UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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BELMONT VILLAS LLC; CHORD ASSOCIATES LLC, JOPAL ENTERPRISES LLC; and BARBARA M. SAEPIA

Plaintiffs,

—against—

PROTECH 2003-D, LLC; AMTAX HOLDINGS 520, LLC; and PROTECH HOLDINGS 128, LLC, CAPMARK AFFORDBLE EQUITY HOLDINGS INC ,CAPMARK FINANCE INC. (formerly known as GMAC COMMERCIAL MORTGAGE CORPORATION), its successors and assigns; CAPMARK CAPITAL INC. (formerly known as GMAC COMMERCIAL HOLDING CORPORATION);

Defendants

-and-

AMTAX HOLDINGS 520, LLC, PROTECH 2003-D, LLC
And PROTECH HOLDINGS 128, LLC,

Counterclaim-Plaintiffs,

-against-

CHORD ASSOCIATES LLC, BARBARA M. SAEPIA,
JOPAL ENTERPRISES LLC, and JOPAL ASSOCIATES INC.

Counterclaim-Defendants.

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Case No.: 07 CV 5138 (JFB)

REPLY AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE

BARBARA M. SAEPIA, an attorney duly admitted to practice before this Court, affirms as follows:

1. I have personal knowledge of the facts and circumstances of this action and I

submit this Reply Affirmation in support the relief requested in Plaintiffs' Order to Show Cause, and as requested in the Complaint, the allegations of which I herein reaffirm.

2. I have reviewed the Declaration of Phil Pavlovicz In Opposition To Plaintiffs' Order To Show Cause executed on March 24, 2008 ("Declaration" or "Pav.Dec.") and must refute several glaring misrepresentations contained therein.

A. <u>Defendants Allegations Regarding Plaintiffs' Mismanagement Are False</u>.

3. In his Declaration, Mr. Pavlovicz argues that Plaintiffs are not entitled to the relief sought due to their alleged "Mismanagement of the Project" based in part upon Plaintiffs': (i) "hiring two contractors instead of one general contractor"; (ii) failure to hire a Construction Manager"; and, (iii) failure "to properly apply for and maintain necessary permits--all of which resulted in numerous delays and significant cost overruns." (Pav.Dec. ¶4).

4. Regarding the first two of the above, annexed hereto is an email dated August 16, 2004 [Ex. E] from Mr. Pavlovicz to myself, Racanelli Construction Co. Inc. ("Racanelli"), and Racanelli's counsel to which Mr. Pavlovicz attached the draft of Belmont Contract Addendum [Ex. F]. Racanelli was the Project's General Contractor and performed all duties other than Site Work[1], which was the responsibility of Condos Bros. ("Condos Bros.")

5. The Belmont Contract Addendum was prepared by Mr. Pavlovicz, and states in relevant part as follows:

> Under the terms of this addendum, Racanelli Construction will act as the Primary General Contractor for the Project and shall work in conjunction with Condos Bros. Construction Corp. for the purpose of coordinating the overall Project and the work required under their respective contracts with the Owner. . . .

[1]Terms not defined herein shall have the same meaning set forth in the Complaint.

The decisions of the Primary General Contractor supercede any inconsistent terms and/or missing terms in the Owner Contractor Agreement between Belmont Villas, LLC, and Condos Brothers Construction Corp.

(Emphasis added).

6. Thus, Defendants approved the use of both Racanelli and Condos, and in the event of any confusion as to "which contractor was necessary for which tasks" (Pav.Dec. ¶4), the above-quoted language, drafted by Mr. Pavlovicz himself, presumably took care of said situation, as Racanelli's decisions took precedence. Moreover, since Racanelli was "coordinating the overall Project", a Construction Manager was not required. If one was required, Mr. Pavlovicz should have made such position known prior to his: drafting of the above addendum in August 2004; Defendants' closing on this Project in October 2004; and, certainly before making his self-serving March 24, 2008 Declaration.

7. Regarding the allegation by Mr. Pavlovicz that among the examples of Plaintiffs' "poor planning" was Plaintiffs contractors' [post-November 2005] encountering, in connection with the force main sewer, of "a preexisting storm sewer that was not provided for in the Project plans", which required the preparation and approval of new plans (Pav.Dec.¶5), such an occurrence is somewhat commonplace in the Suffolk County Southwest Sewer District due to faulty maps provided to the engineers, here Nelson, Pope & Voorhis, LLC[2], by the Suffolk County Department of Public Works ("DPW"), and cannot be attributed to the Developer.

8. In fact, according to the Progress Report of Defendants' Construction Manager, Greyhawk, for the period of December 10 through 14, 2007 [Ex. H], another such sewer

[2]Nelson, Pope & Voorhis, LLC was dismissed from the Project two years prior to the Closing with Defendants [Ex. G].

line was encountered "during the morning of 12/14/07" , as it was "incorrectly depicted on as-built sewer lines from the [C]ounty." Surely such occurrence cannot be blamed on the poor planning of Greyhawk, nor can the earlier occurrence by blamed on Plaintiffs.

9. Also, I dispute Mr. Pavlovicz' claim that we should have submitted a dewatering permit application for 4,000 feet (Pav.Dec. ¶6) when only approximately 500 feet of the planned run was below the water table and thus required a dewatering permit.

10. Further, at Declaration ¶7 Defendants maintain ignorance of Plaintiffs' Article 78 proceeding against the N.Y.S. Department of Environmental Conservation ("DEC") which challenged the Plaintiffs' denial under the DEC's Brownfield Cleanup Program, and that "Plaintiffs argued that the groundwater on the site was contaminated, a claim that was bound to further delay the pending dewatering permit application."

