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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2010-010943 12/20/2018

HONORABLE JAMES D. SMITH

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Deputy

I M H SPECIAL ASSET N T 168 L L C, et al. CHRISTOPHER H BAYLEY

v.

APERION COMMUNITIES L L L P, et al.

DAVID J CANTELME
MARK FAUCHER
20410 N 55TH AVE
GLENDALE AZ 85308
DON C FLETCHER
THOMAS D LAUE
JEFFREY M PROPER
RICHARD R THOMAS
JUDGE J. SMITH

MINUTE ENTRY

The Court held a bench trial on November 2 and 9, 2018, regarding Plaintiffs' accounting of amounts recovered toward satisfying the judgment against Defendants. The Court carefully considered the evidence presented, including the witnesses' demeanor while testifying. The Court makes these findings of fact and conclusions of law. The Court also made many factual findings and legal conclusions in the Minute Entry (filed October 17, 2018). This order does not repeat those findings and conclusions, but they are important to understanding the issues here.

This order also addresses Defendants' two motions to enforce the mandate from the Court of Appeals. The Court considered the substantial briefing on that issue and heard oral argument on December 7, 2018.

Background regarding this case's lengthy and complex history is helpful. Plaintiffs sued regarding Defendants' failure to repay two loan secured by real estate. The Court granted summary judgment for Plaintiffs on December 21, 2012, and Defendants appealed. Defendants did not, however, post a *supersedeas* bond or obtain a stay of the judgment pending appeal. Not surprisingly, Plaintiffs started collecting on the judgment. The collection efforts included two receiverships, the first by stipulation. The receiverships gathered title to real property, stock in corporations, membership interests in LLCs, and garnished monies. This resulted in several orders from earlier judicial officers approving transactions or transfers of assets to Plaintiffs.

The Court of Appeals issued a memorandum decision on December 27, 2016, that vacated the judgment and remanded the case. The Court of Appeals reversed regarding the amount of the deficiency judgment against Defendant—not regarding the fact of default. The Court of Appeals noted (¶ 33) that, "even if the lenders do not prove their claimed deficiency balances upon remand, substantial deficiency balances will still exist even under the defendants' version of the facts." Plaintiffs requested reconsideration in the Court of Appeals, noting the possible upheaval to four years' of collection efforts if the appellate court vacated the judgment completely. The Court of Appeals granted the motion in part by requiring this Court to enter the new judgment *nunc pro tunc* to December 21, 2012. The mandate issued in November 2017.

As they do now, Defendants argued in 2017 that the Court of Appeals' decision vitiated all post-judgment collection efforts. They contended that the Court must unwind a wide array of the receivers' actions, such as assembling real property, collecting shares of stock in closely-held corporations, selling property, etc. Judge Mullins rejected that argument in the Ruling (filed December 26, 2017) (at 4). Instead, she stayed collection efforts and ordered Plaintiffs to prepare an accounting of what they collected in the preceding five years. "Once collections have been determined, the Court may entertain some of the fact specific objections to post-collection efforts raised by Defendants and the Intervenors." [*Id.* at 4-5.]

Much of Defendants' argument challenges earlier judicial officers' orders approving receivership acts, executing on certain assets (*e.g.*, IRAs), transferring stock in closely-held corporations, approving the Seagoville/Drooy/Equitable transaction, and transferring assets in exchange for canceling receivership certificates. Defendants argued that the Court of Appeals' Decision voided all of those post-judgment orders. They also raised substantive arguments which, at bottom, challenge the propriety of the earlier judicial officers' orders.

The Court concludes that revisiting those earlier orders would amount to an impermissible horizontal appeal. Thus, the Court is not addressing the substance of those arguments now. This does not mean that Defendants cannot challenge Plaintiffs' collection efforts at all. For example, Defendants may argue that Plaintiffs exceeded an earlier post-judgment order's scope while trying to collect. They may dispute the sufficiency of information that Plaintiffs or a receiver provided regarding collections. And, as they did here, Defendants may dispute Plaintiffs' accounting for their post-judgment collections.

I. THE AMOUNT AND EFFECT OF PLAINTIFFS' POST-JUDGMENT COLLECTIONS.

Findings Of Fact

Default And The Credit Bids

1. Defendants defaulted on October 2, 2008. Default interest of 24%, compounded monthly, began accruing then.

2. The principal balance on the Eladio Loan at default was $6,580,000.00. The principal balance on the Aperion Loan at default was $3,450,000.00.

