UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

MASTER CASE NO. 09-2106-MD-GOLD/GOODMAN

In re:

FONTAINEBLEAU LAS VEGAS
CONTRACT LITIGATION

MDL NO. 2106

This document relates to:

ALL ACTIONS
_____/

DEFENDANT BANK OF AMERICA, N.A.'S
CORRECTED NOTICE OF PENDING, REFILED,
RELATED OR SIMILAR ACTIONS

Pursuant to S.D. Fla. L.R. 3.8 and 7.1, and Section 2.15.00 of the Court's Internal Operating Procedures, defendant Bank of America, N.A. ("BANA") notifies the Court of a related and similar action pending in this District.

Attached as Exhibit A is a copy of the complaint in *Soneet Kapila v. Jeffrey Soffer, et al.*, Adv. No. 09-21481-AJC (Bankr. S.D. Fla.) (the "*Trustee* Action"), an action filed in the United States Bankruptcy Court for the Southern District of Florida on June 8, 2011.[1] The *Trustee* Action is a "similar" action under Section 2.15.00 of the Court's Internal Operating Procedures because it "involves subject matter which is a material part of the subject matter of another action or proceeding . . . pending before this Court." The *Trustee* Action involves the same subject matter as two actions previously transferred to MDL No. 2106: (1) *Avenue CLO Fund, et al. v. Bank of America, N.A., et al.*; and (2) *Brigade Leveraged Capital Structures Fund, Ltd., et*

[1] BANA is not a party to the *Trustee* Action.

al. v. Fontainebleau Resorts, LLC, et al., Adversary No. 11-01130-mkn (Bankr. D. Nev.), a recently-filed action that is the subject of a May 19, 2011 Judicial Panel on Multidistrict Litigation Conditional Transfer Order.[2]

All three actions involve claims arising out of representations and certifications made by Fontainebleau to BANA and other lenders in connection with the financing for the development of the Fontainebleau Casino and Resort under the June 6, 2007 Credit Agreement and Disbursement Agreement. In the *Avenue* Action against BANA, the Term Lender Plaintiffs allege that BANA breached its duties as Disbursement Agent by allowing Fontainebleau to access loaned funds despite BANA's alleged knowledge that Fontainebleau could not meet various conditions precedent under the Credit Agreement and Disbursement Agreement. In the *Brigade* action, the same Term Lender Plaintiffs reverse course and allege that Fontainebleau and various of its affiliates, officers and directors repeatedly made knowingly false and misleading statements which were intended to, and did, *conceal* from BANA and the Project's lenders (including Plaintiffs) that Fontainebleau could not meet the very same conditions precedent.

In the *Trustee* Action, the Fontainebleau Chapter 7 Trustee asserts breach of fiduciary duty and statutory fraudulent conveyance claims against various Fontainebleau officers and directors based on allegations identical to the *Brigade* Plaintiffs' fraud allegations.[3] Thus, a

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[2] The *Brigade* action was filed in the District Court of Clark County, Nevada on March 25, 2011, and removed by defendant Crown Services (US), LLC on May 2, 2011 on the ground that it is "related to the Chapter 7 cases currently pending in the United States Bankruptcy Court for the Southern District of Florida . . . jointly administered with the bankruptcy case *In re Fontainebleau Las Vegas Holdings, LLC*, Case No. 09-21481." The *Brigade* Action was transferred by JPML on May 19, 2011 pursuant to Conditional Transfer Order No. 2 ("CTO No. 2") (D.E. No. 56). Certain *Brigade* action parties have filed motions to vacate CTO No. 2; briefing on those will be completed on June 30, 2011. A true and correct copy of the *Brigade* complaint is annexed hereto as Exhibit B.

[3] *See* Ex. A, ¶¶ 83-85.

central question in each of the *Avenue*, *Brigade* and *Trustee* Actions is whether Fontainebleau made materially false and misleading representations concerning its financial condition to a group of lenders under a senior secured credit facility, including BANA (who was also the lenders' agent under the credit facility). Accordingly, the *Trustee* Action is "similar" to the *Avenue* and *Brigade* Actions under Section 2.15.00 of the Court's Internal Operating Procedures.

Dated: June 29, 2011
Miami, Florida

Respectfully submitted,

By: /s/ David E. Bane

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CERTIFICATE OF SERVICE

I, Melissa Wangenheim, hereby certify that on June 29, 2011, I served true and correct copies of the foregoing Defendant Bank of America, N.A.'s Corrected Notice of Pending, Refiled, Related or Similar Actions by first class mail on the following counsel of record:

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EXHIBIT A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
(MIAMI DIVISION)
www.flsb.uscourts.gov

In re

FONTAINEBLEAU LAS VEGAS HOLDINGS, LLC, et al.,

Debtors.
_____/

CASE NO. 09-21481-BKC-AJC
CHAPTER 7
(Jointly Administered)

SONEET KAPILA, not individually but as Chapter 7 trustee of the above-styled jointly administered Debtors,

Plaintiff,
vs.

JEFFREY SOFFER, an individual, ALBERT "SONNY" KOTITE, an individual, RAY PARELLO, an individual, BRUCE WEINER, an individual, GLENN SCHAEFFER, an individual, JAMES FREEMAN, an individual, DEVENDRA "DEVEN" KUMAR, an individual, FONTAINEBLEAU RESORTS, LLC, a Delaware limited liability company, TURNBERRY, LTD., a dissolved Florida limited partnership, TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P., a Delaware limited partnership, TURNBERRY WEST CONSTRUCTION, INC., a Nevada corporation,

Defendants.
_____/

ADV. NO.

ADVERSARY COMPLAINT FOR DAMAGES, TO AVOID AND RECOVER AVOIDABLE TRANSFERS AND FOR OTHER RELIEF

The Plaintiff, SONEET KAPILA ("Kapila or the "Trustee"), not individually but as Chapter 7 Trustee of the above-styled jointly administered Debtors, files this Adversary Complaint for Damages, to Avoid and Recover Avoidable Transfers and for Other Relief, against the Defendants, JEFFREY SOFFER, ALBERT "SONNY" KOTITE, RAY PARELLO,

BRUCE WEINER, GLENN SCHAEFFER, JAMES FREEMAN, DEVENDRA "DEVEN" KUMAR, FONTAINEBLEAU RESORTS, LLC, TURNBERRY LTD., TURNBERRY RESIDENTIAL LIMITED PARTNER, L.P., and TURNBERRY WEST CONSTRUCTION, INC. (the foregoing named defendants shall sometimes be referred to collectively herein as the "Defendants"),[1] and alleges:

THE PARTIES, JURISDICTION & VENUE

1. On June 9, 2009 (the June 2009 Petition Date), Debtors Fontainebleau Las Vegas Holdings, LLC, Fontainebleau Las Vegas, LLC, and Fontainebleau Las Vegas Capital Corp. commenced these cases by filing voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") with this Court. Thereafter, on November 25, 2009 (the "Nov. 2009 Petition Date"), the affiliated Debtors Fontainebleau Las Vegas Retail Parent, LLC, Fontainebleau Las Vegas, Retail Mezzanine, LLC, and Fontainebleau Las Vegas Retail, LLC filed voluntary petitions for relief under the Bankruptcy Code with this Court (each of the foregoing Debtors shall collectively be referred to herein as the "Debtors"). By orders of Court, each of the Debtors are being jointly administered under Main Case No. 09-21481-BKC-AJC.

