

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                      |   |  |
|----------------------|---|--|
| In re:               | ) | Case No. 10-50494                      |
|                      | ) |  |
| FAIR FINANCE COMPANY | ) | Chapter 7                              |
|                      | ) |  |
| Debtor.              | ) | Chief Judge Pat E. Morgenstern-Clarren |
|                      | ) |  |

**Status Report**

This report addresses the status of certain open cases related to the Fair Finance matter, in anticipation of the pretrial and status conferences this Court set by orders issued on May 21, 2014 in the various adversary proceedings.

**Procedural and Administrative Background**

To minimize the burdens of discovery on parties, witnesses, and the Court, many Fair Finance adversary proceedings with similar circumstances or common factual issues have been aligned into one of two groups, which have been referred to as “Group A” and “Group B” cases. This procedure provided consolidated discovery, minimized the number of times that key witnesses would need to be deposed, and allowed for consistent rulings on common issues.

The “Group A” cases all included a claim to avoid and recover actual fraudulent conveyances from Fair Finance. The three identified common issues in those cases were (1) when Fair Finance became insolvent, (2) whether the fraud scheme at Fair Finance entitled the Trustee to the “Ponzi Scheme Presumption” that transfers made by Fair Finance were made with actual intent to hinder, delay, or defraud creditors, and (3) whether the Trustee was entitled to a 10-year look-back period on fraudulent conveyance claims.

Originally, the Trustee moved to consolidate the “Group A” proceedings to: (1) prevent duplicative discovery, and (2) avoid inconsistent rulings on the common issues. Eventually, procedural developments made it possible to accomplish these goals without formal consolidation under Civil Rule 42. First, the bankruptcy reference was withdrawn for the “Group A” cases. Second, the “Group A” cases were all assigned to District Judge Patricia Gaughan. And finally, all of these matters were referred by Judge Gaughan to Bankruptcy Judge Shea-Stonum for pretrial supervision and for the issuance of reports and recommendations on dispositive motions filed in these matters. This procedural posture enabled the parties to litigate without the possibility of inconsistent rulings, and it also allowed for the coordination of discovery without formal consolidation. For reference, the Stipulated Fact Witness Deposition Protocol entered in the Fortress case, and the Case Management Orders entered in the other Group A cases, are attached as **Exhibit A**.



The “Group A” cases that are not settled are the *Fortress*, *Head*, *Osler* and *Kaffen* lawsuits. As will be discussed below, the *Snow* case settlement is pending the signature of Mr. Snow, who is incarcerated in Pekin, Illinois.

The Trustee respectfully submits that the important interests identified above would be best served by referral of the remaining “Group A” cases to a single bankruptcy judge for pretrial supervision. Judge Gaughan has already referred the *Fortress* case to Judge Harris, and as the Court will see below, the only remaining active “Group A” cases are *Head*, *Osler*, and *Kaffen*.<sup>1</sup>

The “Group B” cases primarily consisted of breach of note and avoidance action claims. Since many of these cases sought to recover transfers from non-debtors or from subsequent transferees, a common issue in these cases was the solvency of certain companies related to Fair Finance and Timothy Durham. Discovery involving the Trustee’s insolvency expert was coordinated across the Group B cases. For reference, Judge Shea-Stonum’s Order re: Motion for an Omnibus Telephonic Status Conference in the “Group B” Adversary Proceedings and the matrix of claims filed in response to that order is attached as **Exhibit B**.

#### **Status of “Group A” Active Cases**

1. *Bash v. Textron Financial Corp.* (the “*Fortress*” case) (Case No. No. 12-5101).<sup>2</sup> Due to its scope, this case has been treated as the lead case in the “Group A” proceedings. It is pending before Judge Harris, discovery is complete, and cross-motions for summary judgment are pending.
2. *Bash v. Head* (Case No. 12-5097). This matter is addressed in the joint report of counsel for the Trustee and counsel for Mr. Head, filed on June 3, 2014 in the *Head* adversary proceeding.
3. *Bash v. Kaffen* (Case No. 12-5149). This case is scheduled for a status conference on June 26, 2014.
4. *Bash v. Osler* (Case No. 12-5158). A status conference relating to the last remaining defendant, Elizabeth McClure, is scheduled for June 26, 2014.

#### **Status of “Group A” Cases With Ongoing Settlement Negotiations or Obligations**

1. *Bash v. Snow* (Case No. 12-5096). The Trustee is awaiting Mr. Snow’s signature on the settlement agreement. Mr. Snow is currently in federal prison in Pekin, Illinois.

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<sup>1</sup> The settlement agreement in the *Snow* case is awaiting the signature of Mr. Snow, who is incarcerated in Illinois. Further, the *Osler* case is distinct from the other Group A cases because the actual fraudulent conveyance claims in that case were resolved by the default judgment entered by the District Court on May 2, 2013, against Dana Osler and Geist Sports Academy, LLC as a sanction for discovery misconduct.

<sup>2</sup> All case citations herein refer to the bankruptcy court docket rather than any district court docket.

### **Status of “Group B” Active Cases**

1. *Bash v. Dalinger Designs, Inc.*, (Case No. 12-5111). This case is scheduled for a pretrial hearing on July 9, 2014.
2. *Bash v. Najem* (Case No. 12-5061). Mr. Najem has paid the Trustee \$10,000 of the \$20,000 due under his settlement agreement with the Trustee. The Trustee has demanded final payment by no later than June 13. If Mr. Najem fails to pay, the Trustee will take appropriate action.
3. *Bash v. Courtney Durham* (Case No. 12-5105). The parties have reached a settlement in principle, and the Trustee delivered a final settlement agreement to counsel for Ms. Durham on March 25, 2014. The Trustee has not received a signature or comments. The Trustee hopes to receive a signed agreement prior to the status conference on June 26, 2014.
4. *Bash v. Mitza Durham* (Case No. 12-5032). The parties have agreed on most material settlement terms. The Trustee expects to settle the matter before the status conference on June 26, 2014.

### **Status of “Group B” Cases Involving a Bankruptcy Filing By A Defendant**

1. *Bash v. Alternate Billing Corporation* (Case No. 12-05020). Alternate Billing Corporation filed a Chapter 7 petition on December 30, 2013. The Trustee will file a motion seeking a judgment entry substantially identical to the one Judge Gaughan entered in the *Bash v. Lucas* case after Mr. Lucas filed for bankruptcy. The judgment entry in the *Lucas* case, which is attached as **Exhibit C**, perpetually stays proceedings and closes the case, subject to reopening upon a proper motion.
2. *Bash v. Etelco Services, Inc.* (Case No. 11-5233). The Trustee’s treatment of Etelco Services is intertwined with settlement negotiations with Cindy Landeen, who guaranteed Etelco’s debt. A status conference has been set for June 26, 2014.
3. *Bash v. Landeen* (Case No. 12-5026). The Trustee is in settlement negotiations with Ms. Landeen, who has indicated that she will file bankruptcy if a settlement cannot be reached, and with the Chapter 7 Trustee for Alternate Billing Corporation, of which Ms. Landeen was an officer.

### **Status of “Group B” Cases The Trustee Intends to Voluntarily Dismiss**

1. *Bash v. DW Trailer, LLC* (Case No. 12-5147). The Trustee’s claims against Terry Whitesell in this case were compromised pursuant to a motion filed by the Trustee on August 3, 2012, and subsequently granted by the court. The motion and order are attached as **Exhibit D**. The Trustee has determined that pursuing the remaining defendant, DW Trailer, LLC, is not in the best interests of the estate at this time and he will, therefore, file a notice of voluntary dismissal. DW Trailer neither answered nor moved to dismiss the Complaint.

2. *Bash v. Obsidian Capital Co., LLC* (Case No. 12-5090) and *Durham Whitesell & Assocs., LLC* (Case No. 11-5240). The remaining defendants in these matters are Timothy Durham, Obsidian Capital Company, and Durham Whitesell & Associates. The Trustee has already obtained over \$100 million in judgments against Mr. Durham. Obsidian Capital Company had limited operations and primarily held stock in the now-defunct Obsidian Enterprises, Inc. And the Trustee's investigation of Durham Whitesell & Associates has revealed very limited potential assets to recover. Therefore, the Trustee has determined that pursuing these defendants further is not in the best interests of the estate at this time, and he will file a notice of voluntary dismissal as to all three defendants.

### **Status of Other Cases**

1. *Bash v. Laikin* (Case No. 10-5043). On October 24, 2013, Judge Shea-Stonum issued a Report and Recommendation After Trial recommending that judgment be entered in favor of the Trustee, and against Daniel Laikin, in the amount of \$32,958,018 plus interest at 10.5% and attorney's fees related to a certain Sanctions Order. The Report and Recommendation After Trial is attached as **Exhibit E**. The parties are awaiting a decision on Laikin's objections to the Report and Recommendation, which have been fully briefed before the District Court.
2. *Bash v. National Lampoon*. This case is pending as number 11-cv-4999-DSF-AGR in the United States District Court for the Central District of California. On May 19, 2014, the Trustee and National Lampoon filed a *Joint Notice of Pending Settlement and Motion to Stay Proceedings*. The case has been stayed while the parties finalize and document their settlement agreement.
3. *National Lampoon v. Durham*. This case is pending as number 13-cv-1094 in the United States District Court for the Southern District of Indiana. The Trustee intervened in this lawsuit. A pretrial was held on June 3, 2014, and the Court tolled the motion for summary judgment deadlines in light of pending settlement discussions. The parties are to file a status report by July 1.
4. *Bash v. Vitesse* (Case No. 13-5068). The Trustee will file a motion for a default judgment in advance of the status conference on June 26, 2014.
5. *Bash v. Sallee* (Case No. 14-5019). This matter will be addressed in the joint pretrial statement which will be filed by June 16, 2014. The Trustee is awaiting the receipt of certain documents in evaluating a potential settlement, and a pretrial conference has been set for June 19, 2014.



6. *Bash v. Frantz* (Case No. 12-5151) and *Bash v. Alig* (Case No. 12-5141). Shannon Frantz filed a Chapter 7 petition on May 30, 2012. Cornelius Alig filed a Chapter 7 petition on April 29, 2012. As with the case against Alternate Billing Corporation, the Trustee will file a motion seeking a judgment entry substantially identical to the one Judge Gaughan entered in the *Bash v. Lucas* case.

Date: June 4, 2014

Respectfully submitted,

/s/ Brian A. Bash

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**CERTIFICATE OF SERVICE**

A copy of the foregoing has been served via ECF or regular, U.S. Mail, on June 4, 2014,  
on the attached service list.

*/s/ Brian A. Bash*  
\_\_\_\_\_  
*Chapter 7 Trustee*

## SERVICE LIST

### Electronic Mail Notice List

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# **EXHIBIT A**

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

|                                   |   |                                  |
|-----------------------------------|---|----------------------------------|
| In re: FAIR FINANCE COMPANY,      | ) | Bankruptcy Case No. 10-50494     |
|                                   | ) | Chapter 7                        |
| Debtor.                           | ) | JUDGE MARILYN SHEA-STONUM        |
| <hr/>                             | ) |                                  |
| BRIAN A. BASH, CHAPTER 7 TRUSTEE, | ) | <b>Adv. Pro. No. 12-05096</b>    |
|                                   | ) | <b>Case No.: 5:12-cv-980-PAG</b> |
| Plaintiff,                        | ) | <b>JUDGE PATRICIA A. GAUGHAN</b> |
|                                   | ) |                                  |
| vs.                               | ) |                                  |
|                                   | ) |                                  |
| RICKY SNOW,                       | ) | CASE MANAGEMENT ORDER            |
|                                   | ) |                                  |
| Defendant.                        | ) |                                  |

Pursuant to a status call held in this matter on August 13, 2012, the following deadline and case management procedures are hereby established.

**A. Case Deadlines.**

1. By not later than **October 31, 2012**, all written discovery shall be completed.
2. By not later than **August 16, 2012**, counsel for the plaintiff shall circulate a matrix of fact witnesses common to the Related Cases (as defined below) (the "Witness Matrix"). By



not later than **August 29, 2012**, Defendant(s) shall supplement the Witness Matrix with any fact witnesses they intend to depose.

3. Nothing on the Witness Matrix shall prejudice the plaintiff or any other party to depose or call as a witness any person not listed thereon.
4. Depositions of other party and nonparty fact witnesses shall commence following the close of written discovery and all parties shall use their best efforts to complete as many depositions as possible by **March 14, 2013**. All parties to this adversary proceeding shall continue to attempt to reduce the number of affirmative witnesses identified in their initial disclosures. Additional time for depositions may be requested and will be granted only upon a showing of good cause.
5. By not later than **March 29, 2013**, counsel shall *jointly* file with the Court a list of all matters which are not in dispute in this case and which can be the subject of stipulations including any documentary evidence upon which the parties intend to rely in the prosecution or defense of their respective cases.
6. By not later than **March 29, 2013**, each party shall *separately* file with the Court a statement of relevant matters which remain in dispute.
7. The Court will hold a further pretrial in this matter after the March 29, 2013 filing deadlines set forth above. At that time, the Court will address further deadlines with respect to (1) expert report(s) and necessary expert discovery, (2) scheduling of motions for summary judgment *if* there is a prospect that such motions would be productive, (3) trial dates, and (4) any other matters.

**B. Coordination of Written Discovery and Document Productions.**

1. Plaintiff has identified three (3) issues in this case that the plaintiff believes are common to seven (7) matters (including this matter) pending before this Court with the following captions and case numbers: *Bash v. Textron Financial Corp., et al.* (5:12-cv-987), *Bash v. Somerset CPAs, P.C.* (5:12-cv-992), *Bash v. Ronald O. Kaffen, et al.* (5:12-cv-994), *Bash v. Donald Fair, et al.* (5:12-cv-996), *Bash v. Ricky Snow* (5:12-cv-980), *Bash v. John Head* (5:12-cv-981), and *Bash v. Dana Osler, et al.* (5:12-cv-997) (the “Related Matters”). Those issue are (1) whether Fair Finance became insolvent and, if so, when; (2) whether Fair Finance was operated as a “Ponzi Scheme;” and (3) whether the plaintiff is entitled to a ten (10) year look back period with respect to fraudulent transfer claims (collectively, the “Common Issues”). Accordingly, in the interests of efficiency, the parties shall serve their written discovery requests and written responses on *all* parties in the Related Matters, in addition to service on the parties in this case.
2. The Court has authorized the plaintiff to operate an electronic data room for purposes of the adversary proceedings related to the Fair Finance Company bankruptcy case [Case No. 10-50494, Dkt. 997]. The plaintiff shall endeavor to have the data room operational and open to the defendant(s) on or before July 31, 2012. The motion filed by the plaintiff for authority to set up the data room identifies those documents that will be included in the data room, and the plaintiff shall operate and provide access to the data room in accordance with the terms of the plaintiff’s data room motion [Case No. 10-50494, Dkt. 989]. The plaintiff is relieved of any obligation to review documents in the data room for relevance in response to any document requests, and any party seeking documents outside of the data room should specifically so state in any written discovery requests. If

a party wishes to inspect documents that are not included in the data room, plaintiff and that party can address the request on a case-by-case basis through an appropriate written request under Civil Rules 26 and 34, subject to an appropriate agreement on the costs of such production.

3. If a defendant wishes to seek discovery of relevant documents from any other defendant in this or any of the Related Matters, the defendant shall seek such discovery directly from that defendant through a Rule 34 request or Civil Rule 45 subpoena directed to the producing party. No defendant shall serve such a request or subpoena on the plaintiff for documents produced to the plaintiff by other parties.
4. If any documents not included in the data room are produced by the plaintiff pursuant to a document request, the plaintiff shall provide each of the other parties in the Related Matters with copies of any written response to such document request and shall make copies of the relevant documents available for copying and inspection.

### **C. Coordination of Certain Fact Depositions.**

1. Depositions of fact witnesses that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues.
2. By not later than **September 28, 2012**, the parties shall exchange lists of any fact witnesses they believe may provide testimony relevant to the resolution of the Common Issues.
3. For any fact witness that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues, the parties shall be entitled to use such deposition testimony as evidence in any of the Related Matters provided that notice of the deposition is given to *all* parties in the Related Matters. For such witnesses, the parties

shall serve all parties in the Related Matters with a copy of any deposition notice or subpoena issued in the corresponding case at least fourteen (14) days prior to the deposition date. The date, time and location of the deposition shall be set by agreement between the plaintiff, the other defendants in that case, and the deponent. Any party wishing to attend such deposition or wishing to ask questions related to the Common Issues at the deposition shall provide all of the other parties in the Related Matters with notice of the party's intent to do so at least three (3) business days prior to the deposition. The failure to provide such notice does not preclude a party from appearing at the deposition and/or asking questions related to the Common Issues at the deposition. However, the parties should endeavor to provide such notice to facilitate the planning of conference room facilities. While counsel may attend the deposition by telephone, counsel should be present if counsel intends to ask questions related to the Common Issues at the deposition, unless arrangements are made prior to the deposition with the consent of the party noticing the deposition. Any counsel attending the deposition by telephone may seek the consent of the other counsel in attendance at the deposition to examine the deponent, and counsel shall be reasonable and cooperative in addressing such a request. All parties shall cooperate in good faith as to all other issues relating to the taking of depositions.

**D. Other Matters.**

1. Email service to counsel of record for a party shall be deemed sufficient service for purposes of this case management order.



MARILYN SHEA-STONUM  
U.S. Bankruptcy Judge

AUG 23 2012

IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

|                                   |   |                                  |
|-----------------------------------|---|----------------------------------|
| In re: FAIR FINANCE COMPANY,      | ) | Bankruptcy Case No. 10-50494     |
|                                   | ) | Chapter 7                        |
| Debtor.                           | ) | JUDGE MARILYN SHEA-STONUM        |
| <hr/>                             | ) |                                  |
| BRIAN A. BASH, CHAPTER 7 TRUSTEE, | ) | <b>Adv. Pro. No. 12-05097</b>    |
|                                   | ) | <b>Case No.: 5:12-cv-981-PAG</b> |
| Plaintiff,                        | ) | <b>JUDGE PATRICIA A. GAUGHAN</b> |
|                                   | ) |                                  |
| vs.                               | ) |                                  |
|                                   | ) |                                  |
| JOHN HEAD, <i>et al.</i>          | ) | CASE MANAGEMENT ORDER            |
|                                   | ) |                                  |
| Defendants.                       | ) |                                  |

Pursuant to a status call held in this matter on August 13, 2012, the following deadline and case management procedures are hereby established.

**A. Case Deadlines.**

1. By not later than **November 9, 2012**, all written discovery shall be completed.
2. By not later than **August 16, 2012**, counsel for the plaintiff shall circulate a matrix of fact witnesses common to the Related Cases (as defined below) (the "Witness Matrix"). By

not later than **August 29, 2012**, defendant(s) shall supplement the Witness Matrix with any fact witnesses they intend to depose.

3. Nothing on the Witness Matrix shall prejudice the plaintiff or any other party to depose or call as a witness any person not listed thereon.
4. By not later than **November 30, 2012**, counsel shall have concluded the deposition of defendant, John Head.
5. By not later than **December 15, 2012**, counsel shall have identified any additional deposition testimony needed in this case and shall use their best efforts to complete as many depositions as possible by **March 14, 2013**. All parties to this adversary proceeding shall continue to attempt to reduce the number of affirmative witnesses identified in their initial disclosures. Additional time for depositions may be requested and will be granted only upon a showing of good cause.
6. By not later than **December 31, 2012**, counsel shall *jointly* file with the Court a list of all matters which are not in dispute in this case and which can be the subject of stipulations including any documentary evidence upon which the parties intend to rely in the prosecution or defense of their respective cases.
7. By not later than **January 7, 2013**, each party shall *separately* file with the Court a statement of relevant matters which remain in dispute.
8. The Court will hold a further pretrial in this matter after the January 7, 2013 filing deadline set forth above. At that time, the Court will address further deadlines with respect to (1) expert report(s) and necessary expert discovery, (2) scheduling of motions for summary judgment *if* there is a prospect that such motions would be productive, (3) trial dates, and (4) any other matters.

**B. Coordination of Written Discovery and Document Productions.**

1. Plaintiff has identified three (3) issues in this case that the plaintiff believes are common to seven (7) matters (including this matter) pending before this Court with the following captions and case numbers: *Bash v. Textron Financial Corp., et al.* (5:12-cv-987), *Bash v. Somerset CPAs, P.C.* (5:12-cv-992), *Bash v. Ronald O. Kaffen, et al.* (5:12-cv-994), *Bash v. Donald Fair, et al.* (5:12-cv-996), *Bash v. Ricky Snow* (5:12-cv-980), *Bash v. John Head* (5:12-cv-981), and *Bash v. Dana Osler, et al.* (5:12-cv-997) (the “Related Matters”). Those issue are (1) whether Fair Finance became insolvent and, if so, when; (2) whether Fair Finance was operated as a “Ponzi Scheme;” and (3) whether the plaintiff is entitled to a ten (10) year look back period with respect to fraudulent transfer claims (collectively, the “Common Issues”). Accordingly, in the interests of efficiency, the parties shall serve their written discovery requests and written responses on *all* parties in the Related Matters, in addition to service on the parties in this case.
2. The Court has authorized the plaintiff to operate an electronic data room for purposes of the adversary proceedings related to the Fair Finance Company bankruptcy case [Case No. 10-50494, Dkt. 997]. The plaintiff shall endeavor to have the data room operational and open to the defendant(s) on or before July 31, 2012. The motion filed by the plaintiff for authority to set up the data room identifies those documents that will be included in the data room, and the plaintiff shall operate and provide access to the data room in accordance with the terms of the plaintiff’s data room motion [Case No. 10-50494, Dkt. 989]. The plaintiff is relieved of any obligation to review documents in the data room for relevance in response to any document requests, and any party seeking documents outside of the data room should specifically so state in any written discovery requests. If



a party wishes to inspect documents that are not included in the data room, plaintiff and that party can address the request on a case-by-case basis through an appropriate written request under Civil Rules 26 and 34, subject to an appropriate agreement on the costs of such production.

3. If a defendant wishes to seek discovery of relevant documents from any other defendant in this or any of the Related Matters, the defendant shall seek such discovery directly from that defendant through a Rule 34 request or Civil Rule 45 subpoena directed to the producing party. No defendant shall serve such a request or subpoena on the plaintiff for documents produced to the plaintiff by other parties.
4. If any documents not included in the data room are produced by the plaintiff pursuant to a document request, the plaintiff shall provide each of the other parties in the Related Matters with copies of any written response to such document request and shall make copies of the relevant documents available for copying and inspection.

### **C. Coordination of Certain Fact Depositions.**

1. Depositions of fact witnesses that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues shall be coordinated by the parties.
2. By not later than **September 28, 2012**, the parties shall exchange lists of any fact witnesses they believe may provide testimony relevant to the resolution of the Common Issues.
3. For any fact witness that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues, the parties shall be entitled to use such deposition testimony as evidence in any of the Related Matters provided that notice of the deposition is given to *all* parties in the Related Matters. For such witnesses, the parties

shall serve all parties in the Related Matters with a copy of any deposition notice or subpoena issued in the corresponding case at least fourteen (14) days prior to the deposition date. The date, time and location of the deposition shall be set by agreement between the plaintiff, the other defendants in that case, and the deponent. Any party wishing to attend such deposition or wishing to ask questions related to the Common Issues at the deposition shall provide all of the other parties in the Related Matters with notice of the party's intent to do so at least three (3) business days prior to the deposition. The failure to provide such notice does not preclude a party from appearing at the deposition and/or asking questions related to the Common Issues at the deposition. However, the parties should endeavor to provide such notice to facilitate the planning of conference room facilities. While counsel may attend the deposition by telephone, counsel should be present if counsel intends to ask questions related to the Common Issues at the deposition, unless arrangements are made prior to the deposition with the consent of the party noticing the deposition. Any counsel attending the deposition by telephone may seek the consent of the other counsel in attendance at the deposition to examine the deponent, and counsel shall be reasonable and cooperative in addressing such a request. All parties shall cooperate in good faith as to all other issues relating to the taking of depositions.

**D. Other Matters.**

1. Email service to counsel of record for a party shall be deemed sufficient service for purposes of this case management order.



MARILYN SHEA-STONUM  
U.S. Bankruptcy Judge

AUG 23 2012

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

In re: FAIR FINANCE COMPANY,  
Debtor.

Bankruptcy Case No. 10-50494  
Chapter 7  
JUDGE MARILYN SHEA-STONUM

BRIAN A. BASH, CHAPTER 7 TRUSTEE,  
Plaintiff,

**Adv. Pro. No. 12-05158**  
**Case No.: 5:12-cv-00997-PAG**  
**JUDGE PATRICIA A. GAUGHAN**

VS.

DANA OSLER, *et al.*,

## CASE MANAGEMENT ORDER

Defendant(s).

Pursuant to a status call held in this matter on August 13, 2012, the following deadline and case management procedures are hereby established.

### A. Case Deadlines.

1. By not later than **November 14, 2012**, all written discovery shall be completed.
2. By not later than **August 16, 2012**, counsel for the plaintiff shall circulate a matrix of fact witnesses common to the Related Cases (as defined below) (the “Witness Matrix”). By

not later than **August 29, 2012**, defendant(s) shall supplement the Witness Matrix with any fact witnesses they intend to depose.

3. Nothing on the Witness Matrix shall prejudice the plaintiff or any other party to depose or call as a witness any person not listed thereon.
4. By not later than **December 14, 2012**, the depositions defendant, Dana Osler; defendant, Elizabeth McClure; and the deponent identified pursuant to Fed. R. Civ. P. 30(b)(6) for defendant, Geist Sports Academy, LLC shall have taken place.
5. Depositions of other party and nonparty fact witnesses shall commence following the close of written discovery and all parties shall use their best efforts to complete as many depositions as possible by **March 14, 2013**. All parties to this adversary proceeding shall continue to attempt to reduce the number of affirmative witnesses identified in their initial disclosures. Additional time for depositions may be requested and will be granted only upon a showing of good cause.
6. By not later than **January 4, 2013**, counsel shall *jointly* file with the Court a list of all matters which are not in dispute in this case and which can be the subject of stipulations including any documentary evidence upon which the parties intend to rely in the prosecution or defense of their respective cases.
7. By not later than **January 4, 2013**, each party shall *separately* file with the Court a statement of relevant matters which remain in dispute.
8. The Court will hold a further pretrial in this matter after the January 4, 2013 filing deadlines set forth above. At that time, the Court will address further deadlines with respect to (1) expert report(s) and necessary expert discovery, (2) scheduling of motions for summary judgment *if* there is a prospect that such motions would be productive, (3) trial dates, and (4) any other matters.

## **B. Coordination of Written Discovery and Document Productions.**

1. Plaintiff has identified three (3) issues in this case that the plaintiff believes are common to seven (7) matters (including this matter) pending before this Court with the following captions and case numbers: *Bash v. Textron Financial Corp., et al.* (5:12-cv-987), *Bash v. Somerset CPAs, P.C.* (5:12-cv-992), *Bash v. Ronald O. Kaffen, et al.* (5:12-cv-994), *Bash v. Donald Fair, et al.* (5:12-cv-996), *Bash v. Ricky Snow* (5:12-cv-980), *Bash v. John Head* (5:12-cv-981), and *Bash v. Dana Osler, et al.* (5:12-cv-997) (the “Related Matters”). Those issue are (1) whether Fair Finance became insolvent and, if so, when; (2) whether Fair Finance was operated as a “Ponzi Scheme;” and (3) whether the plaintiff is entitled to a ten (10) year look back period with respect to fraudulent transfer claims (collectively, the “Common Issues”). Accordingly, in the interests of efficiency, the parties shall serve their written discovery requests and written responses on *all* parties in the Related Matters, in addition to service on the parties in this case.
2. The Court has authorized the plaintiff to operate an electronic data room for purposes of the adversary proceedings related to the Fair Finance Company bankruptcy case [Case No. 10-50494, Dkt. 997]. The plaintiff shall endeavor to have the data room operational and open to the defendant(s) on or before July 31, 2012. The motion filed by the plaintiff for authority to set up the data room identifies those documents that will be included in the data room, and the plaintiff shall operate and provide access to the data room in accordance with the terms of the plaintiff’s data room motion [Case No. 10-50494, Dkt. 989]. The plaintiff is relieved of any obligation to review documents in the data room for relevance in response to any document requests, and any party seeking documents outside of the data room should specifically so state in any written discovery requests. If a party wishes to inspect documents that are not included in the data room, plaintiff and

that party can address the request on a case-by-case basis through an appropriate written request under Civil Rules 26 and 34, subject to an appropriate agreement on the costs of such production.

3. If a defendant wishes to seek discovery of relevant documents from any other defendant in this or any of the Related Matters, the defendant shall seek such discovery directly from that defendant through a Rule 34 request or Civil Rule 45 subpoena directed to the producing party. No defendant shall serve such a request or subpoena on the plaintiff for documents produced to the plaintiff by other parties.
4. If any documents not included in the data room are produced by the plaintiff pursuant to a document request, the plaintiff shall provide each of the other parties in the Related Matters with copies of any written response to such document request and shall make copies of the relevant documents available for copying and inspection.

**C. Coordination of Certain Fact Depositions.**

1. Depositions of fact witnesses that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues.
2. By not later than **September 17, 2012**, the parties shall exchange lists of any fact witnesses they believe may provide testimony relevant to the resolution of the Common Issues.
3. For any fact witness that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues, the parties shall be entitled to use such deposition testimony as evidence in any of the Related Matters provided that notice of the deposition is given to *all* parties in the Related Matters. For such witnesses, the parties shall serve all parties in the Related Matters with a copy of any deposition notice or subpoena issued in the corresponding case at least fourteen (14) days prior to the

deposition date. The date, time and location of the deposition shall be set by agreement between the plaintiff, the other defendants in that case, and the deponent. Any party wishing to attend such deposition or wishing to ask questions related to the Common Issues at the deposition shall provide all of the other parties in the Related Matters with notice of the party's intent to do so at least three (3) business days prior to the deposition. The failure to provide such notice does not preclude a party from appearing at the deposition and/or asking questions related to the Common Issues at the deposition. However, the parties should endeavor to provide such notice to facilitate the planning of conference room facilities. While counsel may attend the deposition by telephone, counsel should be present if counsel intends to ask questions related to the Common Issues at the deposition, unless arrangements are made prior to the deposition with the consent of the party noticing the deposition. Any counsel attending the deposition by telephone may seek the consent of the other counsel in attendance at the deposition to examine the deponent, and counsel shall be reasonable and cooperative in addressing such a request. All parties shall cooperate in good faith as to all other issues relating to the taking of depositions.

**D. Other Matters.**

1. Email service to counsel of record for a party shall be deemed sufficient service for purposes of this case management order.

*Marilyn Shea-Stonum*

MARILYN SHEA-STONUM  
U.S. Bankruptcy Judge

AUG 23 2012



**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|   |   |  |
|---|---|--|
| In re: FAIR FINANCE COMPANY,<br><br>Debtor. | ) | Bankruptcy Case No. 10-50494<br>Chapter 7<br>JUDGE MARILYN SHEA-STONUM |
| BRIAN A. BASH, CHAPTER 7 TRUSTEE,           | ) | Adv. Pro. No. 12-05149   |
| Plaintiff,                                  | ) | Case No.: 5:12-cv-994-PAG  |
| vs.   | ) | JUDGE PATRICIA A. GAUGHAN  |
| RONALD KAFFEN, <i>et al.</i> ,              | ) | CASE MANAGEMENT ORDER  |
| Defendant(s).                               | ) |  |

Pursuant to a status call held in this matter on August 13, 2012, the following deadline and case management procedures are hereby established.

**A. Case Deadlines.**

1. By not later than **October 31, 2012**, all written discovery shall be completed.
2. By not later than **August 16, 2012**, counsel for the plaintiff shall circulate a matrix of fact witnesses common to the Related Cases (as defined below) (the "Witness Matrix"). By

not later than **August 29, 2012**, defendant(s) shall supplement the Witness Matrix with any fact witnesses they intend to depose.

3. Nothing on the Witness Matrix shall prejudice the plaintiff or any other party to depose or call as a witness any person not listed thereon.
4. By not later than **November 30, 2012**, the deposition of defendant, Ronald Kaffen shall have taken place.
5. Depositions of other party and nonparty fact witnesses shall commence following the close of written discovery and all parties shall use their best efforts to complete as many depositions as possible by **March 14, 2013**. All parties to this adversary proceeding shall continue to attempt to reduce the number of affirmative witnesses identified in their initial disclosures. Additional time for depositions may be requested and will be granted only upon a showing of good cause.
6. By not later than **March 29, 2013**, counsel shall *jointly* file with the Court a list of all matters which are not in dispute in this case and which can be the subject of stipulations including any documentary evidence upon which the parties intend to rely in the prosecution or defense of their respective cases.
7. By not later than **March 29, 2013**, each party shall *separately* file with the Court a statement of relevant matters which remain in dispute.
8. The Court will hold a further pretrial in this matter after the March 29, 2013 filing deadlines set forth above. At that time, the Court will address further deadlines with respect to (1) expert report(s) and necessary expert discovery, (2) scheduling of motions for summary judgment *if* there is a prospect that such motions would be productive, (3) trial dates, and (4) any other matters.