11. In fact, by email dated October 20, 2004 from Mr. Pavlovicz to me [Ex. I], Mr. Pavlovicz had stated in part as follows:

> A review of the sampling point locations from the GCI Phase II map revealed that SGB-1, SGB-5, SGB-19, SGB-17, SGB-21 and SGB-16, **all points that contained chemical or metals concentrations above NY DEC reportable limits**, are well within the property boundaries. . . .
>
> (Emphasis added).

12. In the above email, Mr. Pavlovicz does not address whether said concentrations were "minimal" (Pav. Dec. ¶7), which he does so now with the benefit of hindsight, and without being, as I am, a guarantor for all environmental liability. Indeed, prior to submittal of the application Mr. Pavlovicz reviewed same and offered his input as demonstrated in an email to me dated March 29, 2005 [Ex. J].

13. Apparently, the possibility of bringing another source of funding into the Project, DEC Brownfield Tax Credits, was non-minimal enough for Defendants to support my fiduciary efforts to obtain them by submitting a letter to the DEC dated January 24, 2006 in support of our application. [Ex. K], in which Defendants recognized that the delays were not of Plaintiffs' doing:

> There were delays in the construction schedule due to DEC mandated testing pursuant to reports of exceedance in the groundwater standards. In addition, there were delays resulting from soil remediation and the inability to dewater as a result of the tardy reinstatement of the dewatering permit.

14. Further, at Declaration ¶8, Mr. Pavlovicz claims that:

> After plaintiffs turned over responsibility for construction, I learned that they had failed to maintain in effect a DEC freshwater wetlands permit. . . .

15. In contrast to the above false claim, annexed hereto [Ex. L] are the minutes of Project Coordination Meeting held May 23, 2006, (one month before officially assuming responsibility for construction) with Mr. Pavlovicz presiding, which includes Items 1.6 ("arrange onsite meeting with DEC to discuss issue of wetlands boundaries"), and 1.7 ("permit for Pumphouse which is about to expire").

16. In addition, annexed hereto are minutes of Project Coordination Meeting held June 6, 2006 [Ex. M], again with Mr. Pavlovicz presiding, which references Item 1.6 above and states in part as follows:

> A meeting with Rob March of the DEC was attended by Phil Pavlovicz and Justin Lia. Results of the meeting were that the DEC would allow us to slope the grade down to the wetland boundary if we reclaim portions of the area. . . .

17. Continuing at Declaration ¶8, Mr. Pavlovicz claims that:

> As a result the DEC issued a limited stop work order in October 2006, and significantly, withheld approval of our July 2006 application for a dewatering permit for the full length of the force main sewer. The dewatering permit was delayed a full year and did not issue until July 2007.

18. In contrast, at page 4 of Capmark's Construction Monitoring Report dated January 19, 2007 [Complaint Ex. 45] submitted by Mr. Pavlovicz, he states that, despite the lapse of the dewatering permit, "**work can continue at the site uninterrupted**." (Emphasis added).

19. Further, Mr. Pavlovicz implies that Plaintiffs efforts to remove Condos Bros were misguided, and that such removal efforts caused Condos Bros to cease work. (Pav.Dec. ¶9). In fact, it was Condos. Bros.' fraudulent conduct and inexperience that added to the delays, and now, two years later, the Project remains unfinished, vindicating Plaintiffs' decision.

20. Yet, Plaintiffs' 2006 efforts were thwarted by Mr. Pavlovicz. By email to me dated March 9, 2006 Mr. Pavlovicz, stated in part as follows [Complaint Ex. 30]:

> Barbara:
>
> After a short discussion with Frank Guzauskas today, **I would request that you hold off on any formal actions regarding tranferance** [sic] **of work from Condos Bros to another Contractor**. Frank and I will be at the site next Tuesday morning and would like to discuss the issues in detail before you move forward. I know you understand that this is a sensitive matter that can impact construction progress. **Additionally, this type of action requires lender approval**. While we are on site next Tuesday, we would like to meet with all parties to ensure a smooth transition if an agreement can be reached that is mutually beneficial to the project team as a whole.
>
> (Emphasis added).

21. Thereafter, as a condition to allowing any further payments to be made, Defendants required that Plaintiffs "step-aside" and let the so-called experts take over construction responsibilities, and in June 2006 we entered into the Operating Agreement and Construction

Agreement Amendments which purportedly addressed all outstanding issues and would result in the Project's timely completion. I have had no say in the construction progress since that time, and thus, cannot be held liable for Defendants' subsequent incompetence.

22. Indeed, I was told to "keep quiet" by letter dated July 12, 2006, Andrew L. Kramer, Esq. of Brown Raysman (now Thelen Reid Brown Raysman & Steiner LLP), as counsel to Capmark, which delivered to Plaintiffs fully executed copies of the Amendments ("Brown Raysman Letter") [Complaint Ex. 29]. In the Brown Raysman Letter, Mr. Kramer stated:

> **Pursuant to these documents, you have delegated to Protech Holdings 128, LLC, as Class A Special Member, the responsibility for completing the Project in accordance with a revised budget and timeline that you have agreed to with your partners and your construction lender**. I understand that the construction process, which had essentially halted, has now recommenced in earnest.
>
> I also understand that you have been sending written commentary and criticism, primarily to Phil Pavlovicz, on a fairly regular basis that suggests that the delays in the Project are the results of decisions and actions that have been made by your partners and construction lender and that the Project would have not stalled had you been permitted to remove George Condos and proceed against the payment and performance bond, as you had desired. . . . **Accordingly, I have been asked to respectfully request that you discontinue with the stream of accusatory emails, as they are not productive.**
>
> (Emphasis added).

23. Again, Defendants' problematic decision to keep Condos Bros. on the job can be seen from the fact that the Project is still not complete, and, according to the Suffolk County Water Authority ("SCWA") letter dated February 25, 2008 [Ex. N], water service has not yet commenced, and will not commence before correction of the failure of "the inspection of the large meter vault" due to untimely backfilling, and the placing of a 90° bypass on the wrong side, errors performed by Condos Bros.