2. By Order dated April 20, 2010, the Bankruptcy Court converted the Debtors' cases to Chapter 7 liquidations.

3. Thereafter, Kapila was appointed Chapter 7 trustee of the estates of the Debtors, which appointment was accepted by the Bankruptcy Court.

4. As such, Kapila is the duly appointed and acting Trustee of the jointly administered Chapter 7 bankruptcy estate of the Debtors.

[1] In compliance with Fed. R. Bankr. P. 7020 and Local Rule 7003-1(D) regarding the joinder of multiple parties in a single action, the claims asserted against the named defendants arise out of the same series of transactions and involve common issues of law and fact.

5. Defendant Fontainebleau Resorts, LLC ("FBR") is a Delaware corporation with its principal place of business in Florida, and at all times material hereto was an insider of the Debtors as that term is defined under the Bankruptcy Code.

6. Defendant Turnberry Residential Limited Partner, L.P. ("TRLP") is a Delaware limited partnership, and at all times material hereto was an insider of the Debtors as that term is defined under the Bankruptcy Code.

7. Defendant Turnberry West Construction, Inc. ("TWC") is a Nevada corporation, and at all times material hereto was an insider of the Debtors as that term is defined under the Bankruptcy Code.

8. Defendant Turnberry Ltd. is a Florida limited partnership, and at all times material hereto was an insider of the Debtors as that term is defined under the Bankruptcy Code.

9. Defendant Jeffrey Soffer ("Soffer"), a Florida resident, was, at all material times, the Chairman and CEO of FBR and a member of its Board of Managers. Soffer is also one of two members of the Board of Directors of Fontainebleau Las Vegas Capital Corp. Soffer owns or controls the Turnberry companies. He was, at all material times, President, Treasurer, Secretary and Director of TWC. Soffer is the manager of the general partner of both TRLP and Turnberry Ltd. At all times material hereto, Soffer acted as a *de facto* or *de jure* officer, director, manager and/or control person of the Debtors, and was an insider of the Debtors as that term is defined under the Bankruptcy Code.

10. Defendant Albert "Sonny" Kotite ("Kotite'), a Florida resident, is the Executive Director of FBR and a member of its Board of Managers. Kotite is also one of two members of the Board of Directors of Fontainebleau Las Vegas Capital Corp. At all times material hereto,

Kotite acted as a *de facto* or *de jure* officer, director, manager and/or control person of the Debtors, and was an insider of the Debtors as that term is defined under the Bankruptcy Code.

11. Defendant Ray Parello ("Parello"), a Florida resident, is a member of the Board of Managers of FBR. Parello currently serves as Director of Finance for Turnberry Associates. At all times material hereto, Parello acted as a *de facto* or *de jure* officer, director, manager and/or control person of the Debtors, and was an insider of the Debtors as that term is defined under the Bankruptcy Code.

12. Defendant Bruce Weiner ("Weiner"), a Florida resident, at all material times was a member of the Board of Managers of FBR. At all times material hereto, Weiner acted as a *de facto* or *de jure* officer, director, manager and/or control person of the Debtors, and was an insider of the Debtors as that term is defined under the Bankruptcy Code.

13. Defendant Glenn Schaeffer ("Schaeffer"), a Nevada resident, was a member of the Board of Managers of FBR until May 2009. Schaeffer also served as the President of Fontainebleau Las Vegas Capital Corp. and a member of its Board of Directors until May 2009. At all times material hereto, Schaeffer acted as a *de facto* or *de jure* officer, director, manager and/or control person of the Debtors, and was an insider of the Debtors as that term is defined under the Bankruptcy Code.

14. Defendant James Freeman ("Freeman"), a Nevada resident, was the Senior Vice President and Chief Financial Officer of FBR. Freeman also served as the Treasurer of Fontainebleau Las Vegas Capital Corp. At all times material hereto, Freeman acted as a *de facto* or *de jure* officer, director, manager and/or control person of the Debtors, and was an insider of the Debtors as that term is defined under the Bankruptcy Code.

15. Defendant Devendra "Deven" Kumar ("Kumar"), a Nevada resident, was the Senior Vice President of Development and Finance at FBR. At all times material hereto, Kumar acted as a *de facto* or *de jure* officer, director, manager and/or control person of the Debtors, and was an insider of the Debtors as that term is defined under the Bankruptcy Code.

16. Defendants FBR, Soffer, Kotite, Parello, Weiner, Schaeffer, Freeman and Kumar are sometimes collectively referred to herein as the "D&O Defendants."

17. At all times material hereto, the D&O Defendants were acting within the scope of their authority on behalf of the Debtors and/or the remaining corporate/partnership defendants.

18. The Trustee files this Complaint pursuant to 11 U.S.C. § 541(a) as successor to the interests in property of the estate, and pursuant to 11 U.S.C. § 544.

19. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334.

20. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

21. Venue is proper in this district pursuant to 28 U.S.C. § 1409.

A. Preliminary Statement

22. The claims at issue in this adversary proceeding seek the recovery of damages for breach of fiduciary duty and aiding and abetting breach of fiduciary duty, and to avoid and recover fraudulent transfers arising out of the Debtors' involvement with the development and construction of the multi-million dollar, multi-use Fontainebleau Resort and Casino in Las Vegas, Nevada (the "Project").

23. The Project was to include: (i) a 63-story glass skyscraper featuring over 3,800 guest rooms, suites and condominium units; (ii) a 100-foot high, three level podium complex housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater

and rooftop pools; (iii) a 353,000 square-foot convention center; (iv) a high-end retail space including shops and restaurants; and (v) a nightclub.[2]

24. The Debtor, Fontainebleau Las Vegas, LLC ("FBLV"), owned the real estate upon which the Project was being constructed. FBLV contracted with TWC, an insider of the Debtors to act as general contractor for the Project.