**B. Coordination of Written Discovery and Document Productions.**

1. Plaintiff has identified three (3) issues in this case that the plaintiff believes are common to seven (7) matters (including this matter) pending before this Court with the following captions and case numbers: *Bash v. Textron Financial Corp., et al.* (5:12-cv-987), *Bash v. Somerset CPAs, P.C.* (5:12-cv-992), *Bash v. Ronald O. Kaffen, et al.* (5:12-cv-994), *Bash v. Donald Fair, et al.* (5:12-cv-996), *Bash v. Ricky Snow* (5:12-cv-980), *Bash v. John Head* (5:12-cv-981), and *Bash v. Dana Osler, et al.* (5:12-cv-997) (the “Related Matters”). Those issue are (1) whether Fair Finance became insolvent and, if so, when; (2) whether Fair Finance was operated as a “Ponzi Scheme;” and (3) whether the plaintiff is entitled to a ten (10) year look back period with respect to fraudulent transfer claims (collectively, the “Common Issues”). Accordingly, in the interests of efficiency, the parties shall serve their written discovery requests and written responses on *all* parties in the Related Matters, in addition to service on the parties in this case.
2. The Court has authorized the plaintiff to operate an electronic data room for purposes of the adversary proceedings related to the Fair Finance Company bankruptcy case [Case No. 10-50494, Dkt. 997]. The plaintiff shall endeavor to have the data room operational and open to the defendant(s) on or before July 31, 2012. The motion filed by the plaintiff for authority to set up the data room identifies those documents that will be included in the data room, and the plaintiff shall operate and provide access to the data room in accordance with the terms of the plaintiff’s data room motion [Case No. 10-50494, Dkt. 989]. The plaintiff is relieved of any obligation to review documents in the data room for relevance in response to any document requests, and any party seeking documents outside of the data room should specifically so state in any written discovery requests. If

a party wishes to inspect documents that are not included in the data room, plaintiff and that party can address the request on a case-by-case basis through an appropriate written request under Civil Rules 26 and 34, subject to an appropriate agreement on the costs of such production.

3. If a defendant wishes to seek discovery of relevant documents from any other defendant in this or any of the Related Matters, the defendant shall seek such discovery directly from that defendant through a Rule 34 request or Civil Rule 45 subpoena directed to the producing party. No defendant shall serve such a request or subpoena on the plaintiff for documents produced to the plaintiff by other parties.
4. If any documents not included in the data room are produced by the plaintiff pursuant to a document request, the plaintiff shall provide each of the other parties in the Related Matters with copies of any written response to such document request and shall make copies of the relevant documents available for copying and inspection.


### **C. Coordination of Certain Fact Depositions.**

1. Depositions of fact witnesses that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues
2. By not later than **September 17, 2012**, the parties shall exchange lists of any fact witnesses they believe may provide testimony relevant to the resolution of the Common Issues.
3. For any fact witness that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues, the parties shall be entitled to use such deposition testimony as evidence in any of the Related Matters provided that notice of the deposition is given to *all* parties in the Related Matters. For such witnesses, the parties

shall serve all parties in the Related Matters with a copy of any deposition notice or subpoena issued in the corresponding case at least fourteen (14) days prior to the deposition date. The date, time and location of the deposition shall be set by agreement between the plaintiff, the other defendants in that case, and the deponent. Any party wishing to attend such deposition or wishing to ask questions related to the Common Issues at the deposition shall provide all of the other parties in the Related Matters with notice of the party's intent to do so at least three (3) business days prior to the deposition. The failure to provide such notice does not preclude a party from appearing at the deposition and/or asking questions related to the Common Issues at the deposition. However, the parties should endeavor to provide such notice to facilitate the planning of conference room facilities. While counsel may attend the deposition by telephone, counsel should be present if counsel intends to ask questions related to the Common Issues at the deposition, unless arrangements are made prior to the deposition with the consent of the party noticing the deposition. Any counsel attending the deposition by telephone may seek the consent of the other counsel in attendance at the deposition to examine the deponent, and counsel shall be reasonable and cooperative in addressing such a request. All parties shall cooperate in good faith as to all other issues relating to the taking of depositions.

**D. Other Matters.**

1. Email service to counsel of record for a party shall be deemed sufficient service for purposes of this Case Management Order.

  
MARILYN SHEA-STONUM  
U.S. Bankruptcy Judge

AUG 23 2012

**IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|   |   |  |
|---|---|--|
| In re: FAIR FINANCE COMPANY,<br><br>Debtor.         | ) | Bankruptcy Case No. 10-50494<br>Chapter 7<br>JUDGE MARILYN SHEA-STONUM |
| <hr style="width: 40%; margin-left: 0;"/>           |   |  |
| BRIAN A. BASH, CHAPTER 7 TRUSTEE,<br><br>Plaintiff, | ) | <b>Adv. Pro. No. 12-05152</b>  |
| vs.   | ) | <b>Case No.: 5:12-cv-996-PAG</b>                                       |
| DONALD FAIR, et al,                                 | ) | <b>JUDGE PATRICIA A. GAUGHAN</b>                                       |
| Defendants.   | ) | CASE MANAGEMENT ORDER  |

Pursuant to a status call held in this matter on August 13, 2012, the following deadline and case management procedures are hereby established.

**A. Case Deadlines.**

1. By not later than **October 31, 2012**, all written discovery shall be completed.
2. By not later than **August 16, 2012**, counsel for the plaintiff shall circulate a matrix of fact witnesses common to the Related Cases (as defined below) (the "Witness Matrix"). By

- not later than **August 29, 2012**, defendant(s) shall supplement the Witness Matrix with any fact witnesses they intend to depose.
3. Nothing on the Witness Matrix shall prejudice the plaintiff or any other party to depose or call as a witness any person not listed thereon.
  4. By not later than **November 30, 2012**, counsel shall have concluded all depositions of fact witnesses specific to this case.
  5. Depositions of other party and nonparty fact witnesses shall commence following the close of written discovery and all parties shall use their best efforts to complete as many depositions as possible by **March 14, 2013**. All parties to this adversary proceeding shall continue to attempt to reduce the number of affirmative witnesses identified in their initial disclosures. Additional time for depositions may be requested and will be granted only upon a showing of good cause.
  6. By not later than **March 28, 2013**, counsel shall *jointly* file with the Court a list of all matters which are not in dispute in this case and which can be the subject of stipulations including any documentary evidence upon which the parties intend to rely in the prosecution or defense of their respective cases.
  7. By not later than **April 4, 2013**, each party shall *separately* file with the Court a statement of relevant matters which remain in dispute.
  8. The Court will hold a further pretrial in this matter after the April 4, 2013 filing deadline set forth above. At that time, the Court will address further deadlines with respect to (1) expert report(s) and necessary expert discovery, (2) scheduling of motions for summary judgment *if* there is a prospect that such motions would be productive, (3) trial dates, and (4) any other matters.



### **B. Coordination of Written Discovery and Document Productions.**

1. Plaintiff has identified three (3) issues in this case that the plaintiff believes are common to seven (7) matters (including this matter) pending before this Court with the following captions and case numbers: *Bash v. Textron Financial Corp., et al.* (5:12-cv-987), *Bash v. Somerset CPAs, P.C.* (5:12-cv-992), *Bash v. Ronald O. Kaffen, et al.* (5:12-cv-994), *Bash v. Donald Fair, et al.* (5:12-cv-996), *Bash v. Ricky Snow* (5:12-cv-980), *Bash v. John Head* (5:12-cv-981), and *Bash v. Dana Osler, et al.* (5:12-cv-997) (the “Related Matters”). Those issue are (1) whether Fair Finance became insolvent and, if so, when; (2) whether Fair Finance was operated as a “Ponzi Scheme;” and (3) whether the plaintiff is entitled to a ten (10) year look back period with respect to fraudulent transfer claims (collectively, the “Common Issues”). Accordingly, in the interests of efficiency, the parties shall serve their written discovery requests and written responses on *all* parties in the Related Matters, in addition to service on the parties in this case.
2. The Court has authorized the plaintiff to operate an electronic data room for purposes of the adversary proceedings related to the Fair Finance Company bankruptcy case [Case No. 10-50494, Dkt. 997]. The plaintiff shall endeavor to have the data room operational and open to the defendant(s) on or before July 31, 2012. The motion filed by the plaintiff for authority to set up the data room identifies those documents that will be included in the data room, and the plaintiff shall operate and provide access to the data room in accordance with the terms of the plaintiff’s data room motion [Case No. 10-50494, Dkt. 989]. The plaintiff is relieved of any obligation to review documents in the data room for relevance in response to any document requests, and any party seeking documents outside of the data room should specifically so state in any written discovery requests. If a party wishes to inspect documents that are not included in the data room, plaintiff and

that party can address the request on a case-by-case basis through an appropriate written request under Civil Rules 26 and 34, subject to an appropriate agreement on the costs of such production.

3. If a defendant wishes to seek discovery of relevant documents from any other defendant in this or any of the Related Matters, the defendant shall seek such discovery directly from that defendant through a Rule 34 request or Civil Rule 45 subpoena directed to the producing party. No defendant shall serve such a request or subpoena on the plaintiff for documents produced to the plaintiff by other parties.
4. If any documents not included in the data room are produced by the plaintiff pursuant to a document request, the plaintiff shall provide each of the other parties in the Related Matters with copies of any written response to such document request and shall make copies of the relevant documents available for copying and inspection.


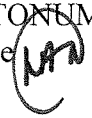
### **C. Coordination of Certain Fact Depositions.**

1. Depositions of fact witnesses that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues
2. By not later than **September 17, 2012**, the parties shall exchange lists of any fact witnesses they believe may provide testimony relevant to the resolution of the Common Issues.
3. For any fact witness that the parties believe may provide testimony that may be relevant to the resolution of the Common Issues, the parties shall be entitled to use such deposition testimony as evidence in any of the Related Matters provided that notice of the deposition is given to *all* parties in the Related Matters. For such witnesses, the parties shall serve all parties in the Related Matters with a copy of any deposition notice or

subpoena issued in the corresponding case at least fourteen (14) days prior to the deposition date. The date, time and location of the deposition shall be set by agreement between the plaintiff, the other defendants in that case, and the deponent. Any party wishing to attend such deposition or wishing to ask questions related to the Common Issues at the deposition shall provide all of the other parties in the Related Matters with notice of the party's intent to do so at least three (3) business days prior to the deposition. The failure to provide such notice does not preclude a party from appearing at the deposition and/or asking questions related to the Common Issues at the deposition. However, the parties should endeavor to provide such notice to facilitate the planning of conference room facilities. While counsel may attend the deposition by telephone, counsel should be present if counsel intends to ask questions related to the Common Issues at the deposition, unless arrangements are made prior to the deposition with the consent of the party noticing the deposition. Any counsel attending the deposition by telephone may seek the consent of the other counsel in attendance at the deposition to examine the deponent, and counsel shall be reasonable and cooperative in addressing such a request. All parties shall cooperate in good faith as to all other issues relating to the taking of depositions.

**D. Other Matters.**

1. Email service to counsel of record for a party shall be deemed sufficient service for purposes of this case management order.

  
MARILYN SHEA-STONUM  
U.S. Bankruptcy Judge  AUG 23 2012



proceeding identified by the Plaintiff to the Court as the Group B cases (the “Group B Actions”). The parties to the active and pending Group B cases are referred to herein as the “Group B Party” (individually) or “Group B Parties” (collectively).

2. Depositions of fact witnesses in the above-captioned action shall be taken after January 1, 2013.
3. The Party noticing any deposition in the above-captioned action shall serve all other Group A Parties and Group B Parties with a copy of any deposition notice or subpoena for a deposition at least fourteen (14) days prior to the deposition date. Witnesses previously deposed in a separate adversary proceeding brought by the Trustee (including any of the other Group A or Group B Actions) may be deposed again in this action after the close of initial written discovery, as the Court previously ruled that defendants in the above-captioned action could attend but were not permitted to ask questions or object at such depositions.
4. The date, time and location of the deposition shall be set by agreement between the Trustee, Fortress and the deponent (including non-party witnesses). Any other Group A Party or Group B Party wishing to attend such deposition or wishing to ask questions at the deposition shall provide all of the other Group A Parties and Group B Parties with notice of the party’s intent to do so at least three (3) business days prior to the deposition. The failure to provide such notice does not preclude a party from appearing at the deposition and/or asking questions at the deposition. However, the parties should endeavor to provide such notice to facilitate the planning of conference room facilities. While counsel may attend the deposition by telephone, counsel should be present if counsel intends to ask questions at the deposition, unless arrangements are made prior to

the deposition with the consent of the party noticing the deposition. Any counsel attending the deposition by telephone may seek the consent of the other counsel in attendance at the deposition to examine the deponent, and counsel shall be reasonable and cooperative in addressing such a request. The parties shall cooperate in good faith as to all other issues relating to the taking of depositions.

5. On the fourteenth (14th) calendar day following the close of the initial deposition discovery period established by the Court in the above-captioned action, currently set at March 14, 2013, each Party shall serve the other Party with a list identifying each person that the serving Party expects to call as a fact witness at trial or on whose testimony the Party expects to rely for purposes of summary judgment. If any person listed by either of the Parties was not deposed during the initial deposition discovery period, any Party shall have the right to take that person's deposition and shall endeavor to complete the deposition within forty-five (45) days of the date on which the lists of witnesses are exchanged by the parties. The Party identifying the witness as a trial or summary judgment witness shall endeavor to have the witness be made available to the other Party for deposition without the need to issue a subpoena. By the conclusion of the 45-day period for depositions of additional fact witnesses, the Parties shall present to the Court a proposed agreed-upon schedule for expert discovery.
6. Nothing in this Stipulation shall be used by any Party to support any argument in favor of consolidation in any respect of any actions and this Stipulation relates to solely to the matters expressly set forth herein.

IT IS SO ORDERED.



Marilyn Sea-Stonum  
U.S. Bankruptcy Judge

WE HEREBY STIPULATE:

Joseph F. Hutchinson, Jr.

Joseph F. Hutchinson, Jr. (0018210)  
Thomas R. Lucchesi (0025790)  
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April 13, 2012)  
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*Counsel for Defendants Fortress Credit Corp.*

# **EXHIBIT B**



**IT IS SO ORDERED.**

**Dated: 11:58 AM August 31 2012**



**IN THE UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                       |   |                              |
|-----------------------|---|------------------------------|
| In re:                | ) | Bankruptcy Case No. 10-50494 |
|                       | ) |                              |
| FAIR FINANCE COMPANY, | ) | Chapter 7                    |
|                       | ) |                              |
| Debtor.               | ) | JUDGE MARILYN SHEA-STONUM    |
|                       | ) |                              |
|                       | ) |                              |
|                       | ) |                              |

**ORDER RE: MOTION FOR AN OMNIBUS TELEPHONIC STATUS CONFERENCE IN  
THE "GROUP B" ADVERSARY PROCEEDINGS**

On August 21, 2012, the Court held a hearing on the Trustee's Motion for an Omnibus Telephonic Conference in the Group B Adversary Proceedings... (the "Motion") and the Objection of RM Classic Car Production, Inc. to the Motion. Counsel for the Trustee and counsel for many of the Defendants in what the Trustee has labeled the Group B Adversary Proceedings appeared. Based on matters discussed during the hearing, the Court granted the Motion, in part, and the following shall apply in each Group B Adversary Proceeding.



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### **Omnibus Pre-Trial Conference**

An omnibus pre-trial conference shall be held on **September 25, 2012 at 10:30 a.m.** in Courtroom 260, 2 S. Main Street, Akron, Ohio. Telephonic appearances will be permitted. Trustee's counsel shall arrange a dial in number for telephonic participants. By not later than noon on September 24, 2012, the Trustee's counsel shall file notice of the dial in number in the main case captioned above and shall serve a copy of said notice on all interested parties, including all of the Defendants and Defendants' counsel in the Group B adversary proceedings.

By not later than **September 14, 2012**, Trustee's counsel shall file with the Court a matrix of pending Group B Adversary Proceedings. Trustee's counsel shall indicate on the matrix with respect to each adversary proceeding whether the Trustee believes the solvency or insolvency of any person is relevant to that particular adversary proceeding. In addition, Trustee's counsel shall indicate the status of each adversary proceeding on the matrix. Specifically, the Trustee's counsel shall indicate whether (1) settlement discussions are on-going, (2) settlement discussions are anticipated, but have not commenced, (3) settlement discussions have concluded, or (4) one or more of the parties to the adversary proceeding does not want to engage in settlement discussions. In those cases where settlement discussions are on-going or are anticipated, counsel shall also indicate in what ways the Court can facilitate settlement discussions.

The Court will conduct individual pre-trial conferences in each of the Group B cases listed on the Exhibit attached to this Order. Those individual pre-trial conference dates will be set by separate order of the Court. At those conferences, participation of the client or, in the case of persons that are not individuals, the individual client representative with decision making

authority will be required. Such individuals may, but are not required, to audit the Omnibus pre-trial conference.

In certain of the Group B adversary proceedings, the Court previously scheduled further pre-trial conferences. Those pre-trial conferences will be held telephonically as previously scheduled.

### **Expert Discovery**

By not later than **September 21, 2012**, plaintiff/Trustee shall provide the defendants with the plaintiff/Trustee's expert's disclosure(s) and report(s) on the insolvency issues in the active and pending Group B cases.

###

# PENDING GROUP B ACTIONS

| Case Name  | Bankruptcy Case No. | District Case No. (if applicable) |
|--|---------------------|-----------------------------------|
| Bash v. Etelco Services, Inc. et al.   | 11-5233             | 12-00984                          |
| Bash v. Car Collector Magazine, LLC; Jeffrey Broadus; RM Classic Car Production, Inc.  | 12-5017             | 12-01155                          |
| Bash v. Alternate Billing Corporation  | 12-5020             | 12-00999                          |
| Bash v. Cindy Landeen  | 12-5026             | 12-01152                          |
| Bash v. Erika Lookadoo Jiles   | 12-5029             | 12-01671                          |
| Bash v. Mitza Durham   | 12-5032             | 12-01672                          |
| Bash v. Table Moose Media, LLC   | 12-5035             | N/A                               |
| Bash v. Neil Lucas   | 12-5046             | 12-00998                          |
| Bash v. Balint and Associates; Raymond W. Balint (Preference Claim)  | 12-5049             | N/A                               |
| Bash v. Stephen Blaising   | 12-5057             | 12-00977                          |
| Bash v. Mercho, Wells & Masterson, Inc. and Hassan Mercho  | 12-5059             | N/A                               |
| Bash v. Henri Najem; Najem Durham Enterprises, LLC; Najem Management, Inc.; Najem Enterprises, Inc.; Najem Durham Investments, LLC | 12-5061             | 12-02222                          |
| Bash v. Bennett Productions, Inc.  | 12-5069             | 12-00982                          |
| Bash v. Joseph Hennigin  | 12-5078             | 12-00979                          |
| Bash v. Bernard Durham aka B.J. Durham   | 12-5104             | 12-01153                          |
| Bash v. Courtney Durham  | 12-5105             | 12-01673                          |
| Bash v. Joan SerVaas   | 12-5106             | 12-01154                          |
| Bash v. Bruce Long   | 12-5110             | 12-00986                          |
| Bash v. Daling Designs, Inc.   | 12-5111             | N/A                               |
| Bash v. Phillip Press, Inc.  | 12-5113             | N/A                               |
| Bash v. Melissa McDowell   | 12-5142             | N/A                               |
| Bash v. Michael Reardon  | 12-5143             | N/A                               |
| Bash v. Shannon Connor Design, Inc.  | 12-5144             | 12-01156                          |
| Bash v. Plopper and Partners, LLC  | 12-5156             | N/A                               |
| Bash v. Edward Morris  | 12-5163             | N/A                               |

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
AKRON DIVISION**

|                              |   |                                  |
|------------------------------|---|----------------------------------|
| <b>In re:</b>                | ) | <b>Chapter 7</b>                 |
|                              | ) |                                  |
| <b>FAIR FINANCE COMPANY,</b> | ) | <b>Case No. 10-50494 (mss)</b>   |
|                              | ) |                                  |
| <b>Debtor.</b>               | ) | <b>Judge Marilyn Shea-Stonum</b> |
|                              | ) |                                  |

**TRUSTEE'S MATRIX OF PENDING "GROUP B" ADVERSARY PROCEEDINGS AND  
NOTICE OF CONFERENCE CALL INFORMATION FOR OMNIBUS PRETRIAL  
CONFERENCE ON SEPTEMBER 25, 2012 AT 10:30 A.M.**

Brian A. Bash, the Chapter 7 Trustee for Fair Finance Company (the "**Trustee**" for the "**Debtor**"), respectfully files the below matrix of the pending Group B adversary proceedings in accordance with this Court's Order dated August 31, 2012 (Dkt. 1075) (the "**Order**"). As required by the Order, the matrix sorts the pending Group B adversary proceedings into one of four categories depending on the status of settlement negotiations between the Trustee and the defendant(s) in each adversary proceeding.

In addition, the Trustee hereby provides the following dial-in information to the defendants in the matrix for the omnibus status conference of **September 25, 2012, at 10:30 a.m.** in the Bankruptcy Courtroom 260, 2nd Floor, 2 South Main Street, Akron, Ohio:

**Conference Call Dial In: 888-853-9376**

**Passcode: 216-861-7834**

Finally, in accordance with the Order, a copy of this filing is being served on counsel for all of the defendants in the pending "Group B" adversary proceedings listed in the below matrix.



**CATEGORY 1: GROUP B CASES WITH ONGOING SETTLEMENT DISCUSSIONS**

| # | Case Name   | Bankruptcy Case No.<br>(District Case No.) | Solvency<br>Relevant? If yes,<br>which entity or<br>entities. |
|---|---|--|---|
| 1 | Bash v. Car Collector Magazine, LLC, et al.               | 12-5017 (12-01155)                         | No.   |
| 2 | Bash v. Table Moose Media, LLC                            | 12-5035                                    | Yes – DC Investments, LLC; Diamond Investments, LLC           |
| 3 | Bash v. Mercho, Wells & Masterson, Inc. and Hassan Mercho | 12-5059                                    | Yes – DC Investments, LLC; Timothy Durham                     |
| 4 | Bash v. Bennett Productions, Inc.                         | 12-5069 (12-00982)                         | Yes – DC Investments, LLC                                     |
| 5 | Bash v. Dalinger Designs, Inc.                            | 12-5111                                    | Yes – DC Investments, LLC; Timothy Durham                     |
| 6 | Bash v. Phillip Press, Inc.                               | 12-5113                                    | Yes – DC Investments, LLC                                     |
| 7 | Bash v. Melissa McDowell                                  | 12-5142                                    | Yes – Timothy Durham  |
| 8 | Bash v. Shannon Connor Design, Inc.                       | 12-5144 (12-01156)                         | Yes – DC Investments, LLC; Timothy Durham                     |
| 9 | Bash v. Edward Morris                                     | 12-5163                                    | Yes – DC Investments, LLC                                     |

**CATEGORY 2: GROUP B CASES IN WHICH SETTLEMENT DISCUSSIONS ARE ANTICIPATED BUT HAVE NOT COMMENCED**

| # | Case Name  | Bankruptcy Case No.<br>(District Case No.) | Solvency Relevant? If yes, which entity or entities.                |
|---|--|--|---|
| 1 | Bash v. Etelco Services, Inc., et al.                                    | 11-5233 (12-00984)                         | No.   |
| 2 | Bash v. Alternate Billing Corp.  | 12-5020 (12-00999)                         | Yes – DC Investments, LLC; Diamond Investments, LLC; Timothy Durham |
| 3 | Bash v. Cindy Landeen  | 12-5026 (12-01152)                         | Yes – Diamond Investments, LLC                                      |
| 4 | Bash v. Erika Lookadoo Jiles   | 12-5029 (12-01671)                         | Yes – Timothy Durham  |
| 5 | Bash v. Neil Lucas   | 12-5046 (12-00998)                         | Yes – DC Investments, LLC; Diamond Investments, LLC; Timothy Durham |
| 6 | Bash v. Stephen Blaising   | 12-5057 (12-00977)                         | Yes – Timothy Durham  |
| 7 | Bash v. Henri Najem; Najem Management, Inc.; and Najem Enterprises, Inc. | 12-5061 (12-02222)                         | Yes – DC Investments, LLC; Timothy Durham                           |
| 8 | Bash v. Joseph Hennigin  | 12-5078 (12-00979)                         | Yes – DC Investments, LLC   |
| 9 | Bash v. Bernard Durham aka B.J. Durham                                   | 12-5104 (12-01153)                         | Yes – DC Investments, LLC; Diamond Investments, LLC; Timothy Durham |

|    |  |                    |   |
|----|--|--------------------|---|
| 10 | Bash v. Joan SerVaas                             | 12-5106 (12-01154) | Yes – DC Investments, LLC; Timothy Durham |
| 11 | Bash v. Bruce Long                               | 12-5110 (12-00986) | Yes – DC Investments, LLC                 |
| 12 | Bash v. Plopper and Partners, LLC                | 12-5156            | No.                                       |
| 13 | Bash v. 77 <sup>th</sup> Street Partners, et al. | 12-5212            | Yes – Timothy Durham                      |

**CATEGORY 3: GROUP B CASES IN WHICH SETTLEMENT DISCUSSIONS HAVE BEEN CONCLUDED**

| # | Case Name   | Bankruptcy Case No.<br>(District Case No.) | Solvency Relevant? If yes, which entity or entities. |
|---|---|--|--|
| 1 | Bash v. Michael Reardon ( <i>settled subject to documentation and approval</i> )  | 12-5143                                    | Yes – DC Investments, LLC                            |
| 2 | Bash v. Balint and Associates, et al.<br>( <b>Preference Claim:</b> <i>discussions concluded <u>without</u> settlement – summary judgment motions pending</i> ) | 12-5049                                    | No.  |

**CATEGORY 4: GROUP B CASES IN WHICH ONE OR MORE OF THE PARTIES DOES NOT WANT TO ENGAGE IN SETTLEMENT DISCUSSIONS**

| # | Case Name               | Bankruptcy Case No.<br>(District Case No.) | Solvency Relevant? If yes, which entity or entities. |
|---|-------------------------|--|--|
| 1 | Bash v. Mitza Durham    | 12-5032 (12-01672)                         | Yes – DC Investments, LLC; Timothy Durham            |
| 2 | Bash v. Courtney Durham | 12-5105 (12-01673)                         | Yes – DC Investments, LLC; Timothy Durham            |



The Court's Order also requested input from the Trustee's counsel on the ways the Court could facilitate settlement discussions in the Group B cases in Category 1 (discussions ongoing) and Category 2 (discussions anticipated). After consideration, the Trustee's counsel believes that the Court can encourage settlement discussions between the parties and possible resolution of the Trustee's claims by (a) proceeding with setting individual pre-trial conferences in each of the pending Group B cases and requiring the in-person attendance of the client or client-representative (in the case of corporate clients) with decision making authority without exceptions, and (b) setting trial dates starting with the two cases in Category 4 of the matrix (the Mitza Durham and Courtney Durham matters), and continuing with later trial dates for the cases in Categories 1 and 2 of the matrix. The preference claim in Category 3 of the matrix (the Balint matter) may be resolved by the pending dispositive motion; though a trial should be scheduled in that case as well to the extent any claims are not resolved by motion.

Date: September 14, 2012

Respectfully submitted,

/s/ David F. Proaño

---

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*Counsel for the Trustee*

# EXHIBIT C

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                                |   |   |
|--------------------------------|---|---|
| <b>Brian A. Bash, Trustee,</b> | ) | <b>CASE NO. 5: 12 CV 998</b>                      |
|                                | ) |   |
| <b>Plaintiff,</b>              | ) | <b>JUDGE PATRICIA A. GAUGHAN</b>                  |
|                                | ) |   |
| <b>vs.</b>                     | ) |   |
|                                | ) | <b><u>Judgment Entry Perpetually Staying</u></b>  |
| <b>Neil Lucas,</b>             | ) | <b><u>Further Proceedings and Closing the</u></b> |
|                                | ) | <b><u>Within Case</u></b>                         |
| <b>Defendant.</b>              | ) |   |

The Court has been informed by lead counsel of record that a voluntary petition for relief in a case under Title 11 of the United States Code (the “Bankruptcy Code”) was filed on October 4, 2013 by defendant Neil Lucas, Case No 13-10583-FO-7 in the United States Bankruptcy Court for the Southern District of Indiana. Pursuant to 11 U.S.C. § 362, the filing of a such a case under the Bankruptcy Code mandates a stay of the within proceedings.

Further proceedings in the within case are hereby perpetually stayed and the within case is hereby **CLOSED**, subject to reopening upon written motion of plaintiff or any other proper party in interest, after the bankruptcy case is closed or dismissed, a discharge in bankruptcy is granted or

denied, there is a granting of relief from the stay imposed by Section 362, or there is an injunction imposed by virtue of 11 U.S.C. § 524.

IT IS SO ORDERED.

/s/ Patricia A. Gaughan  
PATRICIA A. GAUGHAN  
United States District Judge

Dated: 10/8/13

# **EXHIBIT D**

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                      |   |                           |
|----------------------|---|---------------------------|
| In re:               | ) | Case No. 10-50494         |
|                      | ) |                           |
| FAIR FINANCE COMPANY | ) | Chapter 7                 |
|                      | ) |                           |
| Debtor.              | ) | Judge Marilyn Shea-Stonum |
|                      | ) |                           |

**MOTION OF TRUSTEE TO APPROVE COMPROMISE  
WITH TERRY WHITESELL AND JULIA WHITESELL**

Brian A. Bash (the “**Trustee**”), the duly appointed Chapter 7 Trustee for Fair Finance Company (the “**Debtor**”) in the above-captioned case, hereby moves for entry of an order, in substantially the form attached hereto as **Exhibit A**, approving the compromise of claims against Terry Whitesell and Julia Whitesell, for the reasons more fully set forth in the attached memorandum of law. The proposed Settlement Agreement, executed by the parties, is attached to this Motion as **Exhibit B**.

Date: August 3, 2012

Respectfully submitted,

/s/ David Proaño

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*Counsel for the Trustee*



1050494120803000000000007

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

|                      |   |                           |
|----------------------|---|---------------------------|
| In re:               | ) | Case No. 10-50494         |
|                      | ) |                           |
| FAIR FINANCE COMPANY | ) | Chapter 7                 |
|                      | ) |                           |
| Debtor.              | ) | Judge Marilyn Shea-Stonum |
|                      | ) |                           |

**MEMORANDUM IN SUPPORT OF MOTION OF TRUSTEE TO APPROVE  
COMPROMISE WITH TERRY WHITESELL AND JULIA WHITESELL**

In support of the Motion of Trustee to Approve Compromise With Terry Whitesell and Julia Whitesell (the “**Motion**”),<sup>1</sup> the Trustee states as follows:

**INTRODUCTION AND SUMMARY:**

The Trustee has filed litigation against Terry Whitesell and Julia Whitesell (the “**Defendants**”), in the Bankruptcy Court seeking to recover certain transfers of money, enforce certain contractual obligations and obtain judgment against the defendants on common law claims, as described more particularly in the complaints filed in the adversary proceedings, including the following adversary proceedings: *Bash v. Terry Whitesell, et al.*, Adv. Pro. No. 12-5109 [against Terry Whitesell and Julia Whitesell]; *Bash v. Durham Whitesell & Associates, LLC, et al.*, Adv. Pro. No. 11-5240 [against Terry Whitesell, among other defendants]; *Bash v. Obsidian Capital Co., LLC, et al.*, Adv. Pro. No. 12-5090 [against Terry Whitesell, among other defendants]; and *Bash v. DW Trailer, et al.*, Adv. Pro. No. 12-5147 [against Terry Whitesell, among other defendants] (collectively, the “**Litigation**”).

The bankruptcy reference was withdrawn in the matter of *Bash v. Terry Whitesell, et al.*, and the case is currently pending in the United States District Court for the Northern District of Ohio as Case No. 5:12-cv-993.

---

<sup>1</sup> Terms capitalized but not defined herein shall have the meanings ascribed to them in the Motion.

Following the filing of the litigation, and as part of settlement discussions, the Defendants submitted a notarized personal financial statement and financial records to the Trustee, and Mr. Whitesell was subjected to a Debtor's examination under oath, which demonstrated a limited ability to pay the entire amount of the claim at issue in the litigation. The personal financial statement and Debtor's examination transcript are attached as **Exhibits C and D**, respectively, and they also have been posted on the Trustee's Fair Finance Company bankruptcy website at: <http://www.kccllc.net/FairFinance>.

The personal financial statement demonstrates a significant risk that, in the absence of a settlement, the Whitesells will declare bankruptcy, in which case the Trustee may be entitled to a small share of recovery years in the future, if any. Due to the Defendants' limited financial ability, the Trustee has agreed to accept a payment of **\$30,000.00** from the Defendants in order to settle the Trustee's claims, subject to this Court's approval of the agreement. The Trustee considered the following factors in determining to compromise the claims at issue in exchange for this payment by the Defendants:

(1) The limited financial means of the Defendants as demonstrated by the notarized personal financial statement, the sworn deposition testimony of Mr. Whitesell, and the financial records submitted to the Trustee;

(2) The costs to the estate of litigating the claim to conclusion in view of potential difficulties in collecting on any judgment; and

(3) The benefit to the estate of obtaining a cash settlement at this stage of the litigation without further delay and expense.

Accordingly, as addressed in detail below, and for these reasons, the Trustee submits that this proposed compromise is fair and reasonable, and in the best interests of the estate.



**PROPOSED FINDINGS OF FACT:**

A. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 157 and 1334 and Rule 9019 of the Federal Rules of Bankruptcy Procedure. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

B. On February 8, 2010 (the “Petition Date”), creditor-investors (the “**Petitioning Creditors**”) filed a petition for involuntary bankruptcy against the Debtor.

C. Attorney Bash is the duly appointed, qualified and acting trustee (the “**Trustee**”) in the within proceedings.

D. Terry Whitesell and Julia Whitesell (the “**Defendants**”) are residents of the State of Indiana.

E. The Trustee has filed litigation against Terry Whitesell and Julia Whitesell (the “**Defendants**”), in the Bankruptcy Court seeking to recover certain transfers of money, enforce certain contractual obligations and obtain judgment against the defendants on common law claims, as described more particularly in the complaints filed in the adversary proceedings, including the following adversary proceedings: *Bash v. Terry Whitesell, et al.*, Adv. Pro. No. 12-5109 [against Terry Whitesell and Julia Whitesell]; *Bash v. Durham Whitesell & Associates, LLC, et al.*, Adv. Pro. No. 11-5240 [against Terry Whitesell, among other defendants]; *Bash v. Obsidian Capital Co., LLC, et al.*, Adv. Pro. No. 12-5090 [against Terry Whitesell, among other defendants]; and *Bash v. DW Trailer, et al.*, Adv. Pro. No. 12-5147 [against Terry Whitesell, among other defendants] (collectively, the “**Litigation**”).