3. A trustee's sale of the Eladio Property occurred on January 5, 2010.

4. IMH 161 successfully credit bid $3,460,000.00 at the Eladio Trustee's Sale to purchase the Eladio Property.

5. A trustee's sale of the Aperion Property occurred on January 5, 2010.

6. IMH 168 successfully credit bid $3,200,000.00 at the Aperion Trustee's Sale to purchase the Aperion Property.

The Receiverships And Ordered Accounting

7. Under the Order Appointing a Receiver Over Stockholder, LLC dated June 12, 2013 ("Stockholder Receivership Order"), the Court appointed the Reaves Law Group, by and through David M. Reaves (the "Stockholder Receiver"), as receiver over entities formerly owned by Maniatis and the Trust (collectively, the "Recorp Entities").

8. Under the Order Appointing a Receiver Over the DPM-TT Trust and Property Owned and Controlled by David P. Maniatis dated August 22, 2013, as amended by the Order Amending Order Appointing a Receiver Over the DPM-TT Trust and Property Owned and Controlled by David P. Maniatis dated April 18, 2014 (collectively, the "MCA Receivership Order"), the Court appointed MCA Financial Group, Ltd., by and through Keith Bierman (the "MCA Receiver"), as receiver over assets owned and controlled by Maniatis and the Trust.

9. In December 2017, Judge Mullins ordered Plaintiffs to prepare a detailed accounting of everything they collected toward satisfying the judgment. [Min. Entry (filed December 26, 2017) (at 5).]

Cash Payments And Garnishments

10. Plantiffs and Defendants entered into the Stipulation to Quash Temporary Restraining Order and Lifting Order Freezing Schwab Accounts on February 21, 2013. The Court approved that stipulation on February 21, 2013 ("Order Approving February 2103 Stipulation").

11. Plaintiffs received a wire transfer from Maniatis' then-counsel of $186,464.81 on March 6, 2013.

12. Plaintiffs received a check from Maniatis for $13,535.09 on March 11, 2013.

13. Plaintiffs received a wire transfer from the MCA Receiver's estate for $583,333.33 on October 24, 2013.

14. Plaintiffs received a check from the MCA Receiver's estate for $154,725.31 on May 14, 2015.

7500 E. Deer Valley Road Property

15. The Stockholder Receiver held 100% of the shares of Recorp Communities, Inc. Recorp Communities was the manager of Pango Holdings, LLC. Pango held title to the Deer Valley property.

16. The Stockholder Receiver conveyed title to the Deer Valley property to Plaintiffs on September 5, 2013.

17. Plaintiffs received a Broker's Opinion of Value for this property on December 23, 2013, and it suggested a value between $230,000.00 and $309,900.00.

18. Plaintiffs ascribed a value of $275,000.00 to the property in its accounting. Defendants' expert, David Barber, did not dispute the propriety of that valuation.

19. The Broker's Opinion of Value is competent evidence of that asset's value, there is no other competent evidence of its value, and the $275,000.00 figure is reasonable.

255 Noholike Way in Kihei, Hawaii

20. The Court approved a stipulation in which Maniatis agreed to transfer title to the Hawaii property to Plaintiffs.

21. Maniatis, however, did not transfer title to the Hawaii property.

22. The Court then ordered Maniatis to sign a quitclaim deed to transfer the Hawaii property to Plaintiffs. If Maniatis failed to execute the documents, then the Court authorized the MCA Receiver to execute such documents on Maniatis' behalf. [Min. Entry (filed September 25, 2013).] Maniatis failed to execute the documents.

23. The MCA Receiver executed a quitclaim deed for the Hawaii property in favor of Plaintiffs.

24. Plaintiffs obtained a Broker's Opinion of Value regarding the Hawaii property that estimated a sales price from $4,900,000.00 to $5,900,000.00.

25. The Broker's Opinion of Value is the only competent evidence of the value of the Hawaii property near the time of the MCA Receiver transferred it to Plaintiffs.

26. Plaintiffs obtained a title report regarding the property months after they acquired it. That title report identified liens for unpaid property taxes of $10,528.29, two liens in favor of Wells Fargo Bank of $2,580,000.00, and a lien in favor of Lake Olympia Estates, Ltd. of $10,000,000.00.

27. Plaintiffs had to satisfy the liens to secure marketable title to the Hawaii property.

28. Lake Olympia Estates was an entity related to Maniatis. Plaintiffs paid approximately $1,200,000.00 to buy the Lake Olympia Estates lien. This purchase had the practical effect of satisfying that lien. The Court rejects Plaintiffs' argument that the lien was a liability of $10,000,000.00 that made the Hawaii property worthless.[1]

29. Indeed, Plaintiffs' argument that the Hawaii property was worthless is untenable. Plaintiffs are sophisticated entities that are part of a large, publicly-traded corporation specializing in real estate lending and investment. They would not have taken title to a real estate asset that was worthless.

