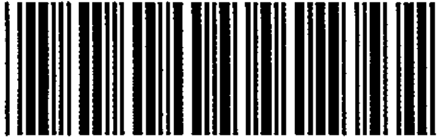

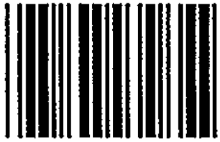

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DONALD J. TRUMP,	)	APPELLATE DIVISION
	)	DOCKET NO.: A-6141-08T3
Plaintiff/Appellant,	)	
	)	ON APPEAL FROM THE
v.	)	SUPERIOR COURT OF NEW JERSEY
	)	LAW DIVISION - CAMDEN COUNTY
TIMOTHY L. O'BRIEN; TIME	)	
WARNER BOOK GROUP, INC.; and	)	SAT BELOW
WARNER BOOKS, INC.,	)	HONORABLE MICHELE M. FOX, J.S.C.
	)	
Defendants/Respondents.	)	

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APPENDIX TO BRIEF OF PLAINTIFF/APPELLANT DONALD J. TRUMP
Volume XI
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TABLE OF CONTENTS

Page

Notice of Appeal,
Filed August 13, 2009 .... 1a

Civil Case Information Statement for Notice of Appeal
Filed August 13, 2009 .... 3a

Order of the Honorable Michele M. Fox, J.S.C.,
Granting Defendants' Motion for Summary Judgment
on Actual Malice,
Entered July 15, 2009 .... 6a

Complaint and Jury Demand filed by Donald J. Trump
Against Timothy L. O'Brien, et al., Superior Court
of New Jersey, Camden County,
Filed January 23, 2006 .... 8a

Answer of Defendants Timothy L. O'Brien, Time Warner
Book Group Inc., and Warner Books, Inc.,
Filed August 28, 2006 .... 34a

Statement of Items Submitted to the Court on the
Defendants' Summary Judgment Motion on Actual Malice 49a

Defendants' Notice of Motion for Summary Judgment on
Actual Malice,
Filed March 20, 2009 .... 50a

Defendants' Memorandum of Law in Support of Motion for
Summary Judgment on Actual Malice,
Filed March 20, 2009 .... 52a

Statement of Undisputed Material Facts in Support of
Defendants' Motion for Summary Judgment on Actual Malice,
Filed March 20, 2009 .... 85a

Certification of Mark S. Melodia, Esq. in Support of
Defendants' Motions for Summary Judgment,
Filed March 20, 2009 .... 98a

Exhibit 1
Certification of Timothy L. O'Brien,
dated November 10, 2006 .... 114a

Exhibit 2
Transcript of the deposition of Timothy L. O'Brien,
Dated October 15 and 16, 2007 .... 119a

Exhibit 3
News article from The New York Times entitled "Is Trump
Headed for a Fall?," by Timothy L. O'Brien and
Eric Dash,
Published March 28, 2004 .... 317a

Exhibit 4
News article from The New York Times entitled "Now, Reality
for Trump Looks More Like 'Survivor'," by
Timothy L. O'Brien and Eric Dash,
Published September 24, 2004 .... 327a

Exhibit 5
News article from The New York Times entitled
"The Midas Touch, With Spin On It," by Timothy
L. O'Brien,
Published September 8, 2004 .... 332a

Exhibit 6
Timothy L. O'Brien's notes from interviews of Donald
J. Trump,
Dated from late 2004 through mid-2005 .... 342a

Exhibit 7
Book entitled TrumpNation: The Art of Being the Donald,
By Timothy L. O'Brien 490a

Exhibit 8
Page from Hachette Book Group's website entitled
"About Us," 491a

Exhibit 9
Letter from Mark S. Melodia, Esq. and Andrew J.
Ceresney, Esq. to William M. Tambussi, Esq.,
Dated May 23, 2007 .... 493a

Exhibit 10
Contract between Warner Books Inc. and Timothy L.
O'Brien,
Dated December 6, 2004 .... 501a

Exhibit 11
Transcript of the deposition of Donald J. Trump,
Dated December 19 and 20, 2007 .... 513a

Exhibit 12
Letter from Andrew J. Ceresney, Esq. and Mark S.
Melodia, Esq. to William M. Tambussi, Esq.,
Dated August 1, 2007................................ 700a

Exhibit 13
News article from The New York Times entitled "What's
He Really Worth?," by Timothy L. O'Brien,
Published October 23, 2005.......................... 741a

Exhibit 14
Hachette Book Group Royalty Statement for the Book,
For period ending June 30, 2008 .... 762a

Exhibit 15
Timothy L. O'Brien's notes from interviews of the first
of the three confidential sources cited on page
154 of the Book ("Source I"),...................... 768a

Exhibit 16
Timothy L. O'Brien's notes from interviews of the second
of the three confidential sources cited on page
154 of the Book ("Source 2"), ...789a

Exhibit 17
Timothy L. O'Brien's notes from interviews of the third
of the three confidential sources cited on page
154 of the Book ("Source 3"),...................... 794a

Exhibit 18
Excerpts from the transcript of the deposition of Leigh
Michelle Lokey,
Dated September 7, 2007............................ 816a

Exhibit 19
Excerpts from the transcript of the deposition of
Allen Weisselberg,
Dated January 7, 2008.............................. 826a

Exhibit 20 - Omitted, duplicate of 8a-33a
Complaint and Jury Demand filed by Donald J. Trump
Superior Court of New Jersey, Camden County against
Timothy L. O'Brien, et al.,
Filed January 23, 2006 .... ***

Exhibit 21
Memorandum of Law of Defendants Timothy L. O'Brien,
Time Warner Book Group, Inc., and Warner Books Inc.,
In Support of Defendants' Motion to Dismiss,
Dated May 15, 2006 .... 842a

Exhibit 22
Transcript of the hearing on Defendants' Motion to Dismiss,
Dated August 18, 2006 .... 870a

Exhibit 23
Order of the Honorable Faustino J. Fernandez-Vina, J.S.C.,
Filed August 30, 2006 .... 896a

Exhibit 24
Order of the Honorable Dorothea O'C. Wefing, P.J.A.D.,
Denying Interlocutory Appeal,
Dated October 12, 2006 .... 898a

Exhibit 25
Plaintiff's First Set of Interrogatories to Defendant
Timothy L. O'Brien,
Dated June 2006 .... 900a

Exhibit 26
Plaintiff's First Set of Document Requests to Defendant
Timothy L. O'Brien,
Dated June 2006 .... 920a

Exhibit 27
Plaintiff's First Set of Document Requests to Defendant
Time Warner Book Group,
Dated June 2006 .... 936a

Exhibit 28
Order of the Honorable Irvin J. Snyder, J.S.C.,
Filed February 13, 2007 .... 951a

Exhibit 29
Timothy L. O'Brien's Responses and Objections to Plaintiff's Second Set of Interrogatories, Dated January 11, 2008 ....954a

Exhibit 30
Excerpts from the transcript of the deposition of Jeffrey S. McConney, Dated December 5 and 6, 2007 .... 967a

Exhibit 31
Excerpts from the transcript of the deposition of Donald Bender, Dated November 29, 2007............................ 974a

Exhibit 32
News article from The Washington Post entitled "He's the Top; His Casino Business May Be Down, But Donald Trump Is on a Roll," by David Segal, Published September 9, 2004 .... 978a

Exhibit 33
News article from Time entitled "Trump's Reality Woes: He Does the Firing, but His Battered Casino Empire Suggests He's a Better Pitchman than Manager," by Dan Kadlec, Published April 12, 2004 .... 985a

Exhibit 34
News article from Fortune entitled "What Does Donald Trump Really Want? The Girl and the Car, Obviously. Respect, Maybe. And He Could Definitely Use a Mortgage – Soon. Whatever He's After, He's His Own Worst Enemy," by Jerry Useem, Published April 3, 2000 .... 988a

Exhibit 35
News article from The Wall Street Journal entitled "Donald's Wealth Estimates Trump Reality–Several Billions Are Based on Profits that Are Far in the Developer's Future," by Linda Sandler, Published January 19, 2000 .... 1001a

Exhibit 36
Letter from Andrew J. Ceresney, Esq. to William M. Tambussi, Esq., Dated July 5, 2007.................................1004a

Exhibit 37
Letter from Andrew J. Ceresney, Esq. to Mark P. Ressler, Esq. and William M. Tambussi, Esq.
Dated September 28, 2006 .... 1008a

Exhibit 38
News article from Forbes entitled "Housing Honchos," by Matthew Miller and Duncan Greenberg,
Published October 6, 2008 .... 1014a

Exhibit 39
Letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq.,
Dated December 19, 2006 .... 1020a

Exhibit 40
Title Report for Trump Tower Chicago, 401 North Wabash Venture LLC,
Dated March 4, 2005 .... 1030a

Exhibit 41
Timothy L. O'Brien's notes from an interview of Donald J. Trump,
Conducted on March 22, 2004 .... 1183a

Exhibit 42
Timothy L. O'Brien's notes from an interview of Donald J. Trump,
Conducted on March 26, 2004 .... 1192a

Exhibit 43
News article from The New York Times entitled "Market Place: Trump Hotels Digs Deep for Cash to Try to Prop a Teetering House," by Timothy L. O'Brien and Eric Dash,
Published May 6, 2004 .... 1194a

Exhibit 44
Defendants' First Set of Interrogatories,
Dated August 21, 2006 .... 1197a

Exhibit 45
Transcript of a hearing before the Honorable Irvin J. Snyder, J.S.C.,
Conducted on December 20, 2006 .... 1228a

Exhibit 46
Letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq.,
Dated January 10, 2007 .... 1290a

Exhibit 47
Plaintiff Donald J. Trump's Objections and Responses to Defendants' Second Set of Interrogatories,
Dated July 31, 2007 .... 1292a

Exhibit 48
Letter from Mark S. Melodia, Esq. to the Honorable Irvin J. Snyder, J.S.C., (Footnote 3 Confidential Redacted Pursuant to Court Order)
Dated February 8, 2007.............................. 1329a

Exhibit 49
Order and Report by the Commonwealth of Pennsylvania Gaming Control Board,
Dated February 1, 2007.............................. 1336a

Exhibit 50
Letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq.,
Dated April 26, 2007, ... 1455a

Exhibit 51
Letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq.,
Dated December 18, 2007 .... 1457a

Exhibit 52
Letter from Mark F. Ressler, Esq. to Andrew J. Ceresney, Esq.,
Dated January 7, 2008 .... 1458a

Exhibit 53
Certification of Maria Gorecki, Esq.,
Dated April 26, 2007.............................. 1482a

Exhibit 54
Letter from Kellie A. Lavery, Esq. to William M. Tambussi, Esq.,
Dated May 8, 2007 .... 1484a

Notice of Deposition of a Representative of Plaintiff, Donald J. Trump, Dated May 8, 2007 .... 1485a

Exhibit 55
Letter from William M. Tambussi, Esq. to Kellie A. Lavery, Esq., Dated July 13, 2007 .... 1489a

Exhibit 56
Letter from Martin Domb, Esq. to Mark P. Ressler, Esq., Maria Gorecki, Esq., Andrew J. Ceresney, Esq., and Andrew M. Levine, Esq., Dated January 23, 2008 .... 1492a

Exhibit 57
Transcript of a hearing before the Honorable Michael Kassel, J.S.C., Conducted on February 1, 2008 .... 1494a

Exhibit 58
Letter from Maria Gorecki, Esq. to Andrew J. Ceresney, Esq., Dated February 14, 2008 .... 1521a

Exhibit 59
Transcript of the deposition of Felix H. Sater, Dated April 1, 2008 .... 1522a

Exhibit 60
News article from Business Journal of Phoenix entitled "Phoenix Council OKs Trump-Bayrock, Westcor Proposals," by Mike Padgett, Published September 22, 2005 .... 1568a

Exhibit 61
News article from The Arizona Republic entitled "Neighbors Feel 'Trumped' By High-Rise Approval," by Monica Alonzo-Dunsmoor, Published September 27, 2005 .... 1570a

Exhibit 62
Press release by People Restoring Our Totally Endangered City Trust ("PROTECT") and People Organized, Exercising Democracy ("P'OED"), Published October 5, 2005 .... 1574a

Exhibit 63
News article from The Arizona Republic entitled
"City Rejects Trump, Other Camelback high-rises,"
by Monica Alonzo-Dunsmoor,
Published December 22, 2005 .... 1577a

Exhibit 64
Mortgage Recording and Endorsement for 400 Fifth Realty LLC,
from the New York City Department of Finance Office
of the City Register,
Dated August 31, 2006............................ 1579a

Exhibit 65
Transcript of the deposition of Howard M. Lorber,
Dated April 14, 2008............................. 1609a

Exhibit 66
Letter from Andrew J. Ceresney, Esq. to Mark P.
Ressler, Esq.,
Dated February 13, 2008 .... 1650a

Exhibit 67
Letter from Maria Gorecki, Esq. to Andrew J. Ceresney, Esq.,
Dated July 16, 2008 .... 1653a

Exhibit 68
News article from The Dallas Business Journal entitled
"Trump Eyeing Sites for Dallas Tower,"
by Christine Perez,
Published on February 20, 2006................... 1657a

Exhibit 69
Blog posting on the Trump University website entitled
"The Trump Brand," by Donald J. Trump,
Appeared February 21, 2006 .... 1659a

Exhibit 70
News article from The Philadelphia Inquirer entitled
"Trump the Best-Known City Casino-Game Player,"
by Suzette Parmley,
Published December 15, 2006 .... 1666a

Exhibit 71
News article from The Palm Beach Post entitled
"It's Trump vs. Market in Condo Project,"
by Alexandra Clough,
Published January 28, 2007 .... 1670a

Exhibit 72
News article from Reuters News entitled "Trump Stays Upbeat Despite Setbacks," an interview by Chris Reiter, Published July 6, 2007 .... 1673a

Exhibit 73
Letter from Mark S. Melodia, Esq. enclosing Defendants' Motion to Compel Plaintiff to Answer Interrogatories, Dated June 6, 2007 .... 1675a

Notice of Motion to Compel Plaintiff to Answer Interrogatories, Dated June 6, 2997 .... 1676a

Letter Brief in Support of Motion to Compel, Dated June 6, 2007 .... 1678a

Certification of Mark S. Melodia, Esq., Dated June 6, 2007 .... 1684a

Exhibit A-Omitted, duplicate of 1197a-1227a
Defendants' First Set of Interrogatories Directed to Plaintiff, Dated August 21, 2006 .... ***

Exhibit B
Plaintiff's Objections and Responses to Defendants' First Set of Interrogatories, Dated October 20, 2006 .... 1688a

Exhibit C
Letter from Andrew J. Ceresney, Esq., to Mark R. Ressler, Esq. and William M. Tambussi, Esq., Dated November 2, 2006 .... 1727a

Exhibit D
Letter from Maria Gorecki, Esq. to Andrew J. Ceresney, Esq., Dated December 4, 2006 .... 1734a

Exhibit E-Omitted, duplicate of 1020a-1029a
Letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq., Dated December 19, 2006 .... ***

Exhibit F-Omitted, duplicate of 1290a-1291a
Letter from Mark P. Ressler, Esq. to
Andrew J. Ceresney, Esq.,
Dated January 10, 2007 .... ***

Exhibit G
Letter from Mark P. Ressler, Esq. to Andrew J.
Ceresney, Esq.,
Dated January 11, 2007 .... 1737a

Exhibit H-Omitted, duplicate of 1455a-1456a
Letter from Mark P. Ressler, Esq. to Andrew J.
Ceresney, Esq.,
Dated April 26, 2007 .... ***

Exhibit 74
Order of the Honorable Irvin J. Snyder, J.S.C.,
Filed July 6, 2007 .... 1741a

Exhibit 75
News article from USA Today entitled "How Rich Is Trump? Our
Guess: $2.6B+," by Paul Wiseman,
Dated March 9, 1990 ....1743a

Exhibit 76
News article from The Washington Post entitled "They Do,
They Do, Already! Six Years, One Baby and a Zillion
Bucks or So Later, the Trump-Maples Merger," by
Roxanne Roberts,
Published December 20, 1993........................1745a

Exhibit 77
Blog posting from The Blogger News Network entitled
"Trump Good and Bad," by Paul Burns,
Published July 3, 2007.......................... 1749a

Exhibit 78
News article The New York Times entitled "Losses Increase as
Cash Decreases, Straining Trump's Casinos," by
Timothy L. O'Brien and Eric Dash,
Published July 30, 2004 .... 1755a

Exhibit 79
News article The New York Times entitled "Trump Must Ante Up $55 Million to Hold On to 25% of His Casino," by Timothy L. O'Brien and Eric Dash, Published August 11, 2004 .... 1760a

Exhibit 80
Audio copy of an excerpt from an interview of Donald J. Trump by Timothy L. O'Brien, Dated March 28, 2005 .... 1764a

Exhibit 81
Audio copy of excerpt from interview of Donald J. Trump by Timothy L. O'Brien, Dated March 28, 2005 ....1765a

Exhibit 82
Audio copy of an excerpt from an interview of Donald J. Trump by Timothy L. O'Brien, Dated February 16, 2005.......................... 1766a

Exhibit 83
Excerpts from the transcript of the deposition of Rob Nissen, Dated June 26, 2008.............................. 1767a

Exhibit 84-Omitted, duplicate of 1688a-1726a
Plaintiff's Objections and Responses to Defendants' First Set of Interrogatories, Dated October 20, 2006 ....***

Exhibit 85
Plaintiff's Brief in Further Support of Plaintiff's Motion to Compel Discovery and in Opposition to Defendants' Cross-Motion to Compel Discovery, Dated December 3, 2007.......................... 1770a

Exhibit 86
Letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq., Dated July 20, 2007 ....1820a

Exhibit 87
News article from The Wall Street Journal entitled "Crisis on Wall Street: Economic Tumult Besets Trump Property Projects," by Alex Frangos, Published March 10, 2009......................... 1827a

Exhibit 88
News article entitled "Atlanta Trump Towers on Hold, Deposits Not Lost," by Bill Liss 1829a

Exhibit 89
News article from the Associated Press, entitled "Trump Venture Folds, Leaving Buyers Strapped," by Elliot Spagat,
Published March 6, 2009 ....1830a

Exhibit 90
News article Business Week entitled "Lawyer: Trump High-Rise in New Orleans on Hold," by Becky Bohrer,
Published February 17, 2009 .... 1833a

Exhibit 91
News article from Crain's New York Business entitled "Trump's Towering Troubles; Fabled Brand Looks Damaged," by Theresa Agovino,
Published December 15, 2008 .... 1834a

Exhibit 92
News article from The Wall Street Journal entitled "Trump, Lenders Suspend Legal Row," by Alex Frangos,
Published March 4, 2009 .... 1836a

Exhibit 93
News article from The New York Times entitled "In Las Vegas, a Break in the Real Estate Action," by Steve Friess,
Published March 6, 2009 .... 1838a

Exhibit 94
Spreadsheet of Trump License Fees,
Dated as of June 30, 2005 .... 1843a

Exhibit 95-Omitted, duplicate of 1737a-1738a
Letter from Mark P. Ressler, Esq. to Andrew J. Ceresney, Esq.,
Dated January 11, 2007 .... ***

Exhibit 96
News article from The New York Post entitled "Gimme Shelter," by Braden Keil,
Published May 4, 2006 .... 1845a

Exhibit 97
Page from the website of the architects for the proposed building at 400 Fifth Avenue, New York, New York 1848a

Exhibit 98
Excerpts from the transcript of the deposition of Gerald Rosenblum, Dated November 14, 2007........................... 1849a

Exhibit 99
Cortland Associates, LP v. Cortland Neighborhood Condominium Association, No. SOM-C-12003-04, 2005 WL 2334364 (N.J. Super. Ch. Div. Sept. 23, 2005) 1854a

Exhibit 100
Freemotion Fitness Financing Services v. Total Health & Fitness, L.L.C., No. L-2128-06, 2008 WL 3890444 (N.J. App. Div. Aug. 25, 2008) 1863a

Exhibit 101
Jaliman v. Selendy, No. 12820/04, 2005 WL 818447 (N.Y. Sup. Ct. Mar. 17, 2005) 1867a

Exhibit 102
Kearney v. Bayway Refining Co., 2008 WL 2388415 (N.J. App. Div. June 13, 2008) 1879a

Exhibit 103
Sea Crest Enterprises, L.L.C. v. City of Elizabeth, No. L-4272-00, 2006 WL 2590327 (N.J. App. Div. Aug. 8, 2006) 1888a

Exhibit 104
Suson v. NYP Holdings, Inc., No. 300605TSN2006, 2008 WL 927985 (N.Y. Civ. Ct. Mar. 31, 2008) 1898a

Plaintiff Donald J. Trump's Responses to Defendants' Statement of Material Facts and Plaintiff's Counterstatement of Material Facts, Filed April 24, 2009 .... 1908a

Plaintiff Donald J. Trump's Responses to Defendants' Statement of Material Facts in Support of Defendants' Motion for Summary Judgment on Loss Causation and Damages (Omitted pages 9-24, irrelevant to Plaintiff's appeal) .... ***

Plaintiff Donald J. Trump's Counterstatement of Material Facts 1916a

Plaintiff Donald J. Trump's Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment, Dated April 24, 2009 .... 1944a

Certification of William Tambussi in Support of Plaintiff Donald J. Trump's Memorandum of Law in Opposition to Defendants' Motions for Summary Judgment, Dated April 24, 2009 .... 2037a

Exhibit A
Portions of the transcript of the deposition of Allen Weisselberg, Dated January 7, 2008 .... 2050a

Exhibit B
Portions of the transcript of the deposition of Donald J. Trump, Dated December 19, and 20, 2007 .... 2088a

Exhibit C
News article from WWD entitled "The Donald Machine Revs Up," by Pete Born, Published February 5, 2005 .... 2137a

Exhibit D
News article from Forbes entitled "How Much is Donald Worth?," by Stephane Fitch, Published November 28, 2005 .... 2138a

Exhibit E
Portions of the transcript of the deposition of Timothy L. O'Brien, Dated October 15 and 16, 2007 .... 2139a

Exhibit F
Four-page document produced by Defendant Timothy L. O'Brien, Bearing bates stamp TOB-EF-00005762-65 .... 2189a

Exhibit G-Omitted, duplicate of 317a-326a
News article from The New York Times entitled "Is Trump Headed for a Fall?," by Timothy L. O'Brien, Published March 28, 2004 .... ***

Exhibit H-Omitted, duplicate of 501a-512a
Contract between Warner Books Inc. and Timothy L. O'Brien, Dated December 6, 2004 .... ***

Exhibit I
One-page document produced by Defendant Time Warner Book Group, Bearing bates stamp TWBG-PD-00000916 .... 2193a

Exhibit J
Promotional materials for the Book prepared by Time Warner Book Group 2194a

Exhibit K-Omitted, duplicate of 332a-341a
News article from The New York Times entitled "The Midas Touch, With Spin on It," by Timothy L. O'Brien and Eric Dash, Published September 8, 2004 .... ***

Exhibit L-Omitted, duplicate of 327a-331a
News article from The New York Times entitled "Now, Reality for Trump Looks More Like 'Survivor'," by Timothy L. O'Brien and Eric Dash, Published September 24, 2004 .... ***

Exhibit M-Omitted, duplicate of 1755a-1758a
News article from The New York Times entitled "Losses Increase as Cash Decreases, Straining Trump's Casinos," by Timothy L. O'Brien and Eric Dash, Published July 30, 2004 .... ***

Exhibit N
Letter from Donald J. Trump to Eric Dash and Timothy O'Brien, Dated August 4, 2004 .... 2196a

Exhibit O
News article from The New York Times entitled "Can Trump Afford Casino Stake?," by Timothy L. O'Brien and Eric Dash, Published August 12, 2004 .... 2197a

Exhibit P
Letter from Lawrence S. Rosen, Esq. to David E. McCraw, Esq., Dated August 26, 2004 .... 2199a

Exhibit Q
Letter from Weiser LLP to David E. McCraw, Esq., Dated September 2, 2004 .... 2202a

Exhibit R
Portions of the transcript of the deposition of Michelle Lokey, Dated September 7, 2007 .... 2203a

Exhibit S
Portions of the transcript of the deposition of Gerald J. Rosenblum, Dated November 13, 2007 .... 2240a

Exhibit T
Email chain between Timothy L. O'Brien and Michelle Lokey, Dated September 15, 2005 .... 2244a

Exhibit U
Letter from Michelle L. Scarbrough, Esq. to Larry Ingrassia, Dated October 21, 2005 .... 2246a

Exhibit V
Notes from Timothy L. O'Brien from interviews with Allen Weisselberg and Michelle Scarbrough, Dated April 21, 2005 .... 2247a

Exhibit W
News article from The New York Times entitled "Trump Group Selling West Side Parcel For $1.8 Billion," by Charles V. Bagli, Published June 1, 2005 .... 2261a

Exhibit X
Portions of the transcript of the deposition of Joseph Plambeck, Dated September 25, 2007 .... 2263a

Exhibit Y
Portions of the transcript of the deposition
of Patrick O'Brien,
Dated March 27, 2008 .... 2283a

Exhibit Z
Letter from Donald J. Trump to Larry Ingrassia,
Dated October 21, 2005 .... 2284a

Exhibit AA
Letter from Marc E. Kasowitz, Esq. to Lawrence J.
Kirshbaum,
Dated October 27, 2005 .... 2285a

Exhibit AB-Omitted, duplicate of 741a-761a
News article from The New York Times entitled "What's He
Really Worth?," by Timothy L. O'Brien,
Published October 23, 2005 .... ***

Exhibit AC
Graphic that appeared along side the article from
The New York Times entitled "What's He Really Worth?,"
Published October 23, 2005 .... 2287a

Exhibit AD
Confidential News Sources Policy of The New York Times
Company, Available at http://
www.nytco.com/company/business_units/sources.html 2288a

Exhibit AE
Agreement of Limited Partnership of Hudson Waterfront
Associates I, L.P.,
Dated November 30, 1994 .... 2291a

Exhibit AF
News article from The New York Times entitled "Trump Sues
Asian Partners Over Sale of West Side Site,"
by Charles V. Bagli,
Published July 12, 2005 .... 2395a

Exhibit AG
Transcript from Timothy L. O'Brien's appearance on KNDD,
Aired November 17, 2005 .... 2397a

Exhibit AH
Notes from Timothy L. O'Brien from interviews with
Donald J. Trump,
Dated December 20, 2004 .... 2402a

Exhibit AI
Letter from Jason D. Greenblatt, Esq. to
Larry Ingrassia,
Dated October 20, 2005 .... 2431a

Exhibit AJ
Email chain between Dave Dillon, Timothy L. O'Brien and
Michael White,
Dated November 3, 2005 .... 2433a

Exhibit AK
Email chain between Rick Wolff, Andrew Blauner,
Emi Battaglia and Timothy L. O'Brien,
Dated July 13, 2005 .... 2435a

Exhibit AL
Relevant portions of the transcript of the deposition
of David Dillon,
Dated August 13, 2008 .... 2437a

Exhibit AM
Email chain between Dave Dillon, Timothy L. O'Brien,
Michael White, and John Betterman,
Dated June 10, 2005 .... 2443a

Exhibit AN
Email from Dave Dillon to Timothy L. O'Brien,
Dated October 31, 2005 .... 2446a

Exhibit AO
Two-page document produced by defendant
Time Warner Book Group,
Bearing bates stamp TWBG-EM-00022456-7 .... 2457a

Exhibit AP
Press Release,
Dated October 26, 2005 .... 2459a

Exhibit AQ
TrumpNation Talking Points 2462a

Exhibit AR
Email chain between Timothy L. O'Brien, Richard Wolff and Liz Dubelman,
Dated October 31, 2005 .... 2465a

Exhibit AS
TrumpQuizzes that appear in the Book 2468a

Exhibit AT
Email chain between Timothy L. O'Brien and Lacy O'Toole,
Dated October 26, 2005 .... 2481a

Exhibit AU
Transcript of Timothy L. O'Brien's appearance on Squawk Box,
Airing October 31, 2005 .... 2483a

Exhibit AV
Email chain between Allan M. Siegal and Larry Ingrassia,
Dated November 1, 2005 .... 2485a

Exhibit AW
Transcript of Timothy L. O'Brien's appearance at Coliseum Books,
In December 2005 .... 2489a

Exhibit AX
Email chain between Timothy L. O'Brien, Renee Supriano, Rob Nissen, Richard Wolff, Lisa Dallos, and Andrew Blauner,
Dated October 23, 2005 .... 2504a

Exhibit AY
Peter Newcomb's appearance on <u>Your World</u> with Neil Cavuto,
Airing November 7, 2005 .... 2506a

Exhibit AZ
One-page document produced by plaintiff Donald J. Trump,
Bearing bates stamp TR000092386 .... 2508a

Exhibit BA
Advertisement that appeared on the front cover of <u>The New York Times Magazine</u>,
Dated October 28, 2006 .... 2509a

Exhibit BB
Portions of the transcript of the deposition
of Howard M. Lorber,
Dated April 18, 2008 .... 2511a

Exhibit BC
Portions of the transcript of the deposition
of Felix H. Sater,
Dated April 1, 2008 .... 2546a

Exhibit BD
Letter from Donald J. Trump to Tevfik Arif,
Dated January 1, 2005 .... 2561a

Exhibit BE-Omitted, duplicate of 896a-897a
Order of the Honorable Faustino J. Fernandez-Vina, J.S.C.,
Dated August 30, 2006 .... ***

Exhibit BF-Omitted, duplicate of 870a-895a
Transcript of Motion To Dismiss before the Honorable
Faustino J. Fernandez-Vina, J.S.C.,
Dated August 18, 2006 .... ***

Exhibit BG-Omitted, duplicate of 898a-899a
Order of the Honorable Dorothea O'C. Wefing, P.J.A.D.,
Entered October 12, 2006 .... ***

Exhibit BH-Omitted, duplicate of 900a-919a
Plaintiff's First Set of Interrogatories to Defendant
Timothy L. O'Brien, ... ***

Omitted, duplicate of 920a-935a
Plaintiff's First Request to Defendant Timothy L.
O'Brien for the Production of Documents .... ***

Plaintiff's First Set of Interrogatories to
Defendant Warner Books 2562a

Omitted, duplicate of 920a-935a
Plaintiff's First Request to Defendant Timothy L.
O'Brien for the Production of Documents .... ***

Plaintiff's First Set of Interrogatories to
Defendant Time Warner Book Group, Inc. 2578a

Omitted, duplicate of 936a-950a
Plaintiff's First Request to Defendant Time Warner Book Group, Inc. for the Production of Documents .... ***

Plaintiff's First Request to Defendant Warner Books, Inc. for the Production of Documents 2594a

Exhibit BI
Timothy L. O'Brien's Responses and Objections to Plaintiff's First Request and Objections to Plaintiff's First Request for the Production of Documents 2609a

Exhibit BJ
Time Warner Book Group Inc.'s and Warner Book, Inc.'s Responses and Objections to Plaintiff's First Request For The Production of Documents, Dated September 8, 2006 .... 2646a

Exhibit BK
Timothy L. O'Brien's Responses and Objections to Plaintiff's First Set of Interrogatories, Dated September 8, 2006 .... 2684a

Exhibit BL
Time Warner Book Group Inc.'s and Warner Books, Inc.'s Responses and Objections to Plaintiff's First Set of Interrogatories, Dated September 8, 2006 .... 2713a

Exhibit BM
Defendants' privilege log and redaction log, Dated September 27, 2006 .... 2735a

Exhibit BN-Omitted, duplicate of 951a-953a
Order of the Honorable Irvin J. Snyder, J.S.C., Filed February 13, 2007 .... ***

Exhibit BO
Defendants' privilege log and redaction log, Dated October 17, 2006 .... 2879a

Exhibit BP-Omitted, duplicate of 1228a-1289a
Transcript Of Hearing before the Honorable Irvin J. Snyder, J.S.C., Dated December 20, 2006 .... ***

Exhibit BQ
Order of the Honorable John S. Holston, Jr., J.A.D.,
Dated March 14, 2007 .... 3127a

Exhibit BR
Decision of the Superior Court of New Jersey,
Appellate Division,
Dated October 24, 2008 .... 3129a

Exhibit BS
Letter from Andrew Levine, Esq. to Maria Gorecki, Esq.,
Dated November 21, 2008 .... 3162a

Exhibit BT
Portions of the transcript of the deposition
of Lawrence Ingrassia,
Dated April 30, 2008 .... 3163a

Exhibit BU
Letter from Maria Gorecki, Esq. to Andrew L. Levine, Esq.,
Dated April 5, 2007 .... 3167a

Exhibit BV
Defendants' Responses and Objections to Plaintiff's
Requests for Admissions,
Dated December 8, 2008 .... 3170a

Exhibit BW
Transcript of Hearing before the Honorable Michael J.
Kassel, J.S.C.,
Dated December 7, 2007 .... 3200a

Exhibit BX
Articles written by Timothy L. O'Brien,
Dated March 28, 2004 to October 22, 2004 .... 3243a

Exhibit BY
Email from Timothy L. O'Brien to Arthur Ochs,
Dated September 6, 2005 .... 3297a

Exhibit BZ
Email chain between Timothy L. O'Brien, Richard Wolff,
Rob Nissen, and Andrew Blauner,
Dated October 31, 2005 .... 3300a

Exhibit CA
Email chain between Timothy L. O'Brien, Michael White,
John Betterman, and Dave Dillon,
Dated October 25, 2005 .... 3303a

Exhibit CB
Email from Dave Dillon to Timothy L. O'Brien,
Michael White, Patrick O'Brien, and Michael O'Brien,
Dated November 9, 2005 .... 3306a

Exhibit CC-Omitted, duplicate of 978a-984a
News article from The Washington Post entitled "He's
the Top," by David Segal,
Published September 9, 2004 .... ***

Exhibit CD-Omitted, duplicate of 700a-740a
Timothy L. O'Brien's Supplemental Interrogatory Responses,
Dated August 1, 2007 .... ***

Exhibit CE
Omitted, duplicate of 2735a-3126a
Defendants' Privilege Log,
Dated September 27, 2006 .... ***

Omitted, duplicate of 2879a-3126a
Defendants' Privilege Log,
Dated October 17, 2006 .... ***

Defendants' Production/Redaction Log,
Dated May 25, 2007 .... 3308a

Omitted, duplicate of 2879a-3126a
Defendants' privilege log,
Dated October 17, 2006 .... ***

Defendants' Production/Redaction Log
Various dates 3318a

Defendants' Supplemental Privilege Log,
Dated March 10, 2008 .... 3473a

Defendants' Supplemental Redaction Log,
Dated March 10, 2008 .... 3479a

Defendants' Supplemental Privilege Log,
Dated June 12, 2008 .... 3482a

Exhibit CF
Andrew Blauner's privilege log,
Dated August 24, 2007 .... 3488a

Exhibit CG
Email chain between Robert Castillo and Richard Wolff,
Dated July 26, 2005 .... 3496a

Exhibit CH
Email chain between Andrew Blauner, Richard Wolff,
Emi Battaglia, and Timothy L. O'Brien,
Dated July 13, 2005 .... 3499a

Exhibit CI
Email chain between Rob Nissen, Timothy L. O'Brien,
Richard Wolff, Andrew Blauner, and Emi Battaglia,
Dated September 19, 2005 .... 3501a

Exhibit CJ
Email chain between Richard Wolff, Rob Nissen,
Timothy L. O'Brien, and Andrew Blauner,
and Emi Battaglia,
Dated November 17, 2005 .... 3505a

Exhibit CK
Email chain between Timothy L. O'Brien, Rob Wolff,
Emi Battaglia, and Andrew Blauner,
Dated March 15, 2005 .... 3507a

Exhibit CL
Email chain between Richard Wolff and Timothy L. O'Brien,
Dated March 18, 2005 .... 3509a

Exhibit CM
Reply Memorandum of Law of Defendants Timothy L. O'Brien,
Time Warner Book Group Inc., and Warner Books Inc.,
In Further Support of Defendants' Motion to Dismiss,
Dated July 14, 2006 .... 3510a

Exhibit CN
Email from Michael J. Bowe, Esq. to David E. McCraw, Esq.,
Dated October 21, 2005 .... 3541a

Exhibit CO
Email from Michael J. Bowe, Esq. to David E. McCraw, Esq.,
Dated October 21, 2005 .... 3542a

Exhibit CP
Email from Michael J. Bowe, Esq. to David E. McCraw, Esq.,
Dated October 21, 2005 .... 3544a

Exhibit CQ
Letter from Marc E. Kasowitz, Esq. to Lawrence Ingrassia,
Dated November 9, 2005 .... 3546a

Exhibit CR-Omitted, duplicate of 1458a-1481a
Letter from Marc P. Ressler, Esq. to Andrew J. Ceresney,
Esq.,
Dated January 7, 2008 .... ***

Exhibit CS
Di Lorenzo v. New York News Inc.,
1981 N.Y. App. Div. LEXIS 11522 (May 6, 1981) 3550a

Exhibit CT
First Interstate Credit Alliance, Inc. v. Leroy,
No. 89 Civ. 3263, 1989 U.S. Dist. LEXIS 14523
(S.D.N.Y. Dec. 5, 1989) 3555a

Exhibit CU
Houston v. New York Post, No. 93 Civ. 1996
U.S. Dist. LEXIS 19705
(S.D.N.Y. Jan. 10, 1997) 3561a

Exhibit CV
Metropolitan Opera Association v. Local 100,
No. 00 Civ. 3613, 2005 U.S. Dist. LEXIS 14422
(S.D.N.Y. July 26, 2005) 3568a

Exhibit CW
Roche v. Claverack Coop. Inc. Co.,
No. 505669, 2009 N.Y. App. Div. LEXIS 1389
(Feb. 26, 2009) 3576a

Exhibit CX
Stevens Institute of Technology v. Hine,
No. A-3574-04T2, 2007 WL 2188200
(App. Div. 2007) 3580a

Certification of Donald J. Trump,
Dated April 24, 2009 .... 3591a

Certification of Donald J. Trump, Jr.,
Dated April 23, 2009 .... 3593a

Certification of Ivanka Trump,
Dated April 24, 2009 .... 3595a

Certification of Rhona Graff-Riccio,
Dated April 24, 2009 .... 3597a

Defendants' Reply to Plaintiff's Responses to Defendants' Statements of Material Facts and Defendants' Responses To Plaintiff's Counterstatement of Material Facts,
Dated May 7, 2009 .... 3599a

Supplemental Certification of Mark S. Melodia, Esq., in Further Support of Defendants' Motions for Summary Judgment,
Dated May 7, 2009 .... 3643a

Exhibit 105
Audio copy of an excerpt from an interview of Donald J. Trump, By Timothy L. O'Brien,
Dated December 20, 2004 .... 3649a

Exhibit 106
Audio copy of an excerpt from an interview of Donald J. Trump, By Timothy L. O'Brien,
Dated January 12, 2005 .... 3650a

Exhibit 107
Audio copy of an excerpt from an interview of Donald J. Trump, By Timothy L. O'Brien,
Dated February 16, 2005 .... 3651a

Exhibit 108
Audio copy of an excerpt from an interview of Donald J. Trump And Allen Weisselberg, by Timothy L. O'Brien,
Dated March 4, 2005 .... 3652a

Exhibit 109
Letter from William M. Tambussi, Esq. and Mark P. Ressler, Esq. to the Honorable Michele M. Fox, J.S.C.,
Dated February 12, 2009 .... 3563a

Exhibit 110
News article from The New York Post entitled "Say Spree Hurt Hand During Boat Fracas," by Marc Berman,
Published October 4, 2002 .... 3656a

Exhibit 111
News article from The New York Post entitled "Spree Might Have Broken Knicks Deal," by Marc Berman,
Published October 5, 2002 .... 3658a

Exhibit 112
Donald J. Trump's Statement of Financial Condition,
Dated June 30, 2004 .... 3660a

Exhibit 113
Mortgage Agreement for Mar-A-Lago,
Dated April 6, 1995 .... 3685a

Exhibit 114
Payment guaranty made by Donald J. Trump in favor of UBS Warburg Real Estate Investments Inc.,
Dated November 26, 2002 .... 3742a

Exhibit 115
Excerpts from the transcript of the deposition of Allen Weisselberg,
Dated January 7, 2008.............................. 3753a

Exhibit 116
Excerpts from the transcript of the deposition of Leigh Michelle Lokey,
Dated September 7, 2007............................ 3766a

Exhibit 117
Excerpts from the transcript of the deposition of Gerald J. Rosenblum,
Dated November 13, 2007............................ 3771a

Exhibit 118
Excerpts from the transcript of the deposition of David Dillon,
Dated August 13, 2008.............................. 3780a

Exhibit 119
Excerpts from the transcript of the deposition of Patrick J. O'Brien,
Dated March 27, 2008............................... 3783a

Exhibit 120
Excerpts from the transcript of the deposition of Michael O'Brien,
Dated August 13, 2008.............................. 3791a

Exhibit 121
Undated list of Trump's licensing agreements, produced
In discovery 3795a

Exhibit 122
News article from The Sydney Morning Herald entitled
"Leighton Hit by Mothballed Tower," by Miriam Steffen,
Published December 2, 2008 .... 3799a

Exhibit 123
News article from The Philadelphia Inquirer entitled
"Trump Postpones Philadelphia Development,"
by Suzette Parmley,
Published November 4, 2008 .... 3800a

Exhibit 124
News article from The St. Petersburg Times entitled
"Tampa Tower Loses Trump," by James Thorner,
Published May 30, 2007 .... 3802a

Exhibit 125
News article from The Associated Press State & Local Wire
entitled "Developer: Condo Development on Hold in N.O.,"
Published April 22, 2009 .... 3804a

Exhibit 126
News article from The Daily News entitled "Donald Declares
'Trump Nation' Enemy Territory," by Lloyd Grove,
Published November 10, 2005 .... 3805a

Exhibit 127
Order of the Honorable Michael J. Kassel, J.S.C.,
Dated January 23, 2008 .... 3807a

Exhibit 128
Excerpts from the transcript of the deposition of Donald
Bender,
Dated November 29, 2007 .... 3811a

Exhibit 129
News article from Daily Deal/The Deal "Trump Wins Plan
Confirmation," by Erik Moser,
Published April 6, 2005 .... 3814a

Exhibit 130
Letter from Andrew J. Ceresney, Esq. to Maria Gorecki, Esq.,
Dated May 25, 2007 .... 3816a

Exhibit 131
News article from Business Week entitled
"Trump: Bigger than Coke or Pepsi?," by Diane Brady,
Published December 14, 2004 .... 3817a

Exhibit 132
Ajax Enterprises v. Declan Fay, No. 04-4539,
2007 U.S. Dist. LEXIS 38515 (D.N.J. May 15, 2007) .. 3820a

Exhibit 133
Burns v. Bank of America, 03 Civ. 1685,
2008 Dist. LEXIS 98335 (S.D.N.Y. Dec. 4, 2008)...... 3824a

Exhibit 134
Kipper v. NYP Holdings, Inc., No. 54,
2009 WL 1148653 (N.Y. Apr. 30, 2009) 3839a

Exhibit 135
Liberty Lobby, Inc. v. Anderson, No. 81-2240,
1991 WL 186998 (D.D.C. May 1, 1991) 3848a

Exhibit 136
Neff v. Coates, No. 977-04,
2008 WL 1988022 (N.J. Super. App. Div. May 9, 2008) 3857a

Exhibit 137
Skidmore v. Wall Stadium Concessions, Inc., No L-1460-01,
2006 WL 552505 (N.J. Super. App. Div. Mar. 8, 2006) 3866a

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DONALD J. TRUMP, Plaintiff, vs. TIMOTHY O'BRIEN, TIME WARNER BOOK GROUP INC., WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION, CIVIL PART CAMDEN COUNTY Docket No. L-545-06 **CERTIFICATION OF RHONA GRAFF-RICCIO**

I, Rhona Graff-Riccio, of full age, certify as follows:

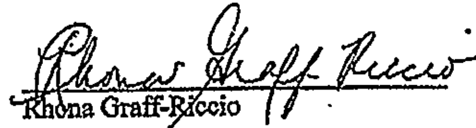
1. I am a Vice President and Assistant to the President of The Trump Organization, 725 Fifth Avenue, New York, New York 10022. I have personal knowledge of the facts contained in this certification in accordance with R. 1:6-6.

2. In or around October 2006, Donald J. Trump, my employer, asked me to coordinate the effort of publishing a glossy, gatefold, full-color advertisement depicting his real estate holdings.

3. To develop the advertisement, we contracted with an outside vendor and incurred costs in the hundreds of dollars.

4. The advertisement was published on four dates in three publications: *The New York Times*, on October 15, 2006 at a cost of $146,400 and on March 18, 2007 at a cost of $100,000; *New York Magazine*, on October 30, 2006 at a cost of $89,100; and *The New York Post*, on March 21, 2007 at a cost of $45,000.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.



Rhona Graff-Riccio

DATED: April 24, 2009

APR-24-2009 09:58 TRUMP 1212 755 3230 P.003

DONALD J. TRUMP, Plaintiff, v. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY DOCKET NO. CAM-L-545-06 *Civil Action*

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSES TO DEFENDANTS' STATEMENTS OF MATERIAL FACTS, AND DEFENDANTS' RESPONSES TO PLAINTIFF'S COUNTERSTATEMENT OF MATERIAL FACTS

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Table of Contents

Page

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSES TO DEFENDANTS' STATEMENTS OF MATERIAL FACTS 1

Actual Malice 1

Loss Causation and Damages 7

DEFENDANTS' RESPONSES TO PLAINTIFF'S COUNTERSTATEMENT OF MATERIAL FACTS 17

DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSES TO DEFENDANTS' STATEMENTS OF MATERIAL FACTS

Defendants address below only those of plaintiff's responses to defendants' statements of undisputed facts for which further explanation may be useful to show that plaintiff has not demonstrated that there exists a genuine issue to be tried. Defendants' decision not to address other responses herein does not constitute an admission to the assertions contained in plaintiff's responses.

Defendants' objections herein to the admissibility of certain documents or testimony cited as support for plaintiff's statements are not intended to be comprehensive. Defendants' lack of any objection to the admissibility of any document or testimony cited by plaintiff does not constitute waiver of any objection as to admissibility if offered at trial.

Actual Malice

Defendants' Statement 14

Plaintiff's unsupported allegation does not establish a genuine dispute as to the facts set forth in defendants' statement 14. Defendants were not required to produce documentary evidence substantiating the interviews of O'Brien and his research assistant. See Trump v. O'Brien, 403 N.J. Super. 281, 301 (App. Div. 2008). Plaintiff was provided with the names and interview dates of all non-confidential sources and thus had the means to establish whether the interviews occurred. (See Opp. Ex. BO; Ex 12 at 2-14; Ex. 7 at 249-63.)

Defendants' Statement 15

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 15. The roles of Plambeck and O'Brien in conducting research do not controvert the fact that they conducted extensive documentary research for the Book. Lokey's testimony regarding the April 21, 2005 meeting also does not controvert the fact that O'Brien conducted extensive documentary research, and does not support plaintiff's contention that the information assembled for O'Brien on April 21, 2005 was "critical," particularly given the testimony of Weisselberg, Lokey, and Trump that the information shown to O'Brien on April 21, 2005 related only to ownership of the properties, and not to valuation. (Reply Ex. 115 at 167:7-168:19, 179:18-180:10; Reply Ex. 116 at 43:20-45:21; Ex. 11 at 44:3-7, 269:5-270:3.) The exhibit cited by plaintiff (Opp. Ex. Y at 16:6-15) does not support the allegation that Patrick O'Brien was a "goldmine[] of information for the Book"; in fact, Patrick O'Brien testified he is a tax attorney, not a "real estate lawyer." (Reply Ex. 119 at 7:8-15.) The exhibit cited by plaintiff (Opp. Ex. Y at 16:6-15) also does not provide any information supporting the propositions that reporters and contacts of reporters at The New York Times were "goldmines of information" and that O'Brien ignored them.

Defendants' Statement 16

Plaintiff's reliance on the newsperson's privilege, which the Appellate Division concluded was appropriate, does not raise an issue of material fact as to the facts contained in defendants' statement 16. In addition, the exhibits cited in defendants'

statement 16, including the endnotes to the Book, demonstrate the undisputed fact that in researching and drafting the Book, O'Brien relied on interviews conducted prior to O'Brien's signing a contract for the Book. (Ex. 1 ¶ 8; Ex. 7 at 249-63.)

Defendants' Statement 20

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 20. Nothing in plaintiff's response specifically controverts the statement that in Chapter Six of the Book, O'Brien wrote about the extensive public discussion regarding Trump's net worth over the years. (See Ex. 7 at 143-74.)

Defendants' Statements 21-29, 33, and 49-51

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statements 21 through 29, 33, and 49 through 51. Trump was provided with discovery regarding the confidential sources, including the notes of O'Brien's interviews with the confidential sources, interrogatories regarding O'Brien's efforts to confirm the sources' reliability and regarding other accurate financial information on Trump's finances the sources had provided, and O'Brien's deposition testimony, all of which support these factual statements. (See Ex. 15; Ex. 16; Ex. 17; Ex. 29 at 6-8 (Interrog. No. 1); Ex. 2 at 44:10-48:25, 330:10-17, 342:24-362:11, 616:12-647:11, 658:8-685:17, 690:11-706:2.) Plaintiff produced no evidence to the contrary. In addition, the Appellate Division has held that the identity of the confidential sources was covered by the newsperson's privilege. See Trump, 403 N.J. Super. at 298-301. Plaintiff's reliance on the newsperson's privilege, which the Appellate Division concluded was appropriate,

does not raise an issue of material fact as to the facts contained in defendants' statements 21 through 29, 33, and 49 through 51.

Defendants' Statements 31 and 32

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statements 31 and 32. Nothing in plaintiff's response specifically controverts the facts stated in defendants' statement 31 that O'Brien met with Allen Weisselberg, Trump's CFO, and Michelle Lokey, Trump's in-house counsel, on April 21, 2005 at Trump's offices, at which time Weisselberg estimated Trump's net worth at or about $6 billion – facts supported by Weisselberg's own testimony. (See Ex. 19 at 198:4-199:9, 331:5-21.) Nor does anything in plaintiff's response specifically controvert the facts stated in defendants' statement 32 that Weisselberg discussed valuations with O'Brien and gave O'Brien asset valuations that appear in Chapter Six of the Book, facts also supported by Weisselberg's testimony. (Id. at 241:2-21, 257:25-258:8, 262:2-6, 265:3-8, 268:16-269:6, 274:6-25.)

Defendants' Statement 37

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 37. Judge Fernandez-Vina's ruling that, on the applicable standard for a motion to dismiss, a reasonable person could find that O'Brien endorsed the sources' estimates does not controvert the fact that O'Brien placed the estimates in the context of other estimates, including Trump's own estimates over time, the estimates of Forbes magazine over time, and Trump's CFO's estimates (including a full-page chart of

Trump's asset values as estimated by Trump's CFO). (See Ex. 7 at 149-57.) In addition, defendants' statement 37 cites to objective facts regarding what O'Brien published in the excerpt and Book, which plaintiff's response does not refute.

Defendants' Statement 39

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 39. In addition, defendants' statement 39 cites to the objective fact that O'Brien published Trump's denial – which Trump in his response to statement 35 admits giving – in the excerpt and Book following the reference to the confidential sources, which plaintiff's response does not refute.

Defendants' Statement 54

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 54. Nothing in plaintiff's response contravenes or even addresses the undisputed facts that Trump's holdings are private or that O'Brien needed to rely upon Trump to obtain complete information on his outstanding liabilities. For example, Weisselberg testified at his deposition: "These are private individuals. No one has any clue as to what someone else is worth if you're a privately held company. . . . I don't know how any other developer can make a public statement as to what Mr. Trump's net worth is." (See Ex. 19 at 111:18-112:2.)

Defendants' Statement 55

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 55, and indeed is entirely consistent with defendants' statement.

Defendants object to the phrase "synonymous with luxury and enormous success" as vague and not a material fact pursuant to R. 4:46-2.

Defendants' Statement 57

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 57. The testimony cited by plaintiff explains why Trump feels that his 30% ownership in a limited partnership that owned the West Side Yards was the equivalent of 50% ownership. (Ex. 11 at 62:25-64:19.) It does not specifically controvert the statement that Trump claimed in interviews with O'Brien to have a 50% ownership interest in the West Side Yards project, and in fact strongly suggests that he did so. (Ex. 41 at TOB-PD-00004316; Ex. 42 at TOB-PD-00004323.)

Defendants' Statement 58

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 58. Defendants have produced notes showing what the confidential sources told O'Brien about the West Side Yards, but Trump chose not to depose O'Brien about those notes. (Ex. 15 at TOB-PD-00004389-90, TOB-PD-00004408.) Plaintiff's own exhibits confirm that Trump had a 30% interest and was a limited partner in the West Side Yards project without any power to influence disposition of assets and any right to liquidate his interest for many years. (Opp. Exs. AE, AF.)

Defendants' Statements 59-61

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statements 59 through 61. Nothing in plaintiff's response or in the exhibit

cited (Ex. 10) says or suggests that O'Brien was an employee of Time Warner Book Group Inc. or Warner Books Inc. (the "Warner defendants") or that he received a salary or benefits. In fact, the exhibit cited by plaintiff fully supports defendants' statement. (See id. ¶¶ 1, 3-4, 17.) Paragraph 18(e) also does not controvert the fact that O'Brien retained responsibility for the Book's accuracy. The Warner defendants' right to choose not to publish the Book if O'Brien refused to make changes does not contradict Paragraph 17(a) of the contract, in which O'Brien warranted, represented, and covenanted that the statements in the Book were true or based on reasonable research for accuracy.

Defendants' Statement 62

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 62. Plaintiff never sought to depose a single Warner defendant employee regarding the existence of a legal review. In addition, to the extent that Trump had sought information about the specific details of the legal review, that information would be protected by the attorney-client privilege. (See Opp. Ex. BO.)

Loss Causation and Damages

Defendants' Statement 11

Plaintiff's unsupported allegation does not establish a genuine dispute as to the facts set forth in defendants' statement 11. Defendants were not required to produce documentary evidence substantiating the interviews of O'Brien and his research assistant. See Trump, 403 N.J. Super. at 301. Plaintiff was provided with the names and interview

dates of all non-confidential sources and thus had the means to establish whether the interviews occurred. (See Opp. Ex. BO; Ex 12 at 2-14; Ex. 7 at 249-63.)

Defendants' Statement 12

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 12. The roles of Plambeck and O'Brien in conducting research do not controvert the fact that they conducted extensive documentary research for the Book. Lokey's testimony regarding the April 21, 2005 meeting also does not controvert the fact that O'Brien conducted extensive documentary research, and does not support plaintiff's contention that the information assembled for O'Brien on April 21, 2005 was "critical," particularly given the testimony of Weisselberg, Lokey, and Trump that the information shown to O'Brien on April 21, 2005 related only to ownership of the properties, and not to valuation. (Reply Ex. 115 at 167:7-168:19, 179:18-180:10; Reply Ex. 116 at 43:20-45:21; Ex. 11 at 37:13-22, 44:3-7, 269;5-270:3.) The exhibit cited by plaintiff (Opp. Ex. Y at 16:6-15) does not support the allegation that Patrick O'Brien was a "goldmine[] of information for the Book"; in fact, Patrick O'Brien testified he is a tax attorney, not a "real estate lawyer." (Reply Ex. 119 at 7:8-15.) The exhibit cited by plaintiff (Opp. Ex. Y at 16:6-15) also does not provide any information supporting the propositions that reporters and contacts of reporters at The New York Times were "goldmines of information" and that O'Brien ignored them.

Defendants' Statement 16

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 16. Nothing in plaintiff's response specifically controverts the statement that in Chapter Six of the Book, O'Brien wrote about the extensive public discussion regarding Trump's net worth over the years. (See Ex. 7 at 143-74.)

Defendants' Statement 17

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 17. Nothing in plaintiff's response specifically controverts the statement that the chapter included Trump's own estimates over time, the estimates of Forbes magazine over time, and Trump's CFO's estimates (including a full-page chart of Trump's asset values as estimated by Trump's CFO), facts that are evident from the face of the exhibit cited by defendants. (Ex. 7 at 149-55.)

Defendants' Statement 18

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 18. Plaintiff's reliance on the newsperson's privilege, which the Appellate Division concluded was appropriate, does not raise an issue of material fact as to defendants' statement 18.

Defendants' Statement 27

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 27. Nothing in plaintiff's response specifically controverts any fact in defendants' statement 27, which is a statement setting forth what Trump claims.

Defendants' Statement 28

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 28. While disagreeing over whether Exhibit 53 constitutes a concession, plaintiff admits that no agreements or documentation exist with any licensor for any of the five alleged European opportunities.

Defendants' Statement 29

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 29. The exhibit to which plaintiff cites, plaintiff's own deposition testimony, does not establish plaintiff's conclusory statement that "[t]hese deals were going to be done but for the Book and excerpt in *The New York Times*." Plaintiff's double hearsay testimony regarding statements of Tevfik Arif – who has stated through his counsel that he believes that he had no knowledge or information relevant to the dispute between the parties in this litigation (Ex. 56 at 1) – cannot support the otherwise unsubstantiated statement that "[t]hese deals were going to be done." (See Ex. 11 at 587:3-11 ("What I'm saying to you is that these were deals that were going to be – according to Tevfik, they were going to be done.").)

Defendants' Statement 30

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 30. It is undisputed that plaintiff made the statement cited in defendants' statement 30.

Defendants' Statement 31

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 31. The exhibit cited by plaintiff, McConney's testimony containing the sentence, "I didn't say it is speculative" (Ex. 30 at 502:19-23), does not alter his testimony from moments earlier, cited in defendants' statement 31. (Id. at 500:23-501:2 ("Q. So even once it's written down, it may well be speculative as to what the profits will be; correct? A. Right.").) Nor does it controvert the fact that the essence of the testimony quoted in defendants' statement 31 is that before deals get to the documentation or financing stages, they are too speculative to be valued for financial statement purposes. (Id. at 499:19-501:2, 502:19-23; Ex. 19 at 178:9-13.)

Defendants' Statement 33

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 33. Nothing in plaintiff's response specifically controverts any fact in defendants' statement 33, which is a statement setting forth Trump's testimony.

Defendants' Statements 37-39

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statements 37 through 39. Defendants' statements 37 through 39 discuss deals in Istanbul, Kiev, Yalta, and Warsaw, and do not mention Moscow. Plaintiff's response begins with a discussion of Sater's testimony regarding Moscow, which does not specifically controvert any fact in defendants' statements 37 through 39. The remainder of plaintiff's response, citing to plaintiff's double hearsay testimony regarding

statements of Tevfik Arif – who has stated through his counsel that he believes that he had no knowledge or information relevant to the dispute between the parties in this litigation (Ex. 56 at 1) – cannot support the otherwise unsubstantiated statements that Trump was negotiating with many foreign investors through Arif, that many of the deals were certain to be completed, or that Arif told Trump that publication of the excerpt and Book "killed" the deals.

Defendants' Statement 45

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 45. Plaintiff's conclusory allegation is contradicted by Sater's testimony (Ex. 59 at 152:21-25) and is not supported by any admissible evidence. Plaintiff's double hearsay testimony regarding statements of Tevfik Arif – who has stated through his counsel that he believes that he had no knowledge or information relevant to the dispute between the parties in this litigation (Ex. 56 at 1) – cannot support plaintiff's otherwise unsubstantiated statement that "[t]he fact that Sater did not hear anything from the investors was the result of the Book."

Defendants' Statement 46

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 46. The fact that McConney did not use the word "frequently" does not controvert the fact that the essence of the testimony quoted in defendants' statement 46 is that McConney testified that potential real estate deals frequently fall apart. (See Ex. 30 at 500:18-22.)

Defendants' Statement 54

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 54. The testimony to which plaintiff cites says that "to a certain extent," the project did not go forward because of terrible publicity allegedly caused by the Book and excerpt. (Ex. 11 at 402:2-21 (emphasis added).) The words "to a certain extent" indicate that even plaintiff thought there were additional reasons. Thus, the testimony cited by plaintiff does not specifically controvert the exhibit cited by defendants to establish an additional reason. (See Ex. 63 at 1.)

Defendants' Statements 56-57

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statements 56 and 57. Defendants' Exhibit 61 does not support the proposition that the project had received zoning approval. Defendants' Exhibit 61 describes a decision by the Phoenix City Council to raise height limits in the Camelback Corridor neighborhood as a whole, not "zoning approval" for any individual project. Nothing in plaintiff's response to defendants' statement 57 specifically controverts – or even refers to – the statement that as late as October and November 2005, at the time of the Book's publication, Trump's finance personnel did not estimate profits from the Phoenix project in compiling Trump's net worth because its future was uncertain, and it was at too preliminary a stage to allow for such projections. (See Ex. 98 at 399:14-404:8; Ex. 94 at WEI000001944.)

Defendants' Statement 61

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 61. Nothing in plaintiff's response to defendants' statement 61 specifically controverts the fact that he is unable to identify by name, job title, or any other identifying characteristic any opponents of Trump's Phoenix project who relied on the Book or any person who informed Trump or his agents that the allegedly defamatory statements were a factor in any person's decision regarding the potential transaction. The exhibit cited by plaintiff, Ex. 11 at 402:2-11, does not support the proposition that Trump testified that anyone stood in anger, or stood at all, during community meetings, and indeed Trump did not say so. Trump testified that he did not attend the hearings in Phoenix and so relied on hearsay from people he could not name for the truth of the statement that people held the Book up and screamed during community meetings. (Ex. 11 at 402:22-403:23.)

Defendants' Statement 63

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 63. The testimony cited by plaintiff, that Sater saw people with the Book in their hands at a town hall meeting (Ex. 59 at 124:3-7), does not specifically controvert the fact that Sater offered no evidence of any person opposing Trump's Phoenix project because of the Book, and in fact testified that he doubted the Book caused the neighborhood opposition to the project (id. at 125:4-13).

Defendants' Statements 74, 76, 78, 80-83

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statements 74, 76, 78, and 80 through 83. Nothing in plaintiff's response to defendants' statement 74, which he cites to again in statements 76, 78, and 80 through 83, specifically controverts any fact in defendants' statements 74 or 82, which are statements setting forth what Trump testified to; any fact in defendants' statement 76, which is a statement about what evidence was not produced; or any fact in defendants' statements 78, 80, 81, or 83, which are statements setting forth Lorber's testimony.

Defendants' Statement 87

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 87: Nothing in plaintiff's response specifically controverts any fact in defendants' statement 87, which is a statement setting forth Trump's testimony.

Defendants' Statement 94

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 94. The difference between an "assumption" and an "informed opinion" is not a genuine issue of fact that must be resolved at trial. Whether Lorber's belief about what Prudential would have done is characterized as an "assumption" or an "informed opinion," it still does not establish what Prudential actually would have done, given Lorber's admission that he was not empowered to make unilateral decisions on behalf of Prudential Douglas Elliman, and that he would have needed Dottie Herman and Prudential's approval (the other shareholders) to complete any deal with Trump –

approval which would need to be based on Prudential's sale of their shares or overall dilution of their ownership. (Ex. 65 at 7:16-25, 22:6-18, 103:15-104:3; 105:18-23, 114:14-17 ("I believe Prudential would be a little bit of a sales job to sit down with them and tell them why we wanted to do it.").)

Defendants' Statement 98

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 98. Defendants' statement 98 refers to mitigation expenses and to the documentation of those expenses produced by Trump in this litigation. Plaintiff's response refers to no additional documentation of mitigation expenses, and plaintiff has failed in discovery to produce any such documentation of any mitigation expenses other than the expense of his alleged corrective advertising. (See Ex. 67.)

Defendants' Statement 113

Plaintiff's response does not establish a genuine dispute as to the facts set forth in defendants' statement 113. Nothing in plaintiff's response specifically controverts any fact in defendants' statement 113, which cites to O'Brien's taped interviews with Trump himself. Plaintiff's testimony about alleged damages does not negate the fact that he made the statements attributed to him in defendants' statement 113, nor does it raise any genuine issue of fact that must be resolved at trial.

DEFENDANTS' RESPONSES TO PLAINTIFF'S COUNTERSTATEMENT OF MATERIAL FACTS

Defendants' objections herein to the admissibility of certain documents or testimony cited as support for plaintiff's statements are not intended to be comprehensive. Defendants' lack of any objection to the admissibility of any document or testimony cited by plaintiff does not constitute a waiver of any objection as to the admissibility of a given document or testimony if offered at trial.

1. Defendants admit that Trump is a businessman, real estate developer, entrepreneur, author, and television personality with many holdings and business ventures. With respect to the phrases "extremely successful," "extraordinarily valuable," "enormously successful," "among the most highly rated," and "synonymous with luxury and enormous success," defendants object that such self-congratulatory phrases are vague and not material facts pursuant to R. 4:46-2; to the extent they are material, defendants deny them.

2. Denied. Plaintiff's citation to his own self-serving testimony is insufficient to establish the facts in plaintiff's statement 2 or to demonstrate that it is uncontroverted pursuant to R. 4:46-2.

3. Denied. The Trump deposition testimony cited by plaintiff, making the unsubstantiated claim that he lost deals that he does not know about, does not support the proposition that his ability to close deals and secure financing "depends on investors trusting his reputation." (Opp. Ex. B at 502:2-16.) The Forbes article cited by plaintiff does not support or even address the proposition for which it is cited, that Trump's

"status as a billionaire enables him to marshal resources." Defendants object to the phrase "what most in the industry would deem impossible" as vague and not a "fact" that is verifiable or of record.

4. Denied. Plaintiff's citation to his own self-serving testimony alleging that he was damaged by the allegedly defamatory statements does not support or even address the proposition that Trump's business "is based on his billionairedom," and is insufficient to establish the fact or demonstrate that it is uncontroverted pursuant to R. 4:46-2.

5. Admitted.

6. Defendants admit that O'Brien's credentials suggest that he is credible and produces quality journalism, but deny the remainder of plaintiff's statement. The exhibits cited by plaintiff do not support plaintiff's contentions that O'Brien has "a history of unprincipled reporting practices" or "a personal bias against Trump." (See Opp. Exs. B, F, G.)

7. Defendants admit that O'Brien and the Warner defendants signed a contract for the delivery, publication, and marketing of the Book, and they admit that a Warner employee drafted the document that plaintiff cites as Exhibit I, but deny that the exhibit demonstrates that the Warner defendants were "eager to participate." Defendants object to the word "however" as vague and as improperly suggesting that the Book was not "frank and honest," without citing any evidence for this alleged "fact."

8. Defendants admit that the Warner defendants marketed the Book, but deny the remainder of plaintiff's statement. The exhibits cited by plaintiff do not establish that the Warner defendants "provided substantial editorial oversight." Defendants object that

the word "defamatory" in this statement is a conclusion of law rather than a statement of material fact pursuant to R. 4:46-2.

9. Admitted.

10. Admitted.

11. Defendants admit that O'Brien published Exhibit G on March 28, 2004, but deny the remainder of plaintiff's statement, which is not supported by Exhibit G or any other exhibit.

12. Defendants admit that O'Brien published Exhibits K and L, but deny the remainder of plaintiff's statement, which is not supported by Exhibits K and L or any other exhibit. The articles cited by plaintiff noted that analysts believed that Trump's casino company had an unmanageable amount of debt and that a bankruptcy might occur. (See Opp. Exs. K, L.) That bankruptcy did in fact ensue. (See Reply Ex. 129.)

13. Defendants admit that O'Brien reported in Exhibit M a value for Trump's casino holdings of $34.5 million and that Trump told him the value was $49 million, but deny the remainder of plaintiff's statement. The exhibits cited by plaintiff do not support plaintiff's statement as to the actual amount of Trump's stake, nor does any other evidence of record. (See Opp. Exs. M, N.)

14. Defendants admit that O'Brien wrote Exhibit O, which raised the question of whether Trump would need to borrow $55 million to make an investment in Trump Hotels & Casino Resorts, but deny the remainder of plaintiff's statement. The exhibits cited by plaintiff do not establish that O'Brien "stated" that Trump needed to borrow

$55 million; nor do they support plaintiff's statement as to whether Trump actually needed to borrow the money, nor does any other evidence of record. (Opp. Exs. O, P, Q.)

15. Defendants lack sufficient knowledge to confirm or deny that O'Brien's access was "unprecedented" or that plaintiff's intent was "to make sure that O'Brien had correct information," and deny that in fact such full and correct accounting was ever provided. (See infra ¶ 18.) Defendants admit the remainder of the statement.

16. Defendants object to the word "countless" as vague, but admit the remainder of the statement.

17. Defendants admit that Trump took O'Brien to California, but deny the remainder of plaintiff's statement. The trip occurred on January 12, 2005. (Ex. 6 at TOB-EF-00007894.)

18. Defendants admit that net worth is calculated as assets minus liabilities, but deny the remainder of plaintiff's statement. O'Brien has testified that he never saw Trump's Statement of Financial Condition ("SOFC") prior to his deposition. (Ex. 2 at 248:16-22, 251:4-13, 255:12-256:7, 259:10-21.) Because O'Brien reported in the Book claims by Trump and Trump's CFO that Trump's net worth was between $4 billion and $6 billion (Ex. 7 at 153-55), it is irrelevant if O'Brien ever reviewed a document in which Trump claimed that he was worth about $3.5 billion. (Reply Ex. 112 at TR000051483.) Because the SOFC is an unaudited, unverified statement summarizing Trump's own claims about the values of his assets and liabilities, which explicitly states that it is a "compilation" and "the representation of the individual whose financial statements are presented," and that the accountants "have not audited or reviewed" the SOFC and "do

not express an opinion or any other form of assurance on it" (id. at TR000051480), defendants deny that it could have proved Trump's net worth even if O'Brien had seen it.

19. Denied. Defendants further deny that anything in this statement would be material even if it were true.

20. Defendants admit that O'Brien never mentioned the course at Palos Verdes by name in the Book, but note that O'Brien discusses Trump's golf courses collectively in the Book on pages 155 and 172. (Ex. 7 at 155, 172.) The deposition testimony cited by plaintiff does not support either the proposition that the golf course is extremely valuable or that O'Brien does not mention the golf course in the Book. (Opp. Ex. B at 41:20-42:10.)