F. To facilitate settlement of the claims asserted by the Trustee in the Litigation, the Defendants provided the Trustee with certain evidence of their financial condition, including a notarized personal financial statement and certain financial records, and a debtor’s examination of Mr. Whitesell, and in view of such evidence the Trustee is willing to accept a reduced amount

to settle the claims at issue in the Litigation. The notarized personal financial statement and deposition transcript are available on the Trustee's Fair Finance Company bankruptcy website:

<http://www.kccellc.net/FairFinance>. The pertinent facts are as follows:

- a. Mr. Whitesell is 72 years old, and Mrs. Whitesell is 69 years old. *See Personal Financial Statement*, page 1.
- b. Mr. Whitesell is currently subject to an order of specific performance, which is on appeal, requiring him to pay, jointly and severally with Tim Durham and J. Roe Hitchcock, approximately \$1.6 million to indemnify a surety after a business co-owned by the three men was unable to pay certain debts. *See Personal Financial Statement* at 11, *Frontier Insurance Company v. J. Roe Hitchcock et. al.*, Case No. 08-cv-00531 (S.D. Ind). The judgment is being appealed by Mr. Whitesell, although the outcome remains uncertain.
- c. Mr. Whitesell has stated under oath that if he is required to comply with the specific performance order, he "wouldn't have any alternative" but to file bankruptcy. *See Whitesell Examination* at p. 52.
- d. Mr. Whitesell has also stated under oath that he is presently appealing a tax lien filed by the Internal Revenue Service for payroll taxes which Mr. Durham failed to pay while operating Durham Whitesell Associates, in the amount of \$60,000 plus penalties; and that he has received a demand letter from PNC under which he may have up to \$70,000 in potential liability on a loan guarantee. *See Whitesell Examination* at pp. 35-36, 53-54.
- e. Mr. and Mrs. Whitesell have a house in Indianapolis and a condominium in Florida, both of which are likely underwater even without the IRS tax lien. The remaining balance on the Whitesell's Indianapolis home exceeds \$800,000, while Zillow estimates it is worth only \$650,000. The remaining balance on the Whitesell's

Naples, Florida home is approximately \$670,000, while Zillow estimates it is worth approximately \$660,000. See *Personal Financial Statement* at page 8, [www.zillow.com](http://www.zillow.com).<sup>2</sup>

- f. Mr. and Mrs. Whitesell's largest assets are their IRAs and an account in the name of the Julia Whitesell Trust, which total approximately \$80,000. *Personal Financial Statement* at 12.
  - g. Mr. and Mrs. Whitesell have three cars and a boat, which they estimate to have a value of \$26,200, net of liens. *Personal Financial Statement* at p. 9.
  - h. Mr. Whitesell has an equity investment in a country club which he purchased for \$13,000. *Personal Financial Statement* at 8. Mr. Whitesell has represented that he has been unable to sell his interest for two years, that he is approximately 50<sup>th</sup> in line to sell his interest, and that he believes that the club sells four new memberships before selling one membership of a resigning member. *Whitesell Examination* at 33-34.
  - i. Mr. and Mrs. Whitesell valued their personalty at the purchase price to the best of their memory. This includes furniture purchased for approximately \$60,000, jewelry purchased for approximately \$17,000, and other items purchased for approximately \$40,000. It is unclear what value the Trustee or the Whitesells could realize from the sale of these items. *Personal Financial Statement* at p. 13.
  - j. Mr. Whitesell had equity interests which are now worthless in a number of failed companies, primarily Obsidian Enterprises, related companies, and other entities in which he invested with Timothy Durham. *Personal Financial Statement* at pp. 13-14.
- The losses on these companies were significant enough that his accountants advised

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<sup>2</sup> Mr. Whitesell guessed that the Indianapolis home was worth \$900,000 on his personal financial statement, based upon a 2006 appraisal showing the house was worth \$1.1 million. For clarity, the addresses are 9129 Admirals Bay Dr., Indianapolis, IN and 4005 Gulf Shore Boulevard North, Naples, Florida, Unit 401.

him not to have taxes withheld from his paycheck, as his federal income tax obligations will be eliminated by net operating loss carry-forwards. *Whitesell Examination* at pp. 16-17.

- k. Mr. Whitesell is employed as the CEO of United Expressline, the only remaining Obsidian subsidiary in operation, and is part of a group buying United's assets to keep it running as a going concern.
- l. Mr. and Mrs. Whitesell receive approximately \$17,600 in cash monthly from salary, pensions, and social security, in addition to health insurance benefits. *Personal Financial Statement* at 3. This number will be significantly reduced when Mr. Whitesell's net operating loss carryforwards expire and the Whitesells need to withhold for federal income tax. Mr. Whitesell does not know when that will occur. *Whitesell Examination* at p. 16.
- m. In addition to their personal maintenance and cost of health care, the Whitesells pay approximately \$11,000 in debt service, insurance, and homeowner's association fees monthly, and \$1,200 a month in legal fees.

G. In recognition of the fact that the Defendants are deeply insolvent in view of the \$1.6 million judgment against Mr. Whitesell (a judgment on appeal with an uncertain outcome), and in view of the likelihood that the Whitesells would file for bankruptcy if the Trustee were to continue in the pursuit of the litigation against them, the parties have agreed to provide for settlement and discharge of the claims the Trustee may assert against the Defendants arising from the Transfers on the terms set forth in the Settlement Agreement attached to this Motion as **Exhibit B**.

## **PROPOSED CONCLUSIONS OF LAW:**

### **I. The Applicable Standard Under Rule 9019.**

A. Rule 9019(a) of the Federal Rules of Bankruptcy Procedure provides that “[o]n motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement.”

B. Compromises are favored in bankruptcy cases. *In re Leeway Holding Co.*, 120 B.R. 881, 891 (Bankr. S.D. Ohio 1990); *Magill v. Springfield Marine Bank*, 67 B.R. 378, 383 (C.D. Ill. 1986). The decision to approve a settlement or compromise lies within the discretion of the Court and is warranted where the settlement is found to be reasonable and fair in light of the particular circumstances of the case. *Protective Comm. for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson (In re TMT Trailer Ferry, Inc.)*, 390 U.S. 414, 424-25 (1968); *International Distrib. Centers, Inc. v. Talcott, Inc.*, 103 B.R. 420, 422 (S.D.N.Y. 1989); *In re Texaco*, 84 B.R. 893, 901 (Bankr. S.D.N.Y. 1988); *In re Albert-Harris, Inc.*, 313 F.2d 447, 449 (6th Cir. 1963); *In re Parkview Hospital-Osteopathic Medical Center*, 211 B.R. 603 (Bankr. N.D. Ohio 1996); *In re Victoria Alloys, Inc.*, 261 B.R. 918, 920 (Bankr. N.D. Ohio 2001); *In re SIS Corp.*, 108 B.R. 608, 612 (Bankr. N.D. Ohio 1989).

C. In determining whether a settlement is reasonable, a court should consider the following factors:

- a. The probability of success in litigation;
- b. The difficulty in collecting any judgment which may be obtained;
- c. The complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attendant to it; and
- d. The interests of creditors and equity holders and a proper deference to their reasonable views of the settlement.

See *In re Martin*, 91 F.3d 389, 393 (3d Cir. 1996); *In re Drexel Burnham Lambert Group, Inc.*, 960 F.2d 285, 292 (2d Cir. 1992); *TMT Trailer*, 390 U.S. at 424-25; *In re A & C Properties*, 784 F.2d 1377, 1381 (9th Cir. 1986); *In re Swallen's, Inc.*, 210 B.R. 128 (Bankr. S.D. Ohio 1997); *In re McLean Indus., Inc.*, 84 B.R. 340, 344 (Bankr. S.D.N.Y. 1988); *In re Carla Leather, Inc.*, 44 B.R. 457, 466 (Bankr. S.D.N.Y. 1985).

D. Bankruptcy courts should approve a proposed settlement, after an independent review and evaluation of the applicable principles of bankruptcy law, unless it “fall[s] below the lowest point in the range of reasonableness.” *In re W.T. Grant Co.*, 699 F.2d 599, 608 (2d Cir. 1983), *cert. denied*, 464 U.S. 822 (1983) (citations omitted) (*quoting Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972)); *see also In re Tennol Energy Co.*, 127 B.R. 820 (Bankr. E.D. Tenn. 1991); *In the Matter of Energy Cooperative, Inc.*, 886 F.2d 921 (7th Cir. 1989); *In re Dow Corning Corp.*, 198 B.R. 214 (Bankr. E.D. Mich. 1996). Under *TMT Trailer*, courts should seek to balance the probable benefit and potential cost of pursuing a claim or defense against the costs of the proposed settlement. The Court is not required to conduct a “mini-trial” on the merits of the underlying causes of action being settled. *In re Blair*, 538 F.2d 849 (9th Cir. 1976); *see also In re Walsh Construction, Inc.*, 669 F.2d 1325 (9th Cir. 1982).

E. Accordingly, courts generally give considerable deference to a trustee’s recommendation of a proposed compromise and settlement. *See Rivercity v. Herpel (In re Jackson Brewing Co.)*, 624 F.2d 599, 604 (5th Cir. 1980) (affirming district court’s reliance on trustee’s evaluation of merits of claim); *In re Blair*, 538 F.2d at 851, n.1 (affirming district court’s reliance on trustee’s conclusory statements in recommending settlement). Indeed, the Court should give weight to a trustee’s informed judgment that a compromise is fair and equitable to the estate. *See International Distrib. Centers, Inc.*, 103 B.R. at 423; and *In re Carla Leather, Inc.*, 44 B.R. at 465.

## **II. The Proposed Compromises Satisfies the Rule 9019 Standard.**

A. The Trustee respectfully submits that the compromise to be achieved by the proposed Settlement Agreement satisfies the standards for approval and, therefore, should be approved under Rule 9019.

B. As part of settlement negotiations of the claims in the litigation against the Defendants, the Defendants submitted a notarized personal financial statement and certain financial records to support their claim that they do not have the financial ability to pay the entire amount of the transfers that the Trustee sought to avoid in this litigation. In addition, Mr. Whitesell testified under oath regarding the finances of the Defendants. The notarized personal financial statement and deposition transcript are available on the Trustee's Fair Finance Company bankruptcy website: <http://www.kccllc.net/FairFinance>.

C. Following a review of the financial records submitted by the Defendants, and the examination under oath of Mr. Whitesell, the Trustee determined that Defendants do not have the financial ability to pay the entire amount of the claim sought by the Trustee through the avoidance action. The Trustee's informed judgment is that the estate would have difficulty collecting the entire amount of any judgment that the Trustee may obtain against the Defendants.

D. Accordingly, in view of Defendants' limited financial ability, the Trustee has agreed to accept a payment of **\$30,000.00** from the Defendants in order to settle the Trustee's claims, subject to this Court's approval of the agreement. The Trustee considered the following factors in determining to compromise the claims at issue in exchange for this payment by the Defendants:

(1) The limited financial means of the Defendants as demonstrated by the notarized personal financial statement and financial records submitted to the Trustee, as well as the sworn testimony of Mr. Whitesell at the debtor's examination;

(2) The costs to the estate of litigating the claim to conclusion in view of potential difficulties in collecting on any judgment; and

(3) The benefit to the estate of obtaining a cash settlement at this stage of the litigation without further delay and expense.

E. In sum, the Trustee submits that the proposed compromise is reasonable and in the best interests of the estate and creditors, in view of the issues regarding the collectability of any judgment that the Trustee may obtain against Defendants. For this reason, the Trustee recommends the approval of compromise that includes a payment by the Defendants in the amount of **\$30,000.00** to the estate, as set forth in the Settlement Agreement attached hereto as **Exhibit B**. In exchange for such payment, the Trustee has agreed to provide a mutual release of the Defendants as set forth in Article 3 of the Settlement Agreement.

F. Having provided notice of the Motion to (a) the Office of the United States Trustee, (b) counsel to the Petitioning Creditors, (c) the Defendants, and (d) all parties who have requested notice, the Trustee requests and submits that, under the circumstances, no other or further notice need be given.

WHEREFORE, the Trustee respectfully requests that this Court enter an Order, in substantially the form attached hereto as **Exhibit A**, (i) granting the Motion; (ii) approving the compromise on the terms set forth in the Settlement Agreement; and (iii) authorizing and directing the parties to take all actions necessary or incidental to performance under the Settlement Agreement.



Date: August 3, 2012

Respectfully submitted,

/s/ David Proaño

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Kelly S. Burgan (0073649)

David Proaño (0078838)

Joseph M. Esmont (0084322)

BAKER & HOSTETLER LLP

PNC Center

1900 East 9<sup>th</sup> Street, Suite 3200

Cleveland, Ohio 44114-3482

Telephone: 216.621.0200

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jesmont@bakerlaw.com

*Counsel for the Trustee*

**EXHIBIT A**  
**PROPOSED ORDER**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

In re: ) Case No. 10-50494  
)  
FAIR FINANCE COMPANY ) Chapter 7  
)  
Debtor. ) Judge Marilyn Shea-Stonum  
)

**ORDER APPROVING COMPROMISE OF CLAIMS BY THE TRUSTEE  
AGAINST TERRY WHITESELL AND JULIA WHITESELL**

This matter having been presented to the Court upon the Motion of Trustee to Approve Compromise With Terry Whitesell and Julia Whitesell (the “**Motion**”),<sup>1</sup> and upon the Memorandum of Law In Support of the Motion; and the Court having considered the Motion, and it appearing that the compromise is in the best interest of the Debtor’s estate and creditors, and after due deliberation and consideration of the facts and circumstances therein:

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The Motion is **GRANTED** in its entirety.
2. The notice of the Motion was adequate and sufficient under the circumstances.
3. The compromise is hereby approved in accordance with the terms and conditions set

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<sup>1</sup> Terms capitalized but not defined herein shall have the meanings ascribed to them in the Motion and the Memorandum of Law in Support of the Motion.

forth in the Settlement Agreement attached to the Motion.

4. The parties are hereby authorized and directed, without further order of this Court, to take all actions necessary or incidental to performance under the Settlement Agreement and to implement and effectuate this Order.

5. The Court shall retain jurisdiction with respect to all matters arising from or related to the Settlement Agreement and the implementation of this Order.

IT IS SO ORDERED.

###

Submitted by,

/s/ David Proaño

Kelly S. Burgan (0073649)

David Proaño (0078838)

Joseph M. Esmont (0084322)

BAKER & HOSTETLER LLP

PNC Center

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*Counsel for the Trustee*

**EXHIBIT B**  
**SETTLEMENT AGREEMENT AND RELEASE**

## SETTLEMENT AGREEMENT AND RELEASE

This Settlement Agreement and Release (the "Settlement Agreement") is made and entered into this 31 day of July, 2012, by and between Brian A. Bash, in his capacity as the Chapter 7 Trustee (the "Trustee") for Fair Finance Company ("Fair Finance" or the "Debtor") in a Chapter 7 Bankruptcy Proceeding pending in the United States Bankruptcy Court for the Northern District of Ohio (the "Bankruptcy Court") as case no. 10-50494, and Terry Whitesell and Julia Whitesell, both residents of Indiana (the "Defendants").

WHEREAS, the Trustee has filed certain adversary proceeding against Terry Whitesell and Julia Whitesell in the Bankruptcy Court seeking to recover certain transfers of money, enforce certain contractual obligations and obtain judgment against the defendants on common law claims, as described more particularly in the complaints filed in the adversary proceedings, including the following adversary proceedings: *Bash v. Terry Whitesell, et al.*, Adv. Pro. No. 12-5109 [against Terry Whitesell and Julia Whitesell]; *Bash v. Durham Whitesell & Associates, LLC, et al.*, Adv. Pro. No. 11-5240 [against Terry Whitesell, among other defendants]; *Bash v. Obsidian Capital Co., LLC, et al.*, Adv. Pro. No. 12-5090 [against Terry Whitesell, among other defendants]; and *Bash v. DW Trailer, et al.*, Adv. Pro. No. 12-5147 [against Terry Whitesell, among other defendants] (collectively, the "Litigation"); and

WHEREAS, the bankruptcy reference was withdrawn in the matter of *Bash v. Terry Whitesell, et al.*, and the case is currently pending in the United States District Court for the Northern District of Ohio as Case No. 5:12-cv-993; and

WHEREAS, the Defendants dispute liability and the factual allegations asserted by the Trustee in support of the claims in the Litigation; and

WHEREAS, the Defendants provided substantial evidence and documentation to the Trustee of their current financial condition, including personal financial statements, bank records, tax returns and other financial records, and Mr. Whitesell also provided testimony under oath to the Trustee's counsel regarding the financial condition of the Defendants; and

WHEREAS, the parties desire to enter into this Settlement Agreement in order to provide for certain payment in full settlement and discharge of the claims that the Trustee has or may have against the Defendants regarding the claims asserted in the Litigation.

NOW, THEREFORE, in consideration of the covenants set forth herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the undersigned agree as follows:

1. **Settlement Payment.** Contemporaneous with the execution by the Defendants of this Settlement Agreement, the Defendants shall pay to the Trustee the total sum of Thirty Thousand Dollars (\$30,000.00) (the "Settlement Payment") by certified or cashier's checks, payable to "Brian A. Bash, Trustee for Fair Finance Company" and delivered to David F. Proaño, Baker & Hostetler LLP, 1900 East 9<sup>th</sup> Street, Suite 3200, Cleveland,

Ohio 44114, to be held by the Trustee in trust pending the entry by the Bankruptcy Court of an order approving this Settlement Agreement.

2. **Effectiveness Upon Final Approval.** Within seven (7) calendar days after the Trustee's timely receipt of the Settlement Payment, the Trustee shall file an appropriate motion with the Bankruptcy Court for authority to compromise the claims and causes of action in the Litigation on the terms set forth in this Settlement Agreement. This Settlement Agreement shall become effective and be binding if: (a) a final order is entered by the Bankruptcy Court in the records of the Debtor's bankruptcy case approving the compromise on the terms set forth in this Settlement Agreement; and (b) (i) the period within which any person or entity timely may appeal from such final order shall have expired and no appeal shall have been timely commenced or, if an appeal is timely commenced, such appeal shall have been ordered dismissed by the highest court of competent jurisdiction to which such appeal is taken, and (ii) the period within which any person or entity timely may seek reconsideration of, or seek to alter or amend, or seek a new hearing or trial regarding such final order shall have expired and no such motion for reconsideration of, or to alter or amend, or to have a new hearing or trial regarding such final order shall have been timely filed or, if any such motion is timely filed, such motion shall have been denied by a final order of the Bankruptcy Court or another court of competent jurisdiction (the occurrence of (a) and (b) shall constitute "Final Approval").

3. **Mutual Releases.** The following mutual releases shall be effective only upon Final Approval of this Settlement Agreement:

- (a) **Release by the Trustee of the Defendants:** Except for claims arising out of this Settlement Agreement, the Trustee, on behalf of himself, the Debtor and its estate (the "Trustee Releasing Parties"), hereby fully, finally and forever releases, acquits and discharges the Defendants from any and all claims, demands, obligations, judgments, actions, causes of action and/or liabilities for injuries, losses, damages and/or compensation of any nature, kind or description whatsoever, known or unknown, foreseen or unforeseen, which the Trustee Releasing Parties ever had, now have, or may have against the Defendants arising from or relating to the claims asserted in the Litigation. Any claims and causes of action not expressly released herein are hereby deemed preserved. Further, nothing in this paragraph or in this Settlement Agreement shall alter, affect or discharge any of the claims pending against any of the other defendants to the Litigation.
- (b) **Release by the Defendants of the Trustee:** Except for claims arising out of this Settlement Agreement, the Defendants hereby fully, finally and forever release, acquit and discharge the Trustee and the Trustee's agents, representatives, attorneys, employees and professionals, and the Debtor and its estate (the "Trustee Released Parties") from any and all claims, demands, obligations, judgments, actions, causes of action and/or liabilities for injuries, losses, damages and/or compensation of any nature, kind or description whatsoever, known or unknown, foreseen or unforeseen, which the Defendants ever had,

now have, or may have against the Trustee Released Parties arising from or relating to the claims asserted in the Litigation. In addition, the Defendants are hereby deemed to have waived any right that they otherwise may or would have to file a claim in the Debtor's bankruptcy case pursuant to 11 U.S.C. § 502 arising from the payment of the Settlement Sum. Any claims and causes of action not expressly released herein are hereby deemed preserved. Further, nothing in this paragraph or in this Settlement Agreement shall alter, affect or discharge any of the claims pending against any of the other defendants to the Litigation.

4. **Representations and Warranties Regarding Financial Condition.** To induce the Trustee to enter into this Settlement Agreement, the Defendants represent and warrant, to the best of their knowledge, information and belief, that the Personal Financial Statement submitted by the Defendants, as amended and as further clarified at the sworn examination of Terry Whitesell conducted by the Trustee's counsel, represents a true, accurate, and complete disclosure of all of the assets of the Defendants as of the date of this Settlement Agreement (the "**Disclosed Assets**"). The Defendants further represent and warrant that since the time of their submission of the Personal Financial Statement, as amended, the combined value of their assets has not increased by more than \$5,000.00. The Trustee shall have the right to pursue all available legal rights and remedies against the Defendants arising from or related to any undisclosed monies, funds, loans, transfers, assets, financial assistance, financial accommodation or claims (collectively, the "**Undisclosed Assets**") if the value of any Undisclosed Assets (or the aggregate value, if there is more than one undisclosed asset) equals or exceeds \$5,000. The legal rights and remedies available to the Trustee shall include, without limitation, claims against the Defendants for breach of this Settlement Agreement, and the Trustee shall, at a minimum, be entitled to liquidated damages equal to the value of the Undisclosed Assets.
5. **Dismissal of Litigation.** Within seven (7) calendar days of Final Approval, the Trustee shall take such action as is necessary to dismiss the Litigation with prejudice.
6. **No Admissions.** It is understood that this settlement is a compromise of disputed claims and that the payment of the Settlement Sum made hereunder is not to be construed as an admission of any liability for any alleged transfers.
7. **Tolling Agreement.** In the event this Settlement Agreement is vacated or set aside for any reason, or in the event that the Defendants do not timely pay the Settlement Sum as required by Paragraph 1 of this Settlement Agreement, the parties agree that all statutes of limitations applicable to any and all claims asserted in the Litigation, or that were available to the Trustee and not expired at the time of the filing of the Litigation, shall be tolled from the date of this Settlement Agreement and shall remain tolled for one hundred eighty (180) days from the date on which the Settlement Agreement is vacated or set aside or from the date the Settlement Sum was due and payable. Nothing in this provision shall be construed as an admission by any party that any claims have or have not been barred, or are about to be barred, by any applicable statute of limitations.

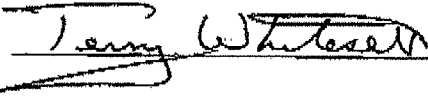


8. **Acknowledgment and Authority.** The parties to this Settlement Agreement acknowledge that each has read this Settlement Agreement and that the execution hereof is not induced by any representation other than as expressly contained herein, that the person executing this Settlement Agreement on behalf of the respective party has been duly authorized to execute and deliver this Settlement Agreement and that this Settlement Agreement is the legally binding obligation of such party.
9. **Choice of Law and Venue.** This Settlement Agreement shall be governed by the laws of the State of Ohio as applicable to agreements made and to be performed in Ohio, without regard to conflict of law principles. The parties further agree that the United States Bankruptcy Court for the Northern District of Ohio has jurisdiction over any disputes arising out of this Settlement Agreement, including, without limitation, disputes regarding its enforcement, construction and interpretation.
10. **Integration.** This Settlement Agreement constitutes the entire agreement of the parties with respect to the subject matter of this agreement and supersedes and extinguishes any and all prior oral and/or written agreements between the parties concerning the subject matter of this agreement.
11. **Written Modifications Only.** This Settlement Agreement may only be modified or amended through a written document signed by both parties to this Settlement Agreement.
12. **Construction.** No provision of this Settlement Agreement shall be interpreted or construed against any party hereto because such party or its legal representative drafted such provision. The terms of this Settlement Agreement are contractual and are not mere recitals.
13. **Survivability.** If any provision of this Settlement Agreement is determined to be unlawful, invalid or unenforceable for any reason, the remaining provisions shall continue to be binding upon all the parties.
14. **Successors, heirs and assigns.** This Settlement Agreement is binding on the successors, heirs and assigns of the parties to this Agreement.
15. **Counterparts.** This Settlement Agreement may be executed in counterparts, each of which shall be deemed an original regardless of the date of its execution and delivery. All such counterparts together shall constitute one and the same document.

[signature page follows]

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement as of the date set forth above.

**TERRY WHITESELL**

\_\_\_\_\_

**JULIA WHITESELL**

\_\_\_\_\_

**Brian A. Bash, as Trustee of the Fair Finance Company**

By:

\_\_\_\_\_

**EXHIBIT C**  
**PERSONAL FINANCIAL STATEMENT**

# NOTARIZED PERSONAL FINANCIAL STATEMENT

## Section 1. Personal Information

|                         | Full Name          | Social Security No. (SSN) | Date of Birth (mm/dd/yy) | Driver's License Number and State |
|-------------------------|--------------------|---------------------------|--------------------------|-----------------------------------|
| Your:                   | TERRY C. WHITESELL | [REDACTED]                | 6/24/39                  | INDIANA                           |
| Spouse (if applicable): | JULIA L. WHITESELL | [REDACTED]                | 4/21/42                  | INDIANA                           |

Address (Street, City, State, ZIP Code) (County of Residence):

9129 ADMIRALS WAY DR  
INDIANAPOLIS IN 46236  
MARION CO

Telephone Numbers:

Home: 317 822-1573 Cell Phone: ( )  
317-439-1628

Marital Status:

☒ Married ☐ Single ☐ Divorced ☐ Widowed

Name, Age, and Relationship of any dependent(s) (attach separate page for additional dependents):

1. NONE AT HOME  
2.  
3.

## Section 2. Employment

Your Employer's Name:

UNITED EXPEDITION INC.

Address (Street, City, State, ZIP Code):

14485 CP AL 8  
BASTY IN 46257

Spouse's Employer's Name:

HOME MAKER

Address (Street, City, State, ZIP Code):

Work Telephone Number:

(800) 321-0702

Does employer allow contact at work?

☒ Yes ☐ No

How long with this employer?

1 (years) | 1 (months)

CFO

Yearly Salary:

\$165,000

Yearly Bonus or Incentives:

0

Number of exemptions claimed on Form W-4:

2

Pay Period:

☒ Weekly ☐ Bi-Weekly  
☐ Monthly ☐ Other

Work Telephone Number:

( )

Does employer allow contact at work?

☐ Yes ☐ No

How long with this employer?

(years) | (months)

Occupation:

Yearly Salary:

Yearly Bonus or Incentives:

Number of exemptions claimed on Form W-4:

Pay Period:

☐ Weekly ☐ Bi-Weekly  
☐ Monthly ☐ Other

## Section 3. Other Financial Information (Attach copies of applicable documentation)

Are you a party to a lawsuit? Yes ☒ No ☐ (If yes, answer the following - attach separate page if more than one lawsuit)

☐ Plaintiff

☐ Defendant

Location of Filing:

Represented by:

Docket/Case No.:

Amount of Suit: ATTACHED  
\$ SEE NOTE 1

Possible Completion Date (mm/dd/yy):

Subject of Suit:

Have you ever filed bankruptcy? Yes ☐ No ☒ (If yes, answer the following)

Date Filed (mm/dd/yy):

Date Dismissed or Discharged (mm/dd/yy):

Petition No.:

Location:

Do you expect any increase or decrease in any anticipated income? Yes ☒ No ☐ (If yes, answer the following)

Explain (Use attachment if needed):

SEE NOTE 2

How much will it increase or decrease?

\$

When will it increase or decrease?

\$

Are you the grantor or beneficiary of a trust, estate, or life insurance policy? Yes ☐ No ☒ (If yes, answer the following)

Place where recorded:

ALA SEE NOTE 3

EIN:

Name of the trust, estate, or policy:

Anticipated amount to be received:

\$

When will the amount be received?

In the past 10 years, have you resided outside of the United States for periods of 6 months or longer? Yes ☐ No ☒ (If yes, answer the following)

Country and City of residence:

Dates lived abroad - from (mm/dd/yy):

To (mm/dd/yy):

300061802.1

**Section 4: Cash Flow Information**

**A. Income/Receipts**

List all money or other income received from any source on a monthly basis by you, your spouse, or any other member of your household, identifying the recipient, source and amount. For any income received on a basis other than monthly, convert to a monthly basis for the purpose of this statement.

| <u>Description</u>                                   | <u>Recipient and Source</u>  | <u>Amount</u>              |
|--|------------------------------|----------------------------|
| Salary/Wages   | <u>NET - UNITED ENERGY</u>   | <u>\$ 12,283</u>           |
| Commissions/Advances                                 |                              | <u>\$ 0</u>                |
| Consulting Fees                                      |                              | <u>\$ 0</u>                |
| Dividends  |                              | <u>\$ 0</u>                |
| Interest   |                              | <u>\$ 0</u>                |
| Annuities  |                              | <u>\$ 0</u>                |
| Pensions   | <u>TERRY</u>                 | <u>\$ 2,283.15</u>         |
| Rents/Royalties                                      |                              | <u>\$ 0</u>                |
| Sales of Assets (Net)                                |                              | <u>\$ 0</u>                |
| Repayment of Loans                                   |                              | <u>\$ 0</u>                |
| Payments on obligations made on you behalf by others |                              | <u>\$ 0</u>                |
| Fringe Benefits (e.g. car)                           | <u>HEALTH INSURANCE</u>      | <u>\$ 500 -</u>            |
| Alimony/Child Support                                |                              | <u>\$</u>                  |
| Gifts/Bonuses  |                              | <u>\$</u>                  |
| Other (Itemize)                                      | <u>TERRY SOCIAL SECURITY</u> | <u>\$ 2,339.00</u>         |
|  | <u>TJUA SOCIAL SECURITY</u>  | <u>\$ 860.00</u>           |
| <b>Total Monthly Receipts</b>                        |                              | <u><b>\$ 18,110.00</b></u> |

[continued on next page]

**B. Expenses/Disbursements**

List all monthly expenditures for whatever purpose for you or your household for the past 12 months, identifying the purpose and the amount, including projected expenses. For any expenditure which varies from month to month, indicate a range of amounts and the average amount on a monthly basis.

| Description                          | Purpose                       | Amount   |
|--------------------------------------|-------------------------------|----------|
| Mortgage/Rent                        | CHASE BANK                    | \$ 6917  |
| Food                                 |                               | \$ 800   |
| Utilities                            |                               | \$ 850   |
| Payment on Loans                     | JULIA'S CAR                   | \$ 628   |
| Real Estate Taxes                    |                               | \$ 1028  |
| Insurance Premiums                   | CAR-HOUSE LIFE                | \$ 1387  |
| Medical Expenses                     |                               | \$ 350   |
| Automobile Expenses                  |                               | \$ 600   |
| Alimony/Child Support                |                               | \$ 0     |
| Income Taxes                         |                               | \$ 0     |
| Other Expenses (Itemize)             | NURSING HOME ASSIST - FATHER  | \$ 800   |
| HOME REPAIRS - 912                   | AV. FIVE YEAR LEGAL FEE PER 1 | \$ 1200  |
| HOME MAINT. 700                      | MILES FOR CASHING EFT         | \$ 1000  |
| PERSONAL CARE 300                    |                               | \$       |
| GIFTS ECT                            |                               | \$       |
| TRAVEL - CHRISTMAS 500               |                               | \$       |
| Total Monthly Expenses/Disbursements |                               | \$ 17772 |

\*If you anticipate unusual expenses in the coming 12 months, please describe them:

SEE NOTE 4

[continued on next page]

**Section 5: Statement of Assets and Liabilities as of this date:** \_\_\_\_\_ *(provide date)*

**A. Assets:**

List all assets owned by you, your spouse, or any other member of your household, directly or indirectly, and all assets which are subject to your or your spouse's possession, enjoyment, or control, regardless of whether legal title or ownership is held by a relative, trustee, lessor, or any other intermediary, including but not limited to the categories indicated below:

1. **Cash On Hand.** Include cash that is not in a bank.....**TOTAL:**

*SEE PAGE 5*

2. **Funds in Bank Accounts.** Include all checking, online bank accounts, money market accounts, savings accounts, and stored value cards (e.g., payroll cards, government benefit cards, etc.).

| Provide the following information for each of your bank accounts <i>(attach separate page if needed)</i> : |   |                |  |
|--|---|----------------|--|
| Type of Account  | Full Name & Address (Street, City, State, ZIP Code) of Bank, Savings & Loan, Credit Union, or Financial Institution | Account Number | Account Balance As of _____ (mm/dd/yyyy) |
|  |   |                | \$                                       |
|  |   |                | \$                                       |
|  |   |                | \$                                       |
|  |   |                | \$                                       |
| <b>TOTAL:</b>  |   |                |  |

3. **Funds in Safe Deposit Boxes.**

| Provide the following information for each safe deposit box <i>(attach separate page if needed)</i> : |                        |                  |
|---|------------------------|------------------|
| Full Name & Address (Street, City, State, ZIP Code) of Location of Safe Deposit Box                   | Description of Content | Value of Content |
| <i>NONE</i>   |                        | \$               |
|   |                        | \$               |
| <b>TOTAL:</b>   |                        | <i>0</i>         |

[continued on next page]