25. Debtor FBLV and non-debtor Fontainebleau Las Vegas II, LLC were borrowers (collectively, the "Borrower Entities") under certain credit lines obtained to provide financing for the Project.

26. The Borrower Entities were wholly-owned indirect subsidiaries of Defendant FBR, a company founded and substantially owned by Defendant Soffer to develop and operate the Fontainebleau hotels in Miami and Las Vegas.

27. At all times material hereto FBR operated by and through a Board of Managers that was responsible for all major decisions of the Debtors.

28. At all times material hereto, Soffer, FBR and the remaining D&O Defendants, who were officers, directors, managers and/or control persons of FBR and FBLV, also acted as *de facto* or *de jure* officers, directors, managers and/or control persons of the Debtors by directing and controlling all aspects of their business and financial operations.

29. The general contractor responsible for the construction of the Project was Defendant TWC, an affiliate of Defendant TRLP. Defendant Soffer was the President of TWC and while serving as the Chairman of the Board of Managers for FBR presented the TWC contract to the FBR Board of Managers for consideration. No other potential general contractor was considered for the Project.

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[2] By Order of the Bankruptcy Court entered after adequate notice and multiple hearings, all of the Debtors' right, title and interest in the Project was sold to a third party for substantially less than the amount of mortgages and liens encumbering the Project.

30. TWC and TRLP were also founded and substantially owned and controlled by Soffer and the remaining D&O Defendants, who were also officers, directors, managers and/or control persons of TWC and TRLP (collectively, the "Turnberry Defendants").

31. The Debtors, along with the Fontainebleau Florida companies, as borrowers, were parties to the May 10, 2005 loan agreement (the "2005 Loan"), pursuant to which Bank of America, as Administrative Agent, loaned more than $365,000,000 for the construction and remodeling of the Las Vegas and Miami Fontainebleau brand hotels.

32. In 2006, the FBR Defendants decided to refinance and restructure the 2005 Loan.

33. Beginning in March 2007, the D&O Defendants solicited certain third parties to participate in financing the Project. In so doing, Soffer and/or the remaining D&O Defendants represented that the Project budget provided to the lenders accurately represented all anticipated costs to complete the Project, that the Project construction drawings were substantially complete, and that sufficient committed construction contracts were in place to complete the Project.

34. However, in truth: (i) the internal budgets for the Project totaled nearly $100 million more than those disclosed to third parties, including lenders, outside of the organization; (ii) the construction drawings were not substantially complete, and, in fact, were never completed; and (iii) the "committed contracts" provided to certain third parties substantially and materially understated the known costs.

35. Among other obligations, the D&O Defendants had a duty to exercise reasonable care to ensure that the Project was managed competently, that it accurately reported the financial condition and progress of construction and that the Project was completed in accordance with the budgets and cost reports provided to third parties, but such did not occur.

36. Instead, the D&O Defendants failed to properly oversee the Project and failed to ensure that accurate information about its financial condition was disseminated to third parties, including the Project lenders.

37. During 2008, the D&O Defendants knew or had reason to know that the actual cost to complete the Project had escalated by hundreds of millions of dollars, well in excess of the then-available financing to complete the Project, and that materially inaccurate information was being provided regarding the Project. The D&O Defendants ultimately engaged in these and other equally questionable activities to ensure that funding would continue and that the true financial condition of the Debtors and its affiliates would remain unknown to third parties, including the Project lenders.

38. As a result of the various acts and omissions of the Debtors' management (as described in more detail below), hundreds of millions of dollars of loans were funded and various other creditors extended trade credit which, had the true facts been known, would have not have occurred.

39. In April 2009, certain of the Project lenders declared a default under their Credit Agreement, with the first set of Debtors filing their bankruptcy petitions in June, 2009.

B. The Project

40. Soffer is the son of Donald Soffer, a prominent real estate developer who developed, among other projects, the City of Aventura, Florida. In 2005, Soffer and his partners purchased the well-renowned Fontainebleau Miami Hotel. Soffer conceived of The Fontainebleau Resort and Casino in Las Vegas, Nevada as the first step in the development of upscale Fontainebleau resorts throughout the world.

41. The Project was designed to be a destination casino-resort on the north end of the Las Vegas Strip, situated on approximately 24.4 acres. As stated above, it was to include a 63-story glass skyscraper featuring over 3,800 guest rooms, suites and condominium units; a 100-foot high three-level podium complex housing casino/gaming areas, restaurants and bars, a spa and salon, a live entertainment theater and rooftop pools; a parking garage with space for more than 6,000 vehicles; and a 353,000 square-foot convention center. The Project also was to include approximately 286,500 square-feet of retail space, including retail shops, restaurants, and a nightclub.

42. Soffer and Schaeffer founded FBR in 2005 to develop and operate the Fontainebleau hotels in Miami and Las Vegas. FBR was controlled by a Board of Managers consisting of Soffer, Schaeffer, Kotite, Parello and Weiner (the "FBR Board of Managers"). The officers of FBR included Soffer, Freeman, and Kumar.

43. FBR created several subsidiaries to develop the Project, including the Debtors (collectively, the "Project Entities"). Each of the Project Entities was wholly-owned, directly or indirectly, by FBR and largely controlled by the FBR Board of Managers. The board of directors of Debtor Fontainebleau Las Vegas Capital Corp. consisted of Soffer and Kotite.

44. The general contractor for the Project was Turnberry West Construction (defined above as TWC). TWC (collectively with TRLP and Turnberry Ltd. referred to herein as the "Turnberry Defendants") is an affiliate of TRLP and Turnberry Ltd., and was created for the purpose of overseeing the construction of the Project

45. Through his position on the Board of Managers and in the Turnberry Defendants, as well as his ownership interests in the Fontainebleau and Turnberry entities, Soffer personally

exercised substantial if not exclusive control over the Project, including decisions regarding Project development, financing and construction.

C. The 2005 Credit Agreement

46. On or about March 18, 2005, Turnberry/Las Vegas Boulevard L.P.;[3] Turnberry/Las Vegas Boulevard, L.L.C.; Krystle Towers, LLC; Fontainebleau Resorts, LLC as borrowers entered into a Credit Agreement (the "2005 Credit Agreement") with certain lenders and Bank of America, N.A. as Administrative Agent pursuant to which funds were loaned to acquire land in Las Vegas for the Development of the Project, satisfy existing related loans and advance deposit funds for the purchase of certain real property south of the Fontainebleau Hotel in Miami, Florida. As of May 24, 2005, draws under the 2005 Credit Agreement to satisfy these and related costs totaled $158,720,858.40.

