part at being taped.

More importantly, Mr. Mocco did testify that he called Mr. Cancellieri in late April or early May 2005 about the pending sale dispute in the Bankruptcy Court. Mr. Mocco said that he learned of the possible sale through Mr. Scarpone and then Mr. deJong. He told Mr. Cancellieri, "Anything Licata tells you is a lie…. Specifically, anything he tells you about my properties is a lie… Google the Vermont Decisions." He added, "I spoke to Cancellieri for four or five minutes… he listened and said thanks".

Mr. Mocco heard from other speculators and always told them the Licata claims were worth nothing. He told most of the callers that he would never negotiate with Mr. Licata - - "I want him in an orange jump suit".

On the Transatlantic issue, Mr. Mocco testified that Transatlantic knew Alan Webber held ownership of FCHG only as a nominee. Transatlantic, he said, was fully aware that Mr. Mocco was the sole owner.

On the issue of who paid taxes on the Mocco and/or Licata properties, Mr. Mocco said he filed tax returns on **all** the properties, which returns were turned over in discovery herein.

Mr. Mocco testified that he used his pocket tape recorder to record thoughts when driving: "fix the window on that building", for example. During a conversation with Mr. Mocco when Mr. Mocco asked him to transfer the properties, "Mr. Licata turned from Dr. Jekyll to Mr. Hyde…. He yelled, screaming and threatened me so much I taped him… from that day on I kept taping him because I knew I was dealing with a liar, cheat, and thief".

Mr. Mocco testified that he or his entities managed **every property** at issue herein. Mr. Licata, he said, never managed any of these properties.

On the subject of the Joint Venture Agreement, Mr. Mocco testified that the Schedule C properties were not going into the Joint Venture., unless there were a written agreement. "I did not trust Licata at that time so I never would have given Licata any interest in any of my properties, including Liberty Harbor… Liberty Harbor was worth a couple of hundred million dollars by that time".[58]

Mr. Mocco also discussed his Fulton Landing project in Jersey City and the Atrium at Hamilton Park, both of which were claimed to be properties in which Mr. Licata had ownership interests under the Joint Venture Agreement. This court will not discuss that testimony since, as noted above, Mr. Licata's Trustees in Bankruptcy have sold Mr. Licata's claims for $1,500,000. The same is true of various miscellaneous claims Mr. Licata asserted against Mr. Mocco.

On his original Bankruptcy, Mr. Mocco testified that (a) all his creditors, other than First Union, approved the Plan of Recognition; (b) the creditors knew he or his wife were keeping the properties; and (c) the creditors expected repayment to come from Mr. Mocco's development of his properties. As to the Bank, he was dealing with First Fidelity, later First Union. He negotiated constantly with First Union "in an attempt to short cut the Bankruptcy". The Bank insisted on immediate payment - - 30 to 45 days - - or the Bank would take the properties. Mr. Mocco had long term financing available, but needed a bridge loan. Eventually, Mr. Mocco and

[58] As set out above, Mr. Licata was claiming that his agreement to the discharge of the mortgage on its semi-landlocked, environmentally contaminated 19 acres in the middle of this 80 plus acres Mr. Mocco owned in Liberty Harbor entitled him to up to 50% of the 19 acre holding. That 19 acre claim eventually grew to a claim to 50% of the 80 plus acres. That claim, together with all of Mr. Licata's claims were compromised by Mr. Licata's Trustees in Bankruptcy for $1,500,000. Thus, as set out above, the claim is not before this court.

the Bank agreed to a $22,000,000 deal with Mr. Mocco putting in $11,000,000 and First Connecticut and EMP putting in most of the remainder. (There were also a massive fees, with some estimates of over $4,000,000 going to Mr. Licata.)[59]

"From the moment Mr. Licata contacted First Union, he became my highly paid consultant… I never spoke to the First Union officers because Mr. Licata told me he was 'expert'". He told me "the transaction was going perfectly, but the properties had to be transferred… to LLC's; they could not be owned by me."

Mr. Mocco continued: "Neither I nor my counsel had any contact with First Union. We trusted the consultant, Mr. Licata, to do that." (On cross examination, Mr. Mocco said that "If anyone in the transaction did not know I owned the property, they were brain dead".)

On cross examination, Mr. Mocco admitted that he told Mr. Licata in one of their taped conversations, that he had drafted innumerable documents in his career. (This admission, of course, bolsters the Lenders' argument that Mr. Mocco took advantage of Mr. Licata by drafting the 3-page agreement.)

Further on cross examination, Mr. Mocco asserted that both Mr. Cohn and Mr. Cancellieri were actively complicit in the Licata-Centrum-Mournes attempt to steal his property. "They were all **gamblers** speculating on a scheme to steal my property". He stated that in the mid 1990's Proskauer "charged a lot of money, Proskauer did Jim Licata's bidding, but may not have known the extent of Jim Licata's wrongdoing. In 2005-2006, "Dale Schreiber of Proskauer represented SWJ, a continuation of Steven Podell (the 'S'), William Mournes, (the 'W') and Jim Licata (the 'L'), which was trying to steal my property". Mr. Mocco continued, "They all

[59] The court is not concerned with the size of those fees, as Mr. Licata is no longer a party herein.

needed someone to buy the claim; Mournes said he had $600,000,000 of foreign money; they all jumped like they hadn't eaten in a week". He did not accuse Proskauer of dishonesty, as he accused Mr. Cohn and Mr. Cancellieri.[60]

Further on dross examination, Mr. Mocco stated that Mr. deJong is "basically an honest guy" but that Mr. deJong did lie to him: "Licata is an expert in causing decent honest guys to behave less than that."

Also on cross examination, Mr. Mocco admitted that he used a nominee to try to expand his personal property, which was an estate in Somerset County, and that he used nominees on over half his deals.

During that cross examination, it appeared that Mr. Mocco may not have accurately described one of those transactions, a sale from Mr. Mocco to Mr. Karcher of 8-10 Clifton Place, Jersey City, in a 2010 deposition.[61] The court allowed this testimony because (a) it reflected some doubt on Mr. Mocco's honesty in his testimony herein; (b) the property in question, when re-transferred to Mr. Mocco, was utilized to help fund the pay-off to First Union; and (c) Mr. Mocco did not disclose ownership of, or a mortgage on, 8-10 Clifton Place to Judge Gindin of the Bankruptcy Court.

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[60] As set out above, Mr. Mocco has settled with Proskauer. Whether that settlement is a factor in Mr. Mocco's statement that Proskauer was not knowingly complicit in the attempt to "steal my property" is not clear.

[61] Mr. Mocco's sale to Mr. Karcher was not consistent with his statement earlier in his testimony that he **rarely sold property**. Mr. Mocco testified that he sold the property **subject to mortgages** which were substantial enough that Mr. Mocco would probably get the property back - - which he eventually did. (Apparently, there was some side agreement between Mr. Mocco and Mr. Karcher pursuant to which Mr. Karcher would re-convey the property to Mr. Mocco.) Subsequently, Mr. Karcher's son Timothy testified. Hs testimony helped convince the court that Mr. Mocco did not testify totally honestly about is relationship with Mr. Karcher concerning 8-10 Clifton Place. The court became convinced that Mr. Karcher was only a nominee or agent, not a real purchaser.

The court also allowed counsel to cross examine Mr. Mocco on a September 30, 2005 Statement of Financial Condition for Peter and Lorraine Mocco (L 219). It listed their Total Liabilities and Net Worth as $519,230,285, with a net worth of $507,586,085. (The court questions one aspect of thw Mocco's financial statement: it does not list the debts to EMP and Transatlantic/GMAC.

Mr. Mocco testified, on cross examination, that he first began to suspect Mr. Licata's integrity when he attended a meeting at Proskaur's office in 1996 where he learned that Mr. Licata had entered into an agreement with First Union which barred First Union from dealing with Mr. Mocco. "Even though I was paying Proskauer's bills, Licata would not let me talk to them. I knew something was wrong; Mr. Licata was an inveterate liar… he [Mr. Licata] said 'Pete, trust me'." Mr. Mocco testified that Mr. Licata told Mr. Mocco that he [Mr. Licata] was the only person who could handle the transaction. (After the meeting, the Proskauer attorneys said they had gotten permission from the First Union attorneys to talk with Mr. Mocco.)[62] Despite Mr. Mocco's concern regarding Mr. Licata, Mr. Mocco felt it was too late for Mr. Mocco to pull out of the deal: "Mr. Licata had $6,000,000 or $7,000,000 of my money; I smelled something rotten, but it was too late."

On the subject of Escrow Agreement, and the 3-page agreement, Mr. Mocco said that if the properties were to be put into LLC's, he wanted to be sure they were **his** LLC's. He discussed the 3-page agreement with Mr. Licata and Mr. deJong; the door was closed, and no one else entered the room. (Mr. Mocco says that Todd Lampert was present at the second meeting, but not the first.) Mr. Mocco testified that **"I never told anybody to keep the 3-page**

[62] Mr. Mocco later testified that he felt Proskauer looked out for his interest; since Mr. Licata was only a nominee, he reasoned Proskauer's relationship with Mr. Licata benefitted Mr. Mocco as well.

agreement secret … everybody knew they were my properties". He went on "The 3-page agreement was merely a memorialization of the deal. I saw no reason to waive it around like a flag".

On the subject of First Union, Mr. Mocco testified that his only obligation was to pay First Union $22,000,000. "They knew I would never give away my properties. I know they were good cash producing properties and they knew I would never give them up".

Further on cross examination, Mr. Mocco was shown a February 5, 2007 letter (L 367) authored by one of his tax counsel, which appeared to contradict Mr. Mocco's previous testimony that First Union was aware of the relationship between Mr. Mocco and Mr. Licata as to the property in question. Mr. Mocco replied that the attorney's letter **did** contain some inaccuracies, and that when he called the lawyer to re-inform him, the attorney, Richard Supinsky of Sills, Cummis, Epstein & Gross, told Mr. Mocco the error was inconsequential. Mr. Mocco also testified that the letter stated that Mr. Licata had told First Union that he [Mr. Licata] was the money source, not Mr. Mocco. Thus, claimed Mr. Mocco, if anyone, **lied** to First Union, it was **Mr. Licata**. Mr. Mocco added, Licata was a "crook and a corruptor".

As to the Plan of Reorganization, Mr. Mocco testified that First Union had claims of significantly more than the $22,000,000 he paid. The court then interrupted the cross examination to state that its opinion will not hinge on the exact amount First Union paid on the loan or claimed it lost on the loan. The court realizes that First Union bought a $44,000,000 loan and received $22,000,000.[63] Whether First Union paid more or less than $22,000,000 when it

[63] Mr. Mocco claims he paid the entire $22,000,000, while the Lenders argue that Mr. Licata paid some of the $22,000,000.

bought the loan from the F.D.I.C., and therefore lost more or less than $22,000,000 is not legally relevant.[64]

Mr. Mocco was asked about the Licata Bankruptcy. Mr. Licata had listed in a Bankruptcy Filing, Schedule M 63, all the assets he had owned in the past six years. He had listed FCHG II through XXVII inclusive of IV. The form listed the years 1996, 1997 and 1998 and under the years the letters "Y" and "N". Under 1996, Mr. Licata listed "N" (presumably means "No", he did not own them) for II through XII, inclusive of IV. Presumably, he did so because Mr. Webber and Mrs. Licata, rather than Mr. Licata, owned FCHG IV. (The court was not convinced that anyone adequately explained why Mr. Licata similarly answered as to the other entities.) The court determined that Mr. Mocco should not be asked extensive questions about the Bankruptcy because he did not have personal information - - he had attended every session but did not have the level of information his lawyers had. The court allowed Mr. Mocco to be questioned about a March 14, 2003 certification he filed in the Bankruptcy (L 373). In it, he wrote that Mr. Licata should not have filed Chapter 11 Petition for FCHG II, III and V trough XXIII; he did not mention FCHG IV. That testimony was inconclusive,[65] as was Mr. Mocco's testimony about a later certification he had written to Judge Shiff seeking clarification of one of Judge Shiff's June 25, 2006 Bankruptcy Order (L 374).

Finally, on redirect examination, Mr. Mocco testified that $11,000,000 of the shortfall needed to pay the original debt to First Union came from him and $0 from Mr. Licata. He also

[64] The First Union arithmetic is complicated because (a) First Union originally sought $68, 000,000 (L 13); and (b) First Union never disclosed how much it paid the F.D.I.C. for the loan. The amount does **not** matter herein.
[65] Mr. Mocco later testified, on redirect examination, that he did not mention FCHG IV because Mr. Licata had not filed a Petition for FCHG IV; thus, it was not in the case.

testified that he and his wife are paying the Nomura (now Capital Bank) mortgage, which is approximately $10,000,000. No one else has paid any of that mortgage, he testified.

Mr. Mocco was called back to testify on the last day of the trial to rebut several points raised on the Lenders' case. Mr. Mocco said that he had testified about his conversation with Mr. Cancellieri in a 2010 deposition. He also testified about M 415, a series of the 1996-2008 Schedule E's for FCHG IV filed by Mr. and Mrs. Mocco. This document demonstrated that Mr. Mocco believed he, not Mr. Licata, owned FCHG IV. (Remarkably, **both** Mr. Mocco and Mr. Licata filed tax returns for the same properties from 1999 on.)

As to M 30 C, the September 15, 1996 Table of Contents for the EMP loan, Mr. Mocco noted that the document reveals that EMP had an income producing collateral package far exceeding the $20,000,000 amount of the loan, as well as guaranties from Mr. Mocco's income producing properties. Thus, argued Mr. Mocco, the Licatas' two guarantees were of no risk to the Licatas. He testified that the interest on the $20,000,000 loan was 15%, causing the interest due per year to be $3,000,000; he further testified that the net income from his properties at that time was approximately three times that amount.

M 74 was the next document discussed by Mr. Mocco in his rebuttal testimony. It was one of a series of documents which demonstrates that Mr. Mocco paid EMP.[66] Mr. Mocco was then asked about the reasons EMP gave him (and/or Mr. Licata) for the loans; he said that the reason was the assets **he owned**, not on any assets owned by Mr. Licata.

[66] The document was not totally conclusive since it did not include physical proof of the wire transfers from the Moccos, but there is not real dispute on the point since the document does certain notes concerning the wire transfers, and M 74 appears to provide corroboration.

When asked about 8-10 Clifton Place, Mr. Mocco testified that EMP had insisted that all the loans be asset – based, and the assets included 8-10 Clifton Place. As to Hamilton Park Health Care Center, Mr. Mocco testified that EMP was given a lien on Hamilton Park's receivables of over $50,000 per month. He further testified that EMP received assignment of a mortgage on Mr. Mocco's home.

"Did Mr. Mocco ever bribe Mr. deJong or do anything to cause him to act dishonestly?" Mr. Mocco answered "No".

"Had Mr. Mocco lost all the First Connecticut properties prior to his Bankruptcy", as Mr. Licata claimed? Mr. Mocco answered "No". There was, he said, a proposal that he transfer some of his property to First Union, but that proposal did not come to fruition. "Was there a fraudulent concealment judgment against Mr. Mocco, as Mr. Licata claimed?" The answer, again, was "No".

On rebuttal cross examination, Mr. Mocco admitted that two of his Liberty Harbor entities were now in Bankruptcy. As to A-1 Self Storage, he said that his wife, not he, was and is the owner. The questions then focused on the three entities listed as guarantors of the EMP loan, which he said were his properties. He admitted that the Licatas were guarantors of the EMP loan (but was unsure if Mrs. Licata was in Bankruptcy when she signed the personal guaranty).

"Was there a judgment by First Union against Mr. Mocco prior to the Bankruptcy?" The answer was "Yes", First Union obtained a judgment of $1,500,000 against us and began seizing all our bank accounts, including our children's… First Union also obtained a rent receiver against us."

Mr. Mocco was then presented with M 74 and 74a is part of the Lender's attempt to demonstrate the validity of their argument that EMP believed it was dealing with First Connecticut (Mr. Licata), **not** Mr. Mocco. The documents do appear to demonstrate that EP never (or virtually never) received a check from the Moccos. Mr. Mocco responded that the bankers were merely using Mr. Licata as the legal "straw man".

Some time in Mr. Mocco's cross examination was devoted to the -10 Clifton Place transactions between Mr. Mocco and Mr. Licata. The court interrupted that testimony because it became clear that neither the court nor anyone else will ever understand that intricate and confusing paper work, now that Mr. Karcher is deceased. The fairest conclusion is that Mr. Mocco and Mr. Karcher made the documents so convoluted as to keep anyone else from unraveling them.

Mr. Mocco was also asked about a spread sheet listing his property ownership on September 26, 1996, the day after the transactions at issue (L 443), as well as his Bankruptcy Estate tax returns (L 448 and 449). The documents appear to indicate that the Moccos' Plan of Reorganization did not provide for a discharge of their loans. Counsel then showed Mr. Mocco an Internal Revenue Code § 108 which indicates that the income tax exclusion utilized by the Moccos only applied if there is a discharge of debt, which did **not occur herein**. (Mr. Scarpone counters that Mr. Mocco may not be paying a tax on the income but the Government more than makes up for it by using a zero basis on the property, which keeps him from taking depreciation on the property.)[67]

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[67] The Lenders are probably correct on this issue. The income taxes would have been payable in 1997. The zero basis utilized by Mr. Mocco affects Mr. Mocco's tax liability for subsequent years, which means that the time value

The Lenders followed up the tax return questioning by pointing out to Mr. Mocco that Mr. Licata did warn him concerning potential tax liability, verging on what Mr. Licata called **criminal tax liability**. Mr. Mocco admitted this was true; more specifically, he admitted that the tapes revealed such conversations. See the July 24 and July 28, 2006 tapes.

The Lenders continued by pointing to L 443 which indicated that "Agent for PMM" paid $22,800,000 to discharge the debt, and that there was a total "Cancellation of Debt" of $14,543,956. Mr. Mocco was asked if these figures could lead to the conclusion that he owed significant taxes in 1997, specifically $5,759,406.18 at a 39.6% tax rate. Mr. Mocco answered, however, that he had such significant tax loss carry forward on the FCHG IV properties that no tax would have been due in any event. Further, Mr. Mocco answered that FCHG properties amounted to approximately 30% of the value of the properties in his Bankruptcy so that any tax underpayment - - and he denied there was any - - would be only 30% of $5,759,406.18, (which is slightly less than $2,000,000).

The remainder of the cross examination consisted of the Lenders trying to impeach Mr. Mocco's credibility. Then **partially** succeeded, at least on the tax issues and the 8-10 Clifton Place Mocco-Karcher relationships. The court emphasizes the word "partially". Mr. Mocco came across as a tough, bright man who does not deliberately lie; rather, he answers in a manner carefully designed to present himself in the best light possible without crossing any clear ethical or legal lines.

How should this court assess Mr. Mocco's credibility? Obviously, Mr. Mocco is not a Boy Scout. To give an example, his management company, after having lost a jury verdict of

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of money makes any tax liabilities forgiven in those subsequent years **less valuable than the tax liabilities avoided in 1997**.

$350,000 to women who had been harassed and/or violated, **filed a Bankruptcy to avoid paying the full amount**. One would argue that a man worth some $500,000,000 should not ordinarily resort to such tactics. To give another example, Mr. Mocco testified that he never sold property, but was confronted by a document that showed he sold 8-10 Clifton Place to Mr. Karcher (albeit in such a confusing manner that he probably would have, and eventually did, end up with the property). The court was never comfortable about the veracity of Mr. Mocco's description of that complex transaction, particularly since Mr. Mocco used the words "nominee", "agent", and "servant" to describe Mr. Karcher's status in the transaction, but repudiated those words in his testimony herein. The documents introduced during the testimony of Mr. Karcher's son Timothy further diminished the court's belief in Mr. Mocco' testimony concerning 8-10 Clifton Place. Mr. Mocco's statement that he never sold any property is also contradicted by his sale of Fulton's Landing.

To give a third example, his dealings with Mr. Licata were intentionally structured in such a confusing and not totally accurate manner as to potentially mislead third parties. (See L 27, wherein **Mr. Mocco and Mr. Licata signed a Lease Agreement at clearly enormous rent figures to cause a lender to EMP to agree to loan to EMP to help pay off First Union**.) On another subject, Mr. Mocco secretly tape recorded his conversations with Mr. Licata while he was telling Mr. Licata, "**I trust you implicitly**" (L 49). To give a few more examples, a taped June 7, 1997 conversation with Mr. Licata finds Mr. Mocco bragging about how he dealt with someone he owed money to, "**I have intentionally not been paying**". So I pay one month; **don't pay three months**…" Another taped conversation shows he did not deal any better with his laborers: "So, you should say come - - come in tomorrow morning at seven o'clock, if I got work for you I'll put you to work. **And at seven o'clock you say, I'm sorry I can't help you**

today, come back tomorrow". He advised Mr. Licata on how to deal with "some guy who's coming in to try to get his bill paid and you got to stop him… **you got to bull shit him."** (December 2, 1997, p. 33) Yet another taped conversation indicate how he deals with his enemies in this case, Mr. Licata: "… he has no idea … **what havoc can be reeked on is whole existence."** Subsequently, he said "Oh, **this is going to involve his wife. This is going to involve his absolute breathing.** Mr. Mocco did not assemble a half billion dollar empire in Jersey City - -presumably worth much more today - - by following the Biblical injunction to "turn the other cheek".

On the other hand, Mr. Mocco appeared to testify truthfully, at least as to his fulsome dealings with Mr. Licata, and his very minimal contact with Horizon, which grew out of his dealings with Mr. Licata. He believed so completely and testified so indignantly that (a) "Mr. Licata was the biggest crook and the most amoral man I ever met", and (b) Mr. Licata was a mere nominee who had no ownership interests in "my property" that his testimony on all those subjects appeared convincing. He was 100% consistent in all that testimony. He successfully withstood lengthy and skillful cross examination by an excellent trial lawyer who was highly motivated and knew the documents very well. Unless Mr. Mocco is an accomplished actor, and unless the court has been hoodwinked and defrauded by his acting - - two unlikely scenarios - - the only logical conclusion is that the court should accept his testimony, at least concerning his dealings with Mr. Licata.

E. <u>Pieter deJong</u>

The fifth witness called by the Mocco interests was Mr. deJong. Mr. deJong graduated from law school in 1972 and practiced until approximately 2010. He was primarily a real estate

lawyer. From 1982 onwards for about a dozen years, he was an associate at Davis, Polk & Wardwell. Mr. deJong represented Mr. Licata starting in or around late 1994 or the summer of 1995. He represented Mr. Licata in 1996 when the Mocco Bankruptcy occurred. The other law firm representing Mr. Licata was Proskauer, the firm in which Mr. Schreiber was a partner.

Mr. deJong also did legal work for Mr. Licata's legal entities, including the First Connecticut Holding Group companies, First Connecticut Holding Group I through XIII. (One of the Holding Group companies, FCHG I, did not involve Mr. Mocco and is not relevant herein.) Mr. deJong began work on these entities by participating in the transaction in which EMP supplied the funds to help the FCHG companies buy out First Union, which held the largest Mocco debt. He prepared the organizational documents for FCHG II, III, IV, X, XI, and XII.

As to FCHG IV, Mr. deJong said FCHG IV, but for a typographical error on the deed, would have owned property from the EMP re-financing. The typographical error caused FCHG IV to have no property, as opposed to the other FCHG entities. Mr. deJong said that when Transatlantic financed a new loan, Transatlantic wanted the loan to "close with only one entity, and we agreed". Mr. deJong represented the entities on that transaction.

Mr. deJong's loyalty was originally to Mr. Licata, although the Moccos paid for Mr. deJong's medical insurance from 1998 until late 1999. (This was part of his compensation working for the joint entities.) He spent a good deal of time with Mr. Licata early on in 1995. Mr. Licata was the most important part of Mr. deJong's practice. By the summer of 1996, Mr. Licata represented close to 100% of Mr. deJong's practice.

Mr. deJong stopped working for Mr. Licata in or around 2001, due to conflicts on another transaction - - Mr. Licata had a lawyer "calling me and threatening lawsuits. Things got more

and more intense … we closed that transaction and I didn't hear from him since after that … I had to file a document with a court which was in places adverse to Mr. Licata". Further, he and Mr. Licata were sued in two cases, one being the present suit by Mr. Mocco.

Mr. deJong tried to re-establish his law practice after the Licata relationship ended, but became disbarred when he did not protect his client's money. He was convicted and served four months of his sentence. He took $266,000 and had to pay back most of that money. He now works for a law firm (as a non-lawyer).[68]

Mr. deJong testified that he dealt at Horizon with David Cohn on a frequent basis concerning Mr. Licata's mortgage refinancing in late 2002 and/or early 2003. Later on, "David Cohn called me … It was early in the year, whatever year it was." Mr. Cohn said, "We have a large transaction in the office … your name came up." Mr. deJong testified that Mr. Cohn said he was doing a closing for Mr. Licata who was selling some assets in Bernardsville, Sayreville, and Hudson County. **"I told him that Mr. Licata did not own any of these properties!"** This was according to Mr. deJong, a very lengthy conversation. **"I took him back to the whole Mocco-Licata dealings and how there was a trial in Vermont that I testified in!"** (He later testified that he told Mr. Cohn that Mr. Mocco had won the trial.) When Mr. Cohn allegedly said "I only have to rely on public records". Mr. deJong said, "**No, Mr. Mocco owns the properties, check with Mr. Scarpone".**

[68] In fairness to Mr. deJong, he appeared to be a lawyer who made errors, but did not consciously steal to lead a lavish life-style. On the other hand, **the court does not believe his conversion of clients' funds was an honest error caused by lack of secretarial help**, as Mr. deJong appeared to state. No one could compare his bills to what he took out as fees and not recognize an enormous imbalance. Interestingly, the disbursement and conviction occurred **after** Judge Colleen Brown's Vermont Decision in which she found Mr. deJong to be basically credible. Obviously, the court will never know how Judge Brown would have been influenced in her credibility conclusion as to Mr. deJong, if the timing had been different.

According to Mr. deJong, Mr. Cohn called him again a few weeks later. This was a shorter conversation in which Mr. deJong said, **"Mr. Licata does not own any of this. Did you call Mr. Scarpone?** Mr. deJong said he was **surprised no one had contacted Mr. Scarpone**.

Later, Mr. deJong was at the Horizon offices to meet Mr. Cohn and Mr. Cancellieri. Mr. Cohn and I discussed the Licata transaction and Mr. Cohn said "We closed the deal and are being sued". Mr. Cancellieri appeared to be quite upset that Mr. Cohn and Mr. deJong had spoken about the transaction before it closed and that Mr. Cohn had not called Mr. Scarpone.

