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 6 *and The LMR Trust*

7 UNITED STATES DISTRICT COURT

8 DISTRICT OF NEVADA

9 * * *

10 KIRK and AMY HENRY,)
)
 11 Plaintiffs,)
)
 12 vs.)
)
 13 FREDRICK RIZZOLO aka RICK RIZZOLO,)
 an individual; LISA RIZZOLO, individually)
 14 and as trustee of The Lisa M. Rizzolo)
 Separate Property Trust and as successor)
 15 trustee of The Rick J. Rizzolo Separate)
 Property Trust; THE RICK AND LISA)
 16 RIZZOLO FAMILY TRUST; THE RICK)
 J. RIZZOLO SEPARATE PROPERTY)
 17 TRUST; and THE LISA M. RIZZOLO)
 SEPARATE PROPERTY TRUST, THE)
 18 RLR TRUST; THE LMR TRUST, and)
 KIMTRAN RIZZOLO, an individual,)
 19)
 20 Defendants.)

Case No. 2:08-CV-00635-PMP-GWF

**DEFENDANT LISA RIZZOLO'S
 OPPOSITION TO PLAINTIFFS'
 RENEWED MOTION FOR
 INJUNCTIVE RELIEF AGAINST THE
 DISSIPATION OR TRANSFER
 OF ASSETS**

21 LISA RIZZOLO,)
)
 22 Crossclaimant,)
)
 23 vs.)
)
 24 FREDRICK RIZZOLO aka RICK)
 RIZZOLO, individually and as trustee of)
 25 The Rick J. Rizzolo Separate Property Trust;)
 RICK J. RIZZOLO SEPARATE PROPERTY)
 26 TRUST and THE RLR TRUST,)
)
 27 Crossdefendants.)

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COMES NOW Defendants, LISA RIZZOLO, THE LISA M. RIZZOLO SEPARATE PROPERTY TRUST and THE LMR TRUST (collectively, “Defendants”), by an through their attorneys of record, BAILUS COOK & KELESIS, LTD., and hereby submits the following opposition to Plaintiffs’ renewed motion for injunctive relief against the dissipation or transfer of assets.

This opposition is made and based upon the pleadings and papers on file together with the arguments of counsel should a hearing on this matter be scheduled by this Honorable Court.

DATED this 5th day of October, 2012.

BAILUS COOK & KELESIS, LTD.

/s/
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POINTS AND AUTHORITIES

1. Introduction.

The Court is aware of the procedural and factual background in this case as well as the arguments propounded by Defendants in opposition to Plaintiffs’ original motion for preliminary injunction. Defendants will not repeat them here except where necessary. For the sake of brevity, attached hereto as Exhibit “A” is a copy of Defendants’ Opposition to Plaintiffs’ Motion for Injunctive Relief Against the Dissipation or Transfer of Assets (#529) and incorporated herein by this reference as though fully set forth.

In the case *sub judice*, Defendant Lisa Rizzolo has steadfastly maintained that the divorce and the attendant divorce decree was not “fraudulent” and was in accordance with considerations

1 allowed by Nevada state law regarding the division of marital property. As such, the decree of
2 divorce determined the interest of the parties in the property.¹ *See, BFP v. Resolute Trust Corp.*,
3 511 U.S. 531 (1994); *see also In Re Erlewine*, 349 F.2d 205 (5th Cir. 2003).

4 In reviewing Plaintiffs' renewed motion for injunctive relief (#635), the underlying
5 premise of the same is that the Rizzolo's divorce was a "fraudulent divorce" and that Plaintiffs
6 will suffer irreparable harm if the Court does not issue an injunction freezing the entire funds in
7 the Cook Islands account. Defendants disagree.

8 As a result of their divorce, Defendant Lisa Rizzolo ("Ms. Rizzolo") was awarded
9 community property with a value substantially less than the value of the property awarded to her
10 former husband, Rick Rizzolo. Rick Rizzolo received property valued in excess of \$30 Million,
11 but as to which there was some risk of both debts and future loss.² Specifically, the divorce
12 decree recites on its face that the value of the "community business" awarded to her former
13 husband, Rick Rizzolo, is "speculative," and subject to "potential debts" from the *Henry* lawsuit,
14 and potential criminal fines and tax impositions. However, "speculative" does not equate to
15 worthless. Rick Rizzolo did not receive a dry hole but rather, an ongoing business which grossed
16 between \$800,000.00 and \$1 Million a month. As such, awarding Rick Rizzolo the Crazy Horse