47. On or about May 10, 2005, the 2005 Credit Agreement was amended and restated to include Fontainebleau Florida Hotel, LLC, Fontainebleau Florida Tower 2, LLC, Fontainebleau Florida Tower 4, LLC (collectively, the "Florida Borrowers") as borrowers along with Turnberry/Las Vegas Boulevard L.P., Turnberry/Las Vegas Boulevard, L.L.C., Krystle Towers, LLC (collectively, the "Nevada Borrowers"), Fontainebleau Resorts, LLC, with certain lenders and Bank of America, N.A. as Administrative Agent.

48. As of May 12, 2005, the 2005 Credit Agreement, as amended and restated, provided for a $150,000,000.00 term loan to the Nevada Borrowers, a $100,000,000 term loan to the Florida Borrowers and a $208,111,695.40 revolving loan to the Florida Borrowers. The total amount of $458,111,695.40 was used to refinance the initial $158,720,858.40 loan referenced

[3] As noted herein, Turnberry/Las Vegas Boulevard, L.P. later converted from a LP to a LLC and changed its name to Fontainebleau Las Vegas Holdings, LLC, which is one of the Resort Debtors in these bankruptcy proceedings.

above, finance the purchase price of the Fontainebleau Hotel in Miami, Florida and satisfy related costs.

D. The 2007 Credit Agreement

49. The 2005 Loan was later refinanced and replaced by three facilities: a $1.85 billion bank financing (the "Credit Agreement Facility"), a $675 million Second Mortgage Note offering, and a $315 million facility to finance construction of the retail portion of the Project (the "Retail Facility"). Each of these facilities closed in June 2007.

50. The Credit Agreement included the following commitments: a $700 million initial term loan facility (the "Initial Term Loan Facility"); a $350 million delay draw term facility (the "Delay Draw Facility," and together with the Initial Term Loan Facility, the "Term Loan Facility"); and an $800 million revolving loan facility. Certain third parties are lenders under the Term Loan Facility and are assignees (direct or indirect) of the original Term Lender, Bank of America, N.A. ("BOA"). The Initial Term Loan Facility was funded upon the closing of the Credit Agreement in June 2007. In conjunction with the 2007 closing transaction, $45.3 million was paid to FBR to satisfy a note obligation it assumed in connection with the Project.

51. According to the Project lenders, the Credit Agreement and other loan documents created a two-step mechanism for the Borrower Entities to obtain access to loan proceeds for the payment of "Project Costs" to construct the Project. The Borrower Entities first were required to submit to the Administrative Agent a Notice of Borrowing specifying the requested loans and designated borrowing dates. A proper Notice of Borrowing obligated the lenders to transfer the requested funds into a Bank Proceeds Account. In order to access the funds in the Bank Proceeds Account to pay for the costs of the Project, the Borrower Entities were required to

submit an Advance Request to the Disbursement Agent pursuant to the terms of a Master Disbursement Agreement, which was executed concurrently with the Credit Agreement.

52. According to the Project lenders, each Advance Request was required to contain, among other things, certifications by the Project Entities, TWC, and others attesting to the accuracy of various information and other data, including: that there was no Default or Event of Default under any of the Financing Agreements; that the Remaining Cost Report set forth all "reasonably anticipated Project Costs required to" complete the Project; that the In Balance Test was satisfied, the critical calculation to determine whether the Borrower Entities' available resources exceeded the remaining costs to complete the Project, which was the primary security for the loans; that there had been no development or event since the Closing Date that could reasonably be expected to have a Material Adverse Effect on the Project; and that each of the Retail Lenders, including Lehman Brothers, had made all advances required of them under the Retail Facility.

E. The CCCS Debacle

53. During the summer of 2008, CCCS International ("CCCS") was contacted by certain D&O Defendants to provide various construction management services for the Project.

54. According to these D&O Defendants, the Project was severely over budget and Fontainebleau was in need of a construction manager able to provide cost management and auditing services to recover prior unnecessary overpayments.

55. In the fall of 2008, CCCS entered into a contract for the construction, bidding, negotiating and auditing of the Project.

56. Before any written agreement was formalized, certain of the D&O Defendants brought CCCS to the Project in an attempt to contain costs and recover prior overpayments. Shortly thereafter, CCS began performing its work under the Contract.

57. During the negotiations prior to the formation of the more formal agreement to be executed, the D&O Defendants knew that there was inadequate financing available for the Debtors to complete the Project or otherwise pay their debts as they became due.

58. Ultimately, CCCS came to learn and conclude that the D&O Defendants failed to adequately design, supervise, coordinate, plan and schedule all of the work performed at the Project, which resulted in significant delays, disruptions, alterations and hardship on many of the subcontractors, consultants and employees who worked on the Project

59. In addition, at the time of CCCS's ultimate termination from the Project, CCCS concluded that it had discovered over $40 million in overpayments in the few months CCCS was onsite, and was apparently on its way to discovering the benchmark of $130 million in contractor/supplier overcharges.

60. Per CCCS, upon its discovery of the highly irregular billing practices and inappropriate payment methods, it was terminated by the D&O Defendants.

61. In May of 2009, CCCS sued Debtor Fontainebleau Las Vegas, LLC and two Soffer affiliates for breach of contract and other claims alleging, *inter alia*: (i) refusing to recognize and accept many discovered over-billings; (ii) refusing to accept the discovery of various improper billing practices by many contractors, subcontractors and suppliers; (iii) maintaining a separate corporate entity as an alter ego to perpetrate various misdeeds and material inaccuracies concerning the billings and payment practices at the Project; (iv) failing to honor various bidding and change order requirements; (v) failing to provide a proper and

adequate design for the Project; (vi) failing to properly coordinate the Project; (vii) lack of adequate supervision and coordination; (viii) inadequate planning and coordination with government requirements; (ix) failing to timely obtain the appropriate permits; and (x) improper, inaccurate and excessive change order work.

F. The Other Acts and Omissions at Issue

62. As alleged in detail herein, lacking good faith, the D&O Defendants engaged in a series of acts of omissions between 2005 and 2009, described in more detail herein, which constituted breaches of their respective fiduciary duties owed to the Debtors or, alternatively, aided and abetted (collectively, the "Acts and Omissions").

63. In March 2007, Soffer and the other D&O Defendants approached certain third parties and their predecessor lenders to secure their participation in the Credit Agreement Facility. In connection with these efforts, the D&O Defendants repeatedly represented that (i) the Project budget provided to the lenders was an accurate, good faith and conservative estimate of the amounts needed to complete the Project, including all Project costs, and that the budget allowed for a financial cushion sufficient to complete the Project even if debt and equity sources were insufficient; (ii) the Project Entities had "committed construction contracts" for a large percentage of the work for the Project; and (iii) the construction drawings for the Project, the documents that would define every aspect of the construction, were substantially complete.