On the subject of a United States investigation of Mr. Licata, Mr. deJong said he was interviewed in Connecticut by a U.S. Assistant Attorney General in the investigation prior to May 2006, but does not remember discussing the investigation with Mr. Cohn. "It is quite possible, if not probable, I discussed this with Mr. Cohn, but I do not have a clear recollection."

On the critical issue of whether the relationship between Mr. Mocco and Mr. Licata concerning FCHG IV differed in any respect from the relationship on the other FCHG entities, Mr. deJong emphatically answered, "No".

On cross examination, counsel confronted Mr. deJong about a disciplinary complaint filed against him before he worked for David, Polk & Wardwell - - which would have been in the late 1970's or early 1980's. He was also confronted by the Formal Complaint in the 2009 Disciplinary Complaint, which seemed to indicate that Mr. deJong was involved in numerous wrongful transactions, while Mr. deJong had indicated he did not commit a long series of transgressions.

From June 1996 to October 1996, Mr. deJong's primary loyalties were to Mr. Licata. After that point, as it became clear that Mr. Mocco was advancing large sums to finance the

properties and “a balance was struck (between Mr. Mocco and Mr. Licata)”. During that period of time, Mr. deJong began to know Mr. Mocco more than he previously had. Only after the EMP transaction, did Mr. deJong begin to view Mr. Mocco as a client, or potential client.

There was no dishonesty, according to Mr. deJong, in Mr. Mocco giving Mr. deJong health insurance from early 1998 to later 1998 or early 1999. When Mr. Mocco sued Mr. Licata and Mr. deJong in this suit in early 1999, the health insurance and any representation ended. Did Mr. Mocco pay him to testify? “No”, but he did pay for a hotel room”.

On the issue of his daughter Courtney, Mr. deJong said she began work for Mr. Mocco when she was around 28 or 29. She worked for Mr. Mocco from around 2010 to 2013. Had Mr. Mocco stopped suing him at that time? “No”. The relationship between Mr. Mocco and Courtney began because Courtney had gone to school with Mr. Mocco’s daughter.

Not surprisingly, Mr. deJong was asked about the 3-page agreement, L 35 and M 6 herein. He testified it was prepared by Mr. Mocco, and that he had not negotiated or written it. Mr. deJong saw the document a day or two before the closing, at that time Mr. Mocco presented it to Mr. Licata. He said the document “is not a typical agreement”, but that he was not unduly concerned. He testified: “With the enormous amount of work that went into this transaction… and with the good faith of the parties, there were questions, and Mr. Mocco had concerns… There was a ‘drop dead’ date to get Bankruptcy Court’s approval, so Mr. Mocco had to decide whether to go through with the EMP transaction”. Mr. deJong’s limited role, he said, was to close the first Union debt deal with EMP. “I was working for the transaction. Licata was working for Moccos at that time, since I did not know Mocco well, I took my orders from Mr. Licata.”

The 3-page agreement was discussed at a meeting between Messrs. deJong , Mocco, and Licata. The meeting was important because the parties were transferring ownership of the properties. Mr. Licata did not make any changes by computer at the meeting. Mr. deJong was not sure if Mr. Licata made the few handwritten changes. He believes Mr. Mocco suggested, and made, the handwritten few changes.

Since First Union had already agreed to settle its loan payment, and had already agreed to let First Connecticut deal with Mr. Mocco, he had no duty to tell Judge Gindin or First Union about the 3-page agreement, although he believed someone else, such as Bankruptcy counsel Proskauer, or Mr. Mocco himself, **may** have had that duty.

On cross examination, Mr. deJong was shown an article in the Morris County Daily Record which discussed disciplinary proceedings involving Mr. deJong other than the matter for which he was disbarred and convicted. The court did not allow that article to be introduced into evidence.

Further on cross examination, Mr. deJong was asked about other matters he handled for Mr. Licata. He displayed a thorough knowledge of those transactions, which was an impressive performance, given that some of the transactions occurred sixteen years ago.

Mr. deJong was then asked about his conversations with Mr. Cohn about the Mocco-Licata dealings: "I told him more than once to call Mr. Scarpone, and I told him repeatedly that Mr. Licata did not own the properties." He went on to say that "in the second conversation, I told him I was surprised he had not called Mr. Scarpone and urged him to do so". Equally importantly, Mr. deJong then said, "I called Mr. Mocco and told him about my conversation with Mr. Cohn." Mr. deJong clarified his testimony by telling this court that the first conversation

with Mr. Cohn was initiated by Mr. Cohn, and that he thereupon called Mr. Mocco to tell him about “the attempted theft”. Mr. Mocco apparently expressed “outrage”.

The second conversation with Mr. Cohn was apparently also initiated by Mr. Cohn “I was totally surprised they were proceeding with the transaction and was also surprised they had not called Mr. Scarpone.” He continued, “Mr. Cohn told me they were just relying on what’s on the record.” Mr. deJong said he called Mr. Mocco again - - “Mr. Mocco thanked me for the warning”.

Mr. deJong again discussed his post-May 2006 meeting with Mr. Cohn and Mr. Cancellieri. He said he was shocked that Mr. Cohn and Mr. Cancellieri told him that they had gone ahead with the transaction (and were being sued).

Further on cross examination, Mr. deJong was asked about being sued by Mr. Mocco in this case in 1999. He said the accusation that he held $8, 000,000 of Mr. Licata’s property was neither accurate nor complete. The allegation was that Mr. deJong’s name was on certain of the critical ownership documents, but only as a formality; he was named in the documents solely “to facilitate the ability to get the loan on a technical basis”.

The next section of Mr. deJong’s cross examination focused on the following paragraph in an October 12, 1999 certification by Mr. deJong:

> Contrary to the assertions of Mr. Mocco in his certification, **the transfer of title to Mr. Licata’s entities were meant to be legal title and not a security device. Good and adequate consideration was obtained for those titles.** My letter of January 5, 1999, and the documentation referred to therein was a product of ongoing negotiations between Mr. Mocco and Mr. Licata and were only in contemplation of those parties attempting to arrive at an agreement regarding certain issues, which agreements were never finalized or otherwise consummated, which is why the documents were never delivered **Neither my letter nor the documents referred to therein were ever meant in any way as an acknowledgment that any title was actually meant as a security device.**

While Mr. deJong attempted to explain away this document, the court was not convinced by his explanation, which was primarily that he trusted his then lawyer (from the Brach Eichler firm) and that, in retrospect, the paragraph in question was not totally accurate.

Mr. deJong admitted that Mr. Mocco secretly taped some Mocco – deJong conversations. He said that he did not find it extraordinary that Mr. Mocco tape recorded him even though he was a neutral escrow agent: "Mr. Licata was so erratic, Mr. Mocco must have felt it to be necessary to begin tape recording everyone involved in this transaction". Mr. deJong said he was slightly, but not overly, troubled by the tape recording. He also admitted that in paragraph 2 of his certification he accused Mr. Mocco of duplicity in asking for some forty (40) boxes of documents relating to these transactions, promising to return the documents, and not do so.[69]

Further in his cross examination, Mr. deJong was asked about his role as escrow agent under the 3-page agreement. On the subject of the 3-page agreement, Mr. deJong said he had Mr. Licata re-sign the agreement, since he wanted the document in place for refinancing with Transatlantic. Mr. Licata agreed the document should be formalized. Both Mr. Licata and Mr. Mocco, for different reasons, wanted the agreement to be made more formal.

Mr. deJong was asked about C-49-D, transcripts of Mocco conversations. On page 107, Mr. Mocco explains why he whited out Mr. Licata's signature "because I don't want to have to be in the position with a guy that I have a handshake with to say I have a gun to your head". Later on in that typed conversation, Mr. deJong said something that proves either (a) he was originally adamant that Mr. Licata was only a nominee, or (b) he told everyone what the other

[69] Mr. deJong did not accuse Mr. Mocco of intending to deceive him on the document return issue. Rather, he said that Mr. Mocco probably changed his mind at some time, but did not originally intend not to return the forty (40) boxes of documents.

person (in the case, Mr. Mocco) wanted to hear. That statement was "I have said to Jim [Licata] … I have reminded Jim of the fact that he doesn't really own these properties… I recall his acknowledgment of the fact that he hold that for you…" (pp. 108-109).

Later on cross examination, Mr. deJong was asked about P 293, an April 24, 2000 certification be filed in the suit which was designed "to reiterate what I previously stated in my October 13 [sic, October 12] certification to the Court". In it he stated that, "**I further unequivocally deny ever acting as an 'escrow agent' for Mr. Mocco with respect to the September 1996 transaction. There was never any escrow agreemen**t written or otherwise with respect to Mr. Mocco and the September 1996 transaction." Mr. deJong said "he **did not remember** the 3-page agreement when he wrote that certification. He further testified that I do not have a real good memory." The court was not convinced by this explanation because Mr. Cohn did remember some transactions very well.

Mr. deJong stated on cross examination that First Connecticut was paying his legal fees at that time. First Connecticut was being funded by Mr. Licata at the time; Mr. Licata appeared to be a very wealthy man, with a lavish life style. At that time, Brach, Eichler, which had taken over from the original defense counsel, Mr. Framento, had ceased representation of Mr. deJong because of lack of payment, Podvey, Sachs, Meanor, Catenacci, Hildner & Cocoziello stepped in and then also ceased representation because of lack of payment.

This lead to a series of questions as to how Mr. deJong eventually came to re-meet with Mr. Mocco, after Mr. Mocco had sued him. An attorney, Anthony Montefeuri, who was a friend and/or lawyer for Mr. Mocco, called Mr. deJong in May 2001 and suggested that Mr. deJong meet with Mr. Mocco. Mr. deJong agreed. Mr. deJong and Mr. Mocco decided to "meet for

coffee". At the meeting, Mr. Mocco said, "I have tape recordings about the escrow agreement. Do you want to listen?"

Mr. deJong said he did want to listen, or at least read the transcripts. Mr. deJong read the transcripts and began a several day search for the 3-page agreement, which he found in a separate location in his home. Did Mr. Mocco volunteer to drop Mr. deJong from the lawsuit? "No", according to Mr. deJong. Mr. deJong testified that he asked to be dropped from the suit, but that Mr. Mocco did not say "yes" or "no". Only later, according to Mr. deJong, did he learn that he was being dropped as a defendant. Unfortunately, for Mr. deJong, Lenders' counsel then confronted him with L 295, a May 31, 2001 certification when he stated that "Podvey Sachs asked me to search further to see if there is any other documents [sic] that I may have. Finally, this past Memorial Day weekend I worked most of Friday, Saturday and Sunday searching boxes of files stored at my house… Later Friday afternoon, I found an escrow agreement… Reviewing that agreement refreshed my recollection…" In that certification, he **never mentioned the meeting with Mr. Mocco**.

Mr. deJong testified that he had a second meeting with Mr. Mocco on September 1, 2001. At that meeting, he transferred the FCHG stock certificates, probably II to XIII, to Mr. Mocco.

Much of Mr. deJong's testimony concerned his earlier dealings with First Union and the establishment of Mr. Licata's nominee status to help effectuate that transaction. While the testimony was useful, little that he said indicated that (a) First Union was defrauded or that (b) Mr. Licata was the actual owner of the properties.

Was the purpose of having Mr. deJong serve as the escrow agent, and not show the document to anyone, to keep it from the Bankruptcy Court? Mr. deJong said that **both Mr.**

Mocco and Mr. Licata told him about the secrecy requirement, but he did not know why they both wanted the secrecy. (The only other person who knew of the 3-page agreement was Todd Lampert, Esq.) Many people, he testified, knew of the concept behind the 3-page agreement: All the EMP people, the First Connecticut people such as Brian Opert and Alan Webber, and the attorneys at Proskauer. Neither Judge Gindin nor the creditors were aware of it. (It is possible that if anyone were harmed by the agreement, it was Credit Suisse, which had loaned to EMP, and demanded that the money not go to anyone involved in a bankruptcy.)[70]

When asked later about the 3-page agreement, Mr. deJong testified that First Connecticut was merely providing consulting services, as he understood it, and that Mr. Mocco wanted Mr. Licata to acknowledge the relationship. Mr. deJong admitted that he did not send a copy of the agreement to Mr. Cohn after their two conversations. Nor, he admitted, did he advise Mr. Mocco to send a copy to Mr. Cohn. Mr. deJong said that he believed the agreement was already part of the public record by 2005 and 2006. Mr. deJong testified that when Mr. Cohn said, in the second conversation, that he had not contacted Mr. Scarpone or checked the records of the lawsuit, he was surprised. Nevertheless, he did not feel it was his duty to send Mr. Cohn the 3-page agreement.

The court allowed counsel for the Lenders to cross examine Mr. deJong concerning his cooperation with the F.B.I. in its investigation of Mr. Licata, starting in 2004. (Mr. Licata was being investigated for bank fraud, which investigation resulted in the March 25, 2006 indictment mentioned above in Mr. Cohn's testimony.) The testimony revealed that Mr. deJong spoke to the F.B.I. in a manner not terribly helpful to Mr. Licata.

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[70] The unsecured Mocco creditors were apparently not harmed because they had agreed to a plan whereby Mocco would utilize the properties so as to fund the Liberty Harbor development and pay them.

Mr. deJong was asked a series of questions concerning the legal mechanisms he, the Licatas, and Moccos went through on various refinancing and how those maneuverings affected the ownership of the stock certificates on the FCHG entities. The testimony covered the history of the stock certificates (and changes therein) through Mr. deJong's tenure as counsel and/or escrow agent for the Moccos and Licatas. While interesting, the testimony did not introduce any real question as to who owned the entities.

Mr. deJong was also asked in series of questions about the documents involved in the Transatlantic loan to FCHG IV. Those documents (see L 295) mentioned neither Mr. Mocco nor the 3-page agreement nor the Escrow Agreement. Do the documents: (a) show that Mr. Mocco did not own FCHG IV; (b) show that the 3-page agreement and the Escrow Agreement were not effective and/or memorable; (c) show that Transatlantic was being defrauded[71]; or (d) harm Mr. deJong's credibility? Mr. deJong did his best to answer those questions. On balance, he skillfully did so, although the court might have been more convinced if there had been reference to the 3-page agreement or the Escrow Agreement.

On the second to last day of trial, Mr. Mocco re-called Mr. deJong as a rebuttal witness. The first subject was the alleged $500,000 bribe or extortion conversation between Mr. deJong and Mr. Licata. Mr. deJong said the **conversation never took place**. The court tends to believe Mr. deJong because it is difficult for it to believe that Mr. deJong, despite his flaws, would go so fare over the line as to blatantly to extort someone (let alone do it on phone which could have been taped).

[71] The court need not address this issue at any length since (a) Transatlantic is not a party; (b) Transatlantic's successor GMAC, **is** being paid (at above market rates); and (d) to the extent Transatlantic was badly treated on this loan, the worst thing that happened to Transatlantic's successor, GMAC is that it was not paid anything out of the $6,500,000 escrow when the Centrum loan was made, which was not the fault of the Moccos.

The next subject was the conversation between Mr. deJong and Mr. Licata allegedly overheard by James Donohue, a Licata employee. See Section VI O in this opinion. Mr. deJong said that the conversation probably related to two $250,000 deposits made by Read Properties and, apparently, First Hudson Realty to buy certain FCHG IV properties. See M 386, the Amended Complaint in that matter. Mr. deJong received one down payment of $250,000 and Mr. Licata the other. The contract to buy the real estate was made in March 2001 prior to Judge Levy's September 21, 2001 order barring any sale. Mr. deJong claimed that he disclosed the Mocco litigation to Read Properties and First Hudson Realty. When Read Properties and First Hudson Realty learned of the litigation, they demanded the return of the down payment. Mr. deJong said he told Mr. Licata that they should both return the $250,000 deposits. Mr. deJong testified that he returned his $250,000 and did have a conversation with Mr. Licata on the subject of Mr. Licata returning his $250,000, in which conversation Mr. Licata somewhat angrily denied that he had any obligation to return the $250,000. Obviously, Mr. Mocco claims that this was the conversation Mr. Donohue overheard.

On cross examination, Mr. deJong was not certain about the dates of his conversations with Mr. Licata about the $250,000 down payments, or his conversations with Mr. Donohue. Given the certainty with which Mr. Donohue testified, the court must conclude that the conversations between Mr. Donohue and Mr. deJong **did occur** and that the $250,000 conversation Mr. Donohue overheard **did occur**.[72]

Also, on cross examination, Mr. deJong admitted that he was suspended from the practice of law **five times** for late payment of his fees (in addition to his **disbarment**). Obviously, those

[72] **Mr. Donohue's credibility is beyond reproach. Mr. deJong's is not**. The court has no difficulty in determining that the conversations occurred; buttressing that conclusion is the fact that Mr. deJong merely testified that he did not remember the conversations, not that the conversations did not occur.

instances must be considered in assessing his credibility. He also admitted to loaning money to his client, Mr. Licata, on two occasions in 2000, which may be close to an ethical line. (The court was also confused about why Mr. Licata, allegedly a fabulously wealthy man, would borrow money from a lawyer with a small one person law firm, barely making enough to live on.)

How to assess Mr. deJong's credibility? There are at least six troublesome issues: (1) his disbarment; (2) his five suspensions (3) his conviction; (4) his signing L 295, a somewhat disingenuous document; (5) his decision not tell Mr. Mocco and Mr. Licata to hire independent lawyers in September1996 when their interest became mutually divergent[73], and (6) his change of loyalty and position as shown by his October 12, 1999 certification and his subsequent recantation. He is a slick, if not, slippery historian. (He is also bright; the court could see how Davis, Polk and Wardwell kept him on for so long to do residential real estate work for its clients; Mr. deJong is bright enough, and concerned enough with legal details to do a good job.)

Based on all the above, the court cannot agree with Judge Colleen Brown that Mr. deJong is a totally credible witness. (In fairness to Judge Brown, she wrote what she did before Mr. deJong was convicted and disbarred.)

One of the best analyses of Mr. deJong's credibility was made by Mr. Mocco: Mr. deJong is a basically honest, but weak, man who was corrupted by Mr. Licata. That analysis is somewhat biased and ignores Mr. deJong's trust fund defalcations. More importantly, it could be changed slightly to read "Mr. deJong is a basically honest, but weak, man who was corrupted

[73] He later admitted "I'm in a super conflict here", but did nothing about it. (See the April 23, 1997 taped conversation.) Mr. Licata's post trial brief thoroughly details the ethical violations committed by Mr. deJong. See pages 46 to 48.

by Mr. Mocco.[74] See the May 24, 1997 taped conversation wherein Mr. Mocco admonished Mr. deJong, "You know, I'm the one who's been paying the bills, right?" Perhaps the best conclusion as to Mr. deJong's credibility is that Judge Brown's binary decision - - credible or not - - is somewhat simplistic, at least in Mr. deJong's case. He was not totally credible - - unlike, for example, Mr. Donohue and Mr. Berreth - - but he did not come across as a man totally uninterested in telling the truth. Rather, he came across as a somewhat honest man who was trying to please his two wealthy clients within the bounds of the law, and is now trying to explain, once more within the bounds of the law, how he did that.

F. Dino Cancellieri

The next witness called by Mr. Mocco was Dino Cancellieri. Mr. Cancellieri was a high school graduate who did a year or two of college.[75] He has been a residential mortgage broker and is now a commercial mortgage broker. Mr. Cancellieri was the owner of Horizon; Mr. Tortora ran the closing department, and Mr. Cohn ran the title search side.[76] Horizon was in business seven years, working solely for Chicago. It closed operations in early 2009. The company "did a couple of million dollars a year" in gross volume. There were almost "thirty (30) employees on the title side".

Mr. Cancellieri met William Mournes, through David Cohn, at a cigar shop. He understood that "Mr. Mournes held himself out as a worldly businessman". (He now thinks that description was overblown.) Mr. Cancellieri met Mr. Podell through Mr. Mournes. He understood that Mr. Podell was a lawyer, member of a wealthy real estate family, and a Tishman

[74] Everything said above is conditioned on Mr. deJong **not** having tried to bribe and/or extort Mr. Licata in exchange for $500,000. With more proof of that conversation, the court would not believe a word of what Mr. deJong said.
[75] At trial he said two years; at his deposition it was a year of community college.
[76] Mr. Cohn had testified that Mr. Tortora was a part owner, but was apparently incorrect in that assumption.

Speyer employer. Mr. Cancellieri later testified that Mr. Podell often came to the office in an inebriated condition. Mr. Cancellieri only met Mr. Licata once. He understood that Mr. Licata was doing a real estate deal with Mr. Mournes and Mr. Podell: they all met once at Horizon's offices.

Mr. Cancellieri was shown M 254, a September 16, 2006 document indicating that Mr. Mournes was wiring $80,000,000 into the Horizon bank account; Horizon was to be paid, of course, of its services. The normal fee for escrow agents is, he thinks, 1%, which in this case would have been $800,000. M 254 also reflects $5,000,000 transfer, for which 1% would have netted Horizon $50,000.[77] Neither the $80,000,000 nor the $5,000,000 even materialized.

Mr. Cancellieri testified that Mr. Mourns used Horizon's office, facilities, telephones, copy machines, and staff to court his own business. Mr. Cancellieri stated that he permitted this since he thought he could get business or profit out of it. He had heard of the $80,000,000 transaction for several years. This was called the "Hong Kong" transaction. There were numerous other exotic transactions bandied about by Mr. Mournes, none of which ever materialized.

Counsel for Mr. Mocco showed Mr. Cancellieri the bill Horizon submitted to Gordon Duval in April 2006. (Mr. Duval was one of several Mournes/SWJ attorneys. Proskauer through Mr. Schreiber, was another attorney for the Mournes/SWJ group.) Mr. Cancellieri okayed sending the bill, and it was paid.

[77] Presumably both sums would have had to be shared with Horizon's bank, Commerce Bank.

Mr. Cancellieri "did a lot of work" for Mr. Mournes and his entities, as Mr. Mournes constantly asked for searches on his various "deals". The bill reflects much of that work.

When asked about the split or break-up between Mr. Mocco and Mr. Licata, Mr. Cancellieri admitted that he knew of the split. He also knew of the Mocco Bankruptcy, "from which this parcel of land arose". He did not remember if Mr. Licata was in Bankruptcy.

Mr. Cancellieri was asked about a second bill, for $15,000 in March 2006, to Dare Investments. He said that he had no real memory of this transactions. (Apparently Dare loaned, and lost, some $5,000,000 to Mr. Mournes and Mr. Podell. Dare sued Horizon on the title policy; the court is not aware of the result of that suit, as it is not relevant to this case.)

Counsel then asked Mr. Cancellieri about M 197, the documents wherein Mr. Cohn, on behalf of Horizon, agreed to keep the terms of the May 26, 2006 closing "confidential". Mr. Cancellieri knew FCHG IV was the subject matter of the transaction which was to be kept "confidential", but did not know why the confidentiality agreement was entered into; he did state that closings must be made public, so he did not think M 197 was worth anything.

When asked about M 132, the Mournes-Horizon indemnification agreement, Mr. Cancellieri said that he "did not know what Mr. Mournes was indemnifying us for." Similarly, he knew little about M 132, the document by which Mr. Cohn, on behalf of Horizon, verified that $3,000,000 was due on the Mocco home. He said that he "relied on Mr. Cohn. The same was true of M 250, a similar statement of Mr. Cohn. The same was also true of a similar statement Mr. Cohn made regarding the Dare loan (in that case verifying that $15,000,000 was due).

The only minor discrepancies between Mr. Cancellieri and Mr. Cohn were that (a) Mr. Cancellieri did not remember Mr. Tortora being consulted on the day to day briefings or discussions on the Licata matters, while Mr. Cohn believed that Mr. Tortora was involved, and (b) Mr. Cancellieri does not believe Mr. Cohn showed him the bulk of the critical documents, but Mr. Cohn disagreed.

Did Mr. Cohn tell Mr. Cancellieri of the pending FDIC investigation of Mr. Licata? "No". Did Mr. Cohn tell Mr. Cancellieri that a court in Vermont had held that Mr. Licata was only a nominee? "No. (Mr. Cancellieri only learned of that after the closing.) Did Mr. Cancellieri ever see M 151, the March 24, 2006 Press Release by the United States Attorney for the District of Connecticut about Mr. Cancellieri's indictment? "No". Did he see the March 25, 2006 e-mail to Mr. Cohn about the indictment? "No". "In any event it would not have mattered. Mr. Licata could have committed murder and still sell has property… Mr. Schreiber, from one of the most prominent firms in the City, said the 363 sale was all that we needed." He believes he learned this from Mr. Cohn - - who apparently learned it from Dale Schreiber.

Mr. Cancellieri was asked about his dealings with Chicago. Apparently, they had a 85-15% split on premiums. He testified that 95% of the cause of Horizon's going out of business was this transaction (the other 5% was the change in market conditions).

Mr. Cancellieri did make one important concession: he agreed that he knew Mr. Mocco was collecting the rents on the property at issue **before** the closing. Obviously, a more careful business owner would have been somewhat more concerned and/or careful at that point.

Counsel for the Lenders asked Mr. Cancellieri if he were "bribed" by the Licatas, as Mr. Mocco claimed. His answer was an emphatic "No" both as to himself and Mr. Cohn. He

emphasized that Mr. Cohn got a salary and would not get much more if the transaction went through. He never promised anything specific to Mr. Cohn if the transaction closed and never gave him anything.

Counsel for the Lenders also asked Mr. Cancellieri about his relationship with Mr. Mournes. Mr. Cancellieri answered that he was courting Mr. Mournes, and had enough confidence in Mr. Mournes that he invested $25,000 of his own money (never repaid) in Mr. Mournes' ”deals”.

Also on cross examination, counsel for the Lenders established that Mr. Cancellieri did not knows the details of either the title work on the transaction or the maneuverings the parties engaged in after the closing of the transaction. Clearly, Mr. Cancellieri, Horizon’s “salesman”, relied on his experienced title searcher, Mr. Cohn. Counsel for the Lenders clearly succeeded in establishing Mr. Cancellieri’s disinterest in the intricate details of Horizon’s title service department.

Mr. Cancellieri admitted, on re-direct, that at one point in time he realized that (a) Mr. Mournes was a man who owed huge sums and grandiose schemes; (b) Mr. Podell was an inebriated bad seed, trust fund baby; and (c) Mr. Licata was under criminal indictment. Nevertheless, he said he issued title policies on the record, not the insured’s character. The records, he testified, justified the title policy.

On redirect, Mr. Cancellieri submitted that all the lawyers Horizon “relied on” got paid at the closing. Nevertheless, he insisted, that he should rely on four or five attorneys not to “risk their law degree” for a fee. “You are calling me stupid or the lawyers corrupt. I listened to four

or five lawyers". That debate was, of course, inconclusive, other than confirming that Mr. Cancellieri, like Mr. Cohn, relied too heavily on lawyers who wanted the transaction to close.