18 ¹Further, it is Ms. Rizzolo's position that any award of marital property in a non-
19 collusive, uncontested dissolution proceeding conducted in accordance with state law, such as
20 here, conclusively establishes reasonably equivalent value. *See BFP v. Resolute Trust Corp.*,
21 *supra*; *In re Erlewine, supra*; *see also, In re Zerbo*, 397 B.R. 642, 655 (2008). Ms. Rizzolo
22 asserts that the Crazy Horse Too was worth substantially more than the property received by her
23 in the divorce and thus, any transfers were for reasonably equivalent value.

24 ²At the time of the parties' divorce in 2005, the Crazy Horse Too was valued in excess of
25 \$30 Million. (Attached hereto, as Exhibit "B" and "C" are the expert opinion(s) of Ricardo
26 Miranda and Shelli Lowe, respectively, evidencing the same.) In exchange for Rick Rizzolo's
27 retention of that club, Ms. Rizzolo got property worth less than those awarded to Rick Rizzolo,
28 plus his guarantee to hold her harmless against various contingent liabilities. Assuming
arguendo, the division of the community property constitutes a "transfer" under NRS
112.150(12) - which is by no means certain since spouses already have "present, existing and
equal interests" in their community property (NRS 123.225(2)) - it was a transfer only to the
extent that the value of the community property awarded to Ms. Rizzolo exceeded in value the
property awarded to Rick Rizzolo. *See Britt v. Damson*, 334 F.2d 896 (9th Cir. 1964).

1 Too did not render him insolvent.

2 Notwithstanding, Ms. Rizzolo’s half of the community property was, and is, her property,
3 during marriage and after divorce, and free from Rick Rizzolo’s debts. As such, a third party is
4 not permitted under Nevada law to question either the parties’ decision to divorce, or collaterally
5 attack the divorce. Assuming *arguendo*, a Nevada divorce decree can be collaterally attacked by
6 a creditor, then the award of community property under the divorce decree is only avoidable to
7 the extent that the value of the community property awarded to Ms. Rizzolo exceeded the value
8 of the property awarded to the debtor, Rick Rizzolo.

9 As discussed in more detail below, injunctive relief is not warranted as the Plaintiffs have
10 failed to present any evidence to this Court that in the event they were to prevail, they would be
11 entitled to the entire funds, if any. As such, Plaintiffs are not likely to suffer irreparable harm.

12 **2. Preliminary Injunction Standard.**

13 “A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on
14 the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the
15 balance of equities tips in his favor, and that an injunction is in the public interest.” *See Alliance*
16 *for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011) (*quoting* *Winter v. Natural*
17 *Res. Defense Council, Inc.*, 555 U.S. 7, 129 S.Ct. 365, 374, 172 L.Ed.2d 249 (2008).

18 Alternatively, a plaintiff may show there are “serious questions going to the merits,” the balance
19 of hardships tips sharply toward the plaintiff, the plaintiff is likely to suffer irreparable harm
20 without injunctive relief, and the injunction is in the public interest. *Id.* at 1132. Whether to
21 grant or deny injunctive relief lies within the Court’s discretion. *Id.* at 1131.

22 **3. Defendant, Lisa Rizzolo did Not Financially Waste Any Monies From the Cook**
23 **Islands Account.**

24 In their renewed motion, Plaintiffs argue that “Ms. Rizzolo’s financial waste has resulted
25 in irreparable harm to Plaintiffs which warrants the immediate entry of an injunction barring any
26 further transfer or dissipation of the remaining money in the Cook Islands account.” *Plaintiffs’*
27 *Renewed Motion (#635)*, p. 3. Simply put, Plaintiffs are wrong. Ms. Rizzolo has used said funds
28 to support herself, her children and grandchildren, she has not financially wasted any funds from

1 the Cook Island account.

2 After her divorce, Ms. Rizzolo has utilized the monies in the Cook Islands account for her
3 living expenses. It was her expectation that upon her death that her assets would go to her
4 children and grandchildren as part of her estate plan. Like many American families, Ms.
5 Rizzolo's family has been hit hard by the recent economic recession. Over the last year, her
6 daughters and their families have had to move in with Ms. Rizzolo and she has been supporting
7 them. Clearly, this has affected her finances but it certainly does not constitute "waste."