21. Denied. The exhibit pages cited by plaintiff describe a March 2005 flight from Florida to New York, not a trip to California. (See Ex. 7 at 181-82.)

22. Defendants lack sufficient knowledge to confirm or deny what instructions plaintiff gave to his employees. However, defendants admit that Lokey, Weisselberg, and Trump all testified that the documents gathered for the April 21, 2005 meeting were designed to show ownership (Reply Ex. 115 at 167:7-168:19, 179:18-180:10; Reply Ex. 116 at 43:20-45:21, 44:3-7; Ex. 11 at 37:13-22, 269:23-270:3), and defendants deny the remainder of the statement.

23. Defendants lack sufficient knowledge to confirm or deny this statement.

24. Defendants lack sufficient knowledge to confirm or deny what Trump previously had provided to the media.

25. Defendants deny that O'Brien was invited to question anyone about Trump's property ownership, but admit the remainder of the statement. O'Brien has testified that he understood that the purpose of the meeting was to document Trump's net worth, but that the materials he was provided were insufficient for that purpose. (Ex. 2 at 248:8-15.)

26. Admitted.

27. Admitted.

28. Defendants admit that the statement accurately describes Weisselberg's testimony, but otherwise deny the statement.

29. Denied. O'Brien has testified that he spoke to Weisselberg on April 21, 2005 for approximately two and a half hours. (Id. at 275:4-8.)

30. Denied. O'Brien has testified that he never saw the SOFC prior to his deposition. (Id. at 248:16-22, 251:4-13, 255:12-256:7, 259:10-21.)

31. Denied. O'Brien has testified that he never saw the SOFC prior to his deposition. (Id. at 248:16-22, 251:4-13, 255:12-256:7, 259:10-21.) Weisselberg also testified that Trump handed O'Brien a document with a blue cover, which Weisselberg assumed was an SOFC but never saw the actual document. (Opp. Ex. A at 201:21-202:6.)

32. Admitted.

33. Admitted.

34. Defendants admit that the statement accurately describes Lokey's testimony, but otherwise deny the statement. O'Brien testified that he "definitely didn't" tell Lokey that he had already written the Book. (Ex. 2 at 329:6-18.)

35. Denied. O'Brien testified that he and Lokey made small talk for 15 or 20 minutes. (Id. at 341:12-25.)

36. Denied. O'Brien testified that he and Lokey made small talk for 15 or 20 minutes. (Id. at 341:12-25.)

37. Denied. O'Brien has testified that he believes Lokey was lying when she testified that O'Brien spent two and a half hours flirting with her. (Id. at 747:6-15, 295:6-23.) Plaintiff's Exhibit T does not establish that O'Brien invited Lokey "out to dinner," but rather establishes that O'Brien suggested that Lokey have dinner at the home of her law professor Mark Alexander, who was one of O'Brien's close friends, and who had spoken highly of Lokey to O'Brien (Ex. 116 at 48:4-50:5), and that Lokey replied that "a trip to the 'burbs' would be a great thing to look forward to." (Opp. Ex. T.)

38. Defendants admit that Lokey wrote a letter in which she used those words.

39. Defendants admit that O'Brien testified truthfully that he never saw Trump's SOFC prior to his deposition on October 15, 2007, but deny the remainder of plaintiff's statement.. (Ex. 2 at 251:4-13, 259:10-21.)

40. Defendants admit that O'Brien's notes establish that O'Brien received information from Weisselberg at the April 21, 2005 meeting, but otherwise deny the statement. Plaintiff's use of the phrase "reviewed voluminous information" also suggests that the notes indicate review of <u>documents</u> by O'Brien, an impression belied by the

notes themselves, which are clearly <u>interview notes</u> that include frequent quotations and the words "AW says." (Opp. Ex. V.)

41. Denied. Plaintiff's own exhibit demonstrates that Weisselberg acknowledged that O'Brien "may have taken some notes." (Opp. Ex. A at 150:7-8.)

42. Defendants admit that the statement accurately describes Weisselberg's testimony, but otherwise deny the statement. O'Brien has testified that the meeting lasted two and a half hours. (Ex. 2 at 275:4-8.) Weisselberg's admissions that he said many of the things O'Brien recorded in the notes undercut Weisselberg's testimony about the length of the meeting. (Reply Ex. 115 at 230:16-231:9, 237:9-241:21, 250:7-14, 257:25-258:22; Ex. 19 at 262:2-6, 263:5-9, 268:16-269:6, 274:6-25.)

43. Defendants admit that the statement accurately describes Lokey's and Weisselberg's testimony, but otherwise deny the statement. For example, Weisselberg substantially admitted that he provided the information contained in the notes to O'Brien at the meeting. (Reply Ex. 115 at 230:16-231:9, 237:9-241:21, 250:7-14, 257:25-258:22; Ex. 19 at 262:2-6, 263:5-9, 268:16-269:6, 274:6-25.)

44. Defendants admit that the statement accurately describes Weisselberg's testimony, but otherwise deny the statement. O'Brien testified that he did not tape record the meeting. (Ex. 2 at 275:24-276:25, 278:7-279:8, 284:8-17, 298:5-299:14.)

45. Defendants admit that the statement accurately describes Trump's testimony, but otherwise deny the statement. O'Brien testified that he did not tape every interview with Trump. (Ex. 2 at 307:5-9.)

46. Denied. The tape recording that plaintiff claims O'Brien denied the existence of was produced to plaintiff on May 25, 2007, along with a transcript that begins with the words "TIM IS WITH DONALD AND ALAN ON THE WAY TO THE AIRPORT." (Ex. 6 at TOB-EF-00007826-7827; Reply Exs. 106, 130.) Weisselberg has testified that he spoke to O'Brien once on the way to the airport, once on the plane back from Florida during that same trip, and once at Trump Tower on April 21, 2005, and at no other time. (Reply Ex. 115 at 151:17-152:9.)

47. Admitted.

48. Denied.

49. Denied. The alleged facts stated in plaintiff's statement 49 would not be material to this motion in any event. Such a statement by O'Brien would not amount to proof that O'Brien believed that Trump's net worth was more than $500 million. The value of one of Trump's assets – in isolation from all of Trump's assets and liabilities – could not show Trump's overall net worth.

50. Admitted.

51. Defendants deny plaintiff's characterization of Plambeck as describing his research role "much differently" from O'Brien, and deny that any such difference would be a material fact, but admit the remainder of the statement.

52. Denied. The cited portion of Plaintiff's Exhibit X does not establish what O'Brien did or did not ask Plambeck to gather. (See Opp. Ex. X at 40:25-42:9.) Plaintiff's Exhibit Y also does not establish that Patrick O'Brien was a "goldmine[] of information" regarding plaintiff's net worth. (Opp. Ex. Y at 16:6-15); in fact, Patrick

O'Brien testified he is a tax attorney, not a "real estate lawyer" (Reply Ex. 119 at 7:8-15). The exhibit cited by plaintiff (Opp. Ex. Y at 16:6-15) also does not provide any information supporting the propositions that reporters and contacts of reporters at The Times were "goldmines of information" and that O'Brien ignored them.

53. Defendants admit that Trump and his attorneys wrote letters to The Times and defendants, but deny the remainder of plaintiff's statement. Defendants object that the word "defamatory" in this statement is a conclusion of law rather than a statement of material fact pursuant to R. 4:46-2.

54. Defendants deny that Lokey explained anything about, or even mentioned, the West Side Yards in the document cited by plaintiff (Opp. Ex. U), and deny that the Book stated that Trump did not have an interest in the West Side Yards, but admit the remainder of the statement. In the Book, O'Brien accurately described Trump's interest in the West Side Yards as entitling him to a management fee and a cut of the profits, but not to control over the disposition of the property. (Ex. 7 at 173 ("Donald gets a management fee of about $2 million a year to oversee the property, and a cut of the profits after all sixteen of the project's buildings are completed and the group he sold it to gets all of its expenses repaid.").)

55. Defendants admit that Trump's attorneys wrote a letter to the Warner defendants regarding the Book, but deny the rest of the statement.

56. Defendants admit that Trump wrote a letter seeking a meeting, but deny that the Book contained "glaring factual errors" and deny that the exhibit cited by plaintiff supports the statement that the meeting was refused. (Opp. Ex. AA.)

57. Defendants admit that The Times published an excerpt from the Book on the front page of the Sunday business section, but deny the remainder of plaintiff's statement. Defendants object that the word "defamatory" in this statement is a conclusion of law rather than a statement of material fact pursuant to R. 4:46-2.

58. Admitted.

59. Denied.

60. Defendants deny that the "TrumpBroke" chapter "repeatedly states that Trump lies about his finances," but admit the remainder of the statement.

61. Defendants admit that Forbes magazine estimated Trump's net worth at $2.7 million in the fall of 2005, but deny the remainder of plaintiff's statement.

62. Defendants admit that plaintiff has accurately quoted the Book's statement that the three anonymous sources told O'Brien that they thought Trump's "net worth was somewhere between $150 million and $250 million." (Ex. 7 at 154.) Defendants deny that the Book quotes the sources as saying that Trump was "not remotely close to being a billionaire," and note that the Book actually said that "none of these people thought he was remotely close to being a billionaire." (Id.) Defendants deny the remainder of the statement.

63. Defendants admit that the Book does not list dates or places of the interviews with the three confidential sources, and admit that O'Brien testified that he held himself to The Times's standards in writing the Book, but deny the remainder of plaintiff's statement. The exhibit cited by plaintiff does not support plaintiff's contention that The Times's standards require a reporter to list the date and place of an interview

with a confidential source. (See Opp. Ex. E.) Other citations in the Book do not list the dates and places for interviews with other confidential sources (see, e.g., Ex.7 at 99 n.44 & 254 (listing date but not place of interview), 205 n.48 & 261 (listing neither date nor place of interview)).

64. Defendants deny that plaintiff's unsupported opinion regarding what the story "suggested to the reader" is a material fact pursuant to R. 4:46-2, and deny that the sentence as a whole is stated in the past tense (Ex. 5 at TOB-PD-00003265 ("The largest portion of Mr. Trump's fortune, according to three people who have had direct knowledge of his holdings, apparently comes from his lucrative inheritance."), but admit the remainder of the statement.

65. Defendants admit that plaintiff correctly quotes a sentence fragment from the Book and that plaintiff correctly quotes O'Brien's testimony, but deny the remainder of the statement. Defendants deny that plaintiff's unsupported opinion regarding what the story "suggested to the reader" is a material fact pursuant to R. 4:46-2. The full sentence from which plaintiff extracted the sentence fragment reads: "Three people with direct knowledge of Donald's finances, people who had worked closely with him for years, told me they thought his net worth was somewhere between $150 million and $250 million." (Ex. 7 at 154.) O'Brien also kept the information current by returning to the sources for updated estimates after his conversation with Weisselberg on April 21, 2005. (Ex. 15 at TOB-PD-00004409; Ex. 2 at 330:10-17, 342:24-347:11.)

66. Denied. Among other things, plaintiff's statement 66 contains a complete mischaracterization of the interview of Trump that is cited in that statement. (Opp. Ex.

AH; Reply Ex. 105.) In that interview, O'Brien asked Trump to comment on his brand, and referenced in his question a just-published Business Week article titled "Trump: Bigger Than Coke or Pepsi?," which quoted Trump as saying: "The brand has become the best brand . . . . I think it's a bigger brand now than Pepsi Cola (PEP) or Coca-Cola (KO)." (Reply Ex. 131 at 1.) O'Brien never endorsed that characterization. Far from ignoring Plaintiff's Exhibit AE, the Agreement of Limited Partnership of Hudson Waterfront Associates I, L.P., O'Brien in the Book accurately summarized the document's terms (Ex. 7 at 172-73) – which directly contradict statements by Trump (Reply Ex. 106; Reply Ex. 107). In the Book, O'Brien cites his discussion of the West Side Yards to his interview with Weisselberg on April 21, 2005, and Weisselberg has acknowledged providing O'Brien with some of the information that appears in that discussion. (Ex. 7 at 172-73, 259; Ex. 19 at 262:2-6.)

67. Denied. The Book does not contain a $55 million figure in relation to 40 Wall Street. (Ex. 7 at 171-72.) None of the exhibits cited by plaintiff establish that the tax assessor did not value the building at $90 million. (Opp. Ex. A; Ex. 7 at 171-72.) O'Brien's statement that New York City assessors valued the building at $90 million was indisputably true. (Ex. 7 at 172.) Defendants deny that the statement is a statement of material fact pursuant to R. 4:46-2, since using the tax assessor value, which was objectively true, as one data point in evaluating Trump's claim that the building was worth more than four times that tax assessor value does not demonstrate that O'Brien knew the sources' estimates were false.

68. Defendants admit that the rebound in the value of Trump's casino holdings appears in the excerpt (which went to press after the Book), but does not appear in the Book. (Ex. 13 at TOB-PD-00004204.) Defendants deny that the statement is material pursuant to R. 4:46-2, since O'Brien's update of the sources' estimates based on the rebounding value of Trump's casino holdings prior to the publication of the excerpt in late October 2005 cannot possibly indicate that O'Brien disbelieved the original confidential source estimates.

69. Defendants object to plaintiff's misleading characterization of the estimates given by the three confidential sources as "the Book's valuation," but admit the remainder of the statement. Defendants deny that the statement is material pursuant to R. 4:46-2, since O'Brien's update of the sources' estimates based on the rebounding value of Trump's casino holdings prior to the publication of the excerpt in late October 2005 cannot possibly indicate that O'Brien disbelieved the original confidential source estimates.

70. Defendants deny that updating an excerpt, but not a Book that already been drafted, constitutes "neglect" on anyone's part, but admit the remainder of the statement. Defendants deny that the statement is material pursuant to R. 4:46-2, since O'Brien's update of the sources' estimates based on the rebounding value of Trump's casino holdings prior to the publication of the excerpt in late October 2005 cannot possibly indicate that O'Brien disbelieved the original confidential source estimates.

71. Denied. Defendants object that nonactionable statements not at issue in this case are not relevant to this litigation and therefore are not material facts pursuant to

R. 4:46-2. Plaintiff's interrogatory answer listing communications he alleges to be defamatory did not mention the statement described in plaintiff's statement 71. (See Ex. 39 at 1-2.)

72. Admitted. Defendants object that non-defamatory statements not at issue in this case are not material to this litigation and therefore are not material facts pursuant to R. 4:46-2.

73. Defendants admit that Trump told O'Brien that his father built Trump Village before the Book was published, but deny the remainder of plaintiff's statement. The exhibit cited by plaintiff does not establish whether Fred Trump built Trump Village. (Opp. Ex. AI.) Defendants object that non-defamatory statements not at issue in this case are not material to this litigation and therefore are not material facts pursuant to R. 4:46-2.

74. Denied. Trump has not identified any credible information that O'Brien ignored that directly contradicted the Book. In addition, Trump's reputation for exaggeration – which defendants have documented and which Trump now has admitted exists (Actual Malice Br. at 20-22; Opp. Statement of Facts at 8 ¶ 56; Exs. 32-35) – supported O'Brien's belief that the sources' estimates of Trump's net worth were more likely to be accurate than Trump's self-serving estimates.

75. Defendants admit that the defendants marketed the Book, but deny the remainder of plaintiff's statement. Defendants deny that the exhibits cited by plaintiff support the existence of a "plan." (Opp. Exs. AJ, AK, AL.) Dillon testified that he intended Plaintiff's Exhibit AJ as a joke (Reply Ex. 118 at 118:19-22); O'Brien's

testimony showed that he viewed it as a joke (Ex. 2 at 570:24-571:6); and other witnesses attested to Dillon's general lack of seriousness (Reply Ex. 119 at 66:17-67:2, 70:22-72:13; Reply Ex. 120 at 47:16-20).

76. Defendants deny that the exhibit cited by plaintiff "described the goal" and object to the phrase "described the goal" as vague and meaningless, but admit the remainder of the statement.

77. Defendants admit that O'Brien made radio appearances and attended book signings, but deny the remainder of plaintiff's statement. Plaintiff has failed to cite to the portion of the motion record establishing this fact or demonstrating that it is uncontroverted pursuant to R. 4:46-2.

78. Defendants admit that plaintiff has accurately quoted Plaintiff's Exhibits AN, AO, and AP, but deny the remainder of plaintiff's statement. The exhibits cited by plaintiff do not establish that O'Brien drafted the talking points plaintiff described or that these talking points ever were distributed. Plaintiff's Exhibit AN, written by O'Brien's friend David Dillon, cannot prove what Plaintiff's Exhibits AO and AQ (which Dillon did not write) were "designed" to do.

79. Admitted.

80. Defendants object to plaintiff's characterization of the documents as having "focused" on organized crime or Trump's sex life, but admit that one of the seventeen points in Plaintiff's Exhibit AQ mentions organized crime and that another mentions Trump's own accounts in interviews with O'Brien of his dreams about sex.

81. Defendants admit that O'Brien recorded an audio track for a VidLit (Ex. 2 at 606:23-607:13) and discussed the possible use of circus music and a Trump doll, but deny the remainder of plaintiff's statement.

82. Admitted. The Book described a television reality show called Eco-Challenge, produced by Apprentice producer Mark Burnett, which "became famous for the episode in which a leech squirmed into one contestant's urethra." (Ex. 7 at 13.) O'Brien then referred to that portion of the Book in one of the Book's quizzes. (Id. at 38.)

83. Admitted. The evidence cited by plaintiff does not establish that O'Brien used the doll. (Opp. Ex. AT.)

84. Defendants object to plaintiff's characterization of Siegel's reaction as "ire" and of his email as having "chided" O'Brien, characterizations not supported by the exhibit to which plaintiff cites (Opp. Ex. AV), but admit the remainder of the statement.

85. Denied.

86. Defendants admit that O'Brien made statements similar to those alleged by the plaintiff, but deny that any of the quoted language appears verbatim in Plaintiff's Exhibit AW.

87. Defendants admit that plaintiff has accurately quoted Slate, but deny the remainder of plaintiff's statement. The exhibit cited by plaintiff does not establish that O'Brien's statements "quickly permeated the financial community." (Opp. Ex. AF.) Defendants object that the word "defamatory" in this statement is a conclusion of law rather than a statement of material fact pursuant to R. 4:46-2.

88. Defendants lack sufficient knowledge to confirm or deny the statement.

89. Defendants lack sufficient knowledge to confirm or deny the statement.

90. Defendants lack sufficient knowledge to confirm or deny the statement.

91. Admitted, though defendants note that the exhibit to which plaintiff cites says "Donnie" rather than "Don Jr." (Opp. Ex. AY.)

92. Admitted, though defendants note that the exhibit to which plaintiff cites says "very kind of hard to value" rather than "very hard to value." (Id.)

93. Denied. The exhibits cited by plaintiff do not establish that Trump was "forced to commission" an advertisement or that the advertisement's purpose was to "counter O'Brien's charges." (Ex. 52 at 2; Ex. 67.)

94. Defendants admit that Trump published a four-page advertisement that cost more than $380,000 to run in The New York Times, The New York Times Magazine, New York Magazine, and the New York Post. Defendants deny that all of the properties showcased in the advertisement were "his" (Trump's), since about half were owned by other people or by entities to whom Trump had licensed his name. (See Reply Ex. 121; Reply Ex. 112 at TR000051482-96.) Defendants deny the remainder of the statement, and note that plaintiff has failed to cite to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted pursuant to R. 4:46-2.

95. Denied. Plaintiff has failed to cite to the portion of the motion record establishing the fact or demonstrating that it is uncontroverted pursuant to R. 4:46-2.

96. Defendants admit that plaintiff has accurately summarized Lorber's testimony, but deny the remainder of the statement.

97. Denied. The exhibit cited by plaintiff does not establish that "Trump and Lorber agreed on the nature of Trump's participation." (Opp. Ex. BB at 111:16-21.) Trump's and Lorber's testimony varied on almost every aspect of the deal, including the structure of the deal (Ex. 11 at 570:6-10; Ex. 65 at 98:15-25); whether Trump would receive commissions (id. at 569:5-17; Ex. 65 at 112:12-21); and when Lorber told Trump the deal was off (id. at 576:20-577:2; Ex. 65 at 117:22-118:9).

98. Denied. The testimony cited by plaintiff does not establish that "Trump and Lorber were actively negotiating." (Opp. Ex. BB at 105:24-106:19.) Lorber testified that they did not talk a lot about the structure of the deal. (Ex. 65 at 108:16-19.)

99. Denied. The exhibits cited by plaintiff specifically contradict plaintiff's proposition that Trump and Lorber discussed the name of the combined company. Lorber testified to what he believed was in his mind and in Trump's mind, not to what they discussed if anything. (Opp. Ex. BB at 111:11-13.) Trump made no mention of a discussion of the name. (Opp. Ex. B at 571:3-4.) Neither of the names Trump testified to appear in Lorber's testimony, or vice versa. (Id.; Opp. Ex. BB at 111:11-13.)

100. Denied. The exhibit cited by plaintiff does not establish that Trump and Lorber were negotiating "details" or that Lorber "wanted to have all the details ironed out." (Opp. Ex. BB at 101:18-19.) Rather, Lorber testified that he wanted to have "a clear understanding with Donald as to what the deal would be" – which cannot be described as "all of the details." (Opp. Ex. BB at 101:4-19 (emphasis added).)

101. Defendants admit that plaintiff has quoted Lorber's testimony almost accurately, though defendants note that the exhibit to which plaintiff cites says

"Prudential would be a little bit of a sales job" rather than "Prudential would have been a little bit of a sales job." But defendants deny there is anything in the record that would support Lorber's speculative belief. Furthermore, the statement is not a material fact pursuant to R. 4:46-2, because it does not connect Lorber's decision to any allegedly defamatory statement at issue in this litigation.

102. Defendants admit that plaintiff has accurately quoted Lorber's testimony, but lack sufficient knowledge to confirm or deny the remainder of the statement. Furthermore, the statement is not a material fact pursuant to R. 4:46, because it does not connect Lorber's decision to any allegedly defamatory statement at issue in this litigation.

103. Defendants admit that Lorber testified that Trump "missed a good opportunity," but defendants lack a basis to confirm or deny Lorber's speculative belief about the possible deal. Defendants note that the statement is not a material fact pursuant to R. 4:46, because it does not connect Lorber's decision to any allegedly defamatory statement at issue in this litigation.

104. Defendants admit that Lorber was working with a group of Italian investors led by Davide Bizzi of Di & Bi Realty, owners of 400 Fifth Avenue in New York City, but deny the remainder of plaintiff's statement.

105. Admitted.

106. Defendants admit that plaintiff has accurately described and quoted Lorber's testimony, but otherwise lack sufficient knowledge to confirm or deny the statement.

107. Admitted.

108. Denied.

109. Defendants admit that plaintiff has accurately summarized Trump's testimony, but otherwise deny the statement. Lorber directly contradicted this testimony, testifying that he did not think there was any discussion of terms at the meeting. (Ex. 65 at 62:10-15.)

110. Admitted.

111. Defendants admit that Trump testified that "it was just a deal that was going to happen," but otherwise deny the statement. Lorber testified that Bizzi "seemed very interested," not that he was very interested. (Opp. Ex. BB at 62:19 (emphasis added).) Defendants object to the admissibility of Lorber's hearsay testimony about Bizzi's statements.

112. Denied. Plaintiff testified that no such document existed (Ex. 11 at 565:18-566:9), and plaintiff's counsel certified that the deal did not reach the documentation stage (Ex. 53 ¶ 3). The exhibits that plaintiff cites do not establish that "Lorber and Donald Trump Jr. ultimately drew up a term sheet," nor do they establish the exact fee or the exact sales price percentage contained in any such term sheet. (Opp. Ex. BB at 64:4-13, 65:8-22 (using phrases such as "somewhere in the neighborhood" and "something like" rather than precise numbers); Opp. Ex. B at 552:23-553:7.) Neither plaintiff nor Lorber produced any such term sheet. (Ex. 65 at 64:17-65:7; Ex. 53 ¶ 3.)

113. Defendants admit that plaintiff has accurately summarized Trump's and Lorber's testimony, but otherwise deny the statement. Defendants object to the admissibility of Lorber's hearsay testimony about Bizzi's statements.

114. Defendants deny the statement, but object to the admissibility of Lorber's hearsay testimony about Bizzi's statements.

115. Defendants admit that plaintiff has accurately quoted Lorber's testimony, but object to the admissibility of Lorber's hearsay testimony about Bizzi's statements. Furthermore, the statement is not a material fact pursuant to R. 4:46, because it does not connect Bizzi's statement to any allegedly defamatory statement at issue in this litigation.

116. Defendants admit that plaintiff has accurately described Lorber's testimony, but object to the admissibility of Lorber's hearsay testimony about Bizzi's statements. Furthermore, the statement is not a material fact pursuant to R. 4:46, because it does not connect Bizzi's statement to any allegedly defamatory statement at issue in this litigation.

117. Defendants admit that plaintiff has accurately described and quoted Lorber's testimony, but object to the admissibility of Lorber's hearsay testimony about Bizzi's statements. Furthermore, the statement is not a material fact pursuant to R. 4:46, because it does not connect Bizzi's statement to any allegedly defamatory statement at issue in this litigation.

118. Defendants admit that Lorber testified to his understanding of Bizzi's views, but deny the statement and object to the admissibility of Lorber's hearsay testimony about Bizzi's statements.. Defendants note that the testimony cited by plaintiff makes no mention of the allegedly defamatory statements having caused Bizzi's alleged reaction. (Opp. Ex. BB at 72:13-73:3.) Furthermore, the statement is not a material fact

pursuant to R. 4:46, because it does not connect Bizzi's statement to any allegedly defamatory statement at issue in this litigation.

119. Defendants admit that plaintiff has accurately described Lorber's testimony, but otherwise deny statement and object to the admissibility of Lorber's hearsay testimony about Bizzi's statements.

120. Defendants admit that plaintiff has accurately described Trump's testimony, but otherwise deny the statement. Furthermore, the statement is not a material fact pursuant to R. 4:46, because it does not connect Bizzi's statement to any allegedly defamatory statement at issue in this litigation.

121. Defendants admit that plaintiff has accurately quoted Trump's testimony, but otherwise deny the statement. Defendants note that any connection between the allegedly defamatory statements and Bizzi's alleged reaction is pure speculation on plaintiff's part. (Ex. 11 at 560:15-562:23.)

122. Defendants admit that Bayrock is a Manhattan-based real estate and development group, and that plaintiff has accurately summarized and quoted Sater's testimony, but deny the remainder of plaintiff's statement.

123. Denied. The testimony cited by plaintiff does not establish that any such "deal" or "arrangement" existed. (Opp. Ex. B at 591:2-9.) Sater's testimony about the Phoenix and Moscow deals did not mention an ownership stake. (Ex. 59 at 94:2-95:5, 138:8-139:10.)

124. Defendants admit that plaintiff has accurately quoted Trump's testimony, but otherwise deny the statement.

125. Defendants admit that Plaintiff's Exhibit BD is a letter from Trump allowing Bayrock to explore possibilities for a Trump International Hotel and Tower in Moscow, but deny that the exhibit supports the proposition that Trump and Bayrock were "in talks." (Opp. Ex. BD.)

126. Defendants admit that plaintiff has accurately quoted Sater's testimony, but otherwise lack sufficient information to confirm or deny the statement.

127. Admitted.

128. Defendants admit that plaintiff has accurately summarized Sater's testimony, but otherwise deny the statement. In the testimony cited by plaintiff, Sater specifically describes the BBG plans as "preliminary." (See Opp. Ex. BC at 135:24-136:10.)

129. Defendants admit that plaintiff has summarized Sater's testimony almost accurately, except that Sater described Ilya Haikan as one of a group of owners, not as the owner, but otherwise deny the statement. (Ex. 59 at 136:14-137:7.)

130. Defendants admit that plaintiff has accurately quoted Sater's testimony, but otherwise deny the statement.

131. Denied. The exhibit cited by plaintiff does not support the statement. Sater testified that he concluded that the lost deal was "possibly" related to the Book and the excerpt. (Opp. Ex. BC at 151:5-21.)

132. Denied. Arif stated through his counsel that he believed that he had no knowledge or information relevant to the dispute between the parties. (Ex. 56 at 1.) Sater testified that Arif never dealt with or had any conversation with the Moscow

project. (Ex. 59 at 149:19-150:5.) Sater testified that he was unaware of any Bayrock-Trump project in Kiev, Warsaw, or Istanbul that was being discussed prior to the Book, let alone that any such project did not go forward because of the Book. (Id. at 153:4-155:10; 156:21-157:5.)

133. Denied. Arif stated through his counsel that he believed that he had no knowledge or information relevant to the dispute between the parties. (Ex. 56 at 1.)

134. Admitted.

135. Denied. The exhibit cited by plaintiff contains inadmissible hearsay because Trump was not present at the hearing and lacks first-hand knowledge of the events he purported to describe. (Ex. 11 at 402:16-403:18.) Even if admissible, there is nothing in plaintiff's testimony to support the fact that opponents "used the Book . . . to try to thwart zoning approval." (Id.)

136. Denied. The testimony cited by plaintiff about Trump's conversation with an unnamed individual is inadmissible hearsay. (Opp. Ex. B. at 407:6-19.) Furthermore, the statement is not a material fact pursuant to R. 4:46, because it does not connect the City Council's decision to any allegedly defamatory statement at issue in this litigation.

137. Denied. Trump was not seeking an "approval." Trump was seeking an overall change in the district's zoning that would have allowed any developer to build a building over 56 feet tall in the Camelback Corridor neighborhood. (See Exs. 60-63.)

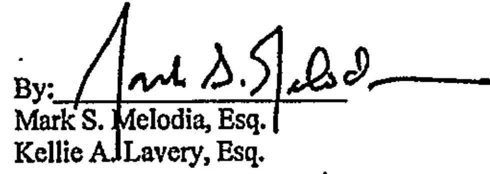
138. Defendants admit that plaintiff has accurately quoted Trump's testimony, but otherwise deny the statement. Defendants deny that the testimony cited by plaintiff establishes that Trump lost any such deals. (Opp. Ex. B at 19:13-20.)

Date: May 7, 2009

DEBEVOISE & PLIMPTON LLP

Mary Jo White, Esq.
Andrew J. Ceresney, Esq.
Andrew M. Levine, Esq.

REED SMITH LLP



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Attorneys for Defendants

DONALD J. TRUMP, Plaintiff, v. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY DOCKET NO. CAM-L-545-06 *Civil Action* **SUPPLEMENTAL CERTIFICATION OF MARK S. MELODIA**

MARK S. MELODIA, of full age, hereby certifies as follows:

1. I am an attorney licensed to practice in the State of New Jersey, and a partner with the law firm Reed Smith LLP, attorneys for defendants Timothy L. O'Brien, Time Warner Book Group Inc., and Warner Books Inc. (collectively "defendants") in this matter. As such, I am fully familiar with the facts set forth herein.

2. I make this Certification in further support of defendants' Motions for Summary Judgment.

3. A true and correct audio copy of an excerpt from an interview of Donald J. Trump by Timothy L. O'Brien, dated December 20, 2004, is attached hereto as **Exhibit 105.**

4. A true and correct audio copy of an excerpt from an interview of Donald J. Trump by Timothy L. O'Brien, dated January 12, 2005, is attached hereto as **Exhibit 106.**

5. A true and correct audio copy of an excerpt from an interview of Donald J. Trump by Timothy L. O'Brien, dated February 16, 2005, is attached hereto as **Exhibit 107.**

6. A true and correct audio copy of an excerpt from an interview of Donald J. Trump and Allen Weisselberg by Timothy L. O'Brien, dated March 4, 2005, is attached hereto as **Exhibit 108.**

7. A true and correct copy of a letter from William M. Tambussi, Esq. and Mark P. Ressler, Esq., to the Honorable Michele M. Fox, J.S.C., dated February 12, 2009, is attached hereto as **Exhibit 109.**

8. A true and correct copy of the article Say Spree Hurt Hand During Boat Fracas, by Marc Berman, which appeared in The New York Post on October 4, 2002, is attached hereto as **Exhibit 110.**

9. A true and correct copy of the article Spree Might Have Broken Knicks Deal, by Marc Berman, which appeared in The New York Post on October 5, 2002, is attached hereto as **Exhibit 111.**

10. A true and correct copy of Donald J. Trump's Statement of Financial Condition, dated June 30, 2004, is attached hereto as **Exhibit 112.**

11. A true and correct copy of a mortgage agreement for Mar-A-Lago, dated April 6, 1995, is attached hereto as **Exhibit 113.**

12. A true and correct copy of a payment guaranty made by Donald J. Trump in favor of UBS Warburg Real Estate Investments Inc., dated November 26, 2002, is attached hereto as **Exhibit 114.**

13. A true and correct copy of excerpts from the transcript of the deposition of Allen Weisselberg, on January 7, 2008, is attached hereto as **Exhibit 115.**

14. A true and correct copy of excerpts from the transcript of the deposition of Leigh Michelle Lokey, on September 7, 2007, is attached hereto as **Exhibit 116.**

15. A true and correct copy of excerpts from the transcript of the deposition of Gerald J. Rosenblum, on November 13, 2007, is attached hereto as **Exhibit 117.**

16. A true and correct copy of excerpts from the transcript of the deposition of David Dillon, on August 13, 2008, is attached hereto as **Exhibit 118.**

17. A true and correct copy of excerpts from the transcript of the deposition of Patrick J. O'Brien, on March 27, 2008, is attached hereto as **Exhibit 119,**

18. A true and correct copy of excerpts from the transcript of the deposition of Michael O'Brien, on August 13, 2008, is attached hereto as **Exhibit 120.**

19. A true and correct copy of an undated list of Trump's licensing agreements, which Trump produced in discovery, is attached hereto as **Exhibit 121.**

20. A true and correct copy of the article Leighton Hit by Mothballed Tower, by Miriam Steffen, which appeared in The Sydney Morning Herald on December 2, 2008, is attached hereto as **Exhibit 122.**

21. A true and correct copy of the article Trump Postpones Philadelphia Development, by Suzette Parmley, which appeared in The Philadelphia Inquirer on November 4, 2008, is attached hereto as **Exhibit 123.**

22. A true and correct copy of the article Tampa Tower Loses Trump, by James Thorner, which appeared in The St. Petersburg Times on May 30, 2007, is attached hereto as **Exhibit 124.**

23. A true and correct copy of the article Developer: Condo Development on Hold in N.O., which appeared on The Associated Press State & Local Wire on April 22, 2009, is attached hereto as **Exhibit 125.**

24. A true and correct copy of the article Donald Declares 'Trump Nation' Enemy Territory, by Lloyd Grove, which appeared in The Daily News on November 10, 2005, is attached hereto as **Exhibit 126.**

25. A true and correct copy of an order of the Honorable Michael J. Kassel, J.S.C., dated January 23, 2008, is attached hereto as **Exhibit 127.**

26. A true and correct copy of excerpts from the transcript of the deposition of Donald Bender, on November 29, 2007, is attached hereto as **Exhibit 128.**

27. A true and correct copy of the article Trump Wins Plan Confirmation, by Erik Moser, which appeared in Daily Deal/The Deal on April 6, 2005, is attached hereto as **Exhibit 129.**

28. A true and correct copy of a letter from Andrew J. Ceresney, Esq., to Maria Gorecki, Esq., dated May 25, 2007, producing audio recordings of interviews of Trump, Allen Weisselberg, and Leigh Michelle Lokey, is attached hereto as **Exhibit 130.**

29. A true and correct copy of the article Trump: Bigger than Coke or Pepsi?, by Diane Brady, which appeared in Business Week on December 14, 2004, is attached hereto as **Exhibit 131.**

30. A true and correct copy of Ajax Enterprises v. Declan Fay, No. 04-4539, 2007 U.S. Dist. LEXIS 38515 (D.N.J. May 15, 2007) is attached hereto as **Exhibit 132.**

31. A true and correct copy of Burns v. Bank of America, 03 Civ. 1685, 2008 Dist. LEXIS 98335 (S.D.N.Y. Dec. 4, 2008) is attached hereto as **Exhibit 133.**

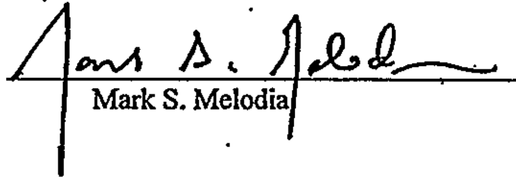
32. A true and correct copy of Kipper v. NYP Holdings, Inc., No. 54, 2009 WL 1148653 (N.Y. Apr. 30, 2009) is attached hereto as **Exhibit 134.**

33. A true and correct copy of Liberty Lobby, Inc. v. Anderson, No. 81-2240, 1991 WL 186998 (D.D.C. May 1, 1991) is attached hereto as **Exhibit 135.**

34. A true and correct copy of Neff v. Coates, No. L-977-04, 2008 WL 1988022 (N.J. Super. App. Div. May 9, 2008) is attached hereto as **Exhibit 136.**

35. A true and correct copy of Skidmore v. Wall Stadium Concessions, Inc., No. L-1460-01, 2006 WL 552505 (N.J. Super. App. Div. Mar. 8, 2006) is attached hereto as **Exhibit 137.**

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me is willfully false, I am subject to punishment.



Mark S. Melodia

Dated: May 7, 2009

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* ALSO ADMITTED IN MARYLAND
◊ CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS CIVIL TRIAL ATTORNEY
~ CERTIFIED BY THE SUPREME COURT OF NEW JERSEY AS WORKERS' COMPENSATION LAW ATTORNEY

February 12, 2009

Honorable Michele M. Fox, J.S.C.
Camden County Hall of Justice
101 South 5th Street
Camden, New Jersey 08103-4001

BY HAND DELIVERY

Re: Trump v. O'Brien, et al.
Superior Court of New Jersey, Law Division, Civil Part
Docket No. L-545-06

Dear Judge Fox:

We are co-counsel for the plaintiff in the above matter, Donald J. Trump ("plaintiff" or "Trump"). We respectfully submit the following summary of the status of this matter in advance of the discovery conference scheduled for February 13, 2009.

I. Background

This is an action filed by plaintiff against Timothy L. O'Brien, Time Warner Book Group, Inc., and Warner Books, Inc. ("defendants"), alleging that defendants defamed him by knowingly, deliberately, and maliciously disseminating out-and-out falsehoods about him and his business acumen, honesty, and net worth -- falsehoods aimed precisely at damaging one of the principal bases for his reputation and success in his real estate, entertainment, and brand-name businesses.

The last discovery conference was held on November 12, 2008. After the conference, the Court issued an Order setting the following discovery deadlines:

- Fact discovery shall be completed on February 12, 2009.

- Plaintiff shall produce all expert reports by March 16, 2009.

- Upon service of plaintiff's final expert report, plaintiff shall notify defendants that the last expert report has been submitted.

- Defendants shall produce all responsive reports sixty (60) days following service of plaintiff's last expert report, or by May 15, 2009, whichever is sooner.

- The parties shall complete all expert depositions by July 3, 2009.

See Order of December 3, 2009, at 1-2. The deadlines are clear.

On February 5, 2009, defendants sent a letter to Your Honor advising that they believe fact discovery should conclude on February 12, 2009. The purpose and relevance of defendants' submission are unclear because plaintiff does not seek, and has made no suggestion to defendants that he intends to seek, any extension. Indeed, plaintiff has long welcomed the close of fact discovery.[1] There is no dispute between the parties on this issue.

As to the issues that do merit consideration at the next conference, plaintiff submits the following points.

II. Issues for Review at February 12, 2009 Conference

Plaintiff respectfully submits the following proposals for the Court's consideration during the conference on February 12, 2009.

A. The Submission of Dispositive Motions Should Not Disturb the Progression of Expert Discovery

As noted above, the Court set deadlines for expert discovery in the Order of December 3, 2009. Plaintiff sees no need to adjust these deadlines. At the last conference, defendants asked for a "staggered approach to expert discovery" such that expert discovery would be stayed pending submission of summary judgment motions.[2] The Court rejected this proposal.[3] Nothing

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[1] In fact, during the last conference, plaintiff's counsel made clear that plaintiff did not see the need for any further fact discovery at all, except for the deposition of Arthur Sulzberger, and two other non-party corporate representatives sought by defendant. The issue that arose was that defendants suddenly advised on the day of the conference that approximately fifty (50) pages of O'Brien's notes existed and would be produced. Plaintiff has elected not to depose O'Brien on such notes.

[2] See Letter of Mark S. Melodia to the Court, November 14, 2008.

[3] See Transcript of November 14, 2008 Hearing, at 7-16 to 8-3.

that has transpired in the three months since the last conference warrants changing that position.

B. A Trial Date Should Be Set for September 2009

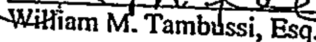
Given the close of fact discovery and the anticipated closure of expert discovery on July 3, 2009, plaintiff requests that a trial date be set for September 2009. Following the close of all discovery, this case will not be subject to mandatory arbitration pursuant to R. 4:21A-1. The time between July 3, 2009 and September 2009 will be sufficient to address any additional dispositive motions as well as pre-trial motions. Therefore, a trial date in September 2009 would appear to be reasonable for this case.

We look forward to the conference on February 13, 2009.

Thank you for Your Honor's generous attention and consideration.

Respectfully submitted,

BROWN & CONNERY LLP

By: 
William M. Tambussi, Esq.

KASOWITZ, BENSON, TORRES
& FRIEDMAN, LLP

By: Mark P. Ressler
Mark P. Ressler, Esq.

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The New York Post

October 4, 2002, Friday

SECTION: Late City Final; Pg. 088

LENGTH: 556 words

HEADLINE: SAY SPREE HURT HAND DURING BOAT FRACAS

BYLINE: MARC BERMAN

BODY:

CHARLESTON - It was either a fight with the angry sea that busted Latrell Sprewell's right hand or, according to two eyewitnesses, just an angry fight.

Sprewell's agent, Bob Gist, said yesterday his client's right-pinkie fracture occurred while skippering his new yacht on the choppy waters of Lake Michigan off the Milwaukee lakefront.

However, two eyewitnesses who asked not to be identified told The Post the Knicks superstar hurt his hand afterward, when, during a late-night party on his boat, he was involved in a skirmish in which he threw a punch that missed and hit a wall.

According to Sprewell's account, Gist said, a wave smacked his plush boat and he scrambled to gain control of the vessel, pulling on a rope to redirect it. Sprewell banged his hand in trying to get the boat back on course, Gist said.

The two eyewitnesses said that after they had sailed on his boat Sept. 20 Sprewell had a party while it was docked at the lakefront area in downtown Milwaukee. About 14 people attended.

Reportedly, an argument ensued about 2:30 a.m. after a woman Sprewell hadn't invited became sick after drinking and vomited on a carpet by the bar area. Sprewell wanted the woman to leave the boat, but her boyfriend objected. Sprewell took a swing at the boyfriend, known as "Mark," missed and hit a wall.

Sprewell, according to the eyewitnesses, cursed in pain and asked his guests not to mention the incident.

No police report was filed.

Through one of his publicists, Sprewell last night denied the account saying, "There's no validity to it. I don't even know a Mark."

Gist could not be reached for comment regarding the eyewitnesses' account.

When told of Gist's version, one eyewitness said, "No way, man. No use lying. Keep it real. He swung at a friend and missed."

Last night, the Knicks said they were unaware of either version.

According to hand specialists interviewed, some fractures of the fifth metacarpal are called "a boxer's fracture" because they result from a punch. "A boxer's fracture" normally occurs when someone punches something with no give, such as a wall or pole.

Sprewell, who has been told by the Knicks not to come to their Charleston training camp, believes he may have first irritated the pinkie in the weight room and that the boating mishap may have resulted in the fracture, Gist said. Sprewell had surgery Monday and will miss six weeks.

"He was so excited, so prepared for camp," Gist said. "He wished he would've known it was broken. He's optimistic he'll be playing before six weeks. He's itching to get out of the cast."

All Sprewell told the Knicks Monday was he banged his hand a couple of weeks ago. The vagueness prompted Knicks coach Don Chaney and GM Scott Layden to set up a special meeting with Sprewell Monday to find out specifics.

In truth, the Knicks weren't worried how Spree hurt the hand. They were angry he didn't report it sooner and wanted to know his thought process before deciding whether to fine him. In their meeting, brass wants to remind him how important he is to the franchise, and as such, is responsible for reporting even minor injuries in the offseason.

GRAPHIC: THE LOWDOWN: According to Latrell Sprewell's agent, the Knick star broke his right pinkie while skipping his new yacht on Lake Michigan. NY Post [color]

LOAD-DATE: October 4, 2002

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The New York Post

October 5, 2002, Saturday

SECTION: All Editions; Pg. 044

LENGTH: 702 words

HEADLINE: SPREE MIGHT HAVE BROKEN KNICKS DEAL

BYLINE: MARC BERMAN

BODY:

CHARLESTON - Latrell Sprewell, in possibly failing to give "prompt notice" to the Knicks about his off-season hand injury, might have breached his Knick contract, according to a clause in the Collective Bargaining Agreement.

The last time Sprewell breached his contract was when he choked his coach P.J. Carlesimo five years ago. Golden State terminated the contract, but it was later reinstated by a judge.

The Knicks don't plan to terminate his contract, but a fine or suspension could be in order after GM Scott Layden, Garden sports prez Steve Mills and Don Chaney meet with Sprewell Monday at their Westchester practice facility.

It appears to depend upon how contrite Sprewell, who will make nearly $13 million this season, acts during the meeting.

It also could hinge who defines the word "prompt" as it relates to Sprewell here.

With evidence mounting Sprewell fractured his right pinkie by punching a wall during a Sept. 20 altercation at a party on his new yacht, this could be the final straw in his often-stellar but always controversial Knick career. Sprewell didn't inform the Knicks about the injury until 10 days later - is that prompt? That question remains to be answered.

According to Chaney, he only told them he banged his hand on his boat. Sprewell will miss at least six weeks.

The relevant clause in the CBA states, "The player agrees to provide to the team's coach, trainer or physician prompt notice of any injury, illness or medical condition suffered by him that is likely to affect adversely the player's ability to render the services required under his contract, including the time, place and nature of such injury, illness or condition."

A prominent Manhattan hand surgeon confirmed that the injury Sprewell suffered - a fracture of the fifth metacarpal in the pinkie area - can be known as "a boxer's fracture" and is most commonly caused from punching something hard.

"Boxer's fracture tends to come from a clenched fist striking a solid object," said Dr. Pamela Sherman of the Hospital for Special Surgery. "That's usually how it happens, punching a wall or drawer; something solid that doesn't

move."

Two eyewitnesses told The Post on Thursday that Sprewell, hosting a party on his yacht docked at Milwaukee's lakefront area, got angry when a woman guest drinking shots of alcohol threw up on a white carpet by the bar. They said Sprewell wanted the woman off the boat, but after her boyfriend interfered, Sprewell took a swing and missed. Sprewell denied the incident through one of his publicists.

Bob Gist, Sprewell's agent, backpedaled on his prior account that his client suffered the fracture navigating his yacht after a Lake Michigan wave smacked the vessel. "I don't know and I really don't care how he hurt his hand, as long as it's not a crime," Gist said.

Shopping Sprewell was a management priority this summer. With Shandon Anderson the scourge of a tumultuous training camp, Sprewell's Knick career is in jeopardy again.

Layden made a telling remark Tuesday. Layden said of Sprewell's replacement, Anderson, "I'm hoping he plays so well that Coach [Chaney] has an unbelievable decision as what to do when we're at full strength." You don't say that about your supposed franchise player.

Chaney said he has to believe Sprewell's version for now. "I read it in the paper but I'd like to speak with him to find out exactly what the story is," Chaney said. "That's one of the reasons we'll be meeting. I can go by only what he said. He said he banged his hand on his boat. We still don't know. Right now we're talking about hearsay."

*

Anderson wasn't surprised by Layden's high praise. "He's the guy who drafted me in Utah," Anderson said. "Your bring in guys you have confidence in." Chaney said, "His weight's down, body fat is way down, he's shooting much better. I look at it as just an off year [last season]." . . . It's questionable whether rookie PG Frank Williams will play a preseason game, two weeks away from contact drills . . . Allan Houston (sprained ankle) still hasn't practiced here. If he misses Tuesday's preseason opener vs. Celts, Chaney may start camp fillers Toby Bailey or Danny Johnson at SG.

LOAD-DATE: October 8, 2002

Donald J. Trump

Statement Of Financial Condition

June 30, 2004

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Certified Public Accountants

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ACCOUNTANTS' COMPILATION REPORT

To Donald J. Trump:

We have compiled the accompanying statement of financial condition of Donald J. Trump as of June 30, 2004, in accordance with Statements on Standards for Accounting and Review Services issued by the American Institute of Certified Public Accountants.

A compilation is limited to presenting in the form of financial statements information that is the representation of the individual whose financial statements are presented. We have not audited or reviewed the accompanying statement of financial condition and, accordingly, do not express an opinion or any other form of assurance on it. However, we did become aware of certain departures from generally accepted accounting principles that are described in the following paragraphs.

Generally accepted accounting principles require that in order to reflect amounts to be received in the future at estimated current values the rights must be non-forfeitable, fixed and determinable and not require any future services. As discussed in Notes 4 and 5, several of the values expressed have been based on future interests that, in some instances, are not for fixed or determinable amounts and, in some instances, are based on performance of future services.

Generally accepted accounting principles require that, with respect to each closely held business entity, summarized information about assets, liabilities and results of operations for the most current year be disclosed in the financial statements. In addition, the current estimated value of each closely held business should be recorded as a net investment (assets net of liabilities). Lastly, the ownership percentages of each closely held business should be disclosed. The accompanying statement of financial condition does not include the required summarized disclosures and reports some closely held business entities in a manner that separately states gross assets and liabilities and states certain cash positions separately from their related operating entity and does not disclose Mr. Trump's ownership percentage in certain closely held businesses.

Generally accepted accounting principles require that the receipt of non-interest bearing deposits in exchange for rights or privileges be recorded at the present value of the liability. As discussed in Note 4, the present value of the liability for non-interest bearing deposits received as a condition of membership in club facilities has not been included in the accompanying statement of financial condition

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Generally accepted accounting principles require that personal financial statements include a provision for current income taxes as well as estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases. The accompanying statement of financial condition does not include such provisions.

The effects of the departures from generally accepted accounting principles as described above have not been determined.

Because the significance and pervasiveness of the matters discussed above make it difficult to assess their impact on the statement of financial condition, users of this financial statement should recognize that they might reach different conclusions about the financial condition of Donald J. Trump if they had access to a revised statement of financial condition prepared in conformity with generally accepted accounting principles.

Weiser LLP
CERTIFIED PUBLIC ACCOUNTANTS

Lake Success, N.Y
September 29, 2004

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STATEMENT OF FINANCIAL CONDITION

JUNE 30, 2004

(See Accountants' Compilation Report)

ASSETS

Cash	$ 156,000,000
Escrow and reserve deposits	16,700,000
Marketable securities – Trump Hotels & Casino Resorts, Inc.	72,800,000
Real and operating properties:	
Trump Tower - 725 Fifth Avenue, New York, New York	349,400,000
NIKETOWN - East 57th Street, New York, New York	212,400,000
40 Wall Street - New York, New York	410,000,000
Club facilities - New York, Florida, New Jersey and California	560,000,000
The Trump World Tower at United Nations Plaza - New York, New York	152,000,000
100 Central Park South - New York, New York	40,100,000
Trump Plaza, Commercial and retained residential portions - New York, New York	26,600,000
Trump Palace, Trump Parc and Trump Parc East Condominiums, Commercial portions - New York, New York	8,400,000
Trump International Hotel and Tower - One Central Park West, New York, New York	10,800,000
Properties under development - Westchester County, New York	102,000,000
Partnerships and joint ventures - (net of related debt):	
Trump Place - Upper West Side, New York, New York	1,204,000,000
Miss Universe Pageants	12,500,000
Trump Park Avenue - New York, New York	133,000,000
Trump Grande Ocean Resort and Residences - Sunny Isles, Florida	4,500,000
Trump Tower Chicago	259,000,000
Properties under development in conjunction with others	90,000,000
Other assets	109,100,000
Total assets	$ 3,929,300,000

The accompanying notes are an integral part of this financial statement.

LIABILITIES AND NET WORTH

Accounts payable and accrued expenses	$ 6,600,000
Deposits payable	5,200,000
Loans payable on real and operating properties:	
Loan related to Trump Tower	32,400,000
Secured lease bonds - NIKETOWN	83,100,000
Loans related to 40 Wall Street	151,000,000
Loans related to club facilities	64,600,000
Loans related to The Trump World Tower at United Nations Plaza	41,400,000
Loan related to the commercial and retained residential portions of Trump Plaza, New York	9,300,000
Loan related to commercial portions of Trump Palace, Trump Parc and Trump Parc East Condominiums	5,600,000
Loan related to Trump International Hotel and Tower	4,500,000
Loans related to properties under development in Westchester County, New York	8,000,000
Mortgages and loans payable secured by other assets	8,500,000
	420,200,000
Commitments and contingencies	
Net worth	3,509,100,000
Total liabilities and net worth	$3,929,300,000

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DONALD J. TRUMP

NOTES TO STATEMENT OF FINANCIAL CONDITION

(See Accountants' Compilation Report)

1. **BASIS OF PRESENTATION:**

The accompanying statement of financial condition consists of the assets and liabilities of Donald J. Trump. Assets are stated at their estimated current values and liabilities at their estimated current amounts using various valuation methods.

Such valuation methods include, but are not limited to, the use of appraisals, capitalization of anticipated earnings, recent sales and offers and estimates of current values as determined by Mr. Trump in conjunction with his associates and, in some instances, outside professionals. Considerable judgment is necessary to interpret market data and develop the related estimates of current value. Accordingly, the estimates presented herein are not necessarily indicative of the amounts that could be realized upon the disposition of the assets or payment of the related liabilities. The use of different market assumptions and/or estimation methodologies may have a material effect on the estimated current value amounts.

Generally accepted accounting principles require that personal financial statements include a provision for current income taxes as well as estimated income taxes on the differences between the estimated current values of assets and the estimated current amounts of liabilities and their tax bases. The accompanying statement of financial condition does not include such provisions.

Certain immaterial personal assets and liabilities, such as automobiles, personal and household effects and personal payables have not been reflected in the accompanying statement.

Pursuant to generally accepted accounting principles, these financial statements do not reflect the value of Donald J. Trump's worldwide reputation. When attached to a real property interest or gaming venture, Mr. Trump's name conveys a high degree of quality and profitability. His persona rises to the level of an internationally recognized brand name. This prestige significantly enhances the value of the properties reflected in these statements, as well as that of his future projects. For example, the selling prices of condominium units at Trump Tower, The Trump World Tower at United Nations Plaza and Trump International Hotel and Tower have been recorded at the highest known levels per square foot. The goodwill attached to the Trump name has significant financial value that has not been reflected in the preparation of this statement.

2. **CASH:**

Cash represents amounts held by Donald J. Trump personally and amounts in operating entities used for working capital, debt service and other business purposes.

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3. **INVESTMENT IN MARKETABLE SECURITIES (CONTINUED):**

Since 1998 and prior to June 30, 2004, Mr. Trump had purchased 2,066,000 shares of the common stock on the open market.

The net effect of the above is that, as of June 30, 2004, Donald J. Trump has beneficial ownership of 25,679,610 shares of the publicly held corporation, Trump Hotels & Casino Resorts, Inc.

This ownership position is more fully described as follows:

- The 36.6% limited partnership interest in Trump Hotels & Casino Resorts Holdings, L.P. is convertible in whole or in part into 13,918,723 shares of Trump Hotels & Casino Resorts, Inc.

  Note that the 1,000 Class B shares now owned by Mr. Trump has voting power equivalent to the voting power of the 13,918,723 conversion shares but the voting power of the Class B Stock would be proportionately diminished as voting common shares are issued pursuant to the conversion rights.

- 9,960,737 shares owned directly by Mr. Trump including the 7,894,737 shares of common stock which Mr. Trump acquired in July of 2003 upon the exchange of his 1,500 shares of Series A Preferred Stock.

- The beneficial ownership includes 1,800,000 shares that Mr. Trump has the right to acquire pursuant to options described above.

Mr. Trump has also purchased bonds issued by Trump Casino Holdings, LLC with a par value and market value of $15,000,000 as of June 30, 2004. These bonds provide an interest rate of 11.625% per annum to be paid semi-annually and an additional 6% in the form of "payment in kind" notes. The bonds mature in the year 2010.

On June 30, 2004 the quoted market value of each share of Trump Hotels & Casino Resorts, Inc. was $2.42. The value ascribed to Mr. Trump's ownership interests in the publicly held company was derived based on that value multiplied by the number of shares which he effectively owned on June 30, 2004. The value of his bonds, $15,000,000, was then added to that number to obtain the value of these securities, $72,800,000. This value is subject to change as it is based upon market conditions. The quoted market value of each share of Trump Hotels & Casino Resorts, Inc. on September 29, 2004 was $ .75 .

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4. **REAL AND OPERATING PROPERTIES:**

Donald J. Trump wholly owns real and operating properties. Estimates of current value of the properties and related debt are determined on various bases, as described below.

Trump Tower

Donald J. Trump is currently the owner of 100% of the equity interests in the entities that own and operate the commercial and retail elements of the 68 floor mixed-use property known as Trump Tower. The property also contains residential condominiums that are owned by the residents. The commercial and retail aspects of the property are located at 725 Fifth Avenue between East 56th and East 57th Streets in New York City. It has been described as New York's most famous contemporary building and third most visited attraction with in excess of 4.5 million visitors annually. Trump Tower stands as a symbol of quality and success and is unequaled in the quality of its retail, professional office and private condominium space. Designed by renowned architect Der Scutt, this 68 floor bronze glass and polished brass structure on Fifth Avenue boasts 178,000 square feet of commercial space and 114,000 square feet of retail space. The continuing success of the retail space has recently been demonstrated when a world famous tenant dramatically expanded its space in the property through the year 2021 at rental rates which are among the highest in the world.

Until the construction of The Trump World Tower at United Nations Plaza, Trump Tower was the tallest residential building and concrete structure in Manhattan.

The estimated current value of $349,400,000 is based upon the assessment of Mr. Trump in conjunction with his associates and outside professionals of recent sales of comparable properties.

Mr. Trump's interest in this property has been pledged as collateral with respect to a loan payable. As of June 30, 2004 the amount of this debt was $32,400,000. The note matures on February 1, 2013 and bears interest at the rate of 7.36%.

Funds in the amount of $2,524,000 have been escrowed pursuant to the terms of this loan. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits."

NIKETOWN

Donald J. Trump is currently the owner of 100% of the entity that is the lessee with respect to two long-term ground leasehold estates relating to land and buildings located between Fifth and Madison Avenues and principally on 57th Street in New York City. On December 8, 1994, the premises were leased to NIKE Retail Services, Inc. The NIKETOWN retail store is a single integrated building with five floors containing approximately 65,000 square feet. NIKE Retail Services, Inc. characterizes its NIKETOWN stores as high-profile stores designed to showcase NIKE products. The building has direct access to both the Trump Tower Atrium and the IBM Through-Block Arcade.

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4. REAL AND OPERATING PROPERTIES (CONTINUED): NIKETOWN (Continued)

The property is leased to NIKE Retail Services, Inc. for a term that will end on May 31, 2017. The lessee will then have the option to extend the lease for three five-year terms beyond that date.

Mr. Trump's interests in this property both as lessee and lessor have been assigned to a new entity, which has used those rights to secure bonds which, as of June 30, 2004, were in the amount of $83,100,000. These are 7.125% secured lease bonds that are designed to be self-amortizing through scheduled payments the last of which will take place on June 1, 2017. The bond payments are designed to be satisfied by the minimum rental payments under the terms of the NIKE lease.

The current value of $212,400,000 reflects the net proceeds which Mr. Trump in conjunction with his associates and outside professionals expect to be derived by him from rental activities pursuant to the lease described above as well as the residual value of the property.

Security deposits in the form of U.S. Treasury Securities in the amount of $7,200,000 have been escrowed pursuant to the terms of these arrangements. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits."

40 Wall Street

On November 30, 1995, an entity, which is wholly owned by Donald J. Trump, became the lessee under a long-term ground lease for the property at 40 Wall Street in New York City.

This is a 72-story tower consisting of 1.3 million square feet. Mr. Trump has restored this property to its position as downtown Manhattan's premier office building.

The estimated current value of $410,000,000 is based upon an evaluation made by Mr. Trump in conjunction with his associates and outside professionals of leases that have been signed or are currently the subject of negotiation and the present value of the resultant cash flow to be derived from the building's operations as well as its residual value. Some of the major tenants are American Express, CNA Insurance, Countrywide Insurance and an affiliate of Bear Stearns & Co. In the evaluation of this property provision was made for ground rent payments when forecasting the anticipated cash flow.

The property is currently subject to two mortgages payable to Wachovia Securities. One mortgage is in the amount of $140,000,000 as of June 30, 2004. It is due on September 9, 2005. Interest is at 2.55% more than the rate known as the London Interbank Offering Rate and at June 30, 2004 was 3.7888%. The other mortgage is in the amount of $11,000,000 as of June 30, 2004. It is due on September 9, 2005.

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4. REAL AND OPERATING PROPERTIES (CONTINUED):
40 Wall Street (Continued)

Interest is at 15% more than the rate known as the London Interbank Offering Rate and at June 30, 2004 was 16.2388%.

Funds in the amount of $5,390,000 have been escrowed pursuant to the terms of these loans. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits".

Club Facilities

Mr. Trump has acquired certain properties for the purpose of developing them into club facilities. Several of these clubs will also contain residential units which he will either rent to others or sell outright. The current value of $560,000,000 is based on an assessment of the cash flow that is expected to be derived from club and rental operations or the sale of residential units after subtracting the estimated costs to be incurred. That assessment was prepared by Mr. Trump working in conjunction with his associates and outside professionals.

The Mar-A-Lago Club in Palm Beach, Florida

Mr. Trump acquired this property in 1985 and transferred ownership to a wholly owned limited liability company in 1995. It is now an exclusive private club. One condition of membership is the contribution of non-interest bearing deposits that do not require repayment until thirty years after receipt and then only upon a members resignation. The fact that Mr. Trump will have the use of these funds for that period without cost and that the source of repayment will most likely be a replacement membership has led him to value this liability at zero. Through June 30, 2004 these deposits amounted to $26,204,000.

The real property owned by the Club is the subject of a mortgage payable that had a balance at June 30, 2004 of $15,300,000 and bears an interest rate of 8.50%. This mortgage will mature on April 25, 2010.

Funds in the amount of $259,000 have been escrowed pursuant to the terms of this loan. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits."

Trump National Golf Club in Briarcliff Manor, New York

Mr. Trump, through a wholly owned entity, acquired Briar Hall Country Club, Briarcliff Manor, New York for $8,500,000. Trump National Golf Club opened for play on July 1, 2002. Construction of a 42,000 square foot clubhouse is under way and will be complete in the spring of 2005. Three hundred and fifty memberships are being offered. One condition of membership is the contribution of non-interest bearing

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4. REAL AND OPERATING PROPERTIES (CONTINUED):
Club Facilities (Continued)

Trump National Golf Club in Briarcliff Manor, New York (Continued)

deposits that do not require repayment until thirty years after receipt and then only upon a members resignation. The fact that Mr. Trump will have the use of these funds for that period without cost and that the source of repayment will most likely be a replacement membership has led him to value this liability at zero. Through June 30, 2004 these deposits amounted to $20,143,000.

The real property owned by the Club is the subject of a mortgage payable that had a balance due at June 30, 2004 of $6,200,000 and bears an interest rate of 1.5% above the prime rate. At June 30, 2004, the rate was 5.50%. This mortgage will mature on February 28, 2011.

In addition to the Golf Club, this property will contain 87 luxury condominium units. These will consist of 16 townhouses and 71 units in two mid-rise buildings. Selling prices range from $1,250,000 to $2,450,000 with regard to the townhouse units and $500 to $835 per square foot with regard to units in the mid-rise buildings. The Attorney General of the State of New York has accepted the condominium plan and sales have begun. As of June 30, 2004 there were eight open signed contracts for townhouses and two townhouses had been delivered.

Deposits in the amount of $1,930,000 have been received from unit purchasers and are reflected in this financial statement as a liability under the caption " Deposits payable."

Trump International Golf Club in Palm Beach County, Florida

Mr. Trump, through a wholly owned entity, acquired a long-term leasehold interest in land that he developed into a first class golf course along with a 45,000 square foot super-luxury clubhouse which is currently in operation. Five hundred and fifty memberships are being offered. One condition of membership is the contribution of non-interest bearing deposits that do not require repayment until thirty years after receipt and then only upon a members resignation. The fact that Mr. Trump will have the use of these funds for that period without cost and that the source of repayment will most likely be a replacement membership has led him to value this liability at zero. Through June 30, 2004 these deposits amounted to $31,662,000.

Sufficient land is under lease and Mr. Trump will be constructing an additional nine-hole course at this facility.

The real property owned by the Club is the subject of a mortgage payable that had a balance at June 30, 2004 of $7,800,000 and bears an interest rate of 1% above the prime rate. At June 30, 2004, the rate was 5.00%. This mortgage will mature on February 28, 2011.

Funds in the amount of $140,000 have been escrowed with the county with regard to this property. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits."

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4. **REAL AND OPERATING PROPERTIES (CONTINUED):**

Club Facilities (Continued)

Ocean Trails Golf Club in Palos Verdes, California

Mr. Trump, through a wholly owned entity, acquired a property that he is developing into a world-class golf course and club on the bluffs of the southern most point of the Palos Verdes Peninsula in California. Once completed this club will be known as Trump National Golf Club / Los Angeles. The course, designed by Pete Dye, features panoramic views of the Pacific Ocean and Catalina Island from every hole. A world class driving range will also be available. The clubhouse boasts fine dining in two Zagat rated restaurants, a players' lounge, bar and banquet facility which can host special events for up to 350 people.

In addition to the Club, Ocean Trails is presently zoned for 49 home sites with unparalleled ocean and golf course views. These will be developed into homes which will sell for prices that range from $5,000,000 to $9,000,000. There will also be 150 golf villas which will be rented at rates that will range from $1,000 to $1,500 per night.

The real property owned by the Club is the subject of a mortgage payable that had a balance at June 30, 2004 of $20,000,000 and bears an interest rate of 7%. This mortgage will mature on December 11, 2004.

Funds in the amount of $257,000 have been escrowed pursuant to the terms of this loan. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits."

Trump National Golf Club in Bedminster, New Jersey

Mr. Trump, through a wholly owned entity, acquired a property consisting of 580 acres that has been developed into a world-class golf course and club in Bedminster, New Jersey. The Club is designed by Tom Fazio and opened in the summer of 2004. Membership positions are being offered at $175,000 but will reach a level of $225,000 over time. This area of the Club can accommodate 300 members. The Club's property will also accommodate a second golf course with facilities for 300 additional members. There will also be 18 cottages available for rental by members. In addition to the golf course, members have the use of an Olympic sized swimming pool and an equestrian center. One condition of membership is the contribution of non-interest bearing deposits that do not require repayment until thirty years after receipt and then only upon a members resignation. The fact that Mr. Trump will have the use of these funds for that period without cost and that the source of repayment will most likely be a replacement membership has led him to value this liability at zero. Through June 30, 2004 these deposits amounted to $22,175,000.

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4. **REAL AND OPERATING PROPERTIES (CONTINUED):**
Club Facilities (Continued)
Trump National Golf Club in Bedminster, New Jersey (Continued)

Deposits in the amount of $380,000 have been received from potential members and are reflected in this financial statement as a liability under the caption " Deposits payable."

The real property owned by the Club is the subject of two mortgages payable. One had a balance at June 30, 2004 of $11,300,000 and bears an interest rate of 1% above the prime rate but will be at least 5.5%. The effective rate at June 30, 2004 was 5.5%. This mortgage will mature on February 28, 2011. The other mortgage is in favor of the persons from whom the property was acquired. The mortgage had a balance at June 30, 2004 of $4,000,000 and bears an interest rate of 4.75%, which was the prime rate as of the date of purchase, October 11, 2002. Segments will mature on September 30, 2004 and 2005.

The Trump World Tower at United Nations Plaza

Donald J. Trump developed and constructed a super luxury residential condominium development at 845 United Nations Plaza in New York City. The 90-story tower has a gross area of 877,000 square feet and is 860 feet in height. The building is situated at the northwest corner of the United Nations Plaza with exposures to the United Nations Park, the East River, Midtown and Downtown Manhattan. There are 370 super luxury condominium units with ceiling height varying from 10 to 16 feet at the uppermost floors. As of June 30, 2004, 331 units have been sold at prices that exceeded $900 per square foot. In addition to the condominium units a bar and a restaurant are on the ground floor level. There is a valet parking facility for 75 cars below grade. Mr. Trump will retain and rent out these commercial spaces.

The current value of $152,000,000 reflects the net proceeds which Mr. Trump in conjunction with his associates and outside professionals expect that he will derive from unit sales during periods subsequent to June 30, 2004 based on current pricing as well as the residual value of the commercial space which will be retained by Mr. Trump.

Deposits in the amount of $2,360,000 have been received from purchasers and are reflected in this financial statement as a liability under the caption " Deposits payable."

Mr. Trump's interests in this property have been pledged as collateral with respect to two loans relating to this property. One had a balance at June 30, 2004 of $11,300,000 and bears an interest rate of the greater of 4% more than the rate known as the London Interbank Offering Rate or 7% and at June 30, 2004 was 7%. The other loan had a balance at June 30, 2004 of $15,100,000 and bears an interest rate of 6%. A portion of both of these loans was to be repaid each time a unit is delivered. Both loans were fully repaid in September of 2004.

Funds in the amount of $670,000 had been escrowed as of June 30, 2004 pursuant to the terms of the loans described above. These funds are reflected in this financial statement under the caption "Escrow and reserve deposits."

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4. **REAL AND OPERATING PROPERTIES (CONTINUED):**

The Trump World Tower at United Nations Plaza (Continued)

Mr. Trump has also pledged his interests in this property as collateral with regard to a purchase money note payable to his former partner with regard to this venture. The balance of that note was $15,000,000 at June 30, 2004. The note was issued with original issue discount so that amount is inclusive of interest at 3.49% through its due date which is January 12, 2006.