30. Plaintiffs' Samuel Montes estimated that the Wells Fargo liens totaled $2,300,000.00 when Plaintiffs received the quitclaim deed to the property in September 2013. Plaintiffs' accounting attributed approximately $2.53 million toward satisfying the bank's liens, but that was the bank liens' total as of June 2014 (which included interest that had accrued since September 2013).

31. The Court calculated the liens against the Hawaii property by ascribing (a) $2,300,000.00 for the Wells Fargo liens, (b) $1,200,000.00 for the Lake Olympia Estates lien, and (c) $10,528.29 for the property tax lien.

32. In total, the Court values the liens encumbering the Hawaii property when Plaintiffs received the quitclaim deeds at $3,510,528.29.

[1] This finding does not address whether the current holder of the lien may collect on it, etc. Other litigation addresses those issues. *IMH, HI, LLC v. Maniatis*, No. CV2014-009581 (Maricopa Cty. Superior Ct.). This finding only addresses the effect of the Lake Olympia Estates lien on the Hawaii property's value when Plaintiffs acquired the property.

33. The Court values the Hawaii property using the midrange of the Broker's Opinion of Value, which is $5,400,000.00. Reducing that value by the liens encumbering the property results in a net value of $1,889,471.71 credited against the deficiency as of September 19, 2013.

Forgiven Equitable Note

34. Judge Flores found that Maniatis wrongfully transferred $1,774,000.00 from Schwab accounts and sold liens on the Hawaii property, which resulted in a transfer of $850,000.00 to his then-lawyer's trust account. [Under Advisement Ruling (filed November 13, 2013) (at 3).]

35. Maniatis paid $425,000.00 to another creditor (Johnson Bank) to obtain a partial release of a different judgment against three Maniatis-related entities. [*Id.*]

36. Judge Flores directed the MCA Receiver to determine if any sources existed to recover the $2,624,000.00 that Maniatis dissipated. [*Id.* at 5.]

37. The MCA Receiver could not locate such sources. Plaintiffs and other creditors of Maniatis entered into the Partial Settlement and Inter-Creditor Agreement. [Trial Ex. 13.]

38. Judge Cooper signed an order approving the Inter-Creditor Agreement. [Order (filed April 3, 2015).]

39. Due to the lack of sources to recover the $2,624,000.00, the MCA Receiver agreed to relieve Plaintiffs' affiliate (IMH EQ, LLC) from making payments on a $3,175,000.00 unsecured note that the affiliate assumed ("the Equitable note").

40. Defendants' expert, David Barber, did not dispute the propriety of crediting this debt forgiveness toward satisfying the judgment.

41. It is appropriate to treat the forgiveness of the Equitable note as a $2,624,000.00 credit toward the judgment.

MCA Receiver Repaid Loans From Plaintiffs

42. The Court filed the Order Granting Verified Motion to Resolve all Outstanding Assets and Issues in the Bierman Receivership Estate; and Approving Discharge of Receiver on April 29, 2015.

43. The Court found that $1,854,741.28 remained due and owing on receivership certificates as of December 8, 2014. [Order (filed April 29, 2015) (at 3:2-8).] The Court approved that receiver transferring to IMH (or its nominee) all property on Exhibit 2 to that order in exchange for retiring the debt evidenced by the receivership certificates. [*Id.* at 3:22-26, 5:3-6.]

44. Retiring of the debt evidenced by the receivership certificates is not an amount collected toward satisfying the judgment.

Value Of Stockholder LLC's Interests In Various Entities

45. The parties agreed for Maniatis and the DPM-TT Trust to transfer to the receiver the shares for any corporation that Maniatis or the trust held. [Stipulation (filed February 21, 2013).]

46. Maniatis provided an affidavit dated March 2013 asserting that the shares in the Recorp Entities had no value.

47. Plaintiffs' expert, Scott Hakala, Ph. D., valued the entities' shares at $327,500.00 as of February 21, 2013. In that respect, he disagreed with Plaintiffs' argument that the shares had a $0.00 value (based on Maniatis' declaration).

48. Hakala reached that conclusion by calculating the fair values for the shares, not the fair market value. Hakala's opinion did not discount the values to account for the fact that Plaintiffs often obtained a minority interest in those entities.