8 Ms. Rizzolo is the mother of three grown children; Monica, Dominic and Leslie. Monica
9 is married to Thomas Pendleton and has four children; Emma and Joey (twin girls) who are 6
10 years old, Thomas (the only boy) who is 5 years old, and Payton who is 3 years old. Monica and
11 Thomas were originally living in Washington with their four children until approximately
12 February, 2011 when Monica took the children with her to Nevada for a visit to attend a baby
13 shower. She and the children stayed with Ms. Rizzolo. After a few weeks, Monica voiced that
14 she and Thomas had been having marital problems and that she wanted to stay with Ms. Rizzolo
15 while she got her life together and tried to figure out where her relationship with Thomas stood.
16 Sometime in July 2011, Monica began to talk seriously about getting divorced. At this point, she
17 and Thomas stopped speaking altogether and did not speak for many months. Ms. Rizzolo was
18 put in a position to facilitate visitation between Thomas and the children and as such, had to
19 make many trips to her home in California with the children to meet Thomas who flew in from
20 Washington so that the children could have contact with both parents. Ms. Rizzolo facilitated
21 these visitations and paid all travel expenses with the children. In addition, she paid Thomas'
22 travel expenses to and from Washington which included round trip airline tickets. Without Ms.
23 Rizzolo's financial assistance and generosity of time spent arranging the details of these visits,
24 the children would not have been able to see their father at all during this time.

25 Things continued on in this manner until April, 2012 when Thomas decided he had tried
26 hard enough and had waited long enough for his relationship with Monica to mend. Thomas was
27 going to start divorce proceedings against Monica. Monica had a change of heart at this time and
28 began trying to rekindle their relationship in earnest. Since April, 2012, Monica and Thomas

1 have managed to get back together and work through their differences enough that Monica will
2 be moving back to Washington with the children in approximately three to four weeks.

3 Ms. Rizzolo fully supported Monica and her children during the entire 19 months she has
4 been in Nevada to include, but not limited to, their food, clothing, medical insurance, doctor
5 bills, credit card payments, auto insurance and some expenses to assist Thomas while he was
6 alone trying to make ends meet up in Washington without his wife's assistance. This figure is
7 approximately \$28,385.15. Monica has not worked and has not contributed anything to her
8 living expenses for either herself or her children during the time she has stayed with her mother.

9 In addition to having her daughter Monica and her four grandchildren living with her
10 since February, 2012, Ms. Rizzolo has also had her son, Dominic living with her since August,
11 2011. Dominic is unmarried and was living out of state when he came home for a visit in
12 August, 2011 and never left. He didn't give an explanation as to why he came home in the first
13 place, however, in December, 2011, he admitted to his mother that he had nowhere else to turn
14 and nowhere to go. He stated that he had messed up his life and he needed her help. As his
15 mother, Ms. Rizzolo felt she had no choice but to help her son in his time of need. He is not
16 working at this time and has no plans to move out as of this date. Ms. Rizzolo has fully
17 supported him during the entire 14 months Dominic has lived with her to include, but not limited
18 to, food, clothing, medical insurance, doctor bills, hospital bills, credit card payments, and auto
19 insurance to the tune of approximately \$11,727.69.

20 Leslie is Ms. Rizzolo's youngest child and has lived with her since she was born. She has
21 a boyfriend named David Bishop and in August, 2012 moved out with him. Leslie is the only
22 child of Ms. Rizzolo who is working both now and in the past and she is also the only child who
23 has ever tried to contribute any money to assist her mother in supporting everyone. Leslie's
24 paycheck is set up to be automatically deposited in Ms. Rizzolo's bank account when she gets
25 paid. While living with her mother, Leslie was fully supported by Ms. Rizzolo as any minor
26 child should be to include, but not limited to, food, clothing, doctor bills, hospital bills, credit
27 card payments, and auto insurance for an approximate total of \$15,308.56. This support
28 continued into her adult years when she left for college through and until she moved back in

1 upon her return. When she moves out with her boyfriend in a few weeks, Ms. Rizzolo will
2 continue to provide assistance with some of Leslie's expenses until she is fully on her feet and
3 able to support herself.