100 Central Park South

The property at 100 Central Park South in New York City is known as Trump Parc East Condominium and consists of an 81-unit luxury apartment house located at the corner of Central Park South and The Avenue of the Americas. The property also contains a commercial condominium unit that is currently leased to three retail tenants. Mr. Trump has converted the property to a Condominium. Through June 30, 2004, units with a value of $24,034,000 have been sold.

The current value of $40,100,000 reflects the net proceeds that Mr. Trump in conjunction with his associates and outside professionals expect that he will derive from residential unit sales during periods subsequent to June 30, 2004 based on current pricing.

Trump Plaza Cooperatives

Trump Plaza was developed by Mr. Trump in 1983 and was sold pursuant to a cooperative offering plan. The property is located on Third Avenue between 61st and 62nd Streets in New York City. The assets reflected in this statement represent certain residual interests that Mr. Trump still owns. These consist of two residential units, and long-term leasehold interest in two residential townhouses, each consisting of four residential units, a parking garage and commercial space.

The estimated current value of $26,600,000 is based upon a recent appraisal of most of the property interests described above ($24,700,000) and an assessment made by Mr Trump in conjunction with his associates of the value the balance of the property interests ($1,900,000).

Mr. Trump's interest in the two residential townhouses, the parking garage and the commercial space has been pledged as collateral with respect to a loan payable. As of June 30, 2004, the amount of this debt was $9,300,000. The note matures on November 1, 2004 and bears interest at the rate of 7.6%. Subsequent to June 30, 2004 this loan was refinanced with a lower interest rate.

Funds in the amount of $215,000 have been escrowed pursuant to the terms of this loan. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits."

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4. **REAL AND OPERATING PROPERTIES (CONTINUED):**

Trump Palace, Trump Parc and Trump Parc East Condominiums -Commercial Portions

These properties were fully developed and the only areas that remained unsold as of June 30, 2004 were:

- 42 storage units at Trump Palace Condominium
- 38 storage units, a parking garage, and other commercial condominium spaces at Trump Parc Condominium
- the commercial condominium elements at Trump Parc East Condominium

The estimated current value of $8,400,000 was based on an assessment made by Mr. Trump in conjunction with his associates of the value of the various properties described above.

These properties have been pledged as collateral with respect to a loan payable. As of June 30, 2004, the amount of this debt was $5,600,000. The note matures on August 31, 2004 and bears interest at the prime rate. As of June 30, 2004, the interest rate was 4%. Subsequent to June 30, 2004 this loan was refinanced at the same interest rate and a maturity date of August 11, 2009.

Trump International Hotel and Tower

Donald J. Trump joined with General Electric Pension Trust and The Galbreath Company in the redevelopment and conversion of the former Paramount Building at One Central Park West in New York City from an office tower into a luxury residential and hotel condominium development.

Under the terms of various agreements with his associates and the condominium, Mr. Trump received certain fees based upon the success of the venture and management fees relating to property operations.

The estimated current value of $10,800,000 was based upon on an assessment made by Mr. Trump in conjunction with his associates of the remaining compensation which he and entities which he owns will derive as a result of hotel and rental operations as well as the value ascribed to the retained commercial condominium elements of the property. These are the garage facility, the restaurant and an easement with respect to the rooftop area, all of which are now owned by Mr. Trump as he has acquired them from his former partners.

Mr. Trump's interest in this property has been pledged as collateral with respect to a loan payable. As of June 30, 2004, the amount of this debt was $4,500,000. The note matures on January 30, 2009 and bears interest at the prime rate. As of June 30, 2004, the interest rate was 4.00%.

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4. REAL AND OPERATING PROPERTIES (CONTINUED):

Properties Under Development in Westchester County, New York

Mr. Trump acquired a property known as The Mansion at Seven Springs in Bedford, New York which consists of over 200 acres of land, a mansion and other buildings. This property will be transformed into 20 luxurious homes. It has been valued at $80,000,000 based on an assessment made by Mr. Trump in conjunction with his associates and outside professionals of the projected net cash flow which he will derive as those units are constructed and sold.

This property is the subject of a mortgage payable that had a balance due at June 30, 2004 of $8,000,000 and bears an interest rate that is the higher of 1% more than the prime rate or 5.25%. At June 30, 2004, the rate was 5.25%. This mortgage will mature on July 1, 2005.

Funds in the amount of $71,000 have been escrowed pursuant to the terms of this loan. This asset is reflected in this financial statement under the caption "Escrow and reserve deposits."

Mr. Trump acquired two additional parcels of land in Westchester County, New York for development and/or sale. One of the them is the subject of an option agreement which permits the potential purchaser to buy that property for $15,000,000 and has been valued at that amount. The second has been valued at $7,000,000 based on its comparable features.

A deposit in the amount of $500,000 has been received from the potential purchaser described above and is reflected in this financial statement as a liability under the caption " Deposits payable."

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5. PARTNERSHIPS AND JOINT VENTURES:

Estimates of current value of Mr. Trump's interests in partnerships and joint ventures reflect his interest therein and are determined on various bases, as described below.

Trump Place

Construction and sales activity are well underway at the 76-acre Trump Place development, located along the Hudson River between 72nd and 59th Streets in Manhattan. Six of the seventeen buildings scheduled for development are complete. These buildings 240, 220, 200, 180, 160 and 140 Riverside Boulevard are located between the newly built extension of West 71st and West 66th Streets, the newly built Riverside Boulevard and Freedom Place. 180 Riverside Boulevard, a luxury rental apartment house, is 98% rented, at rates that average $50 per square foot. There are also 104 affordable apartments in the building that are rented pursuant to a lottery supervised by a non-profit agency. 160 Riverside Boulevard opened in February of 2001 and is now more than 97% occupied at luxury rents that average more than $50 per square foot. 200 Riverside Boulevard is now in full operation as a condominium with all of the 376 units sold and occupied. Construction at 220 Riverside Boulevard is complete. At 48 stories and over 800,000 gross square feet it is the largest and tallest building on the site. This building is comprised of 441 luxury condominium units with unsurpassed amenities and breathtaking views. While the selling prices of condominiums at 200 Riverside Boulevard were in excess of $600 per square foot, those at 220 Riverside Boulevard exceeded $812 per square foot and all units have been sold. At 140 Riverside Boulevard rental activities have reached the 92% occupancy level. Like its neighbors to the north, this 26-story building is a luxury rental expecting to average rents comparable to the other buildings on the site. Of its 354 units, 71 are be affordable housing units to be rented pursuant to a lottery supervised by a non-profit agency and the balance are luxury rental apartments. The sixth completed building is The Heritage at Trump Place between 71st and 72nd Streets, also known as 240 Riverside Drive. It consists of 170 units of luxury condominium housing. One hundred and fifty of these units have been sold at prices that exceed an average of $1,233 per square foot. Four other units have been sold at prices that average $1,740 per square foot. This property is 31 stories tall and contains 266,937 square feet.

A lease has been signed for commercial garages at 220, 200, 180 and 160 Riverside Boulevard and additional commercial spaces are being actively offered for leasing.

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5. PARTNERSHIPS AND JOINT VENTURES (CONTINUED):

Trump Place (Continued)

The entire property consists of 76 acres and has been fully zoned for 5,700 housing units, retail and other uses totaling 7,900,000 square feet of above ground space. Mr. Trump owns 30% of the entire project. Mr. Trump's Hong Kong based partners and various other companies are obligated to fund the development of this project.

The estimated current value of $1,204,000,000 is based upon on an assessment made by Mr. Trump in conjunction with his associates and outside professionals of the net cash flow the partnership will derive from management fees, property sales and the residual value of the property. They then applied his percentage of ownership in order to derive the value ascribed to his position in this financial statement.

Miss Universe Pageants

In October of 1996, Donald J. Trump acquired all of the assets that together are the "Miss Universe Pageants." In 2002 NBC became a 50% joint venture participant in those activities, replacing CBS. The company produces the Miss Universe Pageant, the Miss USA Pageant as well as the Miss Teen USA Pageant. The pageants have been redefined to present the combination of style and intelligence that define the woman of the new millennium. Trump Hotels & Casino Resorts Holdings, L.P. owns a 25% interest in this venture and Mr. Trump owns the remaining 25%.

The alliance with NBC has enabled the Miss Universe Organization to bring together women from around the world in the spirit of first class competition. The resultant prime-time network television specials are broadcast live to a worldwide audience. As a result of this notoriety, site fees for Miss Universe events far exceed those paid to similar organizations. In valuing his 25% interest in this venture at $12,500,000 Mr. Trump and his associates considered negotiations currently in process with regard to ownership of the other interests.

Trump Park Avenue

Donald J. Trump has joined with General Electric Pension Trust in the development of the former Delmonico Hotel at 59th Street and Park Avenue in New York City.

The property consists of 134 residential condominium units that range from one to seven bedrooms contained in approximately 220,000 square feet. Duplex Penthouse units are located on the 31st and 32nd floors. The property also contains 30,000 square feet of commercial space.

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5. **PARTNERSHIPS AND JOINT VENTURES (CONTINUED):**

Trump Park Avenue (Continued)

Costas Kondylis, a prominent architect long associated with luxury architecture, has been engaged to maintain the prewar aesthetic of the area by designing elegant apartment homes. Mr. Kondylis has previously designed such prominent properties as Trump International Hotel and Tower, The Trump World Tower at United Nations Plaza, and 610 Park Avenue that was a conversion of the former Mayfair Hotel.

Trump Park Avenue will become synonymous with an upscale international lifestyle characterized by graciousness and old world luxury skillfully blended with modernity at a truly unrivaled location.

Under the terms of various agreements with his partner, Mr. Trump is to receive certain fees and partnership distributions based upon the success of the venture.

As of June 30, 2004, 67 units have sold at prices that exceeded $1,500 per square foot.

The estimated current value of $133,000,000 was based upon on an assessment made by Mr. Trump in conjunction with his associates and outside professionals of the compensation and partnership distributions that he and entities that he owns will receive as a result of the sale of condominium units as well as the residual value of the commercial space.

Trump Grande Ocean Resort and Residences

Mr. Trump has entered into a sales and marketing license agreement with Dezer Properties for an oceanfront development located between Bal Harbour and Aventura. Upon completion, this project will contain three buildings on eleven acres and nearly 1,000-linear feet of uninterrupted oceanfront property. The Trump International Sonesta Beach Resort was the first building completed and opened to the public in May of 2003. The condominium hotel contains 372 rooms, ballrooms, a state-of-the-art business center and 20,000 square feet of meeting rooms, with approximately 82% sold. Currently under construction is Trump Palace, a residential condominium tower with 267 units that are scheduled for completion in August of 2005, with approximately 93% pre-sold. Pre-construction sales of the third residential condominium called Trump Royale have also begun. Construction of Trump Royale will begin in October 2004 and is approximately 76% pre-sold.

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5. PARTNERSHIPS AND JOINT VENTURES (CONTINUED):

Trump Grande Ocean Resort and Residences

Under the terms of various agreements with his associates, Mr. Trump is to receive fees based upon the success of the venture.

The estimated current value of $4,500,000 was based upon on an assessment made by Mr. Trump in conjunction with his associates of the compensation that he and entities that he owns will derive as a result of property sales and rental operations.

Trump Tower Chicago

Donald J. Trump and Hollinger International Inc. had entered into an agreement to develop Trump International Hotel & Tower at 401 North Wabash Street, the site of the current headquarters for The Chicago Sun-Times.

Under a revised agreement, Hollinger will sell its interests in the property and the joint venture to Mr. Trump and has received $4 million in cash as of June 30, 2004, with a balance of $69 million in cash to be received at closing, for a total of $73 million. The closing is scheduled to occur in October 2004. Mr. Trump considers this to be a cost of his acquisition of the property and reflects it in his assessment of the current value described below.

The project is a 2.5 million square foot, 90-story, super-luxury, mixed-use tower located along the Chicago River just off Michigan Avenue. The glass curtain-wall building has been designed by the world-renowned architectural firm of Skidmore, Owings and Merrill. The building will contain 461 residential condominiums, 227 hotel condominiums, approximately 100,000 square feet of retail and restaurants along a river walk, a 1.2 acre public park and indoor parking facilities for over 1,000 cars. Sales and marketing of the condominiums began in September of 2003 and contracts have been signed representing approximately 67% of the units with a value in excess of $447 million. When complete in 2008, Mr. Trump will manage the building under the Trump International Hotel & Tower flag. The building will be the fourth tallest building in Chicago and one of the most luxurious buildings in the world.

The estimated current value of $259,000,000 reflects the net proceeds which Mr. Trump in conjunction with his associates and outside professionals expect that he will derive from unit sales as the property is developed and units delivered to purchasers during periods subsequent to June 30, 2004 as well as the residual value of the commercial space which will be retained.

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5. PARTNERSHIPS AND JOINT VENTURES (CONTINUED):

Properties Under Development in Conjunction with Others

Mr. Trump has formed certain associations with others for the purpose of developing certain properties as described below. The estimated current value of $90,000,000 was based on an assessment made by Mr. Trump in conjunction with his associates and outside professionals of the cash flow that is expected to be derived by him from these associations as their potential is realized.

Trump Tower Las Vegas

A joint venture agreement has been signed between Mr. Trump and Hyde Park, LLC (controlled by Philip Ruffin) to build a luxury residential condominium tower near the Las Vegas Strip. The property is opposite the famous Fashion Show Mall and is planned to be the tallest residential tower in Las Vegas with over 1,000 condominium units. The site is part of an existing hotel and casino complex, which Ruffin intends to re-develop separately. The project is currently seeking zoning and condominium plan approval. A sales and marketing program is also currently being planned, with a reservation only sales program expected to begin in October of 2004 and contract sales to commence in early 2005.

Trump Island Villas and Trump International Golf Club at Raffles Resort and Trump Casino , Canouan Island, St. Vincent and the Grenadines, West Indies

Mr. Trump has entered into a sales and marketing agreement with the developer of this property for the purposes of operating a 5-star resort and building residential villas. The project consists of a 156-room Raffles Resort & Spa, with a Trump casino and Trump International Golf Club. The residential development will consist of 135 villas and custom-designed estate homes, all to be sold with private golf club memberships. The Raffles Resort will open in the fall of 2004, and sales will begin on the villas in December 2004.

Trump International Hotel & Tower Toronto, Ontario, Canada

A development agreement has been signed with the developer of this project to build a 68-story luxury hotel and residential condominium tower in downtown Toronto. Mr. Trump intends to brand and manage the building under the Trump International Hotel & Tower flag. The building will contain 263 hotel condominiums and over 100 residential condominiums, as well as restaurants and a health club & spa. Pre-sales for the condominiums began in April 2004. The developer will seek financing upon a certain percentage of pre-sales required.

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5. **PARTNERSHIPS AND JOINT VENTURES (CONTINUED):**

Properties Under Development in Conjunction with Others (Continued)

Trump International Beach Club
Fort Lauderdale, Florida

A development agreement has been signed with the developer of this project to build a luxury, ocean front hotel condominium in Fort Lauderdale. Mr. Trump intends to brand and manage the building under the Trump International Hotel & Tower flag. The building will contain 99 hotel condominiums, as well as retail space and a private health club. The project has received zoning approval, and pre-sales for the condominiums are expected to begin in the fall of 2004.

Trump International Hotel & Tower
Fort Lauderdale, Florida

A development agreement has been signed with the developer of this project to build a luxury, ocean front hotel condominium in Fort Lauderdale. Mr. Trump intends to brand and manage the building under the Trump International Hotel & Tower flag. The building will contain 261 hotel condominiums, as well as retail space and a private health club. The project is currently seeking zoning approval, and pre-sales for the condominiums are expected to begin in the spring of 2005.

Trump International Hotel & Tower
Phoenix, Arizona

A development agreement has been signed with the developer of this project to build a luxury residential and hotel condominium on Camelback Road. Mr. Trump intends to brand and manage the building under the Trump International Hotel & Tower flag. The project will contain 200 condominiums and 150 residential condominiums, as well as restaurants, retail space and a private health club. Pre-sales for the condominiums are expected to begin in the spring of 2005.

Trump Tower Tampa
Tampa, Florida

A development agreement has been signed with the developer of this project to build a 50-story luxury residential condominium in downtown Tampa. The building will contain 200 condominiums, as well as retail space and a private health club. Pre-sales for the condominiums are expected to begin in the fall of 2004.

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6. OTHER ASSETS:

Trump Tower

Mr. Trump owns a triplex apartment on the top three floors of Trump Tower (see Note 4). Mr. Trump and his associates have estimated the current value of that apartment to be $60,000,000 based upon their knowledge of the value of similar unique real property. The property is subject to a mortgage that had a balance due at June 30, 2004 of $6,800,000 and bears an interest rate of 7.25%. The mortgage will mature on December 1, 2005.

Mar-A-Lago

Mr. Trump owns two homes which are contiguous to the club facility at Mar-A-Lago which is more fully described in Note 4.

Mr. Trump and his associates have estimated the current value of those homes to be $4,000,000 that based upon their knowledge of the value of similar unique real property. Mr. Trump's interests in these properties have been pledged as collateral with respect to two loans. One had a balance at June 30, 2004 of $500,000 and bears an interest rate of 1.5% more than the rate known as the London Interbank Offering Rate and at June 30, 2004 was 2.73%. This loan will mature on January 1, 2019. The other loan had a balance at June 30, 2004 of $1,200,000 and bears an interest rate of 1.75% more than the rate known as the London Interbank Offering Rate and at June 30, 2004 was 2.98%. This loan will mature on February 1, 2019.

Corporate Jet

An entity owned by Donald J. Trump is the owner of a jet aircraft. Mr. Trump and his associates have estimated the current value of this aircraft to be $8,000,000 based upon their knowledge of the value of similar unique property.

The Wollman and Lasker Skating Rinks in Central Park

Having reconstructed the Wollman Rink in 1986, Mr. Trump has been associated with its success in bringing enjoyment to the people of the City and its surrounding area. The City has granted a license to operate and manage both the rinks in Central Park until June 30, 2012. This arrangement has been in effect since November of 2001 and is achieving great acclaim from all parties.

The estimated current value of $2,500,000, which Mr. Trump and his associates have ascribed to the license, was based upon the present value of the net cash flow that they expect he will derive from this arrangement.

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6. **OTHER ASSETS (CONTINUED):**

Other

Mr. Trump and entities that he owns control several other active businesses as well as properties which are in preliminary stages of development. The assets related to these interests include:

- an international talent representation agency
- a management company that supervises the operation of condominium properties as well as Mr. Trump's own properties
- receivables representing amounts earned to date with regard to television, radio, game and book publishing endeavors
- contract rights with regard to future performances on television, radio and other media activities
- properties owned in conjunction with his siblings consisting primarily of rented apartment units being retained in properties converted to cooperative ownership

The estimated current value of these assets of $34,600,000 is based upon on an assessment made by Mr. Trump in conjunction with his associates and outside professionals of the cash flow that they expect he will derive from these endeavors.

7. **COMMITMENTS AND CONTINGENCIES:**

Mr. Trump also has personal responsibilities with respect to various employment contracts, construction contracts, loan agreements and other commitments. These include recourse obligations concerning partnership indebtedness, guarantees relating to the completion and environmental acceptance of certain projects.

Mr. Trump and his affiliates are parties to various lawsuits and legal actions. At the present time, the outcome of those proceedings cannot be estimated. Mr. Trump believes that these legal actions will not have a material effect on his financial position.

Mr. Trump holds three gaming licenses from the New Jersey Casino Control Commission, as well as a license in the state of Indiana, which regulates the ownership and operation of various casino and hotel facilities. He was also found suitable to hold a casino license in the state of Nevada and has been approved for a license to manage casino facilities by the National Indian Gaming Commission. The various casino control commissions have broad discretion with regard to the issuance, renewal, revocation or suspension of these licenses. The casinos are parties to various administrative proceedings involving allegations of violations of certain provisions of the Casino Control Act. Mr. Trump and his affiliates believe that the final outcome of these proceedings will not have a material adverse effect on his financial position.

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7. **COMMITMENTS AND CONTINGENCIES (CONTINUED)**

Various taxing authorities are currently auditing Mr. Trump and certain of his affiliates. At the present time, the outcome of these examinations cannot be determined.

Mr. Trump periodically maintains funds on deposit in banking institutions in excess of FDIC insured amounts. He is at risk for any amounts exceeding the FDIC amount.

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ULLICO/Mar-A-Lago

PLEASE RECORD AND
RETURN TO:
PAUL RAMPELL, ESQ.
125 WORTH AVENUE
SUITE 202
PALM BEACH, FL 33480

APR-05-1995 5:05PM 95-106770
ORB 8691 Pg 824
Con 10,000,000.00 Doc 35,000.00
Int 20,000.00

FIRST MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF RENTS

By

THE MAR-A-LAGO CLUB, INC.,
a Florida corporation

AS MORTGAGOR

In Favor Of

THE UNION LABOR LIFE INSURANCE COMPANY,
a Maryland corporation

AS MORTGAGEE

DATED AS OF April 6, 1995

CONFIDENTIAL

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TABLE OF CONTENTS

Page

ARTICLE ONE CERTAIN DEFINITIONS 4

ARTICLE TWO REPRESENTATIONS, WARRANTIES AND COVENANTS OF MORTGAGOR 6

2.01. Performance of Note, Mortgage, Etc 6
2.02. Representations, Covenants and Warranties 6
2.02.1. Specific Representations 6
2.02.2. Accuracy of Representations 11
2.02.3. Representations and Warranties to be Continuing 11
2.03. Compliance with Laws 11
2.04. Taxes and Other Charges 11
2.04.1. Taxes and Assessments 11
2.04.2. Mechanic's and Other Lien 12
2.04.3. Tax Reserve 12
2.04.4. No Credit Against the Indebtedness Secured Hereby 13
2.04.5. Insurance; Restoration 13
2.04.6. Non-Impairment of Mortgagee's Rights 18
2.05. Condemnation 18
2.06. CARE OF THE MORTGAGED PROPERTY 19
2.07. Composition of Mortgagor. 20
2.08. Creation of Security Agreement 20
2.09. Compliance with Environmental Law 20
2.10. Contaminants 20
2.11. Environmental Audit 20
2.12. Environmental Indemnification 21
2.13. Mortgagee's Rights With Respect to Contaminants 22
2.14. Further Assurances 22
2.15. Security Agreement and Financing Statements 23
2.16. Assignment of Rents 24
2.17. Restrictive Covenants 24
2.18. Intentionally Omitted 27
2.19. Expenses 27
2.20. Mortgagee's Performance of Defaults 28
2.21. Books and Records 28
2.22. Estoppel Affidavits 29
2.23. Compliance with Laws 29
2.24. Building Codes 29
2.25. Management of the Mortgaged Property. 29
2.26. Intentionally Omitted 30
2.27. Appraisals 30
2.28. Indemnity 30
2.29. Litigation 30
2.30. ERISA Compliance 30
2.31. Key Man Life Insurance Policy 31

ARTICLE THREE DEFAULTS 31

3.01. Event of Default 31

MIFS02...\RE\1170412\0404\1251\MTC3145P.1EC

CONFIDENTIAL

ARTICLE FOUR REMEDIES 33

4.01. Acceleration of Maturity 33
4.02. Mortgagee's Power of Enforcement 33
4.03. Mortgagee's Right to Enter and Take Possession, Operate and Apply Income 34
4.04. Leases 35
4.05. Purchase by Mortgagee 35
4.06. Application of Indebtedness Toward Purchase Price 35
4.07. Waiver of Appraisement, Valuation, Stay, Extension and Redemption Laws 35
4.08. Receiver 35
4.09. Suits to Protect the Mortgaged Property 36
4.10. Proofs of Claim 36
4.11. Application of Monies by Mortgagee 36
4.12. Delay or Omission No Waiver 37
4.13. No Waiver of One Default to Affect Another 37
4.14. Discontinuance of Proceedings; Position of Parties Restored 37
4.15. Remedies Cumulative 37
4.16. Interest After Event of Default 38
4.17. Right to Release 38
4.18. Subrogation 38

ARTICLE FIVE MISCELLANEOUS PROVISIONS 38

5.01. No Assumption of Liabilities 38
5.02. Heirs, Successors and Assigns Included in Parties 38
5.03. Notices, Demands and Other Instruments 38
5.04. Headings 39
5.05. Invalid Provisions to Affect No Others 39
5.06. Changes, Etc 40
5.07. Governing Law 40
5.08. Required Notices 40
5.09. Future Advances. 40
5.10. Covenant Running with Land 40
5.11. After Acquired Property 40
5.12. Time of the Essence 41
5.13. Release 41
5.14. Receipt of Monies 41
5.15. Survival of Provisions 41
5.16. Exhibits 41
5.17. Saturday, Sunday or Non-Business Day 41
5.18. Capitalized Terms 41
5.19. Execution by Parties 42
5.20. Use of the Word "Herein" 42
5.21. Evidence of Satisfaction of Conditions 42
5.22. Monies 42
5.23. No Partnership or Joint Venture 42
5.24. Gender 42
5.25. Stamp or Tax 42
5.26. Assignment of Loan Documents 42
5.27. Rights of Third Parties 42
5.28. Promotional Material 42
5.29. No Agency 43
5.30. Conflicts and Inconsistencies 43
5.31. Consent to Jurisdiction 43

CONFIDENTIAL

TR 000000956

3687a

5.32. Automatic Stay 43
5.33. Limitation of Liability 44
5.34. WAIVER OF JURY TRIAL 45

CONFIDENTIAL

TR 000000957

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SCHEDULE OF EXHIBITS

Exhibit "A"	-	Legal Description
Exhibit "B"	-	Artwork
Exhibit "C"	-	Permitted Encumbrances

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FIRST MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF RENTS

THIS FIRST MORTGAGE, SECURITY AGREEMENT AND ASSIGNMENT OF RENTS (this "Mortgage") made and delivered as of this 6 day of April, 1995, by THE MAR-A-LAGO CLUB, INC., a Florida corporation, having an address c/o The Trump Organization, 725 Fifth Avenue, New York, New York 10022 (hereinafter called "Mortgagor"), in favor of THE UNION LABOR LIFE INSURANCE COMPANY, a Maryland corporation, having an office at 111 Massachusetts Avenue, N.W., Washington, D.C. 20001 (hereinafter called "Mortgagee").

WITNESSETH:

WHEREAS, Mortgagor is indebted to Mortgagee in the principal sum of TEN MILLION AND NO/100 DOLLARS ($10,000,000.00), together with interest thereon, as evidenced by that certain Promissory Note dated of even date herewith (the "Note"), executed by Mortgagor and delivered to Mortgagee, which Note by reference is made a part hereof to the same extent as though set out in full herein.

NOW, THEREFORE, for and in consideration of the sum of Ten ($10.00) Dollars and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged and in order to secure (a) the payment of all indebtedness evidenced by the Note, including, without limitation, the Principal Sum, plus all interest, additional interest and other sums payable pursuant to the Note, (b) the payment of all obligations and liabilities of Mortgagor under the other Loan Documents (as such term is hereinafter defined), (c) the payment of all amounts, sums, and expenses paid hereunder, under the Note or any other security instrument securing the Note, by Mortgagee in accordance with the provisions hereof, of the Note or of any of the other Loan Documents, and (d) the observance, payment and performance of all of the terms, covenants, conditions, obligations, representations, warranties, liabilities, and agreements of Mortgagor under this Mortgage, the Note, and all of the other Loan Documents (all of the aforesaid items (a)-(d) being hereinafter collectively referred to as the "Indebtedness"), Mortgagor does hereby grant, bargain, sell, alienate, remise, release, convey, assign, transfer, mortgage, hypothecate, pledge, deliver, set over, warrant and confirm unto Mortgagee, its successors and assigns forever:

THE MORTGAGED PROPERTY

(A) THE LAND: All that certain plot, piece and parcel of land located in Palm Beach County, State of Florida described on Exhibit "A" annexed hereto and made a part hereof (the "Land").

(B) THE IMPROVEMENTS: (1) All the buildings, structures and improvements of every nature whatsoever now or hereafter situated on the Land; (2) all fixtures, machinery, appliances, equipment, furniture, furnishings, building supplies, materials and personal property of every nature whatsoever now or hereafter owned by Mortgagor and located in or on, or attached to, installed in, and used or intended to be used in connection with or with the operation of, the Land, buildings, structures or other improvements, or in connection with any construction being conducted or which may be conducted thereon, including, but not limited to, all screens, awnings, shades, blinds, curtains, draperies, carpets, rugs, furniture and furnishings, heating, electrical, mechanical, lighting, plumbing, ventilating, air conditioning, refrigerating, incinerating and elevator equipment and systems, stoves, ranges, vacuum cleaning systems, call systems, sprinkler systems (to the extent now or hereafter situated on the Land) and other fire prevention and extinguishing apparatus and materials, motors, machinery, pipes, appliances, equipment, fittings and fixtures

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(collectively, the "Equipment"); (3) all drawings, paintings, photographs, tapestries, sculptures, pottery, china, glassware currently owned or hereafter acquired by Mortgagor and now or hereafter attached to, contained in or used in connection with the operation of the Land, including without limitation, the items set forth on Exhibit "B" annexed hereto and made a part hereof (collectively, the "Artwork") and (4) the trade name, good will and books and records relating to the business of Mortgagor and operation on the Land and all extensions, additions, improvements, betterments, renewals, substitutions and replacements to any of the foregoing, and all of the right, title and interest of Mortgagor in and to any such personal property or fixtures which, to the fullest extent permitted by law, shall be conclusively deemed fixtures and a part of the real property encumbered hereby (said buildings, improvements, Equipment, Artwork and other property described in this paragraph (B) being collectively hereinafter called the "Improvements").

(C) EASEMENTS: All easements, rights-of-way, riparian rights, littoral rights, gores of land, streets, ways, alleys, passages, sewer rights, water courses, water rights and powers, and all appurtenances whatsoever, in any way belonging, relating or appertaining to any of the Mortgaged Property described in paragraphs (A) and (B) above, or which hereafter shall in any way belong, relate or be appurtenant thereto, whether now owned or hereafter acquired by Mortgagor.

(D) TOGETHER WITH (1) all the estate, right, title and interest of Mortgagor of, in and to all judgments, insurance proceeds, awards of damages and settlements hereafter made resulting from condemnation proceedings, tax reduction or certiorari proceedings in respect of real estate taxes and assessments affecting the Mortgaged Property, or the taking of the Mortgaged Property described in paragraphs (A), (B) and (C) above or any part thereof under the power of eminent domain, or for any damage (whether caused by such taking or otherwise) to the Mortgaged Property described in paragraphs (A), (B) and (C) above or any part thereof, or to any rights appurtenant thereto, and all proceeds of any sales or other dispositions of the Mortgaged Property described in paragraphs (A), (B) and (C) above or any part thereof including any awards for changes of the grades of streets or as a result of any other damage to the Land; and, subject to the further provisions hereof, Mortgagee is hereby authorized to collect and receive said awards and proceeds and to give proper receipts and acquittances therefor, and (if it so elects), subject to the terms and conditions hereinafter set forth, to apply the same toward the payment of the indebtedness and other sums secured hereby, notwithstanding the fact that the amount owing thereon may not then be due and payable; (2) all contract rights, general intangibles, actions and rights in action, including without limitation all rights to insurance proceeds and unearned premiums arising from or relating to the Mortgaged Property described in paragraphs (A), (B) and (C) above; and (3) all proceeds, products, replacements, additions, substitutions, renewals and accessions of and to the Mortgaged Property described in paragraphs (A), (B) and (C) above.

(E) TOGETHER WITH all rents, income and other benefits to which Mortgagor may now or hereafter be entitled from the Mortgaged Property described in paragraphs (A), (B) and (C) above to be applied against the Indebtedness and other sums secured hereby; provided, however, that Mortgagor is hereby given a revocable license, so long as no Event of Default has occurred hereunder, to collect and use such rents, income and other benefits as they become due and payable, but not in advance thereof (except as otherwise expressly permitted in this Mortgage), in all events subject to and in accordance with the provisions of this Mortgage and the other Loan Documents. Upon the occurrence of any such Event of Default, the revocable license hereby given to Mortgagor to collect such rents, income and other benefits from the Mortgaged Property described in paragraphs (A), (B) and (C) above shall terminate and such license shall not be reinstated upon a cure of such Event of Default without Mortgagee's prior written consent.

The foregoing provisions hereof shall constitute an absolute and present assignment of the rents, income and other benefits from the Mortgaged Property described in

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paragraphs (A), (B) and (C) above, subject, however, to the revocable license given to Mortgagor to collect and use such rents, income and other benefits as hereinabove provided; and the existence or exercise of such right of Mortgagor shall not operate to subordinate this assignment to any subsequent assignment, in whole or in part, by Mortgagor, and any such subsequent assignment (without implying any right to assign or any consent by Mortgagee) by Mortgagor shall be subject to the rights of Mortgagee hereunder.

(F) TOGETHER WITH all right, title and interest of Mortgagor in and to any and all leases, subleases, lettings, rental agreements, occupancy agreements and licenses, if any, now or hereafter on or affecting the Mortgaged Property described in paragraphs (A), (B) and (C) above, together with all security therefor, all reserve accounts and reserve funds relating thereto, all rights of Mortgagor under any reserve agreements relating to any such leases, subleases, lettings, rental agreements, occupancy agreements and licenses, and all monies payable under all leases, subleases, lettings, rental agreements, occupancy agreements and licenses, and all books and records which contain payments made under the leases, subleases, lettings, rental agreements, occupancy agreements and licenses, and all security therefor, subject, however, to the revocable license hereinabove given to Mortgagor to collect the rents, income and other benefits arising under any such lease, sublease, letting, rental agreement, occupancy agreement or license. Upon the occurrence of any Event of Default, Mortgagee shall have the right, at any time and from time to time, to notify any lessee or occupant of the rights of Mortgagee as provided by this paragraph (F).

(G) TOGETHER WITH any and all air rights, oil, gas and mineral rights, development rights, declarant's or developer's rights under any applicable development order or similar agreement, and all other such rights of Mortgagor with respect to any of the Mortgaged Property, and all zoning rights and other similar rights or interests that benefit or are appurtenant to the Land or the Improvements or both, and any proceeds arising therefrom.

(H) TOGETHER WITH all right, title and interest of Mortgagor in and to any reserve accounts held by Mortgagee (including, without limitation, the Reserves). This Mortgage creates an absolute and continuing assignment of any security interest in any reserve accounts held by Mortgagee (including, without limitation, the Reserves), irrespective of (a) the validity or enforceability of the Loan Documents, (b) any change, amendment or waiver of the terms or conditions of the Loan Documents, and/or (c) any exchange, release or non-perfection of any reserve accounts held by Mortgagee. As long as any of the Indebtedness remains unpaid, Mortgagor will not create or permit the existence of any lien or any other type of preferential arrangement upon any reserve accounts held by Mortgagee.

All of the Mortgaged Property described in paragraphs (A), (B), (C), (D), (E), (F), (G) and (H) above, and each item of mortgaged property therein described, is sometimes collectively herein referred to as the "Mortgaged Property".

TO HAVE AND TO HOLD the Mortgaged Property and all parts thereof unto Mortgagee, its successors and assigns, to its own proper use and benefit forever, subject, however, to the terms and conditions herein:

PROVIDED, HOWEVER, that if Mortgagor shall promptly pay or cause to be paid to Mortgagee the Indebtedness, at the times and in the manner stipulated in the Note, herein, and in the other Loan Documents, all without any deduction or credit for taxes or other similar charges paid by Mortgagor, and shall keep, perform and observe all the covenants and promises in the Note, and any renewal, extension or modification thereof, and in this Mortgage and in the other Loan Documents, to be kept, performed or observed by Mortgagor, then this Mortgage, and all the properties, interest and rights hereby granted, conveyed and assigned shall cease and be void, but shall otherwise remain in full force and effect.

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ARTICLE ONE

CERTAIN DEFINITIONS

In addition to the terms elsewhere defined in this Mortgage, as used herein, including any Exhibits hereto (unless such Exhibit expressly provides for a different definition), the following terms shall have the following meanings, unless otherwise specifically defined herein and if a capitalized term is not defined herein, the same shall have the meaning assigned in the Note:

"Awards" shall mean all awards and/or compensation hereafter made with respect to the Mortgaged Property or any part thereof by any Governmental Authority or other lawful authority for any Condemnation.

"Certified Membership Roll" shall mean that certain Certificate Regarding Membership Agreements, dated as of the date hereof, given by Mortgagor to Mortgagee.

"Condemnation" shall mean any taking of the Property, or any part thereof, pursuant to condemnation proceedings, by the exercise of the right of eminent domain or by conveyance in lieu of condemnation.

"Contaminant" means any waste, pollutant, hazardous substance, toxic substance, hazardous waste and any substance regulated or forming the basis of liability under any Environmental Law, including, without limitation, any special waste, petroleum or petroleum-derived substance or waste, or any constituent of such substance or waste.

"Control" means the possession, directly or indirectly, of the power to direct or cause the direction of the management and policies, whether through the ownership of voting securities or general or limited partnership interests, by contract or other manner of control.

"Post-Default Rate" shall have the meaning assigned in the Note.

"Environmental Law" means all federal, state and local laws, statutes, ordinances and regulations, now or hereafter in effect, and in each case as amended or supplemented from time to time, and any judicial or administrative interpretation thereof, including, without limitation, any judicial or administrative order, consent decree or judgment, relating to the regulation and protection of human health, safety, the environment and/or natural resources (including, without limitation, ambient air, surface water, groundwater, wetlands, land surface or subsurface strata, wildlife, aquatic species and vegetation). Environmental Laws include but are not limited to the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. §9601 et seq.) ("CERCLA"); the Hazardous Material Transportation Act, as amended (49 U.S.C. § 180 et seq.); the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. §136 et seq.); the Resource Conservation and Recovery Act, as amended (42 U.S.C. §6901 et seq.)("RCRA")' the Toxic Substance Control Act, as amended (42 U.S.C. §7401 et seq.); the Clean Air Act as amended (42 U.S.C. §740 et seq.); the Federal Water Pollution Control Act, as amended (33 U.S.C. §1251 et seq.); the Occupational Safety and Health Act, as amended (29 U.S.C. §651 et seq.); and the Safe Drinking Water Act as amended (42 U.S.C. §300f et seq.), and their state and local counterparts or equivalents, as amended from time to time and any transfer of ownership notification or approval statutes.

"Environmental Liabilities and Costs" means, as to any Person, all liabilities, obligations, responsibilities, Remedial Actions, losses, damages, punitive damages, consequential damages, treble damages, costs and expenses (including, without limitation, all fees, disbursements and expenses of counsel, experts and consultants and costs of

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investigation and feasibility studies), fines, penalties, sanctions and interest incurred as a result of any claim or demand by any other Person, whether based in contract, tort, implied or express warranty, strict liability, criminal or civil statute, including, without limitation, any thereof arising under any Environmental Law, Permit, order or agreement with any Governmental Authority or other Person, and which relate to any environmental, health or safety condition, or a Release or threatened Release, and result from the past, present or future operations of such Person.

"Environmental Lien" means any lien in favor of any Governmental Authority for Environmental Liabilities and Costs.

"Event of Default" shall have the meaning set forth for such term in Section 3.01 hereof.

"Governmental Authority" means any nation or government, any state or other political subdivision thereof and any entity exercising executive, legislative, judicial, regulatory or administrative functions of or pertaining to government.

"Loan" shall mean the loan in an amount not to exceed the stated principal amount of the Note made by Mortgagee to Mortgagor, pursuant to the terms, provisions and conditions of this Mortgage, the Note and the other Loan Documents.

"Loan Documents" shall mean the Note, this Mortgage, the Assignment, the Guaranties and all other documents, agreements and instruments now or hereafter evidencing, securing or in any way relating to the Loan.

"Permit" shall mean any permit, approval, authorization, license, variance or permission required from a Governmental Authority under an applicable Requirement of Law.

"Permitted Encumbrances" shall mean those matters described on Exhibit "C" annexed hereto and incorporated herein by reference.

"Permitted Transferee" shall mean any of the following: (i) MALC, Inc., a Delaware corporation, one hundred percent (100%) of the outstanding stock of which shall at all times be owned of record and beneficially by Guarantor, or (ii) any other entity which shall at all times be Controlled by Guarantor and at least fifty-one percent (51%) of the issued and outstanding voting interests of which shall at all times be owned beneficially and of record by Guarantor.

"Person" shall mean an individual, partnership, corporation (including, without limitation, a business trust), limited liability company, joint stock company, trust, unincorporated association, joint venture or other entity, or a Governmental Authority.

"Principal Sum" shall have the meaning assigned to such term in the Note.

"Release" means, as to any Person, any release, spill, emission, leaking, pumping, injection, deposit, disposal, discharge, dispersal, leaching or migration into the indoor or outdoor environment or into or out of any property owned or operated by such Person, including, without limitation, the movement of Contaminants through or in the air, soil, surface water, ground water or property.

"Remedial Action" means all actions required or voluntarily undertaken to (a) clean up, remove, treat or in any other way address Contaminants in the indoor or outdoor environment, (b) prevent the Release or threat of Release or minimize the further Release of Contaminants so they do not migrate or endanger or threaten to endanger public health or

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welfare or the indoor or outdoor environment, or (c) preform pre-remedial studies and investigations and post-remedial monitoring and care.

"Requirement of Law" shall mean, as to any Person, all federal, state and local laws, rules and regulations, including, without limitation, Environmental Laws, ERISA and all orders, judgments, decrees or other determinations of any Governmental Authority or arbitrator, applicable to or binding upon such Person or any of its property or to which such Person or any of its property is subject.

ARTICLE TWO

REPRESENTATIONS, WARRANTIES AND COVENANTS OF MORTGAGOR

Mortgagor represents, warrants, covenants and agrees with Mortgagee as follows:

2.01. Performance of Note, Mortgage, Etc. Mortgagor shall perform, observe and comply with all provisions hereof, of the Note and of each of the Loan Documents, and will promptly pay to Mortgagee the principal with interest thereon and all other Indebtedness required to be paid by Mortgagor under the Note and pursuant to the provisions of this Mortgage and of the other Loan Documents when any payment shall become due.

2.02. Representations, Covenants and Warranties.

2.02.1. Specific Representations. Mortgagor represents, covenants and warrants that as of the date hereof and at all times thereafter during the term hereof:

(a) Mortgagor is a corporation duly organized, validly existing and active under the laws of the State of Florida and has the power and authority to own its properties and to carry on its business as now being conducted;

(b) Mortgagor has complied with all filing, registration and other requirements of state and local laws, insofar as such laws relate to doing business;

(c) Mortgagor has complied with all of the requirements of the Florida Fictitious Name Statute as pertaining to the names used in connection with the Mortgaged Property or any part thereof;

(d) the execution, delivery and performance of this Mortgage, the Note and each of the other Loan Documents have been duly authorized by all requisite corporate action of Mortgagor;

(e) the execution and delivery by Mortgagor and the performance of its obligations under this Mortgage, the Note and the other Loan Documents will not result in it being in default under, breach of or in conflict with any provision of the Articles of Incorporation or Bylaws of Mortgagor or any agreement to which the Mortgagor is a party, or any requirement of any Governmental Authority having jurisdiction over the Mortgaged Property, or result in the creation of any lien or other encumbrance on the Mortgaged Property pursuant to any judgment, agreement or other instrument to which the Mortgagor is a party or by which it or any of its assets are bound (other than liens created by the Loan Documents);

(f) the execution and delivery of this Mortgage, the Note and each of the other Loan Documents do not contravene any contract or agreement to which Mortgagor is a party or by which Mortgagor or any of its properties may be bound and do not contravene any law, order, decree, rule or regulation to which Mortgagor is subject;

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(g) no authorization or approval or other action by and no notice to or filing with any Governmental Authority or regulatory body is required for the due execution, delivery and performance by Mortgagor of this Mortgage, the Note, and the other Loan Documents;

(h) this Mortgage, the Note and all the other Loan Documents have been duly executed and delivered on behalf of Mortgagor and are valid and binding obligations enforceable in accordance with their respective terms;

(i) subject only to the Permitted Encumbrances, Mortgagor is seized of an indefeasible estate in fee simple in, and has good and absolute title to, the Mortgaged Property, and has good right, full power and lawful authority to mortgage and pledge the same as provided herein and Mortgagee may at all times peaceably and quietly enter upon, hold, occupy and enjoy the Mortgaged Property in accordance with the terms hereof; the Mortgaged Property is free and clear of all liens, security interests, charges and encumbrances whatsoever except the Permitted Encumbrances;

(j) Mortgagor will maintain and preserve the first lien of this Mortgage on all of the Mortgaged Property until the Indebtedness and all other sums secured hereby have been paid in full;

(k) Mortgagor is now able to meet its debts as they mature; the fair market value of its assets exceeds its liabilities; and no bankruptcy or insolvency proceedings are pending or contemplated by or against Mortgagor or Guarantor;

(l) all reports, statements and other data furnished by Mortgagor and Guarantor to Mortgagee in connection with the Loan are true, correct and complete in all material respects and do not omit to state any fact or circumstance necessary to make the statements contained therein not misleading;

(m) there are no actions, suits or proceedings pending, or to the knowledge of Mortgagor threatened, against or affecting Mortgagor or all or any portion of the Mortgaged Property;

(n) Mortgagor is not in default under the terms of any instrument evidencing or securing any indebtedness of Mortgagor, and there has occurred no event which would, if uncured or uncorrected, constitute, with the giving of notice, passage of time or both, a default under any such instrument;

(o) no Event of Default exists under this Mortgage, the Note or any of the other Loan Documents; and no event has occurred and is continuing which with notice or the passage of time or either would constitute an Event of Default under any provision thereof;

(p) no chattel mortgage, bill of sale, security agreement, financing statement or other title retention agreement (except those executed in favor of Mortgagee) has or will be executed with respect to any personal property, chattel or fixture used in connection with the construction, operation or maintenance of the Mortgaged Property;

(q) all of the Membership Agreements and the form of Membership Agreement respecting the Club to be operated upon the Mortgaged Property that have been submitted to Mortgagee, and that will be submitted to Mortgagee hereafter, for examination, and, if required, approval, are true, accurate and complete copies thereof;

(r) the Certified Membership Roll sets forth a schedule of Membership Agreements now in effect, together with data which is true and correct in all material respects regarding the Membership Deposits and annual dues thereunder and other

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information respecting each of said Membership Agreements; the Certified Membership Roll accurately reflects the Membership Agreements under which the members of the Club are presently entitled to use the Club and there are no other written or oral membership agreements or leases affecting the Mortgaged Property as of the date hereof; all of the Membership Agreements listed on the Certified Membership Roll have been entered into as "arms length" transactions, and are valid and in full force and effect; the dues and other income and charges set forth in the Membership Agreements are the actual dues, income and charges presently being collected under such Membership Agreements; Mortgagor knows of no default on behalf of Mortgagor or any Club member under any Membership Agreement and no notice has been received from any Club member claiming any default by Mortgagor under any Membership Agreement; there are no modifications or amendments to any of the Membership Agreements; there are no other agreements in existence, oral or written, which modify the obligations of Mortgagor or the Club members under any Membership Agreement; and Mortgagor has neither committed nor suffered any known act or omission that would constitute a default on its part entitling any Club member to damages, rights of set-off or right to terminate any Membership Agreement;

(s) the annual dues set forth on the Certified Membership Roll have not been assigned or encumbered except as set forth in the Loan Documents; no Club member is entitled to any concessions, rebates, allowances or free dues;

(t) the Membership Deposits payable under the Membership Agreements shown on the Certified Membership Roll are non-refundable to the respective Club members except (i) upon the earlier to occur of (A) thirty (30) years from the date of the admission of the respective member to the Club *and* such member's resignation from the Club or (B) within thirty (30) days after the resignation of such member *and* the subsequent reissuance of the Club membership to a new Club member; or (ii) in the event that the use of the Club shall revert to a private single family residence;

(u) all necessary means of ingress and egress to the Mortgaged Property have been dedicated to, and accepted for operation and maintenance by, the appropriate municipality or other appropriate entity, and all easements and cross-easements for utilities, and egress and ingress, necessary for the full utilization of the Mortgaged Property for its intended purposes, have been duly recorded and perfected;

(v) there is no moratorium or like governmental order in effect with respect to the Mortgaged Property and, to the best of Mortgagor's knowledge, no such moratorium or similar ordinance is now contemplated;

(w) the Mortgaged Property is not now damaged as a result of any fire, explosion, accident, flood or other casualty;

(x) the Land is zoned in accordance with all applicable governmental rules, ordinances, regulations and laws so as to permit the operation of a private social club (including, without limitation, a transient rental operation with respect to the residential quarters) at the Mortgaged Property; and Mortgagor is not aware of any matter or requirement respecting zoning ordinances, rules or regulations or any other governmental laws or regulations or any covenants, conditions, easements or restrictions of record which would jeopardize the use of the Mortgaged Property for the foregoing uses;

(y) Mortgagor has in full force and effect all Permits, occupational licenses and other approvals necessary to own and operate a private social club (including, without limitation, a transient rental operation with respect to the residential quarters), and, as of the date hereof the Club is fully operational; all such Permits, occupational licenses and other approvals have been issued without variance or condition and there is no litigation, action,

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citation, injunctive proceeding or like matter pending or threatened with respect to the validity of such matters;

(z) the buildings and other improvements located on the Mortgaged Property are in good condition, structurally sound, free from structural defects and the roofs are watertight and in good sound condition, and the buildings and improvements are free from termites and other infestation and any damage therefrom;

(aa) electric, sewer, water facilities and any other necessary utilities are available in sufficient capacity to service the Mortgaged Property satisfactorily;

(bb) all installments of special taxes or assessments, service charges, water and sewer charges, private maintenance charges, and other prior lien charges by whatever name called, presently due and payable, and all installments of general real estate taxes presently due and payable, respecting the Mortgaged Property, have been paid in full;

(cc) all balance sheets, income statements, financial statements and other financial data that have been provided to Mortgagee with respect to Mortgagor and Guarantor (i) are complete and correct in all material respects, (ii) accurately present the financial condition of Mortgagor and Guarantor, respectively, and the results of its or their operations for the periods for which the same have been furnished, and (iii) as to all balance sheets, income statements, other financial statements and other financial data respecting Mortgagor and Guarantor have been prepared in accordance with sound accounting standards, methods and practices consistently applied;

(dd) (i) no material adverse change in the business, assets, liabilities, financial condition, results of operations generally or with specific reference to the Mortgaged Property or, insofar as the Mortgagor is aware, the business prospects of the Mortgagor or Guarantor have occurred since the date of the most recent financial statements delivered to Mortgagee, (ii) no event has occurred or failed to occur since the date of the most recent financial statements delivered to Mortgagee which has had or may have a material adverse effect on the Mortgagor or Guarantor, and (iii) the Mortgagor has no knowledge of any event which has occurred or failed to occur since the date of the most recent financial statements delivered to Mortgagee which has or may have a material adverse effect on the financial condition of Mortgagor or Guarantor;

(ee) (i) all federal, state and other tax returns of the Mortgagor and Guarantor required by law to be filed have been duly filed, (ii) all federal, state and other taxes, assessments and other governmental charges or levies upon the Mortgagor and its properties, income, profits and assets that are due and payable have been paid, except any such non-payment of which is at the time permitted under Section 2.04.1(b) hereof, and (iii) the charges, accruals and reserves on the books of the Mortgagor, in respect of such taxes and charges that are not yet due and payable (or the non-payment of which is at the time permitted under Section 2.04.1(b) hereof) are adequate, and the Mortgagor knows of no reason to anticipate any additional assessments for any of such years;

(ff) Mortgagor's business and assets are and will continue to be restricted solely to the ownership and operation of the Mortgaged Property;

(gg) Mortgagor is not a party to any agreement or instrument adversely affecting its present or proposed business, properties, assets, operation or condition, financial or otherwise, and Mortgagor is not in default in the performance, observance or fulfillment of any of the obligations, covenants or conditions set forth in any agreement or instrument to which it is a party;

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CONFIDENTIAL

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(hh) Mortgagor has not instituted, caused to be instituted or been a party to and, to the best of its knowledge, there has not been any public offerings with respect to the Mortgaged Property or the memberships in the Club within the meaning of the Securities Act of 1933 and the Securities Exchange Act of 1934;

(ii) Mortgagor possesses all necessary trademarks, franchises, trade names, copyrights, patents, patent rights and licenses to conduct business at the Mortgaged Property as now operated, without any known conflict with the valid trademarks, trade names, copyrights, patents and license rights of others;

(jj) (i) the Mortgaged Property is presently and, at all times during Mortgagor's ownership thereof has been, free of contamination from any substance or material presently identified to be toxic or hazardous according to the Hazardous Waste Law, including, without limitation, any Hazardous Material; (ii) Mortgagor has not caused or suffered to occur and Mortgagor will not hereafter cause or suffer to occur, any Spill at, upon, under or within the Mortgaged Property or any contiguous real estate; (iii) neither Mortgagor nor any other party, including, without limitation, any tenant or occupant of any portion of the Mortgaged Property has been, is or will be involved in operations at or near the Mortgaged Property which could lead to the imposition on Mortgagor or any other owner of the Mortgaged Property of liability or the creation of a lien on the Mortgaged Property under the Hazardous Waste Law; (iv) no summons, citation, directive, letter or other communication, written or oral, from any governmental entity is outstanding against Mortgagor concerning any intentional or unintentional action or omission on the part of Mortgagor resulting in a Release of any Contaminant releasing, leaking, pumping, pouring, omitting, emptying or dumping of any Hazardous Materials into any waters or onto the lands of the State of Florida, or into any waters outside the jurisdiction of the State of Florida, resulting in damage to the lands, waters, fish, shellfish, wildlife, biota, air and other resources owned, managed, held in trust or otherwise controlled by the State of Florida; and (v) no portion of the Mortgaged Property contains any underground or above ground tanks for the storage of fuel oil, gasoline and/or other petroleum products or by-products;

(kk) the operations of Mortgagor comply with all applicable Environmental Laws;

(ll) Mortgagor has obtained all environmental, health and safety Permits necessary for the occupancy and operation of the Mortgaged Property for its present uses, all such Permits are in good standing and Mortgagor is in compliance with the terms and condition of such Permits;

(mm) Mortgagor does not currently, and has not previously owned or leased real property or operations subject to any threatened or outstanding order or judgment from, or consent decree or similar agreement in response thereto with, any Governmental Authority or other Person or subject to any judicial or docketed administrative proceeding respecting (i) Environmental Laws, (ii) Remedial Action or (iii) any Environmental Liabilities and Costs arising from a Release or threatened Release;

(nn) there are no conditions or circumstances associated with the currently or previously owned or leased real property or operations of Mortgagor which could result in a violation of Environmental Laws;

(oo) no part of the Mortgaged Property is a treatment, storage or disposal facility requiring a permit under the Resource Conservation and Recovery Act, 42 U.S.C. §6901 et seq., the regulations thereunder or any state analog. Mortgagor is in compliance with all applicable financial responsibility requirements of all Environmental Laws, including, without limitation, those contained in 40 C.F.R., parts 264 and 265, subpart H, and any state or local equivalents;

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(pp) neither Mortgagor nor its predecessor has failed to file any notice required under any applicable Environmental Law reporting a Release;

(qq) no Environmental Lien and no unrecorded Environmental Lien has attached to any property of Mortgagor;

(rr) there is not now on or in the property owned, leased or operated by Mortgagor (including the Mortgaged Property) (i) any underground storage tanks or surface impoundments, (ii) any polychlorinated biphenyls ("PCBs") used in electrical or other equipment, or (iii) any asbestos-containing material;

(ss) Mortgagor's principal office is located c/o The Trump Organization, 725 Fifth Avenue, New York, New York 10022;

(tt) each of the representations and warranties of Mortgagor and the Guarantor contained in any of the other Loan Documents is true and correct in all material respects. All of such representations and warranties are incorporated herein by this reference to the same extent as if made herein by Mortgagor.

2.02.2. Accuracy of Representations. Mortgagor knows of no facts which would, in any manner, indicate that the statements and the implications therefrom set forth in the warranties and representations contained in this Mortgage are not true and complete in all material respects.

2.02.3. Representations and Warranties to be Continuing. All representations and warranties of Mortgagor set forth in this Mortgage shall be true in all material respects as of the date hereof and at all times thereafter as if restated in their entirety at all times during the term of the Loan.

2.03. Compliance with Laws. Mortgagor covenants and warrants that Mortgagor will at all times hereafter comply with all applicable restrictive covenants, development orders, zoning and subdivision ordinances and building codes, health and Environmental Laws and regulations and any other Requirement of Law relating to the use and operations of the Mortgaged Property. If Mortgagor receives notice from any federal, state or other governmental body that either Mortgagor or the Mortgaged Property is not in compliance with the foregoing requirements, then Mortgagor promptly shall notify Mortgagee of such noncompliance. Without limiting the generality of the foregoing, if Mortgagor receives notice from any Governmental Authority or any other party that either Mortgagor or the Mortgaged Property is not, or may not be, in compliance with any of the foregoing requirements, then Mortgagor promptly shall provide Mortgagee with a copy of such notice.

2.04. Taxes and Other Charges.

2.04.1. Taxes and Assessments.

(a) Mortgagor shall pay promptly when due all taxes, assessments, rates, dues, charges, fees, levies, fines, impositions, liabilities, obligations and encumbrances of every kind whatsoever now or hereafter imposed, levied or assessed upon or against the Mortgaged Property or any part thereof, as well as all income taxes, assessments and other governmental charges levied and imposed by the United States of America or any state, county, municipality or other taxing authority upon or against Mortgagor or in respect of the Mortgaged Property or any part thereof. Mortgagor shall promptly pay when due any and all taxes, charges, filing, registration and recording fees, excises and levies imposed upon Mortgagee by reason of its ownership of the Note, this Mortgage and any of the other Loan Documents or with respect to its interest therein and any instrument of further assurance, other than income, franchise, gross receipts, doing business and similar taxes, and shall

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promptly pay when due all stamp taxes and other taxes required to be paid on the Note, the Mortgage and any other Loan Document. In the event Mortgagor fails to make such payments or fails to cause such payments to be made when due, then Mortgagee shall have the right, but not the obligation, to pay the amounts due, and Mortgagor shall, on demand, reimburse Mortgagee for said amounts, together with interest thereon at the Post-Default Rate from the date said amounts are so advanced until the same are paid to Mortgagee.

(b) Nothing in this Section 2.04 shall require the payment or discharge of any obligation imposed upon Mortgagor by Section 2.04(a) above so long as (i) the failure so to do shall not result in the forfeiture, unenforceability or subordination of the lien of this Mortgage, and (ii) Mortgagor shall in good faith, at its own expense, contest the same or the validity thereof by appropriate legal proceedings which proceedings must operate to (A) prevent the occurrence of any of the events described in clause (i) above, and (B) prevent the collection thereof or other realization thereon, the sale of the lien thereof and the sale or forfeiture of the Mortgaged Property or any part thereof, to satisfy the same; provided, however, that during such contest Mortgagor shall, at the option of Mortgagee, provide security reasonably satisfactory to Mortgagee, assuring the discharge of Mortgagor's obligations hereunder and of any additional interest charge, surcharge, fine, late charge, penalty, fee or expense arising from or incurred as a result of such contest; and provide, further, that if at any time payment of any obligation imposed upon Mortgagor by this Section 2.04 shall become necessary to prevent the delivery of a tax deed conveying the Mortgaged Property or any portion thereof or any interest therein or the sale of the tax lien therefor because of non-payment, or the imposition of any penalty, fine, surcharge, late charge, cost or expense, then Mortgagor shall pay the same in sufficient time to prevent the delivery of such tax deed or the sale of such lien or the imposition of such penalty, fine, surcharge, late charge, cost or expense.

2.04.2. Mechanic's and Other Liens. Mortgagor shall pay, bond, or provide affirmative title insurance endorsements respecting mechanics' or other liens, in form and content acceptable to Mortgagee, from time to time when the same shall become due, with respect to all claims and demands of mechanics, materialmen, laborers, and others which, if unpaid, might result in, or permit the creation of, a lien on the Mortgaged Property or any portion thereof, or on the revenues, rents, issues, income or profits arising therefrom and, in general, Mortgagor shall do, or cause to be done, at the cost of Mortgagor and without expense to Mortgagee, everything necessary to fully preserve the lien of this Mortgage. Within thirty (30) days after notification of the filing of any such lien, but in any event prior to the request for any subsequent Advance under the Note, Mortgagor shall release or discharge the same of record by payment, bonding or shall cause same to be affirmatively insured over by title insurance endorsement as aforesaid. In the event that Mortgagor fails to make payment of, or bond, or provide affirmative title insurance with respect to such claims and demands, Mortgagee may, but shall not be obligated to, make payment thereof, and Mortgagor shall, on demand, reimburse Mortgagee for all sums so expended, together with interest thereon at the Post-Default Rate from the date such sums are expenses until the same are paid to Mortgagee.

2.04.3. Tax Reserve. To further secure the performance and discharge of Mortgagor's obligations under this Section 2.04, but not in lieu of such obligations, Mortgagor shall, commencing on December 1, 1995 and on each Due Date thereafter, pay over to Mortgagee an amount equal to 1/12th of the next maturing annual ad valorem taxes, assessments and charges (which charges for purposes of this Section 2.04.3 shall include without limitation water and sewer charges, if any) of the nature described in Section 2.04.1 hereof for each month that has elapsed since the last date to which such taxes, assessments and charges were paid; and Mortgagor will, in addition, pay over to Mortgagee on the first day of each month sufficient funds (as estimated and as may be adjusted and readjusted from time to time by Mortgagee in its sole discretion to accomplish the stated purpose and in order to accumulate at least thirty (30) days prior to the due date hereof) to permit Mortgagee to

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pay said taxes, assessments and charges when they first become due. Upon demand by Mortgagee, Mortgagor shall deliver to Mortgagee such additional monies as are required to make up any deficiencies in the amounts necessary to enable Mortgagee to pay such taxes, assessments and similar charges. Such deposits shall not be, nor be deemed to be, trust funds but may be commingled with the general funds of Mortgagee. All funds so deposited with Mortgagee shall be held by it without interest and may be commingled by Mortgagee with its general funds. Provided that Mortgagee shall not otherwise have used a portion of such funds in accordance with the provisions of this Mortgage, such funds (less the amounts, if any, which are payable into the reserve fund to be used to pay taxes not yet due and payable), shall be applied in payment of the aforementioned charges when and as payable, to the extent Mortgagee shall have such funds on hand. In the event that there shall occur an Event of Default, the funds deposited with Mortgagee, as aforementioned, shall be applied first in payment of the charges for which such funds shall have been deposited (to the extent then payable) and then to payment of the Indebtedness or any other charges affecting the security of Mortgagee, as Mortgagee determines, in its sole discretion, but no such application shall be deemed to have been made by operation of law or otherwise until actually made by Mortgagee as herein provided. If reserve deposits are being made with Mortgagee as aforesaid, Mortgagor shall furnish Mortgagee with bills for the charges for which such deposits are required to be made hereunder and/or such other documents necessary for the payment of same, at least fifteen (15) days prior to the date on which the charges first become due. Upon an assignment of this Mortgage, Mortgagee shall have the right to pay over the balance of any sums deposited pursuant to this Section and in its possession to the assignee, and, upon written verification of receipt of such funds from such assignee, Mortgagee shall be completely released from all liability with respect to such sums, and Mortgagor shall look solely to such assignee with respect thereto.

2.04.4. No Credit Against the Indebtedness Secured Hereby. Mortgagor shall not claim, demand or be entitled to receive any credit against the principal or interest payable under the terms of the Note or on any other sums secured by this Mortgage for so much of the taxes, assessments or similar impositions as are assessed against the Mortgaged Property or any part thereof or as are applicable to the Indebtedness or to Mortgagee's interest in the Mortgaged Property. No deduction shall be claimed from the taxable value of the Mortgaged Property or any part thereof by reason of the Note, this Mortgage or any other instrument securing the Note.

2.04.5. Insurance; Restoration.

(a) Mortgagor shall maintain (i) "casualty" insurance insuring the Improvements now or hereafter constituting a part of the Mortgaged Property against damage by fire and the other hazards covered by a standard all-risk, extended coverage insurance policy for the full insurable value thereof (which, unless Mortgagee shall otherwise agree in writing, shall mean the full repair and replacement value thereof without reduction for depreciation or co-insurance), (ii) business interruption insurance in an amount adequate to cover continuing expenses during any period of repairs or restoration which amount shall at least be equal to twenty-four (24) months' anticipated gross rental income or gross business earnings, as applicable, from the Mortgaged Property and twelve (12) months' anticipated debt service on the Loan, (iii) Comprehensive General Liability Insurance in respect of the operation of the Mortgaged Property with limits of liability of not less than $5,000,000 for bodily injury per person per occurrence and $5,000,000 for property damage liability per occurrence and (iv) flood (including surface waters) if the Mortgaged Property is located in an area identified by the Secretary of Housing and Urban Development or any other official having jurisdiction as having special flood hazards and in which flood insurance has been made available under the National Flood Insurance Act of 1968 and the Flood Disaster Protection Act of 1973 (as the foregoing may be modified or amended and any successor acts thereto), in an amount at least equal to the outstanding amount of the Indebtedness or the maximum limit of coverage available under said Acts in respect of the Improvements.

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whichever is less. In addition, Mortgagee may require Mortgagor to carry such other insurance on the Mortgaged Property in such amounts as may from time to time reasonably be required by institutional lenders, against insurable casualties including, without limitation, the following types of insurance: automobile, Builder's Risk, sinkhole, hurricane, earthquake, war, nuclear explosion, boiler and machinery, all in amounts adequate to cover repair and replacement expenses; and contingent liability in connection with any loss arising from the fact that any Improvement is deemed to be non-conforming property, which at the time are commonly insured against in the case of mortgaged property similarly situated, due regard being given to the site and the type of the building, and the construction, location, utilities and occupancy or any replacements or substitutions therefor. In addition, from time to time, upon the occurrence of any material change in the use, operation or value of the Mortgage Property or in the availability of insurance in the area in which the Mortgaged Property is located, Mortgagor shall, within thirty (30) days after demand by Mortgagee, obtain such additional amounts and/or such other kinds of insurance as Mortgagee may reasonably require. Mortgagor shall not obtain or continue to maintain any separate or additional insurance which is contributing in the event of loss unless it is properly endorsed and otherwise satisfactory to Mortgagee in all respects.

(b) All liability insurance policies required pursuant to this Section 2.04.5 shall be endorsed to name Mortgagee, its directors, officers, representatives, agents and employees as an additional insured thereunder, and all other insurance policies required pursuant to this Section 2.04.5 shall name Mortgagee as the mortgagee under New York (or the equivalent in Florida) long form non-contributory endorsements. All such insurance policies and endorsements shall be fully paid or paid pursuant to an installment program offered to Mortgagor by the insurer or its broker/agent, provided that the installments are paid on or before the due date thereof so that all required insurance coverage is maintained without interruption. All insurance policies shall contain (i) such provisions and expiration dates, (ii) provide for such deductibles, and (iii) be in such form and issued by such insurance companies qualified and licensed to do business in the State of Florida, all as may be acceptable to Mortgagee. All insurance companies issuing insurance for the Mortgaged Property shall have a rating of "AA" or better by Duff & Phelps for claims paying ability and a minimum "A" Standard and Poors rating or a comparable Best Insurance Guide rating), as may be acceptable to Mortgagee, in its sole discretion. Each policy shall provide that such policy may not be cancelled or materially changed except upon not less than thirty (30) days' prior written notice to Mortgagee of the intention of non-renewal, cancellation or material change and that no act or thing done by Mortgagor shall invalidate the policy as against Mortgagee. In the event Mortgagor fails to maintain insurance in compliance with this Section 2.04.5 or, in the event that a notice of non-renewal, cancellation or material change is given to Mortgagee, as aforesaid, and within ten (10) days after the delivery of such notice Mortgagor shall fail to deliver to Mortgagee evidence of the purchase of a substitute policy of insurance or a renewal of the existing policy of insurance, Mortgagee may, but shall not be obligated to, obtain such insurance and pay the premium therefor and Mortgagor shall, on demand, reimburse Mortgagee for all sums, advances and reasonable expenses incurred in connection therewith, together with interest thereon at the Post-Default Rate from the date such amounts are advanced until the same are paid to Mortgagee. Mortgagor shall deliver to Mortgagee a certificate of insurance with respect to such liability insurance issued to Mortgagee, and copies of all original policies of insurance, certified to Mortgagee by the insurance company or authorized agent as being true copies, together with the endorsements thereof required hereunder, which policies shall be assigned to Mortgagee so, and in such manner and form, that Mortgagee and its successors and assigns shall at all times have and hold the said policies as collateral and further security for the payment of the Indebtedness, until the full payment thereof. The proceeds of insurance policies coming into the possession of Mortgagee shall not be deemed trust funds and Mortgagee shall be entitled to dispose of such proceeds as herein provided, or as otherwise agreed in writing by Mortgagor and Mortgagee.

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(c) The proceeds of insurance paid on account of any damage or destruction to the Mortgaged Property or any part thereof, shall be paid over to Mortgagee. Mortgagee shall have the option, in its sole discretion, to apply any insurance proceeds it may receive pursuant to this Section 2.04.5 (after the deduction of any costs incurred by Mortgagee in connection therewith) to the payment of the Indebtedness (in the order of priority as may be provided in the Note) or to allow all or a portion of such proceeds to be used for the restoration, repair or replacement of the Mortgaged Property as provided in Subsection (f) below; provided, however, that if (i) the aggregate amount of insurance proceeds in connection with any casualty or loss shall be less than or equal to $500,000 and (ii) the restoration of the Mortgaged Property in the reasonable judgment of Mortgagee, can be completed within one hundred twenty (120) days, Mortgagee shall allow such proceeds to be used for restoration and repair of the Mortgaged Property upon compliance with all of the terms and provisions of Subsection (f) below. Any application of insurance proceeds to the Indebtedness shall be made by Mortgagee in such manner and order of priority as Mortgagee shall elect, in its sole discretion. Any portion of the proceeds remaining after payment in full of the outstanding Indebtedness shall be paid to Mortgagor.