Personal Financial Statement - Page 5 of 10

4. **Current Value of Investments.** Include stocks, bonds, mutual funds, stock options, certificates of deposit, annuities, and retirement assets such as IRAs, Keogh, and 401(k) plans.

| Provide the following information for each investment (attach separate page if needed): |                                |               |  |                         |
|---|--------------------------------|---------------|--|-------------------------|
| Type of Investment  | Full Name & Address of Company | Current Value | Loan Balance (if applicable) As of <u>mm/dd/yy</u> | Equity Value Minus Loan |
| <b>SEE NOTE 6</b>   |                                |               |  |                         |
|   | Phone:                         | \$            | \$   | \$                      |
|   | Phone:                         | \$            | \$   | \$                      |
|   | Phone:                         | \$            | \$   | \$                      |
|   | Phone:                         | \$            | \$   | \$                      |
|   | Phone:                         | \$            | \$   | \$                      |
|   | Phone:                         | \$            | \$   | \$                      |
| <b>TOTAL:</b>   |                                |               |  |                         |

5. **Business Interests.** List all corporations, partnerships, limited liability companies, associations, or any or other business entities, whether or not incorporated, in which you or your spouse have a financial interest or in which you or your spouse serve as an officer or director.

| Provide the following information for each business interest (attach separate page if needed): |  |   |   |
|--|--|---|---|
| Full Name and Address of Entity  | Your Position, Affiliation or Interest in the Entity | If you have an ownership or financial interest in the entity, describe the nature of that ownership or interest | If you have an ownership or financial interest in the entity, describe the value of that interest |
| Phone:   |  |   | \$  |
| Phone:   |  |   | \$  |
| Phone:   |  |   | \$  |
| Phone:   |  |   | \$  |
| <b>TOTAL:</b>  |  |   | 0   |

[continued on next page]



6. Available Credit.

| Provide the following information for each bank issued credit cards with available credit (attach separate page if needed): |              |   |   |                  |
|---|--------------|---|---|------------------|
| Full name & Address<br>(Street, City, State, ZIP<br>code) of Credit Institution   | Credit Limit | Amount Owed<br>as of _____ (month/year) | Account Balance As<br>of _____ (month/year) | Available Credit |
| Acct. Name & No.:   | SEE NOTE 7   | \$                                      | \$  |                  |
| Acct. Name & No.:   |              | \$                                      | \$  |                  |
| Acct. Name & No.:   |              | \$                                      | \$  |                  |
| TOTAL:  |              |   |   |                  |

7. Personal Assets. Include all furniture, personal effects, artwork, jewelry, collections (coins, guns, etc.), antiques or other assets with a value over \$2,000.00.

| Provide the following information for any personal assets with a value over \$2,000.00 (attach separate page if needed): |                      |                      |  |  |
|--|----------------------|----------------------|--|--|
| Property Description   | Location             | Current Market Value | (If applicable)<br>Amount Owed on<br>Property as of _____ (month/year) | Equity<br>Current Market Value Minus any<br>Loan |
| Rings, Truss<br>JEWELRY  | Jewelry box<br>+ FLA | \$ 135.00            | \$ 0   | \$ 135.00  |
| SEE NOTE 8   |                      | \$                   | \$   | \$   |
|  |                      | \$                   | \$   | \$   |
|  |                      | \$                   | \$   | \$   |
|  |                      | \$                   | \$   | \$   |
| TOTAL:   |                      |                      |  | \$ 135.00  |

[continued on next page]

8. Life Insurance with Cash Value. Term life insurance does not have a cash value.

| Provide the following information for each vehicle (attach separate page if needed): |       |  |                          |                    |
|--|-------|--|--------------------------|--------------------|
| Policy Number  | Owner | Name and Address of Entity Providing the Insurance | Outstanding Loan Balance | Current Cash Value |
|  |       |  | \$                       | \$                 |
|  |       |  | \$                       | \$                 |
|  |       |  | \$                       | \$                 |
| TOTAL:   |       |  |                          | 0                  |

9. Personal Vehicles Leased or Purchased. Include boats, RVs, motorcycles, trailers, etc.

| Provide the following information for each vehicle (attach separate page if needed): |                                     |                                 |                               |   |                          |
|--|-------------------------------------|---------------------------------|-------------------------------|---|--------------------------|
| Description<br>(Year, Mileage, Make, Model)  | Purchase/Lease Date<br>(mm/dd/yyyy) | Current Fair Market Value (FMV) | Current Loan Balance (if any) | Amount of Monthly Payment and Date of Final Payment | Equity<br>FMV Minus Loan |
| 1997 XKB Jaguar  | 1999                                | \$ 6500                         | \$ 0                          | \$ 0<br>Date:                                       | \$ 6500                  |
| 2002 Lincoln Town Car  | 2014                                | \$ 7000                         | \$ 0                          | \$ 0<br>Date:                                       | \$ 7000                  |
| 2008 Toyota Solara   | 2007                                | \$ 14000                        | \$ 4300                       | \$ 428.72<br>Date: 10/12                            | \$ 9700                  |
| 1999 Pontiac W/50 HP   | 1999                                | \$ 3000                         | \$ 0                          | \$ 0<br>Date:                                       | \$ 3000                  |
| TOTAL:   |                                     |                                 |                               |   | \$ 24,200                |

[continued on next page]

10. Real Property Owned, Rented, or Leased. Include all real property and land contracts.

| Provide the following information for each real property (attach separate page if needed): |                          |   |                                 |                       |
|--|--------------------------|---|---------------------------------|-----------------------|
| Property Description and Location (Street, City, State, ZIP code) and County               |                          | Lender/Lessor/Landlord, Name, Address (Street, City, State, ZIP code) and Phone |                                 | Purchase/Lease Date   |
| 9129 Admiral Byrd<br>Hammock<br>Indianapolis IN 46226                                      |                          | CHASE BANK<br>Indianapolis IN 46204   |                                 | 9-1-1999              |
| Current Loan Balance (if any)  | Current Monthly Payments | Date of Final Payment   | Current Fair Market Value (FMV) | Equity FMV Minus Loan |
| \$27,617   | \$3600                   | 2-25  | \$909,000                       | \$62,383              |
| 4001 E. 41st Street<br>Indianapolis IN 46216   |                          | CHASE BANK<br>Indianapolis IN 46216   |                                 | 2005                  |
| Current Loan Balance (if any)  | Current Monthly Payments | Date of Final Payment   | Current Fair Market Value (FMV) | Equity FMV Minus Loan |
| \$67,030   | \$3229                   | ?   | \$725,000                       | \$58,970              |
| Property Description and Location (Street, City, State, ZIP code) and County               |                          | Lender/Lessor/Landlord, Name, Address (Street, City, State, ZIP code) and Phone |                                 | Purchase/Lease Date   |
|  |                          |   |                                 |                       |
| Current Loan Balance (if any)  | Current Monthly Payments | Date of Final Payment   | Current Fair Market Value (FMV) | Equity FMV Minus Loan |
|  | \$                       |   | \$                              | \$                    |
| TOTAL:   |                          |   |                                 | 117,353               |

11. All Other Assets Not Listed Above with a Value in Excess of \$2,000.00:

| Provide the following information for each asset (attach separate page if needed): |  |          |
|--|--|----------|
| Description  | Location (Street, City, State, ZIP Code) | Value    |
| Equity membership  | MAJESTIC COUNTRY CLUB<br>FISKE'S IN      | \$13,000 |
|  |  | \$       |
|  |  | \$       |
| TOTAL:   |  |          |

300061802.1

**B. Liabilities:**

List and describe all liabilities for which you, your spouse, or any other member of your household, directly or indirectly, is responsible. (Attach separate page if needed.)

| <u>Type of Liability</u>     | <u>Description of Liability</u> | <u>Amount of Liability</u> |
|------------------------------|---------------------------------|----------------------------|
| Mortgages                    |                                 | \$ 1,507,697               |
| Auto Loans                   |                                 | \$ 4800                    |
| Credit Card Debt             |                                 | \$ 8799                    |
| Loans on Insurance Policies  |                                 | \$ 0                       |
| Installment Loans            |                                 | \$ 0                       |
| Medical Bills                |                                 | \$ 0                       |
| Other Loans or Notes Payable |                                 | \$ 0                       |
| Accrued Real Estate Taxes    |                                 | \$                         |
| Judgments/Settlements Owed   |                                 | \$ 7                       |
| Other (Itemize):             | UNCERTAIN LEGAL CASES           | \$ 7                       |
|                              |                                 | \$                         |
|                              |                                 | \$                         |
| <b>Total Liabilities</b>     |                                 | <b>\$ 1,521,396</b>        |

[continued on next page]

Personal Financial Statement - Page 10 of 10

Section 5: Additional Asset Information

In the past 10 years, have any assets been transferred by you or your spouse for less than full value? Yes ☐ No ☒  
(If yes, answer the following):

| List Asset | Value at Time of Transfer | Date Transferred (mmddyyyy) | To Whom or Where was it Transferred |
|------------|---------------------------|-----------------------------|-------------------------------------|
|            | \$                        |                             |                                     |
|            | \$                        |                             |                                     |
|            | \$                        |                             |                                     |

Since November 1, 2008, have you or your spouse transferred any assets with a value in excess of \$2,000.00? Yes ☐ No ☒  
(If yes, answer the following):

| List Asset | Value at Time of Transfer | Date Transferred (mmddyyyy) | To Whom or Where was it Transferred |
|------------|---------------------------|-----------------------------|-------------------------------------|
|            | \$                        |                             |                                     |
|            | \$                        |                             |                                     |
|            | \$                        |                             |                                     |

Under penalties of perjury, I declare that I have examined the information given in this statement, and attached hereto, and, to the best of my knowledge and belief, it is true, correct, and complete. I further declare that I have no assets, owned either directly or indirectly, or income of any nature other than as shown in, or attached to, this statement. I understand that any material misstatements or omissions made by me herein or in any attachments hereto may constitute criminal violations, punishable under 18 U.S.C. 1621 and/or 18 U.S.C. 1746.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 4-9-12  
(Date)

Terry Whitesell  
(Signature)

Sworn before me this \_\_\_\_\_ day of \_\_\_\_\_

\_\_\_\_\_  
Notary Public

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239 261 8901

08:14 PM TERRY WHITESELL 08-04-2012

## **NOTES TO FINANCIAL STATEMENT – TERRY AND JULIA WHITESELL**

### **NOTE 1-LAWSUITS**

1. The IRS issued a tax lien against DWA and Mr. Whitesell for payroll taxes in the amount of \$60,000 plus penalties. This is presently on appeal.
2. Case No. 1:08-cv-00531 in the U.S. District Court, Southern District of Indiana – an order has been issued for specific performance requiring Tim Durham, Roe Hitchcock and Terry Whitesell to deposit \$1,559,256.78 on a surety bond, which is joint and several liability. The order has been appealed, which is still pending.
3. The Fair Trustee has filed the following actions against Terry Whitesell:
  - a. 11-05240 DWA
  - b. 12-05025 Champion Trailer
  - c. 12-05090 Obsidian Capital
  - d. 12-05109 Terry and Julia Whitesell
  - e. 12-05039 DW Leasing
  - f. 12-05147 DW Trailer

### **NOTE 2-EXPECTED CHANGES IN INCOME**

Mr. Whitesell is presently employed by United Expressline, Inc., of Bristol - an Obsidian company. Mrs. Whitesell is a housewife not employed outside of the home.

United Expressline is anticipated to be sold or foreclosed upon by Huntington Capital who is the senior lender and the Trustee who holds a lien on the stock of United Expressline. Mr. Whitesell is involved in efforts to purchase the company with a group and negotiations are continuing. In the event Mr. Whitesell's group is unable to purchase the company, it is most likely his employment will end.

Due to the adverse publicity of Mr. Whitesell's involvement with Obsidian and Mr. Whitesell's age (72 presently), limited employment opportunities exist.

Should the above situations result in unemployment, our joint income will be social security and two small pensions totaling approximately \$60,000 per year.

### **NOTE 3-TRUST**

Both Terry Whitesell and Julia Whitesell are co-trustees of the Terry G. Whitesell Living Trust and the Julia L. Whitesell Living Trust.

Neither Julia nor Terry Whitesell is the beneficiary of any trust, estate or life insurance policies, other than a \$3,000 life insurance policy on the life of Mr. Whitesell's father who recently passed away, which Mr. Whitesell assigned to pay for funeral expenses, and none are expected, other than the living trust referenced below. The majority of our assets are in the Julia L. Whitesell Living Trust.

The items in Terry Whitesell's name include:

00288086-3 / 22516.00-0001

- 1997 Jaguar
- 2002 Lincoln Town Car
- 1999 Pontoon
- Two Chase Bank checking accounts

The other items including the 2 homes bank accounts, etc., are in the Julia L. Whitesell Living Trust.

#### **NOTE 4-UNUSUAL EXPENSES**

During the next 12 months additional legal expense bills will be incurred amount of which is unknown at present.

#### **NOTE 5-ASSETS**

- Cash in bank accounts of Terry Whitesell
  - Cash funds not in bank approx.. \$70
  - Fifth Third Bank account Indianapolis. In account of TGW Consulting LLC account number [REDACTED] in amount of \$1,139
  - Chase Bank Indianapolis In. in personal account number [REDACTED] balance in account \$335.00
- Cash in bank accounts of Julia L. Whitesell Living Trust
  - Cash on hand not in bank account approx. \$125.00
  - The following are all accounts at Fifth Third Bank Indianapolis In in the name of Julia L. Whitesell Living Trust:
    - *Account* [REDACTED] The balance in this account will vary between \$3-13,000 subject to time of month and if funds have been transferred to other accounts.
    - *Account* [REDACTED] This account balance will vary between \$0-11,000.
    - *Account* [REDACTED] This account balance will also vary on timing with balance between \$4-8,000.
    - *Account* [REDACTED] This account will vary again for fund use from \$4-16,000.

#### **NOTE 6-VALUE OF INVESTMENTS**

- All the following are with Merrill Lynch Wealth Management – representative is Andrew Cornell, Indianapolis, IN 317-706-3144:

00288086-3 / 22516.00-0001



|   |          |
|---|----------|
| ○ Terry Whitesell IRA account [REDACTED]      | \$53,154 |
| ○ Julia L. Whitesell IRA account [REDACTED]   | \$ 8,664 |
| ○ Julia L. Whitesell Trust account [REDACTED] | \$17,442 |
| ▪ Total                                       | \$79,260 |

#### **NOTE 7-AVAILABLE CREDIT**

Terry Whitesell bank issued credit cards

| Card                         | Total Credit | Owed    | Bal Available |
|------------------------------|--------------|---------|---------------|
| • Chase Bank card [REDACTED] | \$24,300     | \$6,915 | \$17,384      |
| • Chase Bank card [REDACTED] | \$12,000     | \$1,387 | \$10,612      |
| • Chase Bank card [REDACTED] | \$16,100     | \$0     | \$16,100      |
| • Discovery Card [REDACTED]  | \$10,400     | \$1,497 | \$8,902       |
| • American Xp [REDACTED]     | \$13,400     | \$0     | \$13,400      |

Julia L. Whitesell Living Trust issued credit cards

|   |          |     |          |
|---|----------|-----|----------|
| • Macy American Express card # [REDACTED] | \$10,000 | \$0 | \$10,800 |
|---|----------|-----|----------|

#### **NOTE 8 – PERSONAL ASSETS**

The value is guesstimated based upon the amounts we paid for the items as indicated below. There are no antiques and no pieces of jewelry which are of substantial value.

Jewelry purchased for approximately \$16,725

Art work purchased for \$3,900

Fur coat purchased for \$2,600

Furniture purchased for approximately \$60,305

Misc. items purchased for approximately \$32,761

#### **NOTE 9 – BUSINESS INTERESTS**

Durham Whitesell Capital Company, LLC – unsure of ownership percentage

Obsidian Capital Company – unsure of ownership percentage

Obsidian Capital Partners, LP – unsure of ownership percentage

Obsidian Enterprises, Inc. – unsure of ownership percentage

Champion Trailer Acquisition, LLC – 50% ownership at one time

Custom Trailer – unsure of ownership percentage

John Evans Manufacturing – unsure of ownership percentage

Durham Hitchcock Whitesell & Company, LLC – unsure of ownership percentage

Durham Whitesell & Associates, LLC – unsure of ownership percentage

00288086-3 / 22516.00-0001



DW Leasing, LLC – unsure of ownership percentage  
DW Trailer, LLC – unsure of ownership percentage  
Obsidian Leasing – unsure if had any ownership percentage  
TGW Consulting – 100%  
Q-Spec Inspections – 1% - company now defunct

**EXHIBIT D**  
**WHITESELL DEBTOR'S EXAMINATION**

# Transcript of the Testimony of

**TERRY G. WHITESELL**

**Date:** May 3, 2012

**Volume:** I

**Case:** In Re: Fair Fiance Company, Brian A. Bash , Chapter 7 vs Terry G. Whitesell

PROFILE COURT REPORTERS

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

|                                      |                                    |
|--------------------------------------|------------------------------------|
| In re:                               | No. 10-50494                       |
| Fair Finance Company,                | Chapter 7                          |
| Debtor                               | Chief Judge Marilyn<br>Shea-Stonum |
| Brian A. Bash, Chapter 7<br>Trustee, | Adversary Proceeding<br>Numbers:   |
| Plaintiff                            | 12-05109 (Whitesell)               |
| vs.                                  | 12-05090 (Obsidian)                |
|                                      | 12-05147 (DW Trailer)              |
| Terry G. Whitesell,<br>et al.,       | 12-05240 (DWA)                     |
| Defendants                           |                                    |

- - - -

Deposition of TERRY G. WHITESELL, a Defendant  
herein, taken by the Plaintiff upon adverse party  
examination before Debra A. Butzer, a Notary Public  
within and for the State of Ohio, at the offices of  
Baker Hostetler, PNC Center, 1900 East 9th Street,  
Suite 3200, Cleveland, Ohio, commencing at 1:06 p.m.,  
Thursday, May 3, 2012, pursuant to notice and  
stipulations of counsel.

|  |  |      |                    |   |               |   |         |      |                       |   |  |
|--|--|------|--------------------|---|---------------|---|---------|------|-----------------------|---|--|
| <p style="text-align: right;">Page 2</p> <p style="text-align: center;">EXAMINATION</p> <table><tr><td>Witness</td><td>Page</td></tr><tr><td>TERRY G. WHITESELL</td><td>4</td></tr><tr><td>By Mr. Proaño</td><td>4</td></tr></table> <p style="text-align: center;">-----</p> <p style="text-align: center;">EXHIBITS</p> <table><tr><td>Exhibit</td><td>Page</td></tr><tr><td>Plaintiff's Exhibit 1</td><td>7</td></tr></table>   | Witness  | Page | TERRY G. WHITESELL | 4 | By Mr. Proaño | 4 | Exhibit | Page | Plaintiff's Exhibit 1 | 7 | <p style="text-align: right;">Page 4</p> <p style="text-align: center;">1        ----<br/>2        PROCEEDINGS<br/>3        ----<br/>4        TERRY G. WHITESELL, of lawful<br/>5        age, a Defendant herein, called by<br/>6        the Plaintiff for the purpose of adverse<br/>7        party examination, as provided by the<br/>8        Rules of Civil Procedure for the<br/>9        District Courts of the United States,<br/>10       being by me first duly sworn, as<br/>11       hereinafter certified, deposed and said<br/>12       as follows:<br/>13       ----<br/>14       EXAMINATION OF<br/>15       TERRY G. WHITESELL<br/>16       BY MR. PROAÑO:<br/>17       Q   Mr. Whitesell, could you state and spell your<br/>18       name for the record?<br/>19       A   <b>Terry Whitesell, T-e-r-r-y W-h-i-t-e-s-e-l-l.</b><br/>20       Q   Mr. Whitesell, my name is David Proaño. I'm an<br/>21       attorney here in Cleveland on behalf of Brian<br/>22       Bash, a Trustee for Fair Finance Company.<br/>23       Your counsel is here as well,<br/>24       Mr. Whitesell?<br/>25       A   <b>Yes.</b></p> |
| Witness  | Page   |      |                    |   |               |   |         |      |                       |   |  |
| TERRY G. WHITESELL   | 4  |      |                    |   |               |   |         |      |                       |   |  |
| By Mr. Proaño  | 4  |      |                    |   |               |   |         |      |                       |   |  |
| Exhibit  | Page   |      |                    |   |               |   |         |      |                       |   |  |
| Plaintiff's Exhibit 1  | 7  |      |                    |   |               |   |         |      |                       |   |  |
| <p style="text-align: right;">Page 3</p> <p>APPEARANCES:</p> <p>Baker Hostetler, by<br/>Mr. David F. Proaño<br/>and<br/>Mr. Breaden M. Douthett<br/>PNC Center, Suite 3200<br/>1900 East 9th Street<br/>Cleveland, Ohio 44114<br/>(216) 861-7834<br/>dproano@bakerlaw.com<br/>bdouthett@bakerlaw.com</p> <p>On behalf of the Plaintiff;</p> <p>Krugliak, Wilkins, Griffiths &amp; Dougherty, by<br/>Mr. Gregory D. Swope<br/>4775 Munson Street NW<br/>Canton, Ohio 44718<br/>(330) 497-0700 ext. 183<br/>gswope@kwgd.com</p> <p>On behalf of the Defendants.</p> <p style="text-align: center;">-----</p> | <p style="text-align: right;">Page 5</p> <p>1       Q   And what's his name?<br/>2       A   <b>Greg -- Swope, I'm sorry, S-w-o-p-e.</b><br/>3       Q   I also have with us another attorney for the<br/>4       trustee, Brady Douthett, who is attending today<br/>5       as well.<br/>6       Mr. Whitesell, just to confirm a<br/>7       discussion we just had off the record, but to<br/>8       confirm it on the record, this is a limited<br/>9       deposition just to discuss a financial<br/>10       condition of you and your wife and the personal<br/>11       financial statement that was submitted to the<br/>12       trustee yesterday; is that correct?<br/>13       A   <b>Correct.</b><br/>14       Q   And just to confirm for the record and in front<br/>15       of Mr. Swope, this deposition is only limited<br/>16       to finances for purposes of settlement<br/>17       discussions and is not to be intended as a<br/>18       deposition in any other pending cases?<br/>19       MR. SWOPE: Correct. We<br/>20       understand that.<br/>21       Q   Mr. Whitesell, have you had your deposition<br/>22       taken before?<br/>23       A   <b>Yes.</b><br/>24       Q   Do you understand the basic ground rules for a<br/>25       deposition?</p> |      |                    |   |               |   |         |      |                       |   |  |

2 (Pages 2 to 5)

PROFILE COURT REPORTING

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Page 6

1 **A I think so.**  
2 Q All right. There's just a couple I'd like to  
3 go over.  
4 One, a deposition obviously is under oath.  
5 **A Uh-huh.**  
6 Q Do you understand that?  
7 **A Yes.**  
8 Q To permit for a clear record, I'd like to ask  
9 that you let me finish my question before you  
10 answer, and I'll do the same, I'll give you the  
11 same courtesy, I'll let you finish the answer  
12 before I ask the next question.  
13 Does that make sense?  
14 **A Yes.**  
15 Q And to make sure that we're getting complete,  
16 truthful testimony, without any obstacles,  
17 could you confirm whether or not you're taking  
18 any medications that would affect truthful  
19 testimony today?  
20 **A I am not.**  
21 Q You're not taking any medications?  
22 **A I am not taking any medication --**  
23 Q Thank you.  
24 **A -- that would affect my testimony.**  
25 Q Thank you.

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1 I'd like to just introduce the exhibit  
2 we're going to use today, which is the  
3 Notarized Personal Financial Statement for  
4 Terry Whitesell and Julia Whitesell, as  
5 Exhibit 1.  
6 ----  
7 (Plaintiff's Exhibit 1  
8 marked for identification.)  
9 ----  
10 MR. SWOPE: We can go off the  
11 record for a second?  
12 MR. PROAÑO: Yeah, we're going to  
13 go off the record for a second.  
14 ----  
15 (Discussion off the record.)  
16 ----  
17 Q All right. Mr. Whitesell, could you just  
18 confirm for the record that this is the  
19 financial statement that you prepared, signed  
20 and submitted to the trustee?  
21 **A Yes, it is.**  
22 Q And do you swear under oath that this is a true  
23 and accurate representation of the financial  
24 condition of you and your wife?  
25 **A Yes, it is.**

Page 8

1 Q Is Julia Whitesell your only marriage?  
2 Julia Whitesell, that's your only  
3 marriage?  
4 **A Yes.**  
5 Q How many children do you have?  
6 **A Three, one deceased.**  
7 Q How long have you lived at your current address  
8 of 9129 Admirals Bay, Indianapolis, Indiana?  
9 **A Twelve or 13 years.**  
10 Q Before that, what was your address?  
11 **A You know, I don't recall the specific address.**  
12 **It was in Indianapolis. Knollwood at the**  
13 **Creek, but I don't recall the specific address**  
14 **in there. It was Knollwood at the Creek,**  
15 **Indianapolis.**  
16 Q All right. This current address, Admirals Bay,  
17 has that been your primary address the last 12,  
18 13 years?  
19 **A Yes.**  
20 Q Section two here talks about your employment at  
21 United Expressline, Inc. in Bristol, Indiana  
22 and indicates you're the CEO of that company.  
23 How long have you held that position at  
24 that company?  
25 **A A little over a year now, a year and two or**

Page 9

1 **three months. Two months, maybe.**  
2 Q Who was the CEO prior to your taking that  
3 position?  
4 **A I was CEO, but not as an employee of the**  
5 **company.**  
6 Q Could you clarify for me?  
7 **A I was via my position at Obsidian Corporation,**  
8 **the owner of United. I was a CEO by that**  
9 **position.**  
10 Q In other words, you were CEO in title of United  
11 Expressline, but you weren't employed by that  
12 company?  
13 **A That's correct.**  
14 Q You were employed by Obsidian Enterprises,  
15 Inc.?  
16 **A Most of that time, up until the end of February**  
17 **of 2009. I was no longer employed by them**  
18 **after February of 2009.**  
19 Q Why was that --  
20 **A I resigned.**  
21 Q What was the reason for that resignation?  
22 **A I was concerned about the financial condition**  
23 **of the company and I wanted to continue with a**  
24 **consulting firm that I had -- that I had at one**  
25 **time had in place and I resurrected it and**

3 (Pages 6 to 9)

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|  |   |
|--|---|
| <p style="text-align: right;">Page 10</p> <p>1 started the consulting company again.</p> <p>2 Q What's the name of that company?</p> <p>3 A TGW Consulting.</p> <p>4 Q Do you own that company?</p> <p>5 A Yes, it's -- it's whatever they call it --</p> <p>6 nonfunctioning at the present.</p> <p>7 Q How long has it been nonfunctioning?</p> <p>8 A Since I became an employee of United</p> <p>9 Expressline in -- I think in March of 2011, I</p> <p>10 believe it was.</p> <p>11 Q So just to let me see if I've accurately</p> <p>12 summarized your employment history -- and fill</p> <p>13 in the details if I'm incorrect -- you were</p> <p>14 employed by Obsidian Enterprises until February</p> <p>15 of 2009. During that time you were employed by</p> <p>16 Obsidian you held the title of CEO for United</p> <p>17 Expressline. You resigned in February of 2009</p> <p>18 from Obsidian because of concerns of the</p> <p>19 financial condition of that company, and you</p> <p>20 began working with your consulting company, TGW</p> <p>21 Consulting, until about March 2011, at which</p> <p>22 time you became an employee of United</p> <p>23 Expressline?</p> <p>24 A Correct.</p> <p>25 Q Between the time you resigned from Obsidian in</p>  | <p style="text-align: right;">Page 12</p> <p>1 president of manufacturing.</p> <p>2 Q How do you spell that last name, Woodiwiss?</p> <p>3 A W-o-o-d-i-w-i-s-s, I believe.</p> <p>4 Q Are you the person who makes the principal</p> <p>5 decisions at United?</p> <p>6 A Well, let me say that the operation day-to-day</p> <p>7 management is by Todd Bontrager, along with</p> <p>8 Dave Wagner and Lynn --</p> <p>9 Q All right.</p> <p>10 A -- and I consult with them daily and we meet</p> <p>11 and discuss operations and discuss direction</p> <p>12 and avenue and so forth ongoing.</p> <p>13 Q Who do you report to in your position; anyone?</p> <p>14 A Well, technically speaking, it would be to the</p> <p>15 board of United Expressline.</p> <p>16 Q Who's on that board?</p> <p>17 A At present it's myself and Todd Bontrager and</p> <p>18 Tim Durham.</p> <p>19 We had a former board member, Mark Baumann</p> <p>20 (phonetic) of Huntington and Huntington</p> <p>21 Capital, and he had to resign a few months back</p> <p>22 or sometime because of the conflict issue,</p> <p>23 but --</p> <p>24 Q Is the board still active at United?</p> <p>25 A Well, it's in place. I think our last board</p> |
| <p style="text-align: right;">Page 11</p> <p>1 February 2009 and the time you became employed</p> <p>2 by United Expressline, did you hold any other</p> <p>3 titles or positions in any other companies?</p> <p>4 A Not that I'm aware of, that I would have.</p> <p>5 Q At the time you became an employee of United</p> <p>6 Expressline, why did you decide to take on that</p> <p>7 employment?</p> <p>8 A Having served as CEO and having been involved</p> <p>9 in United Expressline since the acquisition by</p> <p>10 Obsidian in 2001, I believe it was, I had a</p> <p>11 close knowledge of the company. I met with the</p> <p>12 management of United Expressline and we felt</p> <p>13 that there might be an opportunity to put</p> <p>14 together an acquisition, given the circumstance</p> <p>15 at Obsidian, and so we decided to go forward as</p> <p>16 a team and devote our effort towards that as</p> <p>17 well as continuing United Expressline.</p> <p>18 Q So is it correct you always held the title of</p> <p>19 CEO of United Expressline?</p> <p>20 A I believe that was the title that I had up</p> <p>21 there all the time, yes.</p> <p>22 Q Could you identify who the other managers are</p> <p>23 at United Expressline?</p> <p>24 A Todd Bontrager is president, Dave Wagner is</p> <p>25 vice president, and Lynn Woodiwiss is vice</p> | <p style="text-align: right;">Page 13</p> <p>1 meeting per se was in the summer months. I</p> <p>2 don't remember. Last -- I don't recall exactly</p> <p>3 the date. It was just to approve the</p> <p>4 resignation of Mark Baumann.</p> <p>5 Q Did the board set your salary at 165?</p> <p>6 A Yes.</p> <p>7 Q Has that been the same salary since you began</p> <p>8 working at United --</p> <p>9 A Yes.</p> <p>10 Q -- since March 2011?</p> <p>11 A Yes.</p> <p>12 Q Do you receive any bonus or incentives other</p> <p>13 than just the yearly salary?</p> <p>14 A No.</p> <p>15 Q Is there any kind of contract where you are</p> <p>16 entitled to any bonuses based on performance or</p> <p>17 any other indicators?</p> <p>18 A No.</p> <p>19 Q Is there any plan for bonus payments at all?</p> <p>20 A There is for the other managers. Not for</p> <p>21 myself.</p> <p>22 Q Why is that?</p> <p>23 Why aren't you eligible?</p> <p>24 A Well, just didn't feel like that it was</p> <p>25 appropriate for me. They're the day-to-day</p>  |

4 (Pages 10 to 13)

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1 **managers and more directly responsible for the**  
2 **performance of the company.**  
3 **We do have employment contracts or**  
4 **agreements in place.**  
5 Q And it's correct you've provided all the  
6 financials on that company to the trustee,  
7 right?  
8 A I -- well, yes, I know we have.  
9 Q All right.  
10 A **They employ an outside firm to do evaluation**  
11 **studies, so they have all the data.**  
12 Q Is your CEO role at United Expressline your  
13 only employment?  
14 A Yes.  
15 Q Do you have any other source of income, other  
16 than the ones you've identified in this  
17 personal financial statement?  
18 A **No other source.**  
19 Q How long has TGW Consulting been defunct or, I  
20 guess, inactive?  
21 A **Probably since the start of 2011 or right**  
22 **shortly thereafter.**  
23 Q What kind of work did you do with that  
24 consulting firm?  
25 A **Primarily in the marketing and manufacturing**

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1 **distribution consulting work.**  
2 Q And who did you work with, what kind of  
3 companies?  
4 A **Manufacturing firms, primarily.**  
5 Q What's your expertise?  
6 What was your expertise in that consulting  
7 firm?  
8 A **Well, my prior life, I was involved in a**  
9 **manufacturing firm in Richmond, Indiana, Wayne**  
10 **Corporation, who was a school bus manufacturer,**  
11 **national company, and I had been there 25 years**  
12 **and primarily in the role of sales and**  
13 **marketing, all the chairs up through executive**  
14 **vice president, sales and marketing, and then**  
15 **ultimately became president of the company, and**  
16 **so I had a rather lengthy background in that**  
17 **area.**  
18 Q All right. Thank you.  
19 If you could look at page two of that  
20 personal financial statement, Mr. Whitesell,  
21 you have listed income of various sources.  
22 I'd like to ask you about your net income  
23 from United Expressline, and it's true that  
24 number says 12,283?  
25 A Yes.