On the second to last day of trial, the Lenders called Mr. Cancellieri back and asked him about his 2005 conversation with Mr. Mocco, prior to Horizon insuring the Centrum loan. Mr. Cancellieri said that he does not remember if there was a conversation. "Honestly I do not remember speaking to Mr. Mocco", he said. He did say "I might have done something (like getting in touch with people) if I had that conversation". He also said that he never got any e-mails or letters from the Mocco people.

What caused Horizon to insure the mortgage? Horizon was courted very hard by Mr. Licata and his associates - - smart, convincing men who were enormously skillful at convincing others that they were successful business people who could be trusted to make everyone they dealt with a great deal of money. Mr. Cohn's somewhat narrow view of his role - - combined with Centrum's status as a hard money lender 3,500 miles away and Mr. Cancellieri and Mr. Cohn's decision to trust lawyers paid to make sure a deal closed - - made Horizon an ideal "dupe".

G. Dale Schreiber

Mr. Mocco next called Dale Schreiber to the witness stand. Mr. Schreiber graduated from Tufts University in 1962 and Columbia Law School in 1965. He clerked for Judge Frankel, worked in several jobs, helped start a small law firm, and merged his firm into Proskauer in 1987. He has been there ever since, now in a semi-retired status. He has known Mr. Licata since 1987, meeting in a business (real estate) setting. He and Mr. Licata did two real estate developments in 1987 and 1991.

Proskauer became involved in the Mocco Bankruptcy in 1986, at the behest of Mr. Licata. Mr. Schreiber was not involved, as he is not a bankruptcy specialist. Mr. Schreiber's next involvement with those matters was on behalf of Steven Podell who was trying to buy property next door to Mr. Mocco's property in Sayreville.

Proskauer became involved again in 2005 when it formed SWJ, the "S" standing for Steven Podell, the "W" for William Mournes", and the "J" for Jim Licata. While SWJ was not initially interested in the Mocco-Licata properties, Mr. Podell got SWJ interested in those properties. Mr. Schreiber then had discussions with Mr. Shepro in 2005 who was representing the Licata interests. Mr. and Mrs. Licata promised funding for SWJ in 2005, but it never materialized.

Later in 2005, Mr. Schreiber, on behalf of SWJ, told Mr. Grossman representing the Licata Trustees, that SWJ would offer to buy the Trustee's interest in the Licata's assets for $5,000,000. Did he know Mr. Licata's claim to the assets was in dispute? "Of course". The $5,000,000 would also buy the Trustee's (and/or Creditor's Committee) fraudulent conveyance claims against Mrs. Licata. Mr. Schreiber said that the Creditor's Committee then insisted that **it** keep the fraudulent conveyance claim against Mrs. Licata.

The Bankruptcy Court then held an auction, with two bidders. (There was a later auction wherein a competing group decided not to proceed.) At the first auction, SWJ was the initial bidder: there was one other bidder, "which had a definite cap" ("The other bidder was Joe Chestrit"). The winning bid of SWJ was approximately $8,950,000. Mr. Schreiber knew that SWJ would face litigation, of course. The closing was scheduled for June 27, 2005, but did not

happen because the funding failed. The proposed sale included all of Mr. Licata's claimed assets, other than non-assignable tort claims.

When the sale failed, Mr. Schreiber notified the Bankruptcy Court. SWJ continued to try to obtain funding, leading to additional extensions and non-compliance. Finally, in March 2006, the sale began to materialize. Mr. Schreiber testified that the second purchase price (approximately $11,000,000) reflected uncertainty over recovery on the assets, which Mr. Schreiber believed were worth several hundred million dollars.[78] (Mr. Mocco contends that the relatively small size of that sale relative to the value of the assets, demonstrated that SWJ was only buying claims, not rights; Mr. Licata claims that, even if this is true as to other assets of Mr. Licata, it is not true as to FCHG IV.)

Mr. Schreiber testified that he reviewed the briefs and made suggestions on the appeals in the Vermont Decisions. He remembers that SWJ presented the final appeal to the United States Court of Appeals for the Second Circuit. His firm, he said, had little involvement after that.

Mr. Schreiber was not involved in the FCHG IV sale at issue herein. He did not deal with Mr. Cohn on the transaction nor meet with him, although he did talk with him on the telephone two or three times. Mr. Cohn never asked him to explain the § 363 sale. (The discussion between the two concerned the Sayreville mortgage.) He never spoke to anyone from Centrum either.

On cross examination, Mr. Schreiber was asked about Proskauer's involvement in both the Mocco Bankruptcy and the Vermont trial in the Licata Bankruptcy. On the Mocco

[78] Mr. Schreiber's estimate of the value of the assets may have been relatively accurate. Mr. Mocco testified that in or around 2005, his assets - - most of which were contested by Mr. Licata - - approximated $500,000,000.

Bankruptcy, Mr. Schreiber was shown one transcript where a Proskauer partner, Lawrence Lipson, stated that First Union was not aware of Mr. Licata's nominee status and the Proskauer partner, Jeffrey Levitar, stated that he did not know of the nominee status. Was anyone at Proskauer aware of the 3-page agreement? "None of my partners was aware of the 3-page agreement".

Further on cross examination, Mr. Schreiber was asked about a March 3, 2004 Proskauer memorandum which indicated that "FCCH became an equity owner of certain real estate that was conveyed to various limited liability companies owned by James and Cindy Licata and a secured lender with respect to certain mortgages and notes which it acquired the ownership of, all was agreed to by the Moccos and approved by the Bankruptcy Court". This memorandum ended up in the possession of David Cohn in 2006, confirming the court's belief that Mr. Cohn relied, to some extent, on Proskauer in approving the loan. (It does not explain why Mr. Cohn appeared to ignore the Vermont Decisions which were made in the intervening time period.)

Other documents, including e-mail exchanges, were shown to Mr. Schreiber indicating that he was extraordinarily active in the SWJ transaction, but never altered Horizon of the difficult problems involved.[79] These documents also indicated that Mr. Schreiber argued throughout that the transactions would give Mr. Mocco the right to file a claim as to the proceeds of the sale, not to contest ownership of the assets.

As to his "We won" e-mail (L 115), telling Mr. Cohn that he could close, Mr. Schreiber did **not** mean that any buyer could utilize self-help. He merely meant that SWJ could close. His answer most fairly meant: "I did not address the critical issue of whether SWJ was able to

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[79] On re-direct, Mr. Schreiber indicated that the other parties to the e-mails could have alterted Horizon.

foreclose Mr. Mocco's interests and force Mr. Mocco to look to the sale proceeds, nor did I mean that SWJ would have to litigate that issue in New Jersey; I merely meant that SWJ could close." After hearing Mr. Shepro testify - - see Section VI below - - the court believes both Mr. Schreiber and Mr. Shepro knew that everyone involved was buying a lawsuit once they closed and tried to collect the rents.

The last questions asked of Mr. Schreiber were of Proskauer's knowledge of Mr. Licata's alleged nominee status from the original Mocco Bankruptcy. He said neither he nor his partners knew of that status.

How to assess Mr. Schreiber's credibility? Obviously, he is (a) bright, and (b) somewhat defensive about his representation of SWJ in this matter. He vigorously represented SWJ long after he should have realized that at least Steven Podell and James Licata were not trustworthy clients. He apparently allowed his longstanding business relationship with Mr. Licata to cloud his judgment. (He still maintains that William Mournes had a legitimate opportunity to borrow vast sums abroad; no one else agrees with him.) He was not consciously dishonest. He was yet another unwitting "victim" of the Licata interests.[80] The description of Mr. Schreiber in the Lenders' post-trial brief as being "down right conniving" (p. 45) strikes the court as at least slightly overstated.[81]

H. Cynthia Licata

[80] The court uses the phrase "victim" cautiously because it is not 100% certain that Proskauer and/or Mr. Schreiber lost money on these transactions. Mr. Schreiber did testify that Proskauer was not paid in full.

[81] Unfortunately, the court must state that this entire tragedy would not have occurred if he had given to his clients a more nuanced and accurate opinion of the effect of Judge Shiff's orders.

Mrs. Licata did not appear at the trial, although both sides sought her attendance.[82] Both sides agreed to utilize designated selected excerpts from her deposition, short summary of which was read into the record on Mr. Mocco's case. A brief summary follows:

Mrs. Licata explained on May 16, 2002 that her husband left their home in January 2002 and that there had been domestic violence. She said that her husband had moved out now and then, but this was the first time he had "left". (The testimony was introduced to put the June 4, 2002 Agreement between Mr. and Mrs. Licata into a chronological perspective.)

Mrs. Licata refused, on the basis of the Fifth Amendment, to release or discuss her tax returns. This issue was raised to rebut the argument that Mr. Mocco failed to live up to his obligation to keep the FCHG entities in a tax neutral status.

Mrs. Licata then admitted that she (a) did not know the business of FCHG IV; (b) did not know the properties owned by FCHG IV; (c) has never been to the buildings; (d) had never seen the buildings; (e) had never seen photographs of them; (f) had never received money from them; and (g) had never received a tax return from them. She also said that she never owned any FCHG properties. She added that "In the disclosure that he [Mr. Licata] has given [me] in the matrimonial case… [he] does not list any of the Jersey City properties…" She also added that she does "not claim ownership interest in the assets owned by these First Connecticut Holding Group, LLC's."

On November 15, 2011, in a second deposition, about nine years after the above described deposition, Mrs. Licata was asked about her June 4, 2002 Agreement with Mr. Licata.

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[82] The court will not waste any time or space detailing the efforts and Mrs. Licata's reasons for non-appearance. Suffice it to say, most involved her father's health issues, but on one occasion she apparently was prepared to testify and was thwarted by a snow storm.

She explained that she received alimony but no property, except that which she already owned. Mr. Mocco then introduced M 230, a letter Mrs. Licata filed with the I.R.S. in February 2014, wherein she relied on the 2002 Agreement with Mr. Licata. (Theoretically, the letter demonstrates that the 2002 Agreement is in effect and enforceable, contrary to Mr. Shepro's assertion.)[83]

I. Theodore Fichtenholtz

Theodore Fichtenholtz was the first witness called by the Lenders. He graduated from N.Y.U. and the New York Law School, which he attended at night. He began practicing law in New York in 1972; his private practice career focused on real estate, beginning with Vornado as a client. He then moved to a Connecticut real estate company, still specializing in real estate. After 1993 he moved back into private practice as a real estate lawyer. One of his clients was Titan, the real estate lender involved in this case, first described above on page 7. (He has also been a Board member of several major philanthropies, and has worked extensively, pro bono, for the Habitat for Humanity.)

In 1996, Mr. Fichtenholtz represented EMP, the lender discussed above for the first time at page 7. EMP was lending to the Mocco entities. Three small loans were followed by a $20,000,000 loan to the First Connecticut companies. He said he asked both Mr. Mocco and Mr. Licata if there were any agreement between the two, and was told "No". If he had been told "Yes", he said that he would have told EMP not to loan the money because it would violate the Bankruptcy Code. The remainder of the direct examination was focused on demonstrating that

[83] M 230 contains so many inaccuracies apparent on other issues that the court will not consider it for the truth of anything Mrs. Licata asserts therein. She either (a) is dishonest, or (b) relies so heavily on Mr. Licata's version of what transpired that her assertions have no intrinsic worth or merit.

the loan was made with Mr. Fichtenholtz and EMP being **unaware** of the Mocco-Licata agreement.

On cross examination, Mr. Fichtenholtz stated that he has not represented Titan or EMP for over a decade, although they were major clients of his in the 1996 era. He was then asked if he was involved in the due diligence on the Mocco loans, or was merely the scrivener. He answered "No, I did not do due diligence nor was I involved in the decision making".

Mr. Fichtenholtz testified on cross examination that Mr. Mocco was the borrower, Mr. Licata the broker, and EMP the lender of the $20,000,000 in 1996. The loans were for a one year term, with an expectation was for a refinancing thereafter. The "initial loans" were in the aggregate amount of $5,700,000. Apparently, $5,700,000 went to First Connecticut and then to EMP. The "big loan" was for $22,435,000 (split into two parts, the large part of which was $20,435,000 and the smaller of which was $2,000,000.) Mr. Fichtenholtz sent the closing documents to Mr. Licata, not Mr. Mocco, "since these book[s] contain documents you may not wish to have Mr. Mocco see or have knowledge of." Mr. Fichtenholtz said that, on the "big loan" Mr. Licata was apparently the owner of FCHG entities and, therefore, the borrower. Mr. Fichtenholtz was asked, "If Mr. Licata, not Mr. Mocco was the owner, why did EMP insist on Mr. and Mrs. Mocco personally guaranteeing the loan?" The answer was that "EMP wanted guarantees of everyone involved in their loans".[84]

If there were any questions as to Mr. Fichtenholtz' role, he testified that he was excluded from virtually all the meetings that took place. He was, indeed, merely a scrivener.

[84] The records reveal that Mr. and Mrs. Mocco gave mortgages on their home to EMP, but did not personally guarantee the $22,000,000 loan.

Mr. Fichtenholtz was asked if he were aware that Mr. Licata received a broker's fee of more than $2,000,000. He answered that he knew there was a contractual clause allowing same, but did not know if that actually occurred.

As to Fichtenholtz' credibility, he neither did nor said anything which gave the court any reason to question same, although his credibility is of little consequence herein since he had a relatively minor role as the scrivener on a transaction that took place nineteen years ago.

J. Daniel Shepro

Defendants next called to the stand Daniel Shepro, who graduated from Yeshiva in 1964 and then Boston University Law School in 1967. Mr. Shepro has practiced law in Connecticut and Massachusetts. He worked for an insurance company and then in private practice, specializing in real estate and litigation; he has done some bankruptcy work before Judge Shiff, and a small amount of matrimonial practice. He began to represent Mr. Licata in 2004, leading him to the Licata Bankruptcy in 2004-2005, on behalf of Mrs. Licata. This led to work on the transaction between Mrs. Licata and SWJ.

The court asked counsel to question Mr. Schreiber about the state of the Licata's marriage, and counsel did so: "What was the nature of the Licata's marriage?" The answer was: "They were separated in 2014, and still are, but they have never finalized their divorce".

Mr. Shepro was confronted by M-296 and M 97, Affidavits of Lost Membership Certificates signed by Mr. and Mrs. Licata in March 2006. Both are demonstrably false, of course, since the original certificates were not lost; they were being held by Dennis Drasco, Esq., in trust, in compliance with Judge Levy's order. Mr. Shepro stated that "Maybe I knew that". Mr. Shepro was also shown M 175, an e-mail he had prepared for Mr. Frumenti and Mr. Cohn ,

stating that "membership certificates are being held by Dennis Drasco in trust, under an order of Judge Levy. (Drasco may be holding the LLC IV certificates.)" Clearly, all involved, including Proskauer, Mr. Shepro and Mr. Cohn knew there were possible weaknesses in their battle to obtain ownership of FCHG IV.

When asked about the "stale lis pendens" Mr. Shepro said that there was a "stale lis pendens", but does not remember how he knew that.

When asked about the Horizon bill (M 162) he professed to having no memory of same. Were the bills too high? Mr. Shepro said that he doesn't know why the bill included $71,250 for "title readings, analysis, bankruptcy reviews ('Mocco and Licata"), title opinions rendered, etc.", and $25,000 for historical due diligence, security document retrieval (bankruptcy documents, prior title commitments and/or policies, supporting opinions, etc.)"

On the subject of the June 4, 2002 Agreement between Mr. and Mrs. Licata, signed just a few weeks before Mr. Licata filed for Bankruptcy protection, Mr. Shepro noted that such agreements are unenforceable under Connecticut law if the parties do not obtain a divorce decree - - which they did not do herein. He cannot recall any details of any discussions concerning the June 4, 2002 Agreement.

When it was determined, after the May closing, that the escrow was too high, there was an Amendment to the Escrow Agreement to lower same. Mr. Shepro did not inform Centrum of this.

Not surprisingly, Mr. Shepro took the position that Judge Shiff's order approving the sale from Mrs. Licata to SWJ, and not agreeing to Mr. Mocco's proposed modification or clarification order, meant that the interest in FCHG IV was being sold free and clear of all

adverse claims, including those of Mr. Mocco. (Mr. Mocco, he believes, would have claims solely against the cash proceeds of any sale.)[85]

Mr. Shepro testified that neither Mr. Schreiber nor any other Proskauer lawyer told him that only the Licatas' claims were being sold. Apparently, the Proskauer position was that the sale was a final sale, free and clear of any claims by Mr. Mocco.

Mr. Shepro then discussed Aegis Frumenti, a lawyer who brought up the "carve out" issue on these transactions. Mr. Frumenti was a partner at Duane Morris, called in by Mr. Licata to "help facilitate the sale." "He was paid from the proceeds of the sale."

The next subject was Mr. Shepro's (and Mr. Frumenti"s) conversations with Mr. Cohn. "What did Mr. Shepro tell Mr. Cohn?" (See L 121). This led to a discussion of a detailed e-mail in which Mr. Shepro concluded that Mr. Mocco's only claims were against the Estate. Mr. Shepro was certain that Mr. Frumenti agreed with Mr. Shepro's analysis - - and Horizon and the Lenders were so informed.

The final questions asked of Mr. Shepro concerned the closing. On May 26, 2006, Mr. Licata received approximately $1,700,000. Then within a month or two, when counsel learned that the balance due on this GMAC loan was less than expected, she received another $380,000 leading to a total of approximately $2,100,000. Mr. Shepro said there was nothing wrong with that.

[85] When the transaction closed in March 2006, the proceeds to the Estate were $11,250,000, $5,400,000 of which was in cash, and the remainder in notes. Within a day in March 2006, $2,700,000 was utilized for counsel fees to the debtor's counsel, the Creditors Committee counsel and others, leaving approximately$2,700,000 in cash. (The actual approved fee allowances exceeded $4, 000,000, but an agreement limited the fees to one half the cash.) The remaining cash has been exhausted, even after the $1,500,000 payment by Mr. Mocco was received by the Trustees.

On cross examination, Mr. Shepro admitted that the lenders are suing him, Mr. Duval, Mr. Molino, Mr. Podell, and Proskauer.[86] The claim against Mr. Shepro is apparently for a great deal of money, arguably the $15,000,000 loaned, plus the large interest that would accrue on that loan. He is also being sued by Mr. Mocco.

He also admitted that Mrs. Licata may have asserted a claim against Chicago Title. He then conceded that no payments was ever made on the $22,000,000 mortgage or the $15,000,000 Centrum mortgage. He further admitted that he received all the Licata Bankruptcy filings, including those which discussed Mr. Mocco's claim.

Mr. Shepro stated that he told Mr. Cohn about the Vermont Decisions and the Connecticut Bankruptcy proceedings. He told Mr. Cohn of the June 2005 order, but not the later orders because he felt the later orders to be irrelevant. Did he ever tell Mr. Cohn to call Mr. Mocco? "No". When shown the May 21, 2006 Confidentiality Agreement, which he signed, Mr. Shepro said he did not remember the Agreement. He did say that the Agreement is not inconsistent with SWJ trying to collect the rent from the FCHG IV properties.

Mr. Shepro did admit that the ownership certificates of FCHG IV were being held pursuant to Judge Levy's order, by Dennis Drasco, Esq. He argued that the 363 sale and the non-refiling of the lis pendens notices "carve out" Judge Levy's prohibition on the sale or lien of the assets.

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[86] There is some dispute as to whether these claims are for damages, contribution or indemnification.

He also admitted that Mr. Licata has, in two meetings, in Connecticut, tried to set up a group to **again monetize** his claims as to the FCHG IV and/or other disputed properties.[87]

Mr. Shepro was asked about a meeting Mr. Licata, Mr. Shepro, and another attorney attended on September 11, 2005. Shortly before this meeting, Mr. Licata received **$50,000 cash** from the other attorney, supposedly as a down payment for the sale of assets of Mr. Licata's estate. Mr. Shepro did not tell Mr. Cohn about the $50,000 in cash.

Mr. Shepro never spoke to Mr. Mocco or Mr. Scarpone about the proposed transaction, but he did understand that litigation was likely when SWJ tried to collect the rents. "Everybody knew that" he said. He elaborated, "Everybody includes Centrum and SWJ; we expected litigation; we know Mocco was collecting the rents and we discussed this; the Lenders knew that Mocco was collecting the rents; a court fight was anticipated."

On redirect, Mr. Shepro was asked about L 128, a May 25, 2006 opinion letter from Armando Molina, SWJ's counsel. That letter opinion concluded that "upon recording or filing of the Mortgage and other Loan Documents, as applicable, the same will constitute a valid and enforceable First liens [sic] on the property…" The opinion letter also started that "To our best knowledge, after diligent inquiry, there is no existing, threatened or pending action, suit, proceeding, inquiry or investigation wherein an unfavorable decision, ruling or finding would in my way have a materially adverse effect on the Property or its intended use". [88] He agreed with those opinions. Similarly, when shown Aegis Frumenti's May 3, 2006 e-mail which also stated

[87] "When will they ever learn, when will they ever learn?" Peter, Paul and Mary, "Where have all the Flowers Gone"?

[88] Mr. Mocco asserts that this last paragraph was not true because Mr. Mocco had sued Mr. Licata here in New Jersey and would sue again when SWJ tried to collect the rents. To that extent, Mr. Mocco is correct.

that Mr. Mocco would be defeated by the 363 sale, he agreed with that conclusion. Mr. Shepro stated that several Bankruptcy lawyers agreed with him.

Mr. Shepro came across as someone (a) who remembered **less** than any other witness, and (b) was the **most reluctant and wary** of all the witnesses, presumably because he has been sued by both sides. He was called by the Lenders and would apparently have the best chance to immunize himself from liability if the Lenders prevail herein, since the Lenders would have no damages and Mr. Mocco would presumably be unable to prove any liability. Despite his recalcitrance and lack of memory, the court could not state that anything Mr. Shepro testified to was knowingly false, although the court was concerned that Mr. Shepro knew Mr. Licata had received $50,000 in cash as a down payment to sell a property which was part of his Bankruptcy Estate and never told anyone about that illegal transaction.[89]

K. Bruce Buechler

Bruce Buechler was the defendants' next witness. He graduated from Rutgers College and Cordozo Law School. He is now a partner at Lowenstein, Sandler. Mr. Buechler originally worked at the Ravin, Savohrson law firm, representing Mr. and Mrs. Mocco in the Mocco Bankruptcy before Judge Gindin. The major creditor, he testified, was First Union. The First Union claims were purchased by First Connecticut the day before the confirmation hearing on September 26, 1996. He believed First Connecticut was Mr. Licata's entity. Neither on that day, nor for a long period of time afterwards, was he shown the 3-page agreement.

The heart of Mr. Buechler's testimony herein was that he could not disagree with the accuracy of what he said before the Bankruptcy Court on September 26, 1996:

[89] See Innes v. Marzano-Lesnezich, 435 N.J. Super. 198 (App. Div. 2014) wherein Judge Messano, citing Davin, LLC v. Daham, 329 N.J. Super. 54, 76-77 (App. Div. 2000), emphasized that "An attorney is not merely a hired gun, but, rather, a professional required to act with candor and honesty…"

> One other point which has been raised which I think is important to place on the record. There is no relationship or connection between First Union and First Connecticut and likewise **there is no relationship, family-wise, otherwise, insider-wise as defined under the Bankruptcy Code between First Connecticut and the debtors**. These transactions were all arms-length. The other counsel can get p and make the same representations but there is no prior relationship as far as I'm aware of between any of the parties.

Mr. Buechler was also asked about the accuracy of Judge Gindin's statement that "… there no connection between First Connecticut and the debtors." He said that Judge Gindin was accurately paraphrasing what he (Mr. Buechler) had said. Obviously, the purpose of these questions was to establish that if Mr. Licata was only a nominee, Mr. Buechler would not have told the court that there was no relationship between First Connecticut and Mr. Mocco, and the court would not have approved the plan.

Mr. Buechler responded that he could not testify as to whether he would have told Judge Gindin that there was no relationship between Mr. Mocco and First Connecticut if he had seen the 3-page agreement. He said that such an answer would require more information about other documents and positions that he currently possesses or could remember from 1996.

On cross examination, Mr. Buechler said that he did not know if the Plan would have been approved if Judge Gindin knew of the 3-page agreement.

How to assess Mr. Buechler's credibility? He is (a) a bright, careful lawyer; (b) someone with little memory of the events of 1996; (c) someone who had no reason to not to tell the truth; and (d) someone who did testify truthfully.

L. Victoria Morrison

Victoria Morrison, Esq. was defendant's next witness. Ms. Morrison graduated from Case Western University, where she obtained both Bachelors and Juris Doctor Degrees. She

worked at Sherman & Sterling and then Rutgers Law School, after which she joined Riker, Danzig, Scherer, Hyland & Perretti ("the Riker firm"). She now works in-house for a corporation.

In or around 1995 to 1996, while at the Riker firm, she began to help the firm represent First Union. At that time, the F.D.I.C. had taken over the loan portfolio of the Howard Savings Bank (the Howard"). Amongst those loans was the loan at issue herein: the Howard's loan to Peter Mocco, which had been purchased by First Union. She said First Union, as a result of Federal Regulations, needed the portfolio to be sold to an "unrelated" third party, which would be a party who was not the borrower - - in this case a party who was not Mr. Mocco.

Ms. Morrison continued by discussing First Union's efforts to sell the loan in question to First Connecticut for $22,000,000. She stated that on July 12, 1996, she sent a Draft Agreement to Proskauer, representing First Connecticut, which document included an anti-assignment clause, prohibiting First Connecticut from assigning to anyone not approved by First Union (L 191). The Lenders introduced the document, of course, to demonstrate that First Union did not want anyone, including Mr. Mocco, to end up with the benefit of the Agreement unless First Union approved of same. Related documents included prohibitions against involvement by third parties, presumably including Mr. Mocco.

Proskauer's response to Ms. Morrison's Draft Agreements sought a change in the anti-agreement clause and changes in the confidentiality portions of the Agreement. Ms. Morrison did not agree to same, demonstrating that First Union did not want anyone other than First Connecticut, and definitely not including Mr. Mocco, being involved in the transaction. On August 15, 1996 Ms. Morrison informed First Connecticut that First Union would give **very**

limited permission to Mr. and Mrs. Mocco to learn what assets were being acquired (L 23). That document gave the Moccos no rights other than the right to learn the identity of the assets. **She made it absolutely clear that, as she understood the Federal Regulations, Mr. Mocco could not be involved with First Connecticut, while First Connecticut acquired the loan.**

On cross examination, Ms. Morrison said that First Union, with different paper work, could have made a direct agreement with Mr. Mocco pursuant to which Mr. Mocco would have paid, or been obligated to pay $22,000,000. As to the 3-page agreement, she stated that if she knew of the 3-page agreement, **she could not have approved of the transaction if the agreement were signed before the First Union – First Connecticut transaction closed.** She admitted that the 3-page agreement could have legally been signed one day, or minute, **after the closing.**

Ms. Morrison came across as being credible. She clearly had no bias or leanings, and spoke clearly, forcefully and emphatically. (It could be argued, of course, that she had a more literal view of Federal Regulations than some others might have.) She believed very strongly in the importance of following the Federal Regulations.