49. Hakala's calculation also accounted for the fact that many of the Recorp Entities had substantial debt.

50. Hakala factored the value of water rights in New Mexico into his calculated value of fractional interests in partnerships and closely-held corporations that Plaintiffs received. His report and testimony explained how he valued those assets at $327,500.00. [*See* Trial Ex. 59 (Hakala report).]

51. Hakala's $327,500.00 figure accounts for his calculated net realizable value of the assembled properties' water rights. That net realizable value is $1,124,583.00. [Trial Ex. 59 at HAK056751.] Hakala calculated that realizing value from the water rights would include building a water treatment plant and necessary infrastructure. He acknowledged, however, that is a "floor on the valuation due to the fact that a real option will capture more upside." [Trial Ex. 59 at HAK056674.]

52. Plaintiffs' parent corporation had calculated the water rights' value at $6.8 million in 2015, too. Based on that datum, Hakala suggested the water rights may have had a value as of February 21, 2013, of $4.1 million minus "interim costs." [Trial Ex. 59 at HAK056674.]

53. Recognizing that the Court lacks a detailed expert analysis supporting its calculated value, this paragraph explains the calculation the Court used for these assets. Hakala valued the assets at $327,500.00, which included a net realizable value of the water rights of $1,124,583.00. Thus, his valuation is 29.12% of the water rights' net realizable value. The Court believes that IMHFC's 2015 valuation provides a more realistic starting point. Hakala calculated that valuation as of February 21, 2013, to be $4.1 million less "interim costs", such as legal and professional fees. The Court attributes 5% of the $4.1 million valuation to such interim costs; this results in a valuation of $3,895,000.00. Using the same 29.12% factor yields a valuation of $1,134,224.00

($3,895,000.00 x 0.2912 = $1,134,224.00). The Court attributes that sum to Plaintiffs' collection efforts for these properties.[2]

54. Defendants pointed to Trial Exhibit 30 in their written closing (at 11:22-24). Defendants argued that exhibit relates to SEC filings by Plaintiffs' parent corporation, IMH Financial Corporation. Defendants asserted that the exhibit shows that IMHFC valued New Mexico water rights obtained as part of collecting on the judgment at $20,000,000.00.

55. Neither side moved to admit Trial Exhibit 30 here. Neither side presented competent testimony regarding its contents. Indeed, the final exhibit worksheet refers to many SEC-related documents that neither side sought to admit or discuss at trial. [Ex. Worksheet (referring to Exs. 30-35, 39-53).]

56. The Court did not consider Trial Exhibit 30 or other exhibits not admitted. There is not competent evidence supporting Defendants' argument regarding New Mexico water rights in this regard.

57. Defendants also pointed to the testimony and report of their expert, David Barber. Barber conceded that he is not qualified to value water rights, to appraise real or personal property, or to value stock in the closely-held companies at issue. Barber is a certified fraud examiner. Although he would be qualified to opine on topics relating to financial fraud, it is difficult to conclude that he is qualified to opine on valuation issues.

58. Indeed, Barber did not attempt to offer valuation opinions. Instead, he opined regarding the propriety of Hakala's approach "from an accounting perspective . . . ." [Tr. (11/09/2018) at 220:6.] Barber concluded that Hakala's report and Plaintiffs' accounting of amounts collected should have "accounted for" an appraisal of the water rights from May 2017. [*Id.* at 225:9-13.]

59. The Court gives little weight to Defendants and Barber pointing to appraisals from other entities/people. [*See* Attachments U and V to Trial Ex. 56.] Attachment U is a real estate appraisal from CBRE, but Defendants did not offer any testimony from its authors. Moreover, the CBRE analyses in 2015 and 2017 examined a collection of property that Plaintiffs or their affiliates had assembled through purchasing additional property. That is, purchasing property beyond what Plaintiffs received via collection efforts here.

60. Attachment V to Trial Exhibit 56 is a water valuation report from Gary Lee, but Defendants did not offer any testimony from him. Representatives from CBRE and Lee were not available to explain the documents or for cross-examination. Barber did not (and admittedly could not) use those reports to prepare valuation opinions. Instead, Barber only opined that Plaintiffs should have "accounted for" those materials.

[2] If an appellate court concludes that the Court's analysis in this paragraph is improper, then the Court would find the only competent evidence of value for these assets to be Hakala's $327,500.00 figure.

61. In contrast, Plaintiffs expert, Hakala, is qualified to offer opinion values, included such opinions in his report, testified on direct examination regarding them, and was available for cross-examination.