(d) In the event of damage or destruction to the Mortgaged Property or any portion thereof, whether insured or uninsured, Mortgagor shall give prompt written notice thereof to Mortgagee and, to the extent the insurance proceeds are not applied to the reduction of Indebtedness in accordance with the terms and conditions hereof, Mortgagor shall promptly commence and diligently continue to perform the repair, restoration and rebuilding of the portion of the Mortgaged Property so damaged or destroyed (hereinafter referred to as the "Work") to restore the Mortgaged Property in full compliance with all legal requirements and so that the Mortgaged Property shall, to the extent possible and reasonably practicable, be at least equal in value and quality and general utility as they were prior to the damage or destruction, and if the Work to be done is structural or if the cost of the Work as estimated by Mortgagee shall exceed the sum of $250,000 (hereinafter referred to as "Major Work"), then Mortgagor shall, prior to the commencement of the Work, furnish or cause to be furnished to Mortgagee: (1) complete plans and specifications for the Work (approved by all governmental authorities whose approval is required), for Mortgagee's approval, which plans and specifications shall bear the signed approval thereof of an architect satisfactory to Mortgagee (hereinafter referred to as the "Architect") and shall be accompanied by the Architect's signed estimate, bearing the Architect's seal, of the entire cost of completing the Major Work; and (2) certified or photostatic copies of all permits and approvals required by law in connection with the commencement and conduct of the Work.

(e) Mortgagor shall not commence any Work until Mortgagor shall have complied with the applicable requirements referred to in Subsection (d) above, and after commencing the Work, Mortgagor shall perform the work diligently in a good and workmanlike manner, in good faith, substantially in accordance with the plans and specifications referred to in Subsection (d)(1) above, if applicable, and in compliance with all applicable laws.

(f) Each casualty insurance policy shall provide that the proceeds of insurance paid on account of any damage or destruction to the Mortgaged Property, or any part thereof ("Proceeds"), shall be paid in accordance with the provisions hereof. Mortgagor promptly shall deliver to Mortgagee any Proceeds which are paid directly to Mortgagor by the casualty insurance carrier. If, pursuant to Section 2.04.5(c) above, Mortgagee has elected, in its sole discretion, or is otherwise expressly required by the terms of Section 2.04.5(c) above, to make all or a portion of any Proceeds available to Mortgagor for restoration of the Mortgaged Property, all such Proceeds delivered to Mortgagee as aforesaid, together with all Proceeds paid directly to Mortgagee on account of damage or destruction to the Mortgaged Property, less the cost, if any, to Mortgagee of such recovery and of paying out such Proceeds (including reasonable attorneys' fees and costs allocable to inspecting the work and reviewing the plans and specifications therefor paid to third parties),

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upon the written request of Mortgagor, will be applied by Mortgagee to the payment of the cost of the Work referred to in Subsection (d) above and shall be paid out from time to time to Mortgagor as restoration progresses and/or, at Mortgagee's option exercisable from time to time, directly to the contractor, subcontractors, materialmen, laborers, engineers, architects and other persons rendering services or materials in connection with the Work, as said Work progresses, except as otherwise hereinafter provided, but subject to the following conditions, any of which Mortgagee may waive:

(i) If the Work to be done is structural or if it is Major Work, the Architect (or other professional satisfactory to Mortgagee) shall be in charge of the Work.

(ii) Each request for payment shall be made at least ten days prior to the requested date of disbursement and shall be accompanied by a certificate of the Architect, and Mortgagor stating (1) that all of the Work completed has been done in a good and workmanlike manner, substantially in compliance with the approved plans and specifications, if any be required under said Subsection (d) above, and in accordance with all provisions of law; (2) the sum requested is justly required to reimburse Mortgagor for payments by Mortgagor to, or is justly due to, the contractor, subcontractors, materialmen, laborers, engineers, architects or other persons rendering services or materials in connection with the Work (giving a brief description of such services and materials), and that when added to all sums previously paid out by Mortgagee, if any, does not exceed the cost of the Work done to the date of such certificate; and (3) that the amount of Proceeds remaining in the hands of Mortgagee, together with other funds otherwise available to Mortgagor, will be sufficient on completion of the Work to pay for the same in full (giving in such reasonable detail as Mortgagee may require an estimate of the cost of such completion and if such other funds are required, including a certificate of Mortgagor, as to the sources of such funds).

(iii) Each request shall be accompanied by partial waivers or releases of liens, satisfactory to Mortgagee, covering that part of the Work previously paid for, if any, and by a search prepared by a title company satisfactory to Mortgagee or by other evidence satisfactory to Mortgagee, that there has not been filed with respect to the Mortgaged Property, or any part thereof, or any mechanic's lien or other lien or instrument for the retention of title not discharged of record (by bonding or otherwise) in respect of any part of the Work and that there exist no encumbrances on or affecting the Mortgaged Property, or any part thereof, other than the Permitted Encumbrances and those which may have been approved by Mortgagee.

(iv) There shall be no Event of Default on the part of Mortgagor under this Mortgage, the Note or any other Loan Document and no facts or circumstances shall then exist which, upon notice and/or lapse of time, would constitute an Event of Default.

(v) The request for any payment after the Work has been completed shall be accompanied by a copy of any certificate or certificates required by law to render occupancy and operation of the Mortgaged Property.

Upon completion of the Work and payment in full therefor, or upon failure on the part of Mortgagor promptly to commence or diligently to continue the Work, or at any time upon written request by Mortgagor, Mortgagee may apply the amount of any Proceeds then or thereafter in the hands of Mortgagee to the payment of the Indebtedness (in order of priority as may be provided in the Note) without premium or penalty; provided, however,

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that nothing herein contained shall prevent Mortgagee from applying at any time the whole or any part of such Proceeds to the curing of any Event of Default under this Mortgage or the Note.

(g) If the insurance proceeds are made available for restoration of the Mortgaged Property pursuant to Section 2.04.5(c) above, but the Work to be done is not structural or Major Work, the Proceeds shall be paid directly to Mortgagor from time to time as restoration progresses to be applied toward the cost of the Work, subject to the provisions of Subsections (d), (e) and (f) above, other than those applicable to Major Work.

(h) If within one hundred twenty (120) days (or such longer period of up to one hundred eighty (180) days as may be approved by Mortgagee in writing upon the written request of Mortgagor and submission by Mortgagor to Mortgagee of evidence that (i) Mortgagor is diligently prosecuting all such action as may be required by this provision and (ii) notwithstanding such continuous diligent efforts by Mortgagor, Mortgagor cannot comply with this provision within 120 days) after the occurrence of any damage or destruction to the Mortgaged Property or any portion thereof requiring structural work or Major Work in order to restore the Mortgaged Property, Mortgagor shall not have submitted to Mortgagee, for Mortgagee's approval, the plans and specifications for the repair, restoration and rebuilding of the Mortgaged Property so damaged or destroyed (approved by the Architect and by all Governmental Authorities whose approval is required), or if, after such plans and specifications are approved by all such Governmental Authorities, other parties and Mortgagee, Mortgagor shall fail promptly to commence such repair, restoration and rebuilding, or if thereafter Mortgagor fails diligently to continue such repair, restoration and rebuilding or is delinquent in the payment to mechanics, materialmen or others of the costs incurred in connection with the Work, or in the case of any damage or destruction to the Mortgaged Property or any part thereof requiring neither structural work nor Major Work in order to repair and restore, if Mortgagor shall fail promptly to repair, restore and rebuild the Mortgaged Property so damaged or destroyed, or in any other material respect fails to comply with its restoration obligations under this Section 2.04.5 then, upon notice to Mortgagor, in addition to all other rights herein set forth, Mortgagee, or any lawfully appointed receiver of the Mortgaged Property, may at their respective options, perform or cause to be performed such repair, restoration and rebuilding, and may take such other steps as they deem advisable to perform the Work; provided, however, that Mortgagee shall be permitted to give such shorter notice (and in such manner) as is reasonably practical or no notice if necessary to meet an emergency situation in case of other special circumstances. Mortgagor hereby waives, for Mortgagor and all others holding under Mortgagor, any claim against Mortgagee and such receiver arising out of anything done by Mortgagee or such receiver pursuant hereto (other than as a result of Mortgagee's or such receiver's gross negligence or willful misconduct) and Mortgagee may apply all or a portion of the Proceeds (without the need to fulfill any other requirements of this Section 2.04) to reimburse Mortgagee, and/or such receiver, for all amounts expended or incurred by them, respectively, in connection with the performance of the Work, and any excess costs shall be paid by Mortgagor to Mortgagee upon demand.

(i) To further secure the performance and discharge of Mortgagor's obligations under this Section, but not in lieu of such obligations, Mortgagor shall pay over to Mortgagee an amount equal to 1/12th of the next maturing annual insurance premiums for each month that has elapsed since the last date to which such premiums were paid; and Mortgagor shall, in addition, pay over to Mortgagee together with each monthly installment on the Note, sufficient funds (as estimated, and as may be adjusted and readjusted, from time to time by Mortgagee in its sole discretion to accomplish the stated purpose) to permit Mortgagee to pay said premiums when they first become due. Such deposits shall not be, nor be deemed to be, trust funds but may be commingled with the general funds of Mortgagee. Upon demand by Mortgagee, Mortgagor shall deliver to Mortgagee such additional monies as are necessary to make up any deficiencies in the amounts necessary to

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enable Mortgagee to pay such premiums when due. Provided that Mortgagee shall not otherwise have used a portion of such funds in accordance with the provisions of this Mortgage, such funds (less the amounts, if any, which are payable into the reserve fund to be used to pay premiums not yet due and payable), shall be applied in payment of the aforementioned premiums, when and as payable, to the extent Mortgagee shall have such funds on hand. In the event that there shall occur an Event of Default, the funds deposited with Mortgagee, as aforementioned, may be applied first in payment of the premiums for which such funds shall have been deposited (to the extent then payable) and then to the payment of the Indebtedness or any other premiums affecting the security of Mortgagee, as Mortgagee determines, in its sole discretion, but no such application shall be deemed to have been made by operation of law or otherwise until actually made by Mortgagee as herein provided. Mortgagor shall furnish Mortgagee with bills for the premiums for which such deposits are required to be made hereunder and/or such other documents necessary for the payment of same, at least thirty (30) days prior to the date on which the premiums first become payable. Upon an assignment of this Mortgage, Mortgagee shall have the right to pay over the balance of any sums deposited pursuant to this Section and in its possession to the assignee, and, upon written verification of receipt of such funds from such assignee, Mortgagee shall be completely released from all liability with respect to such sums, and Mortgagor shall look solely to such assignee with respect thereto.

2.04.6. Non-Impairment of Mortgagee's Rights. Nothing contained in Sections 2.04.3 and 2.04.5(i) herein shall be deemed to affect any right or remedy of Mortgagee under any provisions of this Mortgage or of any statute or rule of law to pay any amount required to be paid by Sections 2.04.1 and 2.04.5(i) hereof and to add the amount so paid together with interest at the Post-Default Rate to the Indebtedness. Although Mortgagee shall use its reasonable efforts to make such payments in a timely fashion, the arrangements provided for in Sections 2.04.3 and 2.04.5(i) hereof are solely for the added protection of Mortgagee and entail no responsibility on Mortgagee's part beyond the use of due credit for sums actually received by it. Upon assignment of this Mortgage, any funds on hand shall be turned over to the assignee and, upon written verification of receipt of such funds from such assignee, Mortgagee shall be completely released from all liability with respect to such funds, and Mortgagor shall look solely to such assignee with respect thereto.

2.05. Condemnation.

(a) Mortgagor, immediately upon obtaining knowledge of the institution of any proceedings for the Condemnation of the Mortgaged Property or any portion thereof, shall notify Mortgagee in writing of the pendency of such proceedings. Mortgagee, at its election and in its discretion, may participate in any such proceedings and Mortgagor from time to time shall deliver to Mortgagee all instruments requested by it to permit such participation. All Awards or other taking or purchase in lieu thereof, of the Mortgaged Property or any portion thereof, shall be paid in accordance with the provisions of this Section 2.05. Mortgagee shall not be limited to the interest paid on the proceeds of any Award, but shall be entitled to the payment by Mortgagor of interest at the applicable rate provided for herein or in the Note. All awards or other taking or purchase in lieu thereof of the Mortgaged Property, or any part of the foregoing, are hereby assigned to and shall be paid to Mortgagee. Mortgagor, upon the request by Mortgagee, shall make, execute and deliver any and all instruments requested for the purposes of confirming the assignment of the aforesaid Awards and compensation to Mortgagee free and clear of any liens, charges or encumbrances of any kind or nature whatsoever. Mortgagor hereby authorizes Mortgagee to collect and receive such Awards, to give proper receipts and acquittances therefor and in Mortgagee's sole discretion to apply the same toward the payment of the Indebtedness, notwithstanding the fact that the Indebtedness may not then be due and payable, or to the restoration of the Mortgaged Property.

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CONFIDENTIAL

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(b) In the event that the whole of the Mortgaged Property shall be taken or condemned by any Governmental Authority for any public or quasi-public use or purpose, or if any part thereof shall be so taken or condemned and the part thereof not so taken or condemned cannot feasibly be used or reconverted for use as a building or buildings of the type, character and condition existing immediately prior to such taking or Condemnation, as determined by Mortgagee (the foregoing being referred to as a "Complete Taking"), then, any Award payable in connection therewith shall be paid to Mortgagee and applied to the Indebtedness (in the order of priority as may be provided in the Note). Any portion of any Award remaining thereafter shall be paid to Mortgagor.

(c) In the event that a portion of the Mortgaged Property is taken or condemned so that there is less than a Complete Taking, then, Mortgagor promptly shall commence (but in no event later than sixty (60) days after the date of such taking or condemnation) and diligently continue to repair, restore, replace or rebuild the Mortgaged Property in accordance with the provisions of Section 2.04.5 hereof, as if such taking or condemnation had resulted in "damage or destruction to the Mortgaged Property" (within the meaning of subparagraph (d) of said Section 2.04.5), substantially to its condition immediately prior to such taking or condemnation and the proceeds of any Award paid to Mortgagee in connection therewith will be made available to Mortgagor for such purposes; provided, however, that in such event such proceeds shall be disbursed to Mortgagor subject to and in accordance with the provisions of subparagraphs (d), (e) and (f) of said Section 2.04.5, provided, further, however, that if the part of the Mortgaged Property remaining after any Condemnation cannot feasibly be used or reconverted for use as a distinct and functional architectural unit buildings of the type, character and condition existing immediately prior to such Condemnation, then the proceeds of any Award paid to Mortgagee in connection therewith will not be used or such repair or restoration and will instead be applied to the Indebtedness as provided in subparagraph (b) above.

(d) Notwithstanding any taking by eminent domain, alteration of the grade of any street or other injury to or decrease in value of the Mortgaged Property by any Governmental Authority, Mortgagor shall continue to make all payments due hereunder and under the Note and under the other Loan Documents.

2.06. CARE OF THE MORTGAGED PROPERTY.

(a) Mortgagor shall preserve and maintain the Mortgaged Property in good condition and repair. Mortgagor shall not permit, commit or suffer any waste of the Mortgaged Property or of any part thereof, and will not take any action which will increase the risk of fire or other hazard to the Mortgaged Property or to any part thereof.

(b) Except as otherwise expressly permitted under the Loan Documents, no part of the Mortgaged Property shall be removed, demolished, altered or added to, without the prior written consent of Mortgagee, which consent may be withheld or denied in Mortgagee's sole and arbitrary discretion. Mortgagor shall have the right, without such consent, to remove and dispose of free from the lien of this Mortgage any part of the Mortgaged Property as from time to time may become worn out or obsolete, provided, however, that either simultaneously with or prior to such removal, any such Mortgaged Property shall be replaced with other mortgaged property of equal utility and of a value at least equal to that of the replaced Mortgaged Property, when first acquired and free from any security interest of any other person and by such removal and replacement Mortgagor shall be deemed to have subjected such replacement mortgaged property to the lien of this Mortgage, and provided, further, that in no event shall Mortgagor remove any of the Artwork, without the prior written consent of Mortgagee, which consent may be withheld or denied in Mortgagee's sole and arbitrary discretion.

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(c) Mortgagee may enter upon and inspect the Mortgaged Property at any reasonable time during the life of this Mortgage for all purposes, including, without limitation, verification of Mortgagor's compliance with all of the terms, covenants and provisions of this Mortgage.

2.07. Composition of Mortgagor. At all times throughout the term of the Loan, the Mortgagor shall be Controlled by Guarantor and Guarantor shall be the record and beneficial owner of at least fifty-one percent (51%) of the issued and outstanding voting securities of Mortgagor. In the event that (a) any of the voting securities of Mortgagor shall be sold, conveyed or otherwise transferred or pledged, hypothecated or otherwise transferred as security for debt (whether voluntarily, involuntarily by operation of law or otherwise); (b) there shall be an increase in the number of issued and/or outstanding shares of the voting securities of Mortgagor or (c) there shall be created one or more additional classes of voting securities of Mortgagor, however accomplished and whether in a single transaction or in a series of related or unrelated transactions, with the result that in any event the voting securities of the Mortgagor shall be Controlled by a person or entity other than Guarantor, the entire balance of the Indebtedness of the Note shall be accelerated and become immediately due and payable, at the option of Mortgagee. In the event Mortgagee elects to accelerate the entire balance of the Indebtedness, Mortgagee shall have no obligation to allege or show any impairment of its security and may pursue any legal or equitable remedies for default in such payment without such allegation or showing.

2.08. Creation of Security Agreement. Mortgagor shall not own or acquire or agree to acquire any property for use at the Mortgaged Property of any character subject to any security agreement, mortgage, conditional sale agreement or other title retention agreement, or assign, pledge or in any manner transfer or encumber its rights to receive income from the Mortgaged Property.

2.09. Compliance with Environmental Law.

(a) Mortgagor shall comply strictly and in all respects with the requirements of all Environmental Laws and related regulations and with all similar applicable laws and regulations and shall notify Mortgagee promptly in the event of any Release or the presence of Contaminants upon the Mortgaged Property, and shall promptly forward to Mortgagee copies of all orders, notices, permits, applications or other communications and reports received in connection with any such Release or Contaminants or any other matters relating to any Environmental Law or related regulations or any similar applicable laws or regulations, as they may affect the Mortgaged Property.

(b) Mortgagor shall not, and shall not knowingly permit any other Person to, (i) cause or suffer to occur any Release at, upon, under or within the Mortgaged Property or any contiguous real estate, or (ii) engage in operations, at or near the Mortgaged Property, which could lead to the imposition on Mortgagor or any other owner of the Mortgaged Property of liability or the creation of a lien on the Mortgaged Property under any Environmental Law.

(c) Mortgagor shall not permit any portion of the Mortgaged Property to contain any underground or above ground tanks for storage of fuel oil, gasoline and/or other petroleum products or by-products.

2.10. Contaminants. Mortgagor shall not, and shall not knowingly permit any other Person to dispose of any Contaminant by placing it in or on the ground or waters of any property owned or leased by Mortgagor or any contiguous property.

2.11. Environmental Audit. Mortgagee shall have the right from time to time (which right will only be exercised if Mortgagee reasonably believes that there may be a

CONFIDENTIAL

Release or Contaminants upon the Mortgaged Property) to obtain, at Mortgagor's sole cost and expense, an environmental site assessment or environmental audit report, or an update of such an assessment or report, with respect to the Mortgaged Property, all in scope, form and content satisfactory to Mortgagee. The cost of any such environmental assessment shall be borne by Mortgagor. Upon receipt of any notification or otherwise obtaining knowledge of any Release or other event that could result in Mortgagor incurring Environmental Liabilities and Costs, Mortgagor shall, at its cost, conduct or pay for consultants to conduct, such tests or assessments of environmental condition at such operations or properties (if any), including, without limitation, the investigation and testing of subsurface conditions, and shall take such remedial, investigational or other action, as any Governmental Authority requires or as is appropriate and consistent with good business practice. If the consultant selected by Mortgagor is not reasonably acceptable to Mortgagee, Mortgagee shall (i) select a consultant of its own choosing to monitor the work of Mortgagor's consultant and Mortgagor shall pay for all reasonable costs incurred by Mortgagee's consultant in connection with performing such monitoring activities, and (ii) promptly notify Mortgagor of such determination and appointment. Nothing contained in this Mortgage shall be construed as limiting or impeding Mortgagor's rights and obligations to take any and all actions necessary and desirable to address any Release or Environmental Liabilities and Costs or to comply with all Environmental Laws.

2.12. Environmental Indemnification.

(a) Mortgagor agrees to defend, indemnify and hold harmless Mortgagee and its respective Affiliates, and direct and indirect directors, shareholders, officers, employees, agents, attorneys, consultants and advisors of or to each of the foregoing persons (each of the foregoing being an "Indemnitee") from and against any and all claims, damages, liabilities, obligations, losses, penalties, actions, judgments, suits, costs, disbursements and expenses of any kind or nature (including, without limitation, fees and disbursements of counsel to any such Indemnitee) which may, at any time or from time to time, be actually imposed on, incurred by or asserted against any such Indemnitee in connection with or arising from or out of, any investigation, litigation or proceeding, whether or not any such Indemnitee is a party thereto, and/or any matter whether based on any federal, state or local law or other statutory regulation, securities or commercial law or regulation, or under common law or in equity, or in contract, tort or otherwise, in any manner relating to or arising out of this Mortgage, any other Loan Documents, any of the Indebtedness, or any act, event or transaction related to or attendant to any thereof, including, without limitation, (i) any and all Environmental Liabilities and Costs arising from or connected with the past, present or future operations of Mortgagor involving any of the Mortgaged Property, or damage to real or personal property or natural resources or harm or injury alleged to have resulted from any Release of Contaminants on, upon or into such property or any contiguous real estate, (ii) any and all costs and/or liabilities incurred in connection with the investigation, removal, cleanup and/or remediation of any Contaminant present or arising out of the operations of any facility of Mortgagor, (iii) any and all costs or liabilities incurred in connection with any Environmental Lien, (iv) any and all costs or liabilities incurred in connection with any other matter affecting any facility pursuant to Environmental Laws, including, without limitation, CERCLA and applicable state property transfer laws, whether, with respect to any of the foregoing, such Indemnitee is a mortgagee pursuant to any leasehold mortgage, a mortgagee-in-possession, the successor in interest to Mortgagor, or the owner, lessee or operator of any facility of Mortgagor by virtue of foreclosure, except, with respect to any of the foregoing referred to in clauses (i), (ii), (iii) and (iv), to the extent incurred following (x) foreclosure by Mortgagee, or (y) Mortgagee having become the successor in interest to Mortgagor, attributable solely to acts of Mortgagee, (v) any and all damages, liabilities and costs actually incurred in connection with the breach of any representation, warranty or covenant made by Mortgagor under Sections 2.02.1(jj), 2.02.1(kk), 2.02.1(ll), 2.02.1(mm), 2.02.1(nn), 2.02.1(oo), 2.02.1(pp), 2.02.1(qq), 2.02.1(rr) 2.09., 2.10., 2.11., 2.12., and/or 2.13. of this Mortgagor, and/or (vi) the use or

CONFIDENTIAL

intended use of the proceeds of the Loan or in connection with any investigation of any potential matter covered hereby (collectively, the "Indemnified Matters"); provided, that Mortgagor shall not have any obligation under this Section 2.12(a) to any Indemnitee with respect to any Indemnified Matter caused by or resulting from the gross negligence or willful misconduct of that Indemnitee, as determined by a court of competent jurisdiction in a final non-appealable judgment or order.

(b) Mortgagee agrees that in the event that any such investigation, litigation or proceeding set forth in subparagraph (a) above is asserted or threatened in writing or instituted against it or any other Indemnitee, or any remedial, removal or response action is requested of it or any of its officers, directors, agents and employees, for which any Indemnitee may desire indemnity or defense hereunder, such Indemnitee shall promptly notify Mortgagor in writing.

(c) Mortgagor, at the request of any Indemnitee, shall have the obligation to defend against such investigation, litigation or proceeding or requested remedial, removal or response action, and Mortgagor, in any event, may participate in the defense thereof with legal counsel of Mortgagor's choice. In the event that such Indemnitee requests Mortgagor to defend against such investigation, litigation or proceeding or requested remedial, removal or response action, Mortgagor shall promptly do so and such Indemnitee shall have the right to have legal counsel of its choice participate in such defense. No action taken by legal counsel chosen by such Indemnitee in defending against any such investigation, litigations or proceeding or requested remedial, removal or response action shall vitiate or in any way impair Mortgagor's obligation any duty hereunder to indemnify and hold harmless such Indemnitee.

(d) Mortgagee shall give Mortgagor reasonable prior notice of any settlement, compromise or similar disposition by Mortgagee of any investigation, litigation or proceeding pursuant to which Mortgagor has an obligation to defend.

(e) The obligations of Mortgagor under this Section 2.12 shall survive the repayment of the Loan and release of the liens created by this Mortgage.

2.13. Mortgagee's Rights With Respect to Contaminants. In the event of any Release or the presence of Contaminants affecting the Mortgaged Property, whether or not the same originates or emanates from the Mortgaged Property or any contiguous real estate (unless such Release or Contaminants results from Mortgagee's or its successor's gross negligence or willful misconduct after Mortgagee acquires title to the Mortgaged Property either through the foreclosure of this Mortgage or a deed in lieu thereof), and/or if Mortgagor shall fail to comply with any of the requirements of any Environmental Law, Mortgagor shall cause such work to be performed at the Mortgaged Property and/or take any and all other actions as Mortgagee shall deem necessary or advisable in order to remedy such Release or remove such Contaminants or cure said failure of compliance.

2.14. Further Assurances. At any time and from time to time, upon Mortgagee's request, Mortgagor shall make, execute and deliver, or cause to be made, executed and delivered, to Mortgagee and where appropriate shall cause to be recorded or filed, and from time to time thereafter to be re-recorded and refiled at such time and in such offices and places as shall be deemed desirable by Mortgagee, any and all such further mortgages, instruments of further assurance, certificates and other documents as Mortgagee may reasonably consider necessary or desirable in order to effectuate, complete or perfect, or to

CONFIDENTIAL

continue and preserve the obligations of Mortgagor under the Note, this Mortgage and/or other Loan Documents, and the lien of this Mortgage as a lien upon all of the Mortgaged Property, whether now owned or hereafter acquired by Mortgagor, subject only to the Permitted Encumbrances, and unto all and every person or persons deriving any estate, right, title or interest under this Mortgage or the power of sale herein contained. Upon any failure by Mortgagor to do so after request by Mortgagee, Mortgagee may make, execute, record, file, re-record or refile any and all such mortgages, instruments, certificates and documents for and in the name of Mortgagor, and Mortgagor hereby irrevocably appoints Mortgagee the agent and attorney-in-fact of Mortgagor to do so, which appointment will terminate upon the satisfaction of record of this Mortgage.

2.15. Security Agreement and Financing Statements. Mortgagor (as Debtor) hereby grants to Mortgagee (as Creditor and Secured Party) a security interest in all of Mortgagor's right, title and interest in and to all fixtures, machinery, appliances, Equipment, Artwork, furniture and personal property of every nature whatsoever constituting part of the Mortgaged Property, subject only to the Permitted Encumbrances.

Mortgagor shall execute any and all such documents, including without limitation Financing Statements pursuant to the Uniform Commercial Code of the state in which the Mortgaged Property is located, as Mortgagee may reasonably request, to preserve and maintain the priority of the lien created hereby on property which may be deemed personal property or fixtures, and shall pay to Mortgagee on demand any expenses reasonably incurred by Mortgagee in connection with the preparation, execution and filing of any such documents. Mortgagor hereby authorizes and empowers Mortgagee to execute and file, on Mortgagor's behalf, all Financing Statements and refilings and continuations thereof as Mortgagee deems necessary or advisable to create, preserve and protect said lien. When and if Mortgagor and Mortgagee shall respectively become the Debtor and Secured Party in any Uniform Commercial Code Financing Statement affecting the Mortgaged Property, this Mortgage shall be deemed a security agreement as defined in said Uniform Commercial Code and the remedies for any violation of the covenants, terms and conditions of the agreements herein contained shall be (i) as prescribed herein, or (ii) as set forth by the laws of the State in which the Mortgaged Property is located, or (iii) as to such part of the security which is also reflected in said Financing Statement as set forth by the specific statutory consequences now or hereafter enacted and specified in the Uniform Commercial Code, all at Mortgagee's sole election.

Mortgagor and Mortgagee agree that the filing of a Financing Statement in the records normally having to do with personal property shall never be construed as in anyway derogating from or impairing the express declaration and intention of the parties hereto, hereinabove stated, that everything used in connection with the production of income from the Mortgaged Property and/or adapted for use therein and/or which is described or reflected in this Mortgage is, and at all times and for all purposes and in all proceedings both legal or equitable, shall be regarded as part of the real estate encumbered by this Mortgage irrespective of whether (i) any such item is physically attached to the Improvements, (ii) serial numbers are used for the better identification of certain equipment items capable of being thus identified in a recital contained herein or in any list filed with Mortgagee, or (iii) any such item is referred to or reflected in any such Financing Statement so filed at any time. Similarly, the mention in any such Financing Statement of (1) rights in or to the proceeds of any fire and/or hazard insurance policy, or (2) any award in eminent domain proceedings for a taking or for loss of value, or (3) Mortgagor's interest as lessor in any present or future lease or rights to income growing out of the use and/or occupancy of the Mortgaged Property mortgaged hereby, whether pursuant to such lease or otherwise, shall never be construed as in anywise altering any of the rights of Mortgagee as determined by this instrument or impugning the priority of Mortgagee's lien granted hereby or by any other recorded document, but such mention in the Financing Statement is declared to be for the protection of Mortgagee in the event any court or judge shall at any time hold with respect to

CONFIDENTIAL

clauses (1), (2) and (3) of this Section 2.15 that notice of Mortgagee's priority of interest to be effective against a particular class of persons, including but not limited to the federal government and any subdivisions or entity of the federal government, must be filed in the Uniform Commercial Code records.

2.16. Assignment of Rents. The assignment contained under the Section of this Mortgage entitled "THE MORTGAGED PROPERTY", in paragraph (E) above shall be fully operative without any further action on the part of either party and specifically Mortgagee shall be entitled, at its option, upon the occurrence of an Event of Default hereunder, to all rents, income and other benefits from the Mortgaged Property described in paragraphs (A), (B), (C) and (D) above whether or not Mortgagee takes possession of such Mortgaged Property. Mortgagor hereby further grants to Mortgagee the right, at Mortgagee's option, upon the occurrence of an Event of Default, (i) to enter upon and take possession of the Mortgaged Property for the purpose of collecting the said rents, income and other benefits, (ii) to dispossess (subject to the terms of any applicable lease) by the usual summary proceedings any tenant defaulting in the payment thereof to Mortgagee, (iii) to let the Mortgaged Property or any part thereof, and (iv) to apply said rents, income and other benefits, after payment of all necessary charges and expenses, on account of the Indebtedness and other sums secured hereby. Such assignment and grant shall continue in effect until the Indebtedness and other sums secured hereby are fully paid, the execution of this Mortgage constituting and evidencing the irrevocable consent of Mortgagor to the entry upon and taking possession of the Mortgaged Property by Mortgagee pursuant to such grant, whether or not foreclosure has been instituted. Neither the exercise of any rights under this Section 2.16 by Mortgagee nor the application of any such rents, income or other benefits to the Indebtedness and other sums secured hereby, shall cure or waive any default or notice of default hereunder or invalidate any act done pursuant hereto or to any such notice, but shall be cumulative of all other rights and remedies.

2.17. Restrictive Covenants. In advancing the principal sum secured by this Mortgage, Mortgagee has relied upon, inter alia, the integrity, experience and general reputation of Mortgagor in operating the Mortgaged Property for its intended purpose. Mortgagor acknowledges that the value of Mortgagee's security is directly related to the manner in which the Mortgaged Property will be operated. Mortgagee, prior to advancing the principal sum secured hereby and agreeing to the terms upon which this Mortgage is made, considered Mortgagor's net worth, experience, integrity and general reputation. Accordingly, Mortgagor covenants and agrees that it shall not, without the prior written consent of Mortgagee, which consent may be withheld or denied in Mortgagee's sole and arbitrary discretion:

(a) enter into any Membership Agreement for all or any portion of the Premises other than Membership Agreements that (i) are prepared upon a form which has previously been approved in writing by Mortgagor and Mortgagee; (ii) provide that the Membership Deposits payable thereunder shall be non-refundable to the respective Club members except (A) upon the earlier to occur of (y) thirty (30) years from the date of the admission of the respective member to the Club *and* such member's resignation from the Club or (z) within thirty (30) days after the resignation of such member *and* the subsequent reissuance of the Club membership to a new Club member, or (B) in the event that the use of the Club shall revert to a private single family residence; and (iii) require a minimum Membership Deposit of $50,000; or modify any Membership Agreement unless such Membership Agreement as modified meets the conditions set forth in (i), (ii) and (iii) above;

(b) voluntarily cancel, terminate or accept a resignation from a Club member under any Membership Agreement and in connection therewith, refund the Membership Deposit;

CONFIDENTIAL

(c) fail to maintain a fully operational Club (including, without limitation, the necessary staffing to operate a private social club of up to five hundred (500) members, restaurant facilities and a transient rental business with respect to the residential quarters) or otherwise cease operations at or vacate or abandon the Club at any time (other than during the months of May through September, during which period the Club shall not be required to be open to its members but shall remain well-maintained;

(d) take or fail to take any action that may result in the loss of any occupational licenses and Permits required for the operation of the Club;

(e) take or fail to take any action that may cause the Town of Palm Beach to revoke the zoning for the Club;

(f) take or fail to take any action that may reduce the number of memberships permitted in the Club;

(g) change the location of Mortgagor's principal office or change the location where it keeps its books and records, except upon thirty (30) days prior written notice to Mortgagee;

(h) execute any conditional bill of sale, chattel mortgage or other security instrument covering any of the Equipment or purchase any Equipment in such a manner such that ownership of the same will not vest unconditionally in Mortgagor, free from encumbrances on delivery to the Improvements or create, assume, guaranty, permit to exist or otherwise become directly or indirectly liable for any indebtedness;

(i) further assign any Membership Agreement or the annual dues payable thereunder or any of the rights assigned to Mortgagee simultaneously herewith;

(j) further assign any lease or other occupancy arrangement or the rents derived therefrom or any of the rights assigned to Mortgagee simultaneously herewith;

(k) sell, convey, transfer, or assign (by operation of law or otherwise) or mortgage, further encumber, refinance, alienate, hypothecate or grant a security interest in (whether superior or inferior to the lien of this Mortgage), or grant any other interest whatsoever in, all or any part of the Mortgaged Property without the prior written consent of Mortgagee having been obtained in each instance to the proposed sale, conveyance, assignment transfer, mortgage or pledge, which consent may be withheld or denied in Mortgagee's sole and arbitrary discretion. Any such sale, conveyance, assignment, transfer, pledge, mortgage, refinancing, encumbrance, alienation, hypothecation or grant made without Mortgagee's prior written consent shall be void. Without limiting the foregoing, in the event that without the prior written consent of Mortgagee, Mortgagor shall sell, convey, transfer, assign, mortgage, pledge, further encumber, refinance, alienate, hypothecate or grant a security interest in the Mortgaged Property or any part thereof, or any interest therein (legal or beneficial) or shall be divested of title or any interest therein in any manner or way, whether voluntary or involuntary, by operation of law or otherwise, the entire balance of the Indebtedness shall be accelerated and become immediately due and payable, at the option of Mortgagee (exercisable at any time and in the sole judgment and discretion of Mortgagee). In the event Mortgagee elects to so accelerate the entire balance of the Indebtedness, Mortgagee shall have no obligation to allege or show any impairment of its security and may pursue any legal or equitable remedies for default in such payment without such allegation or showing. Mortgagor shall not, without the prior written consent of Mortgagee in each instance, which consent may be withheld or denied in Mortgagee's sole and arbitrary discretion, further assign the rents from the Mortgaged Property, and any such assignment without the prior express written consent of Mortgagee shall be null and void. Without in any way limiting the generality of the foregoing, Mortgagor agrees that in the event the

CONFIDENTIAL

ownership of the Mortgaged Property or any part thereof becomes vested in a person other than Mortgagor, Mortgagee may, without notice to Mortgagor, deal in any way with such successor or successors in interest with reference to this Mortgage and the Note and other sums hereby secured without in any way vitiating or discharging Mortgagor's liability hereunder or upon the Note and other sums hereby secured. No sale of the Mortgaged Property and no forbearance to any person with respect to this Mortgage and no extension to any person of the time for payment of the Note and other sums hereby secured given by Mortgagee shall operate to release, discharge, modify, change or affect the original liability of Mortgagor either in whole or in part; notwithstanding the foregoing, Mortgagor may, without the prior written consent of Mortgagee, transfer the Mortgaged Property to a Permitted Transferee provided that (i) Mortgagor furnishes Mortgagee with written notice of any proposed transfer at least ten (10) days prior thereto, (ii) the proposed transferee executes and delivers to Mortgagee an Assignment of Membership Agreements, Deposits and Dues in the form of the Assignment, a Hazardous Substances Indemnity Agreement in the form of the Hazardous Substances Indemnity Agreement dated of even date herewith made by Mortgagor and Guarantor in favor of Mortgagee, and an Indemnification Agreement in the form of the Indemnification Agreement dated of even date herewith made by Guarantor in favor of Mortgagee and (iii) Mortgagor shall, within five (5) days of any such transfer, provide to Mortgagee complete copies of all documents and instruments executed in connection with any such transfer, including, without limitation, all of the documents described in (ii) above;

(l) suffer or permit a voluntary sale, pledge or other transfer of any Controlling Interest in the Mortgagor without the prior written consent of Mortgagee which consent may be withheld or denied in Mortgagee's sole and arbitrary discretion;

(m) amend, alter or consent to or suffer any amendment, alteration, modification or revocation of the Articles of Incorporation or Bylaws of Mortgagor, or the application for Registration of Fictitious Name of Mortgagor or any other material agreement to which Mortgagor is a party or by which its assets are bound (or waive a material right thereunder) in any manner;

(n) suffer or permit the Mortgaged Property or any portion thereof, to be used by the public in such a manner as might reasonably tend to impair Mortgagor's title to the Mortgaged Property or any portion thereof, or in such a manner as might reasonably make possible a claim or claims of adverse usage or adverse possession by the public, as such, or of implied dedication of the Mortgaged Property or any portion thereof; or use or permit the use of the Mortgaged Property or any portion thereof for any purpose, which in the reasonable opinion of Mortgagee would adversely affect the value or character of the Mortgaged Property or any part thereof;

(o) perform or cause to be performed any construction upon the Mortgaged Property, including transportation of major construction materials, by a general contractor or subcontractor not having collective bargaining agreements with unions affiliated with the AFL-CIO Building Trades Department; thirty (30) days prior to the commencement of any construction upon the Mortgaged Property, Mortgagor shall provide Mortgagee with a list of the names of the general contractor and subcontractors for verification by Mortgagee as to their current status with the Building Trades Department;

(p) employ contractors or subcontractors not having collective bargaining agreements with unions affiliated with the AFL-CIO Building Trades Department to perform the following work upon the Mortgaged Property: (i) expansion, (ii) replacement of the roof, (iii) major repair or replacement of the HVAC system, (iv) elevator repair and maintenance and (v) repair, replacement or installation of electric panel boards and entry service cables;

CONFIDENTIAL

(q) use Mortgagee's name or the name of any person, firm or corporation controlling, controlled by or under common control with Mortgagee in connection with any of Mortgagor's activities, except as such use may be required by applicable law or regulation of any governmental body.

2.18. Intentionally Omitted.

2.19. Expenses. Mortgagor shall pay all costs and expenses in connection with the Loan and the preparation, execution, delivery, performance and enforcement of this Mortgage, including, but not limited to, all loan application fees, the reasonable fees and disbursements of the counsel for Mortgagee (including, but not limited to, (a) the reasonable fees of Mortgagee's counsel in connection with the preparation of this Mortgage, the Note, all other Loan Documents, the closing of the Loan, and (b) the enforcement and protection of the rights of Mortgagee during the existence of this Mortgage, regardless of whether any specific legal proceedings shall be commenced) and Mortgagor, all documentary, intangible and other recording taxes and fees, all recording costs and expenses, surveys, appraisals, photocopying and long distance telephone charges of Mortgagee's counsel, Mortgagee title insurance policies and any endorsements thereto, fees for inspections and title examination; and Mortgagor shall indemnify and hold harmless Mortgagee from and against any and all actual costs, losses, liability and expense arising in connection with any of the foregoing. Mortgagor hereby authorizes Mortgagee to utilize the proceeds of the Loan to satisfy any and all of the costs and expenses referred to herein if not paid by Mortgagor when due and no further direction or authorization from Mortgagor shall be necessary to warrant disbursements in payment of the foregoing, and all such disbursements shall be secured by this Mortgage as fully as if made to Mortgagor, and Mortgagor shall indemnify and hold harmless Mortgagee from and against, and reimburse it for, all claims, demands, liabilities, losses, damages, judgments, penalties, costs, and expenses (including, without limitation, attorneys' fees) which may be actually imposed upon, asserted against, or incurred or paid by it by reason of, on account of or in connection with any bodily injury or death or property damage occurring in or upon the Mortgaged Property subsequent to the date of this Mortgage through any cause whatsoever (unless directly caused by Mortgagee's acts subsequent to Mortgagee's acquisition of title to the Mortgaged Property through the foreclosure of this Mortgage or a deed in lieu thereof) or asserted against it on account of any act performed or omitted to be performed hereunder or on account of any transaction arising out of or in any way connected with the Mortgaged Property, or with this Mortgage or any of the Indebtedness. Without limiting the foregoing, promptly upon demand by Mortgagee, Mortgagor shall pay all costs and expenses heretofore or hereafter incurred by Mortgagee for legal, architectural or engineering services rendered to or for the benefit of Mortgagee in connection with the making of the initial or any subsequent loan to Mortgagor, secured in whole or in part by this Mortgage, the preservation of any security for any such loan or the enforcement of any Mortgagee's rights or remedies hereunder. To the extent not prohibited under applicable law, Mortgagor shall pay all reasonable costs and expenses and reimburse the Mortgagee for any and all reasonable expenditures of every character incurred or expended from time to time regardless of whether or not an Event of Default shall have occurred in connection with the Mortgagee's evaluating, monitoring, administering and protecting the Mortgaged Property or any collateral now or hereafter securing the payment of the Indebtedness, and creating, perfecting and realizing upon the Mortgagee's security interest therein and liens thereon and all reasonable costs and expenses relating to the Mortgagee's exercising any of its rights and remedies hereunder or under any of the other Loan Documents or at law, including, without limitation, all appraisal fees, consulting fees, filing fees, taxes, brokerage fees and commissions, Uniform Commercial Code search fees, fees incident to other title searches and reports, escrow fees, attorneys' fees, legal expenses, court costs, auctioneer fees and other fees incurred in connection with liquidation and all other professional fees. Any amounts to be paid hereunder by the Mortgagor to the Mortgagee shall be a demand obligation owing by the Mortgagor to the Mortgagee and shall bear interest from the date of expenditure until paid at the Post-Default Rate.

CONFIDENTIAL

2.20. Mortgagee's Performance of Defaults. If Mortgagor defaults beyond the expiration of any applicable grace period in the payment of any tax, assessment, encumbrance or other imposition, in its obligation to furnish insurance hereunder, or in the performance or observance of any other covenant, condition or term in this Mortgage, the Note or in any other Loan Document, Mortgagee may, to preserve its interest in the Mortgaged Property, perform or observe the same, and all payments made (whether such payments are regular or accelerated payments) and costs and expenses incurred or paid by Mortgagee in connection therewith shall become due and payable immediately. The amounts so incurred or paid by Mortgagee, together with interest thereon at the Post-Default Rate from the date incurred until paid by Mortgagor, shall be added to the Indebtedness and secured by the lien of this Mortgage. Mortgagee is hereby empowered to enter and to authorize others to enter upon the Mortgaged Property or any part thereof for the purpose of performing or observing any such defaulted covenant, condition or term, without thereby becoming liable to Mortgagor or any person in possession holding under Mortgagor.

2.21. Books and Records.

(a) Mortgagor shall keep and maintain at all times complete, true and accurate books of account and records reflecting the results of the operation of the Mortgaged Property. Mortgagor shall furnish, or cause to be furnished, to Mortgagee (i) within ninety (90) days after the end of each fiscal year of Mortgagor, an annual report and financial statement of Mortgagor, prepared, compiled and certified by an independent certified public accountant of recognized standing and satisfactory to Mortgagee in accordance with sound accounting methods, standards and practices consistently applied, which annual report shall include the operations of the Mortgaged Property (in both narrative and financial statement format) together with, without limitation, balance sheet, income statement, and cash flow statement, all in form and content reasonably satisfactory to Mortgagee, (ii) within ninety (90) days after the end of each fiscal year of Guarantor (which fiscal year shall end on September 30), a current statement of financial condition of Guarantor, prepared and compiled by an independent certified public accountant of recognized standing and satisfactory to Mortgagee in accordance with sound accounting standards, methods and practices consistently applied and certified by Guarantor, (iii) within fifteen (15) days after the end of each calendar month throughout the term of the Loan, a statement prepared and certified by Mortgagor, setting forth the number of members in the Club, the full names and addresses of the members, the amount of the Membership Deposit paid by each member, the annual dues payable by each member and the aggregate Membership Deposits paid to Mortgagor or its Affiliates in the immediately preceding calendar month, together with certified copies of all Membership Agreements executed during the immediately preceding calendar month, (iv) within fifteen (15) days after the end of each calendar month throughout the term of the Loan, monthly operating statements respecting the Mortgaged Property, in form and substance acceptable to Mortgagee, certified to by the chief financial officer of Mortgagor or the equivalent thereof, (v) forthwith after the issuance thereof, any other financial statement of Mortgagor or Guarantor prepared by an accountant or furnished directly or indirectly to any other creditor, (vi) within fifteen (15) days after the same is filed, a copy of all tax returns of Mortgagor and Guarantor, (vii) reports in form and content satisfactory to Mortgagee with respect to operating reports as requested from time to time by Mortgagor and (viii) any other financial information reasonably requested by Mortgagee. Mortgagee and its designated agents shall have the right to inspect Mortgagor's books and records with respect to the Mortgaged Property at all reasonable times. To the extent reasonably practicable and in accordance with Mortgagee's customary practices and controls, Mortgagee shall keep the financial information furnished by Mortgagor confidential, subject however, to the provisions of Section 25 of the Note.

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CONFIDENTIAL

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3717a

(b) In the event Mortgagor fails to comply with the requirements set forth in this Section 2.21, Mortgagee shall have the right upon one Business Day's notice to have Mortgagor's books and records audited by an independent certified public accountant selected by Mortgagee, and the cost of such audit shall be the obligation of Mortgagor which shall be paid on the demand of Mortgagee failing which the same shall bear interest at the Post-Default Rate from the date of payment and shall be enforceable by all of the remedies set forth in this Mortgage or as otherwise provided by law.

(c) The books, records, statements and other financial information required to be delivered to Mortgagee under this Section 2.21 are in addition to those required to be delivered to Mortgagee under the Note. Nothing contained herein shall be deemed to limit or otherwise modify Mortgagor's obligations under the Note to furnish to Mortgagee any books, records, statements, data, audits or other financial information relating to the Mortgaged Property.

(d) Upon each failure by Mortgagor to deliver each financial statement, certificate, document, statement or summary required under this Section 2.21 on or prior to the date upon which such is required to be delivered hereunder, Mortgagor shall pay to Mortgagee, in addition to all other payments due hereunder and under the Note, $1,000.00 as liquidated damages on account of such default and not as a penalty.

2.22. Estoppel Affidavits. At any time or times, within ten (10) days after written request from Mortgagee therefor, Mortgagor shall furnish a certificate, duly executed and in form satisfactory to Mortgagee, setting forth the unpaid principal of and interest on the Note, and any other unpaid sums secured hereby, and whether or not any offsets, defenses or counterclaims exist against such principal and interest or other sums.

2.23. Compliance with Laws. Mortgagor shall promptly and faithfully comply with, conform to and obey all present and future laws, ordinances, rules, regulations and requirements of every duly constituted governmental authority or agency and of the Board of Fire Underwriters having jurisdiction, or similar body exercising similar functions, which may be applicable to it or to the Mortgaged Property, or any part thereof, or to the use or manner of use, occupancy, possession, obligation, maintenance, alteration, repair or reconstruction of the Mortgaged Property, or any part thereof, whether or not such law, ordinance, rule, order, regulation or requirement shall necessitate structural changes or improvements or interfere with the use or enjoyment of the Mortgaged Property.

2.24. Building Codes. Mortgagor shall exercise reasonable care to prevent a violation, by act or omission, of the applicable building codes and other applicable regulations concerning the Mortgaged Property and, in the event that such a violation shall occur, Mortgagor shall use its best efforts to correct same as promptly as practicable.

2.25. Management of the Mortgaged Property. The Mortgaged Property shall be managed at all times throughout the term of the Loan by Mortgagor or by any other entity which is Controlled by Guarantor (the "Approved Manager") or by another management firm approved in writing by Mortgagee in its sole and arbitrary discretion under an agreement in form and content satisfactory to Mortgagee providing for management fees satisfactory to Mortgagee in its sole and arbitrary discretion. Copies of such agreements shall be furnished to Mortgagee for its approval prior to the execution thereof. The approved management agent or Mortgagor shall submit to Mortgagee such information as Mortgagee may request from time to time. All agreements between Mortgagor and the management agent (i) shall be terminable upon not more than thirty (30) days notice and (ii) shall expressly provide that such agreement is subject and subordinate in all respects to this Mortgage (and the lien thereof) and the Note. No change in any management agent or modification in any material respect of any approved management agreement shall be made without notice to and the prior written approval of Mortgagee. No management agent may be appointed (other than an

CONFIDENTIAL

Approved Manager) nor may any approved management agent or agreement with an approved management agent be modified in any material respect or terminated without notice to and the prior written approval of Mortgagee in its sole and arbitrary discretion.

2.26. Intentionally Omitted.

2.27. Appraisals. At Mortgagee's option, Mortgagee shall have the right to procure, but no more frequently than once every twelve (12) months during the term of the Loan, an appraisal of the Mortgaged Property from an appraiser selected by Mortgagee. The cost of any such appraisal shall be borne by Mortgagor. Upon Mortgagor's request, Mortgagee shall provide a copy of any such appraisal to Mortgagor.

2.28. Indemnity. Mortgagor hereby represents and warrants to Mortgagee that it has dealt with no broker, finder or like agent in connection with the Loan and hereby indemnifies and holds harmless Mortgagee from and against any expense, cost or liability (including, without limitation, attorneys' fees and appellate attorneys' fees, paralegal fees, court costs through all appellate levels and disbursements) arising from or incurred in connection with any claim by any broker, finder or like agent who shall claim to have dealt with Mortgagor. Without limiting the foregoing and except for Fugazy International, Mortgagee acknowledges that as of the date of this Mortgage, Mortgagee is not aware of any broker claiming a commission arising out of or in connection with the Loan as a result of having dealt with Mortgagee in connection with the Loan.

2.29. Litigation. At all times throughout the term of the Loan, Mortgagor shall promptly furnish to Mortgagee written notice of, and copies of any documents requested by Mortgagee relating to, any actions, suits or proceedings pending, or to the knowledge of Mortgagor threatened, against or affecting Mortgagor or all or any portion of the Mortgaged Property.

2.30. ERISA Compliance. Mortgagor hereby represents, covenants and warrants that, as of the date hereof and at all times hereafter during the term of this Mortgage:

(a) None of its right or title to, nor any of its interest in, the Mortgaged Property constitutes plan assets (as defined in Department of Labor Regulations 29 CFR § 2510.3-101, including the provisions of sub-paragraph (k) thereof) of any: (i) "employee benefit plan," as such term is defined in section 3(3) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), that is subject to Part 4 of Title I of ERISA ("ERISA Plan"); or (ii) any "plan" that is described in section 4975(e)(1) of the Code ("Tax-Favored Plan");

(b) it shall not cause or permit: (i) any right or title to, or any interest in, the Mortgaged Property to become plan assets of any ERISA Plan or any Tax-Favored Plan; and (ii) the satisfaction of any of the Indebtedness by any ERISA Plan or any Tax-Favored Plan (or any assets thereof);

(c) without limiting the generality of Sections 2.17(i) and 2.17(j) hereof, it will not sell, convey, or transfer its interest in the Mortgaged Property or any part thereof to a person or entity which could not or will not satisfy the undertakings of this Section 2.30 regardless of whether any of the above arise by operation of law or otherwise;

(d) notwithstanding anything contained in this Mortgage to the contrary, it shall not enter into any direct lease with any tenant which is (i) an ERISA Plan or (ii) a Tax-Favored Plan;

(e) it shall, upon the request of Mortgagee and at Mortgagor's sole cost and expense, cooperate with Mortgagee in seeking any opinions, rulings or exemptions which

CONFIDENTIAL

TR 000000988

3719a

Mortgagee, in its discretion, may deem necessary or appropriate for purposes of avoiding liability for prohibited transactions described in section 406 of ERISA or section 4975(c) of the Code;

(f) If Mortgagee requests verification that Mortgagor is in compliance with the requirements of this Section 2.30, Mortgagor shall furnish such verification to Mortgagee in writing within thirty (30) days following the date of such request and/or shall advise in what respect or manner it is not in compliance, and if at any time Mortgagor becomes aware of a failure to comply with its obligations under this Section 2.30, it shall promptly advise Mortgagee in writing, with all relevant details;

(g) notwithstanding any other provision of this Mortgage, in the event that Mortgagor shall at any time sell, convey, transfer or lease or attempt to sell, convey, transfer or lease the Mortgaged Property (or any part thereof) in violation of this Section 2.30, then Mortgagee shall, in addition to all rights and remedies it may have at law, in equity and/or under this Mortgage, be entitled to a decree or order restraining and enjoining such sale, conveyance or transfer and Mortgagor shall not plead in defense thereof that there would be an adequate remedy at law (it being hereby expressly acknowledged and agreed that damages at law would be an inadequate remedy for breach or threatened breach of the provisions of this Section 2.30); and

(h) it will indemnify Mortgagee against, and hold Mortgagee harmless from, any damages, liabilities, judgments, losses and/or costs (including, without limitation, reasonable attorneys' fees) incurred as a result of Mortgagor's breach of any of the representations, warranties or covenants contained in this Section 2.30.

2.31. Key Man Life Insurance Policy. Throughout the term of the Loan, Mortgagor shall maintain or shall cause Guarantor to maintain a key man life insurance policy having a face value of $10,000,000, which life insurance policy shall be collaterally assigned to Mortgagee pursuant to the Assignment of Life Insurance Policy as Collateral of even date herewith executed by Guarantor in favor of Mortgagee (the "Life Insurance Assignment"). The face value of such key man life insurance policy may be reduced by $1,000,000 intervals as and when the Principal Sum shall be so reduced predicated upon actual repayments of the Loan.

ARTICLE THREE

DEFAULTS

3.01. Event of Default: The term "Event of Default," wherever used in this Mortgage, shall mean the occurrence of any one or more of the following events:

(a) failure by Mortgagor to pay (i) any payment of interest or principal when due under the Note and such default shall continue for a period of five (5) days; (ii) the outstanding Principal Sum of the Note, together with interest accrued thereon, at maturity (without the benefit of any grace period); (iii) any deposits for taxes and assessments or insurance premiums when due hereunder and such default shall continue for a period of five (5) days; or (iv) any payment of any other sums to be paid when due by Mortgagor hereunder, under the Note or under any of the other Loan Documents and such default shall continue for a period of five (5) days;

(b) if there shall occur a default in the due observance or performance of any covenant or agreement made by Mortgagor hereunder, under the Note or any of the other Loan Documents (other than payment of money) and such default shall not be curable in which case no grace period shall be applicable, or if curable shall continue for a period of ten (10) days after written notice thereof from Mortgagee to Mortgagor; provided, however,

CONFIDENTIAL

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3720a

if such default is curable, but requires work to be performed, acts to be done or conditions to be remedied which is by their nature cannot reasonably be performed, done or remedied, as the case may be, within such ten (10) day period it shall not be an Event of Default hereunder if Mortgagor shall commence a cure of such default within such ten (10) day period and shall thereafter diligently and continuously process the same to completion; provided further, however, in no event shall such cure period exceed one hundred twenty (120) days);

(c) if any representation or warranty made by Mortgagor hereunder, or by Guarantor under any of the Guaranties or in any statement, instrument or certificate delivered by Mortgagor or Guarantor to Mortgagee pursuant to the provisions hereof, or under the Note or any other of the other Loan Documents shall be determined by Mortgagee to have been false or misleading in any material respect;

(d) If Mortgagor or Guarantor shall file, or there shall be filed against such party, a petition or answer seeking any reorganization, arrangement composition, readjustment, liquidation, dissolution or similar relief under the bankruptcy laws of the United States, under any other applicable Federal, state or other statute or law (hereinafter collectively or individually referred to as "Insolvency Proceedings"), or a receiver, trustee or liquidator shall have been appointed with respect to any such party, for all or any substantial part of such party's property. Notwithstanding, the provisions of this subsection shall not be applicable to any involuntary Insolvency Proceedings which shall be dismissed within sixty (60) days of the later of (i) its commencement, or (ii) service of such process or notice of upon such party, as is required by law to obtain personal jurisdiction over it;

(e) if Mortgagor commits, or omits to do, any act, or any event occurs as a result of which any obligation of Mortgagor to Mortgagee is declared immediately due and payable by the holder thereof;

(f) the entry by any court of last resort of a decision that an undertaking by Mortgagor as herein provided to pay taxes, assessments, levies, liabilities, obligations and encumbrances is legally inoperative or cannot be enforced, or in the event of the passage of any law changing in any way or respect the laws now in force for the taxation of mortgages or debts secured thereby for any purpose, or the manner of collection of any such taxes, so as to affect adversely this Mortgage or the Indebtedness or other sums secured hereby, provided, however, that if, in the opinion of Mortgagee's counsel, it shall be lawful for Mortgagor to pay such taxes, assessments or charges, or to reimburse Mortgagee therefor, then this subsection (g) shall not constitute an Event of Default if Mortgagor pays such taxes, assessments or charges or reimburses Mortgagee therefor within fifteen (15) days after written request by Mortgagee;

(g) If Mortgagor or Guarantor voluntarily suspends the transaction of business, or there is an attachment, execution or other judicial seizure of any material portion of the assets of Mortgagor or Guarantors and such seizure is not discharged within thirty (30) days;

(h) if at any time this Mortgage does not constitute a valid first lien for the Indebtedness on all of the Mortgaged Property, subject only to the Permitted Encumbrances, and such default is not cured within fifteen (15) days after notice from Mortgagee;

(i) if Mortgagor or Guarantor shall in Mortgagee's reasonable judgment, become insolvent or if in Mortgagee's reasonable judgment there shall have occurred a material adverse change in the assets, liabilities or financial position of Mortgagor or Guarantor;

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CONFIDENTIAL

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(j) If Mortgagor shall voluntarily dissolve or involuntarily dissolve by operation of law and not be reconstituted within thirty (30) days thereafter or shall cease to exist in good standing in the jurisdiction under which it is organized existing and/or operating;

(k) If Mortgagor shall sell, transfer, assign, convey, pledge, mortgage, further encumber, refinance, alienate, hypothecate, lease or grant a security interest in all or any part of the Mortgaged Property, any Membership Agreement (or the Membership Deposits and dues payable thereunder) or any lease (or any rents payable under any lease) or if there shall occur any other default or violation under Sections 2.17 or 2.25 hereof, without the prior written approval of Mortgagee in each instance;

(l) If any final, unappealable and uninsured money judgment or judgments in the aggregate sum of $100,000 or more shall be rendered against Mortgagor or in the aggregate sum of $2,000,000 or more shall be rendered against Guarantor, or any writ or warrant of attachment or similar process shall be answered or filed against Mortgagor or Guarantor or any of their respective assets and such judgment, writ, warrant or process shall remain unsatisfied, unsettled, unvacated, unbonded or unstayed for a period of thirty (30) days or in any event later than five days prior to the date of any proposed sale thereunder;

(m) if there shall be filed of record any notice limiting the maximum principal amount that may be advanced under this Mortgage pursuant to Section 697.04(1)(b), Florida Statutes, or any successor statute, unless Mortgagee shall have consented to same, in writing;

(n) if there shall occur and be continuing (beyond any applicable grace or curative period) a default under the Note or any of the other Loan Documents; or

(o) a default under, or any attempted withdrawal, cancellation or disclaimer of liability under, any guaranty or indemnity given by Guarantor to Mortgagee (including, without limitation, the Guaranties) or under any agreement giving security for any such guaranty;

(p) failure to keep the Life Insurance Assignment in full force and effect;

(q) if either of (i) the occupational license for the Club or (ii) the zoning for the Mortgaged Property permitting the operation of the Club shall be revoked;

(r) a default under Section 2.17(c) hereof; or

(s) if the use of the Club shall revert to a private single family residence.

ARTICLE FOUR

REMEDIES

4.01. Acceleration of Maturity. If an Event of Default shall have occurred, Mortgagee may declare the outstanding principal amount of the Note and the interest accrued thereon, and all other Indebtedness secured hereby, to be due and payable immediately, and upon such declaration such principal and interest and other sums shall immediately become and be due and payable without demand or notice.

4.02. Mortgagee's Power of Enforcement. If an Event of Default shall have occurred, Mortgagee may, either with or without entry or taking possession as hereinabove provided or otherwise, and without regard to whether or not the Indebtedness and other sums

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secured hereby shall be due and without prejudice to the right of Mortgagee thereafter to bring an action of foreclosure or any other action for any default existing at the time such earlier action was commenced, proceed by any appropriate action or proceeding: (a) to enforce payment of the Note or the performance of any term hereof or any other right; (b) to foreclose this Mortgage and to sell, as an entirety or in separate lots or parcels, the Mortgaged Property under the power of sale hereinafter provided or the judgment or decree of a court or courts of competent jurisdiction; and (c) to cumulatively pursue any other remedy now or hereafter available to it under any Loan Document, in equity, at law, by virtue of statute or otherwise. Mortgagee shall take action either by such proceedings or by the exercise of its powers with respect to entry or taking possession, or both, as Mortgagee may determine.

4.03. Mortgagee's Right to Enter and Take Possession, Operate and Apply Income.

(a) If an Event of Default shall have occurred, (i) Mortgagor upon demand of Mortgagee, shall forthwith surrender to Mortgagee the actual possession of, and if and to the extent permitted by law, Mortgagee itself, or by such officers or agents as it may appoint, may enter and take possession of all the Mortgaged Property and may exclude Mortgagor and its agents and employees wholly therefrom and have joint access with Mortgagor to the books, papers and accounts of Mortgagor; and (ii) Mortgagor will pay monthly in advance to Mortgagee, on Mortgagee's entry into possession, or to any receiver appointed to collect the rents, income and other benefits of the Mortgaged Property, the fair and reasonable rental value for the use and occupation of such part of the Mortgaged Property as may be in possession of Mortgagor, and upon default in any such payment will vacate and surrender possession of such part of the Mortgaged Property to Mortgagee or to such receiver and, in default thereof, Mortgagor may be evicted by summary proceedings or otherwise.

(b) If Mortgagor shall for any reason fail to surrender or deliver the Mortgaged Property or any part thereof after Mortgagee's demand, Mortgagee may seek to obtain a judgment or decree conferring on Mortgagee the right to immediate possession or requiring Mortgagor to deliver immediate possession of all or any part of the Mortgaged Property to Mortgagee. Mortgagor shall pay to Mortgagee, upon demand, all costs and expenses of obtaining such judgment or decree and reasonable compensation to Mortgagee, its attorneys and agents, and all such costs, expenses and compensation shall, until paid, be secured by the lien of this Mortgage.

(c) Upon every such entering upon or taking of possession, Mortgagee may hold, store, use, operate, manage and control the Mortgaged Property and conduct the business thereof, and, from time to time:

(i) make all necessary and proper maintenance, repairs, renewals, replacements, additions, betterments and improvements thereto and thereon and purchase or otherwise acquire additional fixtures, personal and other mortgaged property;

(ii) insure or keep the Mortgaged Property insured;

(iii) manage, operate and lease the Mortgaged Property and exercise all the rights and powers of Mortgagor in its name or otherwise with respect to the same;

(iv) enter into agreements with others to exercise the powers herein granted Mortgagee, all as Mortgagee from time to time may determine; and Mortgagee may collect and receive all the rents, income and other benefits thereof, including those past due as well as those accruing thereafter; and shall apply the

CONFIDENTIAL

TR 000000992

monies so received by Mortgagee in such manner and order of priority as Mortgagee may determine, in its sole and arbitrary discretion, to (1) the payment of interest, principal, and other payments due and payable under the Note, this Mortgage and/or any other Loan Document, (2) the deposits for taxes and assessments and insurance premiums due, (3) the cost of insurance, taxes, assessments and other proper charges upon the Mortgaged Property or any part thereof; and (4) the reasonable compensation, expenses and disbursements of the agents, attorneys and other representatives of Mortgagee.

Mortgagee shall surrender possession of the Mortgaged Property to Mortgagor only when all that is due upon such interest, principal, and all other outstanding Indebtedness, tax and insurance deposits, and all other amounts due under any of the terms of this Mortgage and/or any other Loan Document, shall have been paid and all defaults made good. The same right of taking possession, however, shall exist if any subsequent Event of Default shall occur and be continuing.

4.04. Leases. Mortgagee is authorized to foreclose this Mortgage subject to the rights of any tenants of the Mortgaged Property or may elect which tenants Mortgagee desires to name as parties defendant in such foreclosure and the failure to make any such tenants parties defendant to any such foreclosure proceedings and to foreclose their rights will not be, nor be asserted by Mortgagor to be, a defense to any proceedings instituted by Mortgagee to collect the sums secured hereby or to collect any deficiency remaining unpaid after the foreclosure sale of the Mortgaged Property.

4.05. Purchase by Mortgagee. Upon any such foreclosure sale, Mortgagee may bid for and purchase the Mortgaged Property and, upon compliance with the terms of sale, may hold, retain and possess and dispose of such property in its own absolute right without further accountability.

4.06. Application of Indebtedness Toward Purchase Price. Upon any such foreclosure sale, Mortgagee may, if permitted by law, and after allowing for costs and expenses of the sale, compensation and other charges, in paying the purchase price, apply any portion of or all of the Indebtedness and other sums due to Mortgagee under the Note, this Mortgage or any of the other Loan Documents, in lieu of cash, to the amount which shall, upon distribution of the net proceeds of such sale, be payable thereon.

4.07. Waiver of Appraisement, Valuation, Stay, Extension and Redemption Laws. Mortgagor agrees to the full extent permitted by law that in case of a default on its part hereunder, neither Mortgagor nor anyone claiming through or under it shall or will set up, claim or seek to take advantage of any appraisement, valuation, stay, or extension laws now or hereafter in force, in order to prevent or hinder the enforcement or foreclosure of this Mortgage or the absolute sale of the Mortgaged Property or the final and absolute putting into possession thereof, immediately after such sale, of the purchasers thereat, and Mortgagor, for itself and all who may at any time claim through or under it, hereby waives, to the full extent that it may lawfully so do, the benefit of all such laws, and any and all right to have the assets comprising the Mortgaged Property marshalled upon any foreclosure of the lien hereof and agrees that Mortgagee or any court having jurisdiction to foreclose such lien may sell the Mortgaged Property in part or as an entirety.

4.08. Receiver. If an Event of Default shall have occurred, Mortgagee, without regard to the value, adequacy or occupancy of the security for the Indebtedness and other sums secured hereby, shall be entitled as a matter of right if it so elects to the appointment of a receiver to enter upon and take possession of the Mortgaged Property and to collect all rents, income and other benefits thereof and apply the same as the court may direct. The expenses, including receiver's fees, attorney's fees, costs and agent's compensation, incurred pursuant to the powers herein contained shall be secured by this Mortgage. The right to

CONFIDENTIAL

TR 000000993

enter and take possession of and to manage and operate the Mortgaged Property and to collect all rents, income and other benefits thereof, whether by a receiver or otherwise, shall be cumulative to any other right or remedy hereunder or afforded by law and may be exercised concurrently therewith or independently thereof. Mortgagee shall be liable to account only for such rents, income and other benefits actually received by Mortgagee, whether received pursuant to this Section 4.08 or Section 4.03 hereof. Notwithstanding the appointment of any receiver or other custodian, Mortgagee shall be entitled as pledgee to the possession and control of any cash, deposits or instruments at the time held by, or payable or deliverable under the terms of this Mortgage to, Mortgagee.

4.09. Suits to Protect the Mortgaged Property. Mortgagee shall have the power and authority to institute and maintain any suits and proceedings as Mortgagee may deem advisable (a) to prevent any impairment of the Mortgaged Property by any acts which may be unlawful or any violation of this Mortgage, (b) to preserve or protect its interest in the Mortgaged Property, and (c) to restrain the enforcement of or compliance with any legislation or other governmental enactment, rule or order that may be unconstitutional or otherwise invalid, if the enforcement of or compliance with such enactment, rule or order might impair the security hereunder or be prejudicial to Mortgagee's interest.

4.10. Proofs of Claim. In the case of any receivership, insolvency, bankruptcy, reorganization, arrangement, adjustment, composition or other judicial proceedings affecting Mortgagor, or any co-maker or endorser of any of Mortgagor's obligations, its creditors or its property, Mortgagee, to the extent permitted by law, shall be entitled to file such proofs of claim and other documents as may be necessary or advisable in order to have its claim allowed in such proceedings for the entire amount due and payable by Mortgagor under the Note, this Mortgage and any of the other Loan Documents, at the date of the institution of such proceedings, and for any additional amounts which may become due and payable by Mortgagor after such date.