24. These corrections and subsequent inspections and approvals will require several months to effect, despite the Brown Raysman letter's acknowledgment of a "revised budget and timeline", which in the Construction Agreement Amendment [Complaint Ex. 26, p. 2] is set forth as a Completion Date of October 31, 2006.

25. Nonetheless, by email dated February 28, 2008 from Mr. Pavlovicz to the Town of Babylon [Ex. O], he claims that currently, "The resulting schedule places physical completion at April 16, 2008."

26. Thus, it is unlikely that Completion will occur some two years after "responsibility for completing the Project" was delegated to Defendants. Indeed, according to Capmark's Construction Monitoring Report dated July 5, 2006 **(**"July '06 Report") [Complaint Ex. 41], as of the Site Review Date of June 27, 2006 (immediately after execution of the Amendments), the Project's Economic Completion Percentage was 87% ("Completion Percentage") and that the Project Completion Date was forecast as October 1, 2006.

27. Construction had started in October 2004; thus Plaintiffs were in control for some 20 months, and achieved 87% completion. "The responsibility for completing the project" was delegated to Defendants some 22 months ago, and they have not yet been able to complete that remaining 13%.

28. Part of the answer is evidenced by Greyhawk Construction Monitoring Report as of November 16, 2007 [Ex. P] which notes that "CBC [Condos Bros. Construction] has been having difficulty getting responses from plumbing and mechanical subcontractors to complete the wetwell installation."

29. Further, while Plaintiffs' counsel will at a later date address in more detail

Defendants' Responses and Objections to Plaintiffs First Request For Admissions dated March 31, 2008 ("Defendants' Responses"), I wish to point out one non-response which is indicative of Defendants' lack of progress at the Project and attempts to obfuscate and place blame on Plaintiffs. The Defendants were requested to admit the truth of the following statement:

> 10. No Certificates of Occupancy has been issued for any unit at the Belmont Villas LLC project.
>
> 30. Defendants' Response is as follows:
>
> Defendants object to this request on the grounds that it is not susceptible to a simple admit or deny and an unqualified response would give rise to an unfair inference in light of the ongoing nature of the Project and Plaintiffs' contention that they are without fault for construction delays. For these reasons and to the extent that Defendants are obligated to respond, Defendants, subject to the foregoing objections and General Objections, respond as follows: **Deny that Certificates of Occupancy will not issue.**
>
> (Emphasis added).

31. "Not susceptible to simple admit or deny"? Either C.O.'s have or have not been issued. "Deny that C.O.'s will not issue"? The request did not ask Defendants' counsel to predict the future. The bottom line is that C.O.'s have not been issued (confirmed by Defendants' non-response), and will not be for many months.

B. Mold

32. At Declaration¶ 12, Mr. Pavlovicz claims that after receiving the letter dated October 30, 2006 [Complaint Ex. 49] from the Project's Architect, Stephen Ray Fellman, P.C. which noted "that many areas of the interior units contain what appears to be black mold", he

> [I]mmediately contacted Enviroscience Consultants, Inc., who, after performing an inspection of the units in question determined that there was no reason to perform a mold inspection, but did recommend that the units be cleaned . . . .

33. In fact, Mr. Pavlovicz did not contact Enviroscience Consultants Inc. ("Enviroscience") until June 2007, after the Town had revoked the Project's building permits due in part to the presence of mold [Complaint Ex. 61]. In a telephone conversation on July 24, 2007, Bart Gallagher of Enviroscience advised me that he was first contacted and retained by Mr. Pavlovicz in June 2007, and had not inspected any units prior to that time. A contemporaneous and dated computer entry of my notes of said conversation is annexed hereto [Exhibit Q].

34. The significance of this discrepancy between Mr. Pavlovicz' claiming to "immediately contact" Enviroscience, a professional and certified remediation company, in the fall of 2006 when in fact he did not do so until June 2007, some eight months later, is that in the interim, instead of competently dealing with the mold issue, he hired D & N Cleaning Management Services Inc. ("D & N")[Complaint Exs. 51, 52] , an unlicensed cleaning company to simply give the affected units a "quick brush up" according to Enviroscience. Thus, the mold problem (46 out of 164 units) only grew more serious until Enviroscience was finally hired.

35. What Mr. Pavovicz also states is that "as a result" of Enviroscience's recommendation (Pav. Dec. ¶13), he hired D & N in December 2006. If Enviroscience did not make any recommendation until after it visited the site in June 2007, how could Mr. Pavlovicz's hiring of D & N in December 2006 been "as a result" of a recommendation that would not be made for some eight months?

36. Further, according to Defendants' Notice of Removal dated October 10, 2007 [Complaint Ex. 65] ("Removal Notice"), one of the three specious grounds for Chord's removal as Managing Member was that "Chord refused to execute the necessary utility easements to allow LIPA (the Long Island Power Authority) access to the Property to provide electrical power to the Project".

37. I will not reiterate here the grounds as to why such allegation is blatantly false and respectfully refer the Court to pp. 5-8 of my Affirmation In Support filed December 10, 2007, except that I annex here [Ex. R] that portion of the October 2, 2007 email from Greyhawk, Defendants' Construction Manager, which apologetically states:

> To all we were told the paper work was previously filled out but not signed. This said we were under this impression if this is not the case we apologize.

38. Responding by email dated October 2, 2007, LIPA noted that the easements had not yet been typed up, and once they were, would be sent to me for signature, which was not done until October 11, 2007 [Ex. S], one day **after** Defendants' issuance of the Removal Notice based, in part, upon my supposed failure "to execute the necessary utility easements".