The Seagoville/Drooy/Equitable Transaction

62. Seagoville Investments, LLLP was an entity that Maniatis and the DPM-TT Trust ultimately controlled.

63. The Equitable Real Estate Company, LLC had the right to buy 11,993 acres in Texas from Seagoville.

64. In January 2014, the receivers and Plaintiffs sought an order authorizing the MCA Receiver to exercise Seagoville's rights to sell the property to Equitable. Plaintiffs would assume Equitable's interests in the property, essentially conveying the property to entities that Plaintiffs owned/controlled.

65. Plaintiffs indicated that they would combine the Seagoville property with property owned by Drooy Properties, LLLP (which the MCA Receiver controlled) and other real property. Plaintiffs' affiliates would then resell the combined property to a third party.

66. Plaintiffs paid approximately $9.4 million to complete all of the necessary transactions regarding this Texas property.

67. In an Order filed February 3, 2014, Judge Flores approved the transactions regarding the Texas property. The transactions had the effect of conveying several pieces of real property to Plaintiffs in exchange for retiring receiver debt.

68. Robert Semple testified for Maniatis and the DPM-TT Trust. Semple controls MW2 Investments, LLC, which acquired a 17% interest in Equitable in April 2014—two months after Judge Flores approved the transactions regarding the Texas property.

69. Semple asserted that his due diligence showed that Seagoville's book value was $9.5 million. Semple's testimony, however, was conclusory and lacked meaningful analysis to be persuasive.

70. Semple relied on two pages of excerpts from Seagoville's 2015 partnership tax returns. That is problematic by itself as two pages are nowhere near a complete picture of an entity's finances.

71. Schedule L to the tax return reflected current assets (*i.e.*, assets expected to be converted to cash within one year) of $2.1 million. The largest assets are $4.45 million in mortgages and real estate loans, which should be transactions with third parties. There is no information in the record regarding the details of those transactions, their likelihood of repayment, etc. The catchall of "other investments" declined from $2.54 million to $1.76 million during the

year, but nothing in the record provided more information regarding those assets. The excerpts also do not provide any information regarding the composition of the largest liability—the partners' capital accounts that totaled $8.19 million at year end.

72. Exhibit 112 is the 2011 balance sheet that Semple asserted he reviewed to determine Seagoville's book value. It showed current assets of $142,414.29. The largest component of assets was a series of notes receivable from Maniatis-related entities totaling more than $6.4 million. The only conclusion to draw is that the $4.45 million in mortgages and real estate loans on Schedule L to the 2015 tax returns are the same loans to the Maniatis-related entities that Exhibit 112 reflects. It is a doubtful at best to suggest that debts from the Maniatis-related entities are receivables that MW2 will collect.

73. Undercutting Semple's credibility is that the Court rejected a proof of claim that he filed in this matter. Similarly, Semple bought MW2 (thereby acquiring an interest in Equitable) *after* the Court approved the Texas transactions. Semple paid only $5000.00 with a deferred payment of another $20,000.00 that is due only if MW2 sells assets. Semple is not personally liable for that $20,000.00. That is an infeasibly-low price for MW2 based on it holding a 17% interest in Equitable if Equitable truly were worth $9.5 million.

74. Semple's history with Maniatis also shows that he is not an unbiased witness. Semple allowed Maniatis to live rent-free in one of Semple's residences from 2014-16. Semple also provided Maniatis with a "cash stipend" of approximately $2000.00 per month in that time frame. Semple is paying Maniatis' legal fees in this matter as well.

75. Exhibits 66, 84, and 85 show that MW2 sued in Texas to invalidate IMH's purchases of certain property in Texas. The Texas court dismissed the action and noted that "the claims asserted in the Petition have no legal basis." [Ex. 66.]

76. The Court largely discounts, if not disregards, Semple's testimony based on the foregoing facts.

77. The Court will not reconsider the propriety of another judicial officer's order approving these transactions.

Stockholder Receivership Loans

78. Plaintiffs loaned the Stockholder Receiver $375,500.00 during that receivership. Interest accrued on those loans.

79. The total accrued interest on the loans as of December 31, 2017, was $105,412.02. The total debt was $480,962.02 and was evidenced by receivership certificates.

80. Plaintiffs have not received repayment for those loans.

81. Plaintiffs did not point the Court to an earlier order allowing the Court to add the

amount of these outstanding certificates to the judgment.