Mr. James Licata

Mr. Licata attended St. Johns for three or four months, and then dropped out of college to start a construction business. (His grandfather was the largest residential builder in the United States.) On or around 1984, he met Mr. Schreiber and began a business relationship with him. Together they bought and developed several properties. As a result of a bad accident, in or around 1977 or 1979, he stopped doing construction work, and began to do financing with a wealthy partner. Soon thereafter, “I had made enough money and decided to go off on my own”.

When confronted by a question as to his conviction, he stated that he carelessly signed documents prepared by Peiter deJong. Mr. deJong's opinion letter in the matter, which led to Mr. Licata's conviction, wrongly stated that there were no litigations against Mr. Licata. The documents were signed as part of a transaction wherein Mr. Licata was buying two assisted living facilities. Mr. Licata stated that he should have more carefully read the documents. In this discussion, Mr. Licata alleged that he learned **Mr. Mocco was under investigation by the F.B.I.** When brought back to the specific question, he stated that his problem was caused by Mr. Mocco. He pled guilty to signing an inaccurate document and paid a $3,000 fine, with no jail time.

In around 1979, Mr. Licata began working on a concept which became First Connecticut Consulting. Several years in late May 1996 he met Mr. Mocco, who wanted to borrow $15,000,000 on a nursing home. "Mr. Mocco never told me he was in bankruptcy". Mr. Licata and Mr. Mocco nonetheless entered into a Consulting Agreement pursuant to which First Connecticut would help Mr. Mocco. Thus, Mr. Licata learned from First Union that Mr. Mocco owed First Union "$54,000,000 plus legal fees".[90] (L 013 confirmed this sum.) Mr. Licata spoke to Mr. Mocco and told him he could try to get him $16,000,000 debtor-in-possession financing.

Mr. Mocco then told Mr. Licata that First Union was trying to convert his Bankruptcy to a Chapter VIII because he had been converting the "adequate protection payments" to pay Mr. Licata, not First Union. Mr. Licata said he personally returned the money to First Union and continued to work with Mr. Mocco.

[90] The legal fees allegedly approximated $16,000,000.

Mr. Mocco was terribly upset, said Mr. Licata, particularly when Proskauer announced that it was terminating all dealings with him. At this point, Mr. Licata said he would start over with Mr. Mocco by meeting with First Union. At that meeting, First Union said it would **accept $22,000,000 from Mr. Licata, not Mr. Mocco. First Union agreed on $22,000,000 with the proviso that Mr. Mocco not be involved.**

Mr. Licata said "I didn't need Mr. Mocco, I intended to develop Liberty Harbor… I had 500 or 600 people working for me." What interests did Mr. Licata believe he was getting in the Mocco Reorganization Plan? "The mortgage on a 19 acre piece of Liberty Harbor [the First Union mortgage], and the FCHG properties pursuant to a thirty year ground lease. Mr. Mocco "would keep Hamilton Park Nursing Home and Liberty Harbor, the Sayreville property and his personal home, plus a 5% Management contract on the FCHG properties".

In dollar figures, what did Mr. Licata gain by the approved Plan of Reorganization? According to him, the following:

1. The leasehold on Hamilton Park Nursing Home. The rent was $300,000 per month. It was worth $20,000,000 to $21,000,000 at the time.
2. The self-storage facility next to Hamilton Park, which was partially completed. It was worth $2,000,000 at the time.
3. Ten apartment buildings, and 34 to 37 townhouses, worth a total of $9,400,000 (See L 24), which in 1996 discusses an appraisal which roughly approximates that figure.
4. Twenty eight other townhouses worth $150,000 to $110,000 apiece, for at least $2,800,000.
5. Twenty four building lots worth approximately $1,200,000.
6. The mortgage on 19 acres of Liberty Harbor.

7. A gravel pit worth a "couple of million".

8. Three, four or five two family homes.

Mr. Licata said that debt he assumed was $22,700,000, he refinanced a portion of this for $1,000,000, he had closing fees and expenses of $3,000,000 and legal fees of $1,000,000, and he put money out for 8-10 Clifton Place. In total, he incurred debt or paid out a total of over $30,000,000.

More specifically, Mr. Licata said he contributed to the successful Mocco Plan of Reorganization the following:

1. A $250,000 deposit.
2. $300,000 to $400,000 of appraisal fees
3. $1,000,000 for application fees
4. $2,000,000 to $1,500,000 legal fees
5. $22,700,000 guarantee to EMP
6. $2,900,000 mortgage to Summit Bank
7. $2,000,000 mortgage on the Mocco home.
8. $1,500,000 pay off on the Hamilton Park receivables
9. $1,000,000 refinancing costs on Nomora
10. $3,000,000 loan on 8-10 Clifton Place[91]

Mr. Licata went on to state that Mr. deJong had been bribed, and Mr. Mocco and Mr. committed **a fraud on the State of New Jersey**, on the 8-10 Clifton Place property. The alleged bribe to Mr. deJong began with the health insurance provided by Mr. Mocco. Allegedly, Mr. deJong defrauded the Bankruptcy Court by omitting records of mortgages in filing with the

[91] Later on, Mr. Licata testified that there was an additional $885,000 prepayment penalty.

Bankruptcy Court; the mortgages would have demonstrated that Mr. and Mrs. Mocco were being paid outside the Bankruptcy.

He also accused Mr. Mocco and Mr. deJong of **defrauding him** on 8-10 Clifton Place transaction by not disclosing two mortgages (and one lawsuit) before Mr. Licata loaned $3,000,000 to 8-10 Clifton Place in August 1996.[92]

Was Mr. Licata aware that Mr. Mocco was taping him. "No". Did he ever tell Mr. Mocco that the properties were Mr. Mocco's? "Yes, if you are referring to his home, A-1 Self Storage and the other Mocco properties". (The court reads the May 1997 conversation between Mr. Mocco and Mr. Licata differently; Mr. Licata to Mr. Mocco that "… your buildings. They're all yours, right?")

Mr. Licata opined that Mr. Webber and Mr. Opert, both of whom he hired, were less than honest and loyal. Mr. Opret, he said, plan flew around the country on Mr. Licata's jet and tried to generate publicity and sales. In or around 1999, Mr. Licata sued Mr. Opert and Mr. Webber (together with Mr. Webber' wife and another former First Connecticut Consulting Group employee). The complaint alleged that Mr. Webber stole approximately $75,000, that Mr. Webber and Mr. Opert engaged in a greater than $60,000 "credit card scheme", and that Mr. Opert and the other First Connecticut employee caused First Connecticut to suffer "more than $250,000 in damages" by fraudulently over-using the corporate jet. He also accused Mr. Opert of stealing computer software and taking that software to Titan Management. (See L 390).

Moving on to the critical issues - - who owned the FCHG entities - - Mr. Licata said that he and Mr. Mocco knew that Mr. and Mrs. Licata would own the entities. Mr. Licata said that he

[92] The court does not know if the allegation is true. Mr. Licata claims Mr. Mocco had a $500,000 first mortgage which was not disclosed, and that there was never any discharge of mortgage. The defendants claim that the $500,000 first mortgage owned by Mr. Mocco was subordinated.

preferred to own the properties - - except for Sayreville - - because he did not want to be in First Union's position.

As to the 3-page agreement, Mr. Licata said he originally refused to sign it, and only initialed it when at the meeting with Mr. Mocco and Mr. deJong he was assured by Mr. deJong that "it was only a gentleman's agreement". (Mr. deJong asked him to sign the document; Mr. Mocco was never asked to sign, and he did not.) Only later did Mr. deJong tell Mr. Licata that he had received the document the night before. Mr. Licata did not obtain a copy of the 3-page agreement. He also said that the authorized First Connecticut signatories never signed the 3-page agreement or even knew of it. He further said he did not, and does not, understand the 3-page agreement to give Mr. Mocco ownership and Mr. Licata mere "nominee" status as to the FCHG properties.

Mr. Licata testified that Mr. Mocco did not keep Mr. Licata in a tax neutral position, as promised in the 3-page agreement. This issue also implicated another important question: Who was reporting to the I.R.S. that he owned the buildings? Mr. Licata produced a partnership income tax return (L 383) which indicated that early in 1997 (because of an extension) **he** filed a 1996 tax return forall the FCHG entities including FCHG IV in 1997.[93] Mr. Licata included in L 383 a personal tax return for 1996, indicating that he reported personal income from all the FCHG entities, including FCHG IV.

[93] Mr. Mocco asserts there is no proof that the document was filed. The document appears to the court to be authentic, however, and the court has no reason to believe it was not filed, as the cover letter from Mr. Licata's accountants, Dylewsky & Goldberg, requested that it be filed, and later I.R.S. documents indicated that the I.R.S. disputes the Licatas' filings.

Going back to the 3-page agreement, Mr. Licata said he never agreed to act as Mr. Mocco's nominee with regard to any property. He never discussed that status with EMP or First Union, he said.

Mr. Licata was then shown the mortgages on the FCHG properties. The mortgages listed Mr. Licata as the manager of every FCHG property. (If a title searcher saw Mr. Mocco's name as the manager of these entities, it is possible the title searcher would have not proceeded.)

Mr. Licata initialed the 3-page agreement at around 5:30 at night; he had been told that night that the 3-page agreement was "just a gentlemen's agreement". Accordingly, he did not object to Judge Gindin's order approving the Bankruptcy Plan; he would have terminated his involvement, if he knew Mr. Mocco was going to own the properties. He believes Mr. Mocco would have faced criminal prosecution at that point.

Mr. Licata was then asked, "On whose behalf was Proskauer acting?" Mr. Licata said Proskauer was acting on his behalf. He, not Mr. Mocco, paid Proskauer, he said.

Counsel then asked Mr. Licata to discuss L 96, a certification he filed in 2001 in this case. That certification contains a job ledger and cash flow statement which at least arguably demonstrate that Mr. Licata did, indeed, pay out a great deal of money to keep the properties afloat.

When asked about the Transatlantic financing, Mr. Licata said that Mr. Mocco never asked him or Mr. deJong to put the property in Mr. Mocco's name. (Thus, if there is fraud, Mr. Mocco kept it going from 1996 to 1997.)

The court then allowed the Lenders to examine Mr. Licata concerning Liberty Harbor, even though the Liberty Harbor properties were not before the court, having been sold by the Trustees to Mr. Mocco for $1,500,000. The questions were allowed because the court believed they light shed some light on the respective parties' credibility. Mr. Licata's testimony on this point was too fragmented to convince the court either way as to whether Mr. Mocco mistreated Mr. Licata on Liberty Harbor.

Mr. Licata next testified that Mr. deJong asked him for $500,000 to cause him to "choose sides" in or around May 2011 in a telephone call.[94] Mr. Licata said that Todd Lampert, Esq. was made aware of the bribery or extortion attempt.

Mr. Licata testified that he did not file a Bankruptcy for FCHG IV because it was owned by Mrs. Licata.

The next question was "Whose idea was it to sell Mr. Licata's assets to SWJ?" His answer was the attorney, now Bankruptcy Judge, Robert Grossman.

Mr. Licata was asked if his indictment related to any of the transactions between Mr. Mocco and Mr. Licata. He said that Mr. deJong, on behalf of Mr. Mocco, tried to get him indicted on multiple issues, but the indictment was narrowed down to one count. At least indirectly, that indictment does relate to the transaction between Mr. Mocco and Mr. Licata since the indictment was based partially on Mr. Licata's assertion in a financial statement submitted to the Roslyn Savings Bank, the alleged victim, that he owned Liberty Harbor even though Liberty Harbor was either 100% or 50% owned by Mr. Mocco.

[94] Mr. James Donohue, an employee of Mr. Licata, allegedly overheard part of that call. Mr. Donohue testified later in the trial.

Counsel for the Lenders then asked Mr. Licata about a certificate Mr. Mocco filed before Judge Julio Fruentes which indicated that he and Mr. Licata "each owned 50% of each "First Connecticut Holding LLC and beneficially owned 50% of the real property it controlled". Arguably, the property referred to in that certification included the FCHG IV properties. The certification does tend to demonstrate that Mr. Mocco has been somewhat inconsistent in his statement of who owned the disputed properties.

The Lenders' counsel asked Mr. Licata about a series of documents, including a Brief by the I.R.S., stating that "IRS records indicate that Cynthia Licata owns a 50% interest in First Connecticut Consulting Group, Inc., First Connecticut Consulting Group, LLC and eleven limited liability companies called First Connecticut Holding Group, LLC XII." That Brief tend to indicate that Mr. and Mrs. Licata did believe they owned the FCHG IV properties. Equally importantly, it tends to demonstrate that Mr. and Mrs. Licata declared income of $41,183 for the last two months of 1996 on FCHG IV. See L 383. (It also implicates the requirement in the 3-page agreement that Mr. Mocco kept Mr. and Mrs. Licata in a tax neutral position.)

Similarly, the Lenders' counsel asked Mr. Licata about his 1997 tax return (L 422) which indicated that he declared $652,570 of income for FCHG IX through VII, inclusive of FCHG IV. (There was also a Nonpassive Loan of $720,000.) The next document, (L 425) was a 1998 tax return, demonstrating that Mr. Licata listed FCHG IV as an entity he owned, $652,570 as nonpassive income for the FCHG entities, including FCHG IV, and a $720,000 nonpassive loss. L 421, the 1999 tax return for Mr. Licata listed FCHG IV as producing $67,673 of income. Obviously, this line of questioning demonstrated that Mr. Licata thought he owned FCHG IV (and the other FCHG entities), and that he declared income on the properties involved.

Mr. Licata testified that he opposed the SWJ purchase at the end because he believed Mr. Mournes was very unreliable.

On cross examination, Mr. Licata said that he has retained four or five former Federal Justice Department personnel to file a Federal RICO claim against Mr. Mocco, Mr. deJong, Mr. Scarpone, possibly Mr. Christopher Sonciser (an Assistant U.S. Attorney), and possibly the Trustees Mr. Mittenberger and Mr. Chorches.

Further on cross examination, Mr. Licata was asked about one of the nine non dischargability petitions filed against him on his Connecticut Bankruptcy. The creditor was Merrill Lynch Financial Services, Inc. ("Merrill Lynch"). That claim was that Mr. Licata told Merrill Lynch that First Connecticut earned $4,432,741 in 1999, but that First Connecticut already lost $1,018,431 in 1999. The tax return Mr. Licata gave Merrill Lynch for First Connecticut's 1999 income was **false,** Merrill Lynch claimed. Mr. Licata said the document (M 371) which showed the $1,018,431 loss was a forgery by an office employee named Rich Walters, (probably an assumed name).

Also on cross examination, Mr. Licata said that he was a 49% owner of Reclaimed Holdings; the 51% owners have put up $15,000,000 to $20,000,000 to fund the suits Reclaimed Holdings will be bringing against the above named individuals. Reclaimed Holdings has also bought the interest of SWJ. The implication, of course, was that Mr. Licata stands to benefit if the Lenders prevail herein.

Mr. Licata testified, on cross examination, concerning the $50,000 cash payment mentioned by Mr. Shepro. It was in the Fall of 2005, in Brooklyn. See M 320. Mr. Licata testified that M 320, evidencing the $50,000, was a forgery. He did say, however, that he

received the $50,000 and sent the bulk of it to his attorneys. Mr. Licata said that Jeffrey Feld, a New Jersey attorney, forged M 320, as well as M 319.

Also on cross examination, Mr. Licata was asked about M 129, allegedly an assignment of the Licata's mortgage on the Mocco residence to Cobra. He said that the assignment never took place.

On cross examination, Mr. Licata was asked about his tax returns. Several Centrum documents seemed to imply that Mr. Licata had not timely filed his 1999 tax return. See M 387 and M 388 wherein Mr. Licata sought and obtained Bankruptcy Court approval in **2005** to hire a CPA to prepare and file his **1999** tax returns. Another document, M 285, listed FCHG XIII, XVI, XVIII, XXIV, XXVII, XVII, and XXIII but not IV or the five entities involved in Judge Brown's decision. Mr. Mocco's counsel argued, of course, that the tax returns showed that Mr. Licata did not believe he owned FCHG IV (or FCHG II, III, X, XI, and XIII). The Lender's counsel argued, more persuasively, that Mr. Licata admitted that he was neither an accountant or tax specialist, and merely signed where the accountant told him to.

Mr. Licata was then asked about M 31 a September 24, 1996 facsimile from Mr. deJong to Mr. Licata which stated:

> You and Mocco have agreed that you (i.e. your LLCs) will hold title to his properties to facilitate the Plan and financing; but will reconvey them to him or his designee for a nominal consideration; and further that you will refinance his properties to the extent that there are Excess Proceeds to be used by you and he as partners to reinvest in other transactions.

Obviously, this is a remarkably important document; Mr. Licata denied receiving it (although he admitted receiving it in his testimony in the Vermont trial).

When asked about the SWJ sale, Mr. Licata said that there came a time when he did not trust, nor want to deal with, Mr. Podell and Mr. Mournes.

Then Mr. Licata was asked about M 108, a Supplemental Certificate by Mr. Licata in the cases dated June 15, 2001. That document listed, on page 2, $11,654,409.93 of expenses allegedly incurred by Mr. Licata in 1996. The cross examination appeared to indicate that all the monies came from Mr. Mocco or his entities.

Mr. Scarpone next asked Mr. Licata about M 237, a May 21, 2006 e-mail, which indicated that efforts were being made to find out the status of the common charge liens "affecting the 37 units owned by FCHG, LLC IV". Mr. Licata denied receiving same. Obviously, if he did receive same, it would bolster Mr. Mocco's claim that Mr. Licata (a) **was still involved with SWJ** and (b) SWJ was trying to purchase the FCHG IV properties **without informing Mr. Mocco.**

On another subject, Mr. Licata testified that he understood the transaction at issue as follows: (a) SWJ would buy the property from Mrs. Licata: (b) SWJ would transfer the property back to Mrs. Licata; (c) Mrs. Licata would transfer the property to Mr. Licata; and (d) Mr. Licata would find a cash purchaser. Instead, said Mr. Licata, his wife took the money from the sale and squandered it. Subsequently, R.D. Legal Funding lent Barry Cohen, Esq., the Licatas' lawyer, $8,000,000 to pursue claims and Mr. Cohen took the money to pay off his creditors.[95]

Mr. Scarpone then showed Mr. Licata M 007, a Contract for Purchase of Real Estate or Transfer of Stock between Mr. Licata, the seller, and Mr. Mocco the buyer. This was a contract that allowed Mr. Mocco to purchase FCHG II's property for $1. To this extent, it is similar to the 3-page agreement and the Escrow Agreement. Mr. Licata said his signature was a forgery. If

[95] R.D. Legal Funding has sued Mr. Cohen in Federal District Court in New Jersey. Mr. Cohen is the majority owner of East Coast Investments ("ECI") an entity owned by Mr. Cohen, Mr. Licata and Mrs. Licata. R.D. Legal Funding claims that it obtained an assignment of Mrs. Licata's second mortgage, in the approximate amount of $23,000,000. The validity of R.D. Legal Funding finding's argument is not before this court, as R.D. Legal Funding is not a party herein. (Mrs. Licata and ECI, which went through a bankruptcy, have both defaulted herein.)

he is correct, Mr. Mocco should be indicted; if not, Mr. Licata's credibility could be diminished. Mr. Licata **did** admit at the trial before Judge Brown that he had seen and read M 007 before.

Mr. Licata also testified that the Escrow Agreement was not valid; it was, he said, either forged or "cobbled together". Once more, both Mr. Mocco and Mr. deJong are criminal fraudsters or Mr. Licata's credibility is suspect.

The court will not address at length the tax return questions posed to Mr. Licata. Mr. Scarpone showed Mr. Licata tax returns which appeared to indicate (a) that Mr. Licata did file tax returns which indicated he believed he acquired the FCHG property in September 1996 (which is consistent with Mr. Licata's argument that the 3-page agreement was not legitimate and enforceable), but, (b) that Mr. Licata may have **lessened** his tax liabilities by listing the FCHG entities on his tax returns.[96]

There was brief re-direct examination of Mr. Licata. Noting that happened therein materially changed the court's view as to the substance of Mr. Licata's testimony or his credibility. (Part of the examination concerned Mr. Licata's tax situation, which remained difficult to understand.)

Mr. Licata was then asked if he took loans from his lawyer, Mr. deJong. He denied ever doing so.

Counsel also asked Mr. Licata if he agreed to pay back the $250,000 down payment he had received from First Hudson Realty and/or Real Properties. He said that the $50,000 to $100,000 he received was non-refundable.

[96] Unfortunately, the record is not clear enough to establish whether Mr. Licata gained or lost, tax wise, by listing the FCHG property as his. (There are several documents concerning which it is uncertain (a) who signed them, and (b) whether they were filed. There is also one Federal Court decision on Mrs. Licata's tax liability, but none on Mr. Licata's.) Further, neither the court nor counsel is knowledgeable enough to understand the issue. That Mr. Licata filed tax returns indicating that **he owned** the FCHG entities is clear; that he lost money by doing so is unclear.

Mr. Licata then testified that Mr. deJong never told him the 3-page agreement was anything other than a "gentlemen's agreement". He further stated that Mr. deJong never told him to inform the Bankruptcy Court of the 3-page agreement. ("To the contrary", was his answer) and never told him to inform Transatlantic about the 3-page agreement or the Escrow Agreement.

After questioning by counsel, Mr. Licata re-confirmed that in May 2011, Mr. deJong called him and asked for $500,000 as a bribe to support Mr. Licata.

How to assess Mr. Licata's credibility? The court has seen Mr. Licata testify at trial and speak at a pre-trial proceeding; it has read submissions by him. It concludes that Mr. Licata is a man who starts with a kernel of truth but has a tendency to embellish or exaggerate. To give few examples, he testified that First Connecticut was looking at $300,000,000 to $400,000,000 of loans per month in its earliest years. That figure appeared to be high. He testified that one of his earliest partners had several hundred million dollars in the bank. That figure seemed high. At an earlier hearing, and herein, he testified that the F.B.I. has "truck loans" of documents it has prepared in a case to be brought against Mr. Mocco. He also stated in an earlier hearing - - and his wife, who obtained the information from him also stated in a written submission - - that Mr. Mocco was a member of the Genovese crime family.[97] In an earlier hearing, he accused Mr. Mocco of trying to have him killed. **The point is not that Mr. Licata is a liar.** The point is that he begins with something which may be truthful - - perhaps Mr. Mocco's name came up on an F.B.I. investigation, and perhaps Mr. Mocco said that he would not be unhappy if Mr. Licata met his maker - - and, perhaps unintentionally, takes that kernel of truth and goes too far.

[97] See M 230 wherein Mrs. Licata wrote, "Jim Licata served the U.S. government with a 17 C subpoena with the FBI on Mocco to be turn over **roughly 1000 302's**. He [Mr. Licata] claims they are so serious about Mocco's involvement with corruption, drug dealings, and affiliation with the Genovese crime family."

There are two documents which reflect poorly on Mr. Licata's credibility. These are the October 12, 1996 and October 28, 1996 letters to him from Mr. Fichtenholtz, both of which indicate that Mr. Licata told Mr. Fichtenholtz **not** to send closing documents on the EMP loans to Mr. Mocco since there were "certain documents you may not wish to have Mr. Mocco see or have knowledge of," (M 33) - - and these were transactions where **liens were to be placed on the Mocco home**. (Mr. Licata eventually relented, however, and allowed the documents to be sent to Mr. Mocco.)

In addition, the court is bothered by Mr. Licata's long list of people who defrauded him: Mr. Mocco; Mr. Scarpone; Mr. Shepro; Mr. Podell; Mr. James Savage, a former partner of Mr. Scarpone's,[98] the people who sued him on failed transactions in Wisconsin: Mr. deJong; Mr. Webber; Mr. Opert; Mr. Feld; Mr. Mournes; Barry Cohen Esq.; Mrs. Licata; an accountant who called himself Rich Walters (probably an assumed name); Judge Colleen Brown; A.U.S.A. Schmeisser, and Mr. Kenny (the other First Connecticut Consulting employee named in the Webber – deJong suit). The court is also bothered by the enormity of the wrongs alleged by Mr. Licata - - possible Federal crimes, possible State crimes, bribery, forgery, etc.[99] Mr. Licata's post trial brief uses the words "forged", "fraudulent", "forgery", "perjured" or "criminal" fifteen times in discussing Mr. Mocco. This court believes Mr. Mocco would do almost anything to build his empire, but "almost anything" does **not** include forgery, perjury or criminal acts. This court does not think Mr. Mocco is a criminal; Mr. Licata's accusations to the contrary diminish his credibility.

[98] Mr. Savage was alleged to have sent confidential documents to Mr. Scarpone while Mr. Savage was working for New Jersey Attorney General's Office. There is merit to the accusation that he sent documents, see L 414, although there is no proof that any documents sent were confidential.
[99] Of course, Mr. Mocco is **almost equally guilty** of blaming everyone who has opposed him of being dishonest.

All this leads to the conclusion that Mr. Licata, while not a liar, has become so embittered that he tend to exaggerate or embellish.[100] That makes him **marginally less credible than Mr. Mocco**, although the difference is so small that, alone, it would not lead to a decision in Mr. Mocco's favor.

N. Timothy Karcher

The Lenders next called Timothy Karcher to the stand. Mr. Karcher, the late Alan Karcher's son, is a partner at the Proskauer firm. Mr. Karcher graduated from Rutgers Newark law school; he worked at the Ravin firm from 1998 and switched to another employer, moved to Dewey, LeBoeuf, and ended up at Proskauer when Dewey, LeBoeuf folded.

Mr. Kraucher was asked about the complicated arrangements between Mr. Mocco and Alan Karcher as to 8-10 Clifton Place. He proved to know very little about the arrangements. On the other hand, at least one of the documents produced (L 64) indicated that Alan Karcher was a mere nominee or agent for Mr. Mocco, thereby calling into question Mr. Mocco's testimony that Alan Karcher bought the property from him. Mr. Karcher also knew very little about the FCHG IV properties. The documents indicated that Alan Karcher served as a nominee or agent for Mr. Mocco, who claimed ownership of the properties (see L -82).

On cross examination, Timothy Karcher re-acknowledged that he knew very little about the transactions between his father and Mr. Mocco.

[100] The bitterness is understandable. Anyone who listened to this trial, and read the exhibits, must wonder how Mr. Licata ended up with so little after dealing with Mr. Mocco, while Mr. Mocco ended up with over a half a billion dollar empire. Nevertheless, Mr. Licata's losses, and particularly his Liberty Harbor losses, are not before this court on account of the Trustees' $1,500,000 settlement with Mr. Mocco.