39. What I wish to add here is that beginning in July 2006, Racanelli had informed Mr. Pavlovicz that, "due to lack of climate control in the apartments" there were "signs of mold growth". [Complaint Ex. 40].

40. Further, by letter dated October 11, 2006 [Complaint Ex. 48], Racanelli again advised Mr. Pavlovicz that:

> [**P]ower was turned off in the unit[s**] and there was no air flow… Racanelli Construction is not responsible for any mold that may develop or any mold remedies. **Please have the climate control turned on so that this situation does not get any worse**." (Emphasis added)

41. Further, in Defendants' consultant's IVI Project Status Report No. 19 dated October 2, 2006 and prepared for Capmark ("IVI Report 19") [Ex. T], it states at page 13 that some mold was present as of August 30, 2006 in building E, G and G2, and that replacement of the affected surfaces "will be undertaken the building is powered. . ."

42. In fact, I first procured electric service to the Project commencing on May 23,

2006, some two months prior to IVI Report 19, and one month prior to Defendants' assumption of construction responsibility. Annexed hereto is a printout of the Project's LIPA account [Ex. U] which sets forth an "Opening Charge" on May 23, 2006, demonstrating the patent falsity of Mr. Pavlovicz's claim of lack of electrical power. (Pav. Dec ¶14).

43. Interestingly, in his Construction Monitoring Report dated August 8, 2006 [Complaint, Ex. 42, p. 4 under "Issues/Recommendations"], Mr. Pavlovicz noted the presence of mold and that "All building [sic] in Phase I are now Air conditioned to prevent this problem."

44. Further evidence of Defendants' mismanagement with respect to the provision of electrical power is evidenced by LIPA bill dated February 14, 2008 [Ex. V] covering the entire Project which shows an outstanding balance of $26,463.01. I telephoned LIPA on March 17, 2008 and spoke with a Ms. Paula Piano from LIPA who looked up an individual account and said that no payments have ever made since May 2006, and that that is probably the case with all of the others. She expressed amazement that the electric service has not yet been turned off.

45. In addition, while I do not have one bill that groups all the units together like LIPA, attached are examples of individual unit Keyspan bills which indicate outstanding balances of approximately $182/unit ($182 x 164 = $29,808), and that such accounts have not been paid since November 15, 2006. [Ex. W].

46. Thus, although the buildings had electrical power beginning in May 2006 and despite Racanelli's July and October 2006 warnings, Defendants nonetheless failed to air-condition the units, thereby allowing mold to grow.

47. Not only does the foregoing evidence Defendants' inability to manage the Project, but it further demonstrates the blatant speciousness of the Removal Notice.

C. Adversary Proceeding

48. Mr. Pavlovicz states at ¶20 of his Declaration in part as follows:

> I understand that a bankruptcy trustee brought an action against Plaintiffs and Belmont alleging that the Project in fact belongs to Roland Conde, a former real estate developer who has been banned from tax-credit projects due to criminal problems in the past. . . .

49. While Bankruptcy Trustees frequently make allegations espousing various theories, in Defendant's Memorandum of Law In Opposition To Plaintiffs' Order to Show Cause ("Defendant's Memo"), counsel for Defendants expands on the above quote to arrive at the contrived conclusion that "Saepia settled the allegations that Conde had a hidden interest in Belmont", and goes on to describe the settlement terms, concluding that because I "paid all of the Conde's [sic] creditors in full, [there was left] no reason for Mr. Ackerman to pursue his claims. [Defendants' Memo, p. 9].

50. Annexed hereto is a letter dated February 5, 2007 from Frank Guzauskas, Capmark Finance Inc, Vice President to me [Ex. X] which references the Adversary Proceeding and requests that I provide him with my "proposed response to the allegations made in the filed complaint", and advises that my failure to do so within 10 days would "constitute an event of default under the Construction Agreement."

51. In order to comply with Mr. Guzauskas' directive, I determined that the best "response", with the least possible involvement of Belmont, would be to quickly settle the matter. After long negotiations, to which Defendants and their counsel were not parties, and numerous drafts of a settlement in which the allegations were not admitted and which instead concentrated on claims that the estate may have had with respect to Mr. Conde's residence, I paid approximately $350,000 (and not "as much as or more than $1 million" (Defendants' Memo, p.17); *see also*, McGrath

Declaration dated March 24, 2008, Ex. 11, pp. 57, 68 setting forth figure of $350,000), and was able to advise Capmark that the matter had been settled.

52. Indeed, by email dated March 7, 2007, I advised Mr. Guzauskas as follows:

> **From:** Barbara Saepia [mailto:bmsaepia@jopal.com]
> **Sent:** Wednesday, March 07, 2007 9:01 PM
> **To:** 'Frank Guzauskas - IL'
> **Subject:** RE: Belmont Villas
>
> . . . As to the adversary, the matter has been settled with the trustee. I have requested a letter from my attorney to be sent regarding same.

53. Yet now my actions to defend the Project, and Capmark's insistence that I do so, are, according to Defendants, somehow indicative of Mr. Conde's "hidden interest". In fact I made a business decision to "get rid of" a matter costing hundreds of thousands of dollars that was threatening my interests worth millions of dollars, and so that I would not continue to be distracted by the then present litigation, or future litigation making similarly spurious claims, such as those made by Defendants. ("Adversary Proceeding [settled] on terms that virtually admit Conde's hidden interest . . . ." (Defendant's Memo, p.15).

54. Mr. Conde, together with my brother Richard and sister Maureen [*see*, Exs. L and M, minutes of meetings at which they, and not Mr. Conde, were present), have helped me with respect to the construction and development of the Project. There is not one Project Document which says they cannot. Indeed, it is within the "Business Judgment" doctrine as to who may assist the Managing Member, and such assistance is not indicative of any hidden interests in the Project.