Page 16

1 Q That's monthly?  
2 A Yes.  
3 Q Do you pay estimated taxes or do you have taxes  
4 deducted prior to paychecks being issued to  
5 you?  
6 A **They withhold taxes relative to state and**  
7 **Medicare, Social Security, I guess.**  
8 Q All right.  
9 A **Not federal tax, I don't believe.**  
10 Q Federal taxes are not withheld?  
11 A No.  
12 Q Do you have to pay those like you would --  
13 A **I haven't had to of recent, but yes.**  
14 Q All right. One question I did have is: Based  
15 on your salary, it seemed like the net  
16 take-home monthly pay was rather high. Can  
17 that be explained by the fact that the federal  
18 taxes are not deducted from the paycheck?  
19 A Yes.  
20 Q Who made the decision not to deduct those  
21 federal taxes from the paycheck?  
22 A **My accountant firm in Indianapolis advised that**  
23 **there wasn't a need to do so.**  
24 Q Why did they say to do that?  
25 A **Because of my loss carry forwards on my income.**

Page 17

1 Q Can you explain that a little bit?  
2 A **Unfortunately, I've had a lot of losses in**  
3 **business investments and securities and so**  
4 **forth, I suppose, but it was their recommend.**  
5 Q So, in other words, they think you're not going  
6 to have to pay federal taxes, so they're not  
7 withholding it from your paycheck?  
8 A **Well, this year. I don't know about**  
9 **forthcoming years.**  
10 Q There's also a pension that is in the amount of  
11 about \$2,100 a month, and it looks like it says  
12 "Terry" there, which I assume is your pension?  
13 A Yes.  
14 Q What's that pension related to?  
15 A **My employment when I was with Wayne**  
16 **Corporation, the school bus manufacturer in**  
17 **Indiana.**  
18 Q And that's paid on a monthly basis?  
19 A Yes.  
20 Q Does that pension vary at all in amount?  
21 A **Unfortunately, it doesn't.**  
22 Q It's a fixed pension?  
23 A Yes.  
24 Q Do you know the health of that pension fund?  
25 A **From my knowledge, it's stable, and the**

5 (Pages 14 to 17)



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1 information they send us every year says  
2 they're good.  
3 Q Who pays the health insurance?  
4 Is that United Expressline?  
5 A **United.**  
6 Q And of course you receive, you and your wife  
7 receive, Social Security, correct?  
8 A **Yes.**  
9 Q Any other sources of income not listed here?  
10 A **No.**  
11 Q The next page is page three of the financial  
12 statement.  
13 There is an entry for mortgage to Chase  
14 Bank of about \$6,900.  
15 Is that for both of your houses?  
16 A **Yes.**  
17 Q Does that include any other homes?  
18 A **No.**  
19 Q There's also an entry for your wife's car for  
20 about \$620.  
21 What kind of car is that?  
22 A **It's a 2008 Toyota Solara.**  
23 Q Why is that monthly payment so high on that  
24 vehicle?  
25 A **I guess we paid so much for the car. I don't**

Page 19

1 know.  
2 Q Real estate taxes, is that paid directly to you  
3 or is that taken out of your mortgage payments?  
4 A **No; we pay it direct.**  
5 Q There's an entry for insurance premiums.  
6 Who is your carrier, insurance carrier?  
7 A **Allstate on the home in Indianapolis and**  
8 **Universal and Hartford on the Florida property.**  
9 Q How about the life insurance?  
10 A **The life insurance, both my wife and I,**  
11 **principal policy is with Genworth, and I think**  
12 **we have an additional policy that expires next**  
13 **year with First Colony, if I recall.**  
14 Q Is there any cash value in those?  
15 A **No, sir.**  
16 Q I also see, it looks like, about \$600 a month  
17 you pay to help your father's nursing care.  
18 A **Well, that was true till about last week. He**  
19 **passed away last week.**  
20 Q Oh, I'm sorry.  
21 There's also an entry for about \$1,200 a  
22 month legal fees.  
23 Which legal firm is that?  
24 A **This firm that's representing me here today.**  
25 **There's also a firm in Indianapolis that**

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1 Jason Lueking is with; another firm, Plopper &  
2 Associates; another one with Buddy Pyl --  
3 MR. SWOPE: Pylitt.  
4 A **Buddy Pylitt.**  
5 Q How do you spell that?  
6 MR. SWOPE: Go ahead.  
7 A **I was going to say it's P-I-i-o-t-t.**  
8 MR. SWOPE: Might be a Y, P-I-y.  
9 Q I know what Mr. Swope is helping you with.  
10 How about Mr. Lueking?  
11 Is he also helping you with these same  
12 cases here, Fair Finance?  
13 A **To some degree. He started on the first case,**  
14 **and then as it turned into different cases, he**  
15 **recommended Greg's firm.**  
16 Q Is Mr. Lueking helping you with any other cases  
17 outside of the Fair Finance lawsuits?  
18 A **Not that's me personally, no.**  
19 Q What else is he helping you with, what  
20 company or --  
21 A **He represents United -- well, let me -- excuse**  
22 **me. He's representing Trailer Acquisition,**  
23 **Incorporated, which is the group attempting to**  
24 **purchase United Expressline.**  
25 Q All right. So he's helping you with that

Page 21

1 acquisition?  
2 A **Yes.**  
3 Q Any other --  
4 A **That's billed -- excuse me. That's billed**  
5 **separately to that group, not to me.**  
6 Q So that doesn't come out of this 1,200 a month?  
7 A **No.**  
8 Q You've mentioned Plopper & Associates.  
9 What matters do they handle for you?  
10 A **Litigation that's with Frontier Insurance**  
11 **Company.**  
12 Q That's the one pending in Indiana?  
13 A **Yes, yes.**  
14 Q This \$1,200 a month being paid to legal fees,  
15 is part of that to Mr. Plopper for the Frontier  
16 lawsuit?  
17 A **Yes, and that's an average number that I just**  
18 **analyzed and divided by the 12.**  
19 Q You've mentioned a Pylitt?  
20 A **Yes.**  
21 Q Who's that lawyer and what's he helping you  
22 with?  
23 A **He -- when the first investigations or when the**  
24 **investigations occurred on Mr. Durham, the**  
25 **federal authorities also wanted to meet with**

6 (Pages 18 to 21)

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1 me, and it was required that I have counsel  
2 separate from Mr. Durham and from the  
3 representatives of Obsidian, so I had to employ  
4 him.  
5 Q Is he a criminal defense attorney?  
6 A That could be.  
7 Q Is he an Indianapolis lawyer?  
8 A Yes.  
9 Now, there's -- if I may?  
10 Q Sure.  
11 A There's an additional lawyer that I have not  
12 paid any funds to, nor have I met with, that  
13 would represent me if there were any  
14 Obsidian-relative items involved that I'm not  
15 sure how they break it down, but they assumed  
16 the representation responsibility for any  
17 Obsidian employees on noncriminal cases, I  
18 guess. I've never met with him yet. I've  
19 signed a piece of paper that says he's who  
20 would represent me.  
21 Q Who's that attorney?  
22 A Give me a minute.  
23 Incidentally, the firm that Buddy is with  
24 is Katz & Korin.  
25 Q Who's Buddy?

Page 23

1 A That's the Buddy Pylitt or -- that's who he's  
2 with.  
3 Q Oh, I see. Katz and Korin is the Pylitt  
4 criminal defense attorney from Indianapolis?  
5 A Yes.  
6 Q All right.  
7 A The other firm representing Obsidian employees  
8 is Borland, B-o-r-l-a-n-d & G-a-e-r-t-e in  
9 Indianapolis.  
10 Q Thank you.  
11 A I also have representation by Birk, Gross, Bell  
12 & Coulter, an accounting firm in Indianapolis,  
13 in the tax -- IRS tax issue.  
14 Q Is that included here in these fees?  
15 A I believe it is, yes.  
16 Q Who's your main contact there at that firm.  
17 A Jeff Birk.  
18 Q There's also an entry back at page three of  
19 this personal financial statement that says  
20 "Misc. for closing estimate."  
21 Am I reading that correctly?  
22 A I'm sorry; what page?  
23 Q It's page three of your personal financial  
24 statement, "Expenses/Disbursements," the bottom  
25 there, \$1,000 a month.

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1 MR. SWOPE: (Indicating.)  
2 A Yeah. That's miscellaneous for clothing.  
3 Q Oh, for clothing?  
4 A Personal issues, you know, shampoos, I guess  
5 all those kinds of things.  
6 Q Miscellaneous expenses --  
7 A Yes.  
8 Q -- for sundry items?  
9 A Yes.  
10 Q Personal items?  
11 A Yes, clothing.  
12 Q And you have \$1,000 a month?  
13 A The best we could estimate on it, you know.  
14 Q All right. If you could turn to the next page,  
15 Mr. Whitesell, and you do reference a couple of  
16 entries where you refer to notes further back,  
17 and we'll go there soon, I just want you to  
18 confirm that you do not in fact have a safety  
19 deposit box?  
20 A I do not have one.  
21 Q If you look at the next page, you also refer to  
22 a note six, which we'll talk about shortly, but  
23 I want to draw your attention to the section  
24 "Business Interests," and I just want you to  
25 confirm whether or not you have any kind of

Page 25

1 ownership in any businesses.  
2 A Not any that are continuing to exist, but I had  
3 some obviously ownership interest in Obsidian,  
4 which I consider obviously no longer in  
5 existence.  
6 Q What was your stake in that company, Obsidian  
7 Enterprises?  
8 A I had a percentage of the stock, and I don't  
9 know what that was.  
10 Q Was that owned through one of the partnerships  
11 or did you own it directly?  
12 A I don't know that answer. I don't know.  
13 Q At what point did you have the sense that your  
14 Obsidian stock was not worth much or anything  
15 at all?  
16 A Well, I think that became somewhat obvious in  
17 probably 2008.  
18 Q The early part of 2008?  
19 A I don't recall, but it just appeared to be.  
20 Q You're also the owner of TGW Consulting?  
21 A Yes.  
22 Q But you don't have any value in that company?  
23 A No.  
24 Q Any other companies that you have an ownership  
25 interest in --

7 (Pages 22 to 25)

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1 A No.  
2 Q -- even if they're defunct?  
3 A **Well, other than those that were involved in**  
4 **Obsidian, that's all, and that was just through**  
5 **Obsidian, nothing separate.**  
6 Q All right. You didn't have a direct ownership  
7 in those companies?  
8 A No.  
9 Q You had it through Obsidian?  
10 A Yes.  
11 Q If you would turn to page eight of your  
12 statement, Mr. Whitesell, it lists under  
13 Section 10 the real property that you own, rent  
14 or lease.  
15 A Yes.  
16 Q We've already talked about your property at  
17 Admirals Bay Drive.  
18 Could you confirm for me the address of  
19 that second property, because it's hard to read  
20 on this document.  
21 A **Sorry. 4005 Gulf Shore Boulevard, North, in**  
22 **Naples, Florida 34103, Unit 401.**  
23 Q What type of property is that?  
24 A **It's a condominium.**  
25 Q And you have here that you purchased it in

Page 27

1 2005; is that correct?  
2 A **That's correct.**  
3 Q Are you the sole owner of that property?  
4 A **It's in my wife's trust, yes.**  
5 Q And when was it transferred to your wife's  
6 trust?  
7 A **Probably in 2010, technically.**  
8 Q When that property was purchased in 2005, in  
9 whose name was it titled?  
10 A **Terry and Julia Whitesell.**  
11 Q Then in 2010 that property was transferred to  
12 your wife's trust?  
13 A Yes.  
14 Q Do you know why that was done?  
15 A **I forgot to do it in 2005, when we bought it.**  
16 Q You had intended to transfer it to the trust?  
17 A Yes.  
18 Q At the time that the property was transferred  
19 to the trust in 2010, did it have mortgages on  
20 it?  
21 A Yes.  
22 Q Did the mortgage company say anything about the  
23 change of ownership?  
24 A No.  
25 Q They allowed it to go through?

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1 A **I've never heard anything, so --**  
2 Q Does that property have two mortgages on it?  
3 A Yes.  
4 Q Are those the original mortgage companies from  
5 the purchase in 2005?  
6 A **I don't recall, truthfully, whether it does or**  
7 **does not. I don't remember.**  
8 Q When you bought the property in 2005, what did  
9 you pay for it?  
10 A **Right at \$920,000.**  
11 Q How did you finance the purchase?  
12 A **I borrowed -- I didn't borrow; I took money**  
13 **from my 401K program.**  
14 Q How much did you take from the 401K?  
15 A **Approximately 20 percent, so it's around**  
16 **185,000, I think.**  
17 Q And then you mortgaged the rest?  
18 A Yes.  
19 Q Was it from Chase Bank that you obtained the  
20 mortgage?  
21 A **Well, it is now. I don't recall if they were**  
22 **the initial ones or not.**  
23 Q Do you recall at some point getting a second  
24 mortgage on that property?  
25 A **Those were both done simultaneously.**

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1 Q The first and the second?  
2 A **Yes. One was a line of credit, home equity.**  
3 Q How much time in a calendar year do you spend  
4 in your Naples property?  
5 A **Not enough.**  
6 Q How much would you say?  
7 A **Well, my wife spends maybe four months total,**  
8 **and I go back and forth to some degree.**  
9 Q In a calendar year, would you guess a couple  
10 weeks, a couple months?  
11 A **No; I probably spend two months, a month and a**  
12 **half.**  
13 Q Who else, other than you and your wife, use  
14 that property?  
15 A No one.  
16 Q You don't rent it out?  
17 A No.  
18 Q Does your other family use it?  
19 A **Only if we're there, they come down. Spring**  
20 **break.**  
21 Q Have you ever tried to sell your property --  
22 A No.  
23 Q -- Naples property?  
24 A No.  
25 Q You have a current fair market value here of

8 (Pages 26 to 29)

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|---|--|
| <p>1 725,000.</p> <p>2 Where did you come up with that number?</p> <p>3 <b>A Just as information that's been derived from</b></p> <p>4 <b>watching other properties down there.</b></p> <p>5 <b>The Florida condominium price range has</b></p> <p>6 <b>taken a horrible hit, and I've observed what</b></p> <p>7 <b>other condos are selling for both in our</b></p> <p>8 <b>condominium complex and in the area, and I'm</b></p> <p>9 <b>estimating what I think it would be, and of</b></p> <p>10 <b>course it depends upon the length of time that</b></p> <p>11 <b>you're willing to sit with it for sale.</b></p> <p>12 Q Going back to your primary residence, do you</p> <p>13 remember how much you paid for that house in</p> <p>14 October of '99?</p> <p>15 <b>A It was either 790 or 729.</b></p> <p>16 Q Chase Bank, which is listed here as the</p> <p>17 mortgage holder, was that the original loaner?</p> <p>18 <b>A I don't believe so, no.</b></p> <p>19 Q Does that have a second mortgage on it as well?</p> <p>20 <b>A Yes.</b></p> <p>21 Q Do you know when the second mortgage was taken?</p> <p>22 <b>A I believe in 2005.</b></p> <p>23 Q You have a fair market value here of 900,000</p> <p>24 for that house.</p> <p>25 How did you apprise that value?</p> | <p>1 MR. SWOPE: Do you remember who</p> <p>2 did the appraisal?</p> <p>3 THE WITNESS: No.</p> <p>4 MR. SWOPE: If he has it, I'll</p> <p>5 provide it.</p> <p>6 THE WITNESS: Yeah.</p> <p>7 MR. PROAÑO: All right. The most</p> <p>8 recent statements from the four</p> <p>9 mortgage companies involved and the</p> <p>10 last three years of homeowners policies</p> <p>11 for the last two houses. So, for each</p> <p>12 house, three years of insurance</p> <p>13 policies, if you're willing to provide</p> <p>14 it, obviously.</p> <p>15 THE WITNESS: Yeah.</p> <p>16 MR. SWOPE: Yeah, not a problem.</p> <p>17 Q No other real estate?</p> <p>18 <b>A No.</b></p> <p>19 Q In the last 10 years, have you owned any other</p> <p>20 real estate, other than these two properties --</p> <p>21 <b>A No.</b></p> <p>22 Q -- indirectly or directly?</p> <p>23 <b>A No.</b></p> <p>24 Q Do you have any assets overseas?</p> <p>25 <b>A No.</b></p>   |
| Page 31   | Page 33  |
| <p>1 <b>A That was my best estimate.</b></p> <p>2 <b>The Indianapolis market is like many home</b></p> <p>3 <b>markets. It's taken a decrease in values, and</b></p> <p>4 <b>I'm just estimating it upon what I think it</b></p> <p>5 <b>might bring, but I -- other than that, that's</b></p> <p>6 <b>the best guidance. We had an appraisal a few</b></p> <p>7 <b>years ago and it was appraised in the nine</b></p> <p>8 <b>hundreds, if I recall. Would we still get in</b></p> <p>9 <b>the 900s? Well, I'd have to, let's put it that</b></p> <p>10 <b>way, but I don't know for sure.</b></p> <p>11 Q All right.</p> <p>12 <b>A There's not been a home sold right -- that's</b></p> <p>13 <b>comparable in our area right of recent, so I</b></p> <p>14 <b>don't know.</b></p> <p>15 MR. PROAÑO: Greg, if you'd be so</p> <p>16 kind, I'm going to ask for a couple of</p> <p>17 things for these houses.</p> <p>18 MR. SWOPE: Uh-huh.</p> <p>19 MR. PROAÑO: The appraisal that</p> <p>20 Mr. Whitesell referenced.</p> <p>21 MR. SWOPE: Do you have a copy of</p> <p>22 that, Terry?</p> <p>23 THE WITNESS: I would assume we do</p> <p>24 somewhere. I haven't -- you know, it's</p> <p>25 a few years back, so --</p>   | <p>1 Q Do you have any money in any foreign bank</p> <p>2 accounts?</p> <p>3 <b>A No.</b></p> <p>4 Q Number 11 lists equity interest in a membership</p> <p>5 of a country club.</p> <p>6 <b>A Yes.</b></p> <p>7 Q How did you arrive at the value of 13,000?</p> <p>8 <b>A That was the equity infusion that I had to pay</b></p> <p>9 <b>in to be a member.</b></p> <p>10 Q Is that like a capital infusion?</p> <p>11 <b>A Yes.</b></p> <p>12 Q Could you get it out if you wanted?</p> <p>13 <b>A I haven't been successful so far. I'm on a</b></p> <p>14 <b>list of many.</b></p> <p>15 Q You're on a list to get it out?</p> <p>16 <b>A Yes.</b></p> <p>17 Q Why is it that you can't get it out?</p> <p>18 <b>A There -- and I can't recall exact terms, but</b></p> <p>19 <b>they have to sell four of their own before</b></p> <p>20 <b>they'll sell one of a resigning member, if I</b></p> <p>21 <b>recall, and in two years or so I think I've</b></p> <p>22 <b>moved down or up one in that category.</b></p> <p>23 Q What number are you on the list?</p> <p>24 <b>A I think I'm number 50.</b></p> <p>25 Q People aren't golfing, huh?</p> |

9 (Pages 30 to 33)

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1 **A Well, I think it's manipulation of membership**  
2 **categories, I believe, but I'm no longer a**  
3 **member, obviously.**  
4 **Q If you'd turn to the 10th page of the**  
5 **statement, the section that talks about**  
6 **Additional Asset Information. That's right**  
7 **above your signature.**  
8 **A Yes.**  
9 **Q One question I do have is: When the Naples**  
10 **property was transferred to your wife's trust,**  
11 **did the trust give anything back to your wife**  
12 **for that transfer?**  
13 **A No. It cost me to transfer it, I know that.**  
14 **Q Just the transaction fees, correct?**  
15 **A It seemed like to me it was like \$2,400 or**  
16 **something like that, some kind of Florida fee**  
17 **to do it.**  
18 **Q But did the trust itself give anything to you**  
19 **and your wife in exchange for that property?**  
20 **A No.**  
21 **Q The second question here is if you or your wife**  
22 **have transferred any assets with a value in**  
23 **excess of \$2,000 since November 1st, 2008?**  
24 **Obviously the correction to that would be**  
25 **the Naples property.**

Page 35

1 **A That's correct. I didn't recognize that.**  
2 **Q That's okay.**  
3 **Is there anything else that should be**  
4 **corrected here for that property?**  
5 **A Not that I'm aware of, no.**  
6 **Q And is it your signature here for Terry**  
7 **Whitesell?**  
8 **A Yes, it is.**  
9 **Q We're going to go into some of the notes now,**  
10 **the next page, "Notes to Financial Statement."**  
11 **It mentions, first of all, an IRS tax lien**  
12 **lawsuit in the amount of 60,000 plus penalties.**  
13 **Who's representing you in this case?**  
14 **A Birk, Gross, Bell & Coulter.**  
15 **Q What's the allegations by the IRS?**  
16 **A This is against DWA, Durham, Whitesell &**  
17 **Associates, for unpaid employee taxes for a**  
18 **period in 2009, as I recall it. Mr. Durham**  
19 **always handled all that, paid whatever, if**  
20 **there was payments that had to come from any**  
21 **source. I didn't realize he hadn't made them**  
22 **until I got hit with it, and obviously they're**  
23 **not going after him.**  
24 **Q They've decided not to go after him?**  
25 **A They apparently have, yeah.**

Page 36

1 **Q Where is the lawsuit pending?**  
2 **A Well, IRS in Indianapolis is, but I don't know**  
3 **if it's coming out of the Cincinnati office or**  
4 **not, but --**  
5 **Q Is it an actual lawsuit or just a tax dispute?**  
6 **A Well, it's a --**  
7 **MR. SWOPE: It's my understanding**  
8 **that a lien was filed, and his**  
9 **accountant has it on administrative**  
10 **appeal and they have a hearing coming**  
11 **up May 9th.**  
12 **THE WITNESS: May 9th.**  
13 **MR. SWOPE: My understanding is**  
14 **they're contesting the amount and**  
15 **validity. That's what the**  
16 **administrative process is now.**  
17 **Q Do you have personal liability on that**  
18 **potentially?**  
19 **A Yes.**  
20 **Q Because of the payroll issues --**  
21 **A Yes.**  
22 **Q How many employees did DWA have that it**  
23 **potentially should have paid taxes on?**  
24 **A Well, it ranged from eight probably down to two**  
25 **at the end.**

Page 37

1 **Q Is DWA another company that should have been**  
2 **listed here earlier as a company that you**  
3 **owned?**  
4 **A Well, at that time it would have been, yes.**  
5 **Q And just for the record, that's Durham,**  
6 **Whitesell & Associates, the name of the**  
7 **company?**  
8 **A Yeah, yeah.**  
9 **Now, if I may, I'll clarify that, then. I**  
10 **was thinking of DWA and Durham Whitesell**  
11 **Leasing or D.W. Leasing and Champion and those**  
12 **being defunct, you know.**  
13 **Q D.W. Leasing is a company that you owned, but**  
14 **is it directly or through Obsidian that you**  
15 **owned it?**  
16 **A It was direct.**  
17 **Q How much of D.W. Leasing did you own or do you**  
18 **own?**  
19 **A I think it was in the 45 percent range,**  
20 **something like that.**  
21 **Q Who owns the balance of that company?**  
22 **A Well, Tim Durham, and then if I recall there**  
23 **was someone else that he had assigned some few**  
24 **shares to for working in it or something. I**  
25 **don't remember now.**

10 (Pages 34 to 37)

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| Page 38   | Page 40  |
|---|--|
| <p>1 Q Then what other defunct companies did you have<br/>2 a direct interest in?<br/>3 MR. PROAÑO: And I'm going to ask,<br/>4 Greg, that you supplement this with<br/>5 that list of companies, even if they're<br/>6 defunct. It's important to us, if<br/>7 that's okay with you.<br/>8 MR. SWOPE: Okay.<br/>9 A Well, you know, there was Obsidian Capital<br/>10 Company; Obsidian Capital Partners; Champion<br/>11 Trailer; Custom Trailer; John Evans<br/>12 Manufacturing; Durham, Hitchcock, Whitesell;<br/>13 Pyramid Coach, D.W. Trailer and Champion<br/>14 Trailer.<br/>15 Q Do you have in front of you the percentage<br/>16 ownership of those companies?<br/>17 A No.<br/>18 Q All right. Let's start with D.W. Trailer.<br/>19 Does it have any assets, that company?<br/>20 A Not that I'm aware of.<br/>21 Q When was the last time it was operating?<br/>22 A I don't recall specifically.<br/>23 Q How many years ago?<br/>24 Just give a --<br/>25 A Five. Four, five, six.</p>  | <p>1 fellow by the name of Tony Schlichte --<br/>2 Q Yeah, I have.<br/>3 A Was it you? Okay.<br/>4 -- and got our information on it. We<br/>5 provided whatever knowledge and data that we<br/>6 had.<br/>7 Q All right.<br/>8 A There's two buses located in Indianapolis that<br/>9 are on a storage lot, and --<br/>10 Q Sure.<br/>11 A I don't believe both of those are D.W. Leasing,<br/>12 though.<br/>13 Q Who would they be owned by; do you think?<br/>14 A Well, I think one of them is D.W. The other<br/>15 one might be Obsidian Leasing.<br/>16 Q All right. You're right.<br/>17 A Then there's one that's D.W. Leasing that's on<br/>18 a sales contract and the income is going into<br/>19 that checking account.<br/>20 Q In Mississippi?<br/>21 A Yes, and just yesterday I received a call from<br/>22 Tony saying that gentleman wants to buy out the<br/>23 balance of that --<br/>24 Q All right.<br/>25 A -- and he'll need somebody to sign off on it.</p>  |
| Page 39   | Page 41  |
| <p>1 Q It's been defunct for a long time?<br/>2 A Yes.<br/>3 Q Is Durham a part owner of that?<br/>4 A Yes.<br/>5 Q Anyone else part owner of that?<br/>6 A Not that I'm aware of.<br/>7 Q How about D.W. Leasing?<br/>8 A Well, that was in the end of the setup to lease<br/>9 buses to Pyramid Coach or others, and I think<br/>10 it was just Tim and I, but there might have<br/>11 been another small percentage partner in it.<br/>12 Q Is that operating, that company?<br/>13 A Well, up till the time that you people, in<br/>14 essence, have taken over the item it had buses,<br/>15 a couple of buses, I think, remaining in it<br/>16 that we were trying to sell.<br/>17 Q There's three buses, right?<br/>18 A It could be. I don't recall. I mean, it was<br/>19 in that group.<br/>20 Q Are those still out there, those three buses?<br/>21 A There's -- they are still out there. I don't<br/>22 know, without notes here, which is which.<br/>23 There was other buses involved --<br/>24 Q All right.<br/>25 A -- but one of your attorneys has spoke to a</p> | <p>1 Q What's the balance owed on that, the sales<br/>2 contract?<br/>3 A I just guesstimate, because I don't know. I'd<br/>4 say 24, 25,000, but I'm not a hundred percent<br/>5 sure.<br/>6 Q Who controls that Mississippi bank account?<br/>7 A Tony.<br/>8 Q In whose name is that account?<br/>9 A Well, D.W. Leasing, I believe.<br/>10 Q Who has the authority to release those funds to<br/>11 the trustee?<br/>12 A Well, you people came to Tim's attorney, I<br/>13 believe, and asked him for a signed release,<br/>14 and I don't know whether it was obtained or<br/>15 not. Jason was contacted, my attorney there in<br/>16 Indy, and -- possibly by you and asked for that<br/>17 release and we said we'd provide it, but have<br/>18 never been provided with any information to do<br/>19 so.<br/>20 Q Do you have the authority to sign a release to<br/>21 allow us to obtain those funds?<br/>22 A As far as I know, I would. I don't --<br/>23 Q You don't see why not?<br/>24 A I don't know why not.<br/>25 Q All right. And Mr. Schlichte has control of</p> |

11 (Pages 38 to 41)

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1 those funds and can send those to us?

2 A Yes.

3 Q Do you know what's the balance in that account?

4 A Estimate, because I don't know for sure. I'd

5 say 12, 13,000, 14, maybe. I don't know.

6 Q Is there anyone withdrawing any money from that

7 account?

8 A No. Not to my knowledge. I'm not a signer on

9 it, so I don't get any of the information.

10 Q You also mentioned you own part of Obsidian

11 Capital Company, Obsidian Capital Partners.

12 Was that the vehicle through which you had

13 shares of Obsidian Enterprises?

14 A Yes.

15 Q Do you know whether or not those are

16 functioning entities anymore?

17 A I don't know the legal status of them remaining

18 anymore. They're not anything that's occurring

19 other than with you people.

20 Q Champion Trailer, what was your stake of

21 ownership interest in that company?

22 A Probably 50 percent.

23 Q Who owned the balance of that?

24 A Tim Durham.

25 Q What's the status of that company?

Page 43

1 A It was closed in 2006, I believe.

2 Q Do you know why it was closed?

3 A We just ran out of business. We tried and the

4 business was good and eventually the business

5 just dried up.

6 Q How about -- was it Custom Trailer?

7 A Custom Trailer was acquired in about 1999 by

8 Durham and a fellow named Roe Hitchcock and

9 myself.

10 Q That was the subject of that lawsuit down

11 south, I think?

12 Do you recall that lawsuit by a bankruptcy

13 trustee against you guys?

14 A No, that wasn't that one.

15 Q That was a different case?

16 A Yes.

17 Q How about Custom Trailer?

18 What happened to that?

19 A Well, that's the one we're speaking of, Custom

20 Trailer. We sold that to an entity that Roe

21 Hitchcock was a part of. He and some other

22 investors bought it from us.

23 Q In what year?

24 A 2002, maybe.

25 Q Do you know what the sales price was?

Page 44

1 A No.

2 Q Do you know what the fate of that company has

3 been?

4 A Yeah, they defaulted on payments to us and to

5 their bank and the company failed then and we

6 -- Tim took back both that and John Evans,

7 which was a part of it, and the Custom Trailer

8 part was -- wasn't anything left of it.

9 Q When was that taken back, those two companies?

10 A I don't recall specifically. I'll say 2003

11 or '4. I don't recall specifically --

12 Q All right.

13 A -- but it was taken back.

14 The Evans portion was still an operating

15 entity and we eventually sold it to -- their

16 legal name I'm not sure, but it was Strict

17 Trailer, and I think their basis was out of

18 Pennsylvania, but I don't recall their

19 corporate legal name.

20 Q Do you remember how much you sold it for?

21 A No.

22 Q When was that transaction?

23 A Probably 2005 or something, thereabouts, '4

24 or '5.

25 Q What was your ownership in John Evans?

Page 45

1 A Well, I assume it was 50 percent when we sold

2 it.

3 Q You also mentioned a company called Durham,

4 Hitchcock, Whitesell?

5 A That was the one that owned and that bought

6 Custom Trailer and Evans Trailer and sold the

7 two to Mr. Hitchcock and other partners, and

8 that's the one that's involved in the Frontier

9 Insurance lawsuits.

10 Q Durham, Hitchcock, Whitesell, what kind of

11 company is that?

12 A It was just a limited liability company, as I

13 recall.

14 Q Do you know what state it was incorporated in?

15 A Probably Indiana.

16 Q When was the last time that functioned?

17 A Whenever the Strict Trailer -- or whenever

18 Custom and Evans was sold to Mr. Hitchcock.

19 Q That was it?

20 A Yes.

21 Now, the only remaining is that we're

22 being sued by this Frontier Insurance Company.