Conclusions Of Law

1. The Court of Appeals issued a Memorandum Decision (the "Decision") in 1 CA-CV 13-0131 on December 27, 2016 (four years after the judgment). The Court of Appeals wrote (¶ 2, emphasis added), "[W]e vacate the deficiency judgment and remand for further proceedings regarding the default balances *only*."

2. "[E]ven if the lenders do not prove their claimed deficiency balances upon remand, substantial deficiency balances still exist even under the defendants' version of the facts." [Decision ¶ 33.] The Court of Appeals estimated a deficiency judgment of approximately $11.4 million, which it characterized as "undisputed" as of the January 2010 trustees' sales. "On remand, the lenders' judgment-collection efforts must be considered *as they apply to those undisputed amounts*." [*Id.* (emphasis added)]

3. Activity in the Court of Appeals after the December 2016 Decision is informative. Plaintiffs asked the Court of Appeals to reconsider the Decision's vacating of the judgment. Plaintiffs anticipated Defendants' arguments about the Decision voiding the post-judgment collection efforts in the intervening four years. Thus, Plaintiffs asked the Court of Appeals to either (1) remand with instructions to modify the judgment or (2) direct this Court to enter judgment *nunc pro tunc* to the date of the original judgment. Defendants opposed the request and argued that no basis existed to enter judgment *nunc pro tunc*. [Opp'n Mot. Reconsideration (dated Mar. 10, 2017) (at 6-10), *IMH Special Asset NT 168, LLC v. Aperion Communities, LLLP*, No. 1 CA-CV 13-0131 (Ariz. Ct. App.).] "A *nunc pro tunc* judgment would protect IMH from the foibles of its actions in taking assets of non-judgment debtors and causing financial ruin of more than 100 such entities and more than 300 non-judgment debtor investors." [*Id.* at 7 ¶ 13.] The Court of Appeals granted Plaintiffs' motion in part—"any modified judgment entered as a consequence of this court's decision shall be ordered *nunc pro tunc* to the date of the original judgment." [Order (filed Apr. 13, 2017), *IMH Special Asset NT 168, LLC v. Aperion Communities, LLLP*, No. 1 CA-CV 13-0131 (Ariz. Ct. App.).]

4. This Court must follow the Decision and the Mandate. "The mandate not only tells who wins but may instruct the district court or agency exactly what to do on remand. That body is then limited by the remand order and may not take the occasion to reach out and decide issues not embraced within its scope." ERIC J. MAGNUSON & DAVID F. HERR, FEDERAL APPEALS, JURISDICTION & PRACTICE § 14:3 (2018) (footnotes omitted).

5. Proceedings following remand "must be limited to issues raised and decided on appeal. . . . Retrial of such [other] issues would constitute an impermissible horizontal appeal from one trial judge's ruling by another trial judge." 1A ARIZONA APPELLATE HANDBOOK § 3.13.7.2, at 3-177 (2010).

6. A horizontal appeal is a request that a second trial judge "reconsider the decision of the first trial judge in the same matter, even though no new circumstances have arisen in the interim and no other reason justifies reconsideration." *Powell-Cerkoney v. TCR-Mont. Ranch Joint Venture, II*, 176 Ariz. 275, 278–79, 860 P.2d 1328, 1331–32 (App. 1993).

7. No new facts or evidence arose regarding the various orders approving transfers, receiver acts, etc. Defendants challenges are arguments that other judicial officers' decisions were incorrect and that this judicial officer should "reverse" them.

8. The Court of Appeals' Decision arguably is a change in circumstances under the horizontal appeal doctrine. This Court, however, does not interpret the Decision as an invitation or direction to reevaluate all of the other judicial officers' decisions throughout this matter's long history. The Court of Appeals indicated that it remanded "only" for proceedings regarding the default balances. It also referred to this Court considering post-judgment collection efforts *vis-à-vis* the "undisputed" January 2010 deficiency of approximately $11.4 million; the Court of Appeals did not direct this Court to consider anew the propriety of those post-judgment collections. When the parties squarely raised the issue of the Decision's possible effect on post-judgment collections, the Court of Appeals directed entry of the new judgment *nunc pro tunc* to December 21, 2012—an option Plaintiffs urged to avoid upsetting those post-judgment collections.

9. *Nunc pro tunc* means "now for then" and "is used in reference to an act to show it has retroactive legal effect . . . ." BRYAN A. GARNER, GARNER'S DICTIONARY OF LEGAL USAGE 622 (3d ed. 2011). "In Arizona, judgments can be both rendered and entered *nunc pro tunc*. A judgment *nunc pro tunc* is by its very nature retroactive." *Valley Nat'l Bank of Ariz. v. Meneghin*, 130 Ariz. 119, 123-24, 634 P.2d 570, 574-75 (1981) (citations omitted). "[T]he legal effect of an order or judgment *nunc pro tunc* relates back to the original judgment and does not constitute a new judgment." 46 AM. JUR. 2D *Judgments* § 120 (2018) (footnotes omitted).