55. What I did offer Mr. Conde prior to his bankruptcy filing is in fact set forth at Defendants' Memo pp. 9-10 describing an entry in Mr. Conde's December 2004 bankruptcy schedules as follows:

> "Roland Conde hopes to receive future income in the approximate

> amount of $100,000 annually beginning in or about 2008 for real estate management and consulting services in connection with certain real estate ventures owned and/or controlled by Barbara M. Saepia . . . contingent upon (1) Ms. Saepia's consent; (2) Mr. Conde's future performance of services, which result in the (3) successful completion of Ms. Saepia's projects."

56. The absurd contention that the promise of future income contingent upon so many factors (which have not been satisfied) somehow demonstrates that Mr. Conde has a "hidden interest" is merely part of Defendants' weak attempt to "throw the kitchen sink" at me and hope something will stick.

57. Indeed, back in 2006 when I had all of the apartments rented based upon Defendants' representation that the Project would be completed by October 31, 2006, I assured my siblings that they would share in the management fees to be paid to Counterclaim Defendant Jopal Associates, Inc. in the form of salaries, and informally agreed to hire an apartment superintendant. According to Defendants, this superintendant must also have a "hidden interest" in the Project.

58. Defendants' smear campaign is further exemplified by Mr. Pavlovicz's language in Pav. Dec. ¶ 20, whereby he alleges that "Mr. Conde has been banned from tax-credit projects due to criminal problems in the past."

59. This so-called "criminal" was acquitted on all counts of the "problems" to which Mr. Pavlovicz is referring, some 15 years ago. *See*, U.S.D.C., S.D.N.Y. Case No. 93-cr-0092 JSM, entitled, U.S. v. Conde, *et al.*

60. Moreover, it is outlandish for Mr. Pavlovicz to declare, under penalties of perjury, that Mr. Conde "has been banned from tax-credit projects." By what document did a governing body confer such imprimatur upon Mr. Conde, and where is Mr. Pavlovicz' evidence of same? Clearly, no such body or document exists.

D. Defendants' Withholding of Financial and Construction Data.

61. Mr. Pavlovicz states at Declaration ¶21 that:

> I understand that Ms. Saepia is arguing that she could not sign a Fannie Mae mortgage extension agreement because she did not have sufficient information about the project . . . . At no time was information regarding construction progress or costs refused when requested. On the contrary, **when construction cost documents were requested, they were forwarded without delay.**

(Emphasis added).

62. As is demonstrated below, the foregoing statement is false.

63. Prior to October 2007, I had executed all Fannie Mae extension agreements, an undertaking that cannot be approached in a cavalier manner, since numerous financial and construction representations and warranties are required, as I had been "in the loop" with regard to all financial and construction data. Indeed, after the Amendments were executed in the Spring of 2006 whereby responsibility for completing the Project by October 31, 2006 was delegated to Defendants, I continued to execute such agreements.

64. An example is set forth in the Fannie Mae extension letter dated March 15, 2007 [Ex. Y] which I executed on March 29, 2007 ("March '07 Extension"). After execution of the Amendments, I had requested that I continue to receive monthly reports, despite the fact that requisitions were thereafter handled by Defendants [Complaint ¶¶182-211, Exs. 33-37], evidenced by my email to Mr. Pavlovicz dated September 17, 2006 [Ex. Z].

65. The most recent financial data that had, and has, been provided to me was that attached to Draw 24, which covered the period ending November 30, 2006, which information I received on March7, 2007, despite Mr. Pavlovicz' claim that he emailed it to me on February 2, 2007. Though I had not received any information thereafter, I nonetheless executed the March '07

Extension, as I did not wish to "cause any waves", and had been assured by Capmark that additional information would be forthcoming.

66. The series of emails which took place at the time, and in response to which I began to detect hesitation on the part of Capmark to provide financial information, follows:

> **From:** Barbara Saepia
> **To:** Frank Guzauskas - IL; Valerie Jados - IL; Dick Williams;
> **cc:** "anthony.freedman@hklaw.com";
> **Subject:** Tax Returns
> **Date:** Wednesday, March 07, 2007 12:59:00 PM
>
> I am trying to fulfill my Partnership obligations to have the tax returns completed and filed. I have previously asked you for information relevant to this matter but neither I, nor our accountant, has received the necessary documentation for all accounts as of Dec. 31, 2006. In addition, I have not been kept up to date as to individual vendor monthly draws. I understand some information is contained in the trustee statements but their statements do not itemize the accounts nor show the individual invoices. I would appreciate being sent copies of these items to keep my records up to date.
>
> Thank you for your cooperation
>
> Barbara
>
> _____
> **From:** Frank Guzauskas - IL [mailto:Frank.Guzauskas@capmark.com]
> **Sent:** Wednesday, March 07, 2007 2:47 PM
> **To:** B Saepia
> **Cc:** Valerie Jados - IL; Richard Williams - OC;
> anthony.freedman@hklaw.com; Phil Pavlovicz - OH
> **Subject:** FW: Belmont Tax Return
> **Importance:** High
>
> Barbara, below is the email that Phil sent you on 2/2/07 and the attachment. We never heard back that this was not sufficient. What exactly is it that you need?
>
> Thanks.
>
> Frank J. Guzauskas
> Vice President
> Construction Lending

From: Phil Pavlovicz - OH
Sent: Friday, February 02, 2007 9:55 AM
To: 'Barbara Saepia'; Valerie Jados - IL
Cc: Frank Guzauskas - IL; Richard Williams - OC; 'WILLYMAC1994@cs.com'
Subject: RE: Belmont Tax Return

Barb:

Please find a PDF of the last draw attached.