4 Further, Ms. Rizzolo has had to maintain her real property both in Nevada and California
5 in order to preserve them. The property in California has had some problems this past year to
6 include being forced by the City of Newport Beach to pay for the relocation of power lines from
7 above-ground electrical poles to underground trenches; the replacement of the heating system;
8 and the replacement of the aged and faltering appliances in the kitchen. Adding these extra
9 unexpected expenses on top of regular maintenance, taxes, insurance and general cost of running
10 the household comes to approximately \$68,526.01 that Ms. Rizzolo has had to expend to keep
11 the California property running in the past year.

12 Ms. Rizzolo also maintains her residence here in Nevada. The Nevada property is her
13 main residence and she has had to expend approximately \$66,924.08 for its upkeep, utilities,
14 security, taxes, insurance and the general cost of running a household that, at times, contained
15 eight people living in it at once. The amount of money Ms. Rizzolo has expended just to keep
16 everyone fed over the last year comes to approximately \$48,000.00 and that estimate is on the
17 low side.

18 During the past year, Ms. Rizzolo has not only supported herself, her three children and
19 her four grandchildren but has also been dealing with some rather serious health conditions as
20 well. On or about June 29, 2011, Ms. Rizzolo had surgery to treat a deviated septum and
21 removal of a polyp from the right maxillary region of her sinus cavity. During and after this time
22 in May and also in June, Ms. Rizzolo had other various tests done, including an abdominal
23 ultrasound. The results of the abdominal ultrasound came back that there was a cancerous tumor
24 in her left kidney. She saw her urologist in July who advised her that the treatment for this kind
25 of kidney cancer was to remove the entire kidney. He subsequently set up surgery to remove her
26 kidney and then conducted the operation on August 17, 2011. She is still under the care of her
27 urologist to monitor her post-operatively.

28 Both as a precaution due to her family history and as a follow up to make sure there

1 wasn't any more cancer lurking anywhere else, Ms. Rizzolo had a battery of tests done. Those
2 tests included, but were not limited to, a colonoscopy, a camera endoscopy, regular endoscopy,
3 CT scan and MRI scan. The gastrointestinal testing revealed that Ms. Rizzolo was also suffering
4 from ulcerative colitis, a stomach ulcer and an unusually dilated duct in her pancreas. She is
5 currently being treated for those conditions with her gastroenterologist and the treatment and
6 prognosis are not yet known.

7 The CT scan and/or MRI she had done during that time revealed something else
8 altogether. She was diagnosed with a cyst of unknown type and origin on her left lung that is
9 currently concerning her physicians. She has been undergoing examination and treatment for
10 that cyst and will continue to do so as soon as she recovers from her recent surgery on her
11 shoulder to repair a torn rotator cuff. Said surgery took place on October 6, 2011. She has fully
12 recovered from her shoulder surgery without incident. Her treatment regarding the lung cyst,
13 however, is currently ongoing and her prognosis is not yet known. She and her doctors will
14 continue to monitor the cyst for any changes that might require treatment.

15 Finally, in addition to the above diagnoses, diseases and conditions, she is also under
16 treatment for a hypothyroid condition and requires medication be taken on a daily basis to
17 manage its symptoms. At present, she is tolerating both the treatment and condition of her
18 thyroid well.

19 Ms. Rizzolo's unexpected medical expenses for the last year are understandably extensive
20 and include, but are not limited to, insurance premium, medical bills after insurance has been
21 billed, bills for her eye doctor, shoulder surgery, gastroenterologist, nephrologist, and various
22 hospital bills. The total that Ms. Rizzolo has had to pay out-of-pocket for the last twelve months
23 is approximately \$41,750.09.

24 Ms. Rizzolo also had unexpected expenses in the last year when it comes to her
25 automobile. She by no means drives a fancy car. In fact, she drives a five year old Range Rover
26 that needs maintenance just like any other five year old car would. She has had the car in the
27 shop twice in the past year to the tune of approximately \$4,480.72. Combine those repair costs
28 with the cost of repair on her daughter's car, fuel, upkeep, insurance and DMV costs, among

1 other things, and the grand total comes to approximately \$14,057.03.

2 Ms. Rizzolo spent the remainder of the money over the past year on general expenses to
3 include, but not limited to, cell phones, rental cars, hotel rooms, general travel expenses when
4 she was in Washington, clothing for her four growing grandchildren, clothing for four adults,
5 general personal incidentals, cash withdrawals, assistance in cleaning both homes, various
6 miscellaneous personal expenses, holiday expenses, gifts for family and friends, etc. in the
7 approximate amount of \$377,340.21.