64. The D&O Defendants provided the following written materials provided to prospective lenders and other third parties (collectively, the "Offering Materials"):

- March 2007 Offering Memorandum. FBR and its arranging banks prepared and provided to potential lenders, including certain third parties, a Confidential Offering Memorandum outlining the material facts concerning the Project and

related financings. The Offering Memorandum included a letter from FBR, signed by its Senior Vice President and Chief Financial Officer, James Freeman, stating in pertinent part that "the information contained in the Confidential Offering Memorandum does not contain any untrue statement of material fact or omit to state a material fact necessary in order to make the statements contained therein, in light of the circumstances under which they were made as part of the overall transaction, not materially misleading."

- March 6, 2007 Lender Presentation. On March 6, 2007, FBR and its arranging banks held a Prospective Lenders Meeting at the Intercontinental Barclay Hotel in New York. The meeting was attended by, among others, Soffer, Schaeffer, Kotite, Freeman and Weiner. During that meeting, the D&O Defendants described the Project and the proposed financing to prospective lenders and provided a written Lender Presentation to meeting participants.

65. In the Offering Materials, the D&O Defendants presented a budget for the hard and soft costs to construct the Project of $1,829,000,000 (the "Construction Budget"). Freeman presented the Construction Budget at the Lender Meeting. FBR and Freeman represented that the Construction Budget was sufficient to cover all anticipated construction costs, excluding the retail components. FBR explained in the Offering Memorandum that the Construction Budget was the product of "a detailed budgeting and design process" and represented that it was "conservative," with substantial allowance for contingencies.

66. At the closing of the Credit Agreement Facility, the D&O Defendants caused FBLV to deliver budgets, including the Construction Budget, to certain third parties and the other lenders.

67. The D&O Defendants also caused FBLV to deliver at closing a Remaining Cost Report based upon the Construction Budget. The Remaining Cost Report, as defined in the Credit Agreement and Disbursement Agreement, set forth, line by line, the anticipated budgets for the construction of the Project. The Remaining Costs set forth in this Report provide a key input into the "In Balance Test."

68. The In Balance Test measures whether the Available Funds for the project exceed the Remaining Costs. In other words, the In Balance Test establishes whether there are sufficient funds, from cash on hand and funds available from the various loan facilities, to complete the Project. The higher the anticipated costs to complete, as reflected in the Remaining Cost Report, the more cash or financing would be needed to ensure that the In Balance Test did not fail. Thus, the Remaining Cost Report was a crucial document that allowed lenders, including certain third parties, to assess the financial viability and progress of the Project. A failure of the In Balance Test meant that the Project lenders' primary source of security was impaired. Accordingly, satisfying the In Balance Test was a condition precedent to Closing and to any Advances under the Disbursement Agreement.

69. Soffer and the other D&O Defendants were responsible for ensuring that the data and other information provided were accurate and that there had been no change in the economic feasibility of constructing and/or operating the Project, or in the financial condition, business or property of the Project entities, any of which could reasonably be expected to have a material adverse effect on the Project. They did not do so.

70. The D&O Defendants knew or should have known, but failed to disclose to the Project lenders and other third parties, that the information being provided was materially inaccurate on Closing. Internal cost estimates available to the D&O Defendants, including those

set forth in a report FBR commissioned from Cummins LLC in late 2006, showed that the actual costs needed to construct the Project were at least $100 million higher than the budgets provided to the Project lenders.

71. Had the true costs of the Project been reflected in the Remaining Cost Report and the In Balance Test, the Project would have been out of balance as of the Closing Date, and the Credit Facility would not have closed.

72. In the Offering Materials and at the Lender Meeting, Soffer and the other D&O Defendants also provided materially inaccurate information about the status of the construction drawings for the Project. Construction drawings are architectural drawings that are used by the contractors to define the work to be done. The drawings typically include renderings of all aspects of the project, including mechanical, structural, electrical, and interior design elements. Construction drawings are used, among other things, to obtain permits and other approvals. Because they define what will actually be built, obtaining completed construction drawings is a critical step in the project budgeting and development process. Construction drawings allow contractors to understand exactly what they will be required to do and so ensure that the construction bids and contracts finalized on the basis of the drawings are accurate and complete, which in turn reduces the likelihood of additional, unanticipated costs.

73. The Offering Memorandum represented the construction drawings for the project as substantially complete:

> Construction Drawings ("CDs") at the Fontainebleau Las Vegas are substantially complete with 80% CDs for tower and garage/convention issued on February 1, 2007. 100% CDs for the tower are expected March 12, 2007. 100% CDs for garage/convention are expected April 4, 2007 and 80% CDs for the podium are expected in April/May 2007.

74. At the time of Closing, the D&O Defendants caused FBLV to provide materially inaccurate information regarding the progress and accuracy of construction drawings.

75. As the D&O Defendants knew or should have known delays in the design process prior to Closing caused significant delays in the preparation of completed construction drawings. Indeed, final construction drawings were not complete even as late as 2009.

76. After the Closing Date, the cost to complete the Project increased dramatically as a result of the D&O Defendants' decisions to upgrade and expand various aspects of the Project. By mid-2008, Soffer, Kumar and others at FBR and TWC calculated the costs required to complete the construction of the Project at more than $300 million in excess of the Construction Budget provided to the Project lenders.

77. The FBR Board of Managers was aware of the substantial cost overruns and, in November 2008, required Soffer to provide a "comfort letter" pursuant to which Soffer agreed (1) not to transfer or dispose of specified assets prior to the completion of the Project, including a yacht valued at $178 million, a Boeing 737 jet valued at $57 million and interests in various companies valued at $116 million, and (2) to invest, at the request of the Board of Managers, "in FBR or an affiliate thereof, an aggregate amount [up to $75 million], which investment shall be used solely to fund the costs of [the Project]."

78. As a result of the cost overruns, the anticipated cost to fund the Project significantly exceeded the funds available to pay these costs. Had these increases been disclosed to the Project lenders, it would have revealed, among other things, that the In Balance Test could not be satisfied. This would have prevented the D&O Defendants from accessing any funds under the Credit Agreement and brought the Project to an immediate halt. Instead, those funds would have remained in the Bank Proceeds Account and ultimately been returned to certain third

parties and other Project lenders who maintained a valid, perfected priority lien on those funds while they remained on deposit.

79. The D&O Defendants knew or should have known about the substantial cost overruns. In fact, certain of the Project lenders assert that the D&O Defendants kept the true cost of the Project from them. In this way, according to the Project lenders, the D&O Defendants were able to secure continued funding under the Credit Agreement Facility while failing to inform the Project lenders of the mounting cost overruns.