23 Q Correct.

24 A They're suing Durham, Hitchcock, Whitesell.

25 Q Now, they're not suing the company; they're

12 (Pages 42 to 45)

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| Page 46  | Page 48   |
|--|---|
| <p>1 suing you personally?</p> <p>2 <b>A Yes.</b></p> <p>3 <b>Q Because you had a personal indemnification</b></p> <p>4 <b>agreement?</b></p> <p>5 <b>A Yes.</b></p> <p>6 <b>Q We'll talk about that in a second.</b></p> <p>7 <b>A Yeah.</b></p> <p>8 <b>Q Finally, Pyramid Coach, you mentioned having a</b></p> <p>9 <b>ownership stake in that.</b></p> <p>10 <b>Now, what was your interest in that</b></p> <p>11 <b>company?</b></p> <p>12 <b>A I don't know the percentage in that.</b></p> <p>13 <b>Q Who else would have --</b></p> <p>14 <b>A Well, Tim Durham, and I think there was some</b></p> <p>15 <b>percentage to Jeff Osler and maybe Steve</b></p> <p>16 <b>Blazing.</b></p> <p>17 <b>Q How do you know Steve Blazing?</b></p> <p>18 <b>A Steve was a marketing separate company in</b></p> <p>19 <b>Indianapolis, had his own business and so</b></p> <p>20 <b>forth.</b></p> <p>21 <b>Q What was his name of his company?</b></p> <p>22 <b>A Steve Blazing.</b></p> <p>23 <b>Q What was the name of his company; do you</b></p> <p>24 <b>recall?</b></p> <p>25 <b>A I want to say it was Blazing and Company, but I</b></p>  | <p>1 <b>ownership that I know of --</b></p> <p>2 <b>Q All right.</b></p> <p>3 <b>A -- anywhere that I've got.</b></p> <p>4 <b>Q If that's the case, just make sure to note</b></p> <p>5 <b>that.</b></p> <p>6 <b>A Okay.</b></p> <p>7 <b>Q There's also a company out there that owns a</b></p> <p>8 <b>truck that has a TV in the back of the truck.</b></p> <p>9 <b>Do you know what I'm talking about?</b></p> <p>10 <b>A Yes.</b></p> <p>11 <b>Q What's that company?</b></p> <p>12 <b>A I think that company's name is GoVision.</b></p> <p>13 <b>Q Who owns that company?</b></p> <p>14 <b>A It's an independent, separate company. I don't</b></p> <p>15 <b>know who owns it. It's not anything affiliated</b></p> <p>16 <b>with us.</b></p> <p>17 <b>Q What's the relationship between GoVision and</b></p> <p>18 <b>the Obsidian companies?</b></p> <p>19 <b>A Back when GoVision came to Champion Trailer to</b></p> <p>20 <b>build a trailer to transport their video</b></p> <p>21 <b>screens, which is one of these gigantic video</b></p> <p>22 <b>screens, Champion built or modified the</b></p> <p>23 <b>trailer, I think it was, to place their video</b></p> <p>24 <b>screens and video equipment on.</b></p> <p>25 <b>Q So was the video screen ever owned by Champion?</b></p> |
| Page 47  | Page 49   |
| <p>1 <b>don't know for sure.</b></p> <p>2 <b>Q All right. And you think Durham and Blazing</b></p> <p>3 <b>had an interest in that Pyramid Coach as well?</b></p> <p>4 <b>A Well, I know Durham did, but I think Osler and</b></p> <p>5 <b>Blazing had some interest in it.</b></p> <p>6 <b>Q What was Pyramid Coach's business?</b></p> <p>7 <b>A They were a management operating company for</b></p> <p>8 <b>operating buses that transported primarily</b></p> <p>9 <b>celebrities, entertainers.</b></p> <p>10 <b>Q Did it own any assets or was it just a</b></p> <p>11 <b>management company?</b></p> <p>12 <b>A Well, I assume it was mostly a management</b></p> <p>13 <b>company. If they had any assets, it was</b></p> <p>14 <b>probably office furniture, maybe some shop</b></p> <p>15 <b>equipment, something.</b></p> <p>16 <b>Q When was the last time it operated?</b></p> <p>17 <b>A Probably 2007, maybe.</b></p> <p>18 <b>Q I'm going to ask you if you could go back to</b></p> <p>19 <b>your personal financial statement, maybe make</b></p> <p>20 <b>another note.</b></p> <p>21 <b>What I'd like to do is have you list all</b></p> <p>22 <b>the companies that you've owned over the last</b></p> <p>23 <b>10 years and your interest in those. If their</b></p> <p>24 <b>value is zero now, just put zero.</b></p> <p>25 <b>A Yeah. I don't have record of the percentage of</b></p> | <p>1 <b>A No.</b></p> <p>2 <b>Q All right. Was GoVision paying any of the</b></p> <p>3 <b>Obsidian companies anything for that?</b></p> <p>4 <b>A No. I believe they had a lease with -- I</b></p> <p>5 <b>didn't have anything to do with this, but I</b></p> <p>6 <b>think it was with Point Leasing.</b></p> <p>7 <b>Q Correct.</b></p> <p>8 <b>A Yeah.</b></p> <p>9 <b>Q Do you know if that's still being paid, that</b></p> <p>10 <b>lease?</b></p> <p>11 <b>A No; it's been paid off.</b></p> <p>12 <b>Q As of when?</b></p> <p>13 <b>A The last I knew about it was probably six,</b></p> <p>14 <b>eight months ago.</b></p> <p>15 <b>Q All right.</b></p> <p>16 <b>A They have contacted myself and others, trying</b></p> <p>17 <b>to get the title cleared on the vehicle.</b></p> <p>18 <b>Q Is that the trailer you're talking about?</b></p> <p>19 <b>A Yeah, and there was a tractor connected with</b></p> <p>20 <b>that, I believe.</b></p> <p>21 <b>Q Who actually owned that tractor and that</b></p> <p>22 <b>trailer?</b></p> <p>23 <b>A Well, there was a leasing company in Wisconsin</b></p> <p>24 <b>that I believe actually had the equipment some</b></p> <p>25 <b>way.</b></p>  |

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|   |   |
|---|---|
| <p style="text-align: right;">Page 50</p> <p>1 Q Who owns the title of the tractor and trailer?</p> <p>2 A <b>Well, Point Leasing, I suppose.</b></p> <p>3 Q Is it Point Leasing?</p> <p>4 A <b>I don't really know for sure, but I think</b></p> <p>5 <b>that's it.</b></p> <p>6 Q Who owns Point Leasing?</p> <p>7 A <b>As far as I know, it's strictly Tim Durham.</b></p> <p>8 Q Did you know where any of those funds paid by</p> <p>9 GoVision to Point Leasing went to?</p> <p>10 A <b>I know some went direct to Tim Durham, yes.</b></p> <p>11 Q Do you know where the other funds went to?</p> <p>12 A <b>No. I mean --</b></p> <p>13 Q All right.</p> <p>14 A <b>-- Point Leasing, when Point Leasing had an</b></p> <p>15 <b>account.</b></p> <p>16 Q It wasn't any funds to you?</p> <p>17 A <b>No.</b></p> <p>18 Q How much were they paid a month?</p> <p>19 A <b>I don't know.</b></p> <p>20 Q Any other companies that you've had any</p> <p>21 ownership interest in the last 10 years that</p> <p>22 you can recall?</p> <p>23 A <b>That's the best I can recall at present.</b></p> <p>24 Q All right. Well, what I'll do is I'll get the</p> <p>25 updated list, because that is important for</p> | <p style="text-align: right;">Page 52</p> <p>1 A <b>Steve Plopper.</b></p> <p>2 Q And you're paying him for that representation?</p> <p>3 A <b>Yes, I am.</b></p> <p>4 Q Is Mr. Durham and Mr. Hitchcock also</p> <p>5 represented by the name lawyers?</p> <p>6 A <b>Yes.</b></p> <p>7 Q Are you paying all the bills for all three</p> <p>8 defendants?</p> <p>9 A <b>No.</b></p> <p>10 Q Are they being shared among the defendants?</p> <p>11 A <b>To the best of my knowledge, they were asked.</b></p> <p>12 <b>I don't know who, other than myself, has paid.</b></p> <p>13 Q All right. But Mr. Plopper is not doing it</p> <p>14 pro bono for you?</p> <p>15 A <b>No. He did for many years, but now he wants</b></p> <p>16 <b>paid.</b></p> <p>17 Q When you say "he did for many years," on this</p> <p>18 specific case, you mean?</p> <p>19 A <b>Yes.</b></p> <p>20 Q If that case were unsuccessful, if you were</p> <p>21 unsuccessful on appeal and were required to</p> <p>22 post the bond, would you declare bankruptcy at</p> <p>23 that point?</p> <p>24 A <b>I assume I wouldn't have any alternative but</b></p> <p>25 <b>for that.</b></p>  |
| <p style="text-align: right;">Page 51</p> <p>1 us --</p> <p>2 A <b>Okay.</b></p> <p>3 Q -- and if there's issues that can be answered</p> <p>4 over email, we'll follow up on that.</p> <p>5 A <b>Sure.</b></p> <p>6 Q Going back to the "Notes" section of your</p> <p>7 statement, this case that's listed as number</p> <p>8 two in the lawsuits against Mr. Durham,</p> <p>9 Mr. Hitchcock and you I understand is appealed</p> <p>10 at the Seventh Circuit; is that correct?</p> <p>11 A <b>I believe that's correct.</b></p> <p>12 Q Have you had to post that surety bond of 1.5</p> <p>13 million or did you get a bond to stay that?</p> <p>14 A <b>No; we've filed the paperwork to say we didn't</b></p> <p>15 <b>want to pay it.</b></p> <p>16 Q All right. Did they allow you not to post the</p> <p>17 bond pending the appeal?</p> <p>18 A <b>That's correct.</b></p> <p>19 Q Do you have personal liability for that bond?</p> <p>20 A <b>Yes.</b></p> <p>21 Q Is it only a portion of the 1.5 million?</p> <p>22 A <b>It's joint and severally.</b></p> <p>23 Q Joint and several liability?</p> <p>24 A <b>Yes.</b></p> <p>25 Q Who's your counsel in that case?</p>                                 | <p style="text-align: right;">Page 53</p> <p>1 Q Apart from the lawsuits that are pending</p> <p>2 against you related to the Fair Finance</p> <p>3 bankruptcy and this lawsuit that's pending in</p> <p>4 the Seventh District in Indiana and the IRS tax</p> <p>5 lien, do you have any other litigation out</p> <p>6 there against you?</p> <p>7 A <b>I have a demand payment letter from PNC Bank</b></p> <p>8 <b>that's not been filed as a suit. It's relative</b></p> <p>9 <b>to one of the buses that you had mentioned.</b></p> <p>10 Q When did you get that letter from PNC?</p> <p>11 A <b>Over a year ago, maybe.</b></p> <p>12 Q And what has PNC decided to do with that</p> <p>13 letter?</p> <p>14 A <b>Well, they had agreed to accept a reduction in</b></p> <p>15 <b>the obligation down to 70,000 if we could find</b></p> <p>16 <b>a buyer, and they had then -- I believe they</b></p> <p>17 <b>agreed to release the bus if we could pay them</b></p> <p>18 <b>50 and then pay them the balance of the 20.</b></p> <p>19 Q Yeah.</p> <p>20 Are you personally obligated on that note?</p> <p>21 A <b>Yes.</b></p> <p>22 Q Who is the principal signer of the promissory</p> <p>23 note.</p> <p>24 A <b>Myself and Tim Durham.</b></p> <p>25 Q Both of you personally?</p> |

14 (Pages 50 to 53)

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1 A Yes.  
2 Q It wasn't through a company you loaned this  
3 money --  
4 A Well --  
5 Q -- or borrowed it?  
6 A No; it was through -- I mean, they wanted  
7 personal guarantees.  
8 Q These are personal guarantees securing a  
9 promissory note made by one of the other  
10 companies?  
11 A I think they're just personal guarantees. I  
12 don't know that. They're personal guarantees.  
13 I know that.  
14 Q I see.  
15 What's the status of that negotiation with  
16 PNC?  
17 A I've never spoke to them. The attorney, Gary  
18 Sallee, which I think you've had communication  
19 with, has handled any of the correspondence,  
20 and I don't know of any correspondence for the  
21 last multiple months.  
22 Q Is that bus -- that's the one in Indianapolis?  
23 A Yes.  
24 Q What's the status of the efforts to sell that  
25 bus?

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1 A Well, I tried diligently to sell the buses,  
2 mailings to limo companies, bus companies,  
3 emails, texts, everything, for a year and a  
4 half, and finally I had one fellow interested  
5 in buying two buses for a total of \$90,000.  
6 The issue was finding -- getting the title  
7 to one of the buses that was in Mississippi.  
8 Mr. Sallee contacted the State of Mississippi  
9 and found that the company was not in good  
10 standing, I guess is the answer they gave him,  
11 and that we had to file paperwork and tax  
12 returns. So we finally got that filed and we  
13 got one title for the bus -- a bus in South  
14 Dakota, and I don't know which company right  
15 offhand that that one is.  
16 Q Sure.  
17 A The title for the bus that I needed to match up  
18 with the PNC one, I sent checks down there  
19 twice on that bus, \$39 apiece, to request a  
20 title. The last information from them was that  
21 they had sent the title to Old National Bank in  
22 Evansville. I inquired with him and he said  
23 "We didn't receive it," and when I was in that  
24 -- working that and so forth you people got  
25 involved, and I think I called here one time

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1 and tried to leave a word with possibly you --  
2 I apologize, I don't know --  
3 Q You did, yeah.  
4 A -- of the prospective buyer and I informed him  
5 of your contact.  
6 Q I did speak with the prospective buyer, yeah,  
7 but I haven't heard back from him.  
8 A Oh, haven't you?  
9 Q No.  
10 A His big concern was getting both titles, you  
11 know.  
12 Q Sure.  
13 PNC has you personally on that one bus?  
14 A On the one bus, yes.  
15 Q On the one?  
16 Do they not have the original title?  
17 A No; they have the title on that one.  
18 Q On that one?  
19 A It was the other bus that was free and clear  
20 sitting down there on that storage lot in  
21 Indianapolis --  
22 Q All right.  
23 A -- that if we could have got that title the two  
24 of them would have brought the 90,000 and we  
25 could have paid off PNC.

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1 Q The bus in the Dakotas, that's free and clear  
2 as well?  
3 A Yes.  
4 Q And what's the fate of that or the status of  
5 that bus?  
6 A We had at one point a gentleman interested in  
7 buying that bus and we needed to obtain the  
8 title and that was the title that I did finally  
9 get from the State of Mississippi, but, again,  
10 everything kind of come to a halt.  
11 Q And he hasn't contacted you about --  
12 A Not -- no. Tony Schlichte had pretty much been  
13 the contact with that gentleman there --  
14 Q All right.  
15 A -- and the other fellow on the contract in  
16 Indianapolis and I didn't have any involvement  
17 with them, but to my knowledge he's not  
18 re-contacted him or anything.  
19 Q If you look down at the note three of your  
20 Notes to Financial Statement --  
21 A Yes.  
22 Q -- paragraph two notes "A revocable living  
23 trust."  
24 Is that known as the Julia L. Whitesell  
25 Living Trust?

15 (Pages 54 to 57)

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1 A Yes.  
2 Q Do you have a trust in your name?  
3 A Yes.  
4 Q Is it called the Terry G. Whitesell Living  
5 Trust?  
6 A Yes.  
7 Q Is that also a revocable living trust?  
8 A Yes.  
9 Q Are there any assets in that trust?  
10 A The only thing that would be in it is those  
11 items that I've listed as the couple of cars  
12 and the pontoon boat and so forth. Those are  
13 in my name.  
14 They're not in a trust. I'm sorry.  
15 Q Yeah, that's what I'm trying to --  
16 A Yeah, those are in my name; not in the trust.  
17 Q What I would like you to do, with your  
18 counsel's assistance, is update the first page  
19 of the Personal Financial Statement with the  
20 name of that trust.  
21 Are you a beneficiary of that revocable  
22 trust, the one in your name, Terry G. Whitesell  
23 Revocable Trust?  
24 A I don't know what you mean by "a beneficiary."  
25 My wife would be a beneficiary and then my

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1 children, in her death.  
2 Q I see.  
3 Are you the, I guess, grantor of that  
4 trust?  
5 A I suppose.  
6 Q All right. If you could just go back to your  
7 financial statement, page one, and just update  
8 that.  
9 You say you're not a grantor of a trust,  
10 and you might want to just clarify that.  
11 A Well, my interpretation of your question was  
12 somebody going to give me something in a trust  
13 outside of just my wife's and I.  
14 Q Sure.  
15 A That was my interpretation.  
16 Q That's fine, and that's why we're here today.  
17 It doesn't matter whether or not there is no  
18 assets in that trust. Just go ahead and  
19 reflect that.  
20 MR. PROAÑO: Do you see that,  
21 Greg?  
22 MR. SWOPE: Uh-huh.  
23 MR. PROAÑO: We could just amend  
24 that.  
25 MR. SWOPE: Sure.

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1 Q Does your trust, in your name, have any assets?  
2 A Not that I'm aware of at all.  
3 Q All right.  
4 MR. PROAÑO: Greg, I'm going to  
5 ask, if you guys are willing, to give  
6 us copies of those two trusts, the two  
7 Whitesells'.  
8 MR. SWOPE: Yeah, we'll get them.  
9 Q But your wife's trust does have assets; is that  
10 correct?  
11 A Yes.  
12 Q Are you the beneficiary of that trust?  
13 A I suppose in her death, prior to mine, I would  
14 be, yes.  
15 Q What assets does her trust have?  
16 This is the Julia L. Whitesell Living  
17 Trust.  
18 A Yes.  
19 Well, the two homes, the bank accounts. I  
20 think her car is in that name, too.  
21 Q The bank accounts are listed on  
22 "Note 5-Assets"?  
23 A I believe so.  
24 Q Do you know when those bank accounts were put  
25 into the name of the trust?

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1 A Well, initially she was banking at Chase, and  
2 they were put in at that time that the Chase --  
3 or that the trust was established, in 2000.  
4 Then she -- when we moved, I guess it was --  
5 well, at some point in there she found that  
6 Fifth Third was a more convenient bank to her  
7 and so she changed them. I don't know what  
8 year she put those into that.  
9 Q I guess I'm trying to get a sense of whether or  
10 not it was recent that --  
11 A No; it was probably five years ago, I guess, or  
12 longer. I don't know.  
13 Q That the bank accounts were put in the name of  
14 the trust?  
15 A Yes.  
16 Q Is all your banking done through accounts in  
17 the name of the trust?  
18 A She -- all of them that are relative to our  
19 family and the house and all that.  
20 As I've indicated, I have two bank  
21 accounts that I use for paying expenses out of  
22 it. You know, if I get expense funds in from  
23 United or something.  
24 Q But those aren't in the name of the trust;  
25 they're in your personal name?

16 (Pages 58 to 61)

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1 A Yes.  
2 Q All right. Let's just back up a little bit.  
3 You had mentioned that the Naples property  
4 was transferred to the trust in 2010?  
5 A Yes.  
6 Q Which attorney was involved in that?  
7 A There's an attorney in Florida. I think his  
8 name is Bailey, Dan Bailey, I believe.  
9 Q And what --  
10 A He had been the original attorney when we  
11 bought the property.  
12 Q He's in Naples, Florida?  
13 A Yes.  
14 Q How about your primary home in Indianapolis?  
15 When was that transferred to your wife's  
16 trust?  
17 A 2000, when we set up the trust.  
18 Q That was put in the trust in 2000?  
19 A Yes.  
20 Q In Note 5 there on this sheet it lists a bank  
21 account in the name of TGW Consulting.  
22 A Yeah.  
23 Q Why is there a balance in that account?  
24 A Because I use it. Just, again, it's a more  
25 convenient bill-paying process through Fifth

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1 Third than what Chase was. Originally I used  
2 Chase, but Fifth Third, about a year ago or  
3 sometime like that, introduced some new  
4 process. Pretty handy deal. I paid my credit  
5 cards on travel and stuff like that through  
6 that.  
7 Q TGW is not operating, though?  
8 A No.  
9 Q You just used the account?  
10 A Yeah. It's in my name, too, you know.  
11 Q At the top of that same page is a few vehicles.  
12 A And the bottom of the previous page.  
13 Q And the bottom of the previous page as well,  
14 correct. Thank you.  
15 MR. SWOPE: Actually, Terry, you  
16 need to be looking at this. Match up  
17 the pages.  
18 THE WITNESS: Oh, I see. Okay. I  
19 was looking at the older.  
20 Q All right. So you've got a 1997 Jaguar, 2002  
21 Lincoln Town Car, 2008 Toyota, 1999 pontoon  
22 boat.  
23 You keep that pontoon boat at your  
24 Indianapolis residence?  
25 A Yes.

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1 Q In the last two years have you sold any  
2 vehicles?  
3 A Yes.  
4 Q Which ones did you sell?  
5 A I sold a 2001 Ford LTD.  
6 Q Is that a model?  
7 A Yeah, Ford. Like Ford LTD. Ford? Yeah.  
8 Q How much did you sell that for?  
9 A I think I got \$2,800.  
10 Q What else have you sold in the last two years,  
11 vehicles?  
12 A I don't -- in the last two years?  
13 As far as I know, that's it.  
14 I had a -- probably -- I don't know what  
15 year it was. I had a Chrysler 300, and I  
16 probably sold it in 2009. I'm speculating.  
17 That's a guess.  
18 Q All right. Do you remember how much you sold  
19 that for?  
20 A About 16,000.  
21 Q Did it have a loan on it?  
22 A Yes.  
23 Q How about any boats in the last, I guess, two  
24 or three years?  
25 Any boats?

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1 A No.  
2 Q Any airplanes?  
3 A No. I had a pon -- or a Sea-Doo that blew up  
4 and the insurance reimbursed me \$2,000, I  
5 think, a couple years ago.  
6 Q In the last three or four years have you sold  
7 anything of value over 5,000, other than the  
8 assets you've mentioned?  
9 A No.  
10 Q All right. Going back to Note 5 there, it  
11 lists the accounts in your name of your wife's  
12 trust --  
13 A Uh-huh.  
14 Q -- and it gives varying balances between zero  
15 and 13,000 and such.  
16 What are the purposes of each one of those  
17 accounts?  
18 A Well, that first account --  
19 Q The [REDACTED]?  
20 A Yes.  
21 As I understand, when we get paychecks, we  
22 get pensions and Social Security, they're  
23 direct deposited in that account. She uses  
24 that account, then, to pay general bills on,  
25 you know, gas, heat, those kind of things, all

17 (Pages 62 to 65)

Page 66

1 the general bills.  
2 Q Mortgage?  
3 A No, I don't think she uses it for the mortgage.  
4 My wife is an old German that you're going  
5 to have the money here and you're going to have  
6 the money here and I know where it's at. So  
7 she moves the money for the condo out of that  
8 account into a condo account. She moves  
9 the money for the house in Indianapolis out of  
10 the account into a separate account, and  
11 she uses those to, you know, provide the funds  
12 for the mortgage, for the insurance, for the  
13 property tax, those things --  
14 Q All right.  
15 A -- but that's her format of keeping the monies.  
16 Q Which of those and , which one is condo,  
17 which one is house; do you know?  
18 I'm assuming that those are one of the  
19 two.  
20 A I don't know that I know.  
21 I can find that information --  
22 Q All right.  
23 A -- for you from her, but she handles it and  
24 pays all the bills --  
25 Q All right.

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1 A -- and I really don't know, but I'm just  
2 looking here to see if I --  
3 MR. PROAÑO: While he's looking,  
4 Greg, if you could provide the Merrill  
5 Lynch IRA statements, the most recent  
6 ones, that would be helpful.  
7 MR. SWOPE: (Nodding  
8 affirmatively.)  
9 MR. PROAÑO: And then copies of  
10 the last statements for all those bank  
11 accounts.  
12 MR. SWOPE: (Nodding  
13 affirmatively.)  
14 A No, I'm sorry, I can't tell you right offhand  
15 which accounts she's got those in.  
16 Q That's fine. That's okay. I've got the  
17 general idea. Your wife is the one who manages  
18 the finances.  
19 A Yes. She barred me from it years ago.  
20 Q I'm already barred.  
21 Now, does your wife own any assets other  
22 than those assets listed in this statement?  
23 A To my knowledge, not -- I think we tried to  
24 list everything. I mean, the things that are  
25 in her trust are, you know, the houses and the

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1 bank accounts and the car, and then personal  
2 property I assume is in there, you know.  
3 Q You list jewelry of about -- on the last note,  
4 on the last page of this statement.  
5 A Yeah.  
6 Q You list jewelry of about 16,725.  
7 What type of jewelry are you referring to  
8 there?  
9 A She's got her wedding ring that she had  
10 modified over the years, taking other little  
11 diamonds and putting them together.  
12 Q Yeah.  
13 A She's got some chains or pendants or something  
14 like that, probably 10 different items that are  
15 making up that accumulation.  
16 Q All right.  
17 A I've got this ring that's on there and that  
18 bracelet that's in there.  
19 Q Any watches of any value?  
20 A No. That's not -- I don't know what that watch  
21 is even, but it's not insured.  
22 Q Did Durham ever give you Rolexes?  
23 A Yes, he did.  
24 Q How many?  
25 A Two over time, I think it was.

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1 Q What happened with those?  
2 A I sold them.  
3 Q How long ago?  
4 A Probably three or four years ago.  
5 Q Do you remember how much you got for them?  
6 A Six thousand dollars.  
7 Q Each?  
8 A No; total.  
9 Q Sold them at once?  
10 A Yes.  
11 Q To whom?  
12 A It was a firm in Indianapolis, some jewelry  
13 company in Indianapolis, over on the west side.  
14 Q And that was pretty common, for Durham to give  
15 out Rolexes like that?  
16 A Well, he gave them to some of them. One was  
17 after he sold a company back in '99 or  
18 something like that, he gave it to some of us,  
19 and the other one he gave to us later on.  
20 I don't know who else he gave one to.  
21 Q What else did you receive of value from Tim  
22 Durham?  
23 A Probably in 2007 or '8, maybe.  
24 Q What would that have been?  
25 A A shared barrel of whiskey that he give me and

18 (Pages 66 to 69)

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1 another guy that both liked Jack Daniel's.  
2 Q A literal barrel of whiskey?  
3 A Well, it wasn't. I mean, we got a barrel plus  
4 the bottled bottles out of it, that came out of  
5 it.  
6 Q You mentioned art work here.  
7 Was that Peter Max or anyone else?  
8 A No; it's Bill Mack.  
9 Q M-a-c-k?  
10 A M-a-c-k.  
11 It's a raised relief sculpture in a frame,  
12 beautiful. I'd love to sell it to you. I've  
13 been trying to sell it for years.  
14 Q Do you have it listed somewhere?  
15 A You mean a website or something?  
16 Q Yes.  
17 A I did have. I took it off because we didn't  
18 get any inquiries.  
19 Q And is this just your guess of what that is,  
20 3,900?  
21 A No; I paid 3,900 for it.  
22 Q How long ago was that?  
23 A When I bought it?  
24 Q Yes.  
25 A Probably 20002 or something like that.

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1 Q And you keep that in Indianapolis?  
2 A Yes.  
3 It's all boxed up, in case you're ready  
4 for it.  
5 Q Fur coat, is that your wife's?  
6 A Yes.  
7 Q How long ago was that bought?  
8 A I don't have any idea.  
9 Q The furniture of 60,000, where did you get that  
10 value?  
11 A She went around the house and estimated. She  
12 keeps records pretty extensively, so she had  
13 records on just about everything that we  
14 bought, and she went around the house and  
15 listed those, wrote them down, looked up her  
16 receipts, and that's the number she came up  
17 with.  
18 Q Is there anything in that collection of  
19 furniture that's unusual, other than couches  
20 and chairs, things like that?  
21 A No, not really. There is no antiques. We're  
22 not into antiques.  
23 Q Are you into coins or --  
24 A No.  
25 Q -- old guns?

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1 A There's a wall mural, you know, but that's part  
2 of the house now and so forth. But, no, we  
3 don't have any guns.  
4 Q All right.  
5 A I don't know of anything. She's never -- any  
6 time I've started collecting things and said "I  
7 want to put this away for memorabilia," she  
8 said "It's junk," you know, "Get rid of it."  
9 Q You also listed miscellaneous items of 32,000.  
10 A It's junk, you know. I mean, she bought items  
11 like pillows and all that kind of stuff. We  
12 didn't know how to handle that. I mean, we put  
13 down a number there as best we could.  
14 Q And that wouldn't be furniture; it would just  
15 be knick-knacks?  
16 A Odds and ends.  
17 Q And that would be kept in either Naples or --  
18 A Yeah, it's a combination of the two.  
19 Q It's a combination of the two?  
20 A Yeah.  
21 Q All right.  
22 MR. PROAÑO: Why don't we just  
23 take a five-minute break and I'll  
24 figure out whether we're done here and  
25 we can move on to our discussions?

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1 MR. SWOPE: Okay.  
2 ----  
3 (Recess taken.)  
4 ----  
5 Q Mr. Whitesell, I just have three follow-up  
6 things. One is, with your counsel's  
7 permission, we'd like to request the last three  
8 years of tax returns.  
9 Have you done your 2011 yet?  
10 MR. SWOPE: Yes.  
11 Q All right. 2009, 2010, 2011.  
12 And then related to the tax return  
13 question, what was the capital loss that you  
14 are deducting for this year that your  
15 accountants have said you should deduct for  
16 your federal taxes?  
17 A The dollar amount or something?  
18 Q What's the dollar amount and what's it related  
19 to?  
20 A I don't recall a dollar amount, but it's loss  
21 carry-forwards from the investments in these  
22 companies.  
23 Q So this is losses from the Obsidian-related  
24 companies?  
25 A Yes.

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1 Q Anything else related to that?

2 A No.

3 There would be a tax return for a year, I

4 guess, for TGW Consulting and I don't think I

5 paid any tax other than state or something. I

6 don't remember.

7 Q And then do you claim any theft loss on -- are

8 you going to claim any theft loss for this year

9 or previous years?

10 A Theft?

11 Q Correct.

12 A I --

13 Q Or is this just losses related to the decline

14 in --

15 A Yeah, I think that's just what it was. Not

16 theft.

17 Q The final question I have is: You had

18 mentioned a law firm that is representing

19 Obsidian Enterprises. What was the name of

20 that law firm again?

21 You said they told you "Hey, we're here

22 for you if you need the help."

23 A It started out that Bingham, McHale represented

24 employees of Obsidian, then when the legal

25 challenges came in to Tim they said they could

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1 no longer represent any of us, and so there

2 was --

3 Q Because they're representing Tim only?

4 A Well, they dropped Tim as well --

5 Q All right.

6 A -- and they said they didn't want to go any

7 further. I'm not sure whether it was money or

8 just they didn't want to do it. So they set up

9 an arrangement with Borland -- B-o-r-l-a-n-d --

10 & G-a-e-r-t-e in Indianapolis to represent

11 Obsidian employees in noncriminal cases, I

12 guess.

13 Q Who is paying that bill?

14 A Well, it was a flat payment of \$25,000 to them.

15 Q By?

16 A By Obsidian or by -- well, it was by Obsidian,

17 but it was from funds, I guess, that they had

18 received from their insurance directors and

19 officers liability insurance, if I recall.

20 Q All right. Was the payment actually made by

21 Obsidian Enterprises or another entity to this

22 law firm?

23 A I think that the check was made from Obsidian,

24 and I don't know if it was made to them direct

25 or if it was made to -- I assume it was.

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1 Q To the law firm?

2 A Yeah, it was sent to -- it was sent to that

3 Kiefer at Bingham, McHale, and he handled the

4 transfer setup.

5 Q So the actual \$25,000 payment went to Bingham,

6 McHale and Bingham, McHale would have sent that

7 on --

8 A Yeah.

9 Q -- to that other law firm?

10 A Right.

11 Q And is it your understand that you're entitled

12 to a share of that \$25,000 advance payment if

13 you need it?

14 A Well, if it were within the scope of what

15 they're set up to represent us.

16 Q Have you had any need to have their

17 representation on that?

18 A No. I don't know if others have or have not.

19 Q All right. Then do you know if there's any

20 other payments made to this law firm to support

21 this work?

22 A No. To my knowledge, they agreed to take it

23 for \$25,000 total.

24 Q Flat fee?

25 A Yeah.

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1 Q All right.

2 MR. PROAÑO: I don't think I have

3 any further questions, unless you do,

4 Brady.

5 MR. DOUTHETT: No.

6 MR. PROAÑO: All right. We can go

7 off the record.

8 Thank you.

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TERRY G. WHITESELL

Date

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The State of Ohio, )  
                  ) SS:  
County of Cuyahoga.)

CERTIFICATE

I, Debra A. Butzer, a Notary Public  
within and for the State aforesaid, duly  
commissioned and qualified, do hereby certify  
that the above-named TERRY G. WHITESELL was  
by me, before the giving of his deposition,  
first duly sworn to testify the truth, the  
whole truth and nothing but the truth;

That the deposition as above set forth was  
reduced to writing by me by means of  
stenotypy, and was later transcribed upon a  
computer by me;

That the said deposition was taken in all  
respects pursuant to the stipulations of  
counsel herein contained; that the foregoing  
is the deposition given at said time and place  
by said TERRY G. WHITESELL;

That I am not a relative or attorney of  
either party or otherwise interested in the  
event of this action.

IN WITNESS WHEREOF, I hereunto set my hand  
and seal of office, at Cleveland, Ohio this  
23rd day of May, A.D. 2012.

Debra A. Butzer, Notary Public  
ProFile Court Reporting  
1500 The Leader Building  
526 Superior Avenue, East  
Cleveland, Ohio 44114  
(216) 592-9999

My Commission expires:  
January 8, 2013

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### CERTIFICATE OF SERVICE

A copy of the foregoing has been served via ECF or regular, U.S. Mail, on August 3, 2012, on the attached service list.

/s/ David Proaño

David Proaño

*Counsel for the Trustee*

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IT IS SO ORDERED.

Dated: 02:39 PM August 21 2012

  
MARILYN SHEA-STONUM *JS*  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION

|                      |   |                           |
|----------------------|---|---------------------------|
| In re:               | ) | Case No. 10-50494         |
|                      | ) |                           |
| FAIR FINANCE COMPANY | ) | Chapter 7                 |
|                      | ) |                           |
| Debtor.              | ) | Judge Marilyn Shea-Stonum |
|                      | ) |                           |

**ORDER APPROVING COMPROMISE OF CLAIMS BY THE TRUSTEE  
AGAINST TERRY WHITESELL AND JULIA WHITESELL**

This matter having been presented to the Court upon the Motion of Trustee to Approve Compromise With Terry Whitesell and Julia Whitesell (the "**Motion**"),<sup>1</sup> and upon the Memorandum of Law In Support of the Motion; and the Court having considered the Motion, and it appearing that the compromise is in the best interest of the Debtor's estate and creditors, and after due deliberation and consideration of the facts and circumstances therein:

It is hereby **ORDERED, ADJUDGED, AND DECREED** as follows:

1. The Motion is **GRANTED** in its entirety.
2. The notice of the Motion was adequate and sufficient under the circumstances.
3. The compromise is hereby approved in accordance with the terms and conditions set

<sup>1</sup> Terms capitalized but not defined herein shall have the meanings ascribed to them in the Motion and the Memorandum of Law in Support of the Motion.



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forth in the Settlement Agreement attached to the Motion.

4. The parties are hereby authorized and directed, without further order of this Court, to take all actions necessary or incidental to performance under the Settlement Agreement and to implement and effectuate this Order.

5. The Court shall retain jurisdiction with respect to all matters arising from or related to the Settlement Agreement and the implementation of this Order.

IT IS SO ORDERED.

###

Submitted by,

/s/ David Proaño

Kelly S. Burgan (0073649)

David Proaño (0078838)

Joseph M. Esmont (0084322)

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# **EXHIBIT E**

IT IS SO ORDERED.

Dated: 01:18 PM October 24 2013



**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

|                         |   |                           |
|-------------------------|---|---------------------------|
| IN RE:                  | ) | CASE NO. 10-50494         |
|                         | ) |                           |
| Fair Finance Company,   | ) | CHAPTER 7                 |
| DEBTOR.                 | ) |                           |
|                         | ) | JUDGE MARILYN SHEA-STONUM |
|                         | ) |                           |
| Brian A. Bash, Trustee, | ) | ADVERSARY NO. 10-5043     |
| PLAINTIFF,              | ) |                           |
|                         | ) |                           |
| vs.                     | ) |                           |
|                         | ) | REPORT AND RECOMMENDATION |
| Daniel S. Laikin,       | ) | AFTER TRIAL               |
| DEFENDANT.              | ) |                           |

This matter comes before the Court on the complaint of Brian Bash, Trustee (“Plaintiff” or “Trustee”), primarily alleging breach of a note made by Daniel Laikin (“Defendant” or “Laikin”) in favor of DC Investments, LLC (“DCI”), the grandparent company of the Debtor, Fair Finance Company (“Fair Finance”), and seeking payment of all amounts due under the note. Breaden Douthett, Michael Montgomery and Alexis Osburn appeared at trial as counsel for the Plaintiff. Mark Phillips and Lori Welker appeared at trial as counsel for Defendant. During the trial, the Court received evidence in the form of Stipulations [Adv. Pro. Dkt. # 79],<sup>1</sup> exhibits and

<sup>1</sup> In light of the Sanctions Order (defined below), certain Stipulations were excluded from the trial record. Those



testimony from Laikin, Howard Klein (“Klein”), Jeffrey Osler (“Osler”), Eileen Hostetler (“Hostetler”), Mark Byers, John Weingardt (“Weingardt”), and the Trustee and by designation of deposition transcripts, the testimony of Jeffrey Birk, Edward Morris and Edward J. Morris, P.C., Gary Sallee (“Sallee”), Timothy S. Durham (“Durham”), Robert Laikin, Joseph Poluka (“Poluka”), Laurence S. Shtasel (“Shtasel”), Corazon Victoriano, and Laikin. At the conclusion of closing arguments, the Court took the matter under advisement.