4.11. Application of Monies by Mortgagee.

(a) If upon acceleration of the Indebtedness as provided in Section 4.01 hereof Mortgagor shall fail to pay the same forthwith upon such demand, Mortgagee shall be entitled, to sue for and to recover judgment against Mortgagor for the whole amount so due and unpaid together with costs and expenses, including without limitation the reasonable compensation, expenses and disbursement of Mortgagee's agents, attorneys and other representatives, either before, after or during the pendency of any proceedings for the enforcement of this Mortgage; and the right of Mortgagee to recover such judgment shall not be affected by any taking possession or foreclosure sale hereunder, or by the exercise of any other right, power or remedy for the enforcement of the terms of this Mortgage, or the foreclosure of the lien hereof.

(b) In case of a foreclosure sale of all or any part of the Mortgaged Property and of the application of the proceeds of sale to the payment of the sums secured hereby, Mortgagee shall be entitled to enforce payment from Mortgagor of all amounts then remaining due and unpaid and to recover judgment against Mortgagor for any portion thereof remaining unpaid, with interest.

(c) Mortgagor hereby agrees, to the extent permitted by law, that no recovery of any such judgment by Mortgagee and no attachment or levy of any execution upon any of the Mortgaged Property or any other property shall in any way affect the lien of this Mortgage upon the Mortgaged Property or any part thereof or any lien, rights, powers or remedies of Mortgagee hereunder, but such lien, rights, powers and remedies shall continue unimpaired as before.

CONFIDENTIAL

TR 000000994

3725a

(d) Any monies collected or received by Mortgagee under this Section 4.11 shall be applied to the payment of the Indebtedness and all other amounts due and unpaid under the Note, this Mortgage and all other instruments securing the Note, in such manner and order of priority as is set forth in the Note, this Mortgage and the other Loan Documents.

(e) The provisions of this Section 4.11 shall not be deemed to limit or otherwise modify the provisions of the Note or the Indebtedness evidenced by the Note.

4.12. Delay or Omission No Waiver. No delay or omission of Mortgagee or of any holder of the Note to exercise any right, power or remedy accruing upon any Event of Default shall exhaust or impair any such right, power or remedy or shall be construed to waive any such Event of Default or to constitute acquiescence therein. Every right, power and remedy given to Mortgagee may be exercised from time to time and as often as may be deemed expedient by Mortgagee.

4.13. No Waiver of One Default to Affect Another. No waiver of any Event of Default hereunder shall extend to or affect any subsequent or any other Event of Default then existing, or impair any rights, powers or remedies consequent thereon. If Mortgagee (a) grants forbearance or an extension of time for the payment of any sums secured hereby; (b) takes other or additional security for the payment thereof; (c) waives or does not exercise any right granted in the Note, this Mortgage or any other instrument securing the Note; (d) releases any part of the Mortgaged Property from the lien of this Mortgage or any other instrument securing the Note; (e) consents to the filing of any map, plat or replat of the Land; (f) consents to the granting of any easement on the Land; or (g) makes or consents to any agreement changing the terms of this Mortgage or subordinating the lien or any charge hereof, no such act or omission shall release, discharge, modify, change or affect the original liability under the Note, this Mortgage or any other Loan Document or otherwise of Mortgagor, or any subsequent purchaser of the Mortgaged Property or any part thereof or any maker, co-signer, endorser or surety. Except as otherwise expressly provided in an instrument or instruments executed by Mortgagee, no such act or omission shall preclude Mortgagee from exercising any right, power or privilege herein granted or intended to be granted in case of any Event of Default then existing or of any subsequent Event of Default nor, except as otherwise expressly provided in an instrument or instruments executed by Mortgagee, shall the lien of this Mortgage be altered thereby, except to the extent of releases as described in subparagraph (d) above of this Section 4.13. In the event of the sale or transfer by operation of law or otherwise of all or any part of the Mortgaged Property, Mortgagee, without notice to any person, firm or corporation, is hereby authorized and empowered to deal with any such vendee or transferee with reference to the Mortgaged Property or the indebtedness secured hereby, or with reference to any of the terms or conditions hereof, as fully and to the same extent as it might deal with the original parties hereto and without in any way releasing or discharging any of the liabilities or undertakings hereunder.

4.14. Discontinuance of Proceedings; Position of Parties Restored. If Mortgagee shall have proceeded to enforce any right or remedy under this Mortgage by foreclosure, entry or otherwise and such proceedings shall have been discontinued or abandoned for any reason, or such proceedings shall have resulted in a final determination adverse to Mortgagee, then and in every such case Mortgagor and Mortgagee shall be restored to their former positions and rights hereunder, and all rights, power and remedies of Mortgagee shall continue as if no such proceedings had occurred or had been taken, subject to the effect of any judgment entered in such proceedings.

4.15. Remedies Cumulative. No right, power or remedy conferred upon or reserved to Mortgagee by the Note, this Mortgage or any other Loan Document or instrument securing the Note is exclusive of any other right, power or remedy, but each and every such

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right, power and remedy shall be cumulative and concurrent and shall be in addition to any other right, power and remedy given hereunder or under the Note or any other Loan Document or instrument securing the Note, or now or hereafter existing at law, in equity or by statute.

4.16. Interest After Event of Default. If an Event of Default shall have occurred, all sums outstanding and unpaid under the Note and this Mortgage shall bear interest at the Post-Default Rate as provided in the Note.

4.17. Right to Release. Mortgagee at all times shall have the right to release any part of the Mortgaged Property now or hereafter covered by this instrument or any other security Mortgagee now has or may hereafter have securing payment of all or any part of the Indebtedness, without releasing any other part of the Mortgaged Property or other security, and without affecting the lien, assignment of rents and security interest of this instrument as to the part or parts thereof not so released.

4.18. Subrogation. Mortgagee shall be subrogated to all rights, titles, interests, liens, benefits, remedies, equities, superior title and security interests (the "Subrogated Liens") owned, claimed or held as security for any indebtedness or other obligation (the "Discharged Obligations") directly or indirectly satisfied, discharged or paid with money or other property advanced by Mortgagee. Irrespective of any formal or informal acknowledgement of partial or complete satisfaction or release of the Discharged Obligations, the Subrogated Liens shall be continued, renewed, extended, brought forward and rearranged as security for the Indebtedness in addition to and cumulative of the lien and security interest of this instrument. Foreclosure hereunder shall constitute foreclosure of the Subrogated Liens.

ARTICLE FIVE

MISCELLANEOUS PROVISIONS

5.01. No Assumption of Liabilities. Mortgagee in no way assumes or agrees to any liability, obligation or expense of Mortgagor arising from or in connection with the Mortgaged Property, the Club or the Membership Agreements. By accepting this Mortgage, Mortgagee does not assume nor shall Mortgagee be deemed to have assumed any of the obligations or liabilities of Mortgagor respecting any of the Membership Deposits nor shall Mortgagee grant or be deemed to have granted any subordination or non-disturbance agreements with respect thereto.

5.02. Heirs, Successors and Assigns Included in Parties. Subject to the terms and conditions of this Mortgage, the Note and the other Loan Documents restricting Mortgagor's right to sell, assign, pledge, encumber or in any other manner transfer any interest in itself, the Mortgaged Property, or any of the Loan Documents, and without implying any right of Mortgagor so to do, whenever one of the parties hereto is named or referred to herein, the heirs, successors and assigns of such party shall be included and all covenants and agreements contained in this Mortgage, by or on behalf of Mortgagor or Mortgagee shall bind and inure to the benefit of their respective heirs, successors and assigns, whether so expressed or not.

5.03. Notices, Demands and Other Instruments.. Any notice, demand, consent, authorization, request, approval or other communication given or required hereunder shall contain a clear and concise statement of the purpose of such notice and shall be effective and valid only if in writing, signed by the party giving such notice or his authorized counsel and (a) delivered in person by a commercial messenger service regularly retaining receipts for such delivery, (b) sent by facsimile transmission (provided the same is followed immediately

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by an original hard copy sent by one of the other means enumerated herein), (c) a reputable express courier or delivery service for whom a receipt is obtained, or (d) if mailed, sent by registered or certified mail, postage prepaid, return receipt requested, addressed as follows:

If to Mortgagee:

The Union Labor Life Insurance Company
111 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Attention: Mr. Thomas C. Perkins
Facsimile No.: (202) 682-7932

with mandatory copies to:

The Union Labor Life Insurance Company
111 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Attention: James F.M. McNulty, Esq.
Facsimile No.: (202) 682-7932

Weil, Gotshal & Manges
701 Brickell Avenue, Suite 2100
Miami, Florida 33131
Attention: Barry Frank, Esq.
Facsimile No.: (305) 374-7159

If to Mortgagor:

The Trump Organization
725 Fifth Avenue
New York, New York 10022
Attention: Mr. Donald Trump
Facsimile No.: (212) 935-0141

with mandatory copies to:

The Trump Organization
725 Fifth Avenue
New York, New York 10022
Attention: Allen Weisselberg
Facsimile No.: (212) 935-0141

The Trump Organization
725 Fifth Avenue
New York, New York 10022
Attention: Joseph Tahl, Esq.
Facsimile No.: (212) 826-9727

All such notices shall be considered given on the date when delivered (refusal of delivery shall constitute delivery) or if mailed, on the date of deposit of such notice as evidenced by the return receipt with respect to such notice received by the sender thereof, addressed to the parties to be notified at the addresses set forth above or to any other addresses as any party may hereafter specify to the others by like notice.

5.04. Headings. The headings of the Articles, Sections, paragraphs and subdivisions of this Mortgage are for convenience of reference only, are not to be considered a part hereof, and shall not limit or expand or otherwise affect any of the terms hereof.

5.05. Invalid Provisions to Affect No Others. In the event that any of the covenants, agreements, terms or provisions contained in the Note, or in this Mortgage or in

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any other instrument securing the Note shall be invalid, illegal or unenforceable in any respect, the validity of the remaining covenants, agreements, terms or provisions contained herein or in the Note or in any other instrument securing the Note shall be in no way affected, prejudiced or disturbed thereby.

5.06. Changes, Etc. Neither this Mortgage nor any term hereof may be changed, waived, discharged or terminated orally, or by any action or inaction, but only by an instrument in writing signed by the party against which enforcement of the change, waiver, discharge or termination is sought. Any agreement hereafter made by Mortgagor and Mortgagee relating to this Mortgage shall be superior to the rights of the holder of any intervening lien or encumbrance.

5.07. Governing Law. This Mortgage shall be governed by and construed in accordance with the laws of the State of Florida.

5.08. Required Notices. Mortgagor shall notify Mortgagee promptly of the occurrence of any of the following: (a) receipt of notice from any Governmental Authority relating to the Mortgaged Property; or (b) commencement of any judicial or administrative proceedings by or against or otherwise affecting Mortgagor or the Mortgaged Property, or any other action by any creditor thereof as a result of any default under the terms of any loan.

5.09. Future Advances. This Mortgage secures such future or additional advances (in addition to the principal amount of the Note) as may be made by Mortgagee or the holder hereof, at its exclusive option, to Mortgagor or its successors or assigns in title, for any purpose, provided that all such advances are made within twenty (20) years from the date of this Mortgage or within such lesser period of time as may be provided by law as a prerequisite for the sufficiency of actual notice or record notice of such optional future or additional advances as against the rights of creditors or subsequent purchasers for valuable consideration to the same extent as if such future or additional advances were made on the date of the execution of this Mortgage. The total amount of indebtedness secured by this Mortgage may be increased or decreased from time to time, but the total unpaid balance so secured at any one time shall not exceed the maximum principal amount of $20,000,000 plus interest thereon and any disbursements made under this Mortgage made for the payment of Impositions, taxes, assessments, levies, insurance, or otherwise with interest on such disbursements. It is the intent of the parties that this Mortgage shall secure the payment of the Note and any additional advances made from time to time pursuant to any additional promissory notes or otherwise contemplated under this Mortgage, all of said indebtedness being equally secured hereby and having the same priority as any amounts advanced as of the date of this Mortgage. It is agreed that any additional sum or sums advanced by Mortgagee shall be equally secured with, and have the same priority as, the original Indebtedness and shall be subject to all of the terms, provisions and conditions of this Mortgage, whether or not such additional loans or advances are evidenced by other promissory notes of Mortgagor and whether or not identified by a recital that it or they are secured by this Mortgage. It is further agreed that any additional promissory note or promissory notes executed and delivered pursuant to this Section 5.09 shall automatically be deemed to be included in the term "Note" wherever it appears in the context of this Mortgage.

5.10. Covenant Running with Land. During the term of this Mortgage and until all amounts secured hereby are paid in full, all of the covenants and agreements of Mortgagor in this Mortgage are deemed to be and are covenants which touch, concern, and run with the Land; and it is the expressed intent of Mortgagor and Mortgagee that any successor or assign of Mortgagor or any person who acquires title to the Mortgaged Property shall be bound by such covenants and agreements as if such person had made such covenants and agreements directly with Mortgagee.

5.11. After Acquired Property. All right, title, and interest of Mortgagor in and to all extensions, improvements, betterments, renewals, substitutions, and replacements of, and

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all additions and appurtenances to the Mortgaged Property, hereafter acquired by, or conveyed to, Mortgagor or constructed, assembled, or placed by Mortgagor upon the Land, and all conversions of the security constituted thereby, immediately upon such acquisition, conveyance, construction, assembling, placement, or conversion, as the case may be, and in each such case, without any further mortgage, conveyance, assignment, or other act by Mortgagor, shall become subject to the lien of this Mortgage as fully and completely, and with the same effect, as though now owned by Mortgagor and specifically described in the granting clause of this Mortgage, but at any and all times Mortgagor will execute and deliver to Mortgagee any and all such further assurances, mortgages, conveyances, or assignments thereof, as Mortgagee may reasonably require for the purpose of expressly and specifically subjecting the same to the lien of this Mortgage.

5.12. Time of the Essence. Time is hereby declared to be of the essence of this Mortgage and of every part hereof.

5.13. Release. Mortgagor acknowledges that it executed this Mortgage and each of the Loan Documents as its own voluntary act free from duress and undue influence. Mortgagor hereby releases Mortgagee and its employees and agents from any claims that it may have against Mortgagee, its employees or its agents for the acts of any of the foregoing parties in the negotiation of the Loan.

5.14. Receipt of Monies. The receipt by Mortgagee of any sum of money pursuant to this Mortgage with knowledge of the breach of any term, covenant or provision of this Mortgage shall not be deemed a waiver of such breach. No provision of this Mortgage shall be deemed to have been waived by Mortgagee unless such waiver shall be in writing and signed by a duly authorized officer of Mortgagee. No payment by Mortgagor or receipt by Mortgagee of a lesser amount of any sum of money herein stipulated shall be deemed to be other than on account of the next due payment under the Note or this Mortgage: nor shall any endorsement or statement on any check, or any letter accompanying any check, be deemed an accord and satisfaction; and Mortgagee may accept such payment or check without prejudice to Mortgagee's right to recover the balance of any payment or other monies under this Mortgage or pursue any of the remedies in this Mortgage or the Loan Documents.

5.15. Survival of Provisions. All covenants, agreements, representations and warranties made in this Mortgage and the documents delivered in support of the Loan shall be deemed to have been material and relied on by Mortgagee and Mortgagor and shall survive the execution and delivery to Mortgagee of the Note, the Loan Documents and the disbursement and advance of funds pursuant to the Loan.

5.16. Exhibits. All of the schedules and exhibits annexed hereto are incorporated herein by reference and form a part of this Mortgage.

5.17. Saturday, Sunday or Non-Business Day. If the date for the performance of any term, provision or condition (monetary or otherwise) under the Note or this Mortgage shall happen to fall on a Saturday, Sunday or non-Business Day, the date for the performance of such term, provision or condition shall be extended to the next succeeding Business Day immediately thereafter occurring, with interest at the rate provided in the Note on the outstanding principal balance or other monetary payment to such next succeeding business day if such term, provision or condition shall result in the extension of any monetary payment due to Mortgagee.

5.18. Capitalized Terms. Capitalized terms used in this Mortgage and not otherwise defined herein shall have the respective meanings assigned to such terms in the Note.

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5.19. Execution by Parties. All persons executing this Mortgage in a representative capacity, acknowledge, warrant and represent that he is an official representative of the firm or corporation in whose name he is executing this Mortgage and that he possesses full and complete authority to bind said firm or corporation to the full and faithful performance of all conditions, terms, provisions, covenants, warranties and representations as contained in this Mortgage.

5.20. Use of the Word "Herein". The words "herein", "hereof", "hereunder" and other words of similar import refer to this Mortgage as a whole and not to any particular article, Section or other subdivision of this Mortgage unless specifically noted otherwise in this Mortgage.

5.21. Evidence of Satisfaction of Conditions. Any term, provision or condition of this Mortgage which requires the submission of evidence of the existence or non-existence of a specified fact or facts implies as a condition the existence or non-existence, as the case may be, of such fact or facts and Mortgagee shall, at all times, be free independently to establish to its reasonable satisfaction such existence or non-existence.

5.22. Monies. All references to monies in this Mortgage, the Note or any of the Loan Documents, or the equivalent thereof, shall be deemed to mean lawful monies of the United States of America.

5.23. No Partnership or Joint Venture. Nothing herein nor the acts of the parties hereto shall be deemed or construed to create a partnership or joint venture between Mortgagor and Mortgagee.

5.24. Gender. The use of any gender shall include all other genders. The singular shall include the plural and vice versa.

5.25. Stamp or Tax. Should any stamp tax, intangible tax, or other tax (excluding income, franchise, gross receipts or similar taxes with respect to Mortgagee), now or hereafter become payable with respect to this Mortgage, the Note, or any of the documents executed in connection herewith or their execution or delivery, Mortgagor will pay the same prior to the due date thereof and hold Mortgagee harmless from the cost of same.

5.26. Assignment of Loan Documents. Mortgagee may assign this Mortgage, the Note and the other Loan Documents executed in connection with the Loan and all of its rights hereunder and thereunder and all of the provisions of this Mortgage shall continue to apply to the Loan. Mortgagee shall have the right to participate and syndicate the Loan with other lending institutions. The rights of Mortgagor under this Mortgage, the Note and the other Loan Documents are not assignable.

5.27. Rights of Third Parties. Mortgagee makes no representations and assumes no obligations as to third parties concerning the quality of the construction of the Improvements or the absence therefrom of any defects. In this regard, Mortgagor agrees to and shall indemnify Mortgagee from any liability, claim or losses resulting from the disbursement of the Note or from the condition of the Mortgaged Property whether related to the quality of construction or otherwise and whether arising during or after the term of the Note. This paragraph shall survive the repayment of the Note and shall continue in full force and effect so long as the possibility of any liability, claim or loss exists.

5.28. Promotional Material. The Mortgagee may issue press releases, advertisements and other promotional materials in connection with Mortgagee's own business, promotional and marketing activities, describing the Loan and the matters giving rise to the Loan with the prior consent of the Mortgagor, which consent shall not be unreasonably withheld or delayed.

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5.29. No Agency. Mortgagee is not the agent or representative of Mortgagor, and Mortgagor is not the agent or representative of Mortgagee, and nothing in this Mortgage shall be construed to make Mortgagee liable to anyone for goods delivered or services performed by them upon the Mortgaged Property or for debts or claims accruing to them against Mortgagor. Nothing herein shall be construed to create a contractual relationship between Mortgagee and anyone supplying labor or materials to the Mortgaged Property.

5.30. Conflicts and Inconsistencies. In the event of any conflicts or inconsistencies between the terms of the Note and this Mortgage, the terms of the Note shall govern and control.

5.31. Consent to Jurisdiction. Mortgagor does hereby irrevocably and unconditionally submit to the jurisdiction of the courts of the State of Florida and does further irrevocably and unconditionally stipulate and agree that the Federal Courts in the State of Florida or the Circuit Court of the State of Florida in and for Palm Beach County, Florida shall have jurisdiction to hear and finally determine any dispute, claim, controversy or action arising out of or connected (directly or indirectly) with this Mortgage, the Note and/or the Loan Documents. Mortgagor does hereby irrevocably and unconditionally appoint Paul Rampell, Esq. (the "Process Agent") to receive on behalf of Mortgagor service of copies of the summons and complaint and any other process or papers which may be served in any action or proceeding arising out of or connected with this Mortgage, the Note and/or the Loan Documents. Mortgagor does hereby irrevocably authorize and direct the Process Agent to accept service on its behalf and does hereby agree that final judgment in any action or proceedings shall be conclusive and may be enforced in any other jurisdiction by suit on the judgment or in any other manner provided by law. Nothing in this Mortgage shall affect the right of Mortgagee to bring an action or proceeding against Mortgagor or its property in the courts of any other jurisdiction. To the extent that Mortgagor has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise), with respect to the Mortgagor's property, Mortgagor hereby unconditionally and irrevocably waives such immunity in respect of its obligations under this Mortgage, the Note and/or the Loan Documents. The foregoing consent, in advance, to the jurisdiction of the above-mentioned courts and the appointment of the Process Agent are material inducements for Mortgagee to make the Loan and accept this Mortgage.

5.32. Automatic Stay. In consideration of the recitals and mutual covenants contained herein, and for other good and valuable consideration, Mortgagor hereby agrees that in the event that Mortgagor shall (i) file in any bankruptcy court of competent jurisdiction or be the subject of any voluntary or involuntary petition under title 11 of the U.S. Code, as amended ("Bankruptcy Code"), (ii) be the subject of any order of relief issued under the Bankruptcy Code, (iii) file or be the subject of any petition seeking any reorganization, or arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any present or future federal or state act or law relating to bankruptcy, insolvency, or other relief for debtors, (iv) have sought or consented to or acquiesced in the appointment of any trustee or receiver, conservator, or liquidator, or (v) be the subject of any order, judgment, or decree entered by any court of competent jurisdiction approving a petition filed against Mortgagor for any reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any present or future federal or state law relating to bankruptcy, insolvency or relief for debtors, then, subject to court approval, Mortgagee shall thereupon be entitled and Mortgagor hereby irrevocably consents to relief from any automatic stay imposed by Section 362 of the Bankruptcy Code, or otherwise, on or against the exercise of the rights or remedies otherwise available to Mortgagee as provided in the Note, this Mortgage, and other Loan Documents, and as otherwise provided by law, and Mortgagor irrevocably waives its right to object to such relief.

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5.33. Limitation of Liability. Notwithstanding anything to the contrary contained in this Mortgage or any other Loan Documents and except as otherwise expressly provided below, neither Mortgagor nor any member, partner, officer, shareholder, director or employee of Mortgagor nor any Permitted Transferee shall be personally liable for either (a) the repayment of any of the principal of, interest on, or prepayment fees or late charges and any other sums or payments, or other charges or fees, or other amounts due or required to be paid under any of the Loan Documents or due in connection with the Loan (all such sums are hereinafter collectively called the "Loan Debt") or (b) for any deficiency or other judgment which Mortgagor may obtain before or after foreclosure of this Mortgage after default by Mortgagor or (c) for the performance of any covenants or obligations of Mortgagor under any of the Loan Documents, provided, however, that neither Mortgagor, any general partner of Mortgagor nor any Permitted Transferee shall be exonerated or exculpated for any loss or damage suffered by Mortgagee, and Mortgagor, any general partner of Mortgagor and any Permitted Transferee shall be personally liable for any liability, loss, or damage (including, without limitation, reasonable attorneys' fees, paralegal fees and disbursements and appellate attorneys' fees and disbursements) (i) arising out of any fraud, material misrepresentation, misapplication of insurance proceeds, condemnation awards, Membership Deposits or trust funds in violation of applicable law or the provisions of this Mortgage; (ii) arising out of Mortgagor's failure to comply with the provisions of this Mortgage prohibiting the sale or further encumbering of the Mortgaged Property; (iii) arising out of the failure of Mortgagor to apply proceeds of annual membership dues and other income of the collateral toward the costs of improvement, repair, maintenance and operation of the Mortgaged Property and to the payment of taxes, lien claims, insurance premiums, management fees and debt service payable to Mortgagee pursuant to this Mortgage or any other Loan Document; (iv) arising out of Mortgagor's entering into or modifying Membership Agreements in violation of the provisions of this Mortgage or the Assignment; (v) arising out of waste or the willful destruction to the Mortgaged Property, including the electrical, plumbing, heating or air conditioning systems of the Mortgaged Property; (vi) for the fair market value of any personalty or fixtures removed from the Mortgaged Property or disposed of in violation of any provision of this Mortgage or any other Loan Document; (vii) arising out of the receipt by Mortgagor of monies in connection with a modification of any existing or future Membership Agreement and not applied in (iii) above or the entering into of a new Membership Agreement in violation of the applicable provisions of the Note, this Mortgage or the Assignment; (viii) incurred by Mortgagee in connection with any claim, demand, order, consent decree, settlement, judgment or verdict arising from the manufacture, deposit, storage, disposal, burial, dumping, injecting, spilling, leaking or other placement or release in, on or about the Mortgaged Property of asbestos or a hazardous or toxic waste, waste product or substance as defined in 42 U.S.C. § 9601 (as hereafter amended and any successor statutes thereto) or as defined in any other statute, rule or regulation governing such wastes, waste products or substances; (ix) resulting from any claims, actions, proceedings or suits initiated by Mortgagor (or any party empowered to act on behalf of Mortgagor) or any Permitted Transferee alleging that the relationship of Mortgagor and Mortgagee is that of joint venturers, partners, tenants in common, joint tenants or any relationship other than that of debtor and creditor; (x) any and all brokerage commissions or finder's fees due in connection with the Loan or acquisition of the Mortgaged Property by Mortgagor; or (xi) for the reasonable attorneys; fees and other costs and expenses incurred by Mortgagee as a result of any action described in items (i) through (x) above or in connection with enforcing the liability of any obligor under this Section 5.31; and provided, further, that the foregoing limitations on Mortgagor's personal liability with respect to the Loan Debt and other obligations shall not (1) impair the validity of the indebtedness secured by Mortgagee's collateral or the lien on or security interest in the collateral, (2) constitute a waiver of any obligation evidenced by the Note or secured by any other Loan Document, (3) release or impair the Note or the lien of this Mortgage or any other Loan Document, (4) release, impair or affect in any way the validity or enforceability of any guaranty or indemnity agreement given to Mortgagee in connection with the loan secured hereby, or (5) limit the right of Mortgagee as mortgagee or secured party to

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EXHIBIT "B"

Artwork

1. Anonymous copy after original by CHARLES BASKERVILLE -- Sulter Riding a White Horse, with Attendants, oil on canvas, 82 x 53 Inches
2. ORVILLE BULMAN -- Elcumsite, signed and dated 1963, oil on canvas, 29-½ x 24-½ Inches
3. ORVILLE BULMAN -- Lame Repo, signed, oil on canvas, 21-5/8 x 23-1/2 inches
4. ORVILLE BULMAN -- Three Ladies Riding Three Zebras and Three Tigers, signed, oil on canvas, 29-3/4 x 29-1/2 inches
5. ORVILLE BULMAN -- The Joli Fille, signed, oil on canvas, 19-½ x 21-½ inches
6. ORVILLE BULMAN -- Le Lamoyne, signed, oil on canvas, 19-½ x 21-½ Inches
7. ORVILLE BULMAN -- The Lame Repo, signed, oil on canvas, 19-½ x 21-½ inches
8. ORVILLE BULMAN -- The 'Arant I' and 'Petite II', signed, oil on canvas, 19-½ x 21-½ inches
9. ORVILLE BULMAN -- The 'Bouton de Rose', signed, oil on canvas, 19-½ x 21-½ inches
10. ORVILLE BULMAN -- The 'Bonne Chasse', signed, oil on canvas, 19-½ x 21-½ inches
11. ORVILLE BULMAN -- The 'Coope d'Essal', signed, oil on canvas, 21-3/4 x 23-1/2 inches
12. ORVILLE BULMAN -- 'Le Haut' Timonier, signed, oil on canvas, 19-½ x 21-½ inches
13. ORVILLE BULMAN -- 'La Barque de Roi', signed, oil on canvas, 21-3/4 x 23-1/2 inches
14. ORVILLE BULMAN -- Chez Modeste, signed and dated 1963, oil on canvas, 29-½ x 24-½ inches
15. CHARLES BASKERVILLE -- Three Indian Dancers, signed, oil on canvas, 35-5/8 x 29 Inches
16. FRENCH SCHOOL, 18th Century -- Portrait of an Elegant Lady, Seated in a Chair, pastel, 35-½ x 28 inches
17. DOYLY-JOHN -- Along the Canal, signed, oil on canvas, 17-¼ x 25-½ inches
18. A. DZIGURSKI -- Surf at Sunrise, signed, oil on canvas, 23-½ x 36 inches

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19. DUTCH SCHOOL, 18th Century -- Naval Battle Scene, oil on canvas, 30-½ x 38-½ inches (restored)

20. DUTCH SCHOOL, 18th Century -- Three Warships Weighing Anchor, oil on canvas, 30-½ x 39 inches

21. DUTCH SCHOOL, 18th Century -- Shipping in a Stormy Sea, oil on canvas, 30-½ x 39 inches

22. DUTCH SCHOOL, 18th Century -- Shipping Under Cloudy Skies, oil on canvas, 30-½ x 39 inches

23. ITALIAN SCHOOL, 18th Century -- Portrait of Benedetto Saluzzo Della Manta, Dated 1750, oil on canvas, 54 x 40 inches

24. B. HALPERN -- Portrait of Marjorie Merriweather, signed, pastel on canvas, 23 x 19½ inches

25. FRENCH SCHOOL, 18th Century -- Portrait of a Gentleman Wearing Armor and Cravat, oil on canvas, 28-½ x 23-½ inches

26. Style of RICHARD COSWAY -- Portrait of Mrs. Hutton, oil on canvas, 29-¼ x 24-¼ inches

27. Manner of BORGOGNONE -- Extensive Battle Scenes, a pair, oil on canvas, each approximately 13 x 46 inches

28. CAMBRIO -- Mediterranean Scene, signed, oil on canvas, 23-½ x 35-½ inches

29. ELLA M. BURKET -- Jug with Flowers, signed, oil on canvasboard, 19-½ x 15-½ inches

30. MILDRED HAYWARD -- White Chrysanthemums in a Green Glass Vase, signed, oil on canvas, 41-3/4 x 33-1/2 inches

31. MARY MACKERNON -- Purple Flowers in a Vase, signed, pastel, 24 x 17-½ inches

32. O. MONCAYO -- Two Zebras, signed, oil on canvas, 3-¼ x 4-¼ inches

33. MARYLOU WHITNEY -- Garden Party, signed and dated '68, Gouache, pen and ink on board, 7 x 11-¼ inches

34. MARYLOU WHITNEY -- Just Friends, signed and dated '68, Gouache, pen and ink on board, 7 x 11-¼ inches

35. GILLESPIE -- Little Girl with Flower and Dog, signed, oil on wood, 4-3/8 x 6-1/2 inches

36. Group of reproductions of watercolors -- Including a Van Gogh painting and two botanical prints. (9 in lot)

37. Reproductions of two GOULD prints

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38. F. BARTALOZZI after HOLBEIN -- Portraits of Two Women. Two stepple engravings in brown and sanguine, published in 1798 and 1799, 17-½ x 12-½ inches, one badly creased

39. Lithographic reproduction of a german 19th-century painting -- The Gentlemen's Visit, laid down on panel, painted over, 7-3/4 x 9-3/4 inches

40. DUTCH SCHOOL, 18th Century -- Portrait of a Scholar, oil on panel, 9 x 7 inches

41. DUTCH SCHOOL, 18th Century -- Portrait of a Scholar, oil on panel, 9 x 7 inches

42. DUTCH SCHOOL -- Lady and Two Men Seated in an Interior, oil on panel, 12-½ x 10-3/4 inches

43. CHINESE SCHOOL, 20th Century -- Junks in the Harbor, watercolor on silk, 14-½ x 10-¼ inches

44. Reproduction of a watercolor -- Village Scene

45. GUY GORRIERO -- English Cottage, signed, pastel, 13-½ x 19-½ inches

46. GEORGE SEIFERT -- The Landing of Ponce de Leon, signed, oil on canvas, 23-½ x 51 inches

47. D. B. WALCOTT -- Portrait of a Gentleman in a Black Coat, signed and dated 1863, oil on canvas, oval 26 x 21 inches

48. ENGLISH SCHOOL, 17th century -- Portrait of a Gentleman, oil on canvas, 48 x 36-½ inches

49. FRENCH SCHOOL, 18th Century -- Lady and Gentleman Seated on a Banquette, watercolor mounted in needlepoint mat, 3 x 3-3/4 inches

50. ITALIAN SCHOOL, 18th Century -- Two Women on a Balcony Watching a Workmen and Lady with Flower Tray, oil on canvas, 65 x 35 inches

51. DOYLY-JOHN -- Canal Scene, signed, oil on canvas, 25-½ x 17-½ inches

52. Manner of H. RIGAUD -- Portrait of an Elegant Lady with Red Cloak, oil on canvas, 37 x 28-½ inches

53. DOYLY-JOHN -- Houses by the Sea, signed, oil on canvas, 23-3/4 x 17-½ inches

54. EDWIN HARD WEEKS -- Market in Grenada, signed and dated Grenada 1870, oil on canvas, 34-¼ x 59-½ inches

55. After MIGNARD -- Portrait of a Lady Wearing Blue Fabric Shawl, oil on canvas, oval 25 x 18 inches

56. DUTCH SCHOOL, 17th Century -- Portrait of Woman in Black Dress and Spanish Lace Collar, oil on canvas, 39 x 33 inches

57. Reproductions of two parts of a DAVID painting -- photographic reproductions on canvas, 10 x 8 inches

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58. Style of BRONZINO -- Portrait of an Elegant Young Woman, oil on panel

59. FRENCH SCHOOL -- The Hunt, oil on panel

60. PERSIAN PAINTING -- Extensive Scene with Hunters, Women Dancing, Farmers, etc., pen and ink and colors on card, 4-3/4 x 8-3/4 inches

61. R. BUCKNER, JR. -- Portrait of Empress Eugenie in Formal White Gown, signed, oil on canvas laid down on board, 50 x 39 inches

62. RUSS CONN -- Florida Scene, signed, watercolor, 12-3/4 x 21 inches

63. EMILIO DE BLAAS -- Man Seated by a Waterway, signed and dated Florida 1929, watercolor, 13 x 18-3/4 inches

64. DOROTHY HENDERSON -- Three Toucans, signed, watercolor, 14-3/4 x 21-3/4 inches

65. AMERICAN SCHOOL -- Mar-A-Lago, marker pen, 10-½ x 8 inches

66. DUNCAN ARRAN -- Still Life with Flowers in a Glass, signed and dated 1971, oil on canvasboard, 23-½ x 19-½ inches

67. Group of three reproductions of paintings on canvas -- Utrillo and two Dutch Masters

68. Group of six reproductions of watercolors and paintings -- Winslow Homer and E. Le Bas

69. EUGENE BERMAN -- Velndus de Chapeaux, signed and dated 1939, watercolor, 24-3/4 x 19-1/4 inches

70. PHIL BRINKMAN -- two reproductions of paintings of beach scenes

71. Two reproductions of WINSLOW HOMER -- watercolors

72. JOHN HAYMAN -- Paris Scenes, set of 7, signed, pen and ink and watercolor, 11-½ x 8-½ inches

73. CAPTAIN H. MULZAC -- Harbor Scene, silkscreen reproduction

74. BOSSO -- Woman Walking Through Arch, signed, watercolor, 18-½ x 12-½ inches

75. Reproduction of a DEGAS painting

76. Reproductions of two GERARD paintings

77. Reproductions of MONTE drawings -- Drawings of Dancers

78. REPRODUCTIONS OF FOUR PAINTINGS -- Two Utrillos and Two Dutch, 17th Century on canvas

79. SPANISH SCHOOL, 18th Century -- Portrait of a Woman, oil on canvas, length: 22 inches

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3737a

80. FRENCH SCHOOL, 18th Century (Style of BOUCHER) -- Two Young Gardeners in a Formal Gardener, oil on canvas, 37-3/4 x 43-1/2 inches

81. Reproduction of a MIGNARD painting -- Elegant Seated Lady and Blackamoor

82. After TITIAN -- La Bella, Color mezzotint

83. Jean Sohet after DEWINNE (1840) -- Portrait of S.M. Leopold I, oil on canvas, 17-5/8 x 14-1/2 inches

84. Reproductions of two paintings -- by R. W. Watson

85. FRENCH SCHOOL, 18th Century -- Portrait of an Elegant Lady Holding a Small Bouquet, oil on canvas, 50 x 38 inches

86. F. GILLAN -- French Church, oil on canvas

87. After FRANK SALISBERRY -- Portrait of Marjorie Merriweather, mezzotint

CONFIDENTIAL

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3738a

EXHIBIT "C"

Permitted Encumbrances

1. General Taxes for the year 1995 and subsequent years which are not yet due and payable.

2. Easements as recorded in those certain instruments recorded in Deed Book 109, at Page 37, Deed Book 116, at Page 191 as conveyed in Deed Book 124, at Page 430, Public Records of Palm Beach County, Florida.

3. Easements and Reservations as reserved in that certain instrument recorded in Official Records Book 2342, at Page 773, Public Records of Palm Beach County, Florida.

4. Easements as reserved in those certain instruments recorded in Deed Book 959, at Page 401, and Official Record Book 887, at Page 1146, Public Records of Palm Beach County, Florida.

5. Deed of Conservation and Preservation Easement of Donald J. Trump and the National Trust Historic Preservation in the United States to be recorded in the Public Records of Palm Beach County, Florida.

6. The right, title or interest, if any, of the public to use as a public beach or recreation area any part of the Land lying between the water abutting the Land and the most inland of any of the following: (a) the natural line of vegetation; (b) the most extreme high water mark; (c) the bulkhead line; or (d) any other line which has been or which hereafter may be legally established as relating to such public use. This Permitted Encumbrance shall apply only to the beachfront parcel of the Land located east of South Ocean Boulevard.

7. The right of the United States Government arising by reason of the United States Government's control over navigable waters in the interest of navigation and commerce.

8. The ordinary high water mark of the Intracoastal Waterway.

9. The mean high water line of the Atlantic Ocean.

10. Coastal Construction control line recorded in Plat Book 36, Page 91, Public Records of Palm Beach County, Florida.

11. The Right-of-Way of Ocean Blvd., as laid out and in use.

12. Terms, provisions, restrictive covenants, conditions, reservations and easements contained in Declaration of Use Agreement dated August 10, 1993 by The Town of Palm Beach, The Mar-a-Lago Club, Inc. and Donald J. Trump, and recorded on October 15, 1993 in Official Records Book 7933, Page 22, Public Records of Palm Beach County, Florida.

13. Easement Deed recorded in Official Record Book 4746, Page 1469, Public Records of Palm Beach County, Florida.

14. Perpetual Easement to the State of Florida Department of Transportation recorded in Official Record Book 8396, Page 25, Public Records of Palm Beach County, Florida.

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JOINDER AND CONSENT

The undersigned, DONALD J. TRUMP, individually ("DJT"), hereby joins in and consents to the attached First Mortgage, Security Agreement and Assignment of Rents of even date herewith (the "Mortgage") made by The Mar-A-Lago Club, Inc. ("Mortgagor") in favor of Union Labor Life Insurance Company ("Mortgagee") for the sole purpose of unconditionally and forever subordinating any and all interest that DJT may have in the Mortgaged Property (as such term is defined in the Mortgage) under or by virtue of that certain Declaration of Use Agreement dated August 10, 1993 among the Town of Palm Beach, Mortgagor and DJT and recorded in Official Records Book 7933, Page 22 of the Public Records of Palm Beach County, Florida (the "Declaration").

DJT hereby agrees and confirms that any and all interest that DJT may have in the Mortgaged Property under or by virtue of the Declaration shall at all times be entirely subject, subordinate and inferior in right of priority to the lien of the Mortgage.

Without any notice to or the consent of DJT, Mortgagee may amend, modify, extend, consolidate, restate or replace the Mortgage in any respect or waive any of the terms of, exercise any rights under, or otherwise deal with the Mortgage or exercise any rights in respect of the Mortgaged Property allowed at law or in equity or pursuant to any of the Loan Documents (as such term is defined in the Mortgage), and the same shall in no way alter the subordination of DJT's interest in the Mortgaged Property.

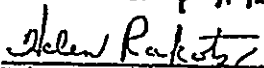
DJT does hereby irrevocably and unconditionally submit to the jurisdiction of the courts of the State of Florida and does further irrevocably and unconditionally stipulate and agree that the Federal Courts in the State of Florida or the Circuit Court of the State of Florida in and for Palm Beach County, Florida shall have jurisdiction to hear and finally determine any dispute, claim, controversy or action arising out of or connected (directly or indirectly) with the Mortgage or this Joinder and Consent. DJT does hereby irrevocably and unconditionally appoint Paul Rampell, Esq., as its agent (the "Process Agent") to receive on behalf of DJT service of copies of the summons and complaint and any other process or papers which may be served in any action or proceeding arising out of or connected with the Mortgage or this Joinder and Consent. Copies of the summons and complaint and any other process or papers shall be sent to DJT at the address set forth below contemporaneous with the delivery of same to the Process Agent. DJT does hereby irrevocably authorize and direct the Process Agent to accept service on his behalf and does hereby agree that final judgment in any action or proceedings shall be conclusive and may be enforced in any other jurisdiction by suit on the judgment or in any other manner provided by law. Notwithstanding the foregoing appointment of the Process Agent, service upon DJT may be made by mailing or delivering a copy of such process to the address of DJT, as set forth below. Nothing in the Mortgage or this Joinder and Consent shall affect the right of Mortgagee to bring an action or proceeding against DJT or his property in the courts of any other jurisdiction. To the extent that DJT has or hereafter may acquire any immunity from jurisdiction of any court or from any legal process (whether through service or notice, attachment prior to judgment, attachment in aid of execution, execution or otherwise), with respect to DJT's property, DJT hereby unconditionally and irrevocably waives such immunity in respect of its obligations under this Joinder and Consent. The foregoing consent, in

ORB 8691 Pg 883
DOROTHY H. WILKEN, CLERK PB COUNTY, FL

advance, to the jurisdiction of the above-mentioned courts and the appointment of the Process Agent are material inducements for Mortgagee to make the Loan to Mortgagor and accept this Joinder and Consent.

Signed, sealed and delivered in the presence of:

Print Name: Joseph A Tahl

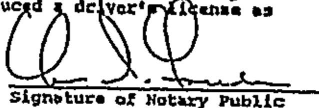


Print Name: Helen Rakotz

DONALD J. TRUMP, Individually
Address: c/o The Trump Organization
725 Fifth Avenue
New York, NY 10022

STATE OF New York)
COUNTY OF New York) ss:

The foregoing instrument was acknowledged before me this 3rd day of April, 1995, by DONALD J. TRUMP, individually. He is personally known to me or has produced a driver's license as identification.



Signature of Notary Public

[Affix Notarial Stamp]

Printed Name of Notary Public
State of ______
My Commission expires: ______

Notary Public, State of New York
No. 31-4743494
Qualified in New York County
Commission Expires Sept. 30, 1995

MIAMI....1\43\121784121000\\12511\M0333A.350

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PAYMENT GUARANTY

made by

DONALD J. TRUMP

as Guarantor,

in favor of

UBS WARBURG REAL ESTATE INVESTMENTS INC.

Dated as of November 26, 2002

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CONFIDENTIAL TR000027446

PAYMENT GUARANTY

This **PAYMENT GUARANTY** (this "*Guaranty*"), dated as of November 26, 2002, made by DONALD J. TRUMP, an individual ("*Guarantor*"), having an address at 725 Fifth Avenue, New York, New York 10022, in favor of UBS WARBURG REAL ESTATE INVESTMENTS INC., a Delaware corporation (together with its successors and assigns, hereinafter referred to as "*Lender*"), having an address at 1285 Avenue of the Americas, 11th Floor, New York, New York 10019.

RECITALS:

A. Pursuant to that certain Loan Agreement dated as of the date hereof (as the same may be amended, modified, supplemented or replaced from time to time, the "*Loan Agreement*") by and between VH Property Corp., a Delaware corporation ("*Borrower*") and Lender, Lender has agreed to make a loan (the "*Loan*") to Borrower in an aggregate principal amount not to exceed $20,000,000, subject to the terms and conditions of the Loan Agreement;

B. As a condition to Lender's making the Loan, Lender is requiring that Guarantor execute and deliver to Lender this Guaranty; and

C. Guarantor hereby acknowledges that Guarantor indirectly owns one hundred percent (100%) of the beneficial interest in Borrower, and consequently will materially benefit from Lender's agreeing to make the Loan;

NOW, THEREFORE, in consideration of the premises set forth herein and as an inducement for and in consideration of the agreement of Lender to make the Loan pursuant to the Loan Agreement, Guarantor hereby agrees, covenants, represents and warrants to Lender as follows:

1. **Definitions.**

(a) All capitalized terms used and not defined herein shall have the respective meanings given such terms in the Loan Agreement.

(b) The term "*Guaranteed Obligations*" means payment of all the Debt as and when the same is due in accordance with the Loan Documents (and whether accrued prior to, on or after such date).

2. **Guaranty.**

(a) Guarantor hereby irrevocably, absolutely and unconditionally guarantees to Lender the full, prompt and complete payment when due of the Guaranteed Obligations.

(b) All sums payable to Lender under this Guaranty shall be payable on demand and without reduction for any offset, claim, counterclaim or defense.

(c) Guarantor hereby agrees to indemnify, defend and save harmless Lender from and against any and all costs, losses, liabilities, claims, causes of action, expenses and damages, including reasonable attorneys' fees and disbursements, which Lender may suffer or which otherwise may arise by reason of Borrower's failure to pay any of the Guaranteed Obligations when due, irrespective of whether such costs, losses, liabilities, claims, causes of action, expenses or damages are incurred by Lender prior or subsequent to (i) Lender's declaring the principal, interest and other sums evidenced or secured by the Loan Documents to be due and payable, (ii) the commencement or completion of a judicial or non-judicial foreclosure of any Deed of Trust, or (iii) the conveyance of all or any portion of the Property by deed-in-lieu of foreclosure.

(d) Guarantor agrees that no portion of any sums applied (other than sums received from Guarantor in full or partial satisfaction of its obligations hereunder), from time to time, in reduction of the Debt shall be deemed to have been applied in reduction of the Guaranteed Obligations until such time as the Debt has been paid in full, or Guarantor shall have made the full payment required hereunder, it being the intention hereof that the Guaranteed Obligations shall be the last portion of the Debt to be deemed satisfied.

3. **Representations and Warranties.** Guarantor hereby represents and warrants to Lender as follows (which representations and warranties shall be given as of the date hereof and shall survive the execution and delivery of this Guaranty):

(a) **Authority and Execution.** Guarantor has all necessary power and authority to enter into and perform this Guaranty and all other agreements and instruments to be executed by him in connection herewith. This Guaranty has been duly executed and delivered by Guarantor.

(b) **Enforceability.** This Guaranty constitutes a legal, valid and binding obligation of Guarantor, enforceable against Guarantor in accordance with its terms, except as enforceability may be limited by applicable bankruptcy, insolvency, reorganization, moratorium or similar laws affecting the enforcement of creditors' rights generally, and general principles of equity.

(c) **No Violation.** The execution, delivery and performance by Guarantor of his obligations under this Guaranty do not and will not violate any law, regulation, order, writ, injunction or decree of any court or governmental body, agency or other instrumentality applicable to Guarantor, or result in a material breach of any of the terms, conditions or provisions of, or constitute a material default under, or result in the creation or imposition of any mortgage, lien, charge or encumbrance of any nature whatsoever upon any of the assets of Guarantor pursuant to the terms of any mortgage, indenture, agreement or instrument to which Guarantor is a party or by which Guarantor or any of Guarantor's properties is bound. Guarantor is not in default under any other guaranty which it has provided to Lender.

(d) **No Litigation.** There are no actions, suits or proceedings at law or at equity, pending or, to Guarantor's best knowledge, threatened against or affecting Guarantor which involve or might involve the validity or enforceability of this Guaranty or which might

materially adversely affect the financial condition of Guarantor or the ability of Guarantor to perform any of its obligations under this Guaranty. Guarantor is not in default beyond any applicable grace or cure period with respect to any order, writ, injunction, decree or demand of any Governmental Authority which might materially adversely affect the financial condition of Guarantor or the ability of Guarantor to perform any of its obligations under this Guaranty.

(e) **Consents.** All consents, approvals, orders or authorizations of, or registrations, declarations or filings with, all Governmental Authorities (collectively, the "*Consents*"), if any, that are required in connection with the valid execution, delivery and performance by Guarantor of this Guaranty have been obtained and Guarantor agrees that all Consents required, if any, in connection with the carrying out or performance of any of Guarantor's obligations under this Guaranty will be obtained when required.

(f) **Financial Statements and Other Information.** All financial statements of Guarantor heretofore delivered to Lender are true and correct in all material respects and fairly present the financial condition of Guarantor as of the respective dates thereof, and no materially adverse change has occurred in the financial conditions reflected therein since the respective dates thereof. None of the aforesaid financial statements or any certificate or statement furnished to Lender by or on behalf of Guarantor in connection with the transactions contemplated hereby, and none of the representations and warranties in this Guaranty contains any untrue statement of a material fact or omits to state a material fact necessary in order to make the statements contained therein or herein not misleading. Guarantor is not insolvent within the meaning of the United States Bankruptcy Code or any other applicable law, code or regulation and the execution, delivery and performance of this Guaranty will not render Guarantor insolvent.

(g) **Consideration.** Guarantor is the owner, directly or indirectly, of all of the legal and beneficial equity interests of the Borrower.

4. **Financial Statements.** In addition to the financial statements required pursuant to Section 6(b) below, Guarantor shall deliver to Lender within twenty (20) days after request by Lender, such other financial information with respect to Guarantor as Lender may reasonably request.

5. **Unconditional Character of Obligations of Guarantor.**

(a) The obligations of Guarantor hereunder shall be irrevocable, absolute and unconditional, irrespective of the validity, regularity or enforceability, in whole or in part, of the other Loan Documents or any provision thereof, or the absence of any action to enforce the same, any waiver or consent with respect to any provision thereof, the recovery of any judgment against Borrower, Guarantor or any other Person or any action to enforce the same, any failure or delay in the enforcement of the obligations of Borrower under the other Loan Documents or Guarantor under this Guaranty, or any setoff, counterclaim, and irrespective of any other circumstances which might otherwise limit recourse against Guarantor by Lender or constitute a legal or equitable discharge or defense of a guarantor or surety. Lender may enforce the obligations of Guarantor under this Guaranty by a proceeding at law, in equity or otherwise, independent of any loan foreclosure or similar proceeding or any deficiency action against

CONFIDENTIAL TR000027449

Borrower or any other Person at any time, either before or after an action against any of the Property or any part thereof, Borrower or any other Person. **This Guaranty is a guaranty of payment and performance and not merely a guaranty of collection.** Guarantor waives diligence, notice of acceptance of this Guaranty, filing of claims with any court, any proceeding to enforce any provision of any other Loan Document, against Guarantor, Borrower or any other Person, any right to require a proceeding first against Borrower or any other Person, or to exhaust any security (including, without limitation, the Property) for the performance of the Guaranteed Obligations or any other obligations of Borrower or any other Person, or any protest, presentment, notice of default or other notice or demand whatsoever (except to the extent expressly provided to the contrary in this Guaranty).

(b) The obligations of Guarantor under this Guaranty, and the rights of Lender to enforce the same by proceedings, whether by action at law, suit in equity or otherwise, shall not be in any way affected by any of the following:

(i) any insolvency, bankruptcy, liquidation, reorganization, readjustment, composition, dissolution, receivership, conservatorship, winding up or other similar proceeding involving or affecting Borrower, the Property or any part thereof, Guarantor or any other Person;

(ii) any failure by Lender or any other Person, whether or not without fault on its part, to perform or comply with any of the terms of the Loan Agreement, or any other Loan Documents, or any document or instrument relating thereto;

(iii) the sale, transfer or conveyance of the Property or any interest therein to any Person, whether now or hereafter having or acquiring an interest in the Property or any interest therein and whether or not pursuant to any foreclosure, trustee sale or similar proceeding against Borrower or the Property or any interest therein;

(iv) the conveyance to Lender, any Affiliate of Lender or Lender's nominee of the Property or any interest therein by a deed-in-lieu of foreclosure;

(v) the release of Borrower or any other Person from the performance or observance of any of the agreements, covenants, terms or conditions contained in any of the Loan Documents by operation of law or otherwise; or

(vi) the release in whole or in part of any collateral for any or all Guaranteed Obligations or for the Loan or any portion thereof.

(c) Except as otherwise specifically provided in this Guaranty, Guarantor hereby expressly and irrevocably waives all defenses in an action brought by Lender to enforce this Guaranty based on claims of waiver, release, surrender, alteration or compromise and all setoffs, reductions, or impairments, whether arising hereunder or otherwise.

(d) Lender may deal with Borrower and Affiliates of Borrower in the same manner and as freely as if this Guaranty did not exist and shall be entitled, among other things, to grant Borrower or any other Person such extension or extensions of time to perform

any act or acts as may be deemed advisable by Lender, at any time and from time to time, without terminating, affecting or impairing the validity of this Guaranty or the obligations of Guarantor hereunder.

(e) No compromise, alteration, amendment, modification, extension, renewal, release or other change of, or waiver, consent, delay, omission, failure to act or other action with respect to, any liability or obligation under or with respect to, or of any of the terms, covenants or conditions of, the Loan Documents shall in any way alter, impair or affect any of the obligations of Guarantor hereunder, and Guarantor agrees that if any Loan Document is modified with Lender's consent, the Guaranteed Obligations shall automatically be deemed modified to include such modifications.

(f) Lender may proceed to protect and enforce any or all of its rights under this Guaranty by suit in equity or action at law, whether for the specific performance of any covenants or agreements contained in this Guaranty or otherwise, or to take any action authorized or permitted under applicable law, and shall be entitled to require and enforce the performance of all acts and things required to be performed hereunder by Guarantor. Each and every remedy of Lender shall, to the extent permitted by law, be cumulative and shall be in addition to any other remedy given hereunder or now or hereafter existing at law or in equity.

(g) No waiver shall be deemed to have been made by Lender of any rights hereunder unless the same shall be in writing and signed by Lender, and any such waiver shall be a waiver only with respect to the specific matter involved and shall in no way impair the rights of Lender or the obligations of Guarantor to Lender in any other respect or at any other time.

(h) At the option of Lender, Guarantor may be joined in any action or proceeding commenced by Lender against Borrower in connection with or based upon any other Loan Documents and recovery may be had against Guarantor in such action or proceeding or in any independent action or proceeding against Guarantor to the extent of Guarantor's liability hereunder, without any requirement that Lender first assert, prosecute or exhaust any remedy or claim against Borrower or any other Person, or any security for the obligations of Borrower or any other Person.

(i) Guarantor agrees that this Guaranty shall continue to be effective or shall be reinstated, as the case may be, if at any time any payment is made by Borrower or Guarantor to Lender and such payment is rescinded or must otherwise be returned by Lender (as determined by Lender in its sole and absolute discretion) upon insolvency, bankruptcy, liquidation, reorganization, readjustment, composition, dissolution, receivership, conservatorship, winding up or other similar proceeding involving or affecting Borrower or Guarantor, all as though such payment had not been made.

(j) In the event that Guarantor shall advance or become obligated to pay any sums under this Guaranty or in connection with the Guaranteed Obligations or in the event that for any reason whatsoever Borrower or any subsequent owner of the Property or any part thereof is now, or shall hereafter become, indebted to Guarantor, Guarantor agrees that (i) the amount of such sums and of such indebtedness and all interest thereon shall at all times be

CONFIDENTIAL TR000027451

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subordinate as to lien, the time of payment and in all other respects to all sums, including Principal and interest and other amounts, at any time owed to Lender under the Loan Documents, and (ii) Guarantor shall not be entitled to enforce or receive payment thereof until all Principal, interest and other sums due pursuant to the Loan Documents have been paid in full. Nothing herein contained is intended or shall be construed to give Guarantor any right of subrogation in or under the Loan Documents or any right to participate in any way therein, or in the right, title or interest of Lender in or to any collateral for the Loan, notwithstanding any payments made by Guarantor under this Guaranty, until the actual and irrevocable receipt by Lender of payment in full of all Principal, interest and other sums due with respect to the Loan or otherwise payable under the Loan Documents. If any amount shall be paid to Guarantor on account of such subrogation rights at any time when any such sums due and owing to Lender shall not have been fully paid, such amount shall be paid by Guarantor to Lender for credit and application against such sums due and owing to Lender.

(k) Guarantor's obligations hereunder shall survive a foreclosure, deed-in-lieu of foreclosure or similar proceeding involving the Property and the exercise by Lender of any of all of its remedies pursuant to the Loan Documents.

6. **Covenants.**

(a) As used in this Section 6, "*Net Worth*" shall mean, as of a given date, (x) the total assets of Guarantor as of such date less (y) Guarantor's total liabilities as of such date, determined in accordance with the same method of accounting used to prepare the financial statement of Guarantor delivered to Lender in connection with the closing of the Loan.

(b) Until all of the Guaranteed Obligations have been paid in full, Guarantor (i) shall maintain a Net Worth in excess of $20,000,000, (ii) shall not sell, pledge, mortgage or otherwise transfer any of his assets, or any interest therein, on terms materially less favorable than would be obtained in an arms-length transaction if such transaction decreases the Net Worth of Guarantor below $20,000,000 and (iii) shall deliver to Lender annually, within one hundred twenty (120) days following the end of April 30 of each year of the term of the Loan a financial statement of Guarantor compiled by Guarantor's accountant's and certified by Guarantor, which sets forth in reasonable detail Guarantor's Net Worth and which shall be prepared in accordance with sound accounting practices. Lender hereby approves of M.R. Weiser Co. as Guarantor's accountants.

(c) Until all of the Guaranteed Obligations have been paid in full, Guarantor shall not sell, pledge, mortgage or otherwise transfer any of its assets, or any interest therein, on terms materially less favorable than would be obtained in an arms-length transaction.

7. **Entire Agreement/Amendments.** This instrument represents the entire agreement between the parties with respect to the subject matter hereof. The terms of this Guaranty shall not be waived, altered, modified, amended, supplemented or terminated in any manner whatsoever except by written instrument signed by Lender and Guarantor.

8. **Successors and Assigns.** This Guaranty shall be binding upon Guarantor, and Guarantor's estate, heirs, personal representatives, successors and assigns, may not be

assigned or delegated by Guarantor and shall inure to the benefit of Lender and its successors and assigns.

9. Applicable Law and Consent to Jurisdiction. THIS GUARANTY SHALL BE GOVERNED BY, AND CONSTRUED IN ACCORDANCE WITH, THE SUBSTANTIVE LAWS OF THE STATE OF NEW YORK. GUARANTOR IRREVOCABLY (A) AGREES THAT ANY SUIT, ACTION OR OTHER LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THIS GUARANTY MAY BE BROUGHT IN A COURT OF RECORD IN THE CITY AND COUNTY OF NEW YORK OR IN THE COURTS OF THE UNITED STATES OF AMERICA LOCATED IN THE SOUTHERN DISTRICT OF NEW YORK, (B) CONSENTS TO THE JURISDICTION OF EACH SUCH COURT IN ANY SUCH SUIT, ACTION OR PROCEEDING AND (C) WAIVES ANY OBJECTION WHICH IT MAY HAVE TO THE LAYING OF VENUE OF ANY SUCH SUIT, ACTION OR PROCEEDING IN ANY OF SUCH COURTS AND ANY CLAIM THAT ANY SUCH SUIT, ACTION OR PROCEEDING HAS BEEN BROUGHT IN AN INCONVENIENT FORUM. GUARANTOR IRREVOCABLY CONSENTS TO THE SERVICE OF ANY AND ALL PROCESS IN ANY SUCH SUIT, ACTION OR PROCEEDING BY SERVICE OF COPIES OF SUCH PROCESS TO GUARANTOR AT ITS ADDRESS PROVIDED IN SECTION 14 HEREOF. NOTHING IN THIS SECTION 9, HOWEVER, SHALL AFFECT THE RIGHT OF LENDER TO SERVE LEGAL PROCESS IN ANY OTHER MANNER PERMITTED BY LAW OR AFFECT THE RIGHT OF LENDER TO BRING ANY SUIT, ACTION OR PROCEEDING AGAINST GUARANTOR OR ITS PROPERTY IN THE COURTS OF ANY OTHER JURISDICTIONS.

10. Section Headings. The headings of the sections and paragraphs of this Guaranty have been inserted for convenience of reference only and shall in no way define, modify, limit or amplify any of the terms or provisions hereof.

11. Severability. Any provision of this Guaranty which may be determined by any competent authority to be prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions hereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction. To the extent permitted by applicable law, Guarantor hereby waives any provision of law which renders any provision hereof prohibited or unenforceable in any respect.

12. WAIVER OF TRIAL BY JURY. GUARANTOR HEREBY WAIVES THE RIGHT OF TRIAL BY JURY IN ANY LITIGATION, ACTION OR PROCEEDING ARISING HEREUNDER OR IN CONNECTION THEREWITH.

13. Other Guaranties. The obligations of Guarantor hereunder are separate and distinct from, and in addition to, the obligations of Guarantor now or hereafter arising under any other Guaranties, pursuant to which Guarantor has guaranteed payment and performance of certain other obligations of Borrower described therein.

14. Notices. All notices, consents, approvals and requests required or permitted hereunder (a "*Notice*") shall be given in writing and shall be effective for all purposes if either hand delivered with receipt acknowledged, or by a nationally recognized overnight

delivery service (such as Federal Express, and using the next-day delivery option), or by certified or registered United States mail, return receipt requested, postage prepaid, or by facsimile and confirmed by facsimile answer back, in each case addressed as follows (or to such other address or Person as a party shall designate from time to time by notice to the other party): If to Lender: UBS Warburg Real Estate Investments Inc., 1285 Avenue of the Americas, 11th Floor, New York, New York 10019, Attention: Robert W. Pettinato, Telecopier (212) 713-4631, with a copy to: Gibson, Dunn & Crutcher LLP, 333 South Grand Avenue, 49th Floor, Los Angeles, California 90071, Attention: Mark S. Pecheck, Telecopier (213) 229-7520; if to Guarantor: Donald J. Trump, c/o Trump Organization LLC, 725 Fifth Avenue, New York, New York 10022, Telecopier (212) 755-3230, with a copy to: Trump Organization LLC, 725 Fifth Avenue, New York, New York 10022, Attention: Jason D. Greenblatt, Assistant General Counsel, Facsimile No.: (212) 980-3821, and a copy to Trump Organization LLC, 725 Fifth Avenue, New York, New York 10022, Attention: Allen Weisselberg, Facsimile No.: (212) 832-5396. A notice shall be deemed to have been given: in the case of hand delivery, at the time of delivery; in the case of registered or certified mail, when delivered or the first attempted delivery on a Business Day; or in the case of overnight delivery, upon the first attempted delivery on a Business Day.

15. **Guarantor's Receipt of Loan Documents.** Guarantor by its execution hereof acknowledges receipt of true copies of all of the Loan Documents.

16. **Interest; Expenses.**

(a) If Guarantor fails to pay all or any sums due hereunder upon demand by Lender, the amount of such sums payable by Guarantor to Lender shall bear interest from the date of demand until paid at the Default Rate in effect from time to time.

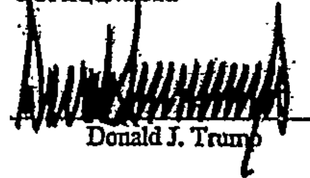
(b) Guarantor hereby agrees to pay all costs, charges and expenses, including reasonable attorneys' fees and disbursements, that may be incurred by Lender in enforcing the covenants, agreements, obligations and liabilities of Guarantor under this Guaranty.

17. Joint and Several Obligations. If Guarantor consists of more than one Person, each such Person shall have joint and several liability for the obligations of Guarantor hereunder.

[Remainder of Page Intentionally Left Blank; Signature Page Follows]

IN WITNESS WHEREOF, Guarantor has executed this Guaranty as of the date first above written.

GUARANTOR:



Donald J. Trump

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1 * * * C O N F I D E N T I A L * * *
2 SUPERIOR COURT OF NEW JERSEY
3 LAW DIVISION: CAMDEN COUNTY
4
5 DONALD J. TRUMP,)
)
6 Plaintiff,)
)
7 vs.) No. CAM-L-545-06
)
8 TIMOTHY L. O'BRIEN, TIME)
WARNER BOOK GROUP INC.,)
9 and WARNER BOOKS INC.,)
)
10 Defendants.)
------------------------)
11
12
13
14
15
16 January 7, 2008
17 10:02 a.m.
18
19 Deposition of ALLEN WEISSELBERG, held
20 at the offices of Kasowitz, Benson, Torres &
21 Friedman, 1633 Broadway, New York, New York,
22 before Laurie A. Collins, a Registered
23 Professional Reporter and Notary Public of
24 the State of New York.
25

2

1
2 APPEARANCES:
3
4 BROWN & CONNERY LLP
5 Attorneys for Plaintiff
6 360 Haddon Avenue
7 Westmont, New Jersey 08108
8 BY: WILLIAM M. TAMBUSSI, ESQ.
9 WILLIAM F. COOK, ESQ.
10 - and -
11 KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
12 1633 Broadway
13 New York, New York 10019-6799
14 BY: MARK P. RESSLER, ESQ.
15 MARIA GORECKI, ESQ.
16
17 DEBEVOISE & PLIMPTON LLP
18 Attorneys for Defendants
19 919 Third Avenue
20 New York, New York 10022
21 BY: ANDREW J. CERESNEY, ESQ.
22 ANDREW M. LEVINE, ESQ.
23 MARY JO WHITE, ESQ. (p.m. only)
24 JULIE S. SUH, ESQ.
25

3

1
2 APPEARANCES (continued):
3
4 ALSO PRESENT:
5 EDWARD FORD, CLVS, Videographer
6
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2 THE VIDEOGRAPHER: Good morning. This
3 is Tape Number 1 of the videotaped deposition
4 of Allen Weisselberg taken by defendants in
5 the matter of Donald J. Trump, plaintiff,
6 versus Timothy O'Brien, Time Warner Book
7 Group, Inc., and Warner Books, Inc.,
8 defendants, in the Superior Court of New
9 Jersey, Law Division: Camden County, Case
10 Number CAM-L-545-06.
11 This deposition is being held at 1633
12 Broadway, New York, New York, on January 7th,
13 2008. The time is 10:02 a.m.
14 My name is Ed Ford. I'm the certified
15 legal video specialist. The court reporter is
16 Laurie Collins. We're in association with
17 Veritext, 1350 Broadway, New York, New York.
18 For the record will counsel please
19 introduce themselves.
20 MR. RESSLER: For Plaintiff Donald J.
21 Trump from the firm Kasowitz, Benson, Torres &
22 Friedman, Mark Ressler and Maria Gorecki.
23 MR. TAMBUSSI: Also for plaintiff from
24 the firm of Brown Connery, William Tambussi
25 and William Cook.

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1
2 MR. CERESNEY: For Defendants Timothy
3 O'Brien, Time Warner Book Group and Warner
4 Books, Inc., Andrew Ceresney, Andrew Levine,
5 and Julie Suh from the firm of Debevoise &
6 Plimpton LLP.
7 THE VIDEOGRAPHER: Okay. Now will the
8 court reporter please swear in the witness.
9 ALLEN WEISSELBERG,
10 called as a witness, having been duly sworn
11 by the notary public, was examined and
12 testified as follows:
13 EXAMINATION BY
14 MR. CERESNEY:
15 Q. Good morning, Mr. Weisselberg.
16 A. Good morning.
17 Q. Let me just introduce myself on the
18 record. I'm Andrew Ceresney from Debevoise &
19 Plimpton. We represent the defendants in this
20 matter. I'll be asking you some questions in
21 connection with a lawsuit that Mr. Trump, your
22 employer, has brought against my clients.
23 A. Okay.
24 Q. And I apologize, I have a cold today.
25 So if you don't -- I apologize in advance if my

150

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2 the documents so that when he finished with me, he
3 would start going through documents with her.
4 And there was a tape recorder sitting
5 right to the side of where he was sitting. So I
6 assumed the thing was being taped.
7 Q. Did he take notes during that meeting?
8 A. He may have taken some notes. I don't
9 recall that. I do recall -- I don't typically get
10 taped when I speak to people, because that's not
11 my business. I have a clear recollection of him
12 saying that to me.
13 Q. Let's just go back to the ride out to
14 Florida.
15 A. Sure.
16 Q. Out to the airport to Florida. Was
17 that the first time you met Mr. O'Brien?
18 A. Yeah, I think so. He may have been in
19 the office, but I didn't know who he was. I
20 hadn't met him. I may have seen him walk around
21 or come to see Donald or something. But I hadn't
22 officially been introduced to him. So I didn't
23 know who he was. Then when I saw him in the car,
24 I think I remembered seeing him walking around the
25 office periodically, coming in and out of

151

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2 Mr. Trump's office.
3 Q. Had you ever spoken to him before?
4 A. No.
5 By the say, Mr. Trump spent a lot of
6 time with him.
7 Q. When was the trip to Florida?
8 A. Well, it would have had to be during
9 the winter months because my wife comes home from
10 Florida the end of March. So I would have to say
11 somewhere in February as a guess. It could have
12 been -- it could have been the beginning of March
13 or -- I think February.
14 Q. So it was prior to the meeting in Trump
15 Tower?
16 A. Oh, yes.
17 Q. Prior to that discussion on the way out
18 to the airport, had you ever spoken to Mr. O'Brien
19 on the phone?
20 A. No, or since that meeting we haven't
21 spoken.
22 Q. So the two times you've spoken to
23 Mr. O'Brien are on the ride out to the airport on
24 that day you were flying to Florida?
25 A. And there was some conversation on the

152

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2 plane flying to Florida. He walked back. You
3 asked me -- there were only two times.
4 Q. Okay. So there's that time, that
5 incident -- that instance, and then the Trump
6 Tower conference room?
7 A. Correct.
8 Q. Any other phone calls with Mr. O'Brien?
9 A. No.
10 Q. Prior to the trip to Florida, had you
11 ever spoken to Mr. Trump about Mr. O'Brien?
12 A. Only to the extent that he told me he
13 was going to write a book about Donald and that
14 Donald was spending -- that he was going to spend
15 time with him taking him around to the golf
16 courses, taking him to Florida. I think he even
17 went out to California I think at one point.
18 And I said, Are you sure you want to do
19 that? Do you know this fellow's background? Do
20 you know his writings? Do you know who he is?
21 Has he written about you before? He said, No, I
22 feel fine. I'm okay with it. I think it's
23 important we share with him everything we have.
24 Okay.
25 Q. You mentioned prior articles he had

153

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2 written.
3 A. No, I said, Did you check to see if he
4 had written anything about you before? I didn't
5 know what they were.
6 Q. I was going to ask you, did you know
7 anything about whether he had written before about
8 Mr. Trump?
9 A. I only found out later on, because of
10 the book -- and I didn't know this going in, that
11 he had worked for a fellow named Barrett way back
12 when, who I think has written some negative stuff
13 about Donald years ago, which I didn't know until
14 I read the book. It was mentioned in there. I
15 was saying, Oh, so I see where his training ground
16 came from.
17 Q. Did you know about any articles that
18 Mr. O'Brien had written for The Times about
19 Mr. Trump prior to the book?
20 A. Truthfully, no, I don't know.
21 Q. Go ahead.
22 A. He may have written something. I read
23 the Journal every day and the Post.
24 Q. Had you had any discussions with
25 Mr. Trump prior to the Florida trip about

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2 Donald told me or maybe a secretary told me. I
3 don't recall exactly who told me I would have a
4 meeting with Mr. O'Brien.
5 Q. What were you told at that time?
6 A. There would be a meeting with
7 Mr. O'Brien. The purpose of the meeting was to go
8 over some assets, have some discussion about his
9 net worth, and also to show him our various books
10 to be able to finally convince him that things we
11 claimed we owned we did own. And we --
12 Q. Go ahead.
13 A. We spent the next couple of weeks --
14 "we" being myself and Michelle Lokey, because she
15 hadn't been with us all that long -- literally
16 going through our entire office finding every
17 binder and document we could bring to that
18 meeting.
19 By the way, just so you understand -- I
20 said this before -- we're a privately held
21 company. We don't do this. We don't have to do
22 this. Other reporters have been maybe frustrated
23 by the fact we didn't do this, as you indicated to
24 me earlier with some of the articles you showed
25 me.