10. The Court cannot locate binding Arizona authority on point. Persuasive authority suggests it is the judgment debtor's burden to show what it paid toward a judgment, though. "As a general rule, the burden of proving payment of a judgment rests on the defendant or other person claiming payment." 50 C.J.S. *Judgments* § 882 (2018).

11. Some of the issues here relate to receiver certificates. "The rights of a purchaser of a receiver's certificate depend on the provisions of the order authorizing it. The holder of a receiver's certificate is entitled to have the property of the insolvent held until the certificate is redeemed." 75 C.J.S. *Receivers* § 199 (2018).

12. The certificates "are merely evidence in the hands of the holder that he or she is entitled to receive from the fund under the control of the court the amount specified if the fund is sufficient to pay in full all holders of such certificates, or, if it is not sufficient, then a pro rata share with other such holders." 75 C.J.S. *Receivers* § 190.

13. "Payment of receivers' certificates can be had only on a receiver's application to the court for such an order." 75 C.J.S. *Receivers* § 212.

14. "If the receiver pledges certificates as security for money borrowed to carry on a corporate business, the certificates pledged bind the receiver and the property in his or her charge only to the extent that the borrowed funds come into the receiver's hands or those of the receiver's appointees." 75 C.J.S. *Receivers* § 213.

15. The Court will not add the amount of the unpaid receivers' certificates ($480,962.02) to the judgment.

THE COURT FINDS:

The date of default is October 2, 2008; 24% default interest, compounded monthly, began accruing then. The principal balance on the Eladio Loan at default was $6,580,000.00. The principal balance on the Aperion Loan at default was $3,450,000.00. Plaintiffs successfully credit bid $3,460,000.00 for the Eladio property and $3,200,000.00 for the Aperion property on January 5, 2010. The issue is the amount of any deficiency remaining after those successful credit bids. That will be the amount of the judgment here, effective December 21, 2012.

Counsel must confer to attempt to agree on a calculation of the default balances using the foregoing data. Of course, the parties would preserve their arguments for appeal.

The payments/collections to credit against the deficiency judgment to calculate the current amount owed are:

Date	**Description**	**Amount**
02/21/2013	Recorp Entities' stock	$1,134,224.00
03/06/2013	Wire transfer	$186,464.81
03/11/2013	Check	$13,535.09
09/05/2013	Deer Valley property	$275,000.00
09/19/2013	Hawaii property	$1,889,471.71
10/24/2014	MCA Receiver wire transfer	$583,333.33
10/26/2014	Forgiven note assumed by IMH EQ, LLC	$2,624,000.00
05/14/2015	MCA Receiver check	$154,725.31

The parties must confer to determine if they can agree to the amount remaining on the *nunc pro tunc* judgment through December 31, 2018, after considering the foregoing payments and their effect on accruing interest.

II. THE SCOPE OF THE MANDATE.

Defendants did not post a *supersedeas* bond or obtain a stay of the 2012 judgment pending the appeal. "Absent such steps, a creditor may enforce its judgment, and the court may enforce its orders by civil contempt." DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 26.1 (6th ed. 2018) (footnotes omitted). As was their right, Plaintiffs pursued collection efforts while the Court of Appeals considered the matter. The Court of Appeals' Decision in December 2016 vacated the 2012 judgment. Defendants argued that the Decision voids all post-judgment collection efforts and that the Court must unwind them. In sum, the Court must undo all of the receivers' work, reverse transfers of corporate stock, and order real property returned to Maniatis, his trust, and others.

The Court of Appeals directed this Court in the Decision to conduct further proceedings for the issue of "default balances only". Plaintiffs asked the Court of Appeals to reconsider, arguing that the Decision vacating the December 2012 judgment threatened the substantial post-judgment collection efforts. In response to that briefing, the Court of Appeals directed this Court to enter judgment *nunc pro tunc*—a modification that Plaintiffs argued would preclude attacks on the post-judgment collection efforts. Defendants argued against modifying the Court of Appeals' Decision *because* it would have that effect.