Mr. Karcher knew so little about the matter at issue that the court need make no conclusions as to his credibility, but hastens to note that it does not have any reason to question same.

O. James Donohue

James Donohue, called by the Lenders, testified that he possesses a two year college degree. He is a landscape architect who has done work for Mr. Licata, both as a landscape architect and as a manager of one of Mr. Licata's construction companies. "I did whatever Jim wanted me to do". (He calls Mr. Licata "Jim" because he has known Mr. Licata since they went to high school together.) He generally reported directly to Mr. Licata. Eventually he relocated to Mr. Licata's headquarters in Connecticut; at that time he did work on the home Mr. Licata was building and on business projects.

Mr. Donohue met Mr. deJong at that time. Right before the 2001 Memorial Day weekend on Wednesday night, Mr. deJong called Mr. Donohue at Mr. Donohue's home. The call lasted 20-30 minutes. Mr. deJong apparently complained about Mr. Licata's business behavior and said, "I am trying to get out of this unscathed". A few days later, Mr. deJong called again to let Mr. Donohue know he had discovered a critical document at his house. (The court assumes it was the 3-page agreement or the Escrow Agreement.) A few days after that call, Mr. Donohue was in Mr. Licata's office when he overheard **Mr. deJong ask Mr. Licata for approximately $260,000**. Later that day when Mr. Donohue was out in the yard, Mr. Licata opened the window and yelled out "**Pieter flipped**". Mr. Donahue stopped working for Mr. Licata in February 2002.

On cross examination, Mr. Donohue said that when he overheard the conversation between Mr. Licata and Mr. deJong, he heard Mr. Licata speak, but not Mr. deJong. Mr. Licata was on a hand held phone, but not a speaker phone. When he heard Mr. Licata yell out the window, **"Peiter flipped"**, he was working on a job out in the yard.

Mr. Donohue is now an independent construction manager. He is a friend of Mr. Licata's but not a very close social friend. Mr. Donohue remembers the phone calls with Mr. deJong because it was "so rare that he called me at home".

Mr. Donohue's credibility was **enhanced** in the court's view, because, with one exception, he did not criticize Mr. Mocco and because the conversation he overheard about Mr. deJong asking Mr. Licata for $260,000 may be related to the $250,000 down payment from Read Properties and/or First Hudson Realty.[101]

[101] The only minor error in Mr. Donohue's testimony may have been a one week confusion as to whether the "Pieter flipped" shout by Mr. Licata was on the same day as the overheard $260,000 conversation. The court believes the $260,000 conversation was a few day **before** the Memorial Day weekend, and the "Pieter flipped" shout a few days **after** the weekend.

VI Conclusions[102]

The court will not address the Lenders' argument that Mr. Mocco does not possess standing to bring the suit, given New Jersey's liberal view of standing. See Pressler & Verniero, Current New Jersey Court Rules Comment R. 4:26-1 (2015). To paraphrase an oft-repeated Appellate Division statement, the standing argument is not sufficiently meritorious to merit discussion.

A. Is the Mortgage Valid?

1. **Who owned the property?**

a. Mr. Licata held title to the FCHG properties as a nominee.

This conclusion is made independently of the conclusions of the Federal Judges in the Vermont Decisions. It is reached for several reasons:

(a) It is undisputed that Mr. Mocco owned all the FCHG properties from the outset. Accordingly, the court must place the **burden of proof** on anyone - - in this instance, Mr. Licata - - claiming that Mr. Mocco gave up the properties.

(b) **The Consulting Agreement** states that Mr. Licata was only Mr. Mocco's agent. That arrangement would be changed, of course, but it at least serves as a starting point.

(c) **The 3-page agreement** states that Mr. Licata was only a nominee for the properties. The 3-page agreement is accurately described in Mr. Licata's post trial brief as "a crude and poorly drafted document" (p. 11), drafted by a lawyer imposing his views on a non lawyer, but it does indicate agreement between two tough, experienced business people. At least two of the clauses - - the tax neutrality clause and the clause requiring Mr. Mocco to pay off the mortgage - - are in Mr. Licata's favor. The agreement is not unconscionable or unenforceable.

(d) **The Escrow Agreement** (L 58) reinforces the concept that Mr. Licata was only a nominee. The court does not agree with Mr. Licata's post trial; brief that it is a "compilation of forged and/or altered documents…" (p. 18)

[102] The court is setting out all of its conclusions, including several which might arguably be considered unnecessary to the opinion or, in legal parlance, mere dicta. The court is doing so because it wants any reviewing tribunal to know all of this court's holdings in order to de-necessitate a remand. It is possible some of the conclusions may be relevant to the damage aspects of this case, or the Federal Court case. If so, this would advance the goal of judicial economy - - there is no reason the parties should have to re-try issues which were tried over a four month period before the undersigned. The court takes notice of Mr. Mocco's suggestion on page 58 of his post-trial brief that "…the Court must be careful… to avoid making unnecessary or superfluous factual rulings that may confuse or complicate later proceedings in these consolidated actions or in the Federal lawsuit." The court thanks Mr. Mocco for his suggestion, but believes a complete record is appropriate.

(e) **More importantly**, the September 24, 1996 facsimile from Mr. deJong to Mr. Licata (M 31) confirms that Mr. Licata was only holding the properties as a nominee.

(f) While not directly on point, the Contract for Purchase of Real Estate between Mr. Licata and Mr. Mocco (M 009) generally supports the concept that Mr. Mocco could buy the property back from Mr. Licata for $1, if he satisfies the mortgage.

(g) Mr. Mocco came across as a **relatively** straight-forward, honest witness, at least on this issue. That conclusion is **tempered** to some extent by his refusal to acknowledge that he has done anything wrong, and his refusal to acknowledge that anyone who has opposed him could have legitimate motives. The court does not agree with Mr. Licata's post trial brief when it asserts that Mr. Mocco is a perjurer. (p. 22)

(h) Mr. Mocco is a man whose entire energies are devoted to building, and holding real property. He knows every property he has owned; he has little interest in stock, bonds, etc.; over 99% of his net worth is in real estate; he would almost never give up any property to anyone. (He testified that he views his properties almost like his seven children; he is a builder, owner, and manager, not a trader). This factor alone is far dispositive since Mr. Mocco did give up (or lost) the Hope Six project, and did sell one property to Mr. Karcher (albeit in a transaction wherein Mr. Mocco could, and did, regain the property.) See page 99 above. A fact finder, however, should take into account the fact that Mr. Mocco's mode of business makes it unlikely he would give up ownership of the FCHG IV properties.

(i) **The Moccos ran all the FCHG properties**, collected the rents, paid the mortgages, etc. from the very outset. Mr. Licata never paid a dime of the mortgage payments. This is, of course, not dispositive, but is at least indicative of who actually owned the FCHG properties.

(j) Mr. Opert's credibility, while diminished by the four problem areas laid out on pages 89 above, and by the contradictory testimony discussed by Bruce Duke, Mr. Licata's able attorney on pages 24-25 of Mr. Licata's post trial brief was **generally** strong. He, of course, bolstered Mr. Mocco's assertions about Mr. Licata's nominee status.

(k) While the court is not bound by the holdings of the Vermont Decisions, it does find that the trial transcript and the Decisions lead to the conclusions that Mr. Licata held title to the FCHG entities as a nominee. Nothing which occurred in this trial changes the court's opinion on that subject. The post-trial brief of the Lenders, pages 108-109, lists several defects in the Vermont Decisions. Three of these defects are particularly troublesome to this court - - the failure to acknowledge that the Licatas reported income taxable from FCHG IV, the failure to address the obvious defects in the ownership or certificate ledgers of FCHG IV,

and the unfortunate fact that Judge Brown ruled before Mr. deJong was convicted and disbarred - - but none changes this court's conclusion.

(l) Nothing which occurred in this trial has convinced this court that the Mocco-Licata relationship as to FCHG IV, which was inadvertently omitted from the Licata Bankruptcy proceeding, differed materially from the Mocco-Licata relationship as to FCHG II, III, X, XI, and XIII.

(m) The Mocco-Licata conversations, taped by Mr. Mocco, support Mr. Mocco on this point. See L 49, p. 52 wherein Mr. Licata said, "You were worried about your buildings. **They're all yours**, right"? And see June 4, 1997 from Mr. Licata: "… maybe legally the properties are in corporate names that I'm involved in. Other than that, **they're not my properties and I don't lay claim to nothing**."[103]

(n) While Mr. Licata's Bankruptcy does not, in and of itself, prove anything about his integrity, as Mr. Mocco has also used the Bankruptcy Courts, the fact that Mr. Licata has numerous creditors who claim to be owed a total of more than $200,000,000, and that nine of these creditors have sought to have their debts not discharged due to Mr. Licata's alleged dishonesty, does indicate that he tends to deal less than perfectly with those whose money he wants.

(o) Mr. Licata's **conviction** is entitled to some weight, although not conclusive weight, in assessing his credibility.

(p) Mr. Licata does have a credibility problem, insofar as he tends to exaggerate. As set out above, he is not dishonest, but has a tendency to take a kernel of truth and exaggerate or magnify it. For that reason, Mr. Mocco's testimony is **somewhat more believable.**

(q) Having someone else hold his property in a nominee status was a **common business practice** for Mr. Mocco. There was nothing unusual for him to have the FCHG properties so held.

(r) Most importantly, Mr. Mocco is such a tough, uncompromising man that the court cannot imagine him giving up the property in question.[104] To give an obvious example, he was, and remains furious, that First Union would **try to collect on a valid loan when it had every right to collect on**. That a "consultant" acting on his behalf would try to end up with Mr. Mocco's property would be **something that Mr. Mocco would have never accepted.** To put this

[103] As set out above, the court is **not** relying on the tapes for **any** of its rulings. The tape is mentioned only for illustrative purposes.
[104] Mr. Licata accurately summed up his view of Mr. Mocco in a telephone conversation with him: "You're a tough motherfucker" (December 2, 1997, p. 45).

> into perspective, Mr. Mocco is so intransigent and so unwilling to accept that person or entity opposing his efforts to build an empire, is acting legitimately that 19 years later he still is angry at First Union, for trying to collect on a valid debt; the court does not think it is possible he would have agreed to letting Mr. Licata or anyone else take a portion, let alone a substantial portion, of his empire.

While the court's holding on this point is consistent with Judge Brown's, this court differed with Judge Brown in that this court did not base its holding on Mr. deJong being a credible witness. As set out above, it had many other reasons to reach its holding. As to Mr. deJong, the court believes he should not have prepared the Escrow Agreement or been involved with the 3-page agreement in light of his conflicting duties to Mr. Licata and Mr. Mocco. Nevertheless, he apparently has no reason to testify untruthfully **at this time** about those documents. His demeanor when testifying about these documents appeared to reflect a rueful ex-lawyer with no reason to lie anymore. In sum, the court believes for all the above listed reasons that Mr. Licata was only a nominee; Mr. deJong merely adds a scintilla of evidence to that conclusion.[105]

b. The Lenders have not carried their burden of proof that the 3-page agreement is of no force and effect because of Mr. Mocco's failure to keep Mr. Licata in a tax neutral position.

The heading of this section refers specifically to the Lenders' burden of proof because it is not clear to the court whether Mr. Licata was actually kept in a tax neutral position, as his tax return situation was impossible to understand. It is clear that he filed tax returns for 1996

[105] The court has not addressed the Statute of Frauds issue because it believes the 3-page agreement is not a conveyance of real estate. More accurately, the 3-page agreement confirms that the Moccos continue to own the real estate and Mr. Licata continues to be the Moccos' agent or nominee. Moreover, there is enough proof that the Moccos owned the real estate that this court could rule in favor of their ownership even if the 3-page agreement were considered unenforceable on account of the Statute of Frauds.

through 1998 that included the FCHG entities.[106] It is also clear that the Licatas engaged in a lengthy lawsuit with the I.R.S. over their tax returns. What is not clear is whether they were harmed by declaring ownership of the FCHG properties, given the intricacies of the FCHG income, expenses, and depreciation (and all the other holdings and expenses they may have had).

Equally important, even if the Licatas did suffer adverse tax consequences as a result of the 3-page agreement, the agreement itself does not contemplate rescission or nullification if the Licatas suffered adverse tax consequences. It merely says that "if First Connecticut [Mr. Licata's entity] incurs any additional tax liability over and above its own tax obligations on its earned interest income and consulting fee income, then in that event Hamilton [Mr. Mocco's entity] agrees to make First Connecticut whole".

Finally, the Trustees, not Mr. Licata, owned any claims Mr. Licata had against Mr. Mocco, including any claims for violation of the 3-page agreement. As set out above, the Trustees settled all their claims for $1,500,000.

For all the reasons, the 3-page agreement cannot be rescinded or nullified by any possible failure of Mr. Mocco to keep Mr. Licata in a tax neutral position.

c. The Lenders have not carried their burden of proof that the 3-page agreement and Escrow Agreement are of no force and effect because of Mr. Mocco's non payment of the EMP debt.

Judge Colleen Brown addressed this issue as follows:

> … the conditions of the Escrow Agreement were met such that deJong, in is capacity as the Escrow Agent, was required to issue documents of ownership to Mocco or his designee. EMP had released the "ownership shares" of the respective LLCs, the Licatas had executed and delivered irrevocable limited Powers of Attorney to deJong granting deJong the authorize to issue replacement shares to the person or entity Mocco would

[106] The I.R.S. did obtain a judgment from a Federal District Court Judge against Mrs. Licata in 1996 in the amount of $1,481,000 for her 1996 taxes. Whether that judgment - - for taxes and penalties - - would have existed, or been higher or lower, if the Licatas had not claimed ownership in the FCHG entities is not clear.

designate, and Mocco designated the person or entity to whom he wanted replacement shares issued. Thus, all conditions precedent had been satisfied and deJong as bound by the Escrow Agreement to issue the replacement ownership shares.

Judge Brown did not address a possible "glitch" concerning the issue: while Mr. Mocco did repay EMP the approximately $22,000,000 it was owed, and EMP did release the "ownership shares", there is an ongoing dispute between EMP and Mr. Mocco over approximately $74,000 EMP claims Mr. Mocco owes on the commercial loans and approximately $1,000,000 plus substantial interest EMP claims Mr. Mocco owes on the home residence loan. The EMP – Mocco case, which also involves claims by Mr. Mocco that EMP defrauded him, has been stayed pending the outcome of this case. This court cannot find that the EMP dispute is substantial enough, compared to the $22,000,000 loan, to call into question the enforceability of the 3-page agreement and the Escrow Agreement. At the minimum, Mr. Mocco has substantially complied with the 3-page agreement and the Escrow Agreement.

d. The FCHG IV shareholder record book is too inconclusive to control over the testimony and documents before the court.

The defendants initially spent a great deal of time and effort trying to demonstrate that a careful reading of the FCHG IV shareholder book proves that Cynthia Licata was the owner of FCHG IV. The truth is that the shareholder record book is so inconsistent, duplicative, and confusing that no one can or should rely on it. At least seven persons or entities are listed at different times as between 50% and 100% shareholders: James Licata, Cynthia Licata, Peter Mocco, Lorraine Mocco, Alan Karcher, Alan Webber, and FCHC IV. One of the people listed, (Mr. Webber), was a mere nominee, one (Mr. Karcher), is dead, and one (Mrs. Licata), has denied ownership. An eight name, Pieter deJong, is listed as having Unit Powers. A more accurate record book would most likely reveal that a **ninth person or entity**, Dennis Drasco,

Esq., trustee was the real owner at the time of the transactions at issue. There is so little rhyme or reason to the names that no careful lawyer or judge should rely on that record book. Accordingly, this court will not rely on the shareholder record book to reach any decisions as to who owned FCHG IV, particularly as it has had the benefit of the testimony of the principal actors and the documents they signed and exchanged. Indeed, Mr. Schafhauser admitted in open court that the record book reveals a Byzantine pattern of ownership, arguing that Mr. Mocco should be held accountable for creating such confusion - - a position the court agrees with to some extent, as will be discussed subsequently.

2. Is Mr. Mocco barred from bringing this action?

a. Mr. Mocco is not be barred on account of his failure to update the lis pendens.

Mr. Mocco filed 15 notices of lis pendens against Mr. and Mrs. Licata, FCHG II, III, IV, V, VI, VII, VIII, IX, X, XII, and Pieter deJong on or around November 1, 1999. Each notice listed a property in Jersey City, or North Bergen, roughly coterminous with the list set out on page 18 above. All the notices were filed to protect Mr. Mocco's interests in the properties encompassed in this suit, which was instituted in April of 1999. Three years later, Mr. Licata filed the Connecticut Bankruptcy proceeding, which presumably encompassed all the FCHG properties but, by inadvertence, did not include the FCHG IV properties. Neither at that time nor at any time before the Centrum mortgage did Mr. Mocco amend or supplement the notices. Mr. Mocco argues that (1) "The New Jersey lis pendens statute does not allow for any amendment or renewal of a lis pendens beyond its statutory five-year term", citing Lawrence J. Feinberg, Handbook of New Jersey Title Practice, New Jersey Land Title Institute (2005) at 75-5 thru 75-6 and N.J.S.A. 2A:15-11, and (2) "this filing of a lis pendens violates the automatic [Bankruptcy]

stay", citing Barnett v. Edwards, 214 B.R. 613, 618-620 (4th Cir. B.A.P. 1997 (affirming sanction for recording lis pendens in violation of a stay.)

Mr. Mocco is wrong. On the amendment issue, N.J.S.A. 2A:15-7B specifically provides that a party "may, at any time thereafter, file … a motion … to justify the filing of a continuation of the notice of lis pendens" and that the court may hold that the notice of lis pendens "shall be continued of record and shall have the same effect as provided in subsection a [the subsection providing for the original notice]." On the Bankruptcy issue, the Barnett case did not involve an already existing lis pendens, while In re Knightsbridge Dev. Co., Inc., 884 f.2d 145, 148 (4th Cir. 1989) specifically states that an "amendment was a legitimate post-petition activity." And see United States v. Inslaw, Inc., 932 f.2d 1467, 1473 (D.C. Cir. 1999) and In re Millerlee Corp., 70 B.R. 780, 783 (Bankr. S.D. N.Y. 1987).

Thus, Mr. Mocco should have updated his notices of lis pendens. Indeed, if he had done so it is **possible** Horizon and Centrum would not have erred. The court uses the word "**possible**" because Mr. Cohn's title searchers did report the original notices, and Mr. Cohn did know of Mr. Mocco's claims. On the other hand, it would seem monumentally unfair to Mr. Mocco to strip him of a portion of his empire, for which he worked hard for thirty years, merely because his counsel, through inadvertence or a misreading of the complex area of law concerning the interplay of Bankruptcy and real property, committed a minor, technical error. This court will not do so.

b. Mr. Mocco is not barred by his failure to disclose to the Bankruptcy Court the existence of FCHG IV.

At first glance, once could also criticize Mr. Mocco for not alerting the Bankruptcy Court and Judge Colleen Brown of the existence of FCHG IV. One could argue that Mr. Mocco was

collecting the rents on the properties and wanted to hide them from Judges Shiff and Brown. On the other hand, Mr. Mocco's position was that **he** owned FCHG IV, so there was no reason for him to bring the FCHG IV to the attention of Judge Brown, whose job was to rule on Mr. Licata's claim to the other FCHG properties. The court finds that Mr. Mocco had **no duty** to bring FCHG IV into the Bankruptcy proceedings.[107]

c. **Mr. Mocco is not barred by laches and estoppel.**

The Lenders' laches and estoppel argument consists of four parts: (1) Mr. Mocco not disclosing the 3-page agreement to Judge Ginden in 1996; (2) Mr. Mocco not objecting to the Sale Order in 2005 (or at least telling Judge Shiff that he intended to seek relief beyond the assets of the estate); (3) Mr. Mocco not renewing the lis pendens; and (4) Mr. Mocco not recording Judge Levy's court order. The court disagrees. The failure to tell Judge Gindin of the 3-page agreement was a wrongful act, but it occurred so early in the process that it does not strengthen the Lenders' laches argument. As to Mr. Mocco's alleged lack of effort to stop the sale in 2005, the court transcripts quoted above demonstrate that he forcefully objected. As to the failure to amend the lis pendens, the court will not, as set out above, strip Mr. Mocco of a large part of his empire on such a minor error. Finally, while it was possible for Mr. Mocco to record Judge Levy's order, there is no law requiring him to do so - - and the Lenders could have discovered the order themselves. Laches and estoppel cannot be invoked herein.

d. Mr. Mocco is not barred by Judicial Estoppel.

[107] Mr. Scarpone has reminded the court that Bankruptcy Courts possess jurisdiction **only** as to the properties or assets listed by their debtors. Unlike courts of general jurisdiction, they do not have broader jurisdiction over related property and do not deal with the entire controversy doctrine. Thus, there was no reason anyone should have alerted Judge Brown as to FCHG IV, an asset or property **not** before her court.

The Lenders' judicial estoppel argument has two bases. To quote their summary judgment brief:

> The doctrine of judicial estoppel bars litigant from asserting a position that is inconsistent with one that has been previously assert by that litigant in the same or a prior proceeding. See Cummings v. Bahr, 295 N.J. Super. 374, 385-87 (App. Div. 1996); Chattin v. Cape May Greene, 243 N.J. Super. 590, 620 (App. Div. 1990); aff'd. 124 N.J. 520 (1991). Courts may apply the doctrine of judicial estoppel so that "[a] party will not be permitted to play fast and loose with the courts." See Levin v. Robinson, Wayne & LaSala, 246 N.J. Super. 167, 180 (Law Div. 1990), overruled in part on other grounds by, Kimball Int'l Inc. v. Northfield Metal Prods., 334 N.J. Super. 596 (App. Div. 2000). In light of their repeated prior representations in two separate bankruptcy proceedings, the Moccos are surely barred by judicial estoppel in this case.

This court will **not** discuss the second of the "two separate bankruptcy proceedings" referred to by the Lenders - - Mr. Mocco's representations to the Connecticut Bankruptcy Court in 2005. The court believes that nothing said or done, or not said or done, by Mr. Mocco or Mr. Scarpone in that Bankruptcy could be considered inconsistent with any other position taken by Mr. Mocco.

The Lenders' argument as to the Mocco Bankruptcy is more serious:

> **When they were seeking to obtain the Bankruptcy Court's approval of their plan of reorganization in September 1996, the Moccos failed to disclose the Three-Page Agreement (or their right to reacquire the First Connecticut properties at some later point) to the Bankruptcy Court. The Moccos also neglected to mention to the Bankruptcy Court, EMP, Transatlantic and virtually everyone else with whom they interacted that Mr. Licata was a "nominee" of some kind.** Instead, the Moccos, through their counsel, falsely represented to the Bankruptcy Court that FCCG's acquisition of the First Union debt was "arms length," and that the Moccos had retained no further rights relative to properties at issue - - representations directly at odds with the Three-Page Agreement prepared and executed the night before. On that basis, the Bankruptcy Court proceeded to approve the Moccos' plan of reorganization.

The Lenders go on to note that parties have been judicially estopped by positions they have taken in Bankruptcy court.

> This proposition has been explicitly recognized where a litigant has made affirmative representations to a bankruptcy court designed to modify the parties' rights and interests, and then introduced a different version of events in a subsequent proceeding. Citizens First Nat'l Bank of N.J. v. Bluh, 281 N.J. Super. 86, 96, n. 5 (App. Div. 1995) ("Additionally, defendant assert in their brief that plaintiff took a contrary position about Cavaliere's ability to encumber the property in a motion for non-dischargeability in Cavaliere's bankruptcy case. If this were true, judicial estoppel would apply…"); Barzda v. Clemente, 2010 WL 770424, *2 (N.J. App. Div., Mar 3, 2010) ("The court also held that plaintiff' claim was barred by the doctrine of judicial estoppel based on his affirmative statement , made under oath, in his petition to the bankruptcy court.")

Notwithstanding the foregoing, the court will not bar Mr. Mocco from asserting his entitlement to the FCHG IV properties. In New Jersey cases where judicial estoppel was utilized, clear-cut, black and white inconsistencies existed between the first and second proceedings in question. For instance, in Levin v. Robinson, Wayne & La Sala, 246 N.J. Super. 167 (Law Div. 1990), the plaintiff's wife had earlier brought a divorce action against him, seeking equitable distribution of the plaintiff's asserts, including the funds from a Partnership Agreement with his former law firm. The plaintiff noted at the commencement of the action that his interest in the partnership was $55,841. He then submitted a later statement that did not list his partnership interest at all, let alone the amount of its worth. As the dispute continued, the plaintiff asserted that "there was a written Partnership Agreement . . . and that [plaintiff] had already received everything he was entitled to receive for his partnership interest." Id. at 173-74. Mr. Levin stated in a Certification that:

> The enclosed Agreement of Partnership fully governed my compensation during my employment with the firm . . . and dictated the terms of my final payment upon departure from the firm. . . . I am aware that the payments made to other members of the firm upon their departure therefrom were made in complete accordance with said Agreement of Partnership. . . . My understanding of the Agreement of Partnership is that I have received substantially all monies relating to my partnership interest . . . I received $24,958.63 from [the Partnership] for my partnership interest."

Id. at 174.

The plaintiff later brought an action against his former partnership, alleging that he was owed $300,000 in his partnership interest based on an oral partnership agreement. The defendants in the suit contended that the plaintiff was judicially estopped from bring such allegations. In determining that judicial estoppel applied, the court stated that:

> The principle of judicial estoppel applies in this case to prevent [plaintiff] from now arguing that he is entitled to anything from the . . . partnership in addition to what he received when he resigned. In his divorce action, [plaintiff] certified and his attorney represented that [plaintiff] had received all that he was entitled to receive from the partnership under the Partnership Agreement. [Plaintiff] cannot now make contrary assertions to this court.

Id. at 181.

In Bray v. Cape May City Zoning Bd. of Adjustment, 378 N.J. Super. 160 (App. Div. 2005), plaintiffs obtained approval from the City of Cape May to develop a "tourist/guest house." The plaintiffs asserted that the structure would act as a bed and breakfast, with a kitchen to prepare meals for the guests. Years later, they applied to the Board of Adjustment for an opinion that the site is a "hotel," in which the kitchen could be opened to the public. The claim was rejected by the Board; the rejection was affirmed by the trial court. The Appellate Division also affirmed, stating that judicial estoppel prevented the plaintiffs from asserting that what they once classified as a "tourist/guesthouse" was now a "hotel" with "dining facilities [that] could be opened to the public" Id. at 164. Judge Skillman wrote:

> Plaintiffs repeatedly represented in their original and revised applications for site plan approval and in their presentations to the Planning Board that their proposed development project would be a "tourist/guest house," which is a permitted use in the zone where their property is located. Moreover, when members of the Board suggested that plaintiffs' proposed structure could be considered a hotel because of its size and number of guest-rooms, plaintiffs and their attorney emphatically rejected this suggestion, insisting that their intent was solely to operate a bed and breakfast that would fall within the Cape May zoning ordinance's definition of a tourist/guest house. . . . Furthermore, if the Planning Board had rejected plaintiffs' representation that their proposed facility would be a tourist/guest house and required them to apply to the Board of Adjustment for a use variance, plaintiffs

> would have had to satisfy a substantially more onerous evidential burden than is required for site plan approval of a permitted use.