8 In addition, Ms. Rizzolo has incurred substantial attorneys fees and costs related to this
9 litigation. Over the past year, she has paid approximately \$123,919.88 just in litigation fees and
10 costs in this matter.

11 **4. Plaintiffs Have Failed to Make a Strong Showing That They Will Likely Succeed on**
12 **the Merits.**

13 While Nevada has adopted the Uniform Fraudulent Transfer Act, NRS 112.140, *et seq.*
14 (“NUFTA”), there appears to be no Nevada decision in which it was held that creditors of a
15 marital community which has been terminated by divorce may set aside a property award on the
16 basis that it was a fraudulent transfer. Because of such, Plaintiffs’ NUFTA claim must fail. *See*
17 *Britt v. Damson*, 334 F.2d 896, 901 (9th Cir. 1964).

18 In fact, in Nevada a third party cannot collaterally attack a decree of divorce. *See* NRS
19 125.185. Specifically, NRS 125.185 provides “[n]o divorce from the bonds of matrimony
20 heretofore or hereafter granted by a court of competent jurisdiction of the State of Nevada, which
21 divorce is valid and binding upon each of the parties thereto, may be contested or attacked by
22 third persons not parties thereto.” *See Gutowsky v. Gutowsky*, 38 Misc. 2d 827, 238 N.Y.S.2d
23 877 (S.Ct. 1963) (divorce decree granted in Nevada could not be attacked collaterally in New
24 York by a third person); *Madden v. Cosden*, 314 A.2d 128 (Md.Ct.App. 1974) (third-party
25 collateral attack in Maryland on a binding Nevada divorce decree not permitted). Applying
26 Nevada law, a creditor of only one spouse, such as the Plaintiffs, cannot collaterally attack as a
27 fraudulent transfer under NUFTA the award of community property in a Nevada divorce decree.

28

1 Ms. Rizzolo recognizes that in its orders (#536, #582), the Court has determined under
 2 the summary judgment standard, a reasonable jury could find the Rizzolo's divorce constituted a
 3 fraudulent transfer citing *In re Beverly*, 374 B.R. 221, 233-34 (9th Cir. BAP 2007) and *Mejia v.*
 4 *Reed*, 74 P.3d 166, 173 (Cal. 2003). *Order (#582)*, p. 5. It is of import to note, the *Beverly* and
 5 *Mejia* cases dealt strictly with marital settlement agreements and not decrees of divorce. In fact,
 6 the *Beverly* and *Mejia* cases have been distinguished by *In re Bledsoe*, 569 F.2d 1106, 1110 (9th
 7 Cir. 2009), as to the distinction between marital settlement agreements and dissolution
 8 judgments.

9 In *Bledsoe*, the trustee of the debtor-wife's bankruptcy estate brought an adversary
 10 proceeding to set aside transfer of assets to debtor's ex-husband pursuant to a judgment entered
 11 in a state court dissolution proceeding. In rejecting the trustee's position, the Ninth Circuit noted
 12 in *Bledsoe*:

13 For example, *Britt v. Damson*, 334 F.2d 896 (9th Cir. 1964), contradicts
 14 Trustee's position. There, we rejected claims premised on Washington law
 15 and brought under the predecessor statute to § 544, because "[w]e [we]re not
 16 aware of any Washington decision in which it was held that creditors of a
 17 marital community which has been terminated by divorce may set aside a
 18 property award on the basis that it was a fraudulent transfer." *Id.* At 901.

19 Other cases involved a marital settlement agreement, rather than a dissolution
 20 judgment entered at the conclusion of a regularly conducted state-court
 21 proceeding. *See Beverly v. Wolkowitz (In re Beverly)*, 374 B.R. 221 (B.A.P.
 22 9th Cir. 2007)(applying California law to a marital settlement agreement),
 23 *adopted*, 551 F.3d 1092 (9th Cir. 2008)(order); *Mejia v. Reed*, 31 Cal.4th 657,
 24 3 Cal.Rptr.3d 390, 74 P.3d 166, 174 (2003)(same); *Corzin v. Fordu (In re*
 25 *Fordu)*, 201 F.3d 693, 707-09 (6th Cir. 1999)(applying Ohio law to a marital
 26 separation agreement); *Roosevelt v. Ray (In re Roosevelt)*, 176 B.R. 200 (9th
 27 BAP Cir. 1994)(applying California law to a marital settlement agreement).
 28 Because transfers under a settlement agreement may raise different issues in
 this context, we need not and do not decide whether *Greeninger* would apply
 to a marital settlement agreement. *See In re Lynch-Kirby*, 220 Or.App. 188,
 185 P.3d 494, 496 (2008)(applying the rule that a marital settlement
 agreement is treated as a contract, whose terms are governed by the parties'
 intent, not the court's).