Judicial officers approved all of the post-judgment collection efforts that Defendants challenge. The Court of Appeals did not vacate those post-judgment orders. Defendants' arguments, however, effectively ask this judicial officer to review earlier judicial officers' post-judgment orders. That seems to be a quintessential horizontal appeal when the Court of Appeals has not yet addressed those orders. Moreover, Defendants did not show that the underlying circumstances changed to justify that type of review/horizontal appeal. For example, Defendants did not show a material change in the facts or law presented to those earlier judicial officers. The Decision is not that type of change because the Court of Appeals (1) noted that a substantial deficiency still exists (warranting post-judgment collection efforts), (2) directed this Court to enter the revised judgment *nunc pro tunc* to December 21, 2012 (providing a valid judgment for those post-December 2012 collection efforts), and (3) did not identify any errors in the post-judgment orders.

The Court also is reluctant to reexamine earlier orders because parties and non-parties relied on them to take concrete steps, not merely to prepare for trial or craft strategy. The receivers

transferred real and personal property following those orders. Plaintiffs bought other real property, combined it with property received here, and sold the combined parcels.

At end of this process, the Court will enter a *nunc pro tunc* judgment that is effective as of December 21, 2012. The judgment will establish Defendants' liability for breaching the agreements and will set the damages as of that date. The post-judgment collection efforts will follow and be under that valid *nunc pro tunc* judgment. Accordingly, the Court disagrees with Defendants that the Court of Appeals' Decision by itself voids all collection efforts since December 2012.

IT IS ORDERED:

Not later than **February 1, 2019**, the parties must submit either a joint proposed form of judgment or competing forms of judgment, while preserving all rights for appeal. The judgment will be *nunc pro tunc* to December 21, 2012, and based on these data:

- The date of default is October 2, 2008.
- 24% default interest, compounded monthly, began accruing on October 2, 2008.
- The principal balance on the Eladio Loan at default was $6,580,000.00.
- The principal balance on the Aperion Loan at default was $3,450,000.00.
- Plaintiffs successfully credit bid $3,460,000.00 for the Eladio property and $3,200,000.00 for the Aperion property on January 5, 2010.

The judgment must state the deficiency balance as of December 21, 2012.

In a separate section, the judgment will credit the amounts shown in the foregoing table against the deficiency judgment. Based on those credits, this section of the judgment will show the remaining balance on the judgment as of December 31, 2018.

III. ATTORNEY'S FEES.

The Court of Appeals directed the Court to consider the parties' "competing requests for attorney's fees and costs on appeal . . . ." [Decision ¶ 53.] The Court indicated in the Minute Entry (filed October 17, 2018) that it would award Plaintiffs their fees and costs in the underlying action preceding the appeal. But the Court later directed the parties to address that issue. [Min. Entry (filed November 30, 2018).] Plaintiffs then filed a waiver of any pre-judgment fees and costs through December 21, 2012. [Notice Limited Waiver Pre-J. Award Att'ys' Fees & Costs (filed December 17, 2018).]

Aperion and Eladio agreed in the notes to pay "all costs of enforcement and collection" in the event of default. That included "reasonable attorneys' fees and taxable and non-taxable costs . . . (including, without limitation, all such costs incurred in connection with any bankruptcy, receivership, or other court proceedings whether at the trial or appellate level)." [Eladio Note § 12; Aperion Note § 12.] Maniatis personally guaranteed those notes as well.

This Court lacks discretion to refuse to award fees under a contract provision. It must enforce the attorney's fee provision under the contract's terms. *E.g., McDowell Mtn. Ranch Cmty. Ass'n, Inc. v Simons*, 216 Ariz. 266, 269, ¶ 14, 165 P.3d 667, 670 (App. 2007). If Plaintiffs submit a fee application that is reasonable on its face, then Defendants must show that the fees are "clearly excessive." *Id.* at 271, ¶ 20, 165 P.3d at 672.

To provide as complete a record for appeal as possible, the Court notes that it would award Plaintiffs their appellate fees if the contractual provision were discretionary or if A.R.S. § 12-341.01 applied. Plaintiffs succeeded in many respects on appeal. The Court of Appeals affirmed the finding that Defendants breached the agreements and noted that a substantial deficiency existed. At most, the Court would temper a fee award moderately to account for Defendants' success regarding the amount of the deficiency judgment.

IT IS ORDERED awarding Plaintiffs their fees and costs on appeal, including the motion for reconsideration after the Court of Appeals issued the Decision. Plaintiffs must submit a fee application with *China Doll* affidavit no later than **January 18, 2019**. Defendants will have 10 days (plus any mail time) to respond. The form of judgment must include language relating to this fee award and a blank for the Court to insert the awarded amount.