Thanks

Phil Pavlovicz
Senior Construction Analyst
Construction Department

From: Barbara Saepia [mailto:bmsaepia@jopal.com]
Sent: Friday, February 02, 2007 10:35 AM
To: Valerie Jados - IL
Cc: Frank Guzauskas - IL; Richard Williams - OC; Phil Pavlovicz - OH; WILLYMAC1994@cs.com
Subject: Belmont Tax Return

Valerie,

In order for the 2006 tax returns to be completed, our accountant, William McCarthy, has requested that we provide the costs incurred and paid to December 31, 2006 along with all invoices associated with the payments. I would appreciate if you could send us that information as soon as possible. Thank you for your cooperation.

Barbara

From: Barbara Saepia [mailto:bmsaepia@jopal.com]
Sent: Wednesday, March 07, 2007 8:33 PM
To: 'Frank Guzauskas - IL'`
Subject: RE: Belmont Tax Return

Frank,
I never received the e-mail from Phil. I will review it and see if there is any additional information I may need.

Barbara

From: Barbara Saepia [mailto:bmsaepia@jopal.com]
Sent: Tuesday, March 13, 2007 9:23 PM
To: 'Frank Guzauskas - IL'; Valerie Jados - IL; Dick Williams; Phil Pavlovicz - OH; 'anthony.freedman@hklaw.com'
Subject: Tax Returns

I studied the latest Belmont Villas Draw 24 that was sent to me last week but, unfortunately, that information is not sufficient to complete the tax returns. The last Draw information I received was in Sept. 2006, which were draws 20 and 21. I am still missing draws 22 and 23. In addition, the latest spreadsheet Valerie forwarded only included information up to November 30, 2006. The accountant must have the uses spreadsheet complete to December 31, 2006.

The accountant will submit an extension for the returns to allow time for you to forward more complete information to me. Once the documentation is received, he will work on the returns as quickly as possible. Thank you for your cooperation.

From: Valerie Jados - IL [mailto:Valerie.Jados@capmark.com]
Sent: Wednesday, March 14, 2007 9:02 AM
To: Barbara Saepia; Frank Guzauskas - IL; Richard Williams - OC; Phil Pavlovicz - OH; anthony.freedman@hklaw.com
Subject: RE: Tax Returns

The spreadsheet that I provided was the last draw that was done in 2006; we did not do another draw until January 2007.

Valerie Jados
Phone 312-845-5174
Fax 312-845-8623
Direct Fax 312-845-5175

67. Further, the following email exchange took place on May 21, 2007:

From: Barbara Saepia [mailto:bmsaepia@jopal.com]
Sent: Monday, May 21, 2007 10:28 AM
To: 'Frank Guzauskas - IL'; 'Valerie Jados - IL'; Richard Williams - OC
Subject: tax returns

William McCarthy, our accountant, has informed me that he requires the general ledger to complete the tax returns for 2006. Please send that information as soon as possible to: Bill@lipskygoodkin.net. Thank you.

Barbara

From: Frank Guzauskas - IL [mailto:Frank.Guzauskas@capmark.com]
Sent: Monday, May 21, 2007 10:32 AM
To: Barbara Saepia; Valerie Jados - IL; Richard Williams - OC
Subject: RE: tax returns

Barb, what general ledger are you referring to? I do not understand your request.

Thanks.

Frank J. Guzauskas
Vice President
Construction Lending

68. The Vice President of Construction Lending feigns ignorance as what a general ledger, *i.e*., a record of all expenses paid, is? He does "not understand" such a simple, explicit request?

69. Further, it must be noted that I copied Anthony Freedman, Esq. of Holland & Knight LLP ("Holland & Knight") with my emails referenced above. Mr. Freedman had been Plaintiffs' transactional counsel since prior to the October 2004 Closing. Subsequently, as a result of law firm mergers, Holland & Knight also represented Capmark during this time, and I had asked Mr. Freeman to forward my requests for financial and construction data.

70. In addition, in an extensive letter dated April 18, 2007 [Ex. AA], Mr. Freedman informed Defendants of my concerns regarding the incompleteness of the Project, warned of the Town's threat to revoke the building permits, and called for the removal of Protech 128. In addition, Mr. Freedman, who had negotiated with Capmark in connection with the 2006 Amendments, stated in part as follows:

> In June of 2006, by virtue of the Amended Agreements, Barbara Saepia, the Managing Member of Chord Associates, LLC ("Chord"), which in turn, is the Managing Member of Belmont Villas LLC (the

> "Owner"), delegated to Protech Holdings 128, LLC, as Class A Special Member ("Protech") the responsibility for bringing about completion of construction ("Completion") of the Belmont Villas housing development (the "Project"). This delegation was made in the context of various amendments to agreements involving the Project that were intended to permit Completion in accordance with a revised time schedule and budget and with the applicable deadlines for such Completion extended appropriately. It is important to recognize that these agreements were reached in the context of substantial concern by both Chord and Capmark about contractor performance, and as a resolution of some disagreement as to the best means of obtaining satisfactory performance. **Moreover, the paramount objective of the various amendments was to obtain timely and satisfactory Completion.**
>
> (Emphasis added).

71. Shortly after sending the foregoing letter, Mr. Freeman advised that Capmark had requested that he cease representation of my interests, and shortly thereafter Plaintiffs' co-counsel, Bruce H. Kaplan, Esq., advised that he had been contacted by the firm of Reed Smith LLP on behalf of Defendants.