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2 But Mr. Trump chose in this case to
3 take him everywhere and show him everything, which
4 he -- ask Harry Macklowe one day and see the
5 answer you get. We took everything out,
6 everything, and let him see everything we had.
7 Q. When you say "everything," what
8 specifically, what types of documents
9 specifically, did you ask -- well, let me back up.
10 Who determined which documents to pull
11 to show to Mr. O'Brien?
12 A. Michelle Lokey is an attorney, and
13 certainly an attorney can determine what it is
14 that we have to show someone to prove ownership,
15 whether it's through a deed or something being
16 recorded in a county clerk's office or a binder
17 showing evidence of ownership.
18 Whatever we had at our disposal,
19 anything we had at our disposal that would show
20 ownership we wanted to be forthcoming and give to
21 him to be able once and for all to end the
22 argument about ownership.
23 Q. Did you have discussions with Ms. Lokey
24 about what she should pull, what documents she
25 should pull?

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2 A. No. I just had to help her find some
3 of these things, because they wasn't there that
4 long and she didn't know the various places we
5 store things. But other than that, not really.
6 Q. These were documents that demonstrate
7 ownership of properties; correct?
8 A. Ownership of properties, yes.
9 Q. You also said that the meeting was
10 going to be also related to net worth; right?
11 A. Yeah, I assumed we would sit down and
12 go through all the assets and the liabilities with
13 him, and I said, okay, whatever questions you
14 have, you ask me and I'll be happy to answer them
15 for you.
16 Q. Did you pull documents relating to net
17 worth?
18 A. There are no documents relating to net
19 worth. I'll give you an example. Other than
20 cash, you get a bank statement. Or marketable
21 security, we get a document.
22 If I say 40 Wall is worth X dollars, I
23 show him number one we own 40 Wall Street. I had
24 to clear that hurdle first. We own 100 percent of
25 40 Wall Street. So show him the valuation. He

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2 didn't ask to see anything to support my numbers.
3 It was just conversation.
4 Q. Did you pull audited financial
5 statements for 40 Wall Street?
6 A. He didn't ask for them.
7 Q. That wasn't my question. My question
8 was did you pull those in advance of the meeting.
9 A. No. Because audited financial
10 statements doesn't necessarily give you the
11 valuation of the property. That's the book value.
12 Q. Wouldn't the audited financial
13 statements tell you the cash flow from the
14 property?
15 A. It would tell you the cash flow from
16 the property for that moment, that period.
17 Q. And wouldn't that allow you to derive a
18 potential valuation for a property under the
19 income method?
20 A. That's one way of doing it. It's not
21 the only way of doing it.
22 Q. Did you pull golf course membership
23 lists to show him?
24 A. I don't recall doing that.
25 Q. Why not?

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2 really done because we didn't have anything to
3 show. All we had was basically all of our costs
4 that we incurred and paid for in that job, whether
5 it's for land acquisition or legal fees or
6 accounting fees or architectural fees or
7 engineering fees. That would have made up the
8 valuation at that point.
9 You can't value something unless you
10 actually have financing to build it, because you
11 can't sell one apartment in a building unless you
12 have the proceeds, the money, to build that
13 building. We didn't get that financing until July
14 of '05.
15 Q. So for Vegas that market value of that
16 property would have been minimal?
17 A. I don't know how much we spent. I
18 mean, the value of the land could have been $100
19 million. If you call that minimal, I don't know.
20 Q. At the time you spoke to Mr. O'Brien,
21 the market value of that property was minimal?
22 MR. RESSLER: I object to the form of
23 the question.
24 Q. What was the market value of the
25 property?

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2 A. I don't recall. Whatever -- whatever
3 we had probably paid/spent in dollars at that time
4 probably would have been the valuation on the
5 statement of financial condition.
6 Now, once we had financing in place in
7 '05 --
8 Q. July of '05?
9 A. July of '05. Once we began converting
10 reservations into hard contracts, we began to see
11 a pattern of how things were going and we were
12 able to raise pricing and just keep getting more
13 and more. That would have now given me enough
14 substance to begin to do a projection.
15 But prior to that without financing in
16 place, I wouldn't do a projection. The deal may
17 have fell apart.
18 Q. Did Mr. Trump give you any instructions
19 on what you should provide to Mr. O'Brien?
20 A. No. Other than -- yes, he did. I
21 showed him everything we have in our possession to
22 show ownership: every document, every binder,
23 every recorded deed. We showed him everything so
24 he walks out of there feeling comfortable.
25 Q. So Mr. Trump specifically mentioned

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2 ownership and not valuation?
3 A. No, we didn't discuss anything about
4 it. I would just hand him that myself. But as
5 far as ownership, he would -- understand one
6 thing: Mr. O'Brien continuously, no matter how
7 much Donald talked, did not believe we owned
8 anything on the west side. He didn't believe it.
9 There was only one way to prove it: show him the
10 documents that show evidence of ownership.
11 Q. Did you discuss with Mr. Trump
12 valuations, that is, what you should provide --
13 A. No.
14 Q. -- with regard to valuations?
15 A. No.
16 Q. Did you compile a list of what
17 documents were provided to Mr. O'Brien on April
18 21st?
19 A. I did not.
20 Q. What other discussions do you recall in
21 advance of the April 21st meeting with either
22 Mr. Trump or Ms. Lokey?
23 A. Constant conversation was finding every
24 binder that we had in our place. That was the
25 constant conversation. I mean, if you would have

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2 been in my office those couple of weeks, we had
3 ten people finding all these documents to make
4 sure we had everything.
5 Q. How did you determine that you had, as
6 you say, everything?
7 A. Well, we knew the assets that we had.
8 Q. How did you know that?
9 A. It's on our statement of financial
10 condition.
11 Q. So you checked the statement of
12 financial condition?
13 A. I know -- I'm there 34 years. I think
14 I should know the assets that we own. And I gave
15 her -- I told her what they were, and she went out
16 and found every piece of paper that indicated the
17 ownership of those assets.
18 Q. What did you do to prepare for the
19 meeting other than pulling these documents?
20 A. Not knowing the questions that were
21 going to be asked of me, same thing I'm doing
22 today: I'm walking in just with my knowledge of
23 being in the company all these years and a sense
24 of what goes on on a day-to-day basis. I really
25 didn't do much.

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2 A. The mathematics are.
3 Q. At the time what was your understanding
4 of what Mr. Trump's stake in Trump World Tower was
5 worth?
6 A. What his percentage of ownership was?
7 What are you asking?
8 Q. In terms of absolute dollar numbers,
9 what was your understanding of what Mr. Trump's
10 stake in Trump World Tower was worth?
11 A. Whatever our statement of financial
12 condition had on it. I don't recall what it is
13 now. I don't know today what it was then.
14 Q. Was it approximately 300 million?
15 A. It could have been.
16 Q. Does this at all refresh your
17 recollection regarding what you told Mr. O'Brien
18 about Trump World Tower on April 21st?
19 MR. RESSLER: Objection to the form of
20 the question.
21 Q. You can answer.
22 A. He asked questions about what the
23 property was worth. I may have taken him through
24 a scenario of projected sales. As I indicated to
25 you before, projected sales, less cost to build,

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2 net profit at the end, the split in between the
3 two partners.
4 Q. So does this refresh your recollection?
5 MR. RESSLER: Objection to the form of
6 the question.
7 Q. You can answer.
8 A. It seems to be numbers that are on the
9 right track to making sense, yes.
10 Q. Then it says, financial crisis: Korea
11 caused Daewoo to pull out of the hotel, and they
12 forfeited their stake. The deal to Donald -- in
13 the deal to Donald for zero??
14 MR. RESSLER: I'm sorry, I object to
15 your insertion of the word "in." The word
16 "in" doesn't appear in these jottings. It
17 says, and they forfeited their stake, dash,
18 the deal to Donald. So you're supplying what
19 you would like to interpret --
20 MR. CERESNEY: Mr. --
21 MR. RESSLER: -- these jottings to be,
22 and that's improper.
23 MR. CERESNEY: Mr. Ressler, hold on a
24 second.
25 MR. RESSLER: No, I'm not going to hold

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2 on.
3 MR. CERESNEY: Hold on. There is a dot
4 there. It says "in." And if you --
5 MR. RESSLER: It doesn't say "in,"
6 Andrew.
7 MR. CERESNEY: But there is a dot
8 there. If you look -- if you look --
9 MR. RESSLER: Is there a legend here
10 that you would like to direct me to like one
11 would find on a map? It is completely
12 appropriate, Andrew -- let me just say this,
13 and then you can respond. It's completely
14 inappropriate -- and you know this -- for you
15 to stick words in an exhibit.
16 The words that you're reading into this
17 exhibit do not appear on this exhibit. You
18 know that, and it's wrong for you to insert
19 words that don't exist.
20 MR. CERESNEY: Mr. Ressler, I'm not
21 inserting words that don't exist. I will ask
22 the witness --
23 MR. RESSLER: Are you maintaining for
24 the sake of this record that the word "in"
25 appears between "stake" and "the"?

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2 MR. CERESNEY: Yes, I am.
3 MR. RESSLER: Okay.
4 MR. CERESNEY: And indeed --
5 MR. RESSLER: That's laughable.
6 MR. CERESNEY: -- I can --
7 MR. RESSLER: That's laughable.
8 MR. CERESNEY: You know, Mr. Ressler --
9 MS. WHITE: You and I are both
10 laughing.
11 MR. RESSLER: That's ridiculous.
12 That's ridiculous. There's a line -- there's
13 a dash.
14 THE WITNESS: There's a dash there.
15 How does a dot --
16 MR. RESSLER: A dot signifies an "in"?
17 MR. CERESNEY: Mr. Ressler, I'm going
18 to move on.
19 MR. RESSLER: It's preposterous.
20 MR. CERESNEY: I'm going to move on.
21 MR. RESSLER: It's preposterous.
22 MR. CERESNEY: I'm going to move on,
23 and I hope you will too. And I'm going to ask
24 the witness then to read it so we can get his
25 understanding of what it says.

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2 THE WITNESS: This is totally -- I read
3 the comment when you guys were going back and
4 forth. This is absurd.
5 Q. Okay.
6 A. What happened --
7 Q. I would like to ask a question.
8 A. Certainly you can.
9 MR. RESSLER: And then you provide the
10 answer that you were going to provide.
11 THE WITNESS: Okay.
12 MS. WHITE: If it's responsive.
13 MR. RESSLER: You provide whatever
14 answer you choose to provide, Mr. Weisselberg.
15 MR. CERESNEY: If it's responsive to
16 the question.
17 MR. RESSLER: You provide whatever
18 answer you choose to provide.
19 MR. CERESNEY: Are you done,
20 Mr. Ressler?
21 MR. RESSLER: Ask your question.
22 MR. CERESNEY: Are you done?
23 MR. RESSLER: Ask your question.
24 MS. WHITE: Is that a "yes"?
25 MR. RESSLER: Ask your question.

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2 Q. Mr. Weisselberg, it then says no -- why
3 don't I say it, and then you tell me whether you
4 agree with what I've read.
5 No dollar sign paid. "No, none at
6 all."
7 Is that what you -- did I read what
8 appears to be on this page?
9 A. You read the exact words on the page,
10 which never happened.
11 Q. That does not refresh your recollection
12 about what you said at the meeting about Daewoo?
13 MR. RESSLER: Objection to the form of
14 the question.
15 A. Not even close.
16 Q. Okay. Thank you.
17 A. Actually I indicated to you earlier
18 exactly what transpired, including the promissory
19 note and how they -- how they got out of the Trump
20 World Tower deal and why they got out of the deal,
21 because they wanted to diversify their holdings in
22 the United States and abroad. And this was a way
23 of getting them to be involved in lots of our
24 licensing deals.
25 Q. And that's what you recall telling

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2 Mr. O'Brien that day?
3 A. Absolutely.
4 Q. Let's turn to the next page. Do you
5 recall speaking to Mr. O'Brien about Trump Park
6 Avenue?
7 A. I don't recall which assets he chose to
8 talk about that day. These are his notes. I'll
9 be happy to respond to things in these notes.
10 Q. Fair enough.
11 A. I don't recall the exact assets he
12 chose to talk about.
13 Q. Let me read it, and you tell me whether
14 you agree with my reading of what's in front of
15 you. Okay?
16 A. Okay.
17 Q. Trump Park Avenue. GE put up 115M,
18 which I will assume is $115 million --
19 A. Correct.
20 Q. -- for DT to pay off mortgage. DT took
21 out GE. There is a line there, which I interpret
22 as "in." Do you interpret that line as "in"? No?
23 A. You don't want to be sarcastic, do you?
24 Q. December for 140M, which I will
25 interpret as a million dollars. Can we agree with

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2 that? I will read it all. He financed the 140
3 million. Estimates he will sell units for 300 to
4 400 million. Values it at about $160 million.
5 Did I read that as you read it?
6 A. You read the words. I have no idea
7 what they mean, though. I understand a couple of
8 things that are on here.
9 Q. What do you understand that's on here?
10 A. The original 115, 115 million mentioned
11 up front.
12 Q. Is that -- go ahead.
13 A. We bought out GE for $140 million. We
14 financed that through a loan from UBS to take them
15 out. Just so you know, that loan today is down to
16 $15 million from $140 million. I actually even
17 reupped part of that loan by an additional 25
18 million. So we even paid off more than that. The
19 loan would have been gone by now.
20 And we still have a bunch of units left
21 to sell. And the building is doing great, getting
22 big numbers.
23 Q. So the 115 that GE put up initially,
24 that's accurate; correct?
25 A. Again, it's a long time ago. The

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2 number looks correct, I have to assume it's
3 correct.
4 Q. And the amount that Mr. Trump paid GE
5 to buy out GE, which is 140 million listed here,
6 that's accurate?
7 A. That's accurate. It may be 143. I
8 don't remember exactly. Maybe 140, 143. That's
9 about right.
10 Q. Here it also says, estimates he will
11 sell units for 300 to 400 million dollars, values
12 it at about -- values it at about $160 million.
13 A. What that probably means is 300 million
14 all together, 140 going to pay back the bank, and
15 160 above that.
16 Q. Is that what you told Mr. O'Brien?
17 A. It sounds like -- again, the numbers
18 seem to make sense, yes.
19 Q. Let's go to the next project, Chicago.
20 A. What is that?
21 Q. I'm going to read it, and you tell me
22 whether this your understanding of what it says.
23 A. Okay.
24 Q. It says, ESTS. 1.1 billion. And this
25 is the disputed dash. 1.1 billion --

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2 A. You want to believe a dot or dash means
3 the word "in"? My wife took Gregg in school
4 called shorthand. She can probably argue that
5 with you.
6 Q. Okay. Let's just ignore that word for
7 the moment.
8 A. Okay.
9 Q. Estimates 1.1B sales. Okay?
10 A. Projected sales.
11 Q. Was that approximately what you and the
12 Trump Organization were projecting would be sold
13 at Chicago in 2005?
14 A. No, not in 2005. The job hadn't even
15 been constructed yet. That's over time.
16 Q. Excuse me. My mistake in the question.
17 In 2005 were you projecting that the
18 sales ultimately in Chicago would be $1.1 billion,
19 approximately?
20 A. That's correct. As a -- can I expand
21 on that?
22 Q. Sure.
23 A. As a matter of fact, we had sold, out
24 of the box, so to speak, $550 million of units in
25 a relatively short period of time.

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2 Q. Okay. And we're going to talk about
3 Chicago later.
4 A. Go ahead.
5 MR. RESSLER: Are you finished with
6 your --
7 THE WITNESS: Uh-huh.
8 Q. Then it says mezzanine debt and
9 Deutsche Bank, 770 million.
10 Is that the approximate amount of the
11 debt that Deutsche Bank and the mezzanine debt?
12 A. Sounds about right.
13 Q. It says, Fortress gets kicker and
14 interest.
15 Does that look accurate?
16 A. Yes.
17 Q. Is Fortress actually getting a kicker
18 and interest on the loan?
19 A. The kicker comes at the end, and the
20 interest is accrued while the construction is
21 going on.
22 Q. Just to be clear, Fortress is the
23 entity that lent the mezzanine debt on this
24 project; correct?
25 A. That's correct.

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2 Q. Then it says, so there's -- and then
3 there's an A with a circle -- 400 million of
4 equity. The building and -- in the building, and
5 DT will get A with a circle 300 to 350 million.
6 Does that appear approximately correct
7 as to what you understood in 2005?
8 A. Yeah, well, I don't -- I guess he's
9 taking the 770 of total debt and backing out --
10 backing out -- backing it out from a billion one
11 and coming up with a net number. It's about
12 right.
13 Q. Does this refresh your recollection
14 that you told him that in --
15 A. Sounds reasonable, yeah.
16 Q. -- In April of 2005?
17 MR. RESSLER: Objection to the form of
18 the question.
19 A. Uh-huh.
20 Q. Yes?
21 A. Yes.
22 Q. Let's go to the next one, 40 Wall
23 Street.
24 A. Okay.
25 Q. They have been offered 350, and it's

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2 cut off. It says, DT bought 1 million, and 34
3 million in improvements equals 35 million, and the
4 building has 145 million in leverage.
5 MR. RESSLER: Line.
6 Q. Line leverage.
7 MR. RESSLER: Thank you.
8 Q. Is that accurate, that Mr. Trump had
9 been offered, in 2005, $350 million?
10 A. I recall a letter coming in, which we
11 immediately ignored because we felt it was worth
12 somewhere in excess of $400 million at that point,
13 and we didn't accept that offer.
14 Q. Do you think you told Mr. O'Brien that?
15 A. I don't recall the date the offer came
16 in with 350 on it. I don't recall the date.
17 Q. It's possible you told him that?
18 A. Possibility. I just don't recall.
19 Q. The next part says that Mr. Trump
20 purchased it for a million dollars, 40 Wall; is
21 that correct?
22 A. Yes, that's correct.
23 Q. And that there was $34 million made in
24 improvements. Was that accurate?
25 A. At the time, uh-huh.

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2 Q. And the time being in 2005?
3 A. Yeah. We've done some things since
4 that time, but for the large part, yes.
5 Q. And then it talks about the building
6 has $145 million in leverage, which I assume means
7 debt. Is that approximately correct?
8 A. I don't know what that means. I don't
9 know.
10 Q. How much was the debt outstanding at
11 the time, approximately?
12 A. The debt -- we refinanced the building
13 a number of times, three or four times. It was
14 65, and then it went to 125, and then it went to
15 151, and now it's at 160. So I don't know at what
16 points in time each of those happened. So I'm not
17 sure of the number at any one given time. But we
18 started out with 65 million that went to I think
19 125 that went to 151 that went to 160. I just
20 don't recall the dates of when those things
21 happened.
22 Q. Do you believe you told Mr. O'Brien
23 that it was approximately 145 million at the time?
24 A. The debt?
25 Q. The debt.

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2 A. It doesn't say that here. It says
3 leverage. I don't know what that means.
4 Q. You don't know what the word "leverage"
5 means?
6 A. Not in this vein.
7 Q. You don't know that sometimes debt is
8 referred to as leverage?
9 MR. RESSLER: Objection to the form of
10 the question.
11 A. Leverage -- it can be -- it can be
12 termed that. But I don't recall the number 145
13 and the word "leverage" meaning the same thing.
14 The debt was 150. I don't believe it was 145. I
15 think it was 151, actually. That would have been
16 the debt. 145 is not a debt number. So when you
17 say 145 and tie it into the word "leverage," I
18 don't get that same -- I don't get that same
19 conclusion.
20 Q. Okay. All right. Let's keep going.
21 A. Sure.
22 Q. So A with a circle $180 million and
23 then the dash debt on building. Okay?
24 A. Wait, now I'm really confused. What
25 does that say, go at 180?

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2 Q. It says A with a circle?
3 A. That means at, go at 180.
4 Q. Right. Debt on building. Agrees that
5 city assesses at $90 million.
6 Do you see that?
7 A. I see it. I don't know what it means.
8 Q. Does the 180 appear to be the sum of
9 the 145 million and the 35 million dollars that's
10 mentioned in the prior paragraph?
11 MR. RESSLER: Objection to the form of
12 the question.
13 Q. You can answer.
14 A. Does the 180 --
15 Q. Appear to be the sum of the 145 million
16 in leverage that's mentioned and the $35 million
17 in improvement that's mentioned in the prior
18 paragraph.
19 MR. RESSLER: Objection to the form of
20 the question.
21 A. I could assume that he's adding those
22 numbers together.
23 MR. RESSLER: I'm sorry for
24 interrupting, but you shouldn't assume because
25 these of course aren't your jottings or

246

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2 writings.
3 A. Yeah, I don't know what he had in mind
4 with these numbers.
5 MR. RESSLER: So don't assume.
6 THE WITNESS: Okay.
7 MR. RESSLER: Whoever wrote these will
8 explain as he or she sees fit. I don't want
9 you to assume anything about these jottings;
10 all right?
11 THE WITNESS: The one thing in here I
12 don't agree with is the city assessed at 90.
13 I never even heard that number. I don't know
14 if it's an accurate number. Without having a
15 real estate tax bill in front of me, could I
16 just say off the top of my head, yes, that's
17 what the assessment is?
18 We have all these properties. We have
19 100 tax bills that come in. How would I know
20 the assessment for 40 Wall Street at a meeting
21 when I brought nothing in there with me?
22 Q. You don't recall that? Is that what
23 you're saying?
24 A. I don't recall it because it's
25 absolutely not true.

247

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2 Q. Okay. Let's look at the next
3 paragraph. It's 88 to 90 percent leased.
4 Was that accurate at the time?
5 A. Oh, in '05? I don't recall what the
6 percentage of occupancy was at that time. I
7 wouldn't -- by the way, again, I walked into that
8 meeting with no notes, and I wouldn't know that
9 percentage in my head.
10 Q. You don't recall seeing that?
11 A. I'm not a leasing agent for that
12 building, so I wouldn't recall whether it's 75 or
13 95. I wouldn't know that.
14 Can I ask you a question?
15 Q. No, you don't, actually, because I get
16 to ask the questions. Thank you, Mr. Weisselberg.
17 A. Okay. I went to the wrong school.
18 Q. Then it says, Donald put net 200 plus M
19 million on sale would conservatively get
20 approximately 155 million dash on sale, open
21 quote, thinks the building would sell for 410
22 million, close paren.
23 Do you recall saying this to
24 Mr. O'Brien?
25 A. No.

248

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2 Q. Do you recall telling Mr. O'Brien that
3 you thought that the building would sell for
4 approximately 410 million?
5 A. I don't recall that. I may have, but I
6 don't recall. I certainly don't recall the
7 percentages that are here, 88 to 90 percent. I
8 don't recall that. I also don't recall Donald
9 could net. Are these Mr. O'Brien's thoughts?
10 They're not my thoughts, what he could net on a
11 sale.
12 Could certainly get 155. I don't know
13 where that came from. It wasn't my thoughts. I'm
14 not a broker. I have no idea what the market at
15 that time would have given us. We estimated 410,
16 assuming that's correct. But I never would have
17 said 155 to him if I had 410 in my financial
18 statement.
19 So where these thoughts came from could
20 only be his own thinking of when he was writing
21 his notes. I don't know when he wrote these
22 notes. He may have had other notes and he took
23 those notes and then went home and sat and thought
24 about it and wrote his --
25 Q. The only question I'm asking you --

249

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2 MR. RESSLER: I'm sorry, are you
3 finished?
4 A. Wrote his book.
5 Q. I'm only asking if you recall saying
6 this to Mr. O'Brien that day.
7 A. No.
8 Q. Okay. Let's go on to the next one,
9 West Side Yards.
10 A. Sure.
11 Q. Again, I'll read it and you tell me if
12 at any point you disagree with my reading.
13 A. Okay.
14 Q. Six partnerships that own portions of
15 the site. Seven buildings are up and five
16 occupied. There will be 16 -- there's an
17 abbreviation for buildings, and then there's that
18 dash with the dot, total.
19 Is that accurate?
20 MR. RESSLER: Is your reading accurate?
21 Q. Is my reading accurate?
22 A. Your reading is accurate.
23 Q. Is that an accurate statement about the
24 West Side Yards?
25 A. I don't recall if it was five

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2 partnerships or six. It's either five or six
3 partnerships.
4 Q. Do you recall whether you said that to
5 Mr. O'Brien on April 21st?
6 A. I don't recall that.
7 Q. Then it says, Donald will net 1.3
8 billion when the project is completed. Do you
9 recall saying that to Mr. O'Brien?
10 A. That -- that sounds like something I
11 would say. When the 16 buildings were completed,
12 over that time period that it would take to do
13 that, we could end up with $1.3 billion of
14 proceeds.
15 Q. It goes on for about a page describing
16 the West Side Yards.
17 A. Okay.
18 Q. Three million square feet of condo
19 property will generate approx -- A with a circle
20 $3 billion, the dash with the period cash off of
21 development costs of 840 million. Net there is
22 2.2 billion.
23 Is that something you told Mr. O'Brien
24 on April 21st?
25 A. It doesn't look right. Mathematically

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2 it doesn't seem right. I don't think I would say
3 that, the reason why, because I don't know what
4 the construction costs are to build these
5 buildings.
6 I might know about projected sales, but
7 I wouldn't know what the construction costs would
8 be to build the remaining, what is it, nine
9 buildings left to go? There were seven buildings?
10 There were five -- there were 11 buildings left to
11 build. I wouldn't know the construction costs to
12 build a building if my life depended on it.
13 So I can't tell you what $840 million
14 means. To build 11 buildings for a cost of $840
15 million doesn't make any sense.
16 Q. Would anyone in the Trump Organization
17 have had that information at the time?
18 A. I don't know. Probably not. Since
19 we're a 30 percent partner, our Hong Kong
20 partners, they were the ones that did all the
21 costing analysis of that project as to what the
22 cost would be to build the building.
23 Especially when you're dealing with 11
24 buildings, they don't all get built today; they
25 get built over time. And who's to say what

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2 construction costs would go down the road.
3 So I don't know where the 840 million
4 of costs would have come from. I don't know.
5 Q. Does the $3 billion in sales, is that a
6 number that you're familiar with?
7 A. I don't remember. I don't recall what
8 the sales projection would have been for that
9 property.
10 Q. Let's go to the next entry. I asked
11 time frame? He doesn't know and will get back to
12 me. Are they discounting the cash flow and what
13 is rate. Are they -- what rate are they using.
14 Doesn't know. Will get back to me.
15 Do you recall this?
16 A: Not really, but I will give my answer
17 that I gave to you before about discounting,
18 because you asked that question earlier about
19 discounting things. And typically what I always
20 believe in doing is saying values -- inflation,
21 and real estate values for the most part will rise
22 generally, in New York. I wouldn't say that about
23 Kansas or someplace in the midwest, but in New
24 York generally speaking. And inflation --
25 inflation and real estate values will go up

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2 simultaneously with the discounting rate going the
3 other way.
4 So typically I don't discount, I don't
5 add for inflation, I just neutralize it and leave
6 it in today's dollars.
7 Q. Do you remember this discussion with
8 Mr. O'Brien about that?
9 A. I honestly don't.
10 Q. Is it possible you had that --
11 MR. RESSLER: Objection to the form of
12 the question.
13 Q. Is it possible you had that discussion?
14 MR. RESSLER: Objection to the form of
15 the question.
16 A. Anything is possible, but I won't say
17 for sure I didn't have that conversation. I don't
18 recall having it, but it's possible.
19 Q. The next entry says, will sell 1.6
20 billion, the dash with the period, rentals over a
21 ten-year period at a cost of 448 million. So a
22 net there of 1.2 billion.
23 Do those numbers look like what you
24 told Mr. O'Brien that day?
25 MR. RESSLER: Objection to the form of

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2 the question.
3 A. If it's a rental building, you're not
4 selling anything; you're renting. So to say that
5 we'll sell 1.6 billion in rentals, you're making
6 an assumption we're going to take those entire
7 building as a rental building and sell the entire
8 building. That was never contemplated.
9 So I don't know what that means. I
10 don't know what that means.
11 Q. You don't recall that?
12 A. No. I don't recall what it means. You
13 don't -- unless you're going to sell a rental
14 building, then all you do is receive rent. You
15 write a check out every month. That's it.
16 Q. It was never contemplated that -- I'm
17 sorry, did it ever occur that the general
18 partnership that owned -- the limited partnership
19 that owned the West Side Yards sold these
20 buildings wholesale?
21 A. The limited partnership? You mean --
22 that's us.
23 Q. No, the limited partnership that owned
24 the West Side Yards in which Mr. Trump was one of
25 the limited partners, isn't it true that at some

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2 point in May or June of 2005 that limited
3 partnership sold the West Side Yards wholesale?
4 A. It wasn't a limited partnership that
5 sold the property. You mean -- you call -- okay.
6 We're limited partners, the limited partnership.
7 Yeah, and that's why there's a lawsuit.
8 Q. So that actually occurred?
9 A. No. It occurred -- it didn't occur
10 when we had this meeting.
11 Q. Right.
12 A. I didn't know about a sale then, unless
13 I was Houdini. I wouldn't have known about a sale
14 in '05 that would have taken place later on.
15 Q. You don't know where O'Brien got these
16 numbers?
17 MR. RESSLER: Objection to the form of
18 the question.
19 A. I would say that it's a possibility we
20 did an analysis to say over a certain time period
21 we could derive -- it actually says that, ten-year
22 period. See, there's a contradiction. We will
23 sell 1.6 -- no, over a ten-year period, we will
24 take in $1.6 billion of rental income, not sales,
25 at a cost of X dollars, which you see there, which

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2 will derive $1.2 billion.
3 So it's not a sale, because it actually
4 says it right there, see?
5 Q. Is that what you think you told
6 Mr. O'Brien?
7 A. Which makes sense. Over a ten-year
8 period, we can derive $1.6 billion in rental
9 income from those 11 buildings or whatever number
10 buildings it is.
11 Q. Then the next entry: Commercial space
12 is 1.8 million square feet, and the net on that
13 will be $650 million. Over what period of time?
14 Doesn't know. Will get back to me.
15 Do you recall telling Mr. O'Brien that
16 the commercial space will be approximately 1.8
17 million square feet and the net on that will be
18 approximately $650 million?
19 A. I don't recall that. It's possible,
20 but I just don't recall it.
21 Q. Do you recall whether those were
22 accurate numbers at the time?
23 A. At one point it does sound accurate.
24 Q. Did Mr. O'Brien ask you over what
25 period of time that commercial space would come on

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2 line?
3 A. If he did, I wouldn't have been able to
4 give him the answer, because I don't know the
5 answer to that.
6 Q. Did you tell him you would get back to
7 him?
8 A. I would have no way of getting back to
9 him. I don't know the answer. I mean, how -- if
10 we're negotiating and there was a possibility at
11 Columbia University was contemplating -- did you
12 go to that school?
13 Q. Yes, I actually did.
14 A. You're smiling.
15 There was some contemplation at one
16 point -- we met with Mr. Lerner, who owned a
17 credit card company; I forget which one it is.
18 Q. MBNA.
19 A. Okay. Who was -- they were
20 contemplating putting the business school and some
21 other schools in the that facility. It didn't
22 come to fruition. So for me to know what time
23 period a commercial development would take place,
24 I wouldn't know that.
25 Q. The last entry says, total net is 4

258

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2 billion, and DT gets 30 percent of that.
3 A. 1.2.
4 Q. Is that what you told Mr. O'Brien?
5 A. The mathematics work.
6 Q. Is that your recollection?
7 A. If it's 1.2 and that's how we derived
8 it, then it's probably what I told him, yes.
9 Q. Let's look at the next page. DT has
10 200 million. We have the line with the dot on
11 top, debt on the site and sells to New World for
12 85 million, open paren, Chase sells because they
13 had mortgage and became owner when DT defaulted.
14 Does that appear to be what it says?
15 A. The Chinese came along that bought the
16 property from Chase Manhattan Bank for $85
17 million.
18 Q. That was accurate?
19 A. That was accurate.
20 Q. Did you tell Mr. O'Brien that that day?
21 A. I don't recall. It's certainly in
22 public documents. It may have come from me.
23 Q. Then it says, DT is a partner on the
24 site and gets portion of net on all sales.
25 There's an arrow. Then it says, but he is not

259

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2 general partner. And then -- well, let me just
3 ask you about that.
4 Do you recall that part of the
5 discussion?
6 A. No, but he's a limited partner, so
7 that's an accurate statement.
8 Q. An accurate statement?
9 A. It's an accurate -- two words: It's an
10 accurate statement that he's a limited partner and
11 not a general partner.
12 Q. I just thought you said "inaccurate"
13 and I wanted to make sure the record is clear.
14 A. That's okay.
15 Q. Then it says, Is he an owner? "He gets
16 profits just like other owners." But is he an
17 owner? "He is a partner."
18 Is that an interchange you had with
19 Mr. O'Brien that day?
20 A. It sounds like something a continuation
21 of an ongoing conversation about ownership. If
22 you're an ongoing partner, you will receive a
23 percentage of the profits at the end of the day.
24 Then what do you think you are if not an owner?
25 Q. Was that the debate or was that the

260

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2 disagreement that you were having with
3 Mr. O'Brien, whether a limited partner was an
4 owner?
5 A. He didn't get it. He just did not
6 understand the concept. The fact we didn't have
7 certain rights as a limit partner but we had
8 certain restrictions did not necessarily mean that
9 when a building was sold we wouldn't get 30
10 percent of it.
11 Q. Was he denying that you were a 30
12 percent limited partner?
13 A. Correct.
14 Q. No, no, was he denying whether you were
15 a 30 percent limited partner?
16 MR. RESSLER: Objection, asked and
17 answered.
18 Q. Was he deny --
19 MR. RESSLER: He just said correct.
20 Q. Let me ask it a different way. You
21 contrasted ownership with being a limited partner.
22 Did Mr. O'Brien deny that Mr. Trump was a 30
23 percent limited partner in the property?
24 MR. RESSLER: Objection to the form of
25 the question.

261

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2 Q. You can answer.
3 A. He didn't understand that we were a
4 limited partner with a 30 percent right to
5 profits. That's what the documents were on the
6 table to prove to him we were. He just didn't get
7 the concept of what I was talking about.
8 Q. What did he understand was Mr. Trump's
9 interest?
10 A. He didn't know what it was. He -- he
11 didn't -- he didn't understand the concept of
12 limited partnership and ownership being one and
13 the same.
14 Q. He understood limited partnership as
15 different than ownership?
16 MR. RESSLER: Objection to the form of
17 the question.
18 A. I'm not sure he understood what a
19 limited partner really was.
20 Q. Why do you say that?
21 A. Based upon the answers and the comments
22 he was making about ownership. Why would a
23 limited partner not be an owner? If he understood
24 what a limited partner was, he would never even
25 raise the issue.

1 DONALD J. TRUMP) SUPERIOR COURT OF NEW JERSEY
) LAW DIVISION, CIVIL PART
2 vs.)
)
3 TIMOTHY O'BRIEN, TIME) CAMDEN COUNTY
WARNER BOOK GROUP INC.)
4 and WARNER BOOKS INC.)
) CASE NO. CAM-L-545-06
5
6
7 ORAL VIDEOTAPED DEPOSITION
8 LEIGH MICHELLE LOKEY
9 F/K/A MICHELLE LOKEY SCARBROUGH
10 SEPTEMBER 7, 2007
11
12 ORAL VIDEOTAPED DEPOSITION OF LEIGH MICHELLE LOKEY,
13 produced as a witness at the instance of the Defendants
14 and duly sworn, was taken in the above-styled and
15 numbered cause on the 7th day of September, 2007, from
16 7:40 a.m. to 2:21 p.m., before Staci Williams and Nancy
17 A. Salinas, Certified Shorthand Reporters in and for the
18 State of Texas, reported by computerized stenotype
19 machine at the offices of Strasburger & Price, LLP, 600
20 Congress Avenue, Suite 1600, Austin, Texas, pursuant to
21 the applicable Rules of Civil Procedure and the
22 provisions stated on the record or attached hereto.
23
24
25

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3

1
2 INDEX
3 PAGE

4 LEIGH MICHELLE LOKEY
5 Examination by Mr. Andrew Ceresney 6
Signature Page 240
6 Court Reporter's Certificate 242
Witness instructed not to answer 26

7
8 EXHIBITS
9

EXHIBIT	DESCRIPTION	PAGE
10		
11 1	Statement of financial condition with certification to UBS (12)	61
13 2	Corrected copy of Exhibit 1	63
14 3	12-02 Casino Control Commission filing	65
15 4	01-04 Indiana Gaming Commission filing (16)	65
17 5	Audited financial statements for Trump Tower Commercial for the year ending December 31st, 2004 (18)	69
19 6	Audited financial statements for 40 Wall Street, LC for the year ending December 31, 2004 (20)	69
21 7	11-20-06 letter, Gorecki to Ceresney (22)	77
23 8	40 Wall Street mortgage loan documents	79
24 9	4-5-07 letter, Gorecki to Levine (25)	87

4

1 EXHIBITS (cont.)

EXHIBIT	DESCRIPTION	PAGE
3 10	Documents represented to be in room 4-21-05	93
4 11	License agreement for the White Plains residential property (5)	96
6 12	O'Brien notes of 4-21-05 meeting	106
7 13	4-26-05 e-mails, Alexander and Lokey (8)	156
9 14	10-21-05 letter, Ms. Lokey to New York Times	163
10 15	4-2-05 e-mail, O'Brien to Lokey	177
11 16	4-26-05 e-mail, Lokey to O'Brien (12)	180
13 17	5-9-05 e-mail, O'Brien to Lokey	183
14 18	6-2-05 O'Brien notes of conversation with Lokey	197
15 19	8-23-05 e-mail, O'Brien to Lokey (16)	205
17 20	10-20-05 e-mail, O'Brien to Lokey and Graff	215
18 21	10-21-05 O'Brien handwritten notes on conversation with Lokey (19)	219

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1 PROCEEDINGS
2 THE VIDEOGRAPHER: My name is Brendt
3 Fisher of Nationwide Video Productions, Inc.
4 representing Doerner & Goldberg, Inc., located in
5 Roseland, New Jersey. The date today is September 7th,
6 2007, and the time is approximately 7:41. The
7 deposition is being held at the office of Strasburger &
8 Price located at 600 Congress, Suite 1600, Austin,
9 Texas, 78701. The caption of this case is Donald Trump
10 versus Timothy O'Brien, et al. in the Superior Court of
11 New Jersey, Law Division, Civil Part, Camden County,
12 Case No. CAM-L-545-06. The name of the witness is
13 Michelle Lokey. At this time the attorneys will
14 identify themselves and the parties they represent,
15 after which our court reporter Staci Williams, Doerner &
16 Goldberg, will swear in the witness and we can proceed.
17 MR. CERESNEY: Andrew Ceresney and Andrew
18 Levine of Debevoise & Plimpton, LLP, in New York,
19 representing the Defendants Timothy O'Brien, Time Warner
20 Book Group, and Warner Books.
21 MR. TAMBUSSI: William Tambussi and Maria
22 Gorecki representing Donald Trump.
23
24
25.

42

1 Q. Okay. How do you know whether or not those
2 were searched then?
3 A. I was told that they were.
4 Q. By who?
5 A. By Allen and Jae.
6 Q. Allen Weisselberg?
7 A. Yes.
8 Q. Okay. Now, let's talk for -- turn to
9 Mr. O'Brien.
10 A. Mm-hmm.
11 Q. When did you first hear of Tim O'Brien?
12 A. I think I first heard of him from Mr. Trump.
13 Q. Okay. When was that?
14 A. I don't remember. I mean, he -- I know he was
15 working with him maybe before I came to the company. He
16 was showing him around and giving him material for the
17 book.
18 Q. At some point prior to April 21st, though,
19 Mr. Trump mentioned Mr. O'Brien to you?
20 A. May have been mentioned when I was in the room
21 that he was writing a book and that Mr. Trump was
22 cooperating in that effort.
23 Q. Okay. Do you remember anything else about
24 Mr. Trump -- anything else that Mr. Trump said about
25 Mr. O'Brien?

43

1 A. Not prior to meeting him, no.
2 Q. So prior to meeting Mr. O'Brien on April 21st,
3 the only thing you recall about what Mr. Trump said was
4 that he was writing a book on Mr. Trump and that
5 Mr. Trump was cooperating?
6 A. Well, no, when I met with him, there were
7 conversations prior to that about what I needed to do to
8 get ready for that meeting, but with respect to him
9 personally, all I knew is that he had gone to Mar-A-Lago
10 on the plane, I think, and that he was writing a book.
11 Q. Let's talk about you mentioned the conversation
12 that you had -- or conversations. How many
13 conversations did you have with Mr. Trump about
14 preparing for the meeting?
15 A. I don't remember.
16 Q. Was it Mr. Trump who first told you you'd be
17 meeting with Mr. O'Brien?
18 A. I don't remember, it could have been Allen
19 Weisselberg.
20 Q. What do you recall in terms of your
21 conversations first with Mr. Trump about the April 21st
22 meeting?
23 A. Just that this was an unprecedented look at his
24 assets and it was the first time we had done something
25 like this and to be sure that I had everything in order

44

1 and be sure that it was properly marked and ready for
2 Mr. O'Brien's visit.
3 Q. Did he tell you what to pull?
4 A. Allen Weisselberg probably told me more what to
5 pull. I mean, the two of them did, but he -- I mean, I
6 knew what I was supposed to pull was the assets that we
7 owned, and I was to tab our percentage ownership or how
8 Mr. Trump owned portions of that property or all of the
9 property and the deeds.
10 Q. Okay. So documents showing ownership?
11 A. Mm-hmm, yes.
12 Q. And deeds?
13 A. Yes.
14 Q. Okay. Anything else you were told to pull?
15 A. No.
16 Q. Okay. Now -- and this was a conversation that
17 would have included Mr. Trump and Mr. Weisselberg?
18 A. Probably. I think they decided to do it and it
19 was relatively quick. I had maybe two or three days to
20 pull everything together.
21 Q. Okay, so let me just make sure I understand.
22 So April 21st, a few days before that --
23 A. Yes.
24 Q. -- you have one or more conversations -- I'm
25 not trying to put words in your mouth, I just want to

45

1 make sure I've got it straight. One or more
2 conversations with Mr. Trump and Mr. Weisselberg?
3 A. Yes.
4 Q. In that conversation they said you're going
5 to -- they are going to give Mr. O'Brien access to
6 documents, unprecedented access to documents?
7 A. We, the company, are going to do that. I
8 didn't know at the time that I would be meeting with
9 Mr. O'Brien.
10 Q. Okay. So you --
11 A. Just I was simply to gather everything
12 together.
13 Q. And in terms of what you were to gather, you
14 were told to gather documents showing ownership
15 including deeds?
16 A. Yes.
17 Q. Did Mr. Trump or Mr. Weisselberg explain the
18 purpose of the meeting with Mr. -- I'm sorry, let me
19 strike that. Did they explain the purpose of providing
20 these documents to Mr. O'Brien?
21 A. To show ownership of assets.
22 Q. What else do you recall about conversations
23 with Mr. Trump or Mr. Weisselberg prior to April 21st
24 about collecting documents?
25 A. I don't remember anything other than getting --

50

1 but not -- I don't know that I remember talking to Mark
2 about that.
3 Q. Okay. Either before or after the meeting?
4 A. We had lunch after the meeting, but I don't
5 recall that being part of the conversation.
6 Q. Okay. Other than Mr. Alexander, do you recall
7 any other conversations with anyone outside the Trump
8 organization prior to the April 21st meeting about
9 Mr. O'Brien?
10 A. No.
11 Q. Now, just talking about the materials you've
12 collected, you mentioned this list of assets that you
13 used to pull documents for. Did you preserve that list?
14 A. No.
15 Q. Okay. That doesn't exist anymore?
16 A. No.
17 Q. Now, how much time did you spend collecting the
18 documents that you showed to Mr. O'Brien on April 21st?
19 A. I think probably somewhere around 30-plus
20 hours.
21 Q. Why did it take so long?
22 A. Because the binders, some of them were old,
23 some of them had been filed away, some of the deeds
24 weren't with the deal binders. It just took time and it
25 took time to go through all the documents and find the

51

1 deeds in the documents and find the ownership and be
2 very clear that I was tabbing everything correctly.
3 Q. When you pulled these documents -- let me ask a
4 different question. Have you ever personally prepared a
5 net worth statement for anyone?
6 A. No.
7 Q. Are you familiar with the way that such a net
8 worth statement would be prepared?
9 A. No.
10 Q. Okay. Have you ever engaged in the valuation
11 of an asset?
12 A. No.
13 Q. Do you have any expertise in valuing an asset?
14 A. No.
15 Q. Did anyone tell you that one of the purposes of
16 Mr. O'Brien's visit was to understand the valuation of
17 the assets?
18 A. No.
19 Q. Did anyone tell you that one of the purposes of
20 Mr. O'Brien's visit was to understand the liabilities?
21 A. No.
22 Q. Did anyone tell you that Mr. O'Brien was trying
23 to understand Mr. Trump's net worth?
24 A. No, not for this meeting, not for the meeting
25 on April 21st.

52

1 Q. And what was your understanding then of the
2 purpose of the meeting? Just to explore the holdings?
3 A. The purpose of the meeting as my understanding
4 was it was strictly to show assets owned by Mr. Trump.
5 Q. Not liabilities?
6 A. I assumed there would be a secondary meeting
7 for all of that with the appropriate people.
8 Q. And you were not the appropriate person?
9 A. I was not the correct person.
10 Q. One of the things you said earlier was that
11 when you collected the documents, you didn't know you'd
12 be at the meeting?
13 A. Mm-hmm.
14 Q. When were you told you were going to go to the
15 meeting?
16 A. Probably that day.
17 Q. April 21st?
18 A. April 21st.
19 Q. In the morning?
20 A. Probably.
21 Q. That's your best recollection?
22 A. I don't remember if they may have told me the
23 night before or that morning. Since I had pulled and
24 tabbed everything, I seemed like the most logical person
25 to be able to explain it, but Allen came to the meeting

53

1 as well to help since he's been there for all of the
2 acquisitions.
3 Q. Okay. So -- and who told you you'd be
4 attending?
5 A. Allen.
6 Q. Weisselberg?
7 A. Yes.
8 Q. And what did he say exactly?
9 A. He said, "I need you to come to the meeting so
10 that you can show him what you've tabbed, and I can
11 explain if there's any additional information he needs."
12 Q. What if anything did Mr. Trump tell you prior
13 to the meeting about whether you should provide any
14 other documents that Mr. O'Brien might request?
15 A. He didn't tell me anything about that.
16 Q. At the meeting did Mr. O'Brien request other
17 documents as well?
18 A. Not from me.
19 Q. So he didn't ask for net worth statements or
20 audited financial statements or --
21 A. He may have asked that of Allen but not of me.
22 Q. Okay. Okay, so let me come back to that when
23 we discuss the structure of the meeting.
24 A. Okay.
25 Q. You think you spent about 30 hours collecting

1 but not -- I don't know that I remember talking to Mark
2 about that.
3 Q. Okay. Either before or after the meeting?
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5 recall that being part of the conversation.
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15 meeting?
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23 night before or that morning. Since I had pulled and
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10 that you can show him what you've tabbed, and I can
11 explain if there's any additional information he needs."
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13 to the meeting about whether you should provide any
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1 * * * C O N F I D E N T I A L * * *
2 SUPERIOR COURT OF NEW JERSEY
3 LAW DIVISION: CAMDEN COUNTY
4
5 DONALD J. TRUMP,)
)
6 Plaintiff,)
)
7 vs.) No. CAM-L-545-06
)
8 TIMOTHY L. O'BRIEN, TIME)
WARNER BOOK GROUP INC.,)
9 and WARNER BOOKS INC.,)
)
10 Defendants.)
-------------------------)
11
12
13
14
15 November 13, 2007
16 10:08 a.m.
17
18
19 Deposition of GERALD J. ROSENBLUM, held
20 at the offices of Wilson Elser Moskowitz
21 Edelman & Dicker, 150 East 42nd Street, New
22 York, New York, before Laurie A. Collins, a
23 Registered Professional Reporter and Notary
24 Public of the State of New York.
25

1
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10 MARTIN J. BURNS, ESQ.
11
12 ALSO PRESENT:
13 J.D. MARTINEZ, Videographer
14
15
16
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18
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20
21
22
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1
2 THE VIDEOGRAPHER: Good morning. We
3 are on the record. This is the deposition of
4 Gerry Rosenblum taken in the case of Donald J.
5 Trump versus Timothy O'Brien, et al., filed in
6 the Superior Court of New Jersey, Law
7 Division: Camden County, Docket Number
8 CAM-L-545-06.
9 Today's date is November 13th, 2007.
10 The time on the videotape record is 10:08 a.m.
11 This deposition is being held at 150 East 42nd
12 Street, New York, New York.
13 My name is J.D. Martinez on behalf of
14 Veritext.
15 Will everyone please introduce
16 themselves and state whom they represent.
17 MR. MANISERO: Thomas Manisero, Wilson
18 Elser. I represent Weiser and the witness.
19 MR. BURNS: Martin Burns of Wilson
20 Elser, also representing Weiser and the
21 witness.
22 MR. CERESNEY: Andrew Ceresney from
23 Debevoise & Plimpton LLP representing the
24 defendants: Timothy O'Brien, Time Warner Book
25 Group, and Warner Books. With me today is

1 Rosenblum - Confidential
2 Mary Jo White, Andrew Levine, and Julie Suh
3 from the Debevoise firm.
4 MR. TAMBUSSI: William Tambussi from
5 Brown & Connery representing Donald Trump.
6 MS. GORECKI: Maria Gorecki from
7 Kasowitz, Benson, representing Donald Trump.
8 MR. ROSENBLUM: I'm sorry, I'm Gerald
9 Rosenblum.
10 GERALD J. ROSENBLUM,
11 called as a witness, having been duly sworn
12 by the notary public, was examined and
13 testified as follows:
14 EXAMINATION BY
15 MR. CERESNEY:
16 Q. Good morning, Mr. Rosenblum.
17 A. Good morning.
18 Q. Let me introduce myself on the record.
19 I'm Andrew Ceresney from Debevoise & Plimpton. We
20 represent the defendants in this matter. I'll be
21 asking you some questions today and tomorrow
22 regarding the lawsuit that Mr. Trump has brought
23 against my clients.
24 First of all, are you represented by
25 counsel today?

22

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2 read and literally read, not worked upon, perhaps,
3 or not -- but it should be read and thought about
4 and considered from the standpoint of exclusion of
5 errors or omissions or anything that might come to
6 the mind of a person who's familiar with the
7 industry and Mr. Trump's activities.
8 So I always thought it was a good idea
9 I read that statement and think about it. And
10 many years I assisted in the compilation or did
11 the compilation. So -- because, again, I thought
12 it should be done by somebody with a background
13 and understanding.
14 Q. And you had that background and
15 understanding?
16 A. I think I did.
17 Q. When you say you brought background and
18 understanding to those compilations, what in
19 particular were you thinking of? What kind of
20 background?
21 A. The statement and the methodology and
22 the preparation of the statement had evolved over
23 many years. We began issuing a compilation on
24 behalf of Mr. Trump I think somewhere around
25 1981/1982.

23

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2 And the actual process was literally
3 evolved, I believe, by myself working with Donald
4 Trump in the very early years to derive an
5 accurate presentation or what we felt was an
6 accurate presentation.
7 The methodology really didn't change.
8 And questions would be asked, and information
9 would be set down on paper. It's not the same
10 as -- the compilation of a personal financial
11 statement requires a lot of things which are not
12 simply books and records.
13 There are estimates of current value
14 involved, which is generally accepted as an
15 accounting principle with regard to financial
16 statements, compiled financial statements of
17 individuals involve current value, which makes
18 them very unusual. Most other statements you look
19 at reflect historic value and also reflect the
20 cost -- the cost of the various assets you see.
21 But personal financial statements,
22 generally accepted accounting principles, state
23 you're supposed to use current estimated values.
24 So in deriving those estimates, we had
25 a methodology in place. It had evolved. Things

24

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2 had changed. Certain assets were acquired;
3 certain assets were constructed. But that
4 methodology essentially stayed the same.
5 So it was my effort to continue that
6 methodology, because, you know, something evolved
7 over time, it's generally pretty good, we thought,
8 or I certainly thought. So I did have hands on in
9 terms of the compilation process, and I thought
10 that worked pretty effectively.
11 Q. You referenced a methodology. What's
12 the methodology?
13 A. Inquiry and receiving information from
14 the client that's relevant and germane, and
15 reading that information or placing it in kind of
16 a worksheet format that presents that -- helps you
17 to move that information forward so that you can
18 produce a relevant financial statement, that being
19 one that has meaning to the reader.
20 So the effort was to take information,
21 receive information, and literally -- I always use
22 my hands -- compile it into something that moves
23 it forward to the point where it has relevance to
24 the reader rather than just being information,
25 data.

25

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2 So that is the effort. That's the
3 methodology.
4 Q. It sounds like the methodology you're
5 speaking of is a methodology for compiling the
6 actual financial statements; is that correct?
7 A. Yes.
8 Q. How about a methodology for -- did you
9 have a methodology for assessing the values that
10 you were given by Mr. Trump?
11 A. No. In the compilation process, it is
12 not the role of the accountant to assess the
13 values. The role is to accept those values and
14 move them forward.
15 Certainly within the process or the
16 method we attempt and it is the role of the
17 accountant to be jarred by anything that may be
18 inaccurate or may be weird or out of context with
19 the way it was done in prior years or with regard
20 to prior properties or current properties, other
21 properties.
22 So we accept the data prepared by the
23 client. It's not that we are assessing. It's not
24 that we're accepting appraisals or not accepting
25 appraisals or negotiating about it. It's a

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2 process of acceptance, but helping the client to
3 be consistent and sensible about what they are
4 presenting, or at least asking questions that lead
5 you to feel yourself as an accountant that it
6 looks reasonable, you know, the client's
7 methodology or whatever the client used appears to
8 be logical. Logic, I think, is really.
9 Q. Logical, not reasonable?
10 A. Logical, perhaps. Reasonable -- you
11 know, who knows what's reasonable in the world of
12 present values, especially in New York. No, it's
13 more logical than it is reasonable, I would have
14 to say.
15 Q. Let me ask you a few questions just
16 following up on that.
17 So when you compiled a compilation, do
18 you express any opinion at all --
19 A. No.
20 Q. Hold on. Let me finish. Do you
21 express any opinion at all regarding the values
22 that are in the compilation?
23 A. No, not -- not at all. 134569, a
24 compilation is specifically a disclaimer of
25 opinion.

27

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2 Q. So the values that are provided in that
3 compilation are really the client's values, not
4 your own; correct?
5 A. Correct.
6 Q. And you express no opinion on the
7 reasonableness of those values; correct?
8 A. Correct.
9 Q. Now, with regard to your review of
10 those values, I think you said they have to be
11 logical -- I'm sorry, with regard to your reading
12 of those values.
13 A. No, I'm sorry, the value per se does
14 not have to be logical.
15 Q. Okay.
16 A. From my standpoint, because, again, I'm
17 really not -- I wouldn't have any way of knowing
18 if the value was logical. But if there was a
19 method used -- for example, if there was a method
20 used to derive a number in a prior statement for a
21 particular asset, I would assist the client by
22 saying, Listen, last year we showed a certain
23 number, and this year we'd like to show a much
24 different number. You know, is there some --
25 something -- some way in which you're indicating

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2 that? Was there anything -- any substantive
3 reason behind it?
4 And I might transcribe that into a work
5 paper format. And the reason for that is that
6 next year, unless I have transcribed it this year,
7 I'm not going to be able to tell the client what
8 they did last year.
9 And the client, like most -- I'm
10 speaking of all clients. They like to be
11 consistent. They like to be logical. They like
12 to present things in a reasonable manner. And
13 they appreciate -- I believe they appreciate being
14 advised as to how we approach -- how they approach
15 the matter in the prior year.
16 Q. I don't want to mischaracterize what
17 you're saying, so just tell me if this is correct.
18 Do I hear you saying you that you would
19 essentially ensure that the valuations -- or at
20 least ask questions of the client to make sure the
21 valuations are done on a consistent basis from
22 year to year?
23 A. I might, unless the client felt,
24 listen, there's this whole new set of information
25 coming down and, you know, the way we used to do

29

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2 it is no longer appropriate, let's do it this way.
3 And I'd say okay.
4 Q. You would agree to that if they said
5 that?
6 A. If the client said that, that they
7 would like to do it in a different manner, and if
8 the client wishes to express that in one of the
9 footnotes to the statement, say, you know -- not
10 necessarily because it's not comparative, not
11 necessarily we used to do it this way; now we're
12 doing it that way.
13 But perhaps this value was developed in
14 the following manner. And the footnotes to the
15 statement generally explain that, how it was
16 derived. And as long as they are presenting it
17 reasonably and sensibly, logically, it's fine with
18 me. It's their statement.
19 Q. You use the terms "reasonably,"
20 "sensibly," and "logically."
21 A. I'm sorry, I should -- yeah, okay. I'm
22 sorry.
23 Q. I'm trying to understand what you mean
24 by -- it seems like you're not really saying you
25 assess the reasonableness of the value.

50

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2 Q. Fair enough.
3 A. I would say the range was between maybe
4 400 or 500 thousand dollars up to what might have
5 been a maximum of a million.
6 Q. Which year was a million? Was that
7 2005 or 2006?
8 A. Yes, it's been consistent. Yes, I
9 believe it would be 2006, although in 2006 I'm not
10 even certain I was the billing partner in 2006, at
11 the end of 2006. I may very well not have been
12 have been the billing partner at the end of 2006,
13 but I do think it was somewhere in that range.
14 Q. In the million dollar range?
15 A. Somewhere in that range, yes.
16 Q. And it's grown over time, it sounds
17 like?
18 A. It has, as have our services, you
19 know --
20 Q. Sure.
21 A. -- as has his asset pool and the things
22 we do for him.
23 Q. Understood. So his net worth has --
24 A. It's not predicated on his net worth.
25 Q. I'm sorry, to the extent his assets

51

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2 increase and the work you do for him increase, the
3 fees have increased?
4 A. When you say "asset," the number of
5 assets and the items with which we're involved and
6 the processes with which we're involved and
7 perhaps other elements that call for increased
8 involvement that have nothing to do with the
9 assets at all, that have to do with matters that
10 come up.
11 As his complexity has increased, as the
12 complexity of his activities have increased, his
13 fees very well increased.
14 Q. Do you bill him on a fixed rate for
15 your services or by the hour?
16 A. We keep track of hours. We negotiate
17 at the beginning of a period a fee with respect to
18 many of the properties, let's say, or the
19 particular activities. We will have a fixed fee
20 with regard to those activities, which is agreed
21 upon that year, before the year begins. And then
22 we will have what we call specials.
23 Things happen during the year where the
24 intensity of our activities is increased, and we
25 certainly keep track of our time. We probably

52

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2 will not bill straight on time, but we will use
3 that time as a guide to tell us how much -- what
4 is an appropriate invoice.
5 Q. Is Mr. Trump one of Weiser's top ten
6 clients in terms of revenue?
7 A. I would think so.
8 Q. Is he the top client in terms of
9 revenue?
10 A. I would not think so, no. I'm not at
11 all certain of the range of our clients.
12 Q. But you think he's top ten?
13 A. I would think he's top ten.
14 Q. How about top five?
15 A. I really don't know.
16 Q. Okay.
17 MR. MANISERO: It's a firm that does
18 $100 million a year plus.
19 THE WITNESS: Yes.
20 MR. TAMBUSSI: Understood. But you
21 still think -- fair enough.
22 Q. Has he been, when he's been on your
23 account, your biggest client?
24 A. Oh, yes.
25 Q. Do the fees that Mr. Trump pays your

53

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2 firm impact either your compensation or
3 Mr. Bender's compensation?
4 A. No.
5 Q. Do they have any impact at all?
6 A. They have never had any impact on my
7 compensation. I really -- my compensation has
8 been derived by formula since 1979. And that
9 formula does not involve Mr. Trump or the activity
10 with regard to his account.
11 Q. It doesn't involve the revenue that he
12 derives?
13 A. No, it does not.
14 Q. Has Mr. Trump referred other clients to
15 you over time?
16 A. No.
17 Q. No?
18 Let me just show you what we'll mark as
19 Defendants' Exhibit B --
20 MR. TAMBUSSI: Maybe this is an
21 appropriate time to put on the record there is
22 a confidentiality order in place in this case
23 and certain documents that would be shown to
24 the witness and used in the course of this
25 deposition may be covered by that

110

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2 Q. By the way, would a financial statement
3 prepared without these departures have resulted in
4 a reduction of Mr. Trump's net worth? Let me put
5 that another way, because I see you're having
6 trouble.
7 A. No.
8 Q. Okay. Do all of these GAAP exceptions
9 result in a higher net worth than would otherwise
10 be the case if the exceptions were -- if the
11 financial statements were prepared without the
12 exceptions?
13 A. Well, in answer to your first question,
14 the fact that --
15 (Discussion off the record.)
16 MR. MANISERO: Go ahead.
17 A. The fact that generally accepted
18 accounting principles require that a personal
19 financial statement include a provision for
20 current income taxes as well as estimated income
21 taxes on the differences between the estimated
22 current values of assets and the estimated current
23 values of liabilities, yes, you know, if that
24 were -- if that information were available and
25 were prevented -- presented, the net worth would

111

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2 be lower than it is expressed in this financial
3 statement.
4 Q. How about with regard to the exception
5 in the third paragraph of the first page that we
6 talked about with regard to nonforfeitable, fixed,
7 and determinable and not requiring future
8 services, if that GAAP exception were not present
9 and if the financial statements were prepared in
10 accordance with GAAP and not with this exception,
11 Mr. Trump's net worth, I take it, would in fact be
12 lower in these financial statements?
13 A. The stated net worth in the statement,
14 the number presented in the statement, might be
15 lower. Whether the reader, who, after all, is a
16 knowledgeable reader and a reader -- in other
17 words, the reader may say, well, GAAP is not
18 appropriate. The reader might very well say GAAP
19 is not appropriate. I want to know what he will
20 be deriving from those things.
21 So the reader may state to themselves
22 that his true net worth, whatever that is,
23 platonically true net worth, is actually higher
24 than the number presented.
25 Q. I'm not asking about plutonic net

112

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2 worth. GAAP net worth?
3 A. GAAP net worth would be lower.
4 Q. Would be lower?
5 MR. CERESNEY: Why don't we change the
6 tape.
7 THE VIDEOGRAPHER: Going off the record
8 12:42. End of Tape 2.
9 (Recess taken from 12:42 to 12:49.)
10 THE VIDEOGRAPHER: We're returning to
11 the record 12:49 p.m., beginning of Tape
12 Number 3.
13 Q. Mr. Bender -- Mr. Rosenblum -- I'm
14 looking at the word Bender.
15 A. You're prescient.
16 Q. That's right. Looking ahead.
17 MR. MANISERO: Well, that went quickly.
18 A. I'm happy.
19 Q. Let me ask you a few other questions
20 preliminarily before we go into the various
21 different properties, which we'll do after lunch,
22 I promise. Let me ask you to turn to the
23 liability section of the statement of financial
24 condition. I note that there are a number of
25 liabilities here that add up to $720,600,000. How

113

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2 did you satisfy yourself that you were aware of
3 all liabilities of Mr. Trump or his related
4 entities?
5 A. That I was aware of them? I asked the
6 client to provide me with a list of liabilities as
7 they existed at June 30th, 2005. The client
8 presented me with a list, in essence. I'm not
9 certain to this day that I was aware of all of
10 Mr. Trump's liabilities at that point in time, and
11 I sought no corroboration.
12 However, to the extent I did know of a
13 liability or might know of a liability or perhaps
14 should have known of a liability, I certainly
15 would have suggested to the client that they
16 modify their list, and the client would have done
17 so, I'm quite confident.
18 Q. But you didn't corroborate that list?
19 A. I did not corroborate that list, but
20 there is nothing on that list, to the best of my
21 knowledge and belief, that was wrong or omitted.
22 Q. But as you say, you don't know to this
23 day whether this is a complete list or not?
24 A. No, I do not know whether it's a
25 complete list.

114

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2 Q. Looking to the basis of presentation,
3 which is the next page of the financial
4 statements, Note 1 -- and I want to direct your
5 attention here to first the second paragraph about
6 valuation methods. It says here: Such valuation
7 methods include but are not limited to the use of
8 appraisals, capitalization of anticipated
9 earnings, recent sales and offers, and estimates
10 of current values as determined by Mr. Trump in
11 conjunction with his associates and outside
12 professionals. Considerable judgment is necessary
13 to determine market data and develop the related
14 estimates of current value.
15 Accordingly, the estimates presented
16 herein are not necessarily indicative of the
17 amounts that could be realized upon the
18 disposition of the assets or payment of related
19 liabilities. The use of different market
20 assumptions and/or estimation methodologies may
21 have a material effect on the estimated current
22 value of these amounts.
23 Is it fair to say that this essentially
24 indicates that there is judgment involved in
25 deriving these valuations?

115

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2 A. As a reader I would say that.
3 Q. And that the valuations that are in
4 this financial statement are Mr. Trump's judgment
5 about what these assets are valued at?
6 A. In conjunction with his associates,
7 yes.
8 Q. Now, you mention here outside
9 professionals, in some instances outside
10 professionals. Do you know which outside
11 professionals those are?
12 A. Although I may not know in its
13 entirety, I can give you an example.
14 Q. Let me ask you this -- give me the
15 example and then tell me of any others you're
16 aware of.
17 A. An example might be if Mr. Trump was
18 seeking to derive the value for this purpose or
19 his assistants or associates were seeking to
20 derive the value of the apartment unit on the
21 twentieth floor of a certain building in the left
22 corner, southern corner or whatever. He might
23 very well call a salesperson who is not in his
24 employ and say, What do you think the value of
25 that apartment might be?