80. The D&O Defendants were required to inform the Project lenders of all approved change orders. Accordingly, if the D&O Defendants formally approved the change orders required for the expanded Project, the lenders would discover the enormous cost increases, and the D&O Defendants' acts and omissions would be revealed. The D&O Defendants knew or should have known, but failed to disclose to certain third parties, that there were hundreds of millions of dollars of change orders for work required to complete the Project that were not reflected in the various reports and certifications the D&O Defendants made to the Project lenders and other third parties.

81. The D&O Defendants failed to inform the Project lenders of the actual scope and increased cost of the Project by, according to the lenders, purportedly maintaining a duplicate set of books and entries, one for their own internal use to track the actual scope, progress and cost of the Project, and another for presentation to the Project lenders to secure advances from the Credit Agreement Facility:

- Change Order Logs. The D&O Defendants maintained two sets of change order logs. One set accurately tracked all change orders that the D&O Defendants had directed subcontractors to execute, regardless of whether the change orders had

been put through the formal approval process (the "Actual Change Order Log"). The Actual Change Order Log was used by the D&O Defendants to plan and monitor the progress of the construction of the Project. The D&O Defendants did not provide the Actual Change Order Log to the Project lenders. Instead, they provided the Project lenders with a partial change order log that included only those change orders that would continue to misrepresent the Project to be in balance and within the Bank Budget (the "Bank Change Order Log").

- Anticipated Cost Reports. To track the costs required to complete the Project, the D&O Defendants maintained Anticipated Cost Reports ("ACRs"). As with the Change Order Logs, the D&O Defendants maintained two sets of ACRs. The "Real ACRs" reflected all of the costs the D&O Defendants knew would be required to complete the Project, including the "pocketed" change orders. The Bank ACRs consisted of a subset of the Real ACRs.
- Budgets. The D&O Defendants' manipulation of the change orders and ACRs carried over into their calculation of the Project budgets. The Bank Budget, based on the Bank ACRs, reflected the original budget presented to the Project lenders, as modified by formally approved and disclosed change orders. The "Soffer Budget" or "Real Budget," showed all of the items included in the Bank Budget, plus all of the "pocketed" change orders and real anticipated costs reflected in the Real ACR.

82. The D&O Defendants tracked the status of the change orders, anticipated costs and budgets in detailed Microsoft Excel spreadsheets. The spreadsheets showed, column by column: (i) the Bank Budget, including changes to the budget that had been formally approved

by the Project lenders; (ii) the additional changes to the Bank Budget contemplated in the Soffer Budget and reflecting the "pocketed" change orders; and (iii) the difference between the two budgets.

83. Each month, to obtain release of funds, the Credit Agreement and other loan documents required the Borrower to submit to certain third parties' agent, BOA, a "Draw Request," which included budgets, cost reports and various certifications. If the materials provided in the Draw Request showed that the applicable conditions precedent for the advance of funds were satisfied, BOA, the Disbursement Agent, could (assuming it did not have contrary or inconsistent information) release the requested funds to the Borrower. (Disbursement Agreement, § 2.4.6).

84. Beginning no later than mid-2007, in connection with the Draw Requests, the D&O Defendants provided materially inaccurate information about change order logs, cost reports and budgets, including the following.

- Advance Request. The Advance Request was the Borrower Entities' formal request for funds under the financing agreements. Freeman executed the Advance Requests on behalf of the Borrower Entities. In the Advance Request, at the D&O Defendants' direction, the Borrower Entities attested to the accuracy and completeness of the information regarding budgets and costs that were provided with the Draw Request, including the Remaining Cost Reports, the In Balance Report and the General Contractor's Advance Certificate. Because the information provided by the Borrower Entities did not disclose the true anticipated costs and budgets for the Project but instead showed the incorrect cost information reflected in the Bank Budget, the Bank Change Order Log and the

Bank ACR, the D&O Defendants had provided materially inaccurate data and information in the Advance Requests.

- Remaining Cost Reports. The Remaining Cost Reports were spreadsheets that were supposed to show the anticipated costs to complete the Project. The Remaining Cost Reports did not reflect the D&O Defendants' true estimates of Project costs but instead reflected the materially inaccurate information contained in the Bank Change Order Logs and the Bank ACR.
- In Balance Report. The In Balance Reports were supposed to show the difference between funds available to the Project (from the Credit Agreement Facility and other sources) and the anticipated remaining Costs on the Project, as reflected in the Remaining Cost Reports. The D&O Defendants submitted In Balance Reports that reflected incorrect budgets and estimates of anticipated costs and failed to show the actual costs the D&O Defendants knew would be needed to complete the Project. Accordingly, the In Balance Reports continued to show that the Project was in balance when in fact the anticipated costs greatly exceeded the available funds to pay for them.
- General Contractor Advance Certificate. In the General Contractor Advance Certificates, which were submitted with each Draw Request, TWC certified that its budgets were accurate and complete. Soffer executed the General Contractor Advance Certificates for October and November 2008. The budgets TWC submitted to the Project lenders were based on materially inaccurate change orders and cost reports, and the General Contractor Advance Certificates.

- Budget Amendment Certificate. The Borrower Entities were required to request approval for amendments to the Project budgets by submitting Budget Amendment Certificates. The Budget Amendment Certificates, which Freeman signed, certified that the budgets and cost estimates contained therein were accurate and complete, and based on good faith assumptions. The Budget Amendment Certificates did not reflect the D&O Defendants' real budgets (i.e., Soffer Budget) or their actual good faith estimates of project costs but instead reflected the incorrect Bank Budgets, Bank Change Order Logs and Bank ACRs. In fact, Soffer Budget was hundreds of millions of dollars higher than the budgets the D&O Defendants certified as correct in the Budget Amendment Certificates.
- Lender Updates. The D&O Defendants periodically held conference calls with certain third parties and other Project lenders in connection with the Draw Requests. On those calls, and in the written "Lender Updates" that the D&O Defendants distributed to lenders, the D&O Defendants represented that the Bank Budget was the actual budget and failed to inform the lenders of the existence of the Soffer Budget and the fact that, according to the D&O Defendants' true cost information, the Project had experienced hundreds of millions of dollars in undisclosed change orders and cost overruns. On these calls, the D&O Defendants consistently stated, incorrectly, that the Project was "on time and on budget."

85. If the D&O Defendants had incorporated accurate and complete information regarding the budgets and costs to complete the Project into the materials submitted in

connection with the Draw Requests, they would have shown that the Project was well over budget and could not be completed without significant additional funds. As a result, the In Balance Test would have failed and Borrower Entities would not have been able to access additional funding under the Credit and Disbursement Agreements.