Id. at 167-68.

In Kress v. La Villa, 335 N.J. Super. 400 (App. Div. 2000), Mayor Nicholas Cicco of the Town of Guttenberg successfully appealed a bribery conviction growing out of the termination of two special public officers. His defense was that the officers were terminated for other reasons ("they failed to support the Democratic Candidate in the November 1988 election"), not as a result of bribery. In the Kress case, Mayor Cicco, in attempting to obtain legal fee indemnification from the Town, agreed that his actions "were part of his official duties as Mayor." The Appellate Division disagreed, holding that judicial estoppel precluded Mayor Cicco from changing his position: "When a party successfully asserts a position in a prior legal proceeding, that party cannot assert a contrary position in subsequent litigation arising out of the same events." Id. at 412 (citation omitted).

New Jersey courts have also repeatedly asserted that judicial estoppel is an "extraordinary remedy" that "should be invoked only 'when a party's inconsistent behavior will otherwise result in a miscarriage of justice." Kimball International Inc. v. Northfield Metal Prods., 334 N.J. Super. 596, 608 (App. Div. 2000) (citation omitted). "[J]udicial estoppel should be invoked only in those circumstances required to serve its stated purpose, which is to protect the integrity of the judicial process." Id.[108]

As the doctrine is an "extraordinary remedy," the burden of persuasion on this issue must be on the Lenders as the parties seeking to invoke the doctrine herein. The Lenders' first problem

[108] Because of R. 1:36-3, which prohibits reliance on unpublished opinions, the court is not relying on New Jersey's three Real Property-Bankruptcy-Judicial Estoppel decisions: Ramano v. Ramano, 2012 N.J. Super. Unpub. LEXIS 73 (App. Div., Jan. 12, 2012); Davidowski v. Davidowski, 2012 N.J. Super. Unpub. LEXIS 192 (App. Div., Jan. 30, 2012), and Barzda v. Clemente, 2010 N.J. Super. Unpub. LEXIS 426 (App. Div., Mar. 3, 2010). The court feels it sufficient to state that in each of these three cases, the Bankruptcy filing did not mention the disputed property, while in this case, Mocco's filing clearly did so.

is that they have failed to establish that Mr. Mocco affirmatively stated to the Bankruptcy court that he no longer owned the FCHG entities.[109] The Lenders have also failed to prove that Mr. Mocco affirmatively stated to First Union, the unsecured creditors, or EMP, that he no longer owned the FCHG entities.

Further, this was not a classic judicial estoppel situation in which a court issued a ruling in favor of a litigant and against the litigant's adversary, based on the initial misrepresentation, as opposed to a situation in which a settlement was reached. See Kimball, 334 N.J. Super. at 609. In Kimball, Reginald Baker sued Kimball International, Inc. ("Kimball") when a Kimball chair collapsed with Mr. Baker sitting in it. Kimball argued that the chair was **not defective**, and thereafter settled with Mr. Baker for $250,000. In a subsequent suit by Kimball against Northfield Metal Products ("Northfield"), Kimball argued that Northfield had supplied a defective chair part, which was obviously inconsistent with the position it advanced in the first trial. Judge Skillman refused to allow the judicial estoppel defense because the first trial merely resulted in a settlement. He approvingly quoted a Seventh Circuit decision, "[T]o be estopped [a party must] have convinced the court to accept its position in the earlier litigation." Id. at 596 (citation omitted). Importantly, he expressly limited the Levin holding:

> Thus, the statement in Levin v. Robinson, Wayne & La Sala, 246 N.J. Super. 167, 189-90, 586 A.2d 1348 (Law Div.1990), that "no New Jersey court has ever adopted a requirement that a party must 'successfully assert' the prior position to be judicially estopped from later asserting a contrary position," is incorrect, and the holding of that opinion that "prior success" is not a prerequisite of judicial estoppel, id. at 188-91, 586 A.2d 1348, is overruled.

Id. at 596 n.2.

Herein, Judge Gindin merely approved of a plan of reorganization; he did not rule that Mr. Mocco had no liability for all or part of his debt. While the court is not bound by any of the

[109] The case would presumably be far different if Mr. Mocco affirmatively told the Bankruptcy court that Mr. Licata, not he, owned the FCHG entities.

Vermont Decisions, it does find that Judge Sessions of the District Court was accurate when he stated "there is no risk of inconsistent results; the New Jersey Bankruptcy Court was not asked to rule and did not rule one way or the other on the nature of the transferred title."

Further, there is insufficient proof that Judge Gindin, the unsecured creditors, or FMP was led to believe that Mr. Mocco did not own and control the FCHG IV properties. As Mr. Mocco pointed out on page 2 of his brief on this subject, "[T]he creditors had voted to accept the Mocco Plan when both the filed schedule and the filed, approved and circulated to every creditor Disclosure Statement not only disclosed the Moccos' ownership of the assets but stated that they would continue to own them subject to whatever deal the Moccos could make with First Union [whose only interest was in taking the $22,000,000 cash from EMP]." In short, no one relied on or even cared about the intricacies of the Mocco-Licata relationship.

Finally, the Lenders' assignors, the Licatas, were parties to the alleged misstatement to the Bankruptcy Court. In successful judicial estoppel cases, the party asserting estoppel is always someone who did **not** participate in the first proceeding – the law firm in Levin, the Board of Adjustment in Bray, the Town in Kress, for examples.[110] Here, Mr. Licata was actually a participant and a **beneficiary**, with fees of up to $2,000,000, in the Mocco Bankruptcy. Mr. Mocco points out at page 9 of his post-trial brief, "…**it was Licata and only Licata who spoke to First** Union… Therefore, if First Union was misled, it was Licata who misled them. It was Licata who, from the very beginning of his discussions with First Union, failed to disclose his agreement with Mocco and his status as Mocco's consultant." For Mr. Licata's assignees to complain about the non-disclosure of the three page agreement, when their assignor participated

[110] The same was true in each of the three unpublished Real Property-Bankruptcy Judicial Estoppel cases mentioned in note XXX above.

in and benefitted from the non-disclosure, would seem inconsistent with the equitable underpinnings of the judicial estoppel doctrine.

In sum, while no court should lightly condone Mr. Mocco's actions, this court does not believe the Lenders can obtain the extraordinary remedy of judicial estoppel.

e. Mr. Mocco is not be barred by the § 363 sale.

If anything is absolutely clear in the tortured sixteen year history of this case, it is that Judge Shiff never intended the § 363 sale to transfer anything other than Mr. Licata's **claim** to the FCHG IV assets. He never intended to allow a sale which would transfer all right, title and interest to the assets, in derogation of Mr. Mocco's rights. On pages 28 to 50 of this opinion, this court has quoted liberally - - and often verbatim - - from the Lender's Brief on a previous Motion and Cross Motion for Summary Judgment. It did so to give the Lenders every benefit of a doubt on the §316 issue. Any fair reading of those pages and Judge Shiff's quoted excerpts confirms his intentions. If there were any doubt as to Judge Shiff's meaning - - and there should not have been - - it was dissipated by his decision on October 9, 2014 to send the ownership case to this court.[111]

There are at least two additional reasons why the § 363 sale cannot bar Mr. Mocco. The first reason is due process. Mr. Mocco either owned or, at the very minimum, had arguably legitimate claims to the assets to FCHG IV. In our American system of law, no one could divest Mr. Mocco of his assets or claims without due process of law. A § 363 sale does not amount to due process. Secondly - - this point is not raised by any parties herein - - the § 363 order does not differentiate between the five FCHG entities before Judge Brown and FCHG IV. If the § 363

[111] This court notes that Judge Vichness had ruled similarly. In the interest of fairness, this court re-examined the issue independently of Judge Vichness' ruling.

order is to be given the effect sought by defendants herein, it would obliterate Mr. Mocco's claim to the assets of FCHG II, III, X, XI and XIII and nullify the decisions of Judges Brown and Sessions. (Soon to be joined by three judges of the United States Court of Appeals for the Second Circuit). No one could possibly contend for such a result. Put differently, the defendants' position would nullify (a) the decisions of five Federal judges as to FCHG II, III, X, XI and XIII, and (b) prospectively nullify any decision of this court as to FCHG IV. This cannot be so.

3. What are the rights of Mr. Mocco's Opponents?

a. Chicago and the Lenders are the real parties in interest.

As set out above, Chicago is the only party which stands to gain if the mortgage is held to be valid. It would not matter, however, if the court held that the Lenders were the real party in interest since Centrum had utilized Horizon as it agent, Horizon was Chicago's agent, and any information known by Horizon must be attributable to both the Lenders and Chicago.

b. Mrs. Licata and those claiming through her can hold no greater rights than Mr. Licata.

The Lenders claim to have obtained good title from Mrs. Licata, not Mr. Licata. As a matter of law, the argument cannot stand. Mr. Mocco was the original owner. He gave title to all the FCHG entities to Mr. Licata as a nominee. In several instances, Mr. Licata conveyed his interest to Mrs. Licata. Mr. Licata could not give Mrs. Licata any greater rights than he possessed. This decision is buttressed by the fact that Mrs. Licata never paid any money for the rights to FCHG IV, never listed herself as the owner of the FCHG IV properties, never paid any money toward the FCHG IV mortgage, never knew what properties FCHG IV possessed, and never claimed ownership of FCHG IV. (As set out on page 196 below, she and her husband were misled by Mr. Mocco into filing tax returns on the property, which is one of many reasons the court has assessed damages against Mr. Mocco.)

Further, the Agreement between the Licatas stated that **Mr**. Licata, not Mrs. Licata, kept all the rights to the FCHG properties involved in the Mocco dispute.[112]

The ruling stands on another basis: the rule that one may not transfer greater rights than one possesses.[113]

c. The Licata parties wrongfully monetized their claimed interest in FCHG IV.

To understand the issue, a brief chronology is essential. Judge Colleen Brown's decision was dated **July 24, 2004**. Judge William Sessions' affirmance was issued on **March 28, 2006**. No one in the world, with the possible exception of Mr. Mocco, was more aware of these decisions than Mr. Licata and his associates. While it is true that Mr. Licata believed he could possibly achieve a different result with FCHG IV than with the closely related FCHG II, III, X, XI, and XIII properties, any reasonable fact finder would have to conclude that Mr. Licata and his associates embarked on a plan culminating in **May 2006** to monetize whatever interest he had in the FCHG IV properties, which plan included a strategy of moving surreptiously so as to **not alert Mr. Mocco.** Some combination of Mr. Licata, Mr. Mournes, and Mr. Podell found a Seattle Washington based hard-money lender, Centrum, to advance the funds to SWJ, or Licata entity. Obviously, a New Jersey based lender would have been harder to defraud, as would a regular bank, which would have taken more time and conducted real due diligence. Of course, a New Jersey lender would have more likely known of Mr. Mocco. Time was of great importance to the Licata interests because the faster they could get the loan done, the more likely they could obtain the money before Mr. Mocco could go to court to stop them. Out of the Centrum funds,

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[112] As noted above, the Agreement may not be binding because the Licatas never divorced, but it is instructive.
[113]In addition, Judge Sessions held that Mrs. Licata did not have standing to challenge Judge Colleen Brown's decision. That ruling is not dispositive since neither Judge Sessions nor Judge Brown was addressing FCHG IV.

the Licata interests would pay their lawyers, fund an appeal of Judge Sessions' holding to the Second Circuit Court of Appeals, and enrich Mrs. Licata to the tune of approximately $2,100,000.

The Licata interests had made efforts to induce Mr. Cancellieri, and Mr. Cohn of Horizon to do their title work. They gave the Horizon officers and employees as little information as they could, paid them handsomely, promised them even more, and went out of their way **not to alert Mr. Mocco of their plans.**

Honest buyers of the disputed real estate would have altered Mr. Mocco of their existence before the purchase. At the minimum, even if they closed without altering Mr. Mocco, they would have filed a lawsuit to determine their rights and Mr. Mocco's rights. They did not do so. Indeed, Mr. Scarpone believes that the SWJ principals were participating in a scheme to obtain funds from Centrum (or any other lender they could find) and then disappear. He does not believe they even intended to stay around and try to convince a court that SWJ was a good faith purchaser. Mr. Schafhuaser, on the other hand, points to Mr. Schreiber's testimony as evidence that the SWJ principals thought they could prevail against Mr. Mocco. Whoever is correct - - the record points to Mr. Schafhauser - - the SWJ principals were not acting in good faith.

Once they got the money, the SWJ principals paid not a cent to GMAC, which was owed over $6,000,000. They used as much of the Centrum money as they could for their own purposes. It was, until Mr. Mocco learned of it after the fact, a successful scheme.

d. The Lenders' Actual Notice of Mr. Mocco's Claims Makes Their Mortgage Invalid.

Now that the court has determined that nothing Mr. Mocco did bars him from bringing his quiet title actions, and has further determined that the Licata interests were proceeding

without ownership rights, the court must determine if Mr. Mocco can have the mortgage discharged. The answer is yes.

At the time the Lenders advanced the funds they, through their agent Horizon, had notice of the following:

1. The decisions of Judges Brown and Sessions.
2. Judge Levy's order, prohibiting the sale or lien of the properties.
3. Judge Shiff's orders which demonstrated that Judge Shiff knew of the Moccos' claims and did not mean to bar them.
4. The recorded lis pendens notices. The argument that the lis pendens were "stale" does not save the Lenders given the position of Mr. Feinberg of Chicago that even "stale" lis pendens must cause a title searcher to look further.
5. M 175, Mr. Shepro's e-mail setting out the many problems with the SWJ position, and M 189, Mr. Berreth's comparable e-mail.
6. Mr. Mocco's phone call to Mr. Cancellieri.
7. Mr. deJong's two phone calls to Mr. Cohn, buttressed by Mr. Cohn's noted (M 138).
8. Mr. Mocco's physical possession of the properties, as well as the fact ha he was collecting the rents.
9. M 197, the written agreement that the deal and its terms be kept secret (apparently to keep Mr. Mocco in the dark).
10. The decision of Avatar, another hard money lender, not to participate with Centrum because Avatar believed, "… there were just a couple of simple questions that no one effectively answer, i.e. WHO IS THE OWNER OF SWJ? WHY has Peter Mocco

been allowed to continue collecting rents on properties that he does not own?" (M 170)

In addition, there were a series of irregularities not directly connected to the property at issue but disturbing enough cumulatively to convince a careful title insurer and/or lender to either make a very extensive inquiry or not proceed any further:

a. Mr. Licata's indictment.

b. Mr. Mournes' extraordinary debts.

c. Mr. Podell's extraordinary debts.

d. Mr. Licata's extraordinary debts.

e. The borrowers' very unusual agreement to indemnify Horizon if anything went wrong on the Mocco mortgage.

f. The borrowers insistence that Horizon list the minimum amount of the mortgages.

g. The rather extraordinary nature of the proposed transaction: the Lenders wanted over $30,00,000 of title insurance to fund a purchase of a minor portion of a property which, only 90 days before, had sold for $11,250,000, and the buyer, SWJ, was putting up no cash and assuming short term debt equal to 120% of the purchase price.

There was another factor which - - while not "notice" in the usual sense of the word - - should have alerted a careful title searcher of the need for a more extensive review. This was the **total lack of information** from Mr. Mocco, the mortgagee, or the insurer of the properties. Although the court does not feel that lack of information in and of itself can constitute notice, the lack of information on a $30,000,000 deal was so extraordinary it must constitute a factor in deciding whether Horizon and/or Centrum had notice of the problems with the loan.

Taking all of the above into account, the court must conclude that Horizon and/or Centrum had notice that they were merely buying a lawsuit which they might or might not win. Put differently, Horizon was gambling many millions of dollars (in some respects, Centrum's many millions of dollars) that a court might favor the Licata side. And to paraphrase Mr. Scarpone, there were more red flags signaling problems with Mrs. Licata's claims than one sees at a Communist Youth rally.[114]

The most detailed analysis of the law in this area is found in Colegrove v. Behrle, 63 N.J. Super. 356 (App. Div. 1960). In Colegrove, the plaintiffs, Carolyn and Jack E. Colegrove owned a parcel of land upon which they contracted to build a home. Before the contracting company had completed its work, the plaintiffs defaulted on their payments. At that time, Clifton Builders Supply Co. ("Clifton"), a subcontractor working on the project, agreed to complete the project according to the plaintiffs' plans, provided that the plaintiffs conveyed the premises to Clifton. Clifton then agreed to sell the property and divide the proceeds accordingly: (1) Clifton would be reimbursed the cost of completing the construction; (2) the plaintiffs would receive a return on their investment; (3) and Clifton would receive the balance due for materials supplied to the contractor, Ashton Builders.

Accordingly, the plaintiffs conveyed the land to defendant Eleanor Behrle, the nominee acting on behalf of Clifton. A deed was recorded, but it did not make mention of the agreement amongst the plaintiffs and Clifton. Months later, defendants Joseph O'Brien and his wife entered into an agreement to purchase the property from Behrle. The Lawyers Title Insurance Corporation ("Lawyers Title") was tasked to "examine the title, record the documents, receive

[114] The Lenders' post-trial brief, pages 45-46 contains two very informative footnotes describing how several pieces of information which might have altered Mr. Cohn to Mr. Mocco's claims were not conveyed to Mr. Cohn - - primarily because Mr. Schreiber took care to keep them from Mr. Cohn. The list is impressive, but the court remains convinced that Horizon knew enough to be on notice of Mr. Mocco's colorable claims.

the mortgage money and the balance of the purchase price, make distribution of the proceeds, and issue a title insurance policy to the mortgagee." Id. at 361. In between the closing on December 11, 1958 and the recording of the deed on December 15, 1958, the attorney for the plaintiffs notified Lawyers Title of the agreement between Clifton and the plaintiffs. The manager for Lawyers Title thereafter did not make any subsequent disclosures regarding the agreement and did not delay the transaction or notify the parties of the plaintiffs' interest. The O'Briens were not made aware of the trust agreement until they were served with the Colegrove complaint.

The trial court determined that a valid trust existed among the parties and that the defendants were charged with notice prior to the recording of the deed despite the fact that a written memorandum of the trust was never recorded. The Appellate Division upheld the trial court's decision. The Appellate Division found that Lawyers Title was not acting as an independent contractor, as the defendants asserted, but was an agent acting on behalf of the O'Briens and their bank.

In making its decision, the Appellate Division emphasized the extensive amount of work that Lawyers Title engaged in on behalf of the defendants:

> [H]ere Lawyers Title assumed charge of the entire transaction as insurer of the title, adjusted at the closing, receiver and disburser of the purchase moneys, examiner of the title between the date of closing and date of recordation, and recorder of the deed and mortgage. Reference to the settlement sheet prepared by the title insurer indicates that defendants were billed for all of these responsibilities. Thus the title company performed more than the purely ministerial functions of insuring the title and recording the instruments.

Id. at 364.

The Appellate Division also addressed whether the interchange between the plaintiffs' attorney and the manager for Lawyers Title was sufficient to put the title company on notice. In deciding that it was, the Court stated:

> **[I]t is not necessary that actual notice be derived from a written source**. The information given to [the manager] of Lawyers Title by plaintiffs' attorney . . . undoubtedly was sufficient to constitute actual notice under the principle of Schwoebel v. Storrie, 76 N.J. Eq. 466, 469 (Ch. 1909): "When facts are brought to the knowledge of the person contemplating the purchase of the record title which are sufficient to appraise him of the existence of an outstanding claim of title, and a reasonable investigation of such facts would necessarily discover the existence of such outstanding title, the purchaser is put upon inquiry and charged with notice of the facts which a reasonable diligent inquiry would have ascertained."

63 N.J. Super. at 366.

The Appellate Division's decision in Colegrove was consistent with Chief Justice Vanderbilt's holding in Scott v. Stewart, 1 N.J. 60 (1948). The Chief Justice had before him a suit by the niece of an elderly man; the niece had an agreement with her uncle to pay his estate taxes; for his part, the uncle would convey the property, or at least a mortgage on the property, to his niece's sister (the niece's husband was in "the Assylum," so any conveyance to the niece would have been unwise). Subsequently, the uncle agreed to sell the property to a third party, the Stewarts. According to the Court, "Mrs. Stewart admitted that at the time of the making of the agreement and of the deed both her husband and she were told by [the uncle] of the deed to the [niece's sister]." Id. at 62. Accordingly, the Chief Justice decreed that since "the defendants Stewarts took with notice" their interest must be subordinated to the niece's.

The same year as Chief Justice Vanderbilt decided Scott, a Law Division Judge decided McLaren v. American Tel. & Tel. Co, 1 N.J. Super. 600 (Law Div. 1948). McLaren also involved an unrecorded instrument, the instrument being an easement to the telephone company. The Court set out the question before it as follows: "[W]hat is the effect of the failure to record the instrument of June 18th, 1923 in the Clerk's Office of the County of Morris?" The court answered its own question: "The plaintiffs [the now owners] took title to the premises in question with notice of the defendant's rights and subject thereto." Id. at 607. (The telephone

company had put up easily visible poles). "The failure of the defendant to record the instrument does not affect its rights in the circumstances." Id.

The reasoning of Chief Justice Vanderbilt in Scott and the trial court in McLaren was consistent with New Jersey law as far back as the nineteenth century. See Essex County Nat'l Bank v. Harrison, 51 N.J. Eq. 91 (Ch. Div. 1899). In Essex County, Vice Chancellor Mahlon Pitney (later Mr. Justice Pitney of the United States Supreme Court) was dealing with what he characterized as a "deed which was not recorded." (Actually, the deed was not properly recorded.) The complainant, a judgment creditor argued that the "deed is absolutely void as against a subsequent judgment creditor or *bona fide* purchaser not having notice thereof." Id. at 96. The complainant further contended that "notice" meant "notice of the . . . instrument," and that "possession of the defendant . . . could not have the effect of giving complainant notice." The Vice Chancellor disagreed:

> The complete and simple answer to this argument, as it seems to me, is that the effect of the constructive notice, due to possession, is a notice of everything which a party interested in the premises would get by inquiring of the party in possession. **In other words, the actual possession of the premises puts any person having a claim, or seeking to acquire title thereto, to an inquiry of such person as to what his title actually is; and until the complainant has actually made inquiry and has received an untrue answer from Mr. Edwards in this case, he is not in a position to say that he is not chargeable with notice of what his actual right and title was and is. Non constat, if he had inquired of Mr. Edwards, he would not have told him the precise situation of affairs.** The authorities in this state on this topic are uniform, and, I think, fully support the defendants' position. Havens v. Bliss, 26 N.J. Eq. 363; Wanner v. Sisson, 29 N.J. Eq. 141, 150; Cooke v. Watson, 30 N.J. Eq. 345, 352.
>
> For these reasons, it seems to me that the complainant's case fails.

Id. (Emphasis added).

More recently, the Appellate Division re-affirmed the rule in a case similar in some respects to this case. See Howard v. Diolosa, 241 N.J. Super. 222 (App. Div. 1990). In Howard, Joseph Diolosa had obtained a mortgage from the Nanuet National Bank to

buy a house at an unfairly low price from an impoverished custodian, who was in danger of losing his home. In affirming a trial court decision adverse to the Nanuet, Judge Cohen began by reciting the law in this area:

> Constructive notice may be brought home to a mortgagee by known circumstances. See Henion v. Monahan, 110 N.J.Eq. 361, 363, 160 A. 566 (E. & A.1932). **If a purchaser or lienor is faced with extraordinary, suspicious, and unusual facts which should prompt an inquiry, it is equivalent to notice of the fact in question.** Tantum v. Green, 21 N.J.Eq. 364, 367-369 (E. & A. 1869). See the various thoughtful opinions in Lesser v. Strubbe, 56 N.J.Super. 274, 152 A.2d 409 (Ch.Div.1959), rev'd 67 N.J.Super. 537, 171 A.2d 114 (App.Div.1961), aff'd o.b. 39 N.J. 90, 187 A.2d 705 (dissent at 91, 187 A.2d 705 (1963)). What facts did the bank know when it took Diolosa's mortgage?

Id. at 232. Then Judge Cohen answered his own question:

> One way or another, the picture presented to Nanuet should have been a troubling one. Nothing about it made much sense. It should have alerted a potential mortgagee with knowledge of the terms described by Diolosa to the likelihood that Diolosa's purchase was irregular and voidable.
> Bank loan officers are not detectives or social workers, and have no obligation to investigate an apparently regular transaction for latent defects or equities. This case is different. Here, Diolosa described to the loan officer a purchase transaction which all but screamed its irregularity and unenforceability. **A bank can choose to take property for loan security in such circumstances, but only at the risk that its lien will be subject to the equities arising out of the irregular transaction whose likely voidability was revealed to the loan officer by the prospective borrower.**

Id. at 234.

On the rule that possession by a party who does not have record ownership constitutes notice, see in addition, Carteret Properties v. Vanity Donuts, 49 N.J. Super. 116, 128 (App. Div. 1967); Martinique Realty Co. v. Hull, 64 N.J. Super. 599, 605 (App. Div. 1960); Clawans v. Ordway Bldg.& Loan Ass'n, 112 N.J. Eq. 280, 284 (E.& A. 1932). On the rule that partial facts or suspicious circumstances constitute notice, see also EMC Mortg. Corp. v. Chaudbri, 400 N.J. Super. 126, 146 (App. Div. 2008); Vander Weert v. Vender Weert, 304 N.J. Super. 339, 350-351 (App. Div. 1997); Howard v. Diolosa, 241 N.J. Super. 222, 232 App. Div. 1990); Henion v. Monahan, 110 N.J. Super. Eq. 361, 364 (E. & A. 1932); Schwoebel v. Strorrie, 76 N.J. Eq. 466

(N.J. Ch. 1909); Green v. Morgan, 21 A. 857 (Ch. Div. 1891); and Tantum v. Green, 21 N.J. Eq. 364 (E. & A. 1869).