### **Jurisdiction**

This proceeding arises in a case referred to this Court by the Standing Order of Reference entered in this District on April 4, 2012. This Court has jurisdiction to hear this adversary proceeding. 28 U.S.C. § 1334(b), *Waldman v. Stone*, 698 F.3d 910, 916 (6<sup>th</sup> Cir. 2012). This is not a core proceeding<sup>2</sup> although the issues raised in the complaint are related to the Fair Finance bankruptcy case.<sup>3</sup> *Waldman v. Stone*, 698 F.3d at 921-22; *Lowenbraun v. Canary*, 453 F.3d 314, 320 (6<sup>th</sup> Cir. 2006). The parties consented to having this trial conducted by this Court. *See* Consent to a U.S. Bankruptcy Judge Conducting a Jury Trial, Adv. Pro. Dkt # 44 and Order and Memorandum of Pre-Trial Conference held on December 7, 2011 (Adv. Pro. Dkt # 83). Therefore, the parties waived any objection to this Court’s authority to enter proposed findings of fact and conclusions of law pursuant to 28 U.S.C. § 157.

In accordance with 28 U.S.C. § 157(c)(1) and based upon the evidence presented at the trial, the arguments of counsel, the pleadings in this adversary proceeding and the Fair Finance bankruptcy case, the Court is authorized to and makes the following findings of fact and

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excluded Stipulations are Nos. 56, 57, 67, 68, 76, 77, 85, 86, 87, 90, 91, 92, 93, 94, 97, 98, 99, 100, 101, 102, 103, 104, and 106, and the exhibits related to those Stipulations.

<sup>2</sup> The parties have stated in their pleadings that they believe this is a core proceeding under 28 U.S.C. § 157(b). However, the Court must make its own determination as to whether a proceeding is a core proceeding. 28 U.S.C. § 157(b)(3); *Waldman v. Stone*, 698 F.3d 910.

<sup>3</sup> The Fair Finance bankruptcy case was commenced on February 8, 2010. [*See* Finding of Fact #76, herein]

conclusions of law.<sup>4</sup>

### Summary

A summary of the overall findings and conclusions reached by me as the initial finder of fact could be useful to the District Court before setting forth the important minute findings of fact. This adversary proceeding was one of the earliest filed by the Trustee. It appeared to be and, in fact, in many respects proved to be a collection action with respect to a line of credit extended to a member of the inner circle of Durham, who spearheaded the Fair Finance Ponzi scheme. At the beginning of 2002 Laikin assisted Durham in the acquisition of Fair Finance by extending a \$1.7 million dollar loan that was part of proceeds paid to Donald Fair, then the owner of Fair Finance. That loan was quickly repaid and in August 2002, the corporate grandparent of Fair Finance began lending money to Laikin under a line of credit, evidenced by a Note (as defined below) to DCI that was initially capped at \$2 million. That Note, as amended over time, provided that amounts shown as owing on the Note on the books and records of DCI would be deemed “*prima facie* to be correct” as to the “principal amount of the Loan outstanding from time to time.”

Laikin received money under this line of credit in a number of informal ways which were contemporaneously recorded on the books of DCI. Laikin served on a variety of boards of directors of companies owned or controlled primarily by Durham, including from mid-2006 through December 2008 on the Board of Directors of Fair Finance. He and Durham were also allies in controlling the publicly traded company National Lampoon, Inc. (“National Lampoon”) and monies accessed under Laikin’s DCI line of credit frequently were forwarded to National Lampoon for its ongoing operations.

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<sup>4</sup> In reaching its findings of fact and whether or not specifically referenced herein, the Court considered the demeanor of the witnesses who appeared at trial and credibility of all witnesses.

As of the final maturity date on the Note, August 31, 2008, DCI's books showed the total amount owing on the Note to be \$19,497,881.84 including principal and accumulated interest. Laikin personally had made no payments to DCI on his line of credit, nor as of the maturity had he ever inquired of DCI personnel what amount was shown as owing on the DCI books and records. Even after the final maturity date he continued to request and to receive advances from DCI through December 2009, i.e., even after the Federal Bureau of Investigation's ("FBI") raid on Fair Finance.

In July of 2007, while Laikin was serving as an "outside" director on the Fair Finance Board of Directors, a number of obligations owing to DCI, totaling more than \$18 million, including the Note, were transferred to the books of Fair Finance for accounting purposes. Although the ownership of those obligations remained with DCI at that time, they were shown as assets on the Fair Finance books and records. It appears that this action was taken in an effort to prop up the appearance of Fair Finance's solvency.

Back in August 2002, part of the documentation of the Note included a security agreement pursuant to which Laikin and his wife transferred 210,000 shares of Brightpoint, Inc. ("Brightpoint") stock to a preexisting personal securities account owned by Durham, not an account owned by the lender, DCI. Durham already had shares of Brightpoint stock in that account. By sometime in 2006 Durham had sold all the Brightpoint shares. Laikin initially maintained that he owed nothing on Note because he argued that he should be credited with the sales of Brightpoint stock. Of course, he had never acted to cause any of those proceeds to be paid to DCI nor had he bothered to confirm that any purported payment was reflected on DCI's books and records; he also did not report capital gains on his tax returns consistent with any such sales. Having entrusted Durham with control of the Brightpoint stock and proceeds, he now

would have the courts sort out the accounting, to which he never attended, as to whether any proceeds of Brightpoint stock that might have been paid to DCI were improperly booked.

Of course, to have such an action undertaken by this Court, Laikin would have to cooperate in providing information in the discovery phase of this case. Instead of such cooperation, Laikin withheld critical information concerning individuals who had relevant information and could point toward literally volumes of relevant documents. He also conveniently misplaced the laptop computer and cell phone which he used for sending electronic mail, his primary means of written communication.

Laikin attempted to portray himself as an unwitting victim of Ponzi schemer Durham. Responding to that fabrication, the Trustee was able to demonstrate that more than a year prior to the filing of this adversary proceeding, Laikin had proffered to the federal prosecutors information about the Ponzi scheme that Durham was perpetrating through Fair Finance. He did this after pleading guilty to conspiracy to commit securities fraud, a conspiracy that involved Laikin using monies from his DCI line of credit, and in an effort to shorten his own prison sentence. Laikin's claim that in early 2009 he had only recently become privy to such information was shown to be false and just one of many instances that caused this finder of fact to view him as without any credibility as a witness. Ironically even after making this proffer to federal prosecutors, Laikin continued to ask for and to receive advances on his overdue line of credit. Meanwhile, there is no evidence that he did anything to protect Fair Finance certificate holders, a group to whom he had owed obligations as a Fair Finance director from mid-2006 through the end of 2008.

## Findings of Fact<sup>5</sup>

### A. Pre-Trial Proceedings

1. Prior to trial, on August 15, 2013 the Court entered an “Order Granting Plaintiff’s Motion for Sanctions and Imposing Sanctions Against Defendant” (the “Sanctions Order”), which is incorporated by reference as if fully rewritten here. The Sanctions Order was entered as a result of Laikin’s continued violation of his discovery obligations under Federal Rules of Civil Procedure 26 and 37. This Court found that Laikin was completely unforthcoming in his answers to interrogatories and deposition questions requesting the names of persons with knowledge of discoverable information related to his contention that he no longer had any debt payment obligation under the Note. Specifically, it was determined that Laikin knew or should have known that National Lampoon possessed information pertinent to the affirmative defenses raised in his answer (including the alleged sale of Brightpoint stock) and that Laikin knowingly and unjustifiably failed to identify Cora Victoriano as a person with knowledge of and access to such information. Such failure prejudiced Plaintiff by delaying his access to discoverable documents and forcing him to incur substantial costs in obtaining a portion of that information.
2. As a result of Laikin’s serial misconduct with respect to discovery in this adversary proceeding, the Court sanctioned Laikin under Federal Rules of Civil Procedure 26 and 37 by:
  1. precluding him from calling Cora Victoriano as a witness in support of his defense(s) to the any cause of action raised in the amended complaint;
  2. precluding him from adducing any evidence at trial on any subject noted

<sup>5</sup> To the extent that any finding of fact has been mistakenly designated a conclusion of law, and vice versa, such finding or conclusion shall have the effect it would have had if properly designated.



Exhibit NNNNN] On September 9, 2008, the V-6 interest rate was 7.75%. On September 29, 2009, the V-6 interest rate was 7.5%.

5. Fair Finance issued Offering Circulars in connection with the offering of investment certificates for sale to investors in Ohio. [Stipulation #14]. Before an Offering Circular could be issued publicly by Fair Finance, Fair Finance was required to submit the Offering Circular to the Ohio Division of Securities (the “Ohio Division”) for review and to obtain the Ohio Division’s approval to issue the document. [Stipulation # 15] Each Offering Circular submitted to the Ohio Division and subsequently issued by Fair Finance purported to disclose certain information about the business and financial condition of Fair Finance. [Stipulation #16]
6. Durham’s purchase of Fair Finance was accomplished in January 2002, when Fair Holdings, Inc., a corporation incorporated under the law of the State of Ohio (“Fair Holdings or FHI”), purchased all of the outstanding stock of Fair Finance. [Stipulation #19]
7. Durham was Chairman of Fair Holdings. [Durham Depo. at 17-18]
8. DCI is a limited liability company organized under the law of the State of Indiana. [Stipulation #24]
9. DCI has been the sole shareholder of Fair Holdings since Fair Holdings became the sole shareholder of Fair Finance in January 2002. [Stipulation #25]
10. Since the time of DCI’s formation, the members of DCI have at all times been Durham and James F. Cochran (“Cochran”). [Stipulation #26] Durham was appointed the initial Managing Member of DCI under the First Amended Operating Agreement of DCI. [Defendant’s Exhibit 1]



### C. Laikin and his relationships with Durham, the Debtor and related entities

11. Laikin is an individual currently residing in California. He is fairly sophisticated in business matters. Laikin testified that he first met Durham in the late 1980s. Around 2000, Durham and Laikin began doing business together. In addition, they became friends, traveling together on vacation with and without their families, and speaking often. [Laikin Testimony. Victoriano Depo 40:15.-41:1 – stating that Durham and Laikin spoke daily]

12. Laikin and Durham have been involved in several businesses together, including Obsidian Enterprises, Inc. (“Obsidian”), Fair Holdings, Fair Finance and National Lampoon.

## Obsidian

13. Obsidian was an Indianapolis, Indiana based company run by Durham. [Osler Testimony] Laikin was an investor in Obsidian. [Laikin Testimony] From 2001 to 2010, Laikin was a director of Obsidian. [Interrogatory Response No. 8, Plaintiff's Exhibit W] During his term as a director, Laikin sat on the audit committee for Obsidian. While Laikin was a director of Obsidian, Obsidian borrowed money from Fair Holdings. [Laikin Testimony, Plaintiff's Exhibit X] In fact, Obsidian was the largest borrower from Fair Holdings. [Osler Testimony] Without the money from these loans, Obsidian would have ceased operations. *Id.*

## *Fair Holdings*

14. Laikin gave his consent to become a director of Fair Holdings in or around July 2006. [Plaintiff's Exhibit T] As director of Obsidian, he had approved the borrowing of money from Fair Holdings by Obsidian. The loans were non-performing, in that

interest was simply accrued, and when credit limits and maturity dates were reached, the terms of the loans were simply extended. [Osler Testimony]. The money used to fund these loans came from Fair Finance. [Osler Testimony]

### ***Fair Finance***

15. In addition, to their relationship through Obsidian, Laikin lent \$1.7 million to assist Durham in raising sufficient capital to purchase Fair Finance in 2002. [Laikin Testimony] Laikin was repaid the \$1.7 million fairly quickly. [Laikin Testimony/Osler Testimony] In addition, Laikin was a director of Fair Finance from 2006 through December 2008. [Stipulation #60, Laikin Testimony, Plaintiff's Exhibit W]

### ***National Lampoon***

16. In addition, to their relationships with Obsidian, Fair Holdings and Fair Finance, Laikin and Durham were both involved with National Lampoon. Together, they took control of National Lampoon. Laikin was National Lampoon's CEO and president and a director. [Plaintiff's Exhibit W – Interrogatory 8, Victoriano Depo.] While he was a director of National Lampoon, Laikin covered millions of dollars of operating expenses of National Lampoon with money advanced under the line of credit Laikin had with DCI (as described more fully below). [Victoriano Depo. 50:21-54:5 and Depo. Exhibit 2; Laikin Testimony, Plaintiff's Exhibit W – attachment A]

17. Laikin stepped down as CEO in December 2008 when he was indicted for, among other things, engaging in conspiracy to commit securities fraud. [Plaintiff's Exhibit O – a copy of the Indictment against Laikin in the United States District Court for the Eastern District of Pennsylvania, Case No. 08-733 (the "Laikin Criminal Case")]

Laikin pled guilty to Count One of the two count Indictment. Count One had alleged conspiracy to commit securities fraud to manipulate the stock price of National Lampoon. [Plaintiff's Exhibit Q] In September 2010, a judgment was entered against Laikin in his criminal case showing Laikin pled guilty to Count One. [Plaintiff's Exhibit S]

18. Thereafter, Durham, who was also a director of National Lampoon, replaced Laikin as CEO.

19. Laikin remains a majority shareholder of National Lampoon. [Laikin Testimony, Victoriano Depo. 28:21-29:23]

#### ***DCI***

20. Laikin was repaid the \$1.7 million he lent Durham for the purchase of Fair Finance.

Shortly thereafter he entered into a note with DCI to provide him access to a line of credit from DCI. The ultimate source of the funds lent by DCI to Laikin was Fair Finance. [Osler Testimony] Laikin and Durham were the largest borrowers from DCI. [Osler Testimony]

#### **D. The Laikin Note**

21. Laikin's line of credit is evidenced by several documents which the parties agree Laikin executed. The parties agree that Laikin executed the August 8, 2002 "Secured Promissory Note (Line of Credit)," the August 31, 2003 "First Amended Secured Promissory Note (Line of Credit)," and the "Second Amended Secured Promissory Note (Line of Credit)" in favor of DCI. [Stipulations ## 29, 38, 40]

22. By its terms, the Second Amended Secured Promissory Note (Line of Credit) “amends and replaces” the prior notes and “extended the maturity date on the loan to August 31, 2005 and increased the principal amount to \$7,000,000.”
23. The parties also agree that Laikin executed three subsequent amendments to the Second Amended Secured Promissory Note (Line of Credit) that on their face either changed the date for repayment of the loan or increased the principal amount that could be borrowed. These three subsequent amendments, however, each preserved “[a]ll other terms and conditions contained in the [Second Amended Secured Promissory Note (Line of Credit)].” [Stipulations ## 41-46]
24. Thus, the terms of the Second Amended Secured Promissory Note (Line of Credit) generally govern the substance of the agreement between Laikin and DCI, while the Third Amendment fixed the maturity date as August 31, 2008, and the other amendments increased the credit limit. This is consistent with the practice of DCI and Fair Holdings regarding related party loans of simply increasing the credit limit and extending maturity dates when each was reached.
25. The Second Amended Secured Promissory Note (Line of Credit), as amended, (the “Note”) functioned as a line of credit. Under the Note, Laikin promises to pay “the principal sum ... or so much of the principal amount of the Loan represented by this Note as may be disbursed by the Lender under the terms....” The Note provides that the “principal amount of the Loan outstanding from time to time shall be determined by reference to the books and records of the Lender and all payments by the Maker on account of the Loan shall be recorded.” [Joint Exhibit V at 1]

26. The Note further provides that “[s]uch books and records shall be deemed prima facia to be correct as to such matters.” *[Id.]*
27. Under the Note, Laikin and any endorsers “severally waive demand, presentment for payment and notice of nonpayment of this Note and each of them consents to any renewal or extensions of time of payment of this Note without notice.” The Note provides that the “entire outstanding principal balance of this Note shall be due and payable, together with accrued interest, at Final Maturity.” *[Id.]*
28. The Note provides that interest on the unpaid balance of the loan outstanding prior to final maturity will accrue at a per annum rate equal to 1% above the interest rate then being paid by Fair Finance on its V-6 security deposits, and further provides that upon failure to pay at final maturity, the lender may “(a) increase the applicable interest rate on this Note two percent (2%) and (b) add any unpaid accrued interest to the principal and such sum will bear interest thereon until paid at the rate provided in this Note.”

***Advances Under the Note***

29. Accounting for advances made under the Note was done contemporaneously and was reconciled on a daily basis primarily by Osler, the secretary of DCI. [Osler Testimony, Plaintiff’s Exhibit IIII] After July 2007,<sup>8</sup> advance information, in

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<sup>8</sup> In July 2007, the Note receivable was transferred to the books and records of Fair Finance. At the time this occurred, the books and records of DCI showed a balance on the Note of \$14,510,844.84 in principal and \$2,100,971.81 in interest. Plaintiff’s Exhibit MMMMM. This was done in an attempt to bolster the financial picture of Fair Finance. No money was received by DCI in exchange for this transfer to Fair Finance. It was simply a book transfer so that after July 2007, the Note was carried on the books of Fair Finance as an asset. In the January 29, 2009 Offering Circular, the Note, with a balance of \$17,534,479.84, was shown as part of “Other Loans Receivable” which as of December 31, 2007 totaled \$20,238,760. [Klein Testimony and Plaintiff’s Exhibit RRR, p. 38]. Similarly, the proposed Offering Circular dated November 24, 2009 shows the Note constituting \$19,134,567.15 of the “Non-related parties” loan receivables. Defendant makes an issue out of the characteristics identified in the Offering Circulars in comparison to the terms of Note. The Court does not find the argument persuasive. The Plaintiff’s forensic accountant identified it as the Note and the books and records show the accounting transfer of the

addition to being contemporaneously recorded, was transmitted on a monthly basis to Eileen Hostetler, the Assistant Controller at Fair Finance, who then recorded those advances on Fair Finances' Books and Records and calculated and recorded accumulated interest. [Osler Testimony/Hostetler Testimony, Plaintiff's Exhibit IIIII – showing advances on the Note from its inception through December 14, 2009 and Plaintiff's Exhibit LLLLLL- showing advances and interest on Laikin Note, created by Osler and maintained by him until transferred to Fair Finance, and then maintained by Hostetler, and Plaintiff's Exhibit OOOOOO- Fair Finance's General Ledger regarding the Note]

30. Plaintiff's Exhibit IIIII was adjusted in July 2007 to show a credit of \$14,510,844.84 on the Note balance. Contemporaneously, on July 31, 2007, the General Ledger for Fair Finance shows an entry in the same amount for the Note. [See Plaintiff's Exhibit OOOOOO]. Plaintiff's Exhibit IIIII continued to reflect advances or payments made under the Note though the balance was inaccurate as a result of the book transfer of the Note balance as of July 31, 2007 to Fair Finance. In addition, Hostetler continued to record advances and payments on the spreadsheet created by Osler but maintained by her after the transfer of the accounting obligation with respect to the Note. [See Exhibit LLLLLL]
31. The last day Fair Finance employees closed the books on the Note was as of September 30, 2009, and the amount outstanding on the Note on that date was \$19,134,567.15. [Klein Testimony]
32. At trial Laikin claimed that at some point in 2009 when presented with another amendment to the Note by attorney Sallee, Laikin told Sallee that he believed the

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Note to Fair Finance.

Note was no longer outstanding. Laikin further claimed that Sallee acknowledged Laikin's position and agreed with it. Laikin's self-serving testimony is not corroborated by the testimony of Sallee. Sallee, a friend of Laikin, is an attorney who has done work for Laikin, DCI, Fair Finance, Fair Holdings, and National Lampoon. [Sallee Depo. 22:2 – 15, 28:4-25] In contrast to Laikin's testimony, Sallee does not recall Laikin ever asserting that the Note was no longer outstanding or had been paid off. [Sallee Depo. 82:11-20] The only thing Sallee recalled Laikin saying about his obligation was that some of the accounting was wrong. [*Id.*]

33. By his own admission, until late 2009, Laikin never asked to see the books and records of DCI, he never looked at the books and records of DCI, he never asked for a statement of his outstanding balance, and he never requested that the Note be marked satisfied. [Laikin Depo Vol II, p. 150:10-151:16] In fact, he continued to take advances under the Note through December 14, 2009. [Plaintiff's Exhibit IIII, p. 14-15] Osler testified that not long before the FBI raid at Fair Finance, which took place in late November 2009,<sup>9</sup> Laikin and his accountant Weingardt were inquiring as to the balance of the Note. Based on Weingardt's testimony, it was in that time frame that Weingardt was preparing amended tax returns for Laikin and his wife for tax years 2005 and 2006.

34. On November 23, 2009, Sallee asked Osler to send Laikin's loan documentation to Mr. Ronald Kaffen, the attorney working on the Offering Circular for Fair Finance.

35. There is no dispute that the books and records indicate that Laikin owes millions of dollars under the Note. Laikin acknowledged in his responses to interrogatories advances totaling \$11,164,951.85. During his deposition, Laikin acknowledged an

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<sup>9</sup> See Finding of Fact # 76, herein.



additional \$1,204,588.83 making the total amount of advances acknowledged by Laikin \$12,369,540.68. [Klein Testimony]

36. Klein, the Trustee's forensic accountant, who was tasked with assisting the Trustee in preparing the bankruptcy schedules for Fair Finance following the commencement of the involuntary bankruptcy case against Fair Finance, reviewed the books and records of Fair Finance and DCI in light of Laikin's continued dispute of certain transactions listed on his Note balance. Based on his review, he opined that certain changes should be made to the books and records regarding the Note balance.
37. First, Klein opined that three (3) advances totaling \$66,000 should be removed from Laikin's balance. Klein testified that these three advances likely should not have been attributed to the Note balance.
38. Second, he reversed a \$3,272,747 write-off that appeared on Fair Finance's books and records, but not DCI's and which he testified appeared unsupported. [Klein Testimony]. Eileen Hostetler testified that the \$3,272,747 write-off was entered on the books and records of Fair Finance based on instructions emailed to her from Durham on November 23, 2009, i.e., the day before the FBI raid on Fair Finance. [Hostetler Testimony] Klein testified that he found the email from Durham to be an insufficient basis for making the write-off and could find no support in the books and records of Fair Finance or DCI to support such a write-off. [Klein Testimony]
39. Laikin disputes transactions with a reference "D. Bruce Johnston" which were listed on Laikin's Note balance. Klein testified that he did not reverse the advances or payments shown on Laikin's account for "D. Bruce Johnston". Klein acknowledged that the promissory note reflecting a loan to D. Bruce Johnston and Dawna J.

Johnston identified One Leaf Associates, not Laikin, as the lender. [Defendant's Exhibit 30] Klein also agreed that One Leaf Associates had the same payment address as Obsidian and DCI. [Defendant's Exhibits 30, 32] At trial, Laikin denied knowing about or being a part of One Leaf Associates.

40. Klein testified that, based on Laikin's undisputed association with an entity by the name of Four Leaf Partners and Four Leaf Management [Laikin Testimony – a company involving Laikin and two other partners created to provide Laikin an avenue to invest in technology and internet companies], and the association in the work papers of Fair Finance's accountants, Somerset CPAs, P.C., of the Johnstons' loan to Laikin, Klein's professional opinion was that the advances to the Johnstons were properly attributed to the Note balance.

41. The Court finds Laikin's denial of this advance not credible in light of Klein's testimony and the deposition testimony of Sallee with respect to Laikin's business entities. During Sallee's deposition the following exchange took place:

Q: You mentioned that you represented business entities affiliated with Mr. Laikin. Other than this housing company that you've talked about, any other business entities that you've worked for?

A: Yes. I don't, I don't recall the specific names, but I know that there – several of them involved leafs, like three leaf, four leaf, two leaf. I don't remember how leafs they got the to [sic], but there were some entities. And I think that was in the '90s possibly.

Sallee Depo. 28:25-29:10.

42. This is just one example of why the Court will not credit the testimony of Laikin disputing any of the advances.
43. Finally, Klein testified that he recalculated the accumulated interest because a default interest rate higher than that consistent with the provisions of the Note had been used through September 2009. This resulted in a reduction in the balance on the Note in the amount of \$816,000.
44. Thus, Klein calculated that as of December 31, 2009, the balance on the Note, was \$15,385,342.84 in principal and \$7,740,246.21 in interest, for a total of \$23,125,589.05 owing as of that date. [Klein Testimony / Plaintiff's Exhibit OOOOO] The default rate of interest varied from September 1, 2008 to September 30, 2009. After September 30, 2009, the default rate of interest applied by Klein was 10.5%.
45. Laikin has not rebutted the prima facie presumption of validity to be afforded the books and records of DCI, in accordance with the provisions of the Note itself. In particular, Weingardt, the witness proffered by Laikin as a purported expert, was of no use to this finder of fact. For instance, as he began to opine about a possible application of proceeds from an August 3, 2003 Brightpoint stock sale, he thought it appropriate to apply those proceeds from January 1, 2003. His testimony was not reality based.

***Payments Under the Note***

46. There is no dispute that DCI's books and records do not show repayment in full as of the Final Maturity date of August 31, 2008. The books and records show modest periodic payments made under the note. [Plaintiff's Exhibit LLLLL]

*Collateral for the Note*

47. In addition to the Note, Laikin entered into a Pledge Agreement with DCI pursuant to which Laikin was to pledge to DCI the securities identified on Schedule A (the “Pledge Agreement”). [Joint Exhibit *III*] The securities identified on Exhibit A were “210,000 shares of common stock of Brightpoint, Inc.” that “have been transferred or will be transferred to account #885-23467-10 with Securities Research, Inc. in an account of Timothy Durham.” [Joint Exhibit *III*] As the Trustee’s forensic accountant noted, this is an unusual arrangement inasmuch as Exhibit A provided for the transfer of shares into an account of Timothy Durham at Securities Research, Inc. (the “Durham Account”), not into an account of DCI.
48. The parties stipulated that in August 2002 shares of common stock of Brightpoint were transferred from an account in Laikin’s name at Securities Research, Inc. to the Durham Account. [Stipulation #31] In addition, shares of common stock of Brightpoint were transferred from an account in Laikin’s wife’s name at Securities Research, Inc. to the Durham Account. [Stipulation #32]
49. At the time the shares were transferred from the Laikins’ accounts to the Durham Account, the Durham Account already held shares of stock of Brightpoint. [Stipulation #33] The Laikins’ shares were commingled with Durham’s shares in the Durham Account.
50. DCI never foreclosed on the Laikins’ shares. Laikin testified that Durham sold stock at Laikin’s direction. No records of requests for the sale of stock were provided to the Court, no records of stock being sold were provided to the Court, no record of the disposition of the Laikins’ shares was provided to the Court.

51. The parties stipulated that the first time Durham sold shares of common stock of Brightpoint held in the Durham Account was August 5, 2003 [Stipulation #53], and all of the Brightpoint stock was sold by May 2, 2006 [Stipulation #54].<sup>10</sup>
52. According to the testimony of Laikin and Weingardt, the accountant who prepared Laikin's 2003 tax return, Laikin did not claim any gain from the sale of Brightpoint stock in his 2003 tax return. The Court's review of Plaintiff's Exhibit FFFF<sup>11</sup> reveals that Laikin reported a long term capital gain with respect to the sale of shares of Brightpoint in 2003 on Schedule D, statement 14, in the amount of \$77,161.
53. No evidence was presented to the Court showing that any of the 2003 proceeds from the sale of the Laikins's shares went to DCI, or, in fact, that they pertained to the shares transferred under the Pledge Agreement.

**E. Laikin's Use of Advances and Involvement in the Fraud at Fair Finance**

54. Laikin used advances from DCI to perpetuate the securities fraud of which he was accused in the Indictment in the Laikin Criminal Case. The Indictment in the Laikin Criminal Case, in its overt acts discussion in Count One, alleges that (i) "[i]t was a part of the conspiracy that defendants DANIEL LAIKIN, DENNIS BARSKY, TIM DOUGHERTY, and their co-conspirators sought to artificially inflate the price of National Lampoon stock by causing manipulative market activity in National Lampoon stock that was designed to appear to be the product of free and fair market

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<sup>10</sup> Under the Sanctions Order, Laikin was precluded from adducing evidence that Brightpoint stock sale proceeds from 2004 through 2007 paid down his note. Thus, the evidence at trial was limited to transactions in 2003. There is no dispute that the proceeds of the stock sales in 2003 are not sufficient to extinguish the obligation under Laikin Note.

<sup>11</sup> This Exhibit and several others were submitted to the Court pursuant to the provisions of a stipulated protective order [Docket #37]. At an October 21, 2013 post-trial hearing of Laikin's motion to maintain under seal Plaintiff's Exhibits DDD, LLL, FFFF and Defendant's Exhibits 10, 11 and 12 and the Plaintiff's response thereto [Adv. Pro. Dkt. ##227 and 233], counsel agreed that this Court could make reference to any of the sealed exhibits, including quoting from them, in this Report and Recommendation, but would transmit those exhibits to the District Court still under seal, leaving to the District Court the ultimate decision of whether those exhibits should be unsealed.

forces,” (ii) “[i]n or about March 2008, LAIKIN agreed to pay Eduardo Rodriguez, charged elsewhere, approximately \$60,000 to help create artificial volume in National Lampoon stock,” and (iii) “[o]n or about March 19, 2008, defendant LAIKIN caused approximately \$60,000 to be wire transferred from a bank account in Indianapolis, Indiana, to a bank account in Blue Bell, Pennsylvania, for the benefit of Rodriguez as payment for generating volume purchases in National Lampoon stock.” [Plaintiff’s Exhibit O]

55. On March 18, 2008, DCI, transferred a total of \$60,000 to the IOLTA account of Eduardo Rodriguez’s attorney, Edward J. Morris<sup>12</sup> (in total, the “Rodriguez Transfer”). [Morris Depo. Vol. II at 9-12.] Funds used to make the Rodriguez Transfer were advanced under the Note, accounted for under the books and records as Note advances, and at least half of the Rodriguez Transfer was done at Laikin’s direction. [Laikin Testimony / Plaintiff’s Exhibit IIIII]

**F. Laikin’s Involvement in the Durham Criminal Case & Knowledge of the Fair Finance Fraud.**

56. Laikin was well aware of the fraud at Fair Finance. In early 2009, within weeks of resigning as a director of Fair Finance and well before the FBI raid<sup>13</sup> - Laikin and his own criminal defense attorneys in the Laikin Criminal Case were attempting to curry

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<sup>12</sup> In early 2008, Rodriguez retained Edward J. Morris as counsel to form a Delaware corporation named Cheetah Consulting Group, LLC for the purported purpose of entering into a consulting agreement with National Lampoon. [Morris Depo. Vol. II 9:3-10] Morris served as counsel for Rodriguez. [Morris Depo. Vol. II 8:25-9:2] Morris maintains an “interest on lawyer trust account” at PNC Bank in Blue Bell, Pennsylvania (the “IOLTA Account”), established for the purpose of receiving funds from his clients. Fund transfers into the IOLTA Account and out of the IOLTA account are done according to instructions from Morris’ clients. [Morris Depo. at 17-18] Rodriguez told Morris to expect a \$60,000 transfer into the IOLTA Account in connection with Rodriguez’s purported consulting agreement with National Lampoon. [Morris Depo. Vol. II 9:11-15] The IOLTA Account received two separate \$30,000 wire transfers from DCI on March 18, 2008. [Morris Depo. Vol. II at 9-12] Laikin testified that he believed \$30,000.00 of the Rodriguez Transfer would be accounted for under Durham’s line of credit with DCI. [Laikin testimony]

<sup>13</sup> See Finding of Fact # 76, herein.