116

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2 Q. And do you know specifically who those
3 outside professionals might be that contributed to
4 the various valuations in this?
5 A. They could have been -- I really don't
6 know. You're going to 2005, which is a while ago.
7 Q. I understand.
8 A. You're dealing with people I don't deal
9 with.
10 Q. I understand. I'm just asking for your
11 recollection.
12 A. No, I do not.
13 Q. Fair enough.
14 By the way, in this list of different
15 methods of valuation, is one of the acceptable
16 methods listed here the price at which Mr. Trump
17 has been offering properties for sale? Is that an
18 accepted valuation method?
19 A. I would say that would depend on the
20 amount of -- are you saying accepted pursuant to
21 GAAP?
22 Q. Yes. I'm saying GAAP because these
23 are -- in other words -- well, let me ask --
24 A. We would take an exception.
25 Q. Would that fall within the exception

117

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2 for fixed -- not fixed --
3 A. And determinable?
4 Q. And determinable?
5 A. That might -- the amount at which he is
6 offering might fall, if it is not fixed, the
7 amount for which he's offering is determinable.
8 In an instance like that, I think it might be
9 contingent upon the amount of interest that has
10 been manifested by others in his offer. So he
11 might employ that.
12 In other words, he might be very close
13 to a deal in his own mind-set, and he might say
14 that I'm really close enough on this deal to
15 utilize my offering price because, although it
16 hasn't been accepted as yet, and therefore it's
17 not a contract and not determinable and not
18 legally enforceable, it seems to be a number which
19 I think was well derived and I'm going to say that
20 that is that the estimated current value, not
21 pursuant to GAAP but pursuant to perhaps
22 methodology that the reader would find acceptable.
23 That might be used.
24 Q. How about an offer price where there's
25 no demonstration of interest, is that something

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2 Doesn't that indicate that according to
3 generally accepted accounting principles that
4 these financial statements should not reflect the
5 value of Mr. Trump's worldwide reputation?
6 A. I would say that's probably true,
7 because it doesn't -- I would have to research the
8 point. But, for example, GAAP may, in the
9 instance of brand names -- and I'm far from being
10 an expert in this -- GAAP may provide that we
11 express the cost of obtaining that brand, we
12 express the client's cost of obtaining that brand,
13 but not the value.
14 So pursuant to GAAP, we might not be
15 reflecting the value or GAAP would not allow us or
16 permit the reflection of a value but might reflect
17 the admission of a cost, which for GAAP purposes
18 would be the value, but it would not be the
19 estimated current value.
20 So it's not quite clear.
21 Q. Let me ask you this: You prepared this
22 compilation; correct?
23 A. Compiled.
24 Q. You compiled the compilation.
25 And the compilation indicates pursuant

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2 to generally accepted accounting principles they
3 do not reflect the value of his worldwide
4 reputation.
5 Sitting here today and reflecting back
6 on your understanding at the time you prepared
7 these, what was your understanding about whether
8 Mr. Trump's worldwide reputation could be included
9 in these financial statements under GAAP?
10 A. Under GAAP?
11 Q. Under GAAP.
12 A. I would say that the point -- the
13 reflection of any such value is so contingent on
14 future services, on ill-defined -- on nondefined
15 or nonexistent contractual relationships to be
16 derived in the future or to evolve in the future
17 or similar such matters as probably to preclude
18 them under GAAP, as we say there, or as the client
19 says there.
20 Then again, GAAP would also require us
21 to show such item as an asset and to show it at
22 its estimated current value.
23 So there is a possibility that GAAP
24 might conflict in this instance, that one set of
25 GAAP say don't include it at all, or value it at

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2 its cost, which is not its value and acknowledged
3 not to be its value; and another set of GAAP would
4 say, no, you must have present it at the estimated
5 earned value.
6 So I would say that there might be a
7 conflict in GAAP, and certainly there's a lot of
8 research, which I don't have available.
9 Q. At the time you prepared these, which
10 GAAP did you follow? The one that said put it on
11 the financial statements or the GAAP that said
12 don't?
13 A. Obviously we pursued the GAAP that --
14 or the client pursued the GAAP that said do not
15 put it on the statements. I does not appear on
16 the statements.
17 Q. At the time it was your understanding
18 that GAAP, as applied to these financial
19 statements, should not reflect the value of Donald
20 Trump's worldwide reputation in these financial
21 statements; is that correct?
22 A. Correct.
23 MR. CERESNEY: I think we can take
24 lunch now.
25 THE VIDEOGRAPHER: Going off the record

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2 1:06 p.m.
3 (Time noted: 1:06 p.m.)
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150

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2 Vardi, when doing 1998, no change 1999 or 2000.
3 Increase by 10 percent from 2000 to 2001, 2001 to
4 2002, and 5 percent 2002 to 2003. In 2004 held at
5 PY -- which I assume means prior year.
6 A. Prior year.
7 Q. -- per AW -- which I assume means Allen
8 Weisselberg --
9 A. Yes.
10 Q. -- 2005 held at PY prior year per JM --
11 which I assume means Jeff McConney --
12 A. Yes.
13 Q. -- comparable to sale of GM building at
14 $1320 per square foot, approximately 260,000
15 square feet in this property.
16 Do you see that?
17 A. Yes.
18 Q. Does that articulate the methodology
19 for achieving the 349,400,000 valuation that's
20 included on the statement of financial condition
21 for Trump Tower?
22 A. I think that does.
23 Q. What does it mean: Avi Vardi, when
24 doing 1998, no change 1999 or 2000? What does
25 that mean?

151

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2 A. Avi Vardi is an appraiser. I forget
3 what company he's with or what firm he's with. I
4 know him. I've met him on occasion. The client
5 knows him. And there came a time when apparently
6 we were doing the 19 -- well, we were compiling
7 the 1998 financial statement that Avi Vardi had a
8 conversation with our client.
9 And the client was asking Avi Vardi not
10 for an appraisal, per se, not to go out and do an
11 appraisal, but to give the client, in this case
12 Allen Weisselberg, advice on, you know, how you
13 would go about valuing this thing or what the
14 approximate value of this thing is or, you know,
15 general advice, not -- not an appraisal but
16 general advice on how to go about doing it or
17 actually saying, well, in my guess, not
18 professionally, but in my guess it's worth X
19 dollars.
20 That is what is referred to by Avi
21 Vardi. It's referring to a conversation had at
22 the time the 1998 statement was prepared.
23 Q. And was that conversation with Avi
24 Vardi in which he provided the advice that you
25 just described the basis for the official

152

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2 valuation for 1998 that was included on the
3 statement of financial condition that year?
4 A. Probably. And if we look to the
5 analogous work paper for the year 1998, it might
6 say that, and I haven't.
7 Q. You said you met Mr. Vardi --
8 A. On occasion.
9 Q. -- on occasion.
10 Have you ever done any work with him?
11 A. I don't believe so. I can't think of
12 an instance where we worked on a paper together.
13 We may have sought information -- he has done work
14 for Mr. Trump in the past. He has appraised
15 certain properties owned by Mr. Trump for purposes
16 of obtaining -- Mr. Trump's obtaining of financial
17 backing for a venture or financing for a venture.
18 So Avi Vardi has worked with Mr. Trump,
19 and I'm sure I've spoke with Avi Vardi on matters
20 over the years. I met him with regard to a
21 different client, or I conversed with him about
22 matters concerning a different client, with a
23 client that had engaged Mr. Vardi.
24 But I wouldn't say we worked together.
25 I've obtained information from him and counsel

153

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2 from him with regard to property that he's
3 familiar with. But I don't recall ever working
4 with him for these purposes.
5 Q. Do you know the nature of his
6 relationship with Mr. Trump?
7 A. He is an appraiser, an authorized --
8 you know, a licensed appraiser, who has provided
9 Mr. Trump with appraisals, in other matters, not
10 this.
11 Q. Did he also work with Mr. Trump's
12 father, Fred?
13 A. Not to my recollection. I believe he
14 might be too young to have done it.
15 Q. How about his former partner, Irwin
16 Steinberg, is that a name you know?
17 A. It's a name that sounds vaguely
18 familiar, but I don't know that I know him.
19 Q. Do you know if anyone from the Trump
20 organization consulted with Mr. Vardi after 1998
21 regarding the valuation of Trump Tower?
22 A. I do not know, but -- I do not know one
23 way or the other.
24 Q. Does this work paper reflect that there
25 was any consultation with Mr. Vardi, in terms of

Page 1

1 SUPERIOR COURT OF NEW JERSEY
2 CAMDEN COUNTY
3
4 DONALD J. TRUMP,)
5 Plaintiff,)
6 vs.) No. L-545-06
7 TIMOTHY O'BRIEN, TIME)
8 WARNER BOOK GROUP, INC.,)
9 and WARNER BOOK, INC.,)
10 Defendants.)
11
12 The videotaped deposition of
13 DAVID DILLON, called for examination, taken before
14 KATIE K. ELLIOTT, a Notary Public within and for the
15 County of Cook, State of Illinois, and a Certified
16 Shorthand Reporter of said state, at Suite 4000,
17 Ten South Wacker Drive, Chicago, Illinois, on the
18 13th day of August, A.D. 2008, at 10:05 a.m.
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20
21
22
23
24

Page 2

1 PRESENT:
2 BROWN & CONNERY, LLP,
3 (360 Haddon Avenue,
4 Westmont, New Jersey 08108,
5 856-854-8900), by:
6 MR. WILLIAM M. TAMBUSSI,
7 -and-
8 KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,
9 (1633 Broadway Avenue,
10 New York, New York 10019-6799,
11 212-506-1700), by:
12 MS. MARIA GORECKI,
13 -and-
14 ANCEL, GLINK, DIAMOND, BUSH,
15 DiCIANNI & KRAFTHEFER, P.C.,
16 (140 South Dearborn Street, Sixth Floor,
17 Chicago, Illinois 60603,
18 312-207-1000), by:
19 MR. THOMAS G. DiCIANNI,
20 appeared on behalf of the Plaintiff;
21
22
23
24

Page 3

1 PRESENT: (Continued)
2 DEBEVOISE & PLIMPTON, LLP,
3 (919 Third Avenue,
4 New York, New York 10022,
5 212-909-6069), by:
6 MR. ANDREW M. LEVINE,
7 appeared on behalf of the Defendants;
8
9 O'BRIEN AND O'BRIEN,
10 (1249 Waukegan Road,
11 Glenview, Illinois 60025,
12 847-729-8191), by:
13 MR. MICHAEL O'BRIEN,
14 appeared on behalf of the Deponent.
15
16 ALSO PRESENT:
17 Mr. Joseph Cirillo, Videographer, Esquire
18 Deposition Services.
19
20
21
22
23 REPORTED BY: KATIE K. ELLIOTT, CSR, RPR,
24 CSR CERTIFICATE NO. 84-4537.

Page 4

1 THE VIDEOGRAPHER: We're going on the video
2 record at 10:05 a.m. My name is Joseph Cirillo. I
3 am the legal video photographer in association with
4 Esquire Deposition Services. Our address is 11 --
5 excuse me -- 311 West Monroe Street, Chicago,
6 Illinois. The court reporter today is Katie
7 Elliott, also of Esquire Deposition Services.
8 Here begins the videotaped deposition of
9 David Dillon taking place at Reed Smith,
10 Ten South Wacker Drive, 40th Floor, Chicago,
11 Illinois. Today's date is August 13, 2008. This
12 deposition is being taken in the matter of
13 Donald J. Trump, Plaintiff, versus Timothy O'Brien,
14 Time Warner Book Group, Inc., and Warner
15 Books, Inc., in the Superior Court of New Jersey,
16 Camden County, Case No. L-545-06.
17 Counsel, would you please identify
18 yourselves for the record.
19 MR. TAMBUSSI: William M. Tambussi of the firm
20 of Brown & Connery for the Plaintiff Donald Trump.
21 MR. DiCIANNI: Thomas DiCianni, also defending
22 the Plaintiff.
23 MS. GORECKI: Maria Gorecki from Kasowitz,
24 Benson, Torres & Friedman for Plaintiff Donald

Page 81

1 A. There's no set number necessarily, but
2 I -- I can't -- I couldn't even tell you how many
3 people were involved with that scheme. I'm not
4 sure.
5 Q. Is that the only scheme you're talking
6 about when you say that many a dishonest dirtbag in
7 corporate America has been soundly stapled by his
8 columns and comments?
9 A. That's the only one that I'm aware of
10 that resulted in people going to jail for what they
11 had done.
12 Q. How about other people in corporate
13 America who had been soundly stapled by
14 Mr. O'Brien's columns and comments? What are you
15 referring to there?
16 A. The money laundering scheme is the
17 example where -- I think that was the most traumatic
18 example of some of his writing resulting in some
19 action being taken for some dishonesty.
20 Q. Your next -- your next sentence says --
21 you do recall writing all this, right?
22 A. I do.
23 Q. He has visited with Bill Gates, Warren
24 Buffet, and everyone else below them of lesser

Page 82

1 significance and refused to believe the Emperor ever
2 had any clothes on when he did not.
3 Are you referring to something specific
4 about Bill Gates and Warren Buffet when you make the
5 reference to the Emperor never having any clothes
6 on?
7 A. This was some sarcasm referring to my
8 impression that I don't think Tim is necessarily
9 fearful of asking hard questions to accomplished
10 men.
11 Q. Next sentence is, He berated Jack Welch
12 to his face, asked Bill Clinton to hurry up passing
13 the salt when Martha Stewart was done with it at a
14 private dinner party with them, and braved the
15 dangerous rigors of a fisherman's life out at sea.
16 How do you know that Tim O'Brien berated
17 Jack Welch to his face?
18 A. This was sarcasm and exaggeration. He
19 bumped into Jack Welch at some sort of a panel that
20 he was on, and -- and they had some sort of a -- a
21 polite disagreement, but I exaggerated in this. I'm
22 just trying to get a laugh out of my friends.
23 Q. Were you present when Mr. O'Brien met
24 with Mr. Welch?

Page 83

1 A. No.
2 Q. Were you present -- well, you make a
3 reference now to Bill Clinton. Are you referring to
4 President Clinton?
5 A. The former President Clinton.
6 Q. Former president?
7 A. Yes.
8 Q. What is that reference about?
9 A. He was at a party with -- where Bill
10 Clinton and Martha Stewart were. But I'm making
11 that up that that happened. I'm -- I'm just trying
12 to be funny.
13 Q. Well, the next part say that, Soon he
14 will discuss his new book about Trump with Larry
15 King while The Donald remains in a fetal position in
16 his bathroom unable to speak or keep food down as
17 Tim explains the real business aptitude of the
18 wizard behind the curtain.
19 Did you write those words?
20 A. Yes.
21 Q. In June of 2005, what did you know about
22 the book that Timothy O'Brien was writing about
23 Donald Trump that would make -- keep The Donald in a
24 fetal position in his bathroom unable to speak or

Page 84

1 keep food down?
2 A. I was being sarcastic and trying to be
3 funny for my friends.
4 Q. Well, you then say that Mr. O'Brien's
5 going to re -- explain the real business aptitude of
6 the wizard behind the curtain. Where did you get
7 those words from?
8 A. Those are my words.
9 Q. Did Mr. O'Brien ever indicate to you that
10 he believed that Mr. Trump was a wizard behind the
11 curtain?
12 A. No.
13 Q. At -- at or around this time in June of
14 2005, is it still your testimony that you had no
15 discussions with Mr. O'Brien about the substance or
16 nature of the book?
17 A. When was the book published?
18 Q. October 2005.
19 A. Okay. I'm not certain when I received my
20 copy of the book now, but I believe I received it
21 before it was on the shelves.
22 Q. You believe you received it some four
23 months prior to that it would be on the shelves?
24 A. Possibly. I don't recall, but possibly.

Page 117

1 Q. What was Tim O'Brien's plan?
2 A. The overall plan was to have the
3 awareness of the book result in increased sales.
4 Q. What was Mr. O'Brien's plan to increase
5 the awareness of the book?
6 A. I'm telling you about my plan that I
7 discussed with Tim, but Tim's plan --
8 Q. I'm not asking you that question, sir. I
9 hate to interrupt you, but -- and I know you have a
10 loyalty to your longest tenured friend. But in this
11 e-mail you make reference to Tim's strategy, and
12 within 10, 15 words, you make reference to
13 Mr. O'Brien's plan.
14 All I want to know is what was
15 Mr. O'Brien's plan that you wrote about.
16 A. Greater awareness would be helpful.
17 Q. And that would be checkmate. You wrote
18 those words, right?
19 A. It could be, yes. I wrote those words.
20 Q. You're not going to tell me what
21 Mr. O'Brien's strategy or plan was, are you?
22 A. I told you as much as I know about it.
23 Q. You make reference to Mr. O'Brien's
24 strategy as being perfect in this e-mail, do you

Page 118

1 not?
2 A. Yes.
3 Q. And you're not going to tell me --
4 MR. LEVINE: Objection, form.
5 BY MR. TAMBUSSI:
6 Q. -- no matter how many times I ask you
7 what his strategy was that was perfect, are you?
8 A. I think the concept of greater awareness
9 driving sales is -- is Marketing 101, and I think
10 that's a perfect plan.
11 Q. And the plan that you refer to that will
12 turn Donald Trump's lights out instantly, you're not
13 going to tell me what that plan was, either, are
14 you?
15 A. I just did.
16 Q. You finish this e-mail and say, At ease.
17 Smoke 'em if you got 'em.
18 What do you mean by that?
19 A. It's just me trying to be funny as if I
20 was a -- some sort of a commander telling his troops
21 that they could be dismissed. Just one of --
22 another example of me being obnoxious.
23 Q. Did there come a time when you learned
24 that a lawsuit was filed?

Page 119

1 A. Yes.
2 Q. When did you learn that?
3 A. I can't recall exactly when.
4 Q. How did you learn that a lawsuit was
5 filed?
6 A. I believe Tim told me.
7 Q. Did he tell you that in an e-mail or a --
8 a telephone call? How did that work?
9 A. It must have been one of the two.
10 Q. Okay. What did he tell you about the
11 lawsuit?
12 A. Just that a suit had been filed.
13 Q. Did you tell him at that time that it was
14 lights out?
15 A. I don't think I did.
16 Q. Did you tell him at that time it's game
17 over?
18 A. No. I don't believe I did.
19 Q. Did Mr. O'Brien tell you about the -- the
20 nature of the lawsuit?
21 A. In general terms, just that Mr. Trump
22 took issue with some information in the book.
23 Q. Did he tell you anything more specific
24 than that?

Page 120

1 A. Just that he took issue with maybe some
2 of his financial information and how it was
3 presented in the book, and that was of concern to
4 him.
5 Q. Going back to T-38 at the very top, in
6 response to your e-mail regarding strategy where you
7 mention Mr. O'Brien's perfect plan and
8 Mr. O'Brien -- I'm sorry -- perfect strategy and
9 Mr. O'Brien's plan that will turn Donald Trump's
10 lights out instantly, Mr. O'Brien sends -- Mr. Tim
11 O'Brien sends you a response, does he not?
12 A. Yes.
13 Q. He says, In all seriousness, please don't
14 send any more e-mails to me that contain language
15 like this. It's very, very unwise legally.
16 Do you see that?
17 A. Yes.
18 Q. Did you have any discussions with
19 Mr. O'Brien by what he meant by that -- those two
20 sentences?
21 A. I apologized to him. I was getting a
22 little out of hand with my -- with my attempt at --
23 at humor.
24 Q. What did Mr. O'Brien say to you in

1 SUPERIOR COURT OF NEW JERSEY
2 CAMDEN COUNTY
3 --------------------------------X
4 DONALD J. TRUMP, :
5 Plaintiff, :
6 v. :
7 TIMOTHY O'BRIEN, TIME WARNER : No. L-545-06
8 BOOK GROUP INC., AND WARNER :
9 BOOKS INC., :
10 Defendants. :
11 --------------------------------X
12 Washington, D.C.
13 Thursday, March 27, 2008
14 Videotaped deposition of PATRICK J. O'BRIEN, a
15 witness herein, called for examination by counsel for
16 Plaintiff in the above-entitled matter, pursuant to notice,
17 the witness being duly sworn by DENNIS A. DINKEL, a Notary
18 Public in and for the District of Columbia, taken at the
19 offices of DEBEVOISE & PLIMPTON LLP, 555 13th Street, N.W.,
20 Washington, D.C. at 9:57 a.m., Thursday, March 27, 2008, and
21 the proceedings being taken down by Stenotype by DENNIS A.
22 DINKEL, FAPR, CRR, and transcribed under his direction.

Page 2

1 APPEARANCES:
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Page 3

1 APPEARANCES - continued:
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3 On behalf of the Defendant:
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11 Also Present:
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13
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16
17
18
19
20
21
22

Page 4

1 CONTENTS
2 WITNESS PAGE
3 PATRICK J. O'BRIEN
4
5 EXAMINATION BY COUNSEL FOR PLAINTIFF 6
6
7 EXHIBITS
8 TRUMP EXHIBIT NO. DESCRIPTION PAGE
9 45 TOB-EF 8046 to 8047 37
10 46 Three-page document, The New York 37
11 Post, November 4, 2005
12
13
14
15
16
17
18
19
20
21
22

Page 5

1 PROCEEDINGS
2 THE VIDEOGRAPHER: Good morning. This
3 begins tape number 1 in the videotaped deposition of
4 Patrick O'Brien on Thursday, March 27, 2008 in the
5 matter of Donald J. Trump, plaintiff, versus Timothy
6 O'Brien, Time Warner Book Group Inc., and Warner
7 Books Inc., defendants.
8 This case was filed in the Superior Court
9 of New Jersey, law division, civil part, Camden
10 County, docket number L-545-06.
11 This deposition is taking place at
12 555 13th Street, Northwest, Washington, D.C. 20005.
13 My name is Nicholas Guzman. I'll be the
14 legal video specialist on behalf of Alderson
15 Reporting. The certified court reporter today is
16 Dennis Dinkel, also on behalf of Alderson Reporting,
17 located at 1111 14th Street, Northwest, Washington,
18 D.C., 20005.
19 At this time, I ask counsel please
20 introduce themselves for the record.
21 MR. TAMBUSSI: William Tambussi, William
22 Cook of Brown & Connery LLP., Maria Gorecki of

Page 6

1 Kasowitz, Benson, for plaintiff Donald Trump.
2 MR. KARPINSKI: Richard Karpinski,
3 Shapiro, Lipschitz & Schram for plaintiff, Donald
4 Trump.
5 MR. LEVINE: Andrew Levine from the firm
6 Debevoise & Plimpton for the defendants Timothy
7 O'Brien, Time Warner Book Group Inc., and Warner
8 Books Inc.
9 THE VIDEOGRAPHER: For the record, would
10 the court reporter please swear in the witness?
11 Whereupon,
12 PATRICK J. O'BRIEN,
13 business address at 5101 River Road, Bethesda,
14 Maryland 20816, was called as a witness by counsel
15 for Plaintiff, and having been duly sworn by the
16 Notary Public, was examined and testified as follows:
17 EXAMINATION BY COUNSEL FOR PLAINTIFF
18 MR. TAMBUSSI: Thank you.
19 BY MR. TAMBUSSI:
20 Q. Good morning, Mr. O'Brien. My name is
21 Bill Tambussi. I represent the plaintiff, Donald
22 Trump, as you just heard. We're here to take --

Page 7

1 today to take your deposition.
2 I understand, sir, that you're an
3 attorney; is that correct?
4 A. That's correct.
5 Q. Are you familiar with the deposition
6 process?
7 A. Unfortunately, yes.
8 Q. Okay. What area of law do you practice?
9 A. Primarily tax.
10 Q. Okay. Are you familiar with the practice
11 of law in the field of litigation?
12 A. Yes, I am.
13 Q. Are you a tax litigator?
14 A. I have done tax litigation. I'm currently
15 doing tax litigation.
16 Q. Okay.
17 A. And I have taken and defended depositions.
18 Q. Would you like me to go through all the
19 tedious instructions regarding a deposition that are
20 typically given to a witness?
21 A. If I do something in violation of those
22 instructions, I trust you'll bring them immediately

Page 8

1 to my attention.
2 Q. Okay. So you know you all your answers
3 have to be verbal, et cetera, et cetera?
4 A. Correct, yes.
5 Q. Have you ever been deposed before?
6 A. I have not.
7 Q. Okay. This is your first time. Welcome
8 to the experience.
9 Sir, where do you practice law?
10 A. Primarily out of the Washington office,
11 Washington area, although I represent clients in
12 Detroit, Philadelphia, and Chicago.
13 Q. Okay. And what is the name of your law
14 firm?
15 A. O'Brien & O'Brien PC.
16 Q. Is there another living O'Brien who is the
17 other O'Brien in that?
18 A. That's my late father, who was an attorney
19 in Chicago.
20 Q. Okay. And where does your firm have
21 offices?
22 A. In Bethesda, Maryland, 5101 River Road,

Page 9

1 suite 614, and I have a relationship with a law firm
2 in Chicago, where I have offices on Wacker Drive.
3 Q. Do you have any brothers that are also
4 engaged in the practice of law?
5 A. Yes, I do. My older brother, Michael,
6 is -- practices in Glenview, Illinois. Also O'Brien
7 and O'Brien.
8 Q. Do you have any affiliation with your
9 brother Michael's law firm?
10 A. No. I may have been listed as of counsel
11 from time to time. But --
12 Q. But there are two separate law firms, your
13 brother's law firm and your law firm?
14 A. Right. As I understand it, my brother's
15 law firm is incorporated in Illinois. Mine is
16 incorporated in Maryland.
17 Q. I'm going to remind you of one
18 instruction. Even though you may assume to know what
19 my question may be, please wait for me to finish my
20 question.
21 A. Excuse me.
22 Q. No problem. It is more for the court

Page 10

1 reporter's interest in getting a correct record and
2 our interest in him getting a correct record. Thank
3 you.
4 Okay.
5 Are you represented by counsel here today?
6 A. I am not.
7 Q. Let me ask you this: Just very briefly,
8 can you just tell me what college you went to and
9 what law school you went to?
10 A. Georgetown University, undergrad,
11 Georgetown Law. I graduated from law school in 1976
12 and received an LLM in taxation in 1986.
13 Q. Any other formal education beyond law
14 school and the LLM?
15 A. No.
16 Q. Have you continuously been in the practice
17 of law since admission to the bar following
18 graduation from law school?
19 A. Yes, I have.
20 Q. Rather than do this painstakingly, I want
21 to try to just get right to the point. Timothy
22 L. O'Brien, is that your brother?

Page 11

1 A. He is.
2 Q. Do you know what your brother does for a
3 living?
4 A. He's a journalist; currently, he's the
5 editor of the Sunday business section of the New York
6 Times. He also writes books and other materials on a
7 freelance basis.
8 Q. Okay. Do you in any capacity represent
9 your brother?
10 A. No. I do not.
11 Q. Have you represented your brother with
12 regard to any matters in the past?
13 A. Yes, I have.
14 Q. Have you represented your brother in any
15 matters in the past that resulted in any public
16 filings, be they complaints or answers, anything that
17 would be in a court of record?
18 A. Let me give you a complete answer.
19 Q. Sure.
20 A. I have provided him with some limited
21 legal advice with respect to this matter. Other than
22 that, I can think of none where there has been

Page 12

1 litigation, where he was a party.
2 Q. Okay. With regard to this matter, without
3 giving me the substance of any advice that you gave
4 him as an attorney, could you tell me approximately
5 when you provided him with some legal advice, him
6 being Timothy O'Brien?
7 A. Around the time Mr. Trump filed or
8 threatened to file a lawsuit against my brother, we
9 had conversations where he asked my advice.
10 Q. Let me try to refine that a little bit
11 more. Do you recall providing your brother with
12 legal advice before a lawsuit was actually filed by
13 Mr. Trump?
14 A. The reason why I hesitate to say yes or no
15 is I think there was some mention in the press -- and
16 if memory serves, I think Mr. Trump said he was going
17 to sue him.
18 Q. Okay.
19 A. Or he was thinking of suing him or
20 something to that effect, and I recall a telephone
21 conversation around that time.
22 Q. Did you have more than one conversation,

Page 13

1 telephone conversation or otherwise with your brother
2 Timothy O'Brien with regard to Mr. Trump's lawsuit?
3 A. If I did, I don't recall.
4 Q. So as we sit here today, the best of your
5 recollection is that you had a conversation with your
6 brother with regard to either a threatened or
7 actually filed lawsuit?
8 A. Could have been more than one, but in any
9 event, it was -- the sum of it all was very brief.
10 Q. Okay. And that conversation that you
11 recall, that occurred by telephone, correct?
12 A. Yes.
13 Q. Did you have an occasion ever to read the
14 book written by your brother Timothy O'Brien about
15 Donald Trump?
16 A. When it came out, I picked it up and I
17 flipped through it. I never read it completely.
18 Q. Okay. Did you ever have any discussions
19 with your brother Timothy O'Brien regarding any
20 research that he did for the book prior to either you
21 learning that Mr. Trump was intending to file a
22 lawsuit, or had filed a lawsuit?

Page 14

1 A. I recall a conversation we had while the
2 book was being researched and drafted where he told
3 me that he had spent some time with Mr. Trump in
4 Florida.
5 Q. Okay. When did you first learn that your
6 brother, Timothy O'Brien, was planning to do a book
7 about Donald Trump?
8 A. Certainly before it was published but
9 exactly when, I can't tell you.
10 Q. Okay. Do you recall whether or not your
11 brother indicated to you that he had already begun
12 research on a book for Donald Trump?
13 A. Yes. As a matter of fact, he told me he
14 had interviewed Donald Trump and he had spent some
15 time with him.
16 Q. Okay. And that was the trip to Florida?
17 A. Yes, I believe so.
18 Q. Okay.
19 A. And I think the conversation occurred
20 after he got back.
21 Q. Okay. What did your brother tell you
22 about his trip to Florida with Donald Trump?

Page 15

1 A. He had spent a substantial amount of time
2 with Mr. Trump, and that he liked him, he thought he
3 was charming.
4 Q. Did he tell you anything about Mr. Trump's
5 net worth?
6 A. No.
7 Q. Did he tell you anything about Mr. Trump's
8 holdings?
9 A. No.
10 Q. Did he have any discussion with you at
11 that time with regard to Mr. Trump's assets?
12 A. No.
13 Q. Did he ever have any discussion with you
14 at that time after he returned from Florida about
15 Mr. Trump's taxes, for example?
16 A. No.
17 Q. Did he tell you what if anything he
18 intended to do with regard to further research as to
19 Donald Trump in further preparation for writing the
20 book?
21 A. No.
22 Q. Other than that discussion that you had

Page 16

1 with Timothy O'Brien after he returned from Florida
2 with Mr. Trump, did you have any further discussions
3 with him prior to the Trump lawsuit regarding the
4 Trump book?
5 A. Not that I recall.
6 Q. Did your brother Timothy O'Brien ask you,
7 for example, as a tax attorney, for any advice into
8 how to interpret certain filings with regard to
9 Mr. Trump, in particular with regard to his net
10 worth?
11 A. No.
12 Q. Did he ever ask you for any advice in
13 interpreting any of the documents that could be
14 related to Mr. Trump's net worth?
15 A. No.
16 Q. Do you recall having any other
17 conversations with your brother regarding the book
18 Trump Nation after he came back from Florida and
19 before the lawsuit about the book?
20 A. About the substance of the book?
21 Q. Let's start with the substance of the
22 book.

Page 17

1 A. No.
2 Q. Did you have any conversations with your
3 brother with regard to any other aspect of the book
4 between that period of time as to when he came back
5 from Florida and told you that he found Mr. Trump to
6 be, I believe you said somewhat engaging?
7 A. Charming.
8 Q. Charming.
9 A. Charming. He said he liked Mr. Trump.
10 Q. And the time that you learned that a
11 lawsuit was either threatened or going to be filed --
12 A. The only conversation I recall was with
13 respect to Tim's schedule, talk shows, tours, book
14 promotions, the marketing of the book as opposed to
15 the substance of the book.
16 Q. Okay. So with regard to the book, is
17 it -- am I clear that you had two conversations that
18 you recall sitting here today with your brother with
19 regard to the book? One after he came back from
20 Florida? And one later with regard to marketing of
21 the book?
22 A. At least those two. There could have been

Page 62

1 A. Well, Ms. Gorecki provided song lyrics
2 that contain that quotation. At the time I had no
3 idea what it is.
4 Q. Did you have any discussion with your
5 brother Michael about this e-mail?
6 A. No. No.
7 Q. Did you have any discussion with your
8 brother Michael about the Trump Nation book written
9 by your brother Timothy O'Brien?
10 A. Not that I recall.
11 Q. Did you ever have any discussions with
12 David Dillon with regard to the book Trump Nation
13 written --
14 A. Not that I recall.
15 Q. Did you ever have any discussions with
16 Michael White regarding the book Trump Nation written
17 by your brother Timothy O'Brien?
18 A. Not that I recall.
19 Q. Other than this e-mail thread, did you
20 ever have any other e-mails that you recall with your
21 brother Michael regarding Timothy O'Brien's book
22 about Donald Trump?

Page 63

1 A. There may have been. I don't recall any
2 specifically.
3 Q. Did you ever have any discussions with
4 your brother Michael about marketing efforts to be
5 taken with regard to the book Trump Nation?
6 A. I don't recall any. If there were any, it
7 was completely facetious. We're both attorneys.
8 Q. So does that mean everything you say is
9 facetious?
10 A. No. It means we're both attorneys. If we
11 discussed marketing, it would have probably been
12 facetious because we're not marketers.
13 Q. Okay. Do you have a recollection of
14 discussing marketing of the book with your brother
15 Michael?
16 A. No, I do not.
17 Q. Do you have any recollection of discussing
18 marketing of the book with David Dillon?
19 A. No, I do not.
20 Q. Did you have any discussion regarding
21 marketing of the book with Michael White?
22 A. No, I do not.

Page 64

1 Q. Did you ever learn from any source of any
2 of the thoughts that David Dillon had with regard to
3 the marketing of the book?
4 A. Could you repeat that, please?
5 Q. Could you read it back, please?
6 THE REPORTER: "Question: Did you ever
7 learn from any source any of the thoughts that David
8 Dillon had with regard to the marketing of the book?"
9 THE WITNESS: I don't recall.
10 BY MR. TAMBUSSI:
11 Q. Did you ever come to learn that David
12 Dillon had a strategy for the marketing of the book
13 that he communicated to Tim O'Brien?
14 A. David Dillon does construction work on
15 residential homes, and he's a bit of a clown. If I
16 ever came across anything David Dillon said with
17 respect to marketing the book, I would have regarded
18 it as a joke.
19 Q. Let me show you what's been marked
20 previously as T-38 for identification.
21 Let's take a moment and read that
22 document.

Page 65

1 (Pause.)
2 BY MR. TAMBUSSI:
3 Q. Mr. O'Brien, Mr. Patrick O'Brien, have you
4 finished reading that e-mail?
5 A. I have.
6 Q. Do you recall ever seeing that e-mail
7 before today?
8 A. I think that parts of it were quoted in
9 your subpoena.
10 Q. My question to you is did you ever see
11 that e-mail before today?
12 A. Yes.
13 Q. Okay. When did you see it before today?
14 A. At least in your subpoena.
15 Q. Anywhere else?
16 A. Not that I recall. I'm looking to see if
17 I was copied on it. I don't think I was.
18 Q. It does not appear -- I'll represent to
19 you -- that you were copied on it unless there was a
20 blind copy sent, because it was from David Dillon to
21 tob@newyorktimes.com, tob3000@comcast.net. I assume
22 that's not you?

Page 66

1 A. No. That's not me.
2 Q. Michael@abandob.com, which is your brother
3 Michael, correct?
4 A. I assume so, yeah.
5 Q. And michaelwhite@countrywide.com?
6 A. Yes.
7 Q. So it would appear to me that you were not
8 copied on that e-mail?
9 A. It would appear to me that I was not
10 copied.
11 Q. Okay. The e-mail is dated November 3,
12 2005.
13 Do you have any recollection of seeing it
14 before today other than the reference to it in the
15 subpoena?
16 A. Not that I recall.
17 Q. You see that Mr. Dillon makes certain
18 remarks in there referring to "soldiers for the
19 cause"?
20 A. Yes. And he also says "call me nuts,"
21 which I would.
22 Q. Okay. You would not take seriously

Page 67

1 anything Michael Dillon said?
2 A. No. But if he does get a Ferrari out of
3 this deal, I'd like to drive it.
4 Q. Okay. That is being somewhat flip
5 yourself?
6 A. That's what the e-mail says.
7 Q. Uh-huh. And he says at the end, "smoke
8 'em if ya got 'em." Do you know what that refers to?
9 A. Yes, that would refer to cigarettes.
10 Q. Do you know why he put that in this
11 e-mail?
12 A. My speculation would be that it's a
13 reference to soldiers and World War II movies and
14 John Wayne.
15 Q. The last paragraph on the first page of
16 T-38 starts with, "call me nuts." Do you see that?
17 A. Yes.
18 Q. But it says, "I want to concentrate on
19 efforts to move 100,000 books not just 100.".
20 Do you see that?
21 A. Following, "call me nuts."
22 Q. Right.

Page 68

1 A. Right.
2 Q. And then it starts a new sentence. "This
3 is a war and we need to annihilate the enemy not just
4 irritate him." Do you see that?
5 A. Yes.
6 Q. Okay. Was there any discussion that you
7 were party to with either your brother Michael
8 O'Brien, your brother Timothy O'Brien, David Dillon,
9 and/or Michael white in which this book marketing
10 campaign of Trump Nation was a war?
11 A. Not that I recall.
12 Q. The enemy that's being referred to, does
13 that refer to Donald Trump?
14 A. I have no idea.
15 Q. The next sentence says, "I say talk radio
16 today can lead to more talk television tomorrow; and
17 let's hope for Donald to file a lawsuit so we can
18 really blow the cover off sales."
19 Do you see that?
20 A. Yes, I do.
21 Q. Had there been any discussions that you
22 were parent to in or about November of 2005 whereby

Page 69

1 there was an attempt to provoke Donald Trump into
2 filing a lawsuit?
3 A. According to this, this is David Dillon's
4 position. And David Dillon's -- only David Dillon's
5 position.
6 Q. I refer you to the next sentence where it
7 says, "Tim's strategy is perfect if that happens."
8 Tim would be your brother Tim, correct?
9 A. I don't know. It could be.
10 Q. Uh-huh. Is there any other Tim referred
11 to anywhere in that e-mail?
12 A. There are other Tims in the world.
13 Q. Is there any other Tim referred to
14 anywhere else in that e-mail?
15 A. I'm looking to see if Tim is referred to
16 elsewhere in this. No. He is.
17 So your question is whether or not there's
18 another Tim referred to in the e-mail?
19 Q. Correct.
20 A. No. There is not, to the best of my
21 knowledge.
22 Q. Do you know of any other Tim that wrote a

Page 70

1 book about Donald Trump?
2 A. Not specifically, no. But there could
3 have been.
4 Q. Do you know of any other Tim that went on
5 the radio in or about November 2005 to talk about
6 Donald Trump and a book written about Donald Trump,
7 other than Timothy O'Brien?
8 A. I don't recall. There were a lot of
9 people in the media talking about Donald Trump about
10 that time. I have no idea whether their names were
11 Tim or not.
12 Q. You agree with me, do you not, when it
13 says Tim's strategy, it's referring to a strategy of
14 a person named Tim and not David Dillon?
15 A. I didn't write the e-mail. To the best of
16 my knowledge, I haven't seen it before today. You're
17 asking me to speculate. I'm not going to do that.
18 Q. Okay. Let's look at the next sentence.
19 It states, "if Donald gets rattled in the national
20 news by this, he will look guilty. If he does
21 nothing and if he sues, it's game over."
22 It continues, "Tim has a plan that will

Page 71

1 turn his lights out instantly. It's checkmate."
2 Do you know what Tim's plan was that's
3 being referred to there?
4 A. I don't know that Tim had a plan. I don't
5 know what David Dillon is talking about. I assume
6 that's a joke.
7 Q. What would lead you to believe that that's
8 a joke?
9 A. I know David Dillon.
10 Q. How well do you know David Dillon?
11 A. I've known him for years.
12 Q. When's the last time you spoke to him
13 about this lawsuit involving your brother Timothy?
14 A. I've never discussed it with him.
15 Q. How many times have you ever discussed the
16 marketing of the book Trump Nation with David Dillon?
17 A. Ive never discussed it with him.
18 Q. How many times have you discussed the book
19 itself Trump Nation with David Dillon?
20 A. I don't recall ever discussing it with
21 David Dillon.
22 Q. So you have no idea as we sit here today

Page 72

1 because you've had no discussions as to whether or
2 not Dave Dillon was party to a plan or strategy of
3 Tim O'Brien, correct?
4 A. I'm virtually morally certain that he was
5 not.
6 Q. Pure supposition on your part without
7 factual basis, correct?
8 A. Based on years and years of extensive
9 experience with David Dillon, knowing David Dillon
10 since he was a child and knowing David Dillon
11 virtually his entire life. Yes.
12 Q. That it's a pure supposition, correct?
13 A. No. Yes. It's factually based.
14 Q. You had no discussions with David Dillon
15 with regard to this e-mail, correct?
16 A. Not that I recall.
17 Q. You had no discussions with David Dillon
18 as to whether or not your brother Timothy
19 communicated a plan or strategy to him, correct?
20 A. I'm virtually certain he did not.
21 Q. Well, when you say virtually, that means
22 you're not completely certain, correct?

Page 73

1 A. I'm 99.99995 percent sure he didn't.
2 Q. Okay. And on what do you base that
3 conclusion, sir?
4 A. Tim does not discuss things like that.
5 Q. With you, correct?
6 A. With people in general. And if you let me
7 finish --
8 Q. Take your time. We have all day.
9 A. He certainly would not discuss it with
10 David Dillon; and when -- and if you get to meet
11 David Dillon, you will understand why he would not.
12 Q. But you don't know for a fact, as we sit
13 here, that he had no conversations with David Dillon?
14 A. I don't know for a fact that I'm not going
15 to be struck by lightning.
16 Q. I want you to answer my question.
17 A. I just did.
18 Q. No, you did not.
19 You don't know for a fact that your
20 brother Timothy did not have any conversations with
21 David Dillon with regard to a plan or strategy to
22 market the book Trump Nation, correct?

Page 1

1 SUPERIOR COURT OF NEW JERSEY
2 CAMDEN COUNTY
3
4 DONALD J. TRUMP,)
5 Plaintiff,)
6 vs.) No. L-545-06
7 TIMOTHY O'BRIEN, TIME)
8 WARNER BOOK GROUP, INC.,)
9 and WARNER BOOK, INC.,)
10 Defendants.)
11
12 The videotaped deposition of
13 MICHAEL O'BRIEN, called for examination, taken
14 before KATIE K. ELLIOTT, a Notary Public within and
15 for the County of Cook, State of Illinois, and a
16 Certified Shorthand Reporter of said state, at
17 Suite 4000, Ten South Wacker Drive, Chicago,
18 Illinois, on the 13th day of August, A.D. 2008, at
19 1:50 p.m.
20
21
22
23
24

Page 2

1 PRESENT:
2 BROWN & CONNERY, LLP,
3 (360 Haddon Avenue,
4 Westmont, New Jersey 08108,
5 856-854-8900), by:
6 MR. WILLIAM M. TAMBUSSI,
7 -and-
8 KASOWITZ, BENSON, TORRES & FRIEDMAN, LLP,
9 (1633 Broadway Avenue,
10 New York, New York 10019-6799,
11 212-506-1700), by:
12 MS. MARIA GORECKI,
13 -and-
14 ANCEL, GLINK, DIAMOND, BUSH,
15 DiCIANNI & KRAFTHEFER, P.C.,
16 (140 South Dearborn Street, Sixth Floor,
17 Chicago, Illinois 60603,
18 312-207-1000), by:
19 MR. THOMAS G. DiCIANNI,
20 appeared on behalf of the Plaintiff;
21
22
23
24

Page 3

1 PRESENT: (Continued)
2 DEBEVOISE & PLIMPTON, LLP,
3 (919 Third Avenue,
4 New York, New York 10022,
5 212-909-6069), by:
6 MR. ANDREW M. LEVINE,
7 appeared on behalf of the Defendants;
8
9 ALSO PRESENT:
10 Mr. Joseph Cirillo, Videographer, Esquire
11 Deposition Services.
12
13
14
15
16
17
18
19
20
21
22
23 REPORTED BY: KATIE K. ELLIOTT, CSR, RPR,
24 CSR CERTIFICATE NO. 84-4537.

Page 4

1 THE VIDEOGRAPHER: We're going on the record
2 with Tape No. 1 at 1:50 p.m. My name is Joseph
3 Cirillo. I'm the legal video photographer in
4 association with Esquire Deposition Services. Our
5 address is 311 West Monroe Street, Chicago,
6 Illinois. The court reporter today is
7 Katie Elliott, also of Esquire Deposition Services.
8 Here begins the videotaped deposition of
9 Michael O'Brien taking place at Reed Smith,
10 Ten South Wacker Drive, 40th floor, Chicago,
11 Illinois. Today's date is August 13, 2008. This
12 deposition is being taken in the matter of
13 Donald J. Trump, Plaintiff, versus Timothy O'Brien,
14 Time Warner Book Group, Inc., and Warner Books,
15 Inc., in the Superior Court of New Jersey,
16 Camden County, Case No. L-545-06.
17 Counsel, would you identify yourselves
18 for the record, please.
19 MR. TAMBUSSI: William M. Tambussi,
20 Brown & Connery, for Plaintiff Donald Trump.
21 MR. DiCIANNI: Thomas DiCianni, Ancel Glink,
22 also for the Plaintiff.
23 MS. GORECKI: Maria Gorecki, Kasowitz, Benson,
24 Torres & Friedman, for Plaintiff Donald Trump.

Page 5

1 MR. LEVINE: Andrew Levine from
2 Debevoise & Plimpton, LLP, on behalf of the
3 Defendants: Timothy L. O'Brien, Time Warner Book
4 Group, Inc., and Warner Books, Inc.
5 THE VIDEOGRAPHER: Will the court reporter
6 please swear the witness.
7 (WHEREUPON, the witness was duly
8 sworn.)
9 MICHAEL O'BRIEN,
10 called as a witness herein, having been first duly
11 sworn, was examined and testified as follows:
12 EXAMINATION
13 BY MR. TAMBUSSI:
14 Q. Good afternoon, Mr. O'Brien. We're here
15 today to take your deposition in the matter of Trump
16 versus O'Brien, your brother, and others.
17 You were here this morning, were you not,
18 for the deposition of David Dillon?
19 A. Yes, I was.
20 Q. And you, sir, are a member of the bar,
21 also?
22 A. Yes, I am.
23 Q. Would you like me to give you the
24 instructions --

Page 6

1 A. I do not need them. Thank you.
2 Q. Okay. Fair enough.
3 What I'd like to do is really get right
4 to the -- the heart of your deposition, but I do
5 have to ask you some background questions.
6 Mr. O'Brien, you're a practicing
7 attorney?
8 A. Yes, I am.
9 Q. And where do you practice?
10 A. In Illinois, Michigan, and Florida.
11 Q. And do you belong to a firm or are you a
12 solo practitioner?
13 A. I have my own firm, O'Brien and O'Brien.
14 There are three lawyers and two support staff here
15 in Illinois, one support staff member in Michigan.
16 Q. Okay. And what is your area of practice?
17 A. Primarily transactional revolving around
18 closely held corporations. Most of my practice
19 is -- deals with closely held businesses.
20 Q. Okay. Does your practice involve in any
21 way, shape, or form real estate?
22 A. Yes. Probably about 10 percent of my
23 practice is real estate.
24 Q. Okay. I ask you that because I -- I took

Page 7

1 the deposition of one of your brothers, Patrick,
2 who's an attorney, and he referred to you as a real
3 estate and estate attorney. Is that entirely
4 correct or somewhat correct?
5 A. I do a little bit of both of those areas.
6 Q. Okay.
7 A. Probably 15 percent is wills and trust,
8 10 percent real estate, and 75 percent would be
9 transactional.
10 Q. Okay. So when you say transactional, are
11 you talking about buying and selling of
12 corporations?
13 A. There is some merger and acq --
14 acquisition activity. Primarily, I do vendor
15 contracts, customer contracts. With some of these
16 corporations, I handle all their employee matters,
17 plants and equipment purchases, expansions. Some of
18 them are targets occasionally, but that's the basis
19 of my practice.
20 Q. Okay. For how long have you been
21 practicing law?
22 A. 23 years.
23 Q. And from what law school did you
24 graduate?

Page 8

1 A. DePaul.
2 Q. Have you ever testified in a deposition
3 before?
4 A. No, I have not.
5 Q. Have you ever testified in a trial or a
6 hearing?
7 A. Yes, I have.
8 Q. And could you -- on how many occasions?
9 A. 400.
10 Q. 400?
11 A. Yes. I was a -- I ran a halfway house
12 for convicted felons, and I was called in on all the
13 probation or parole revocations as well as the final
14 adjudications.
15 Q. Okay. Other than in your capacity of --
16 of running a halfway house for convicted felons,
17 have you ever testified at a hearing or trial
18 before?
19 A. In criminal court.
20 Q. Okay. Other -- other than in the
21 capacity dealing with --
22 A. No. No, I have not.
23 Q. Okay. Now, have you ever been a party to
24 a lawsuit where you were called as a witness?

Page 37

1 Q. Okay. Did you offer any opinions about
2 the idea of handing out e-mails or fliers -- I'm
3 sorry -- fliers or pamphlets?
4 A. I was not going to join in on it. I was
5 asked to -- I wasn't going to sell my labor that
6 cheaply.
7 Q. Fair enough. Okay.
8 Other than the Donald doll of some sort
9 and the distribution of pamphlets or fliers, did you
10 become aware of any other ideas that your brother
11 Timothy had with regard to the promotion of the
12 book?
13 A. I did not.
14 Q. Did your brother Timothy ever articulate
15 to you any plans that he had for the promotion of
16 the book?
17 A. Beyond the doll, no.
18 Q. Okay. Beyond the doll, did your brother
19 Timothy ever articulate to you any strategies that
20 he had for promotion of the book?
21 A. He did not.
22 Q. Okay. Did your brother Timothy ever
23 articulate to you, either verbally or by e-mail, any
24 thoughts that he had as to ways to heighten

Page 38

1 awareness of the book other than the doll?
2 A. He did not.
3 Q. Did you come to learn at any time of your
4 brother Timothy's thoughts and plans to heighten
5 awareness of the book other than the doll?
6 A. I did not.
7 Q. You were here for David Dillon's
8 deposition, correct?
9 A. That's correct.
10 Q. You're a party to, either wittingly or
11 unwittingly, some of the e-mails that David Dillon
12 sent?
13 A. That's correct.
14 Q. At any time when David Dillon was sending
15 these e -- e-mails out, did you offer any of your
16 opinions, as a brother, to your brother Timothy
17 O'Brien with regard to David Dillon's e-mails?
18 A. I did not.
19 Q. Now, you were here when David Dillon
20 referred to this being a war and the enemy having to
21 be annihilated?
22 A. Yes, I was.
23 MR. LEVINE: Objection to form. Just to be
24 clear, that was in an e-mail.

Page 39

1 MR. TAMBUSSI: E-mail.
2 MR. LEVINE: That was not in the testimony.
3 MR. TAMBUSSI: Okay. Fair enough.
4 BY MR. TAMBUSSI:
5 Q. Did you understand -- did you have an
6 understanding at that time back in -- in late 2005
7 as to what David Dillon was referring to in terms of
8 a war and annihilation of the enemy?
9 A. Yes, I did.
10 Q. And what was your understanding?
11 A. David was attempting to -- David talks in
12 military terms frequently. Most of his life is
13 about weaponry, military. He's a -- he's a -- he's
14 an aficionado of handguns. So I -- so I took it to
15 mean that he was going to assist Tim to blow the
16 sales of this book through the roof in some kind of
17 General Patton fashion.
18 Q. David Dillon was not in the military, was
19 he?
20 A. No. Not in -- not in reality.
21 Q. He was just playing --
22 A. He thinks he is. Yeah, he's pretty sure
23 he was in another life.
24 Q. Did you ever have any discussions with

Page 40

1 your brother Timothy with regard to provoking Donald
2 Trump into filing a lawsuit?
3 A. I did not.
4 Q. Did you ever come to learn that part of
5 your brother Timothy's plan to heighten awareness of
6 the book was to provoke Donald Trump into filing a
7 lawsuit?
8 A. I did not.
9 Q. Did you ever have any discussions, aside
10 from your representation of Mr. Dillon, with
11 Mr. Dillon regarding the plan to provoke Mr. Trump
12 into filing a lawsuit?
13 MR. LEVINE: Objection to form. Whether there
14 was any plan?
15 MR. TAMBUSSI: Yeah.
16 BY THE WITNESS:
17 A. We did not discuss whether there was a
18 plan to provoke him.
19 BY MR. TAMBUSSI:
20 Q. Okay. Now, once the lawsuit was filed --
21 and this is a yes or no question -- did you provide
22 your brother Timothy with any legal advice regarding
23 the lawsuit?
24 A. No.

Page 45

1 A. He did not.
2 Q. Did he ever tell you -- did your brother
3 Timothy ever tell you what he thought Donald Trump
4 was worth?
5 A. He did not.
6 Q. Let me show you a couple e-mails, if I
7 may.
8 MR. TAMBUSSI: This is the next one.
9 (WHEREUPON, discussion was had off
10 the record.)
11 (WHEREUPON, a certain document was
12 marked Deposition Exhibit No. T-63
13 for identification, as of 8-13-08.)
14 BY MR. TAMBUSSI:
15 Q. Mr. O'Brien, just before -- I just want
16 to identify this document for the record. The
17 document marked T-63 before you, which has -- has
18 Bates stamp last four digits 7922 and 7933, is a
19 series of e-mails or a thread of e-mails on
20 May 19, 2005.
21 If you could just take a moment to read
22 those e-mails, I just want to ask you a couple
23 questions.
24 A. I've read it.

Page 46

1 Q. Okay. Now, Mr. O'Brien, the last e-mail
2 appears to be an e-mail from you, Michael O'Brien,
3 from Michael at OB and OB dot com?
4 A. That's correct.
5 Q. Is that from you?
6 A. That's from me.
7 Q. Okay. The subject is the final word, and
8 it appears that the e-mail right before the one that
9 you sent, the last e-mail, is from Tim O'Brien to
10 Pat O'Brien and Mike O'Brien that says, This is how
11 a book ends or starts or whatever.
12 Do you know what he's referring to there?
13 A. I believe he's referring to Rick Wolf's
14 comments about I'm printing it and getting it into
15 production.
16 Q. Well, the previous e-mails seem to refer
17 to a version of -- of the book. Did you -- were you
18 provided in May of 2005 with some sort of preview of
19 the book?
20 A. No.
21 Q. Do you recall reading anything with
22 regard to a version?
23 A. No. You -- you're referring to, Tim,
24 does this version have the restored Trump comment on

Page 47

1 WTC.
2 Q. Yes.
3 A. I don't know what he's talking about.
4 Q. Okay. But you respond, Cocked and locked
5 and ready to rock with a whole mess of
6 exclamation -- exclamation points, correct?
7 A. Right.
8 Q. Is that a military term or a handgun
9 term?
10 A. It's actually a rock and roll term.
11 Q. Okay. All right. And what do you mean
12 by that?
13 A. We're rolling. Just his comment is the
14 book ends or starts or whatever, and I say we're all
15 ready to go.
16 Q. By the way, I -- I wish I'd knew that
17 Mr. Dillon was a handgun aficionado before I took
18 his deposition. That's just an aside.
19 A. Thank goodness you didn't discover that.
20 Actually might have ruined any credibility he has.
21 Q. Okay. Let me go back.
22 Now, previously, we marked at this
23 deposition as T-61 for identification an e-mail that
24 actually ends -- an e-mail thread that ends with you

Page 48

1 on November 1, 2005.
2 Could you just take a moment and read
3 that. I know that you probably read it earlier this
4 morning.
5 A. I'm ready.
6 Q. Let's just go through. Is it fair to say
7 that the very top e-mail text, is that written by
8 you?
9 A. That's correct.
10 Q. It said -- it reads, I just read all
11 14 reviews. Tim, except for the Trump suck ass, you
12 appear to have nailed this.
13 Is that -- did I read that correctly?
14 A. That's correct.
15 Q. Are -- you're saying Trump suck ass.
16 Who's the Trump suck ass you're referring to?
17 A. One of the 14 reviewers.
18 Q. Oh, okay. And I take it that by
19 referring to one of the 14 reviewers as a Trump suck
20 ass that's not a flattering term?
21 A. It's 180 degrees away from flattering.
22 Q. Okay. You didn't like that person's
23 review?
24 A. I didn't like it whatsoever.

Donald J. Trump et. al.

License Agreements

1. **Trump Parc Stamford / Stamford Connecticut**
    - License Agreement between Donald J. Trump & 33 Broad Street Associates II, LLC dated as of May 12, 2006.
    - Management Agreement dated as of May 12, 2006
2. **Trump Marks LLC**
3. **Trump Ocean Club International Hotel and Tower / Panama**
    - License Agreement between Donald J. Trump & K Group Developers Inc. dated as of March 16, 2006.
    - Trump Entertainment Resorts approval of Panama license
4. **Trump International Hotel & Tower / Hawaii**
    - License Agreement between Donald J. Trump & Irongate Azrep BW LLC dated as of February 7, 2006.
    - Lender Comfort Letter
5. Jersey City MetroHomes **[Trump Plaza Jersey City]**
    - License Agreement between Donald J. Trump & Metro Homes, LLC dated as of July 20, 2005 with East & West Estoppels
    - DJT $2M Investment Side Letter dated as of January 3, 2006
6. License Agreement between Donald J. Trump & TRG Holiday, LLC dated as of January 19, 2006. **[Trump Hollywood, Florida]**
7. **Trump Tower Philadelphia / Penn Street**
    - License Agreement with Addendum (dated 5/1/06) between Donald J. Trump & VTE Philadelphia, L.P. dated as of October 14, 2005
8. License Agreement between Donald J. Trump & Nakheel (Dubai) dated as of September 28, 2005.
9. **Trump International Hotel & Tower / New Orleans**
    - License Agreement between Donald J. Trump & Poydras (New Orleans) dated as of August 19, 2005
10. Trump Hotel & Tower Bayrock #2, Ft. Lauderdale, Florida dated as of June 30, 2004. **Trump International Hotel & Tower Ft. Lauderdale License Agreement.**
11. **Trump Tower at City Center**
    - License Agreement between Donald J. Trump & LC White Plains Residential II LLC dated as of May __, 2004.
    - Management Agreement dated as of December 1, 2004
12. **Trump Parc Stamford / Stamford Connecticut**

- License Agreement between Donald J. Trump & 33 Broad Street Associates II, LLC dated as of May 12, 2006.
- Management Agreement dated as of May 12, 2006

13. License Agreement between Donald J. Trump & New Roc Parcel 1A dated as of April 21, 2005. **[Trump Plaza New Rochelle]**

14. **Residences at Trump Park / Yorktown, New York**
    - License Agreement between Trump Marks LLC & Yorktown Realty Associates, LLC dated as of August 11, 2006 with Letter Amendment dated as of September 13, 2006
    - Side Letter between Trump Marks LLC & Yorktown Realty Associates, LLC dated as of August 11, 2006 re: social and golf memberships

15. **Trump Icon Palm Beach / Palm Beach, Florida**
    - License Agreement between License Agreement between Trump Marks LLC & TRG North Flagler Venture, LTD. dated as of August 21, 2006

16. Canouan Island Development-Agreement between Trump Entities & Canouan Resorts Development LTD & Related Entities dated as of November 17, 2003. **Trump Island Villas**
    - Memo re: highlights of the Sales & Marketing Agreement
    - Sales & Marketing Agreement
    - Trademark License Agreement

17. License Agreement between Donald J. Trump & Dezerbrand Florida, LLC dated as of June 16, 2004. **Trump Towers – Trump Tower 1 – Trump Tower 2 – Trump Tower 3**

18. License Agreement between Donald J. Trump & Michael Dezer & Neomi Dezertzov, (Sunny Isles, Florida) dated as of December 2, 2001. **Trump Grande Miami**

19. Trump Phoenix Development LLC, Donald 3. Trump & Camelback Development Partners, LLC dated as of January 19, 2004. **Trump International Hotel & Residences Phoenix**
    - License Agreement
    - Development & Services Agreement
    - Exclusivity & Licensee Designation Agreement

20. Trump Hotel & Tower Bayrock #1, Ft. Lauderdale, Florida dated as of October 2003. **Trump Las Olas Beach Resort**
    - Development & Services Agreement

- License Agreement
- Termination Right Side Letter

21. License & Service Agreement between Trump Organization & Trump Realty Brazil dates as of June 25, 2003. **Villa Trump**
22. License Agreement between Donald J. Trump & Simdag/Robel LLC dated as of October 27, 2004. **Trump Tower Tampa**
    - Guaranty
23. License Agreement between Donald J. Trump & Midland Development Inc., 2025397 Ontario Limited, 2025399 Ontario Limited, 2025401 Ontario Limited, Haddar Development Corp. and 1456253 Ontario Inc. dated as of October 2, 2003. **Trump International Hotel & Tower Toronto**
    - License Agreement
    - Development & Services Agreement
    - Covenant & Agreement
24. License Agreement between Trump Marks LLC and Crescent Heights Diamond, LLC dated as of May 23, 2006. **Trump Tower Tel Aviv**
25. License Agreement between Trump Marks LLC, as Licensor and 1240 West Peachtree L.P., as Licensee for Atlanta, Georgia Licensed Mark dated as of August 2, 2006: **Trump Towers**
26. License Agreement between Trump Marks LLC and Yesil Insaat Gayrimenkul Yatirim Hizmetleri TIC.A.A. dated as of October 5, 2006 **Istanbul, Turkey**
    - Side Letter – confirming execution of the License Agreement; and
    - Side Letter – re: Licensee Corporate Resolution (copy).

12/2/08 Sydney Morning Herald 19
2008 WLNR 22999876

Sydney Morning Herald, The
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December 2, 2008

Leighton hit by mothballed tower

Miriam Steffens

Work on a high-rise building in Dubai for US entrepreneur Donald Trump has been put on hold due to the global financial crisis. The project involves Dubai-based Nakheel and Al Habtoor, as well as the latter's Australian partner, Leighton Holdings. Leighton says its profit will not be affected by the loss of its share of work on the 2.9 billion dirham ($A1.2bn) tower, which was equivalent to some 650 million dirham

---- INDEX REFERENCES ----

REGION: (United Arab Emirates (1UA66); Arab States (1AR46); Middle East (1MI23); Gulf States (1GU47); Dubai (1DU43))

Language: EN

OTHER INDEXING: (NAKHEEL) (Al Habtoor; Donald Trump; Leighton)

COMPANY TERMS: LEIGHTON HOLDINGS LIMITED ASX LEI

TICKER SYMBOL: LEI

Word Count: 84
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The Philadelphia Inquirer

November 4, 2008 Tuesday
. CITY-D Edition

SECTION: BUSINESS; P-com Biz; Pg. C01

LENGTH: 657 words

HEADLINE: Trump postpones Philadelphia development

BYLINE: By Suzette Parmley; Inquirer Staff Writer

BODY:

Developer Donald J. Trump has postponed construction of his $300 million Trump Tower Philadelphia project because of tightening market conditions.

The 45-story, 263-unit tower is proposed for Penn Street near the foot of Spring Garden Street. Construction had been previously delayed because Trump needed riparian rights - or underwater development rights - from the city.

Now the credit crisis and crumbling economy are further stalling the project, where units were to start at $700,000.

"With the current market conditions as they are, we have decided to continue construction in a more favorable environment," said Trump's daughter, Ivanka Trump, who is executive vice president of development and acquisitions for The Trump Organization in New York, which handles Trump's real estate ventures.

Trump had originally projected Trump Tower Philadelphia to be completed by the middle of this year. He spent more than a year acquiring permits and building rights from the city. Then the real estate market tanked.

This follows Trump's building problems in other major cities where he has similar luxury condo hotel towers going up, including Chicago, Miami and Las Vegas.

The credit crisis has affected the availability of financing for such projects, and buyers have become much more cautious.

Ivanka Trump declined to say when construction would proceed on the Philadelphia project, but she said yesterday: "We are committed to this project, want to build the best one possible, and will continue construction when the market allows us to do so."

In Center City, Trump is competing against a slew of other high-end residential projects, including 1706 Rittenhouse, where 31 units start at $4 million.

Real estate broker and developer Allan Domb, the so-called "Condo King of Philadelphia," said Trump's waterfront location was not a slam dunk.

"I've always thought a Trump Tower property should be located in and around Rittenhouse Square," he said yesterday.

"The waterfront area has still not developed the amenities that luxury condo dwellers seek, such as the ability to walk to restaurants, supermarkets, coffee shops," Domb said. "That location is not a walkable location unless you're a marathoner."

Trump postpones Philadelphia development The Philadelphia Inquirer November 4, 2008 Tuesday

According to the Center City District, projected new housing units scheduled for construction this year in eight zip codes between the Schuylkill and Delaware Rivers and from Girard Avenue to Tasker Street was 1,933 units. Of that, 330 units are rentals, and the rest - 1,603 units - are condos and single-family homes.

Since Trump first announced his Philadelphia project in January 2006 that was to include landscaped gardens and a high-end spa, Ivanka Trump said it had received "a substantial response internationally." She said yesterday in a statement that "a significant number of reservations for units had been taken," but she declined to say how many of the 263 units had been sold.

Figures show that sales of upscale residential units in Center City have slowed compared with a year ago.

According to the Prudential Fox & Roach HomExpert Report, 94 homes priced $500,000 or more sold in the second quarter of this year, compared with 105 homes in the second quarter of 2007. For the first nine months of this year, 275 homes priced $500,000 or more sold, compared with 299 homes in the same period of 2007.

Steve Storti, senior vice president of marketing for Prudential Fox & Roach Inc., said there were a number of factors for the decrease.

He said in the previous cycle, from 2003 to 2006, potential Center City condo buyers felt obliged to find a new home before selling an existing home in the suburbs, because they assumed the suburban house would sell quickly.

"What's happening now is you don't want to own two homes for a prolonged period of time," Storti said. "It's a stall on the marketplace that didn't exist a couple of years ago."

Contact staff writer Suzette Parmley at 215-854-2594 or sparmley@phillynews.com.

GRAPHIC: Photograph by: Feed Loader

LOAD-DATE: November 4, 2008

tampabay.com Know it now.

Tampa tower loses Trump

By JAMES THORNER
Published May 30, 2007

Trump Tower Tampa has lost its biggest asset: the Trump name itself.

New York tycoon Donald Trump has terminated his contract with SimDag, the Tampa development team behind the proposed $300-million condo tower long touted as west Florida's tallest and most luxurious.

Trump's defection could be fatal to a project launched with fanfare in February 2005 but pelted with construction liens and lawsuits as the housing market soured.

Trump-branded towers are under construction or already built in cities ranging from Chicago and New York to Miami and Las Vegas, but in the end Tampa apparently didn't have the right stuff.

"We could continue without Trump, but I don't know if we'd even want to, " said Eric Fordin of the Related Group, a Miami developer SimDag enlisted this year to try to save the project.

In a lawsuit filed Friday in federal court, Trump sounded like a man whose patience was spent.

Trump accused SimDag of defaulting on eight months of licensing fees worth $1.03-million.

Aside from the monthly installments, the contract entitled Trump to 50 percent of the profits on the sale of 190 condos worth between $700, 000 and $6.2-million.

SimDag also failed to provide "bona fide purchase contracts" for 70 percent of the condos, a requirement the company was obliged to meet by April 27.

Trump's licensing agreement with SimDag left planning, marketing, construction and financing in SimDag's hands. But the lawsuit alleges the Tampa partners didn't fulfill their end of the bargain.

"SimDag failed and refused to comply with those obligations and responsibilities, " Trump's lawsuit said in seeking damages, interest and attorneys fees from the former partner.

Neither SimDag nor its spokesman David Hooks could be reached for comment.

SimDag principal Frank Dagostino dreamed up the 52-story luxury tower in 2004 and brought Trump aboard in October of that year. At the ritzy rollout in February 2005, Trump whirled into town with his then-fiancee and bragged about selling out the project.

Investors scooped up many units, but SimDag failed to hook financing. Banks shied from pouring hundreds of millions

of dollars into a Tampa Bay area housing market stagnant with thousands of unsold condos.

Tampa officials looked to the tower, one of several new condo high-rises, to help revitalize its central business district. But the proposal never shook criticism that its fancy penthouses and gold-trimmed living may have suited Miami and New York but clashed with Tampa's middlebrow image.

Though the tower is now Trump-less, interest remains in the 1-acre site at 111 S Ashley Drive on the Hillsborough River.

The Related Group has talked about going it alone on a scaled down version of Trump Tower. Last year, Trump himself discussed acquiring the land and assets.

But any second round would likely occur absent SimDag, which owes millions of dollars to Trump, former contractors and depositors. Critics of the project speculate that SimDag will seek protection from creditors through bankruptcy.

"Maybe we come in and bring Trump back," said Fordin, whose company has built Trump condos in and around Miami. "No one knows the other guys. People know Trump."

James Thomer can be reached at jthomer@sptimes.com or 813 226-3313.

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The Associated Press State & Local Wire

April 22, 2009 Wednesday 9:19 PM GMT

SECTION: STATE AND REGIONAL

LENGTH: 133 words

HEADLINE: Developer: Condo development on hold in N.O.

DATELINE: NEW ORLEANS

BODY:

One of the developers of the $60 million, 136-unit Tracage condominium development proposed for New Orleans' Warehouse District said the project is on hold until the economy improves.

But Rob Tatum said developers still intend to move the project forward.

In November 2006, a concrete warehouse was knocked down to clear way for the development. The Tracage site, at the intersection of John Churchill Chase and Annunciation streets, remains fenced off.

Tracage is not the first New Orleans project sidelined by the national economic slump. In February, a lawyer for developers of a proposed Poydras Street high-rise involving real estate mogul Donald Trump said the project is also on hold pending the economic recovery.

Information from: New Orleans CityBusiness, http://www.neworleanscitybusiness.com

LOAD-DATE: April 23, 2009

AUSTEN FLICK IRKS THOSE WITH JANE ADDICTION

BY LLOYD GROVE WITH HUDSON MORGAN

Thursday, November 10th 2005, 7:00AM

There's a spot of bother brewing between fledgling Brit director Joe Wright - whose movie version of "Pride and Prejudice" opens tomorrow - and members of the Jane Austen Society of North America.

I'm told that in a National Public Radio report, also scheduled for tomorrow, diehard fans of the 1813 novel voice a litany of complaints about Wright's mushy, souped-up version - the latest in a long line - of the precise and elegant Austen.

Wright responds with an impolite suggestion.

"They can go jump in a lake," Wright, I'm told, advises NPR L.A. correspondent Kim Masters for her piece on "Morning Edition."

Wright sniffs that he's not interested in "quibblers," adding that he didn't make the film for them. "I made it for myself, really," he reportedly reveals.

The trouble started a couple of months ago when University of Colorado English Prof. Joan Klingel Ray, president of the Jane Austen Society, slagged off the movie in an interview with the U.K.'s Telegraph, criticizing everything from Matthew MacFadyen as the male lead, Mr. Darcy, to the movie's in-your-face sexual imagery.

"The Darcy in the film does not have the quality of attractiveness that Colin Firth has," Ray asserted, referring to the star of the acclaimed 1995 miniseries.

She added: "The film is full of sexual imagery, which is totally inappropriate to Austen's novel. In one scene, a wild boar, which I assume is supposed to represent Darcy, wobbles through a farm with its sexual equipment on show."

After her interview ran, Ray reveals, Focus Features threatened to cancel a screening of the film in Milwaukee for the Austen Society's annual convention.

The screening was held, though, and while some Austen aficionados liked the movie, others complained about "lame" dialogue and Keira Knightley's posture.

I hear that a Focus Features flack actually tried to forbid Masters from quoting Ray because the professor is no longer president of the society.

Wrong. Ray's term ends next month.

DONALD DECLARES 'TRUMPNATION' ENEMY TERRITORY

Donald Trump isn't happy simply to insult New York Times reporter Timothy O'Brien, claiming he "writes like an infantile" (Trump's term).

The Donald is trying to yank O'Brien's juicy new exposé, "TrumpNation," off bookstore shelves.