86. In June 2007, the D&O Defendants caused FBLV to enter into a construction contract for the Project with TWC (the "TWC Contract") pursuant to which TWC was appointed the general contractor. Soffer represented TWC in its presentation of the contract terms to the FBR Board of Managers. No other general contractor applicant was considered. Once TWC was appointed general contractor, inadequate financial controls, oversight and review of construction hard costs was employed.

87. Between 2007 and 2009 more than $1.6 billion was requested by TWC and disbursed in connection with the Project. But not all of the disbursements can be traced to subcontractors or other legitimate purposes. Some of the TWC construction funds was inexplicably disbursed to FBR. Additional funds were disbursed to the Turnberry Defendants or their affiliates. Still much of the $1.6 billion in TWC construction funds remains unaccounted for. Reports reflecting the amounts requested and disbursed by TWC are attached hereto as Composite Exhibit "A."

88. The D&O Defendants knew or should have known that the financial controls and oversight employed in connection with the project was inadequate. Indeed, following audits conducted by Deloitte and Touche, LLP the FBR Board of Managers was advised, as early as May 2007, of significant deficiencies in internal control and financial reporting, including the failure to verify liabilities and expenses incurred related to construction in progress.

89. In additional to the indirect transfers received via the TWC construction funds, certain of the Turnberry Defendants received the benefit of direct transfers from the Debtors to various other Turnberry entities which have no apparent legitimate business purpose (the "Insider Transfers"). Reports detailing the Insider Transfers are attached hereto as Composite Exhibit "B."

90. In additional to the indirect transfers received via the TWC construction funds, FBR received the benefit of extraordinary fees and liabilities disproportionately attributed to the Debtors including 75% of FBR's overheard, administrative fees, employee costs and expenses.

G. All Good Things Must Come to an End

91. Without financing sufficient to pay for the true costs of constructing the Project, it was only a matter of time before the D&O Defendants' Acts and Omissions would result in a failure of the enterprise.

92. The D&O Defendants delayed the process by, among other things, materially delaying payment to subcontractors and by raising additional equity. By the summer of 2008, however, as the D&O Defendants knew or should have known, the Project was facing an overwhelming deficit of more than $300 million dollars.

93. In December, 2008, Lehman provided notification that it would make no further payments under the Retail Facility.

94. By early 2009, the Debtors were unable to access additional equity funding, and subcontractors would no longer tolerate delayed payments for completed work. To access additional needed funds, the D&O Defendants were forced to disclose some of the additional change orders they had "pocketed" and kept from the Project lenders, and that the Project was massively over budget.

95. On April 13, 2009, the Borrower Entities advised the Project lenders that they could not meet the In Balance Test, based upon an increase of $157 million in the figure they used to calculate anticipated costs on the Project. On April 20, 2009, BOA, acting on behalf of certain of the Project lenders, declared a default under the financing agreements, and the first set of Debtors filed for bankruptcy on June 9, 2009.

96. All conditions precedent to the filing of this action have been performed, occurred or have been waived.

COUNT I
BREACH OF FIDUCIARY DUTY
(Against the D&O Defendants)

The Trustee sues the D&O Defendants, jointly and severally, and alleges:

97. The Trustee realleges paragraphs 1 through 96 above as if fully set forth herein.

98. At all material times hereto, the D&O Defendants were *de facto* or *de jure* officers, directors, managers and/or control persons of the Debtor. As such, the D&O Defendants owed the Debtors a fiduciary duty to discharge their duties in good faith, with the care of an ordinarily prudent officer, director or manager in a like position would exercise and in a manner reasonably believed to be in the Debtors' best interests.

99. Lacking good faith, the D&O Defendants exhibited a conscious, grossly negligent and/or reckless disregard for the best interests of the Debtors in relation to the facts and circumstances as set forth herein. The D&O Defendants knew, or, except for conscious, grossly negligent and/or reckless disregard of the facts, should have known, of the risk of damage that ultimately befell the Debtors.

100. The D&O Defendants continuously and on an ongoing basis, breached their respective fiduciary duties owed to the Debtors with breaches that include, but that may not

necessarily be limited to, the following: (i) failing to implement adequate safeguards and controls in regard to the Project; (ii) maintaining and/or otherwise providing to third parties materially inaccurate information regarding material aspects of the Project; (iii) causing the Debtors to incur debts beyond their ability to pay; (iv) causing the Debtors to operate past the point of insolvency; (v) engaging in various acts of gross mismanagement, recklessness and/or bad faith in regard to all material aspects of the Project, including those Acts and Omissions alleged in Paragraphs 22-96 above.

101. Each of the above breaches adversely impacted and conferred no benefit to the Debtors.

102. As a direct and proximate result of the breaches of fiduciary duty of the D&O Defendants, the Debtors suffered damage.

WHEREFORE, the Trustee demands judgment against Defendants FBR, Soffer, Kotite, Parello, Weiner, Schaeffer, Freeman and Kumar, jointly and severally, for compensatory damages, consequential damages, special damages and punitive damages including, but not limited to, the increased liabilities of the Debtors, the decreased value of the assets of the Debtors, the loss of assets of the Debtors in the form of avoidable transfers, the lost enterprise value of the Debtors, out-of-pocket fees, costs and expenses attributable and incurred or paid by the Debtors and the Trustee, all attributable fines, penalties, attorneys' fees, costs and expenses paid or incurred by the Debtors pre-petition and for the value of all of the Debtors' claims against third parties that were not properly or timely pursued by the Debtors, plus pre-judgment and post-judgment interest, court costs and for such other relief this Court deems appropriate.

COUNT II
AIDING AND ABETTING BREACH OF FIDUCIARY DUTY
(Against the D&O Defendants)

The Trustee sues the D&O Defendants, jointly and severally, and alleges:

103. The Trustee realleges paragraphs 1 through 102 above as if fully set forth herein.

104. To the extent it is determined that each or any of the D&O Defendants owed no fiduciary duties to the Debtors, and/or to that extent that each or any of them breached their respective fiduciary duties by engaging in the Acts and Omissions alleged above, then the D&O Defendants acted with knowledge and rendered substantial assistance in regard to such breaches.

105. As a direct and proximate result of the D&O Defendants' acts and omissions as aiders and abettors the Debtors suffered damage.

WHEREFORE, the Trustee demands judgment against Defendants FBR, Soffer, Kotite, Parello, Weiner, Schaeffer, Freeman and Kumar, jointly and severally, for compensatory damages, consequential damages, special damages and punitive damages including, but not limited to, the increased liabilities of the Debtors, the decreased value of the assets of the Debtors, the loss of assets of the Debtors in the form of avoidable transfers, the lost enterprise value of the Debtors, out-of-pocket fees, costs and expenses attributable and incurred or paid by the Debtors and the Trustee, all attributable fines, penalties, attorneys' fees, costs and expenses paid or incurred by the Debtors pre-petition and for the value of all of the Debtors' claims against third parties that were not properly or timely pursued by the Debtors, plus pre-judgment and post-judgment interest, court costs and for such other relief this Court deems appropriate.