72. Thereafter, Mr. Kaplan had requested that Defendants' new counsel provide the requested financial information in the following email:

> From: Bruce H. Kaplan <brucehkaplan@optonline.net>
> To: Toral, Todd
> Cc: 'Barbara Saepia' <bmsaepia@jopal.com>
> Sent: Mon Jul 23 14:25:41 2007
> Subject: Belmont
>
> Todd-
>
> Ms. Saepia requires current financial info in order to prepare the revised NYS DHCR tax credit application, which we will provide to you once we can complete it. She has not seen any financials since Draw 24. Can you assist?
>
> Thank you
>
> -Bruce

73. Defendants' counsel responded:

From: Toral, Todd [mailto:TToral@ReedSmith.com]
Sent: Monday, July 23, 2007 6:35 PM
To: brucehkaplan@optonline.net
Subject: Re: Belmont

Let me see what I can do. Will revert at my first opportunity.
Warm regards,

/s/
Todd C. Toral
Partner
Reed Smith LLP
Two Embarcadero Center, Suite 2000
San Francisco, CA 94111
DD: 415.659.5966
Cell: 415.999.8514

74. Todd C. Toral, Esq. subsequently left Reed Smith, LLP and Gil Feder, Esq. took over this matter (pre-litigation). Mr. Kaplan has advised me that in a telephone conversation with Mr. Feder on August 6, 2007, he reiterated my request for financial information, and Mr. Feder replied that he would forward said request to his client. Mr. Kaplan never heard from Mr. Feder again, and thereafter Defendants retained their current attorneys for this action.

75. In addition, it should be noted that Mr. Toral had instructed that communications should go through him or his office, and this was reiterated by Gil Feder, Esq. from the same law firm later in August 2007.

76. Further, attached is a series of emails between myself and Bill McCarthy, the Project's accountant, dated July 9, 2007 [Ex. BB], in which he states that "[Mr. Guzauskas] never sent me anything."

77. Further, by email dated October 13, 2007 [Ex. CC], Mr. McCarthy states that

he "was never given a set of books and records to audit, **so no audit could be done**." (Emphasis added).

78. I am not the only one seeking financial information regarding the Project. Annexed hereto is Internal Revenue Service ("I.R.S.") Form 4564 dated October 26, 2007 [Ex. DD] directed to the Suffolk County IDA requesting documents in connection with an audit of the Project. The IDA responded, and forwarded the request to me to supplement its response.

79. On March 11, 2008, I received a telephone call from a lawyer in the Washington, D.C. office of Nixon Peabody, LLP, the Bond Counsel for the IDA, who advised me that he was handling the I.R.S. audit, and that "he was being paid by *Capmark* to make it go away," which I perceived to be a conflict of interest in violation of the Cannons of Ethics. He also told me to have no contact with the I.R.S.

80. Defendants' pattern of non-disclosure continues. Again, while Plaintiffs' counsel will at a later date address in more detail Defendants' Responses and Objections to Plaintiffs First Request For Admissions dated March 31, 2008, I wish to here point out another non-response which is indicative of Defendants' unwillingness to provide financial information. The Defendants were requested to admit the truth of the following statement:

> 1. None of the Defendants provided any of the Plaintiffs with any financial data in connection with the Belmont Villas, LLC project ("Project") more recent than that contained in Belmont Villas Draw Request #24 dated January 8, 2007 and covering the period through November 30, 2006 ("Draw 24"). If the answer to this Request is "false", please provide documents demonstrating such falsity.

81. Defendants' ambiguous Response was as follows:

> Defendants object to this Request on the grounds that it is so defective as to form, including by virtue of the ambiguity and misleading nature of the terms "provided" and "financial data" in the context of Project draw requests, that it cannot be admitted or denied.

> Further, the Request is not susceptible to a simple admit or deny and an unqualified response would give rise to unfair inferences in light of Plaintiffs' contentions that they are excused from their failure to execute the Fannie Mae extension agreement. Among other things, the unfair inferences would include that Plaintiffs requested information to which they were entitled, or that such information was withheld, or that Plaintiffs did not have or have access to such information. For these reasons and to the extent Defendants are obligated to respond, Defendants, subject to the foregoing objections and the General Objections, respond as follows: Deny.

82. A similar non-response is made with respect to Request No. 2 concerning construction data more recent than that provided in Draw 24.

83. From the foregoing recitation of the innumerable times in which, I and my agents did, in fact ask ("she should have asked"; Defendants' Memo, p.14) for financial information throughout the Winter, Spring, and "[S]ummer of 2007 when it became apparent that the Project would not be completed in time to meet the deadline for [Fannie Mae permanent financing conversion]" (Defendant's Memo, p.5), it is clear that Defendants' refusal to provide me with the necessary information rendered impossible my ability to truthfully represent to Fannie Mae that "there is no material adverse change in the condition of Borrower, financial or otherwise, since the Closing Date." [Complaint Ex. 67, p. 2]. Thus, I could not execute the October 2007 Fannie Mae Extension Agreement.

84. Indeed, if the need for an extension was so apparent during the "summer of 2007", why did not Defendants, prior to the Fall Equinox, and certainly prior to October 10, 2007, take action regarding the Fannie Mae Extension? They did not do so because they instead were instead "playing chicken" to see who would blink first and make the Fannie Mae required (mis)representations in order to maintain its lower than market-rate rate financing.

E. <u>Insurance Coverage</u>

85. Mr. Palovicz truly outdoes himself with the following:

> I also learned that in the beginning of January 2008, Saepia contacted the Project's insurer on the eve of the conversion of the Project's insurance policy from construction liability insurance to vacant building insurance **and threatened to sue the insurer.**

(Pav. Dec. ¶22)(Emphasis Added).