569 F.3d at 1110, fn. 2.

Applying *Britt*, the Court should reject Plaintiffs' NUFTA claim and not grant a
 preliminary injunction as there appears to be no "[Nevada] decision in which it was held that
 creditors of a marital community which has been terminated by divorce may set aside a property
 award on the basis that it was a fraudulent transfer." *See Britt v. Damson*, 334 F.2d at 901.

1 **5. Plaintiffs Will Not Likely Suffer Irreparable Harm If Injunctive Relief Is Not**
 2 **Granted.**

3 In this litigation, Plaintiffs have been operating under the mistaken belief that if they
 4 prevailed on their NUFTA claim, that all the community property awarded to Ms. Rizzolo could
 5 be avoided as a fraudulent transfer. Simply put, Plaintiffs are wrong. Assuming *arguendo*, a
 6 Nevada divorce decree can be collaterally attacked by a creditor, then the award of community
 7 property under the divorce decree is only avoidable to the extent that the value of the community
 8 property awarded to Ms. Rizzolo exceeded the value of the property awarded to the debtor, Rick
 9 Rizzolo. For NUFTA purposes, it is irrelevant whether the monies owed to Plaintiffs by the
 10 debtor, Rick Rizzolo, are deemed community debts or not. The gravamen of the issue in a
 11 NUFTA claim is to what extent the award of the community property in a divorce constitutes a
 “transfer.” See NRS 112.150(12)³.

12 The Ninth Circuit in *Britt v. Damson*, 334 F.2d at 903, under the predecessor fraudulent
 13 conveyance statute in the Bankruptcy Act, considered a case where the community owned a
 14 construction business operated by the husband. The court awarded the business of the bankrupt
 15 husband and all community obligations to the husband. The wife was awarded the non-business
 16 community property. The court ruled that a court-awarded property settlement is only avoidable
 17 to the extent that the value of the community property awarded to the non-operating spouse
 18 exceeds in value the property awarded to the operating spouse.

19 With respect to the latter, the Ninth Circuit opined:

20 To the extent that the value of the community property awarded to
 21 Mrs. Damson was offset by the value of the community property awarded to
 22 Mr. Damson, the ‘transfer’ to Mrs. Damson was, as a matter of law,
 23 supported by ‘fair consideration,’ as that term is defined in section 67, subd.
 d(1)(e). To this extent the award to each amounted to no more than an equal
 partition of property in which, as indicated above, they each had a vested,
 equal undivided interest.

24 * * *

25 From what has been said it will be evident that, at most, the trustee
 26 can enforce rights only to the extent, if any, that the value of the award to

27
 28 ³NRS 112.150(12) defines “transfer” as “every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset, and includes payment of money, release, lease and creation of a lien or other encumbrance.”

1 Mrs. Damson exceeded one half of the total value of the community property.

2 During the marriage, parties in Nevada have a “present, existing and equal interest” in
3 their community and the alignment of such property does not change upon divorce. *See* NRS
4 123.220-250. To the extent the confirmation of community property to Ms. Rizzolo and her
5 former husband, Rick Rizzolo, amounted to no more than an equal partition of property, they
6 each had a vested, equal undivided interest. In the unlikely event Plaintiffs prevail on their
7 NUFTA claim, at most, they can only avoid to the extent, if any, the value of the award to Ms.
8 Rizzolo exceeded one half of the total value of the community property. *Id.*

9 Even *Beverly*, which Plaintiffs have relied upon, lends support to Ms. Rizzolo’s position
10 that an equal division of community property does not constitute a transfer under NUFTA. It is
11 only the excess which can constitute the same. Specifically, in *Beverly*, 374 B.R. at 233, the
12 Court stated:

13 As pertinent here, the “interest of the debtor in property” is Beverly’s transfer
14 to his spouse of his half of the unencumbered \$1 million in bank deposits.
15 ***This is a transfer. It is not an equal division of bank deposits that would
have had the effect of confirming to Beverly the interest that he already
had. Here, Beverly was entitled to the one-half of the funds that he
transferred.***

16 * * *

17 The issue, rather, is whether the pre-bankruptcy transfer of the debtor’s
18 interest in \$1 million can be avoided under UFTA. ***If so, then the
transferred property would be recoverable for the benefit of creditors
cheated by the MSA that did something other than evenly dividing the
divisible property.*** (Emphasis added.)