- the Government's favor by providing information to the FBI. On February 27, 2009, Laikin, through his counsel, made a proffer to certain Assistant United States Attorneys ("AUSAs") and an FBI agent (the "February Laikin Proffer"). [Shtasel Depo. 23:10-24:7 & Plaintiff's Exhibit DDD]
57. The information provided at the February Laikin Proffer was "based upon information developed by and with Laikin." [Shtasel Depo. 23:16-24:13 & Plaintiff's Exhibit DDD, Motion, pp. 2-3]
58. At the February Laikin Proffer, Laikin informed the Government through his counsel that "Fair Finance's offering of up to \$250 million worth of high interest rate certificates of deposit to investors in Ohio was a 'Stanford-like Ponzi Scheme' and that there likely would not be enough money for Fair Finance to repay its defrauded investors." [Plaintiff's Exhibit DDD, Motion, p. 3; Shtasel Depo. 115:22-117:16 & Ex. 23 at p. 3; Poluka Depo. 19:2-20:16]
59. At the February Laikin Proffer, Laikin informed the Government through his counsel that "Durham had unlawfully used Fair Finance as a vehicle to fund Dunham's [sic] 'lavish lifestyle.'" [Plaintiff's Exhibit DDD, Motion, p. 3]
60. At the February Laikin Proffer, Laikin informed the government through his counsel that "[m]ore than \$124 million of the approximately \$200 million raised through Fair Finance's offering had been loaned to Durham and related parties of Durham without adequate disclosure, including disclosure of the risks relating to such loans." [Plaintiff's Exhibit DDD, Motion, p. 3]
61. At the February Laikin Proffer, Laikin informed the Government through his counsel that "Durham and Fair Finance intentionally violated Section 5 of the Securities Act



of 1933 (the '33 Act') by relying on a rarely-used intrastate exemption to the '33 Act to avoid registering its offerings with the United States Securities and Exchange Commission. Although the intrastate exemption requires that substantially all of the funds raised would be utilized in Ohio, Durham knew that he and his related entities, which received and benefited from Fair Finance's funds, were located *outside of Ohio.*" [Plaintiff's Exhibit DDD, Motion, p. 3](emphasis in original)

62. Laikin's counsel did not speak with third-parties to independently confirm whether Fair Finance was operating as a Ponzi or other illegal scheme. [Shtasel Depo. 27:8-20, 30:4-11; Poluka Depo. 19:2-20:16] Laikin's counsel did not speak with third-parties to independently confirm whether Durham used Fair Finance money to fund his lifestyle. [Shtasel Depo. 28:7-13, 30:4-11; Poluka Depo. 20:17-21:7] Laikin's counsel did not speak with third-parties to independently confirm whether more than \$124 million of the \$200 million raised by Fair Finance through its V-Note offerings had been loaned to Durham or related parties without adequate disclosure. [Shtasel Depo. 28:14-29:7] Laikin's counsel did not speak with third-parties to independently confirm whether Durham intentionally violated securities laws by relying on an intrastate exemption when Durham knew that persons and entities receiving related party loans were located outside of Ohio. [Shtasel Depo. 29:8-30:11] Laikin's counsel did not speak with counsel for Durham, Fair Finance or any of their related entities regarding the matters discussed at the February Laikin Proffer. [Shtasel Depo. 32:19-33:4] Laikin was the sole source of information discussed at the February Laikin Proffer.

63. On March 19, 2009, Laikin was interviewed by certain AUSAs and FBI agents (the “March Laikin Proffer”). [Shtasel Depo. 46:3-15 & 48 & Plaintiff’s Exhibit DDD, Motion, pp. 4-5; Poluka Depo. 38:1-19]
64. The March Laikin Proffer took place less than two and one-half months after Laikin resigned from the Fair Finance Board of Directors. During the March Laikin Proffer, Laikin discussed Durham and Fair Finance during the course of the several hour session. [Shtasel Depo. 51:3-6 & Plaintiff’s Exhibit DDD, Motion, p. 5]
65. At the March Laikin Proffer, Laikin and his counsel informed the Government that “Fair Finance is a subsidiary of DC Investments, a company owned by Durham.” [Plaintiff’s Exhibit DDD, Motion, p. 5] He further informed the Government that “Fair Finance provides consumer loans and packaged health club receivables. Fair Finance generates cash by issuing uninsured variable rate subordinated debt to investors.” [*Id.*]
66. At the March Laikin Proffer, Laikin informed the Government that “[s]everal years after Durham acquired Fair Finance he began lending Fair Finance’s money to his own related companies. Fair Finance had \$200 million in deposits, of which \$100 million had been loaned to Durham controlled companies.” [Plaintiff’s Exhibit DDD, Motion, p. 5]
67. At the March Laikin Proffer, Laikin informed the Government that “Fair Finance has paid for Durham’s extravagant lifestyle and luxury cars, which is contrary to representations made to Fair Finance investors who believe that Fair Finance is using its cash to purchase consumer receivable loans.” [Plaintiff’s Exhibit DDD, Motion, p. 5]

68. At the March Laikin Proffer, Laikin informed the Government that “[s]ubstantially all of Fair Finance’s unsecured debt is carried by Durham’s controlled companies.” [Plaintiff’s Exhibit DDD, Motion, p. 5]
69. At the March Laikin Proffer, Laikin informed the Government that “Laikin was on the Board of Directors of Fair Finance and Durham had repeatedly spoken with him about Fair Finance’s liquidity crisis over the past six months.” [Plaintiff’s Exhibit DDD, Motion, p. 5]
70. At the March Laikin Proffer, Laikin informed the Government that “Durham was concerned that Fair Finance did not have enough cash to make redemptions on maturing debt and that such redemptions were being paid by Durham himself. For example, an Ohio church sought to redeem a \$250,000 note from Fair Finance, but could not because Fair Finance did not have the cash to repay the note. Durham negotiated repayment of the note over a period of time rather than at the maturity date to avoid default.” [Plaintiff’s Exhibit DDD, Motion, p. 5]
71. At the March Laikin Proffer, Laikin informed the Government that “Durham was using new investor money in Fair Finance and assets from CLST Holdings to pay redemptions.” [Plaintiff’s Exhibit DDD, Motion, p. 5]
72. Laikin’s counsel did not speak with third-parties to independently confirm whether Fair Finance was a subsidiary of DCI or whether DCI was owned by Durham. [Shtasel Depo. 52:3-21; Poluka Depo. 39:19-40:2] Laikin’s counsel did not speak with third-parties to independently confirm whether Fair Finance sold consumer receivables or generated cash by issuing uninsured variable rate subordinated debt to investors. [Shtasel Depo. 52:22-53:12; Poluka Depo. 40:3-15] Laikin’s counsel did

not speak with third-parties to independently confirm whether Durham had lent \$100 million of Fair Finance money to his own companies. [Shtasel Depo. 54:20-55:18; Poluka Depo. 40:16-25] Laikin's counsel did not speak with third-parties to independently confirm whether Durham used Fair Finance's money to pay for his extravagant lifestyle, rather than purchase consumer receivables. [Shtasel Depo. 57:22-58:11] Laikin's counsel did not speak with third-parties to independently confirm whether substantially all of Fair Finance's unsecured debt was carried by Durham-controlled companies. [Shtasel Depo. 58:16-59:7; Poluka Depo. 42:21-43:7] Laikin's counsel did not speak with third-parties to independently confirm whether Laikin had served on Fair Finance's Board of Directors or whether Durham had spoken repeatedly with Laikin about Fair Finance's liquidity crisis. [Shtasel Depo. 59:8-60:5; Poluka Depo. 43:8-44:5] Laikin's counsel did not speak with third-parties to independently confirm whether Durham was paying redemptions on V-Notes himself because Fair Finance did not have the cash to make redemption payments. [Shtasel Depo. 60:6-61:3; Poluka Depo. 44:6-20] Laikin's counsel did not speak with third-parties to independently confirm whether Durham was using new investor money in Fair Finance and CLST Holdings assets to pay redemptions on V-Notes. [Shtasel Depo. 61:4-19; Poluka Depo. 44:21-45:19] Laikin was the sole source of information discussed at the March Laikin Proffer.

73. On January 22, 2010, Laikin's counsel filed *Defendant Laikin's Motion for the Production of Materials Pursuant to Brady v. Maryland* (the "Brady Motion") in the Criminal Court in connection with Laikin's sentencing hearing in the Laikin Criminal

Case. [Schtasel Depo. 18:22-19:13 & Plaintiff's Exhibit DDD; Poluka Depo. 12:6-16]

74. The Brady Motion sought production of materials and information that "relate to Laikin's cooperation with ongoing criminal and civil investigations" of Fair Finance, Durham and CLST Holdings, Inc. [Schtasel Depo. 19:24-20:16 & Plaintiff's Exhibit DDD; Poluka Depo. 13:18-14:10]

75. Laikin's attorneys asserted as recently as last year that Laikin's proffer in the Laikin Criminal Case prompted and assisted the Government in its prosecution of Durham, Cochran and Snow. [Poluka Depo. at 140-144] Laikin was hoping to gain post-sentencing cooperation credit, but the Government's response was "to the effect that Laikin got enough breaks." [Poluka Depo. at 141-142:2]

76. As discussed more fully below, Laikin's lack of credibility and the circumstantial evidence under the totality of the circumstances indicate that Laikin was a knowing participant in the Fair Finance fraud scheme while he was a director of Fair Finance. In fact, Laikin continued to receive advances under the Laikin Note through the end of 2009, months after he had asserted that Fair Finance "a subsidiary of DCI" was a Ponzi scheme. [Plaintiff's Exhibit IIII at 14-15 / Plaintiff's Exhibit DDD, Motion, p. 5]

#### **G. Transfer from DCI to Trustee Pursuant to Compromise**

77. On November 24, 2009, agents of the Federal Bureau of Investigation raided the offices of Obsidian and the office of Fair Finance located in Akron, Ohio. [Stipulations ##110 and 111] DCI's business and computer records, which had been stored in the same location, were also seized that day.

78. An involuntary bankruptcy case was commenced against Fair Finance on February 8, 2010. At that time, Fair Finance was owed money by its parent and grandparent companies, FHI and DCI. [Bash Testimony]
79. Plaintiff is the duly appointed Chapter 7 Trustee for the Debtor. [Stipulation #4]
80. On June 16, 2010, the Court entered an order approving a compromise and assignment agreement between DCI and the Trustee pursuant to which all of DCI's property, including accounts receivable and notes receivable of DCI, including the Note, were assigned to the Trustee. [Bash Testimony, Plaintiff's Exhibit LLLLLL].

### **Conclusions of Law**

1. Venue in this Court is proper pursuant to 28 U.S.C. § 1409.
2. The Court has personal jurisdiction over Laikin pursuant to Federal Rule of Bankruptcy Procedure 7004(f).
3. Indiana law governs the claims and defenses at issue in the adversary proceeding as the Note specifies that Indiana Law applies. Joint Exhibits *II*, *IV*, *V*.
4. The Trustee's primary claim in this proceeding is a claim for breach of the Note. Given the language of the Note, it is not a negotiable instrument governed by Indiana Code § 26-1-1.1-101. Rather, the Note is governed under Indiana common law. *Yin v. Society Nat. Bank Indiana*, 665 N.E.2d 58, 62-63 (Ind. Ct. App. 1996).
5. The elements of a breach of contract action are the existence of a valid contract, the defendant's breach thereof and damages. *Breeding v. Kye's Inc.*, 831 N.E.2d 188, 190-91 (Ind. Ct. App. 2005). "A party breaches a contract when it fails to perform all of the obligations that it has agreed to undertake." *Id.* at 191. Trustee, as the party asserting the breach of contract, bears the burden of proving each element of

breach. *Indiana-Am. Water Co., Inc. v. Town of Seelyville*, 698 N.E.2d 1255, 1258 (Ind. Ct. App. 1998).

***Existence of a contract***

6. There is no dispute that Laikin entered into the Note. In addition, the receivable for the Note was transferred to the Trustee and is enforceable by the Trustee. Therefore, the first element is satisfied.

***Breach of the contract***

7. The Plaintiff alleged that Laikin failed to pay the balance owing under the Note at Final Maturity. The evidence presented to the Court includes the books and records, deemed prima facie correct under the terms of the Note, which clearly show that the obligation owing under the Note was not paid as of August 31, 2008 or thereafter. Plaintiff's Exhibit IIII, LLLLL, and OOOOO. The Trustee has shown a breach of contract.

***Affirmative Defenses***

8. The burden of proving an affirmative defense to a breach of contract action lies with the party claiming the defense. *Drener v. Duitz*, 883 N.E.2d 1194, 1201 (Ind. App. 2008); *Van de Leuv v. Methodist Hosp. of Indiana, Inc.*, 642 N.E.2d 531, 533 (Ind. App. 1994). As Laikin notes, the assignee of a contract takes the assignment subject to all equities and defenses existing between the assignor and the debtor. *See Univ. Casework Systems, Inc. v. Bahre*, 362 N.E.2d 155 (Ind. App. 1977). Therefore, Laikin argues he may assert in defense to the Plaintiff's claims all equities and



defenses he would have had against DCI. The defenses asserted by Laikin are payment, estoppel and waiver.<sup>14</sup>

## **Payment**

### **Sale of Brightpoint stock**

9. Laikin asserts that his account should have been credited for the proceeds of the Brightpoint shares he and his wife transferred to the Durham Account. However, he has presented the Court with no evidence upon which the Court could base such a conclusion. Laikin himself professed no knowledge regarding 2003 stock sales or the use or application of proceeds from such sales, and his own accountant testified that Laikin never claimed any 2003 proceeds on his tax return.
10. Laikin's expert witness, Weingardt, nonetheless, claims that 2003 Brightpoint stock sale proceeds should be applied to the Note because Durham attributed 2003 Brightpoint stock sale gains to Laikin in Durham's own tax return for that year. What is missing from Weingardt's analysis is any evidence that DCI received any proceeds from the sale of Brightpoint shares in 2003. Not only did Laikin himself, according to his "expert's" testimony, not claim any gain from 2003 Brightpoint stock sales in his 2003 tax return, Laikin's own sworn interrogatory responses, which purport to illustrate his repayment defense, show no Brightpoint stock sale repayments for 2003.<sup>15</sup> [Plaintiff's Exhibit W] Further Laikin did nothing to cause any contemporaneous record of repayment to DCI to be made on its books.

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<sup>14</sup> In the proposed findings of fact and conclusions of law submitted to the Court by Laikin just prior to the commencement of trial, Laikin for the first time, raised a new defense – prior material breach. At the outset of the trial, the Court granted the Plaintiff's Motion in Limine and excluded this untimely defense.

<sup>15</sup> In attempting to apply the 2003 Brightpoint proceeds from Durham's stock sales, Mr. Weingardt utilized a *pro rata* method of allocating proceeds in his opinion. The Court does not believe the *pro rata* method is proper. Laikin admitted that he and Durham had no agreement on how proceeds would be allocated between him and

11. The Pledge Agreement purports to create a lien in favor of DCI in certain stock described in Schedule A to the Pledge Agreement as collateral for Laikin's obligation to DCI under the Note.
12. According to Laikin, it was his understanding that the proceeds from the sales of the Brightpoint stock were to be applied to Laikin's debt to DCI. However, in reality, it is undisputed that no proceeds were ever applied to pay down the Note.
13. Laikin argues that his debt to DCI under the Note should be credited by the amount of the proceeds from the sale of the Brightpoint stock. For the reasons discussed below, the Court rejects that argument and holds that Laikin is not entitled to credit the proceeds of the Brightpoint stock sales against his obligations under the Note.
14. The Pledge Agreement gave DCI the rights of a secured party under the Indiana Uniform Commercial Code.<sup>16</sup> Putting aside the fact that Laikin himself does not know if DCI had any rights to the Durham Account, it is unquestionable that under the Indiana Uniform Commercial Code, collateral can be sold only in foreclosure after a default. IC 26-1-9.1-609, IC 26-1-9.1-610.

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Durham from the sale of the commingled Brightpoint shares. (Laikin testimony.) In the absence of such an agreement, the Court is presented with a variety of methods to apply. *In re Perkins*, No. 10-3164, 2011 WL 4458961 \*4 (Bankr. N. D. Ohio Sept. 23, 2011) ("methods of tracing commingled funds are 'an equitable substitute for the impossibility of specific identifications' and therefore a court must 'exercise case-specific judgment to select the method best suited to achieve a fair and equitable result on the facts before them.'") The *pro rata* method applies only "where a person wrongfully mingles money of two or more persons." RESTATEMENT (FIRST) OF RESTITUTION § 213(1). There is no suggestion that, as between Durham and Laikin, Durham wrongfully commingled the Brightpoint stock. Indeed, the Pledge Agreement provided for the transfer of Laikin's Brightpoint stock to Durham's personal account. The Trustee's expert opined that the first-in, -first-out (FIFO) method is called for by the IRS for the years at issue. This Court recommends the adoption of that approach. It stands to reason that Laikin pledged his shares, and directed their sale, in an attempt to realize the largest possible gain from the stock. And the IRS uses the FIFO method for the very purpose that it logically presumes the greatest possible realization of gain, and hence taxes on such gains. Moreover, use of this method would produce a realization of gain consistent with that called for by the IRS in the absence of an agreement between the parties, which Laikin acknowledges does not exist. Thus, if proceeds were attributable to the Note, it appears that the FIFO method of allocation would produce the most fair and equitable result. While the Laikins may have realized large capital gains on the disposition of their Brightpoint shares, the trial record is devoid of evidence that the proceeds of those sales were paid to DCI on Laikin's account.

<sup>16</sup> While Indiana common law controls the analysis of the Note, UCC Article 9, as adopted in Indiana, controls the analysis of the collateral deposited pursuant to the Pledge Agreement.

15. In this case, Laikin acknowledged that he never received notices of default from DCI.<sup>17</sup> Moreover, Laikin testified that it is *not* his contention that DCI foreclosed on the pledged Brightpoint stock. [Laikin testimony.] Rather, it is Laikin's contention that Laikin himself directed Durham to sell the stock and apply the proceeds to the Note.

16. The Pledge Agreement provides:

7. Application of Proceeds. The proceeds of any sale of all or any part of the Pledged Securities, and any other cash at the time *held by the Lender under this Pledge Agreement*, shall be applied by the Lender in the following order:

\* \* \*

b. to the payment of any other of the Obligations in such order as the Lender may determine...

(Joint Exhibit *III*)(italics added).

17. The Court finds that Section 7 of the Pledge Agreement was not triggered under the facts presented in this case. First, there is no evidence that DCI ever held the proceeds of the Pledged Securities. Since Section 7 addresses how DCI was to apply proceeds of a sale of the pledged Brightpoint stock to Laikin's obligation, DCI had a contractual duty to apply proceeds of the Brightpoint stock only if DCI "held" those proceeds "under this Pledge Agreement." The Court interprets the phrase "held . . . under this Pledge Agreement" to mean that the contractual duty to apply the proceeds to Laikin's obligations would only arise if DCI received and "held" the sale proceeds by virtue of the fact that the Brightpoint stock was collateral under the

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<sup>17</sup> Laikin makes much of the fact that he never received a default notice from DCI. The Laikin Note, however, required no demand or notice of non-payment, and Laikin consented to the extension of time of repayment *without notice*. (Joint Exhibit V at 3.)

Pledge Agreement — *i.e.*, if DCI held the cash proceeds of a sale because DCI foreclosed on and sold the Brightpoint stock after a default.

18. Here, though, DCI never executed on the collateral via a sale of the Brightpoint stock, as Laikin himself admits. Rather, Laikin directed Durham to sell his stock. Durham, acting as Laikin's agent sold the Brightpoint stock, and apparently converted the proceeds. Thus, DCI never "held" those proceeds "under" the Pledge Agreement.

19. In addition, the law does not require the Court to find that the sale of the pledged securities constituted payments of Laikin's obligations under the Note, even though Durham misappropriated the proceeds from such sales. Laikin misconstrues the applicability of cases like *Old Line Automobile* to the facts of this case. *Old Line Automobile Insurors v. Kuehl*, 127 Ind. App. 445, 455, 141 N.E.2d 858, 862 (Ind. Ct. App. 1957). *Old Line Automobile* involved an insurance agent who collected premiums from the insured but did not remit the payments to the insurer. In an action by the insured against its insurer, the court summarized the applicable law.

[W]here the acts of a principal are such as to justify innocent third persons, who have relied thereon, in believing that the agent is authorized to do that which he does, although the agent in fact had no such authority, the principal is bound thereby, under the rule that where one of two innocent persons must suffer because of the betrayal of a trust reposed in a third, the person most at fault must bear the loss.

*Id.* at 452 (*citing* *Wagner v. McCool*, 52 Ind. App. 124, 100 N.E. 395 (1935)). In that case, the Court found that the insured was justified in believing the agent had the authority to collect the premium payments.

20. An exception to the general rule that the principal will be liable for the acts of his agent exists if the third person knows, or in the exercise of reasonable care should know, that the agent is exceeding his authority. *Michigan Mut. Ins. Co. v. Sports, Inc.*, 698 N.E.2d 834, 849 n.17 (Ind. Ct. App. 1998) In such circumstances, the principal is not bound. *Id.*; see also *Menard v. Dage MTI, Inc.*, 726 N.E.2d 1206 (Ind. 2000) (principal not responsible if third party had notice authority exceeded or did not reasonably believe agent was authorized).

21. For instance, in *American Heritage Banco Inc. v. Cranston*, 928 N.E.2d 239 (Ind. App. 2010) the court explained,

“[t]he law is designed to protect the weak and credulous from the wiles and stratagems of the artful and cunning,” it will not protect those who “ ‘stand mentally on equal footing and in no fiduciary relation,’ ” if they fail to exercise common sense and judgment. *Ehle v. Ehle*, 737 N.E.2d 429, 435 (Ind.Ct.App.2000) (quoting *Biberstine v. New York Blower Co.*, 625 N.E.2d 1308, 1316 (Ind.Ct.App.1993)).

*Id.* at 248. The court found that the law would not aid the Cranstons, sophisticated real estate investors, who did not investigate the transaction on their own nor review the documents they were asked to and did sign to complete the transaction. The court concluded that the “Cranstons failed to exercise common sense and judgment in the instant case when they declined to conduct any investigation whatsoever as to the propriety of the ... transaction. Under the circumstances, we will not find a... right of reliance.” *Id.* (reversing the trial court’s judgment in favor of the Cranstons on their constructive fraud counterclaim against their mortgagee).

22. In this case, Laikin never made an inquiry as to the balance of his loan, the payments credited toward the loan, or the sale of stocks transferred to the Durham Account.

He had no agreement with Durham regarding the allocation of proceeds from any brokerage account. He does not know whether Durham sold stock in 2003, he does not know what happened to the proceeds from the sale of stock by Durham in 2003. In such a circumstance, the Court finds he failed to exercise common sense and judgment. He continued to draw funds from his line of credit even after he reported to the Government that Durham was running Fair Finance, the source of DCI's funds, as a Ponzi Scheme. He cannot credibly assert that the law should view him as the party the law should protect as between himself and the Debtor's estate.

***Unclean Hands preclude assertion of equitable defenses***

23. The defenses of estoppel and waiver, the only defenses other than purported payment that Laikin raised at trial, sound in equity. *Harris v. Brock*, 835 F.2d 1190, 1194 n. 8 (7th Cir. 1987) (describing estoppel and waiver as "equitable doctrines"); *City of East Chicago, Indiana v. East Chicago Second Century, Inc.*, 908 N.E.2d 611, 622 n.2 (Ind. 2009) (describing waiver as an "equitable doctrine"); *State, Indiana Civil Rights Com'n v. Indianapolis Newspapers, Inc.*, 716 N.E.2d 943, 947-48 (Ind. 1999) (describing waiver and estoppel as "equitable doctrines"); *Hrisomalos v. Smith*, 600 N.E.2d 1363, 1366 (Ind. Ct. App. 1992) (identifying "the familiar equitable defenses of clean hands, laches and estoppel as well as the defense of acquiescence"); *George v. Nat'l Collegiate Athletic Ass'n*, 945 N.E.2d 150, 153-54 (Ind. 2011) (describing *in pari delicto* as an "equitable doctrine"); *see also Schlueter v. Latek*, 683 F.3d 350, 355 (7th Cir. 2012) ("[A] court will not enforce a defense of *in pari delicto* if the effect would be to encourage or reward a greater wrong."); *U.S. v. Walerko Tool and Engineering Corp.*, 784 F. Supp. 1385, 1388 (N.D. Ind. 1992) (identifying release as

an equitable defense); *Allegheny Airlines, Inc. v. Fort Corp.*, 663 F.2d 751, 755 (7th Cir. 1981) (identifying accord and satisfaction, estoppel, waiver, leaches and binding election as equitable defenses).

24. The doctrine of unclean hands may bar a defendant's equitable defenses. *See Hot Wax, Inc. v. Turtle Wax, Inc.*, 191 F.3d 813, 825 (7th Cir. 1999) ("The notion of unclean hands working as a bar to the application of laches stems from the belief that an equitable defense, such as laches, cannot be used to reward a party's inequities or to defeat justice.") (citing *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814 (1945)); *In re Richardson*, No. 12-50165, 2013 WL 4498998, at \*9 (Bankr. S.D. Ind. Aug. 21, 2013) (same); *see also Indiana Mills & Mfg., Inc. v. Evenflo Co., Inc.*, No. 04-cv-540SEBVSS, 2005 WL 3150164, at \*7 (S.D. Ind. Nov. 22, 2005) (holding unclean hands barred the defendant's equitable defenses); *see also Edwards v. Academy Pub. Corp.*, 562 N.E.2d 60, 61 (Ind. Ct. App. 1990) (holding the trial court erred in failing to consider whether a defendant seeking equitable relief did so with unclean hands).
25. Courts have broad discretion in applying the unclean hands doctrine. *See Packers Trading Co. v. Commodity Futures Trading Comm'n*, 972 F.2d 144, 148-49 (7th Cir. 1992) ("*Precision* explains that the [unclean hands] maxim gives wide range to the court's use of discretion in refusing to aid the unclean litigant. The court, *Precision* further explains, is 'not bound by formula or restrained by any limitation that tends to trammel the free and just exercise of discretion.'") (citing *Precision Inst. Mfg. Co. v. Automotive Maintenance Mach. Co.*, 324 U.S. 806, 814-15 (1945)).



26. Under Indiana law, the unclean hands doctrine applies when a party has intentionally engaged in misconduct and the misconduct has an immediate and necessary relation to the matter being litigated. *See Hardy v. Hardy*, 910 N.E.2d 851, 856 (Ind. Ct. App. 2009); *Lake County Trust Co. v. Wine*, 704 N.E.2d 1035, 1042 (Ind. Ct. App. 1998).
27. Intentional misconduct creating unclean hands sometimes includes criminal misconduct. *See U.S. v. Eleven Thousand Dollars (\$11,000.00) U.S. Currency*, No. 94-1538, 53 F.3d 334, at \*1 (7th Cir. May 5, 1995) (denying the defendant's equitable claims for the return of \$11,000 that was loaned to the defendant by family and friends but seized by the government when the defendant used the money to purchase illegal food stamps because the defendant had "unclean hands" by virtue of his criminal purchase of illegal food stamps); *Hopper Resources, Inc. v. Webster*, 878 N.E.2d 418, 422-23 (Ind. Ct. App. 2007) ("Yet another maxim provides that 'equity follows the law,' .... In application, this means that 'an equitable right cannot be founded on a violation of law.'"); *Kochert v. Wiseman*, 269 N.E.2d 12, 19 (Ind. Ct. App. 1971) ("The old doctrine that a party may not in a court of equity have 'unclean hands' and still seek relief, is certainly applicable where a violation of the criminal law is involved.").
28. Intentional misconduct creating unclean hands also includes non-criminal misconduct. *See Packers Trading Co. v. Commodity Futures Trading Comm'n*, 972 F.2d 144, 148-49 (7th Cir. 1992) ("One's misconduct which invokes the [unclean hands] maxim 'need not have been of such a nature as to be punishable as a crime or as to justify legal proceedings of any character.'") (citing *Precision Inst. Mfg. Co. v.*

*Automotive Maintenance Mach. Co.*, 324 U.S. 806, 815 (1945)); *Phico Ins. Co., Inc. v. Aetna Cas. and Sur. Co. of Am.*, 93 F. Supp. 2d 982, 994 (S.D. Ind. 2000) (“[A]pplication of the doctrine [of unclean hands] under Indiana law need not rise to conduct of a criminal nature. Rather, it seems that the failure to do that which one has an affirmative duty to do satisfies the element of misconduct.”).

29. A defendant’s misconduct has an immediate and necessary relation to the matters at issue in the litigation when that misconduct arises from the transaction before the court. *Barrett v. Grow*, No. 07-cv-486, 2008 WL 4911206, at \*5 (S.D. Ind. Nov. 13, 2008) (stating intentional misconduct has an immediate and necessary relation to a case if the unclean party “dirtied [his hands] in acquiring the right he now asserts, or [ ] the manner of dirtying renders inequitable the assertion of such rights against the defendant”) (citing *Republic Molding Corp. v. B.W. Photo Utils.*, 319 F.2d 347, 349 (9th Cir. 1963)); *Schmidt v. Koch*, No. 32A01-0904-CV-209, 918 N.E.2d 26, at \*4 (Ind. Ct. App. Dec. 9, 2009) (holding the plaintiff’s “failure to abide by the terms of the same restrictive covenant he sought to enforce against others was not ‘incidental’ to the matter being litigated but, rather, had ‘an immediate and necessary relation to the matter’”) (internal citations omitted); *Hardy v. Hardy*, 910 N.E.2d 851, 856 (Ind. Ct. App. 2009) (holding the defendants’ transfer of a warranty deed as part of a scheme to defraud their creditors had an immediate and necessary relation to the defendants’ equitable reformation claims); *Hopper Resources, Inc. v. Webster*, 878 N.E.2d 418, 422-23 (Ind. Ct. App. 2007) (holding the contractor’s violation of local building permit statutes had an immediate and necessary relation to the contractor’s equitable mechanic’s lien foreclosure claim); *Lake County Trust Co. v. Wine*, 704

N.E.2d 1035, 1042 (Ind. Ct. App. 1998) (holding the defendants' breach of their residential leases had an immediate and necessary relation to the defendants' Section 1983 claims alleging housing discrimination).

30. This Court will not entertain Laikin's equitable affirmative defenses in this case (including accord and satisfaction, release, in pari delicto, waiver, estoppel, setoff and recoupment) because Laikin approaches this Court with unclean hands. The evidence demonstrates that Laikin has unclean hands because he used proceeds of the Note to perpetrate securities fraud.
31. The evidence demonstrates that Laikin has unclean hands because he knew that Durham was using Fair Finance and its affiliates, including the lender on the Note, DCI, to run a massive fraud scheme. Laikin's 11<sup>th</sup> hour epiphany that Fair Finance was operating as a fraud scheme simply does not ring true. Laikin helped Durham buy Fair Finance, was a director of Fair Finance, and spoke to Durham nearly every day. He claimed knowledge of the fraud scheme at Fair Finance based upon his directorship and conversations he had with Durham. Laikin's conduct with regard to his own Note reinforces the Court's recommended finding that he knew full well what was occurring at Fair Finance. Although Laikin was the CEO of a publicly-traded company, he claims he never bothered to track any of the millions of dollars advanced under his Note, nor did he track any of the alleged repayments by the sale of pledged securities. Throughout this time, including when he was a director of Fair Finance, his loan was carried as a significant asset of the company, and never reflected any alleged repayments through the sale of pledged securities, and Laikin asked that a Deed of Trust on his real property collateralizing his Note *not* be

recorded. Finally, Laikin continued to receive advances under the Note through the end of 2009, months after he had asserted that Fair Finance “a subsidiary of DCI” was a Ponzi scheme. (Plaintiff’s Exhibit IIII at 14-15 / Plaintiff’s Exhibit DDD, Motion, p. 5.)

32. In short, the Laikin Note bears all the hallmarks of being a loan to “related parties of Durham without adequate disclosure, including the disclosure of the risks relating to such loans” – the very type Laikin claimed was criminal in seeking to lessen the consequences of his own criminal conduct in the Laikin Criminal Case. Laikin, of course, had every motivation not to intervene in the conduct of Fair Finance – he was a beneficiary of the process. He received millions of dollars which helped him keep National Lampoon running and afforded him the opportunity to reside in two different multi-million dollar California mansions.

33. Inasmuch as Laikin has presented no evidence showing payment in excess of the amounts even he admits were lent to him, and inasmuch as he is barred from asserting his other defenses to the Trustee’s claim, there is no question of breach of the contract. The sole remaining question is therefore one of damages.

### **Damages**

34. Having failed to prove any applicable affirmative defense to the Trustee’s claim of breach of contract, the only remaining question is what damages should be awarded to the Trustee. The books and records show that a total of \$23,125,589.05 was due and owing as of December, 2009 including principal and accumulated interest [Klein Testimony / Plaintiff’s Exhibit OOOOO at 2, 4] Under the terms of the Note, that amount is deemed prima facie correct and the burden of proof lies with the

Defendant to prove that the amount claimed is incorrect. *See Auffenberg v. Bd. Of Trustees of Columbus Reg. Hospital*, 646 N.E.2d 328 (Ind. Ct. App. 1995).

35. The Court finds Klein's testimony credible, supported by the evidence in this adversary proceeding and unrebutted. With the additional default interest accrued to September 15, 2013, Mr. Klein testified that the outstanding amount due on the Note is, in his opinion, \$32,958,018.00, consisting of \$13,820,325 of interest calculated at the default rate of interest from September 1, 2008. The default rate of interest varied from September 1, 2008 to September 30, 2009. After September 30, 2009, the default rate of interest applied by Klein was 10.5%

36. To the extent Laikin attempted to rebut the validity of certain advances shown on the books and records, the Court does not credit his testimony. Similarly, the Court does not find his argument, which lacks any supporting evidence, that repayments should have been credited to his account after Brightpoint stock was sold in 2003, credible. Indeed, the trial record as a whole supports the conclusion that at least from mid-2006 on, Laikin used his DCI line of credit in a manner that imposed a willful and malicious injury on Fair Finance.

## **Conclusion**

The foregoing findings of fact and conclusions of law are hereby submitted to the District Court pursuant to 28 U.S.C. § 157(c)(1), Federal Rule of Bankruptcy Procedure 9033(a), and District Court General Order 2012-7. Based upon these proposed findings of fact and conclusions of law, it is the recommendation of this Court that a judgment in the following amounts be entered in favor of the Trustee and against Laikin:

(a) \$32,958,018 plus interest accruing at the default rate of 10.5% as of September 15,

2013 until paid in full; and

(b) attorney's fees for the Sanctions Order to be determined in a separate proceeding, following entry of judgment, as the parties agreed and the Court ordered at the final pre-trial conference.

Pursuant to the District Court's related case rule, other Fair Finance adversary proceedings have been assigned to Judge Patricia Gaughan. It is the opinion of this judicial officer that the related case rule would extend to the submission of these proposed findings of fact and conclusions of law. Accordingly, I have asked the Clerk's Office of the Bankruptcy Court to coordinate this submission to Judge Gaughan's docket.

# # #

cc (*via* electronic mail):  
BRAEDEN DOUTHETT, Counsel to Plaintiff  
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