86. Submitted herewith is the Affidavit sworn to on March 28,2008 of Wayne Nowland [Ex. EE], Executive Vice President of Bradley and Parker, Inc. of Syosset, New York ("Bradley & Parker"), which has, since the inception of the Project been obtaining general liability and builders' all risk insurance for the Project, and which provides in part as follows:

> 4. Further, as set forth in Exhibit A annexed hereto, on December 12, 2007, Donna Saporita, our Commercial Lines Supervisor, emailed Ms. Saepia at krystiemanor@optonline.net, with a cc to Phil Pavlovicz , in connection with obtaining vacant building coverages, as the then existing policies were scheduled to lapse in January 2008.
>
> 5. Ms. Saporita forwarded an "email [she] just got from a carrier who was going to quote Belmont, but [she then thought] they won't be" because of "$100k in vandalism not reported to any carrier yet".
>
> 6. **Finally, Ms. Saepia has never threatened to sue the insurer, nor commenced any such action.**

(Emphasis added)

87. Thus, in December 2007/January 2008, I was responding to the insurance broker's inquiry regarding Mr. Pavlovicz' failure to disclose $100,000 in vandalism at the nearly complete, yet vacant, Project. I did not contact them.

88. Moreover, I repeat Mr. Nowland's statement that I never threatened to sue the insurer, nor commenced any such action, and thus emphatically refute both Mr. Pavlovicz's perjurious statement and Defendants' counsel's reiteration thereof (Defendants' Memo, pp. 3, 17).

F. Other Matters

89. In my Affirmation filed December 10, 2007 ("Saepia Aff."), I pointed out that Plaintiffs had not been provided with any cure period whatsoever as required by the Operating Agreement (Saepia Aff. ¶¶8-13). (Indeed, under the Doctrine of Impossibility (Defendants' Memo, p. 16), there were no defaults to cure, and any cure period has never commenced, much less expired). I also refuted the McCarthy-like tactic of my purported "false and misleading correspondence to the [non-existent] Belmont Commissioner" (Saepia Aff. ¶¶28-29), and thus, will not reiterate those issues here. I thank the Court for its indulgence thus far with regards to this extended affirmation.

90. In that vein, I must note that I have reviewed Defendants' Memo, which relies heavily on Mr. Pavlovicz' above-discredited Declaration ("harassment of insurance broker"; (Defendants' Memo, p. 3) being but one example), and must briefly note my opposition here to its premises, *inter alia*, that: (1) "Defendants acted in accordance with the [Operating Agreement]" (Defendants' Memo, p.1) ; (2) Defendants had "no choice" but to remove Plaintiffs (Defendants' Memo, p. 6); (3) Plaintiffs could not cure their defaults (Defendants' Memo, p. 7); and, (4) any cure periods have expired (Defendants' Memo, p. 12).

91. *See also*, Supplemental Affirmation In Support of Summary Judgment of Bruce H. Kaplan, Esq. dated March 24, 2008 ("Kap.SJ.Supp.Aff.") (cure periods may not be unilaterally abrogated "as a result of extenuating circumstances"; Special Member, defendant Protech 2003-D, LLC, had the "other alternative" of appointing itself as *additional* Managing Member on October 10, 2007 and executing the Fannie Mae Extension Agreement while affording Chord the appropriate cure period; Defendants already had authority to execute extension under Operating Agreement Amendment §7.4.4)(Kap.SJ.Supp.Aff. ¶¶32-38).

92. Also, it is particularly disingenuous for Defendants to argue that Plaintiffs are now estopped by "more than three additional months" delay (Defendants' Memo, p.11) when such delay – from December 14, 2007 through March 27, 2008 – was due to the three times which Plaintiffs have consented to Defendants' requests for adjournments.

93. Finally, there are a few remaining matters which bear upon Plaintiffs' requests for equitable relief and return to the ***status quo ante***.

94. Mr. Pavlovicz' unsuitability to continue managing the Project and ignorance of the rental market in the Town of Babylon, is demonstrated by his February 28, 2008 email to the Town [Ex. O] in which he, as Senior Construction Analyst, requests guidance from the Town as to whether the units can be marketed as one or two bedroom units.

95. Under the building permits issued to Belmont, the units may be marketed as one bedroom plus den, which rent at higher amounts than one bedroom units.

96. Even those of us who are not exalted Senior Construction Analysts, yet at least have experience renting Low Income Housing Tax Credit apartments to senior citizens within the Town of Babylon, such as my siblings and Mr. Conde, realize that if the Belmont units are marketed as one bedroom units, the Project will have difficulty servicing its debt ($900/unit/mo. vs. $1200/unit/mo.), and will likely fail. Presumably, the mastermind who makes such an error will likely be "banned from tax credit projects" in the future by whatever sanctioning body it is that Mr. Pavlovicz has invoked.

97. In contrast, annexed hereto are three letters from the N.Y.S. Division of Housing and Community Renewal going back to 2002 [Ex. FF] which state that my management of my other Low Income Housing Tax Credit project located in the Town of Babylon has been

satisfactory.

98. For all the foregoing reasons, not the least of which is that Protech 2003's precipitous Removal Notice is based upon false claims, the balancing of the equity inherent with granting the injunctive relief requested weighs in Plaintiffs' favor. Accordingly, an injunction staying the removal of Managing Member interest until the Court can determine the outcome of the relief sought through litigation is warranted.

WHEREFORE, I respectfully request that this Court enter a Preliminary Injunction:

(i) restraining Defendant Protech 2003-D from enforcing and further distributing its Removal Notice dated October 10, 2007 during the pendency of this action;

(ii) compelling that, if applicable, the appropriate Cure Period be tolled during the pendency of the litigation;

(iii) compelling the retraction by Protech 2003-D of its Removal Notice dated October 10, 2007;

(iv) compelling Capmark and its Affiliates to provide the Project's financial and construction activity data for all of 2007 and 2008;

(v) prohibiting Defendants from using any of Belmont Villas LLC's ("Belmont") funds to pay defendants' attorneys fees or other costs associated with defending this suit;

(v) prohibiting Defendants from taking any action or inaction detrimental to Belmont's or Plaintiffs' interest therein;

(vi) compelling Defendants to preserve and protect the assets of Belmont pending the full adjudication of this case;

(vii) together with such other and further relief as may be proper.

BARBARA M. SAEPIA