19 As evident from the foregoing, if the parties in *Beverly* had made an equal division of the
20 bank deposits, it would have had the effect of confirming to the debtor the interest he already had
21 in the same and thus, would not have been a transfer.
22

23 In their renewed motion, Plaintiffs erroneously argue that “Ms. Rizzolo is on pace to
24 dissipate the disputed funds to such an extent that Plaintiffs’ eventual recovery in this proceeding
25 will be substantially diminished.” *Plaintiffs’ Renewed Motion* (#635, p. 3). Simply put,
26 Plaintiffs are wrong. Plaintiffs have failed to establish that they are even entitled to any portion
27 of the funds in the Cook Islands accounts let alone the entire amount. In fact, Plaintiffs have
28 presented no evidence regarding value of any of the property. Absent such, this Court is not in a
position to determine to what extent, if any, the value of the confirmation to Ms. Rizzolo may

1 have exceeded one half of the total value of the community property, if at all. Accordingly, a
 2 preliminary injunction freezing the entire Cook Islands account is not warranted as Plaintiffs
 3 have failed to demonstrate that they will likely suffer irreparable harm.

4 **6. The Balance of Hardships Tips in Favor of Defendant, Lisa Rizzolo.**

5 Plaintiffs are aware that Ms. Rizzolo utilizes the funds in the Cook Islands account for
 6 her personal expenses. Plaintiffs are purposely seeking to freeze the entire Cook Island account
 7 so as to leave Ms. Rizzolo without any funds to live on, maintain her real and personal property
 8 and even to pay her attorney's fees and costs to defend this litigation. In this respect, the sought
 9 for preliminary injunction is overly broad because it does not take into account Ms. Rizzolo's
 10 living expenses and provisions for payment of her attorney's fees and costs. On the other hand,
 11 Plaintiffs have already received \$1 million as a result of the settlement agreement and the Court
 12 recently granted summary judgment against Kimtran Rizzolo and Rick Rizzolo in favor of
 13 Plaintiffs in the amount of approximately \$1 million. Further, Plaintiffs' attorneys are on a
 14 contingency fee retainer and Plaintiffs do not have to pay them on a monthly basis as does Ms.
 15 Rizzolo to her attorneys. Clearly, Plaintiffs do not need a preliminary injunction to prosecute the
 16 instant litigation. However, freezing the entire Cook Islands account would have a devastating
 17 effect on Ms. Rizzolo's ability to defend herself in this matter. Assuming, for the sake of
 18 argument, the Crazy Horse Too had absolutely no value (which it does not), Plaintiffs would only
 19 be entitled to one-half of the Cook Islands account. As such, Plaintiffs seeking to freeze the
 20 entire account is simply an attempt to leave Ms. Rizzolo without any funds during the pendency
 21 of this litigation.

22 **7. Plaintiffs Should Be Required to Post a Bond Pursuant to NRCP 65(c).**

23 Rule 65(c) of the Federal Rules of Civil Procedure ("FRCP") provides:

24 No restraining order or preliminary injunction shall issue except upon the
 25 giving of security by the applicant, in such sum as the court deems proper, for
 26 the payment of such costs and damages as may be incurred or suffered by any
 27 party who is found to have been wrongfully enjoined or restrained.

28 On its face, this language admits no exceptions. *See Atomic Oil Co. v. Bardahl Oil Co.*, 419
 F.2d 1097, 1100 (10th Cir. 1969) ("Rule 65(c) states in mandatory language that the giving of security
 is an absolute condition precedent to the issuance of a preliminary injunction."), *cert. denied*, 397
 U.S. 1063, 90 S.Ct. 1500, 25 L.Ed.2d 685 (1970). "[T]here are important policies undergirding a