Not surprisingly, the leading treatises on the subject agree. New Jersey Practice's Law of Mortgages, written by Roger Cunningham and Saul Tischler in 1975, stated that:

> If the subsequent claimant has actual knowledge of the existence of an unrecorded instrument creating a prior interest in the property in question, he clearly has sufficient notice to make the instrument valid as against him. Indeed, this is the one case where everyone would agree that "actual" notice exists. **But the subsequent claimant is also chargeable with notice if he has actual knowledge of facts which would lead a reasonable man in his position to make further inquiries with respect to the possible existence of a prior interest in the property, provided the existence of such interest would be revealed in the course of a reasonable investigation**. . . . **Thus, it may be said with substantial accuracy that whatever places a party under a duty to inquire amounts to notice if the circumstances are such that the inquiry, if made, would lead to discovery of the requisite facts**. The word "duty" is here used in a special sense, of course; there is a "duty" to make such inquiries as a reasonable man, acting in good faith, would deem necessary for his own protection.
> 29 N.J. Practice § 109 (1975) (emphasis added).[115]

In addition, in the New Jersey Land Title Institute's Third Edition of the Handbook of New Jersey Title Practice, Lawrence Fineberg notes:

> It is true that the recording system established by the Act is the *primary means* by which one acquiring an interest in reality may acquaint himself with the status of title. However, the land records are *not* necessarily one's *exclusive source* of title information. For example, it is well-settled that a person acquiring an interest in land is charged with notice of what would be gleaned from a reasonable inspection thereof.

§ 707. Actual Notice. (3d Ed. 2005).

Accordingly, even though the Lenders did not act in bad faith, the mortgage cannot stand.[116]

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[115] This section was maintained verbatim and transferred to §10.11 of the newest edition of New Jersey Practice's Law of Mortgages, published in 2000 by Myron Weinstein.

[116] The correctness of this ruling is seen by Gaskill v. Wakes, 36 N.J. Eq. 527, 534 (E&A 1883) and Heyder v. Excelsior Building Loan Association, 42 N.J. Eq. 403, 408 (E&A 1887) two 19th century cases relied upon the **Lenders**. In Gaskill, the Court held that the subsequent purchasers "had a right to rely on the condition of the

B. Does Mr. Mocco, nevertheless, bear Responsibility for the Lenders' loss?

There are three procedural questions the court is confronted by in the section of the opinion. First, the Lenders have filed a counterclaim against Mr. Mocco, but the counterclaim does not ask for damages. Rather, it seeks contribution, indemnification and "such other and further relief as the court may deem just and equitable". Second, Mr. Mocco's damages case against the Lenders is in Federal Court. Third, the undersigned has designated this phase of the trial as the "ownership" phase.

Nevertheless, Mr. Mocco has been aware, at least since the start of the trial, if not sooner, that the Lenders have been seeking damages or at least equitable relief from him if they lose the ownership portion of the case. (If the Lenders win the ownership portion, there would be no basis for the court to consider damages.) Mr. Mocco has come to a court of equity. "A party who resorts to equity … exposes himself to the operation of equitable principles and must submit to an equitable resolution on the issues raised." Lasure Technology-Northeast, INc. v. Klingbeil Holding Co., 137 N.J. Super. 353, 357 (App. Div. 1975). Mr. Mocco himself asserted clais for "… imposition of a constructive trust upon any Mocco property still in their [the Licatas] possession…" Judicial economy would be ill-served if the court did not address this issue at this time. All aspects of a 17 year old case should be addressed at the conclusion of a four month trial. As to the pleading defect - - if it can be called that - - Rule 4:9-2 allows the court to permit amendments to conform to the evidence

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records," but conditioned the holding by saying it could only reach that conclusion, "**In the absence of any other notice**… In Heyder, the Court held in favor of the subsequent purchaser prevailed, but cautioned that, "Doubtless, circumstances may, and frequently do, arise to **put the purchaser upon inquiry and charge him with notice**. It seems to me that nothing appears in this transaction which should have put this purchaser upon further inquiry. Thus, even the Lenders' cases, upon close reading, do not help the Lenders on the notice issue.

1. Did the Lenders Act in Good Faith?

a. Neither Mr. Berreth nor Centrum was a knowing participant in a scheme perpetrated by Mr. Licata and/or his associates.

No impartial reader of the record herein can come to any conclusion but one as to Mr. Berreth and Centrum: Mr. Berreth and Centrum were ignorant dupes relying on Horizon and, to a less extent, Mr. Licata and his associates. (More accurately, they were relying on Mr. Licata's associates, as Mr. Licata was apparently somewhat estranged from Mr. Podell and Mr. Mournes.) If one were to characterize Mr. Licata and his associates as having participated in a conspiracy,[117] Mr. Berreth and Centrum must be characterized as **victims, not co-conspirators.** M 189) demonstrates Mr. Berreth's poor judgment. It does not demonstrate that he was a knowing co-conspirator.

b. Mr. Berreth and Centrum acted in actual good faith.

The court uses the phrase "actual good faith", in the colloquial sense. As set out above, that under real estate law any lender with actual notice of an adverse claim may be disqualified as a good faith lender, thereby invalidating any mortgage. Nevertheless, a court of equity must recognize that Mr. Berreth and Centrum acted in good faith, with totally clean hands.

c. Mr. Cohn was not a knowing participant in a scheme perpetrated by Mr. Licata and/or his associates.

The court will not unduly lengthen this already over-long opinion by restating all of its observations concerning Mr. Cohn's testimony. One fact above can illustrate why the court cannot conclude that Mr. Cohn was a knowing participant in a fraud perpetrated by Mr. Licata and/or his associates: eight reputable lawyers - - Mr. Schreiber, a partner in a "Top Ten" law

[117] The court uses the word "conspiracy" and in the colloquial sense. The court does not mean to imply that anyone participated in a conspiracy as defined by the law.

firm; Aegis Frumenti, a partner in another prestigious law firm; Daniel Shepro, Kenneth Sauter, David Duval, Bruce Berreth, Armando Molina, and Frank Tortouro - - all wrote or spoke to Mr. Cohn in a manner which would suggest that the transaction, while difficult and complicated, was in compliance with the law. Mr. Cohn may have been negligent - - the attorneys' letters, read carefully, certain enough caveats to cause a competent title searcher to tread cautiously - - but he was not dishonest. The traditional deference non-lawyers give to lawyers in complicated legal matters explains Mr. Cohn's actions far better than any theory that he may have been induced by dishonest means.[118]

Another way to assess the unwitting nature of Mr. Cohn's participation in the Licatas' scheme to monetize Mr. Licata's interest is to state the obvious: the Mocco-Licata relationship was Byzantine and bizarre. It has taken **eighteen judges** and approximately **thirty law firms to attempt to unravel it.** See pages 1 and 2 above. Several very sophisticated lawyers believed Mr. Licata well past the time they arguably should have known better. To blame a mid-level salaried title searcher for failing to understand this relationship would be to attribute to that title searcher a level of knowledge and legal acumen for greater than he possessed. He erred; he did not intentionally participate in a fraud.[119]

d. Mr. Cancellieri was not a knowing participant in a scheme perpetrated by Mr. Licata and/or his associates.

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[118] Obviously, the court is bothered by Mr. Cohn's statement that he does not remember Mr. deJong telling him that Mr. Licata did not own the property and advising him to call Mr. Scarpone. As set out above in Section VII (j), the court prefers to believe Mr. Cohn did not have a good memory, as opposed to him being dishonest.

[119] On possible obstacle to the court's conclusion as to Mr. Cohn's honesty is M 238 the March 25, 2006 e-mail concerning Mr. Licata's bank fraud indictment, a copy of which was sent to Mr. Cohn, together with a link to M 151, a lengthy March 24, 2006 newspaper article discussing the indictment. That article would have caused most people to seriously reconsider any involvement in a Licata transaction - - and Mr. Cohn stated that he did not remember receiving the e-mail. The court chooses to believe Mr. Cohn and conclude that he was an honest man who either (a) forgot receiving M 238 and M 151; (b) did not properly focus on e-mails; and (c) merely skimmed the e-mail, but consistent with his somewhat narrow view of his role as little searcher, did not take the time to "connect the dots". The court is also bothered by Mr. Cohn's knowledge of Mr. Mournes' extraordinary debts. The court chooses to believe Mr. Cohn was not properly cautious in his instance, as opposed to being dishonest.

Was Mr. Cancellieri a willing part of a scheme or an unwitting dupe? The answer is that Mr. Cancellieri owned a small business, was hunting for potential clients, and that Mr. Mournes appeared to be a potential client/moneymaker. Mr. Cancellieri characterized himself as a salesman, who made money only by being able to "eat what I killed". Mr. Cancellieri invested heavily in the Mournes connection, giving Mr. Mournes carte blanche to use his office, his staff, etc. The Mournes-Podell-Licata connection provided substantial fees and promised even more spectacular transactions (one involving $80,000,000). The transaction at issue was the largest in the company. Obviously, he badly wanted to "close the deal". Was he careful and prudent in this transaction? No. But did he rely on Mr. Cohn and lawyers such as Dale Schreiber? Yes. This was a man with either a one or two year community college education. He was far less sophisticated in title work than Mr. Cohn, who was himself far less sophisticated in complex legal bankruptcy matters than the several lawyers in this matter. Like many people with potential profits in front of their eyes, he may have been somewhat blinded by the glitter of the profits and gone slightly over the line, but he was not a knowing participant in a scheme.

e. Horizon acted in actual good faith.

David Cohn and Dino Cancellieri are extraordinarily dissimilar. Mr. Cohn is a methodical, detail driven middle management career title searcher. Mr. Cancellieri is a dynamic gregarious entrepreneur with no interest in, and little knowledge about, the details of title work. Mr. Cohn spent his entire career as a title searcher. Mr. Cancellieri is a mortgage broker who only briefly ran a title company. There is only one similarity between the two: neither man knowingly committed a fraud at the behest of the Licata interests. Perhaps Mr. Cohn was too narrowly focused on "public records", and Mr. Cancellieri too broadly focused on the pot of gold

profits to be realized through the Mournes-Licata transactions, but neither they nor Horizon can be fairly characterized as consciously violating the law.

Having said all of the above, it must be noted that in some respects Mr. Cohn, Mr. Cancellieri, and, therefore, Horizon, although acting in actual good faith, knew that there was an objection to SWJ's claim of ownership. They knew Mr. Mocco collected the rents, was litigating with Mr. Licata on a closely related manner, was winning that litigation, and would likely assert a serious claim concerning the property. They had to know that Mr. Licata, Mr. Mournes, and Mr. Podell were not Warren Buffet or Bill Gates. Thus, although Horizon cannot be said to have acted in bad faith Horizon believed it was insuring a controverted title, as opposed to insuring a property with 100% confidence that it was correct. The claim that Horizon was to some extent "gambling" that Mr. Licata and his associates and their counsel were correct, is not inaccurate. This is, however, not the same as saying they acted in bad faith.

f. Accordingly, Chicago cannot legitimately be accused of being a knowing participant in a scheme perpetrated by Mr. Licata and/or his associates.

Mr. Scarpone admitted in open court that which is obvious: as between Horizon, Centrum and Chicago, the entity which had the least knowledge of the Licata machinations was Chicago. It follows, axiomatically, that since neither Centrum nor Horizon can legitimately be accused of being a knowing participant in a fraud perpetrated by Mr. Licata and/or his associates, there can be no such claim as against Chicago.

g. Similarly, the court must find that Chicago acted in actual good faith.

It follows, inexorably, that a court of equity must find that Chicago acted in good faith and that its hands were totally clean. It was, quite simply, a victim.

h. The Licata interests (including the Lenders who took through him) are not barred by Mr. Licata's failure to include FCHG IV in the Bankruptcy proceeding.

A court could be tempted to penalize Mr. Licata for his failure to include FCHG IV in the Bankruptcy proceeding. One could call it a fraud on the court for a debtor to file for bankruptcy protection, receive several adverse orders and opinions, and then "discover" another asset the debtor seeks to monetize, despite the original Bankruptcy Court rulings. Once could also denominate the maneuver as "forum shopping". On the other hand, the court believes the failure to include FCHG IV in the Bankruptcy proceedings was simple attorney error. (See page 21 above). There was no testimony that the omission was intentional or in any way designed to help Mr. Licata or harm Mr. Mocco. Mr. Licata, at that time, had no way of knowing either that the Connecticut Bankruptcy Court would transfer his case to Judge Colleen Brown in Vermont or that Judge Brown would eventually decide that he did not own the properties in FCHG I, III, X, XI, and XIII. The omission was a simple mistake with no malice or forethought. It should have no legal consequences to the Licatas or the Lenders who take their rights from Mrs. Licata. (Mr. Licata has an argument that he need not have listed FCHG IV because Mrs. Licata, not him, owned FCHG IV; perhaps, but whether or not the court believes that argument, it will not penalize anyone for the omission.)

Since Mr. Licata cannot be accused of an intentional wrong on this score, it is obvious the Lenders who took their rights from the Licatas cannot be, even if the Licatas' wrongs are attributable to the Lenders.

i. The Lenders are not barred by their subsequent seizure of the escrow proceeds.

When the Centrum loan closed, approximately $6,500,000 was put into escrow, primarily to pay off Transatlantic's successor, GMAC. GMAC received none of the money. The bulk of the money was rightly seized by the Lenders since the loan was in default.

This court has determined that nothing which transpired regarding the Transatlantic loan will bar the Lenders. The court makes this decision because the Lenders did not act illegally, and GMAC has not been harmed as the mortgage remains valid and Mr. Mocco continues to pay interest on their mortgage at above market rates.

j. The Lenders, Horizon and Chicago are not barred by the violation of Judge Levy's Order.

As set out above, Judge Levy's order of September 21, 2001 reads as follows:

> Pending further order of this Court, or should the Bankruptcy Court assume jurisdiction of this matter, the order of the Bankruptcy Court, no party or any affiliate of a party shall transfer, lien, or encumber any interest in any of the Holding Equity LLCs or any properties owned in the name of any such Holding LLCs. The Order set forth in this paragraph does not apply to the property known as the Atrium.[120]

Mr. Mocco argues that the Lenders, Horizon and Chicago violated that order in May 2006. On the other hand, the viability of the order was conditioned upon a critical phrase: "should the Bankruptcy Court assume jurisdiction of this matter, the order of the Bankruptcy Court [approving a sale or lien]…" One could argue that the Bankruptcy Court **had** assumed "jurisdiction of this matter" once Mr. Licata filed for bankruptcy in Connecticut. On the other hand, one could also argue that the Bankruptcy Court **had not** assumed "jurisdiction of this matter" if one defines FCHG IV as "this matter" and one remembers that Mr. Licata, by error, did not list FCHG IV as an asset in his Bankruptcy filing. Only if one concludes that (a) the

[120] Judge Levy was referring to the Mocco Bankruptcy, since the Licata Bankruptcy Petition had not yet been filed. The difference is immaterial since "the order of the Bankruptcy Court" does not identify a specific Bankruptcy Court.

Bankruptcy Court did "assume… jurisdiction of this matter" and the Bankruptcy Court did order the sale through the orders set out on pages 28 to 42 above, could one conclude that the Licata interests acted consistently with Judge Levy's order. This court strongly believes, for all the reasons set out above, that the Bankruptcy Court never intended to allow Mr. Licata to sell his claim to the FCHG assets free and clear of Mr. Mocco's claims. Also, as set out above, Judge Shiff came to the same conclusion. Thus, Mr. Licata clearly violated Judge Levy's order by selling, or trying to sell, all right, title and interest in FCHG IV.

The conclusion that the sale, and loan, violated Judge Levy's September 21, 2001 order does not lead to the conclusion that Horizon, Chicago, and the Lenders must be barred. The various lawyers involved appeared to have a good faith, albeit erroneous, view of the intent of Judge Shiff's order. Unfortunately, each lawyer involved represented a client whose interests were served by a view that Judge Shiff meant to bar all of Mr. Mocco's claims. The lawyer's clients acted in actual good faith, albeit incorrectly. Thus, it court will take into account the September 21, 2001 order but will not rule that the one violation bars the Lenders, Horizon and Chicago. On balance, each one acted in good faith, erring only in reliance on lawyers who themselves erred.

2. Is Mr. Mocco liable for causing damage?

a. Mr. Mocco misled and damaged Centrum, among others.

Mr. Mocco, perhaps in desperation, retained an unreliable man as his "consultant" and kept dealing very publicly with that man for quite some time. That decision precipitated all the losses herein.

Mr. Mocco and Mr. deJong then insisted that the 3-page agreement be drafted and kept highly secret. If First Union had known of the 3-page agreement, it would not have gone ahead

with the closing. See Ms. Morrison's testimony. The court need not decide if Ms. Morrison is correct when she asserted that First Union would have violated Federal Regulations if it had gone ahead with the closing after learning of the 3-page agreement. It is sufficient for the court to know that First Union would not have proceeded with the closing if it knew of the 3-page agreement. [121] See also Mr. Buechler's testimony that he did not know of the 3-page agreement when he represented Mr. and Mrs. Mocco in the Mocco Bankruptcy and assured Judge Ginden that there was no relationship, family wise, otherwise, insider wise as defined under the Bankruptcy Code between First Connecticut and the debtors. Mr. Mocco's dishonesty in dealing with First Union would not **alone** cause him to owe damages herein because it is not clear that First Union lost money on account of his dishonesty. Presumably, First Union wanted $22,000,000 and could have structured the closing differently if it were necessary to do so.

On the other hand, EMP, which would not have gone ahead with its loan if it were aware of the 3-page agreement - - see Mr. Fichtenholtz' testimony on this matter - - did suffer damages. See the very informative February 27, 2015 letter to the court from Corey Buland, Esq., counsel to EMP, explaining how EMP was harmed by Mr. Mocco's deception:

> EMP has been severely harmed as a result of this deceit, particularly the concealment of any purported agency agreement between Mr. Licata and/or FCCG, on the one hand, and Mr. Mocco, on the other. Like First Union and any lender, EMP had a right to know to whom it was lending money so that it could evaluate the borrower's credit worthiness, character, and litigiousness. If the "truth" was that Mr. Licata was acting as Mr. Mocco's agent, EMP loaned money on the basis of false information.
>
> ……………..
>
> Mr. Mocco's claim to be the real party in interest has caused many millions of dollars of financial damage to the Titan Parties—including, of course, non-payment of loans and having to defend a 16-year lawsuit by Mr. Mocco premised on a purported relationship that, if true, is

[121] The court believes Judge Sessions was being overly technical when he held that since First Connecticut Consulting Group had bought the First Union debt, it only mattered that First Connecticut Consulting Group was not misled.

precisely the opposite of what the Titan Parties were told and believed. To be clear, EMP, had it been informed by Mr. Mocco or Mr. Licata, or otherwise been aware of, the purported agency relationship, would not have entered into the transaction as structured.

……………...

The bottom line is that EMP loaned more than $20 million to FCCG based on representations that FCCG was the only party in interest and that it would own most of the real estate securing the obligation. More than 18 years later, some of the loans are still outstanding and the individual now holding the assets underlying the loan—Mr. Mocco—refuses to be bound by the terms. This goes to the costliest harm caused to the Titan Parties: Mr. Mocco's deception (assuming his allegations of agency are true) prevented the Titan Parties from ensuring that all parties now alleging to be its borrowers had signed all the relevant documents; Mr. Mocco subsequently used the lack of his signature to disclaim responsibility for the remaining unpaid debt and more broadly to pick and choose, after the fact, which loan terms he wants to be bound by.[122]

In addition, of course, Mr. Mocco kept the Escrow Agreement secret: It stated in bold print:

"Escrow Agent Shall be the Only One to Hold Signed Copies of the Documents… and Shall Not Release Those Signed Documents or Copies to Anyone… Nor Reveal the Existence of this Agreement, and the Document to Anyone Without Prior Written Mutual Consent of James J. Licata and Peter M. Mocco."

If Mr. Mocco's transactions had not been so shrouded in secrecy as to allow Mr. Licata to peddle his alleged interest to the outside world, Centrum would not be in the position it is in today of having made a worthless loan.

Even Mr. Licata himself was seemingly fooled by, and suffered damage on account of, Mr. Mocco's scheming. Mr. Licata apparently believed he had an ownership interest in the FCHG entities because he filed tax returns on FCHG starting in 1996. For all the reasons set out above, the court cannot rule that Mr. Licata actually owned the FCHG entities, but it can rule that Mr.

[122] As set out above, the Moccos did not sign personal guarantees on the EMP loan while the Licatas, who did not own the property, were forced to sign. Of course, the court is not stating that EMP will prevail in its lawsuit with Mr. Mocco, as that suit has been stayed, and the court does not know any of the details. The court does know that Mr. Mocco has claimed in that suit that EMP, in collusion with Mr. Licata, stole from Mr. Mocco, vastly overcharged Mr. Mocco, violated the usury laws, and owes substantial damages.

Mocco misled virtually everyone, apparently including his co-schemer.[123] (The court is not implying that Mr. Mocco cost Mr. Licata more money than Mr. Licata cost Mr. Mocco; that accounting can never be done.) In addition to the filing tax returns on the FCHG properties, and paying enormous legal fees to defend those tax returns, the Licatas signed **personal guarantees** on the FCHG properties at the behest of EMP. Would they have been asked to sign personal guarantees if EMP knew they were not owners? Of course not. Would they have signed personal guarantees as mere consultant or agents? Of course not. Would EMP insisted on personal guarantees by the Moccos if the paper work were clear? Of course.

Further, the FCHG IV shareholder record book was so Byzantine, to use Mr. Shaufhauser's felicitous phrase, that no one could tell who owned the entities. (This is the least important of Mr. Mocco's obfuscations because Mr. Cohn did not read the shareholder record book.)

Finally, the documents signed to effectuate the Transatlantic loan in 1997 did not mention either the 3-page agreement or the escrow agreement. The paper work was clearly incomplete and confusing. Neither that paper work nor any other documents insured that the outside world would know who owned the property.

Perhaps the most honest statement about how Mr. Mocco dealt with any of the banks, whether First Union, EMP or Transatlantic, was made by Mr. deJong in a conversation with Mr. Mocco:

> I just don't think it's possible to be consistent because the bank has been told so many **different things, there's no way of being consistent with any of us now**, no matter what you say…" (May 20, 1997 tape).

[123] That Mr. Licata filed tax returns on the FCHG entities from September 1996 on and signed personal guarantees to EMP is one of the great puzzles of the case. The Lenders argue that it proved Mr. Mocco never told Mr. Licata that Mr. Licata was an agent or nominee. Equally plausibly, Mr. Licata may have been confused by all the wheeling and dealing between Mr. Mocco and him. The court will quote Judge Colleen Brown, who found that "these strands [between Mr. Mocco and Mr. Licata] have become so entangled that **even the parties have a hard time separating.** She summed up the relationship as follows: "Oh, What a Tangled Web We Weave, **When First We Practice to Deceive!"**

On a related matter, - - although this is not a basis this court's ruling - - Mr. Mocco told the I.R.S. that the Bankruptcy Plan of Reorganization could not be consummated **"if FUNB (First Union) was aware that FCCG was acting for Mocco**". This was done to cause the I.R.S. to allow a tax loss of $9,140,609, which it did. See L-367. At a tax rate of close to 40%, this amounted to over $3,000,000 of tax benefits to Mr. Mocco. Further, Mr. Mocco may have achieved a tax benefit of approximately $2,000,000 based on approximately 30% of the $5,759,406.18 taxes allegedly avoided by Mr. Mocco, as set out in the above discussion on the **discharge issue**). (The Lenders assert the entire $5,759,406.18 was wrongfully saved.) Mr. Mocco admitted at trial that the "forgiveness of debt as the forgiveness between what **through my** nominee I purchased the First Union debt for." That is not a Bankruptcy discharge. The Lenders are not exaggerating when they assert in their April 6, 2015 letter brief, "… the Lenders demonstrated through Mr. Mocco's own **testimony that the Mocco parties took positions at the enormous expense of the U.S. taxpayer**s that are in contravention of law". Once more, the tax issue is merely illustrative, and not a reason in and of itself for the court's ruling.

Thus, Mr. Mocco's deliberate obfuscation of the relationship between him and Mr. Licata (a) misled First Union, (b) misled and caused a loss to EMP, (c) misled and caused a loss to Centrum, (d) to some extent misled and possibly caused a loss to the Licatas, (e) misled and arguably caused a loss to the U.S. Government, and (f) misled Transatlantic. The Lenders do not exaggerate significantly when they assert on page 2 of the post-trial brief that Mr. Mocco defrauded 16 people and entities about the ownership of FCHG IV: (1) EMP; (2) EMP's lawyer; (3) First Union and its lawyer; (4) his own lawyers; (5) Proskauer; (6) Judge Gindin; (7) his other creditors; (8) the JCRA; (9) Nomura Capital; (10) Transatlantic; (11) Judge Brown; (12) Judge Shiff; (13) SWJ; (14) Horizon; (15) Centrum; and (16) The Assignee Banks. Whether or not the

Lenders' list is slightly exaggerated, it is undeniable that if Mr. Mocco had asked differently, they would have avoided the loss at issue.

b. Thus, Mr. Mocco was partially responsible for the losses caused by his intentional acts.

These intentional decisions of Mr. Mocco to hide his ownership accrued to his substantial financial benefit in that they disguised his ownership of FCHG IV when it was to his benefit to do so. These decisions also caused substantial loss to Horizon and Centrum (and EMP, if not also the U.S. Government and Mr. Licata). He must bear some responsibility.

One should not be able to escape liability if one creates what could be characterized as a fraud or, put more charitably, intentionally creates a situation in which an innocent third party suffers a serious loss in reliance thereon. Mr. Mocco, a shrewd lawyer who knew the consequences of what he did, created several such documents - - all the filings in his Bankruptcy case which indicated that Mr. Licata owned the FCHG entities, as well as the shareholder stock book. Centrum relied on these documents, other than the shareholder record book. Mr. Mocco should not be heard to argue that he should not be liable, at least in part, for Centrum's loss.

The court relies solely on New Jersey case law for its decisions herein. A more venerable authority states "**for whatsoever a man soweth, that shall be also reap**". 6:7. The King James Version of the Bible. Galatians 6:7.

Mr. Mocco argued that many, if not most, real estate transactions are structured so that the name of the true owner of the property cannot be easily learned.[124] This argument - - that others

[124] Mr. Mocco testified that he first got the idea of concealing his name on real estate transactions when he learned that the Rockefellers had bought land in Williamsburg by using others' names. Mr. Mocco did the same to acquire property to expand the land he owned around his personal residence.

do it - - is of no legal merit. That others do it does not clothe the practice with impunity if losses to innocent third parties occur.

c. Mr. Mocco is responsible to the Lenders for his agent's wrongs.

Mr. Mocco designated Mr. Licata as his agent in the 3-page agreement, the Escrow Agreement and in the shareholder record book. Indeed, if Mr. Licata were not Mr. Mocco's agent, Mr. Licata would have been the owner of the FCHG properties, a proposition Mr. Mocco has been vigorously arguing against for seventeen years. His agent Mr. Licata acted wrongfully in selling FCHG IV to SWJ. When an agent acts wrongfully to the detriment of an innocent third party, the agent's principal must bear responsibility.