COUNT III
AIDING AND ABETTING BREACH OF FIDUCIARY DUTY
(Against the Turnberry Defendants)

The Trustee sues the Turnberry Defendants, jointly and severally, and alleges:

106. The Trustee realleges paragraphs 1 through 105 above as if fully set forth herein.

107. To the extent it is determined that the D&O Defendants breached their fiduciary duties owed to the Debtors by engaging in the Acts and Omissions alleged above, then the Turnberry Defendants acted with knowledge and rendered substantial assistance in regard to such breaches by the D&O Defendants.

108. As a direct and proximate result of the Turnberry Defendants' acts and omissions as aiders and abettors, the Debtors suffered damage.

WHEREFORE, the Trustee demands judgment against the Turnberry Defendants, jointly and severally, for compensatory damages, consequential damages, special damages and punitive damages including, but not limited to, the increased liabilities of the Debtors, the decreased value of the assets of the Debtors, the loss of assets of the Debtors in the form of avoidable transfers, the lost enterprise value of the Debtors, out-of-pocket fees, costs and expenses attributable and incurred or paid by the Debtors and the Trustee, all attributable fines, penalties, attorneys' fees, costs and expenses paid or incurred by the Debtors pre-petition and for the value of all of the Debtors' claims against third parties that were not properly or timely pursued by the Debtors, plus pre-judgment and post-judgment interest, court costs and for such other relief this Court deems appropriate.

COUNT IV
AVOIDANCE OF FRAUDULENT TRANSFERS
(Against the D&O Defendants)

The Trustee sues the D&O Defendants and alleges:

109. The Trustee realleges paragraphs 1 through 108 above as if fully set forth herein.

110. Pursuant to 11 U.S.C. §§ 544 and 548 and Chapter 726 of the Florida Statutes, the Trustee may avoid: (i) any transfer or obligation, and recover any transfer of property of a debtor, made without receiving reasonably equivalent value in exchange for the transfer when the debtor was insolvent at the time or became insolvent as a result of the transfer, or where the debtor knew or should have known that it would incur debts beyond its ability to pay as such debts matured; and (ii) any transfers that were made to hinder or delay creditors within four years of the Petition Date.

111. During and after their terms as officers, directors and/or control person of the Debtors prior to the Petition Date, the D&O Defendants received, *inter alia*, payments from the Debtors, and/or compensation from the Debtors in the form of salaries, bonuses, stock options, severance payments and other benefits, and any and all other transfers within four years of the petition date, including certain transfers reflected in Composite Exhibit "A." Upon information and belief, at the time such transfers were made, the Debtors were insolvent and/or knew or should have known that it was incurring or would be incurring debts beyond their ability to pay as such debts matured.

112. Based upon the acts and omissions of the D&O Defendants referenced above, the Debtors did not receive reasonably equivalent value for the purported services performed.

113. Alternatively, the transfers were made with actual intent by the Debtors to hinder or delay creditors of the Debtors, and the D&O Defendants did not receive such transfers in good faith due to their knowledge of the impaired financial condition of the Debtors.

114. Pursuant to 11 U.S.C. §§ 544 and 550 and Chapter 726 of the Florida Statutes, the Trustee is entitled to recover from the D&O Defendants the value of the property transferred.

WHEREFORE, the Trustee demands judgment against the D&O Defendants as follows: (i) determining that the transfers were fraudulent and avoidable under 11 U.S.C. §§ 544 and 550 and Chapter 726 of the Florida Statutes; (ii) entering judgment against the D&O Defendants for the value of the transfers, plus interest and costs of suit; (iii) entering judgment against the D&O Defendants avoiding the transfers; (iv) disallowing any claim the D&O Defendants may have against the Debtors' estates unless and until such time as the amounts asserted hereunder are paid as provided in 11 U.S.C. § 502(d), subject to other objections thereto; and (v) for such other relief this Court deems appropriate.

COUNT V
AVOIDANCE OF FRAUDULENT TRANSFERS
(Against the Turnberry Defendants)

The Trustee sues the Turnberry Defendants and alleges:

115. The Trustee realleges paragraphs 1 through 114 above as if fully set forth herein.

116. Pursuant to11 U.S.C. §§ 544 and 548 and Chapter 726 of the Florida Statutes, the Trustee may avoid: (i) any transfer or obligation, and recover any transfer of property of a debtor, made without receiving reasonably equivalent value in exchange for the transfer when the debtor was insolvent at the time or became insolvent as a result of the transfer, or where the debtor knew or should have known that it would incur debts beyond its ability to pay as such

debts matured; and (ii) any transfers that were made to hinder or delay creditors within four years of the Petition Date.

117. As insider of the Debtors, the Turnberry Defendants received certain payments and other transfers from the Debtors, which include certain transfers reflected in Composite Exhibit "A," those transfers evidenced by Composite Exhibit "B," and any and all other transfers within four years of the petition date.

118. Upon information and belief, at the time such transfers were made, the Debtors were insolvent and/or knew or should have known that it was incurring or would be incurring debts beyond their ability to pay as such debts matured.

119. Based upon the acts and omissions of the Turnberry Defendants referenced above, the Debtors did not receive reasonably equivalent value for the purported services performed.

120. Alternatively, the transfers were made with actual intent by the Debtors to hinder or delay creditors of the Debtors, and the Turnberry Defendants did not receive such transfers in good faith due to their knowledge of the impaired financial condition of the Debtors.

121. Pursuant to 11 U.S.C. §§ 544 and 550 and Chapter 726 of the Florida Statutes, the Trustee is entitled to recover from the Turnberry Defendants the value of the property transferred.

WHEREFORE, the Trustee demands judgment against the Turnberry Defendants as follows: (i) determining that the transfers were fraudulent and avoidable under 11 U.S.C. §§ 544 and 550 and Chapter 726 of the Florida Statutes; (ii) entering judgment against the Turnberry Defendants for the value of the transfers, plus interest and costs of suit; (iii) entering judgment against the Turnberry Defendants avoiding the transfers; (iv) disallowing any claim the Turnberry Defendants may have against the Debtors' estates unless and until such time as the

amounts asserted hereunder are paid as provided in 11 U.S.C. § 502(d), subject to other objections thereto; and (v) for such other relief this Court deems appropriate.

Respectfully submitted this 8th day of June, 2011.

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