The law in this area was explained in a real estate unrecorded agreement dispute which bears some resemblance to this case. In Zucker v. Silverstein, 134 N.J. Super. 39 (App. Div. 1975) Jerome Ross had entered into a partnership in 1967 with three other men, pursuant to which Mr. Ross was entitled to a 50% ownership interest in a real estate partnership . The agreement, like the 3-page agreement herein, was not recorded. Then in July 1972, in a recorded deed, he conveyed all of his (and his wife's) interest in the same real estate to a trustee, Harry Silverstein. Less than a month later, Mr. Ross made a written assignment for the benefit of creditors. When Mr. Ross became seriously ill the veteran lawyer Saul Zucker was appointed by a court as his assignee. Mr. Zucker then sued Mr. Silverstein for a return of the land in order to benefit the creditors. Mr. Ross' ex-partners sought to intervene, arguing that all Mr. Ross could convey was his 50% interest. The trial court dismissed Mr. Zucker's complaint, but the Appellate Division reversed:

> In our view, the trial judge would have been amply justified to infer from all such proofs that Ross, in executing the deed to Silverstein as trustee, either preferred respondents [the

> ex partners] as creditors in violation of *N.J.S.A.* 2A:19-3 or that it was part of an illicit agreement between Ross and respondents to preserve some of Ross' assets for him.
> In addition, regardless of all the statutes herein cited and discussed, the trial judge had the inherent equitable power to find from the proofs that appellant [Mr. Zucker], who represents all creditors, was not chargeable with Ross' machinations. **Even if he also concluded that respondents were innocent of any wrongdoing and that appellant failed in his proofs, as between two innocent groups equity will impose the loss on the group whose act first could have prevented the loss.** *Cambridge Acceptance Corp. v. American Nat. Motor Inns, Inc.*, 96 *N.J. Super.* 183, 206 (Ch. 1967), aff'd 102 *N.J. Super.* 435 (App. Div. 1968), certif. den. 53 *N.J.* 81 (1968). Another maxim applies, "Equity aids the vigilant, not those who slumber upon their rights." *Lang v. Hexter*, 137 *N.J. Eq.* 100 (Ch. 1945), aff'd o.b. 138 *N.J. Eq.* 478 (E. & A. 1946). Under the proofs here submitted the trial judge could properly look with suspicion upon the staleness of the Ross' conveyance to Silverstein as trustee and respondents' assertions of their rights. He could reasonably infer that general creditors were misled by the Essex County Register's record which showed the realty in question to be in Ross' individual name.

Needless to say, the Lenders herein, were "not chargeable with [Licata's] machinations," and "that between two innocent groups [the Moccos and the Lenders] equity will impose the loss on the group [the Moccos] whose act first could have prevented the loss."

Just six years ago, the United States Bankruptcy Court for New Jersey re-affirmed the Zucker language. See Dwek v. Sun Nat'l Bank (In re Dwek), 2010 Bankr. LEXIS 1859 (Bankr. D.N.J. Sept. 17, 2009), which concerned a dispute between relatives of a fraudster (Mr. Dwek) and a bank which had loaned the Dweks money. The Dwek relatives had been marginally connected in Mr. Dwek's frauds, so the Bankruptcy Court did not have to rely explicitly on the Zucker language concerning innocent parties. Nevertheless, before finding that the relatives were not innocent parties, the Bankruptcy Court did state:

> The Dweks also argue that "until the 25th hour" the Bank was in the best position to prevent the fraud perpetrated by Solomon [Dwek]. In support, they note **that New Jersey courts have long held that where there are multiple innocent parties, it is the party who could have prevented the loss first that must bear the burden of the los**s. Zucker v. Silverstein, 134 N.J. Super. 39, 52, 338 A.2d 211 (App. Div. 1975) ("as between two innocent groups equity will impose the loss on the group whose act first could have

> prevented the loss."). The Court finds that equitable maxim to be inapplicable here. The task of the Court in this case is not to allocate loss among innocent parties; it is to allocate loss among parties of varying degrees of culpability. Therefore, there is no equitable bar to stop the Bank from raising ratification as a defense in this case.

The leading equity treatise in New Jersey agrees: See the Guidebook to Chancery Practice in New Jersey which entitles a subchapter, "WHERE A LOSS MUST BE BORNE BY ONE OF TWO INNOCENT PERSONS EQUITY WILL IMPOSE THE LOSS ON THAT PARTY WHOSE ACT FIRST COULD HAVE PREVENTED THE LOSS."

The equitable maxim at issue is a major tenant of America jurisprudence. As the United States Court of Appeals for the Tenth Circuit has explained:

> The equitable maxim that where one of two innocent persons must suffer by reason of the fraud of a third person, **the party whose acts, omissions, or negligence enabled the third person to consummate the fraud should bear the loss**, is a fundamental theory upon which the Uniform Commercial Code rests. See in this circuit, Menichini v. Grant, 995 F.2d 1224 (3d Cir 1993) and see also, Brownlow v. Aman, 740 F.2d 1476 (10th Cir. 1984)

Mr. Mocco entrusted Mr. Licata to act as his nominee or agent, and retained him as his agent or nominee for some time. Many years later, the Lenders, who did not empower for Mr. Licata, suffered as a consequence of his wrongs. Mr. Mocco must bear some of that loss.

d. Is it unfair to Mr. Mocco that he be liable to the Lenders for the damages he caused them?

When Mr. Mocco drafted the 3-page agreement he was enmeshed in one of the largest, if not the largest, Bankruptcy case in New Jersey history. His largest creditor claimed to be owed approximately $70,000,000. He stood to lose his entire empire, along with his personal residence. First Union did not believe Federal law allowed it to deal with a party related to Mr. Mocco. By cleverly drafting, and keeping secret, the 3-page agreement, and later, the Escrow Agreement, he was able to: (1) keep every property he owned; (2) pay his primary creditor less than one half of what he owed; (3) emerge from Bankruptcy: (4) avoid giving personal

guarantees to EMP, as did his wife (while Mr. and Mrs. Licata who did not own the properties had to give personal guarantees), (6) avoid paying taxes, and (7) accumulate a net worth of some $500,000,000 just ten years later. In the process, his enemy, Mr. Licata, ended up bankrupt and convicted of a felony a few years later, and the combination of Centrum, Horizon, and Chicago lost a fortune - - while Mr. Cancellieri, a totally honest victim of some combination of Mr. Mocco's and Mr. Licata's maneuvering, lost his business. The only unfairness in this matter would be if Mr. Mocco emerged owing no damages.

Mr. Mocco also asserts that it is unfair to penalize him because too much time (nineteen years) has elapsed since his original deception in 1996. This argument is of no avail. Time has passed because Mr. Mocco and Mr. Licata use the Bankruptcy courts whenever they wish to impede their creditors. Mr. Mocco filed for Bankruptcy in 1994 and filed again in 2013 on the FCHG IV properties; he also filed for Bankruptcy protection for A-1, when it suffered an adverse jury verdict, and one of his Liberty Harbor entities is now in Bankruptcy. For their part, Mr. Licata and SWJ have filed innumerable Bankruptcies. (Mr. Mocco asserts in a post-trial submission "Licata filed more than 25 bankruptcy petitions.") The Lenders should not be penalized on account of Mr. Mocco's and Mr. Licata's resorts to Bankruptcy protection, since the Lenders were not responsible for the action of these two men.

e. Mr. Mocco's liability for damages is not inconsistent with the holding that he owned the real estate free and clear of the mortgage.

The court recognizes that either or both parties might argue that there is an inconsistency between the court's initial holding as to Mocco's ownership and the invalidity of the Centrum mortgage and its secondary holding that Mr. Mocco is responsible for part of Centrum's loss. The difference is that real estate decisions are based on strict case law which compels the

conclusion that a mortgagee who had notice of colorable adverse claims must be precluded from recovering, while in a dispute outside of the strict rules governing real estate ownership and mortgage validity, a court of equity may consider which party proximately caused the loss and had less clean hands.

Put differently, the Lenders accuse Mr. Mocco of having unclean hands. The court does not believe Mr. Mocco's hands are unclean enough to justify Mr. Mocco losing part of his empire. They are unclean enough, however, to impose on Mr. Mocco, who came to an equity court to vacate a mortgage, the obligation to reimburse the totally innocent mortgagee harmed by Mr. Mocco's machinations. As Pomeroy tells us, "he who seeks equity must do equity; he who comes into equity must come with clean hand". Pomeroy §363, §385, §397. And see Borough of Princeton v. Bd. of Chosen Freeholders of Mercer, 169 N.J. 135, 158 (2001); Faustin v. Lewis, 85 N.J. 507, 511 (1981); Untermann v. Untermann, 19 N.J. 507, 518 (1955); A. Hollander & Son, Inc. v. Imperial Blending Corp., 2 N.J. 235, 246 (1949), and Hageman v. 28 Glen Park Assoc, LLC., 402 N.J. Super 43, 55 (Ch. Div. 2008).

f. Does holding Mr. Mocco liable contravene the Vermont decisions?

Mr. Mocco may argue that the court's ruling is not consistent with that of the five Federal Court Judges who rendered the Vermont Decisions. That argument fails for three reasons. First, this court did not conduct a four month trial to rubber-stamp the Federal Court's Decisions. As set out above, those Decisions were entitled to deference, not blind obedience. Second, the court heard witnesses, and lawyers, not available to the Federal Court Judges. And third, the issue facing the Federal Court Judges - - was Mr. Mocco barred from challenging Mr. Licata's ownership of five FCHG entities on account of Mr. Mocco's alleged Bankruptcy fraud - - is different from the decision facing this court: did Mr. Mocco's decision to engage Mr. Licata and

their surreptitious and disingenuous scheming harm **innocent third parties**. The Lenders explained the difference between the Vermont Decision and this case quite accurately:

> **In the Vermont Decision, the Vermont court recognized that Mr. Mocco and Mr. Licata had each spun a "web" of deceit characterized by their relentless efforts to outwit the other by "keep[ing] the other party from knowing all the facts." The Vermont Court thus recognized not only that both parties had acted with stunning bad faith, but also predicated its Decision on this overarching fact. Here, however, there is not dispute that the Lenders have uniformly proceeded in good faith and, therefore, any balancing of the equities relative to the Lenders on the one hand, and the Moccos on the other, should favor the Lenders.**

In sum, the question facing this court is different from the question facing the five Federal Court Judges and demands a different answer.

3. How to apportion proximate cause and damages?

a. There were two equally responsible proximate causes of Centrum's loss.

As set out above, there were several acts or omissions by Mr. Mocco which helped lead to the confusion regarding ownership of FCHG IV, which, in turn, helped cause the loss herein:

a. Choosing and continuing to use, as his "consultant" or partner, the unreliable James Licata. That decision led to Mr. Mocco emerging from Bankruptcy, but also led to disastrous consequences to others.

b. Drafting and keeping secret the 3-page agreement.

c. Drafting and keeping secret of the Escrow Agreement.

d. Drafting extraordinary complex corporate stock ownership documents.

e. Not renewing the notices of lis pendens.

f. Not recording Judge Levy's 2001 order.

g. Not reminding Judge Shiff, or Mr. Licata's lawyers, about Judge Levy's 2001 Order.

h. Not appealing Judge Shiff's denial of its modification motion.

i. Not appealing the § 363 order.

j. Allegedly failing to adequately warn and inform potential buyers and/or lenders that he owned the properties. As set out above, Mr. Mocco testified that he did call Mr. Cancellieri, and Mr. deJong testified that he called Mr. Cohn twice and asked Mr. Cohn to call Mr. Scarpone. The Lenders argue that more could, and should, have been done.

Some of what Mr. Mocco did leading to Centrum's loss was intentional. The intentional actions in many respects caused more culpability than the unintentional or negligent acts and omissions. This is so for two reasons. First, negligence normally requires a duty, and it is not clear that Mr. Mocco owed a duty to Horizon, Centrum and Chicago. Second, while the failure to update the notices of lis pendens was wrong as a matter of law, at least four of the other allegedly negligent acts - - not recording Judge Levy's 2001 order, not reminding Judge Schiff or Mr. Licata's lawyers of Judge Levy's order, not appealing Judge Shiff's denial of the modification motion, and not appealing the § 363 order - - could be characterized as legal judgment calls. The intentional decisions, however, cannot be as easily dismissed.

On the other hand, the Lenders' agent, Horizon, committed several negligent acts or missions which led to the loss:

1. Not paying sufficient attention to the strange nature of the mortgage loan transaction regarding the Mocco residence.
2. Not paying sufficient attention to the strange nature of the Sayreville mortgage transaction.
3. Not paying sufficient attention to several unusual documents and e-mails involved

in the transaction at issue.

4. Not paying sufficient attention to Mr. Licata's indictment. (Mr. Cohn and Mr. Cancellieri testified, and in many respects they were correct, that a murderer could legitimately transfer title.)
5. Not paying sufficient attention to the disastrous credit and judgment histories of both Mr. Mournes and Mr. Podell. (On the other hand, Mr. Cancellieri testified, and in many respects he was correct, that an insolvent person could legitimately transfer property.)
6. Not paying sufficient attention to the notices of lis pendens.
7. Not paying sufficient attention to the Vermont Decisions.
8. Paying too much deference to the opinions of lawyers for other parties whose pay was dependent on the transaction closing.
9. Not contacting Mr. Mocco, the mortgagee on the properties, or the insurer of the properties.
10. Ignoring the apparent phone calls from Mr. Mocco and Mr. deJong to Mr. Cancellieri and Mr. Cohn, respectively.

The court is **not** putting into this "equation" the Lenders' decision to take approximately $6,000,000 of the Escrow money after the May closing; that money would ordinarily have gone to GMAC, the successor in interest to the original mortgagee. This act did not lead to a loss - - except to a theoretical loss by GMAC. As set out above, however, GMAC still holds a valid mortgage and is being paid above market interest rates. The court is also **not** putting into this "equation" the arguably disingenuous answers Mr. Mocco and Mr. Scarpone gave to the court when wrapping up the JCRA litigation. The JCRA litigation was part of the Mocco Bankruptcy,

but did not affect any of the parties herein and arguably did not even damage the JCRA. The court is also **not** putting into this equation the possible loss Mr. Mocco caused the I.R.S.; that possible loss is (a) too unclear, and (b) did not affect any of the parties herein.

One can argue that Mr. Mocco's actions proximately caused the loss since Mr. Mocco's **actions set in motion** the chain of events which led to the confusion which led to the loss. On the other hand, the Lenders, through their agent, Horizon, had the **last clear chance** to avoid the loss. This court, as the fact finder, concludes that 50% of the proximate cause is attributable to Mr. Mocco and 50% attributable to the Lenders.

For a comparable ruling, see Estate of Colquhoun v. Estate of Colquhoun, 88 N.J. 558 (1982). Robert G. Colquhoun ("Robert G.") and is wife had purchased a home for $51,000 thanks to a loan from their son Robert F. Colquhoun. ("Robert F") which loan was secured by a mortgage for that amount. Robert G. and his wife paid back $35,000 to Robert F., leaving $16,000 still owing. Subsequently, Robert F. assigned the mortgage to Robert G. (but not to Robert G.'s wife). Then Robert G. died, followed soon thereafter by his wife whose Will gave all her assets to her son Owen. When Owen, as his mother's executor, sold the home for $81,000, Robert G.'s Estate sued to enforce the $16,000 mortgage. The trial court granted summary judgment to the Estate of Robert G., concluding that Mrs. Colquhoun's Estate was liable for the entire $16,000 principal amount of the mortgage plus interest. The Appellate Division reversed, holding that no money at all was owed on the mortgage because the mortgage merged with the title. The Supreme Court disagreed with both of these diametrically opposite results, and reached what could be described as a Solomonic holding:

> This is a classic example of a case in which competing legal principles may lead to different results.

…………..................................

> Justice Cardozo once wrote: "The goal of juridical effort is not logical synthesis but compromise." B. Cardozo, The Paradoxes of Legal Science 4 (1928). That principle is peculiarly applicable under the unusual circumstances here …. we believe the fair result is to recognize both the donative intent of the son and farther and the fiduciary relationship between the tenants by the entirety by requiring that Elizabeth Colquhoun's estate reimburse her husband's estate for one-half of the principal, $8,000, plus interest due as of the date of his death. In this manner, the donative intent of the donor and recipient as well as the fiduciary relationship of the husband and wife as cotenants are acknowledged.

Id. 562-568[125]

In this case, as in Colquhoun, there are "Two competing legal principles which may lead to different results". One principle is that a mortgagee or purchaser takes his or her position subject to the rights of a previous owner if he or she had notice of the previous owner's position. Under that "competing legal principle" Centrum loses its entire investment. The second "competing legal principle" is that between two innocent parties, the party which gave a fraudster the ability to commit a fraud is responsible for the loss suffered by the other innocent party. Under that principle, Mr. Mocco must compensate Centrum for its entire loss. To choose either approach would be to follow the trial court and the Appellate Division in Colquhoun, both of which decisions the Superior Court held to be erroneous. This court is bound to follow Justice Schreiber's thoughtful majority opinion: Mr. Mocco will reimbursed Centrum for one half of its losses.

b. What is the amount of Centrum's compensable loss?

Calculating Centrum's damages is no simple task because the SWJ principals - - Mr. Mourness, Mr. Podell, and Mr. Licata (sometimes replaced by Mrs. Licata) - - were as adept as

[125] See, similarly, MetLife v. Washington Ave. Assoc., 159 N.J. 484 (1999) where a unanimous Supreme Court held that a trial judge was correct in imposing a default rate of 12.55% in a foreclosure case, where the 15.55% default rate was an unenforceable penalty, but the 9.55% contract rate too low to compensate the lender.

Mr. Mocco in devising complex methods to obfuscate their transactions. Nevertheless, several conclusions can be drawn.

The first conclusion as to Centrum's damages is clear: the Lenders' $50,220,000 claim is untenable. That claim begins with the $15,000,000 principal amount of Centrum's loan to SWJ, together with the interest prescribed by the loan documents - - prime plus 6%, increased to 26% when the default rate of interest is added. While the Lenders are correct when they assert that "SWJ has not repaid a single penny" (Damages brief, p. 4), and while the Lenders' arithmetic is correct, their analysis is only correct if the question before the court is how to calculate the damages owed by SWJ and its guarantor, Mr. Podell.[126] However, the question before this court is how to calculate an equitable lien on Mr. Mocco's FCHG IV properties in order to mitigate Centrum's out of pocket losses caused by Mr. Mocco's conduct. The $50,220,000 figure has no relationship to that question.

Turning to Centrum's out of pocket losses, the arithmetic is as follows:

1. $15,000,000 face amount of the loan.

2. $1,500,000 interest reserve withheld by Centrum.
3,250,000 lock box reserve withheld by Centrum.
600,000 loan fee withheld by Centrum.
30,000 processing fee withheld by Centrum.
40,833.31 interest from May 25, 2006 to May 31, 2006 withheld by Centrum.

The total of Centrum's reserves, fees and interest is $5,420,833.31, leaving a balance of $9,579,166.69 which should have been wired to Centrum. The actual amount wired by Centrum to fund the closing was $9,342,581.06. The difference of $236,585.63 is $225,000 commission paid to Avator, $10,344.63 paid to Avator's attorneys, and an additional $1,241 paid as a fee to Avator.

3. $6,400,000 held by Horizon to cover the GMAC first mortgage
100,000 held by Horizon to cover the condo liens
$6,500,000 total held by Horizon.

[126] Simply put, the $50,220,000 figure is what Centrum expected to be repaid by SWJ. It is also what Centrum would be owed if its mortgage were enforceable against Mr. Mocco. As set out in Part VI A herein, it is not.

4. $2,842,581.06 Net funds actually disbursed at the closing ($9,342,581.06 minus 6,500,000 = $2,842,581.06).

5.	$ 380,000	Wired three months later to Mrs. Licata
	50,000	Wired three months later to James Anderson, the Licatas' lawyer on the Vermont appeal.
	70,000	Wired three months later to SWJ
	$ 500,000	Total wired three months later from the escrow monies.[127]

6. $ 209,656 Paid to Horizon.[128]

7. $3,552,237.06 Total out of pocket loss.

Mr. Mocco has argued that Centrum has not suffered any losses of that magnitude since it has presumably been paid some or all of its losses by Horizon's errors and omissions policy and Chicago's indemnification policy, and possesses claims against Mr. Shepro, Mr. Duval and Mr. Podell. The Lenders have argued that their losses are actually greater since they made interest payments to the bank, from which they borrowed money. The court accepts neither argument. All lawsuits, even including this one, must have limits as to subject matter and time. The subject matter of this case was the relationship between Mr. Mocco, the Licata interests, including SWJ, and Centrum. The time span started in 1996 and ended in late May 2006 when the Centrum loan to SWJ closed - - with the only exception being the $500,000 withdrawal by the Licata allies from the loan escrow monies in August 2006. All of Mr. Mocco's efforts to lessen the magnitude of Centrums losses concern matters which arose (or, in the course of the potential lawsuits against Mr. Shepro, Mr. Duval, Mr. Podell, may arise) well beyond 2006, All of Centrum's efforts to increase the magnitude of its losses concern outside parties - - three

[127] The Lenders correctly point out that Chicago later instituted an interpleader action and caused the full amount of the escrow, $5,929,795 to be deposited into court. As the Lenders explain in n.4, page 8 of their Damages Brief "As to the $70,205 difference between the remaining funds Horizon Title held in escrow and the funds deposited into court, the same is explained by the $75,000 to pay additional conveyance tax [.]"
[128] See n. 46, p. 70, supra.

unrelated banks - - and interest which accrued well after 2006. None of these matters is relevant, or within the boundaries of the lawsuit.

The court's decision not to consider the extraneous material sought to be introduced by Mr. Mocco to diminish Centrum's damages and by the Lenders to increase Centrum's damages is consistent with, and to some extent driven by, the earlier decision of the Discovery Master, Chief Justice Zazzali, to deny Mr. Mocco's request to discover the Chicago settlement documents. The Chief Justice correctly held that those documents were not relevant. Both Judge Vichness and, subsequently, this court, agreed. Centrum had out of pocket losses of $3,552,237.06. What happened, or may happen, later is of no concern to the court.[129] The Lenders' out of pocket loss, notwithstanding the efforts of both parties to diminish or increase it, was $3,552,237.06. Mr. Mocco's one-half share of that amount is $1,776,118.53.

The court will not augment that amount by any prejudgment interest, even though prejudgment interest may be awarded in unliquidated non tort matters "not as a matter of right, but rather in accordance with equitable principles." See Pressler & Verniero, Current N.J. Court Rules, Comment R. 4:42(11) (2015). The reason the court will not add to the $1,776,118.53 any prejudgment interest is that, as set out in footnote 55, page 93 above, Mr. Mocco has lost a very substantial amount of money by virtue of the mortgages being placed on the FCHG IV properties since May 2006. To make him pay prejudgment interest would be to make him pay double for his actions which led to the mortgages being filed.

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[129] There are two bodies of law which independently bar Mr. Mocco from seeking to bring into this case Chicago's payments to Centrum. First, the collateral source rule holds that injured parties' claims may not be diminished by the receipt of insurance proceeds or other third party payments. See Perrier v. Rediger, 169 N.J. 399 (2001); Putusco v. Prince Macaroni, Inc., 50 N.J. 365 (1917); and Rush v. Jeffries, 110 N.J.L. 307 (E & A 1933). Second, under subrogation law, the subrogee is generally entitled to whatever rights the subroger possessed. See Holloway v. State, 125 N.J. 386 (1991), and Standard Accident Ins. Co. v. Pellechia, 15 N.J. 162 (1954). Reflecting that rule of law, the Chicago – Centrum title policy stated that, "The Company [Chicago] shall be subrogated to and be entitled to all rights and remedies which the insured claimant would have had against any person or property in respect to the claim had this policy not been issued."

In conclusion, as set out in Part A herein, Mr. Mocco is the owner of 100% of the legal and equitable interest in FCHG IV, and all deeds and mortgages recorded at the May 25, 2006 closing are deemed null and void. Counsel is to prepare an order directing that the land records of Hudson County disclose that each such deed and mortgage be void and of no legal effect. As set out in Part B herein, an equitable lien on Mr. Mocco's FCHG IV properties shall be imposed in favor of the Lenders in the amount of $1,776,118.53.[130]

[130] The court is aware that FCHG IV is in a bankruptcy proceeding filed and controlled by Mr. Mocco and that the Bankrputcy stay bars any party from taking action against the Bankrupts' property. Therefore, as suggested, note 3, page 6 of the Lender's May 26, 2015 damage letter-brief, if Mr. Mocco refuses to make the payment set out above, the court will impose appropriate sanctions, possibly including the ultimate sanction of deeming the mortgages valid and enforceable.

The Major Errors and Inconsistencies

Mocco's Actions	**Results Obtained**	**Licata's Actions**	**Result Obtained**
1. Not clearly revealing in the 1996 Bankruptcy the details of the transaction with Licata.	Kept all of his properties and dis-Charged substantial debt.	1. Not clearly revealing in the 1996 Bankruptcy the details of the transaction with Mocco.	Gained substantial fees from Mocco.
2. Mocco stating to Judge Gindin in 1995 and to Judge Garrett Brown, in the Jersey City lawsuit in 1997 that the outstanding principal and interest he owed FCCG under the Liberty Harbor Mortgage Loans was in excess of $13 million, even though it would be shortly discharged.	Achieved a settlement wherein he kept Liberty Harbor.	2. Mrs. Licata signing a property settlement agreement in 2022 in which she claimed that she did not have an interest in FCHG IV or any Mocco related entities.	Gained a favorable settlement with Mr. Licata.
3. Mr. Mocco telling the court that no other contracts existed between Mr. Mocco and First Connecticut	Achieved a settlement wherein he kept Liberty Harbor	3. Signing an agreement to sell Liberty Harbor in 2005 without reporting same to the Bankruptcy Court or returning the $50,000 cash deposit given to him in a brown paper bag.	Kept $50,000
4. Not appealing the §363 sale order.	None	4. Not telling the Connecticut Bankruptcy Court that Mr. Licata was a 1/3 owner of SWJ.	Allowing the 363 sale to gain court approval.
5. Not telling the Connecticut Bankruptcy Court that ownership of FCHG IV was in dispute.	None	5. Mr. Licata not telling the Connecticut Bankruptcy Court that Mrs. Licata owned FCHG IV.	None

Mocco's Actions	Results Obtained	Licata's Actions	Result Obtained
6. Understating taxes owed after the Bankruptcy claiming that the First Union debt was "discharged" in Bankruptcy, when it was not discharged.	Several million dollars of tax savings or, at least, several million dollars of tax deferred.	Mr. Licata and/or SWJ not paying off Transatlantic's successor GMAC	Kept much of the money, using same to pay his lawyers and Mrs. Licata.