Trump attorney Marc Kasowitz has just sent O'Brien's publisher a letter demanding not only a total recall of "TrumpNation" but a public correction and apology.

"This book ... contains out-and-out defamatory falsehoods concerning Mr. Trump, his business and his family," Kasowitz wrote to Warner Books. "We demand ... that Warner immediately cease and desist further publishing and disseminating this book."

Yesterday, Warner Books VP Rick Wolff responded: "We have every confidence in Tim O'Brien - he's one of the

nation's leading business investigative journalists, and we firmly believe in Tim's research for this book."

Meanwhile, fired "Apprentice" Jennifer Wallen yesterday lent her support to Mark (Markus) Garrison's allegations in this column of tricky editing on the show, a charge that Trump denied. She added that Trump is a male chauvinist the boardroom.

"I was in there for two hours, fighting for my life, and Donald says out of nowhere, 'I bet you'd make a good wife,' " Wallen, an Arizona real estate broker, told Lowdown in an exclusive interview. "I would say there's ... some sexual discrimination going on there."

Trump's longtime lieutenant, Norma Foerderer, bristled at Wallen's claims, but Trump didn't respond by deadline.

A rep for Mark Burnett Productions claimed Wallen was fired for "how lackluster her event- planning was." Lowdown hears that the producers might look into whether Garrison and Wallen have violated their nondisclosure agreements.

BRIEFING

COMING-OUT PARTY: Recovering anorexic and NYU dropout Mary-Kate Olsen is finally dishing to the glossies after rehab and a long silence. Lowdown hears that the 19-year-old brunette Olsen twin will grace the January cover of W Magazine and share her insights on fashion and film in an accompanying interview. Acclaimed photographer David Sims shot MK on Monday night at Milk Studios for the spread. Olsen's PR rep, Michael Pagnotta, explained: "Ashley did a solo cover for Harper's Bazaar last summer, and this was an opportunity for Mary-Kate to do her own. She's feeling great and wanted to do something beautiful. It was her decision."

ALAS AND ALACK FOR FLACK: It looks like OK! magazine publicist Marisa Schneer needs to be sent to Lowdown's Flack Reeducation Camp. On Monday, Schneer swore that OK! didn't tone down a snarky cover story about Kevin Federline after Britney Spears' lawyers threw a fit. Then Schneer insisted that the mag hadn't replaced a polling question, "Should Britney forgive Kevin?" with "Should Britney and Kevin get a nanny?" Schneer E-mailed this column: "Poll about a nanny is completely untrue." Sure enough, the article just hit newsstands and the poll question is: "Should Britney & Kevin get a nanny?" (Fifty-one percent say yes!) Yesterday, Schneer spun: "It was a misunderstanding. We simply convey what is conveyed to us. The question you sent me Monday was directly forwarded to [editor] Sarah Ivens. The exact response I received was the following: '... Poll about a nanny is madness!' "

Can this marriage be saved?

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Attorneys for Defendants

DONALD J. TRUMP, Plaintiff, v. TIMOTHY L. O'BRIEN, TIME WARNER BOOK GROUP INC., and WARNER BOOKS INC., Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: CAMDEN COUNTY DOCKET NO. CAM-L-545-06 *Civil Action* **ORDER**

THIS MATTER having come before the Court on December 7, 2007 in connection with plaintiff's Motion for Commissions, plaintiff's Motion to Compel Discovery, and defendants' Cross-Motion in Aid of Litigant's Rights and to Compel Discovery; William M. Tambussi, Esq. and William F. Cook, Esq. of Brown & Connery, LLP, and Mark P. Ressler, Esq. and Maria Gorecki, Esq. of Kasowitz, Benson, Torres & Friedman LLP appearing for plaintiff Donald J. Trump; and Mark S. Melodia, Esq. of Reed Smith LLP, and Andrew J. Ceresney, Esq. and Andrew M. Levine, Esq. of Debevoise & Plimpton LLP appearing for defendants Timothy L. O'Brien, Time Warner Book Group Inc., and Warner Books Inc.; and the Court having considered the arguments and submissions of counsel; and for other good cause shown,

IT IS on this 23 day of January, 2008, for the reasons set forth on the record on December 7, 2007, **ORDERED** as follows:

1. Plaintiff's Motion for Commissions is **GRANTED**.

2. Commissions shall issue out of and under the seal of this Court authorizing the issuance of subpoenas for the depositions of Arthur Ochs Sulzberger, Jr., William Keller, and Lawrence Ingrassia.

3. Plaintiff's Motion to Compel Discovery is **MOOTED** by the agreement of the parties.

4. Under the below terms agreed upon by counsel and ordered by the Court, O'Brien shall submit his current home computer and his immediately prior home computer (referred to as the Second and Third Computers) to an independent forensic computer analyst:

   a. The expert will be chosen by defendants, subject to plaintiff's review of the expert's qualifications and rates, and paid for by plaintiff. The name of the expert will be submitted to the Court on or before January 30, 2008.

   b. The court will appoint the expert to carry out his or her duties as an officer of the Court.

   c. The expert will create a "mirror image" of the hard drive of each computer, and search for files that contain certain designated search terms, agreed to by both plaintiff's and defendants' counsel, designed to locate electronic documents, emails, or other "documents," as that term is defined in Plaintiff's First Request for Production of Documents, that are responsive to Plaintiff's First Request for Production of Documents. The expert will provide any such files to defendants' counsel.

d. To the extent possible, the expert will also provide to defendants' counsel any available information showing when any "deleted" file was deleted and any available information about the deletion and contents of any deleted file that cannot be recovered.

e. Defendants' counsel will review these files for privilege and responsiveness to plaintiff's discovery requests, and will supplement defendants' responses to plaintiff's discovery requests, if and as appropriate or required, by March 14, 2008.

f. The expert will sign the confidentiality order in the case and retain the "mirror image" copies of the hard drives and a copy of all files provided to defendants' counsel until the end of this litigation. At the end of this litigation, the expert will destroy these records and confirm such destruction to the satisfaction of defendants.

g. The expert will not disclose the contents of any files or documents to plaintiff, plaintiff's counsel, or any other persons. Because the expert will be an officer of the Court, disclosure of a communication to the expert shall not be deemed a waiver of the attorney-client privilege or any other privilege.

h. The expert may designate assistants to help in the project. Each designated assistant shall sign the confidentiality order and shall be subject to all provisions applicable to the expert.

i. All communications between the expert and plaintiff's counsel will take place either in the presence of defendants' counsel or through written and electronic communication with a copy to defendants' counsel.

j. On or before March 14, 2008, the expert shall file a report with the court setting forth the scope of the work performed and describing in general terms (but

without disclosing the contents) the volume and types of records provided to defendants' counsel.

5. Defendants' Cross-Motion in Aid of Litigant's Rights and to Compel Discovery is **GRANTED** in part and **DENIED** in part.

6. On or before January 7, 2008, plaintiff must respond fully to each subpart of Interrogatory No. 20 from defendants' First Set of Interrogatories.

7. On or before January 7, 2008, plaintiff must respond fully to each subpart of Interrogatory Nos. 1, 3, 4, 5, 6, 7, 8, 11, 12, 14, and 15 from defendants' Second Set of Interrogatories.

8. On or before January 7, 2008, plaintiff must respond fully to, and provide relevant documents (whether in electronic or hard copy form) in connection with, each subpart of Interrogatory No. 9 from defendants' Second Set of Interrogatories, which the Court has limited to written offers or written proposals – maintained within plaintiff's organization or of which plaintiff otherwise has a record – to license the Trump name for any purpose.

9. Plaintiff's supplemental interrogatory responses pursuant to this Order must: (a) provide complete answers corresponding to all subparts of the interrogatories; (b) identify and attach all documents (whether in electronic or hard copy form) relevant thereto; and (c) indicate if plaintiff has no information in his possession, custody, or control that is responsive to any subpart.

TRUE COPY

MICHAEL J. KASSEL, J.S.C.
Honorable Michael J. Kassel, J.S.C.

[ ] Opposed

[X] Unopposed

1 * * * C O N F I D E N T I A L * * *
2 SUPERIOR COURT OF NEW JERSEY
3 LAW DIVISION: CAMDEN COUNTY
4
5 DONALD J. TRUMP,)
)
6 Plaintiff,)
)
7 vs.) No. CAM-L-545-06
)
8 TIMOTHY L. O'BRIEN, TIME)
WARNER BOOK GROUP INC.,)
9 and WARNER BOOKS INC.,)
)
10 Defendants.)
-------------------------)
11
12
13
14
15 November 29, 2007
16 10:01 a.m.
17
18
19 Deposition of DONALD BENDER, held at
20 the offices of Debevoise & Plimpton, 919
21 Third Avenue, New York, New York, before
22 Laurie A. Collins, a Registered Professional
23 Reporter and Notary Public of the State of
24 New York.
25

2

1
2 APPEARANCES:
3
4 BROWN & CONNERY LLP
5 Attorneys for Plaintiff
6 360 Haddon Avenue
7 Westmont, New Jersey 08108
8 BY: WILLIAM M. TAMBUSSI, ESQ.
9 WILLIAM F. COOK, ESQ.
10 - and -
11 KASOWITZ, BENSON, TORRES & FRIEDMAN LLP
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14 BY: MARIA GORECKI, ESQ.
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16 DEBEVOISE & PLIMPTON LLP
17 Attorneys for Defendants
18 919 Third Avenue
19 New York, New York 10022
20 BY: ANDREW J. CERESNEY, ESQ.
21 ANDREW M. LEVINE, ESQ.
22 JULIE S. SUH, ESQ.
23
24
25

3

1
2 APPEARANCES (continued):
3
4 WILSON ELSER MOSKOWITZ
5 EDELMAN & DICKER LLP
6 Attorneys for Welser and Witness
7 3 Gannett Drive
8 White Plains, New York 10604-3407
9 BY: THOMAS R. MANISERO, ESQ.
10
11 ALSO PRESENT:
12 KEVIN GALLAGHER, Videographer
13
14
15
16
17
18
19
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21
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4

1
2 THE VIDEOGRAPHER: We're now going on
3 the record at approximately 10:01 a.m. This
4 is the videotaped deposition of Donald Bender
5 taken in the Superior Court of New Jersey, the
6 Camden County Division, CAM-L-545-06.
7 The deposition is being held today,
8 November 29th, 2007, at the offices of
9 Debevoise & Plimpton, 919 Third Avenue, New
10 York, New York.
11 I'm Kevin Gallagher, the videographer.
12 The court reporter is Laurie Collins. We're
13 both from the independent firm of Veritext
14 Court Reporting. Will counsel now identify
15 themselves for the record.
16 MR. CERESNEY: Andrew Ceresney, Andrew
17 Levine, and Julie Suh from Debevoise &
18 Plimpton, representing the defendants, Timothy
19 O'Brien, Time Warner Book Group, and Warner
20 Books.
21 MR. MANISERO: Thomas Manisero of
22 Wilson Elser representing Weiser and the
23 witness, Mr. Bender.
24 MR. TAMBUSSI: William Tambussi and
25 William Cook from Brown Connery and Maria

5

1 Bender - Confidential
2 Gorecki from Kasowitz, Benson representing
3 Donald Trump.
4 DONALD BENDER,
5 called as a witness, having been duly sworn
6 by the notary public, was examined and
7 testified as follows:
8 EXAMINATION BY
9 MR. CERESNEY:
10 Q. Good morning, Mr. Bender.
11 A. Good morning.
12 Q. Let me introduce myself on the record.
13 I'm Andrew Ceresney from Debevoise & Plimpton. I
14 represent the defendants in this matter. I'll be
15 asking you some questions today in connection with
16 a lawsuit that Mr. Trump has brought against my
17 clients. Okay?
18 Are you represented by counsel today?
19 A. Yes, I am.
20 Q. Is that Mr. Manisero?
21 A. Yes, it is.
22 Q. Your testimony today is under oath, as
23 you see, and is being taken down by the
24 stenographer and videographer. And it may be read
25 or played at trial or used for other purposes in

54

1 Bender - Confidential
2 A. I have never figured it out, but I
3 would say it's in excess of 80 percent.
4 Q. And what percentage of -- is he one of
5 Weiser's top ten clients in terms of fees?
6 A. I'm not privileged to Weiser's billing
7 schedule.
8 Q. Do the fees that Mr. Trump pays your
9 firm impact your individual compensation?
10 A. I have no knowledge how my individual
11 compensation is computed.
12 MR. MANISERO: You're not alone.
13 Q. Does the firm, in determining your
14 individual compensation, take into account the
15 amount of fees that you generate from your
16 clients?
17 A. You would have to ask the executive
18 committee. I have no idea how my compensation is
19 computed.
20 Q. You have no idea --
21 A. No idea.
22 Q. Hold on. You have no idea whether the
23 amount of fees that you personally generate from
24 clients of yours have anything to do with your
25 compensation level?

55

1 Bender - Confidential
2 A. I have no idea how fees are
3 compensated.
4 Q. Let me ask you this: When you became
5 the Trump -- the partner in charge of the Trump
6 account, did your compensation increase?
7 A. Not significantly.
8 Q. Has Mr. Trump referred other clients to
9 you?
10 A. He asked me to speak to one or two
11 people over the years for a few minutes, but we've
12 never -- I never received any business from
13 Mr. Trump.
14 Q. Has he ever threatened you with
15 litigation?
16 A. No.
17 Q. How about Weiser?
18 A. No, not to my knowledge.
19 Q. Has he ever refused to pay your
20 outstanding bills?
21 A. We -- our fees are negotiated once a
22 year. Mr. Trump does not get involved with the
23 billing.
24 Q. Does he pay the full amount of your
25 bill at the end of the year?

56

1 Bender - Confidential
2 A. Yes.
3 Q. After it's negotiated?
4 A. Yes.
5 Q. Is it typically negotiated down?
6 A. No. It's a -- it's -- the base fee is
7 already done, and we set up -- we set up a fee for
8 the year ahead of time. So before we start the
9 work, we know what our fee will be, excluding
10 specials.
11 Q. And typically Mr. Trump pays the full
12 amount of that fee that you've agreed upon?
13 A. Yes.
14 Q. Who is paying Weiser's counsel fees in
15 connection with this litigation?
16 A. Who is paying Weiser's counsel fees?
17 Weiser is paying Weiser's counsel fees.
18 Q. Is Mr. Trump paying Weiser's counsel
19 fees in connection with this litigation?
20 A. Excuse me? Say that again?
21 (Unintelligible conversation interrupted
22 by the reporter.)
23 Q. Is Mr. Trump reimbursing Weiser for its
24 counsel fees in connection with this litigation?
25 A. There have been a number of bills

57

1 Bender - Confidential
2 generated to Mr. Trump. Two or three have been
3 paid. Two or -- a few are outstanding still.
4 Q. Did you bill Mr. Trump for your efforts
5 in collecting materials for production in this
6 litigation?
7 A. Yes, we did.
8 Q. Did you bill Mr. Trump for your fees in
9 representation in connection with the depositions?
10 A. Fees with -- you mean my attorneys'
11 fees?
12 Q. Mr. Manisero's fees. Are you going to
13 bill Mr. Trump for those?
14 A. I plan on billing Mr. Trump for these.
15 Q. Are you being compensated for your time
16 in testifying today by Mr. Trump?
17 A. I plan on billing Mr. Trump for it.
18 Q. And how much time did you spend in
19 preparation for today's testimony?
20 A. I met with Mr. Manisero for an hour or
21 hour an and a half this week, and one of his
22 associates came to my office and met with me and
23 Mr. Rosenblum for an hour and a half or two hours
24 a couple weeks ago, just general items, not any
25 specific --

Daily Deal/The Deal

April 6, 2005 Wednesday

SECTION: BANKRUPTCY; Corporate Restructuring

LENGTH: 600 words

HEADLINE: Trump wins plan confirmation

BYLINE: by Erik Moser

HIGHLIGHT:

After months of wrangling, the equity holders' committee signs on, agreeing to a settlement that includes a $17.5 million cash payout.

BODY:

Trump Hotels & Casino Resorts Inc. on Tuesday, April 5, hit the jackpot with its bankruptcy case, winning confirmation of its prenegotiated reorganization plan after making key settlements with objecting parties.

THCR has only been in bankruptcy court since Nov. 21 and is looking to exit by May 1.

During its nearly four months in U.S. Bankruptcy Court for the District of New Jersey in Camden, THCR faced almost constant battles with its official committee of equity holders, which had been appointed by Judge Judith Wizmur in December.

THCR had planned on full recoveries for all creditors except the equity holders, who were scheduled to receive pennies on the dollar. However, the stockholder group insisted there was more money available.

After multiple objections and efforts to slow down the quickly progressing case, on March 28 the debtor agreed to a settlement with the equity committee. Under this agreement, THCR will distribute $17.5 million and a percentage of new warrants to the committee, which represents about 20,000 shareholders.

The group will also share in the proceeds from the sale of THCR's World's Fair parcel, a 2.4-acre lot in Atlantic City which is scheduled to be put up for 363 auction within two months of the plan's effective date.

But according to Robert Klyman, lead debtor counsel at Latham & Watkins LLPin Los Angeles, from the debtor's perspective, the proceeds from the sale and the warrants were already being distributed to its creditors and thus don't represent new value being found.

"The only thing that company is providing is the $17.5 million in cash," said

TOB-EF-00002994

Klyman. "But compared to paying for the fees of all the lawyers and committees for a long, drawn-out confirmation, $17.5 million is a deal for everyone."

Soon after the stockholder settlement was reached, THCR brokered a deal with DLJ Merchant Banking Partners LPto withdraw its objection to the plan. THCR will be reserving at least $10 million of unused cash from its exit loan to settle claims issues with DLJ.

In January, DLJ filed a $25 million claim against THCR in relation to fees it believes it's owed from failed financing negotiations prior to THCR's filing.

Not surprisingly, Donald J. Trump is turning out to be the biggest winner in the bankruptcy case. In fact, the equity committee called earlier reorganization plans "sweetheart" deals for Trump considering the returns he was set to receive.

In the last version of the plan, there are more than three pages dedicated to explaining the investment agreement between Trump and THCR.

Under this proposal, Trump will invest about $55 million in new cash and $16.4 million for priority notes and also gets a trademark license valued at $124 million. This is for THCR being able to use Trump's name and likeness, free of royalty costs.

There is also a service agreement that keeps Trump THCR's chairman and requires him to appear at six promotional events a year. This duty was judged to be worth $6 million under the latest revised plan, because it permits the reorganized debtor to be associated with the Trump persona.

In return, Trump receives about a 30% interest in THCR, as well as a $2 million annual salary, (with undisclosed bonuses) and a 25% stake in the Miss Universe pageant.

Secured and unsecured creditors will receive full recovery on their claims and the reorganization will reportedly save the company $98 million a year from restructuring its debt.

Marke A. Broude and John W. Weiss also represent the debtor at Latham & Watkins in New York.

Charles A. Stanziale and Jeffrey T. Testa were local counsel at Schwartz, Tobia & Stanziale.

Trump's casino company to emerge from bankruptcy May 12

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May 25, 2007

BY HAND AND EMAIL

Maria Gorecki, Esq.
Kasowitz, Benson, Torres & Friedman LLP
1633 Broadway
New York, NY 10019

Donald J. Trump v. Timothy L. O'Brien, et al.

Dear Maria:

Pursuant to the requests of Mr. Trump, Mr. Weisselberg, and Ms. Scarbrough, the Court's May 10, 2007 Order, and the subsequent clarifications of the Order, defendants are producing the notes and audio recordings of Mr. O'Brien's conversations with Mr. Trump, Mr. Weisselberg, and Ms. Scarbrough. Specifically, please find enclosed a disc that contains the relevant images, load files, and OCR of the requested interview notes (TOB-PD-00004297 to TOB-PD-00004379; TOB-EF-00007765 to TOB-EF-00007894), and a second disc that contains the requested audio recordings (TOB-M-0003 to TOB-M-0044). Today's production also includes the notes and audio recordings of Mr. O'Brien's interviews of other persons, where Mr. Trump was present and participated.

We are also enclosing a production log that: (1) relates documents in today's production to entries on defendants' privilege log dated October 17, 2006; (2) details redactions to the interview notes; and (3) indicates the logged audio recordings not produced today (because they are beyond the scope of the Court's Order).

Please contact me to discuss or if you have any questions.

Very truly yours,

Andrew M. Levine

Enclosures

cc:. Mark P. Ressler, Esq. (by email without attachments)
William M. Tambussi, Esq. (by email without attachments)
Mark S. Melodia, Esq. (by email without attachments)
James F. Dial, Esq. (by email without attachments)

Columbia Business School "My company just stopped providing free coffee...

BusinessWeek

▸ Close Window

DECEMBER 14, 2004

NEWSMAKER Q&A

Trump: Bigger than Coke or Pepsi?

Thanks to his real estate prowess and hit reality show, America's most watched billionaire says his brand "has become the best brand"

Whether it's the guest list for his January wedding, or news on Dec. 13 that the U.S. bankruptcy watchdog objects to the financial package meant to restructure his casino operations, Donald Trump just can't stay out of the news. Not that America's brash billionaire has ever shied from the spotlight: The second season of his hit show *The Apprentice* is nearing its finale, with two players left to go.

BusinessWeek Senior Writer Diane Brady recently met with Trump to discuss the state of his business and his brand. "Trump is becoming a very big licensing operation," he says. How big? More than a dozen deals are under discussion and many more – including Trump caskets – were rejected out of hand. Here are edited excerpts from the conversation:

Q: What do you think makes people look to you as a corporate icon?
A: Certainly, the tremendous success that I've had with real estate in Manhattan would have started that, and the great success of *The Apprentice* also had a lot to do with it. For the finale last year, we had 41.5 million people watching.

Mark Cuban tried a show and it failed. Richard Branson tried a show and it failed quickly and miserably. Yet *The Apprentice* is beating virtually everything. Somehow, there's been a chord hit. Something that I do – undefined – seems to get people to want to watch.

Q: Why can't you define it?
A: I don't want to get overly crazy about defining it because people will say, "Oh, he's so arrogant. Isn't he a terrible human being?" I'm not a terrible human being.

I think I know why they watch me and don't watch other entrepreneurs. I seem to have an instinct for doing things. The thing I do the best is I build the best. Outside the industry, I get credit for being the best promoter when, in fact, I'm the best builder. The jobs are so good and the properties are so successful that people just say that I'm a great promoter.

Q: How important is the brand, though? Some have suggested that simply slapping the name Trump on a property gives it an automatic premium.
A: It's a 25% premium. I recently did a partnership with General Electric (GE), and when GE was choosing who their partner should be, they did a study that showed not only would you sell out for more money per square foot but, more importantly to them, you would sell out much faster with the name Trump. The brand has become the best brand.... I think it's a bigger brand now than Pepsi Cola (PEP) or Coca-Cola (KO).

Q: Really? That would be impressive.
A: I really think it's a bigger brand.... I'm doing a tremendous suit collection, called the Donald J. Trump Signature collection, that's selling incredibly well. And we're dealing with Estee Lauder on a men's fragrance. It's selling off the shelves. Trump is becoming a very big licensing operation.

Q: Do you think you're inspirational to Americans in a way that other billionaires are not?
A: It's hard for me to say yes. I went to the Wharton School of Finance and did well there. I'm an intelligent guy. If I answer

yes, I sound terrible. I'm supposed to take a different kind of approach and say, "Well, I just work hard."

Obviously, there's something going on. You have 41.5 million people watching *The Apprentice* where another show goes off the air.... We're having fun with this whole thing. Then in the end, you kick the bucket, nobody gives a damn, and that's the end of it.

Q: Your personal life is in the press as much as your professional life. Do you feel any pressure to act differently as you become more of a celebrity brand? Martha Stewart obviously discovered how personal actions can affect a brand.
A: Being a major celebrity is a huge disadvantage, because you become such a target. Just ask Martha about that. Given what Martha did, had she not been Martha, nobody would have even looked at it. You have a microscope on you all the time.

It's an advantage in that I sell more suits than anybody else. I sell more apartments than anybody else. I get advantages even in deals. People want to sell to me because of the name.... But if you go out to dinner and spill a drink, it's on the front page of a newspaper the next day.

Q: You were just on the front page of *The New York Post*, with that free ring for your fiancée, Melania.
A: People give me wedding rings. I have every major diamond group throwing diamonds in my face. "Please take our diamonds. Please! Here's a million dollars!" And if I take it, I'm on the front page of the *Post*.

Q: That's a personal peril, though. What about professional perils, such as the attention to your casino operations declaring bankruptcy?
A: The casinos represent less than 1% of my net worth, O.K.? What I'm doing is simply shedding $400 million of debt. I'm doing something that, frankly, if someone else did it, it wouldn't even be a story.

I'm going to create a great casino company. It should be a positive story, but it's a negative story. We've restructured. We've agreed with everybody. When you have too many successes, everybody looks for a chink in the armor.

Q: Are you afraid of failure?
A: I hate failure, and I'll do whatever I can to avoid it. I don't like to lose. I don't like using the word "afraid".... One thing about bad times is that you learn a lot about yourself. I've seen people that I thought were really strong who had bad times and folded like an umbrella. And I've seen people who I didn't think were particularly strong and, in bad times, they stood up like an iron wall. You never know about people until you see them in bad times.

My company is bigger and stronger than it has ever been.... The one thing I'm really most proud of is that I've really provided a lot of jobs for people. Not only have I provided great products but I've provided a lot of income for a lot of families.

Q: Do you think *The Apprentice* has helped to improve the image of Corporate America? It has been a tough few years.
A: When Mark Burnett and I conceived of *The Apprentice*, nobody thought a show that's largely based on business would ever have huge ratings. It might have a place on CNBC but that's it. Not only did it get great ratings but it became the No. 1 [new] show of the season.

That was a great boost to business. I also think we teach ethics in a certain way on the show. I think it's a great tribute to business that *The Apprentice* is such a success.... In Australia, it's the [top-rated] show. People everywhere are interested in this stuff.

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AJAX ENTERPRISES, et al., Plaintiffs, v. DECLAN FAY, et al., Defendants.

Civil No. 04-4539 (NLH)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2007 U.S. Dist. LEXIS 38515

May 15, 2007, Decided
May 15, 2007, Filed

SUBSEQUENT HISTORY: Summary judgment granted, in part, summary judgment denied, in part by, Motion granted by, Claim dismissed by, Request granted, Request denied by *Ajax Enters. v. Fay, 2007 U.S. Dist. LEXIS 65027 (D.N.J., Aug. 31, 2007)*

PRIOR HISTORY: *Ajax Enters. v. Fay, 2007 U.S. Dist. LEXIS 16627 (D.N.J., Mar. 7, 2007)*

COUNSEL: [*1] For AJAX ENTERPRISES, AJAX ENTERPRISES, INC., AJEX ENTERPRISES, INC., UJEX ENTERPRISES, INC., Q TOWN, INC., TJAX INVESTMENT CORP., Plaintiffs: ANDREW L. INDECK, LEAD ATTORNEY, SCARINCI & HOLLENBECK, LLC, LYNDHURST, NJ.

For DECLAN FAY, Defendant: CHRISTOPHER PHILIP LEISE, WHITE & WILLIAMS, LLP, CHERRY HILL, NJ.

For INDUSTRIAL INSURANCE AGENCY, Defendant, ThirdParty Plaintiff, Cross Defendant: EVELYN CADORIN FARKAS, FARKAS & DONOHUE, LLC, FAIRFIELD, NJ.

For INDUSTRIAL INSURANCE AGENCY, Cross Claimant, Cross Defendant, ThirdParty Plaintiff: DAVID C. DONOHUE, LEAD ATTORNEY, EVELYN CADORIN FARKAS, FARKAS & DONOHUE, LLC, FAIRFIELD, NJ.

For DECLAN FAY, Cross Defendant:CHRISTOPHER PHILIP LEISE, LEAD ATTORNEY, WHITE & WILLIAMS, LLP, CHERRY HILL, NJ.

For DECLAN FAY, RISK MANAGEMENT INSURANCE NETWORK AGENCY, Cross Claimants: CHRISTOPHER PHILIP LEISE, LEAD ATTORNEY, WHITE & WILLIAMS, LLP, CHERRY HILL, NJ.

For DECLAN FAY, ThirdParty Plaintiff, Cross Claimant: CHRISTOPHER PHILIP LEISE, LEAD ATTORNEY, CHRISTOPHER PHILIP LEISE, WHITE & WILLIAMS, LLP, CHERRY HILL, NJ.

JUDGES: Joel Schneider, United States Magistrate Judge.

OPINION BY: Joel Schneider

OPINION

OPINION AND ORDER

This [*2] matter is before the Court on plaintiffs' April 2, 2007 informal letter request to amend their answers to interrogatories and Rule 26 disclosures to assert a new damage claim. Defendants object to the amendment. The Court heard oral argument on May 7, 2007. After considering the written and oral arguments of the parties, it is hereby Ordered that plaintiffs' requested amendment is DENIED.

Background

The factual background of this matter was summarized in this Court's March 7, 2007 Opinion and Order granting Plaintiff's Motion for Leave to File an Amended Complaint [Doc. No. 43]. *See Ajax Enters. v. Fay, C.A. No. 04-4539 (NLH), 2007 U.S. Dist. LEXIS 16627, 2007 WL 766335 (D.N.J. 2007)*. By way of brief

summary, Ajax Enterprises ("Ajax") is a Professional Employer Organization ("PEO"). A PEO is a company that provides integrated business services to its clients. A PEO delivers these services by "establishing and maintaining an employment relationship with clients' employees by contractually assuming substantial employer rights, responsibilities, and risks." *See* Complaint at P4, Doc. No. 1. Ajax brought negligence claims against defendants Declan Fay and Industrial Insurance Agency [*3] alleging that by failing to place Ajax with an existing and viable worker's compensation insurance carrier, defendants breached their duty as insurance brokers. Ajax seeks reimbursement of the finder's fee and all premiums paid in the amount of $ 192,340.94, a declaration that defendants are obligated to assume the defense and indemnification of all claims, including currently unknown claims that would have been covered, and a determination that it is a "successful claimant" entitling it to payment of attorney's fees incurred in bringing this action. *Ajax Enters., supra 2007 U.S. Dist. LEXIS 16627, [WL] at *1.*

As to the procedural history of this case, the original Complaint was filed on September 20, 2004. [Doc. No. 1]. On February 9, 2006, Ajax filed its first Motion for Summary Judgment. Defendants filed their Cross Motion for Summary Judgment on March 14, 2006. On December 7, 2006, the Honorable Noel L. Hillman, U.S.D.J., entered an Order denying the parties' Motions. After Ajax's Motion was denied it filed a Motion to Amend its Complaint on January 17, 2007 [Doc. No. 38]. The original plaintiff in this matter was Ajax Enterprises. With leave of court, plaintiffs filed their Amended Complaint [*4] on March 14, 2007, adding as named plaintiffs Ajax Enterprises, Inc. ("Ajax"), Ujex Enterprises, Inc. ("Ujex"), Q-Town, Inc. ("Q-Town") and Tjax Invest. Corp. ("Tjax"). When this Court granted Ajax's Motion to Amend on March 7, 2007 its Opinion and Order cautioned, "although the Court grants plaintiffs leave to amend, the new parties are barred from asserting a damage claim different than the claim Ajax Enterprises has been asserting to date." *Ajax Enters., supra 2007 U.S. Dist. LEXIS 16627, [WL] at *3.* This Court further wrote, "[t]he amendment *is not* intended to permit the new parties to assert new damage claims." *Id.* (emphasis in original). On April 9 and 20, 2007, defendants filed new Motions for Summary Judgment. [Doc. Nos. 54, 56]. Plaintiffs' filed a Cross Motion for Summary Judgment as to liability on April 26, 2007. [Doc. No. 56]. These Motions have not been decided. All fact and expert discovery in the case is complete. The Final Pretrial Conference is scheduled on July 13, 2007.

The issue presently before the Court is plaintiffs' request to amend their answers to interrogatories and Rule 26 disclosures to include a new damage claim. On January 22, 2007, Ajax notified defendants [*5] for the first time that it was claiming that T& L Transportation, Inc. "discontinued its business relationship with the Plaintiffs because of the lapse in insurance...." *See* Plaintiffs' April 2, 2007 Letter Brief at 2, Doc. No. 48. [1] Defendants argue that plaintiffs' amendment is late and prejudicial. [Doc. No. 60].

1 During oral argument on May 7, 2007, plaintiffs' counsel informed the parties that the new damage claim is asserted on behalf of Ujex and Q-Town.

Ajax admits that the first time it notified defendants of the T&L damage claim was on January 22, 2007 when it listed the claim in a damage summary letter it sent the Court. Prior to that date the T&L claim was never identified in Ajax's Rule 26 disclosures and answers to interrogatories. [2] Plaintiffs allege the first time they learned T&L did not renew its business with them because of their insurance problems was on January 7, 2007 at the deposition of T&L's Vice President, Leslie R. Bredell, which was taken in a related state court litigation. [*6] In May 2005, T&L filed a state court Complaint against Ajax, Ujex, Q-Town, and others, and alleged it suffered damages because of the plaintiffs' failure to procure proper insurance.

2 The Court assumes, but is not certain, that Ujex, Q-Town and Tjax never served separate Rule 26 disclosures.

Discussion

Pursuant to *Fed. R. Civ. P. 26(e)(1)* and *(2)*, a party is under a duty to supplement its Rule 26 disclosures and answers to interrogatories if the answers served in the case are incomplete. Courts have used a four (4) part test to determine whether a party breached its duty to amend under *Rule 26(e)* : (1) whether there was a prior response; (2) whether the response became materially incorrect or incomplete; (3) whether the party knew that the response was incomplete; and (4) whether the correct information was otherwise made known to the other party through the discovery process or in writing. *Pfizer, Inc. v. Teva*

*Pharms. USA, Inc., C.A. 04-754 (JCL), 2006 U.S. Dist. LEXIS 74611, 2006 WL 2938723, *3 (D.N.J. 2006).* [*7] Pursuant *Fed. R. Civ. P. 37(c)(1)*, a party who without substantial justification fails to amend a prior response to discovery as required by *Rule 26(e)(2)* is not, unless such failure is harmless, permitted to use as evidence at trial any information not disclosed. "*Rule 37* is written in mandatory terms, and is designed to provide a strong inducement for disclosure of *Rule 26(a)* material." *Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 156 (3d Cir. 1995)*(quotations and citations omitted). In *Pfizer, Inc., supra 2006 U.S. Dist. LEXIS 74611, [WL] at *4*, the Court looked at the following factors to determine if withheld evidence should be excluded: (1) the importance of the information withheld; (2) the prejudice or surprise to the party against when the evidence is offered; (3) the likelihood of disruption at trial; (4) the possibility of curing the prejudice; (5) the explanation for the failure to disclose, and; (6) the presence of bad faith or willfulness in not disclosing the evidence. The burden of establishing substantial justification and harmlessness is on the party that failed to make the required disclosure. [*8] *M. Eagles Tool Warehouse, Inc. v. Fisher Tooling Co., C.A. 97-1568 (JAG), 2007 U.S. Dist. LEXIS 23636, 2007 WL 979854, *12 (D.N.J. 2007)* (citing *Yeti by Molly, Ltd. v. Deckers Outdoor Corp., 259 F.3d 1101, 1107 (9th Cir. 2001)).*

This Court will deny plaintiffs' request to amend their damage claim because it is late and the defendants will be substantially prejudiced by the amendment. Furthermore, the requested amendment is not harmless and there is no substantial justification for plaintiffs' delay in raising the T&L damage claim. Although Mr. Bredell was not deposed until January 7, 2007, plaintiffs knew or should have known long before this date that a plausible reason for why T&L did not renew its contract was because of problems plaintiffs had placing their insurance. This should have put plaintiffs on notice to inquire of T&L why T&L did not renew its contract. In turn this would have alerted Ujex and Q-Town of their damage clam against defendants related to the T&L contract. Nevertheless, plaintiffs admitted at oral argument they did no investigation in this case regarding whether they could assert the non-renewal of the T&L business as an element of their damage [*9] claim. Plaintiffs also provided no good explanation for why they never took Mr. Bredell's deposition in this case. Another reason why plaintiffs should have been aware of the T&L damage claim long before January 22, 2007 was because T&L sued plaintiffs in a separate state court action in May, 2005 based on actions plaintiffs' claim was the fault of the defendants in this case. Moreover, in October 2005, plaintiffs filed a third-party complaint in T&L's state court action relating to the non-renewal of T&L's business. It is plain, therefore, that plaintiffs knew or should have known at least as early as May 2005, that a possible explanation for why T&L did not renew its contract was because of defendants' actions. Plaintiffs' proposed amendment comes after the end of fact and expert discovery, after the filing of two rounds of summary judgment motions, and on the eve of the Final Pretrial Conference. Plaintiffs' request to assert a new damage claim is unquestionably late.

More importantly, not only is plaintiffs' new damage claim late, but the defendants will be substantially prejudiced if plaintiffs' proposed amendment is granted. At this stage of the case all fact discovery is complete [*10] and expert reports have been exchanged. As set forth in Declan Fay's May 4, 2007 letter brief [Doc. No. 60], if plaintiffs' amendment is granted it will inevitably open the door to another round of substantial fact and expert discovery and depositions, and will likely necessitate the need for a new round of expert reports. Many of the depositions that must be taken to address plaintiffs' new claim are of witnesses who were already deposed. Defendants should not be compelled to incur substantial unnecessary transaction costs because plaintiffs now want to assert a new damage claim more than 2 1/2 years after their complaint was filed, and virtually on the eve of the Final Pretrial Conference. This is especially true since plaintiffs knew or should have known about the T&L damage claim at least as early as May 2005.

When this Court granted Ajax Enterprises leave to amend their complaint on May 7, 2007, the Court specifically noted that it would not permit plaintiffs to assert new damage claims. The reason was obvious--an amendment at this late stage of the litigation would inevitably delay trial and substantially prejudice defendants. Despite this Court's admonition, plaintiffs are [*11] now attempting to accomplish what this Court specifically prohibited in its March 7, 2007 Opinion. The Court granted Plaintiffs' Motion to Amend to add new plaintiffs with the clear and unmistakable proviso that it would not permit the new plaintiffs to assert new damage claims that had not previously been raised by Ajax Enterprises.

It is also noteworthy that plaintiffs acknowledge that when they filed their Motion to Amend their Complaint on January 17, 2007 [Doc. No. 38] they were aware of the T&L damage claim. Nevertheless, plaintiffs' Motion did not mention that one of the reasons they wanted to add Ujex and Q-Town as named plaintiffs was so that they could assert the new T&L damage claim. In fact, Plaintiffs' Brief in support of their Motion to Amend represented that if the Motion was granted it would not result in any additional discovery. Plaintiffs' Motion argued that the new plaintiffs should be added to the case to seek reimbursement of the same finder's fee and premiums that Ajax Enterprises had been requesting. Specifically, Plaintiffs' Brief stated:

> As part its claim, the proposed Plaintiffs seek reimbursement of the same finder's fee and all premiums paid. [*12] The Defendants were long ago provided with copies *all* of the subject checks and wire transfers of the proposed Plaintiffs. *There are no further documents responsive to any of the discovery requests that would differ for any of the proposed new Plaintiffs.... Accordingly, the proposed amendment will not cause the need to extend discovery in this matter.*

See Brief at 5, Doc. No. 38-3 (emphasis supplied). This Court will not permit plaintiffs to amend their damage claim after plaintiffs represented in their Motion to Amend that if new parties were added to the case no new damage claims would be asserted. If plaintiffs had revealed in their Motion that they wanted to assert a new damage claim on behalf of Ujex and Q-Town, it is likely the Court's ruling on Plaintiffs' Motion to Amend would have been different.

Accordingly, for all the foregoing reasons, it is hereby

ORDERED this 15th day of May, 2007, that plaintiffs' request to amend its answers to interrogatories and Rule 26 disclosures to assert a new damage claim relating to the non-renewal of T&L's business is DENIED.

s/ Joel Schneider

United States Magistrate Judge

LEXSEE 2008 DIST. LEXIS 98335

KEVIN E. BURNS and BARBARA R. BURNS, and RENEE A. DEFINA, Plaintiffs, -against- BANK OF AMERICA, its affiliates, subsidiaries and agents, including but not limited to BA MORTGAGE, Defendants.

03 Civ. 1685 (RMB) (JCF)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2008 U.S. Dist. LEXIS 98335

December 4, 2008, Decided
December 4, 2008, Filed

PRIOR HISTORY: *Burns v. Bank of Am., 2007 U.S. Dist. LEXIS 40037 (S.D.N.Y., June 4, 2007)*

COUNSEL: [*1] Kevin E. Burns, Plaintiff, Pro se, Hakensack, NJ.

Barbara Burns, Plaintiff, Pro se, Hakensack, NJ.

For Bank of America, its affiliates, subsidiaries, and agents including, but not limited to, Defendant: Keith Michael Brandofino, Steven Scott Rand, LEAD ATTORNEYS, Zeichner Ellman & Krause LLP, New York, NY.

JUDGES: RICHARD M. BERMAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: RICHARD M. BERMAN

OPINION

DECISION AND ORDER

I. Introduction

On or about August 2, 2005, Kevin E. Burns, Barbara R. Burns, and Renee DeFina (collectively, "Plaintiffs") filed a *pro se* amended complaint ("Amended Complaint") alleging, among other things, that Bank of America, its affiliates, subsidiaries, and agents, including Bank of America Mortgage (collectively, "Bank of America" or "Defendants") violated the Fair Credit Reporting Act, *15 U.S.C. § 1681, et seq.* ("FCRA"), the Fair Debt Collection Practices Act, *15 U.S.C. § 1692, et seq.* ("FDCPA"), the Truth in Lending Act, *15 U.S.C. § 1601, et seq.* ("TILA"), and various provisions of Minnesota state law. [1] Plaintiffs' allegations relate to (i) inaccurate credit information about Plaintiffs that allegedly was reported to various credit bureaus by Bank of America beginning on November 1, 2001, and [*2] (ii) the December 5, 2002 (foreclosure) sale of Plaintiffs' mortgaged property in Dakota County, Minnesota ("Minnesota Property"). (*See* Am. Compl., undated, filed Aug. 2, 2005, at 8-21.) [2]

1 Although Plaintiffs are proceeding *pro se*, the Court believes Barbara Burns to be an attorney. (*See* Order, dated June 28, 2006 ("June 28, 2006 Order"), at 1 n. 1); *see also Larsen v. JBC Legal Group, P.C., 533 F. Supp. 2d 290, 295 n.2 (E.D.N.Y. 2008)*. At oral argument on November 19, 2008, Barbara Burns declined to respond when asked by the Court whether she is an attorney. (*See* Hearing Tr., dated Nov. 19, 2008 ("Nov. 19, 2008 Hearing Tr."), at 9.)

Renee DeFina, Barbara Burns's mother, is deceased and is no longer a party to this action. *See Burns v. Bank of America, No. 03 Civ. 1685,*

*2007 U.S. Dist. LEXIS 40037, 2007 WL 1589437, at * 10 n.9 (S.D.N.Y. June 4, 2007)*. Kevin Burns is Barbara Burns's ex-husband. *See Burns v. Ungerman*, No. 03 Civ. 17802, 2004 WL 848272, at *1 (Minn. Dist. Ct. Jan. 16, 2004).

2 Plaintiffs contend that this case represents the continuation of *Bank of America v. Burns*, 01 Civ. 1339 (D. Minn. filed July 24, 2001) ("Minnesota Action"), which appears to have been filed by Bank of America in the state courts [*3] of Minnesota and, thereafter, removed to the United States District Court for the District of Minnesota on or about July 24, 2001. According to Plaintiffs, that case was then "transferred" to the Southern District of New York on or about June 21, 2006. (*See* Pl. Cross-Mot. at 6 n.3; Am. Compl. at 2 n.1; *see also* Nov. 19, 2008 Hearing Tr. at 16-18, 26.) The Minnesota Action appears to have been dismissed without prejudice by United States District Judge David S. Doty for lack of jurisdiction on or about June 21, 2002. (*See* Order in 01 Civ. 1339, dated June 21, 2002, at 1; *see also* Hearing Tr. in 01 Civ. 1339, dated June 21, 2002, at 6.) On or about March 11, 2003, Plaintiffs brought this action against Bank of America in the Southern District of New York.

Plaintiffs filed the Amended Complaint following the December 14, 2005 decision of the United States Court of Appeals for the Second Circuit which vacated this Court's December 18, 2003 Order dismissing Plaintiffs' original complaint, dated March 11, 2003. *See Burns v. Bank of America, 115 Fed. Appx. 105 (2d Cir. 2004)* ("The district court properly granted the [D]efendants' motion to dismiss the complaint for substantially the reasons [*4] it articulated in its order, but we think it prudent to allow the plaintiffs an opportunity to amend their complaint.") (citations omitted); *see also Burns v. Bank of America, No. 03 Civ. 1685, 2003 U.S. Dist. LEXIS 22799, 2003 WL 22990065 (S.D.N.Y. Dec. 18, 2003)*.

On or about June 28, 2006, this Court issued an order granting in part Bank of America's motion to dismiss the Amended Complaint. The June 28, 2006 Order denied Bank of America's motion with respect to Plaintiffs' claims under *FCRA § 1681s-2(b)*, the FDCPA, the Minnesota Consumer Fraud Act ("MCFA"), and Minnesota trespass, conversion, and slander law. (*See* June 28, 2006 Order at 6, 28.) At that time, the Court also denied Plaintiffs' motion for summary judgment on their claims that "Bank of America had no legal rights against the property and its 'foreclosure' of the . . . mortgage [was] illegal and void," because, among other things, (i) "a proposed determination of the parties' legal (real property) interest in the mortgaged property and the legality of the 2002 foreclosure" were "issues not found in the Amended Complaint," and (ii) "*Minnesota Statute § 542.02* governs Minnesota Real Property claims and mandates that Plaintiffs' claims must be litigated [*5] in Dakota County, Minnesota." (*Id.* at 26 (internal quotations and citations omitted).)

On or about April 24, 2008, Bank of America moved for summary judgment on Plaintiffs' remaining claims pursuant to *Rule 56 of the Federal Rules of Civil Procedure* ("Fed. R. Civ. P.") arguing, among other things, that: (1) Plaintiffs' FCRA and MCFA claims should be dismissed because Plaintiffs have "fail[ed] to provide any evidence of . . . alleged damages"; (2) "[u]nder *FCRA § 1681n(c)*, this Court should award Bank of America its attorney's fees incurred in responding to Plaintiffs' . . . harassing and knowingly unsubstantiated FCRA allegations"; (3) Plaintiffs have no claim under the FDCPA because "Bank of America was a creditor and not a debt collector with respect to [P]laintiffs' loan"; (4) Plaintiffs' Minnesota state law trespass, conversion, and slander of title claims fail because Bank of America had the right "as a matter of contract and as a matter of law" to enter and take possession of the Minnesota Property to prevent waste and to commence a foreclosure action; and (5) Plaintiffs "should be precluded pursuant to [*Fed. R. Civ. P.] 37* from offering any evidence not previously disclosed in [*6] discovery." (Bank of America's Mot. for Summ J., dated Apr. 24, 2008 ("BOA Mot."), at 7, 12, 28; *see also id.* at 20-21.)

On or about June 4, 2008, Plaintiffs filed an opposition to Bank of America's motion and "renewed" motion for summary judgment on all of Plaintiffs' (remaining) federal and state law claims. (*See* Pls. Renewed Mot. for Summ. J., undated, filed June 4, 2008 ("Pls. Cross-Mot.").) [3] Plaintiffs also moved pursuant to *Fed. R. Civ. P. 11* and *37* for sanctions "as just compensation for costs . . . incurred by Plaintiffs in responding to the duplicative, voluminous pleadings and 'certifications' filed by defense counsel, an unsuccessful legal position asserted on appeal, and two unsuccessful motions to dismiss"; and pursuant to *Fed. R. Civ. P. 56(f)* "to enable the [deposition of Minnesota attorney

Lawrence Wilford ('Wilford')] to be taken." (Pls. Cross-Mot. at 12, 20.) [4]

3 Plaintiffs' Rule 56.1 Statement, dated June 3, 2008, and Rule 56.1 Counterstatement, dated July 14, 2008, do not cite "to admissible evidence of record supporting each . . . fact," *Giannullo v. City of New York, 322 F.3d 139, 140 (2d Cir. 2003)*, although it appears clearly from Plaintiffs' briefing papers [*7] that Plaintiffs have been notified of (and understand) their obligations under *Fed. R. Civ. P. 56* and *Local Civil Rule 56.1*. (*See, e.g.*, Pls. Rule 56.1 Statement, dated June 3, 2008 ("Pls. 56.1"); Pls. Rule 56.1 Counterstatement, dated July 14, 2008 ("Pls. 56.1 Counterstatement"); Not. to *Pro Se* Opposing Summ. J., dated Apr. 24, 2008.) In any event, "the record [has been] reviewed independently" by the Court to avoid prejudice to any party. *Holtz v. Rockefeller & Co., Inc., 258 F.3d 62, 74 (2d Cir. 2001)*.

4 At oral argument on November 19, 2008, Plaintiffs offered as exhibits Plaintiffs' Statement of Undisputed Facts Pursuant to *Rule 56.1 of the Civil Rules of the Southern District of New York*, dated June 3, 2008 ("Court Exhibit A"), and Plaintiffs' Compliance with Order Regarding Trial Memorandum and Disclosures, dated March 14, 2008 ("Court Exhibit B"). (*See* Nov. 19, 2008 Hearing Tr. at 7-14; *see also* Ltr. from Steven S. Rand to Hon. Richard M. Berman, dated Nov. 19, 2008; Ltr. from Barbara R. Burns and Kevin E. Burns to Hon. Richard M. Berman, dated Nov. 21, 2008.)

On or about June 19, 2008, Bank of America filed a reply, arguing, among other things, that Plaintiffs "have sought this [*8] relief [*i.e.*, sanctions] previously in discovery motions before [United States] Magistrate Judge James C. Francis IV, and their applications have been summarily denied." (Bank of America's Reply in Supp. of Mot. for Summ. J., dated June 19, 2008 ("BOA Reply"), at 8.) On or about July 14, 2008, Plaintiffs filed a sur-reply ("Pls. Sur-Reply"). As noted, oral argument was held on November 19, 2008.

For the following reasons, Bank of America's motion for summary judgment is granted in part and denied in part, and Plaintiffs' motion for summary judgment is denied.

II. Background

On October 28, 1988, Kevin and Barbara Burns "as husband and wife . . . executed a promissory note . . . evidencing a $ 111,000.00 mortgage loan . . . made by Ameristar Financial Corporation ('Ameristar') to Mr. and Ms. Burns." (Bank of America Rule 56.1 Statement, dated Apr. 24, 2008 ("BOA 56.1"), P 1.) The promissory note "was secured by a mortgage dated October 28, 1988 ('Mortgage') forming a lien on [the Minnesota Property]." (BOA 56.1 P 2.) "On November 30, 1988, Ameristar caused the Mortgage to be duly filed with the office of the Registrar of Titles of Dakota County, Minnesota." (BOA 56.1 P 4.) "On February [*9] 15, 1990, Ameristar assigned the Mortgage to [Bank of America's predecessor in interest] Goldome Realty Credit Corporation." (BOA 56.1 P 4.) On or about December 1, 1999, Bank of America obtained the Mortgage "by way of merger and a series of name changes." (BOA Mot. at 25; *see also* BOA 56.1 PP 4-9, Decl. of Jacqueline M. Tobolski, dated Apr. 22, 2008 ("Tobolski Decl."), PP 4-9 & Exs. B, C; Decl. of Lawrence A. Wilford, dated Apr. 18, 2008 ("Wilford Decl."), Ex. I (attached Certificate of Title to Minnesota Property).)

Bank of America asserts that "[o]n July 5, 2002, the [Mortgage] was in default, and it remained in default [in the amount of approximately $ 99,994.51] through the date of the foreclosure sale" on December 5, 2002. (BOA 56.1 P 21; *see also* Wilford Decl., Ex. H.) "On September 6, 2002, Bank of America ordered an initial property inspection from First American [Field Services ('First American')] in connection with the [Minnesota Property]" and "First American subcontracted with Fisher Pratt, Inc. ('Fisher Pratt')." (BOA 56.1 PP 18, 19; *see also* Decl. of Michael W. Smith, dated Apr. 18, 2008 ("Smith Decl."), PP 4, 5.) Fisher Pratt inspected and/or secured the Minnesota Property [*10] on or about September 6, 2002, September 23, 2002, October 17, 2002, November 17, 2002, and December 17, 2002, and indicated that the property was vacant on those occasions. (*See* BOA 56.1 PP 20, 23, 25, 34; *see also* Smith Decl, PP 7, 9, 12, 13, 14, 16; Tobolski Decl., Ex. L; Wilford Decl., Ex. F.)

"On September 12, 2002, Bank of America referred the [Mortgage]' to outside counsel, *i.e.*, the law firm of Leonard, O'Brien, Wilford, Spencer and Gale, Ltd. ('Leonard, O'Brien'), to commence non-judicial foreclosure proceedings." (BOA 56.1 P 21; *see also* Toboloski Decl. P 21.) "On October 1, 2002, Leonard,

O'Brien sent notices to the Burns at the [Minnesota Property address] notifying them of their default, Bank of America's commencement of foreclosure proceedings against them and the Burns's right to reinstate the mortgage." (BOA 56.1 P 29; *see also* Wilford Decl. P 7 & Ex. A.) "The Dakota County Tribune published [a] notice of non-judicial foreclosure sale [of the Minnesota Property] from October 10, 2002 to November 14, 2002, and the notice indicated that the sale date was scheduled for December 5, 2002." (BOA 56.1 P 32; *see also* Wilford Decl. P 10 & Ex. D.)

"On December 5, 2002, third-party [*11] Wells Fargo Bank Minnesota, N.A. purchased the [Minnesota Property]." (BOA 56.1 P 21; *see also* Wilford Decl. P 13 & Ex. G.) "The [P]laintiffs did not exercise their rights of redemption concerning the [Minnesota] Property during the statutory six (6) month redemption period listed in the Sheriff's Certificate of Sale." (BOA 56.1 P 39.) In or about June 2003, "R.A. Ungerman Construction, Inc. ['R.A. Ungerman'] obtained title . . . by redeeming" the Minnesota Property. (BOA 56.1 P 40.) On or about December 24, 2003, following a duly noticed evidentiary hearing, "the Dakota County Minnesota District Court issued an Order in which it held, *inter alia*, that a new certificate of title [to the Minnesota Property] should be issued to [R.A. Ungerman] and that the foreclosure and Sheriff sale conducted [by Bank of America Mortgage] was proper in every material respect." (BOA 56.1 P 41; *see also* Wilford Decl. P 16 & Ex. I (*In re Petition of R.A. Ungerman Construction, Inc.*, No. 03 Civ. 9789 (Minn. Dist. Ct. Dec. 24, 2003) ("*In re R.A. Ungerman*").) Bank of America asserts that Plaintiffs failed properly to appeal the Minnesota District Court's December 24, 2003 Order. (*See* BOA 56.1 P 42; *see also* [*12] Nov. 19, 2008 Hearing Tr. at 5.)

Barbara Burns has disputed a Bank of America Mortgage trade line on her Trans Union credit report on or about October 26, 2001 (referring to "repossession") and in or about December 2001 (referring to "foreclosure"). (*See* Decl. of Eileen Little, dated Apr. 18, 2008 ("Little Decl."), P 7 & Exs. B, D; *see also* Tobolski Decl. P 47.) "[O]n October 30, 2001, Trans Union notified Bank of America of [Barbara Burns's] dispute." (Little Decl. P 10; *see also* Tobolski Decl. P 47.) "[A]fter speaking with Bank of America, on or about January 11, 2002, [Trans Union] updated [Barbara Burns's] credit report . . . and changed [the Bank of America trade line] to 'paid or paying as agreed.'" (Little Decl. P 10; *see also* Tobolski Decl. P 47.) "For the period May 2001 through January 11, 2002, Trans Union received no hard inquiries from any mortgage lenders in connection with an application for a loan by [Barbara] Burns." (BOA 56.1 P 56; *see also* Little Decl. P 10.)

Plaintiffs allege that "[b]etween the dates of January 1, 2002 and June 30, 2002, [they] applied for and were approved for a mortgage refinance loan with Chase Mortgage ['Chase']" and "[o]n or about April 30, [*13] 2002 . . . Chase rescinded the approved mortgage refinance based upon derogatory trade lines reported by [Bank of America] Mortgage." (Pls. 56.1 P 16.)

In or about May 2002, Kevin Burns disputed the Bank of America trade line on his credit report to CSC Credit Services ("CSC") an affiliate of Equifax Information Services, LLC ("Equifax"). (*See* Decl. of Janice Fogleman, dated Apr. 22, 2008 ("Fogleman Decl"), P 11; *see also* BOA Rule 56.1 Counterstatement, dated June 19, 2008 ("BOA Counterstatement"), P 14.) "CSC and/or Equifax 'froze' the Bank of America trade line, and [Kevin Burns's] credit file from July through November 2002 continued to indicate during those months that the [Mortgage] was current." (BOA 56.1 P 52; *see also* Fogleman Decl. P 12.)

Plaintiffs allege that "[o]n or about October 1, 2002, the Plaintiffs obtained an approved refinance offer from Upland Mortgage ['Upland'] and scheduled a closing for November 16, 2002." (Pls. 56.1 P 23.) Plaintiffs further allege that "Upland contacted Bank of America and [Bank of America] Mortgage for payoff and other information necessary to close the loan refinance a total of thirteen times between October 1, 2002 and December 30, 2002" [*14] and "Bank of America and [Bank of America] Mortgage refused to provide the requested information, thereby preventing the Upland loan from being closed." (*Id.* P 24.) Plaintiffs allege that "but for [Bank of America's] false and damaging certifications as furnishers of consumer credit information, the Plaintiffs would have successfully 'dumped' [Bank of America] and created a new relationship with either Chase or Upland on terms far more favorable." (Pls. Cross-Mot. at 21.)

III. Legal Standard

Summary judgment may not be granted unless "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to

judgment as a matter of law." *Fed. R. Civ. P. 56(c)*; *see Maguire v. Citicorp Retail Servs., Inc., 147 F.3d 232, 236 (2d Cir. 1998)*. "If the moving party meets its initial burden of showing a lack of a material issue of fact, the burden shifts to the nonmoving party to come forward with specific facts showing that there is a genuine issue for trial." *Jonas v. Int'l Airline Employees F.C.U., No. 03 Civ. 3374, 2006 U.S. Dist. LEXIS 34150, 2006 WL 1409721, at *2 (S.D.N.Y. May 19, 2006)* (internal quotations and citation [*15] omitted); *see also Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "[A]ll reasonable inferences must be drawn against the [moving] party," and summary judgment may not be granted "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Morales v. Quintel Entm't, Inc., 249 F.3d 115, 121 (2d Cir. 2001)*.

The same standard applies where, as here, the parties file cross-motions for summary judgment. *Id.* "[E]ach party's motion must be examined on its own merits, and in each case all reasonable inferences must be drawn against the party whose motion is under consideration." *Id.*

When the party opposing summary judgment is *pro se*, the Court must read that party's papers liberally and interpret them "to raise the strongest arguments that they suggest." *McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999)* (internal quotation and citation omitted); *see also Jonas, 2006 U.S. Dist. LEXIS 34150, 2006 WL 1409721, at *2*. "By the same token, however, a *pro se* party's bald assertion, completely unsupported by evidence, is not sufficient to overcome a motion for summary judgment." *Thompson v. Tracy, No. 00 Civ. 8360, 2008 U.S. Dist. LEXIS 4228, 2008 WL 190449, at *5 (S.D.N.Y. Jan. 17, 2008)* [*16] (internal quotations omitted).

IV. Analysis

(1) FCRA and MCFA Claims

Bank of America argues, among other things, that Plaintiffs "could not have suffered any injury to their credit" based upon Bank of America's actions because "[e]ven assuming, arguendo[,] that Bank of America had misreported [Barbara] Burns's credit to Trans Union in October through December of 2001 (which Bank of America denies), during that limited three-month period, Trans Union received no hard inquiries from any mortgage lenders in connection with an application for a loan for [Barbara] Burns"; and "although [Kevin Burns] apparently did complain [about his credit report] to CSC in May 2002 . . . [his] credit reports were not negative or adverse at that time." (BOA Mot. at 10, 11-12; *see also id.* at 21 (Plaintiffs' "MCFA claim must fail . . . for the same reasons that [P]laintiffs' [FCRA] claim fails").)

Plaintiffs counter, among other things, that Bank of America "did in fact certify and otherwise falsify derogatory consumer credit trade lines concerning the Plaintiffs at various times in 2001 and 2002" and "but for [Bank of America's] false and damaging certifications as furnishers of consumer credit information, [*17] the Plaintiffs would have successfully 'dumped' [Bank of America] and created a new relationship with either Chase or Upland on terms far more favorable." (Pls. Cross-Mot. at 21.)

Section 1681s-2(b) of the FCRA "imposes a duty on furnishers of information to investigate disputed information after receiving notice of a dispute concerning the completeness or accuracy of information from a [consumer reporting agency] pursuant to *15 U.S.C. § 1681i(a)(2)*." *Jonas, 2006 U.S. Dist. LEXIS 34150, 2006 WL 1409721, at *6*. "Liability under the FCRA attaches for both negligent violations, which require a showing of actual damages, *see 15 U.S.C. § 1681o*, and willful violations, for which statutory and punitive damages are available, *see 15 U.S.C. § 1681n*." *Rosenberg v. Cavalry Invs., LLC, No. 03 Civ. 1087, 2005 U.S. Dist. LEXIS 22788, 2005 WL 2490353, at *2 (D. Conn. Sept. 30, 2005)*. Plaintiffs bear the burden of demonstrating "the existence of a material factual dispute as to the existence of damages." *Spector v. Experian Info. Servs., 321 F. Supp. 2d 348, 356 (D. Conn. 2004)*; *see also Caltabiano v. BSB Bank & Trust Co., 387 F. Supp. 2d 135, 141 (E.D.N.Y. 2005)*.

There is no showing that Bank of America either failed to investigate Plaintiffs' disputed information [*18] or that Bank of America's investigations were unreasonable as a matter of law. *See Amendoeira v. Monogram Credit Card Bank of Georgia, No. 05 Civ. 4588, 2007 U.S. Dist. LEXIS 58680, 2007 WL 2325080, at *1 (E.D.N.Y. Aug. 7, 2007)* ("courts have required a 'reasonable investigation' to determine whether disputed information can be verified" under *FCRA § 1681s-2(b)*) (citation omitted).

Damages

But, even assuming, *arguendo*, that Bank of America violated *§ 1681s-2(b)*, summary judgment in favor of Bank of America would still be appropriate because "no reasonable factfinder could find that [Plaintiffs are] entitled to damages under the FCRA," *Trikas v. Universal Card Servs. Corp., 351 F. Supp. 2d 37, 43 (E.D.N.Y. 2005)*; *see also Casella v. Equifax Credit Info. Servs., 56 F.3d 469, 473 (2d Cir. 1995)*, as explained below.

"To obtain an award of actual damages under the [FCRA], [Plaintiffs] must present evidence of a causal relation between the violation of the statute and the loss of credit, or some other harm." *Whiting v. Harley-Davidson Fin. Servs., 534 F. Supp. 2d 823, 833-34 (N.D. Ill. 2008)* (internal quotations and citation omitted); *see also Casella, 56 F.3d at 473*. Plaintiffs have "not presented sufficient evidence [*19] of damages to survive summary judgment." *Trikas, 351 F. Supp. 2d at 45*. Plaintiffs fail "to present [any] affirmative evidence that [they were] in fact denied a loan application . . . because of the alleged incorrect information contained in [their] credit report[s]." *Evans v. Credit Bureau, 904 F. Supp. 123, 126 (W.D.N.Y. 1995)*; *see also Collins v. Experian Credit Reporting Serv., 494 F. Supp. 2d 127, 135-36 (D. Conn. 2007)*; *Spector, 321 F. Supp. 2d. at 356*. And, Plaintiffs' deposition testimony that they applied for and were denied loans by Chase and Upland based upon the alleged inaccurate information in their credit reports is unsubstantiated, speculative, and conclusory, and "insufficient to avoid summary judgment on an issue as to which [Plaintiffs] bear [] the ultimate burden of proof." [5] *Lee v. ITT Std., 268 F. Supp. 2d 315, 354 (W.D.N.Y. 2002)*; *see also Caltabiano, 387 F. Supp. 2d at 142* ("To demonstrate an actual injury, a plaintiff generally cannot stand on his subjective testimony alone, but must set forth other evidence that such an injury occurred."); *Collins, 494 F. Supp. 2d at 135-36*.

5 Barbara Burns stated (in speculative and conclusory terms) at her deposition, [*20] among other things, that "[c]ertain employees of Bank of America Mortgage falsified certain credit reporting trade lines resulting in a declination of the [Chase] loan"; "[t]here were credit defamations that resulted in the inability of the Plaintiffs to obtain credit when the Plaintiffs should have been able to obtain it"; and "Bank of America made numerous misrepresentations as to the Plaintiffs' creditworthiness and took steps to actively thwart and obstruct an approved refinance with Upland . . . thereby preventing a real estate closing scheduled for [November 16, 2002]." (Dep. of Barbara R. Burns, dated Aug. 30, 2007 ("B. Burns Dep."), at 28, 52, 56-57; *see also* Certification of Barbara R. Burns, undated and unsworn ("B. Burns Certification"), P 6.)

Kevin Burns stated (in speculative and conclusory terms) at his deposition, among other things, that "I believe I was turned down for a couple of credit cards I applied for and I'd have to check my records for anything else"; and Plaintiffs had a problem obtaining approval from Chase for their refinance application because "we had derogatory trade lines on our credit reports from Bank of America." (Dep. of Kevin E. Burns, dated Aug. [*21] 29, 2007 ("K. Burns Dep."), at 98, 117.)

Evidence put forth by Bank of America indicates that, in response to Barbara Burns's October 26, 2001 and December 2001 complaints, Trans Union consulted with Bank of America and, on or about January 11, 2002, "changed [the Mortgage trade line] to 'paid or paying as agreed,'" *i.e.*, months before the alleged Chase and Upland denials. [6] (Little Decl. P 12); *see also Cadet v. Equifax Credit Servs., No. 05 Civ. 4843, 2008 U.S. Dist. LEXIS 3983, 2008 WL 189873, at *6 (E.D.N.Y. Jan. 18, 2008)* (credit denials did not occur between "the date Trans Union was notified of the inaccuracy . . . and the date they corrected their records"). And, "for the period May 2001 through January 11, 2002, Trans Union received no hard inquiries from any mortgage lenders in connection with an application for a loan for [Barbara] Burns." (Little Decl. P 14); *see also Johnson v. Equifax, Inc., 510 F. Supp. 2d 638, 647 (S.D. Ala. 2007)* (plaintiff "proffered no evidence that . . . Regions [Bank] relied on a Trans Union report to deny her a loan").

6 The record also indicates that on or about June 26, 2002 (*i.e.*, prior to the alleged Upland denial in November 2002), "Bank of America forwarded a Universal [*22] Data Form (UDF)" to Trans Union, Experian, and CSC, instructing them to "remove all derogatory information from [Barbara Burns's Bank of America] trade line." (Tobolski Decl. P 41 & Ex. N.)

Plaintiffs have "failed to show that the disputed [information] caused the [alleged] credit denial []" by

Upland. *Reed v. Experian Info. Solutions, Inc., 321 F. Supp. 2d 1109, 1115 (D. Minn. 2004)*; *see also* (Fogleman Decl. P 12 (Kevin Burns's credit report "continued to indicate during [the five month period from July 2002 through November 2002] that . . . the loan was 'I-1' or in good standing").)

Plaintiffs failed to allege any emotional distress damages in their Amended Complaint. But, even assuming, *arguendo*, that they had done so, the only support for such a claim is Barbara Burns's unsupported and conclusory deposition testimony that "[t]here was public humiliation within the community where Bank of America was holding itself up as the owner of the [Minnesota Property] and the Plaintiffs as the trespassers." (B. Burns Dep. at 52); *see also Mele v. Davidson & Assocs., Inc.*, 02 Civ. 0450, 2004 WL 2285111, at *6 (W.D.N.Y. Oct. 7, 2004) ("It is well-established that a party cannot move for summary [*23] judgment on an issue that was not raised in the pleadings."). Plaintiffs "must produce more than conclusory allegations regarding stress and frustration to recover for emotional distress under the FCRA." *Molina v. Experian Credit Info. Solutions, 02 Civ. 5561, 2005 U.S. Dist. LEXIS 45258, 2005 WL 5525336, at *6 (N.D. Ill. Jan. 19, 2005)*; *see also Denius v. Dunlap, 330 F.3d 919, 930 (7th Cir. 2003)* (plaintiff's "bare allegations that he was 'embarrassed' and 'humiliated' were insufficient to justify sending the issue to the jury").

Nor does the record "support a finding of willfulness . . . and, on a motion for summary judgment, [Plaintiffs] cannot rely on conclusory allegations." *Trikas, 351 F. Supp. 2d at 44* (internal quotations and citation omitted); *see also Casella, 56 F.3d at 476*; *Spector, 321 F. Supp. 2d at 348* ("[T]o survive summary judgment on a willful non-compliance claim, a plaintiff must set forth affirmative evidence demonstrating conscious disregard or deliberate and purposeful actions."). Plaintiffs set forth no evidence that Bank of America's investigations pursuant to *FCRA § 1681s-2(b)* "involved willful misrepresentations or concealments." *Pinner v. Schmidt, 805 F.2d 1258, 1263 (5th Cir. 1987)*; [*24] *see also Spector, 321 F. Supp. 2d at 357-58.* To the contrary, as noted, the record shows that Bank of America responded to Barbara Burns's October and December 2001 disputes by "instruct[ing] Trans Union to . . . change [the Mortgage trade line] to 'paid or paying as agreed'" on or about January 11, 2002. (Toboloski Decl. P 47); *see also Garrett v. Trans Union, L.L.C., No. 04 Civ. 00582, 2006 U.S. Dist. LEXIS 73395, 2006 WL 2850499, at *12 (S.D. Ohio Sept. 29, 2006)* (even "[f]ailure to adequately re-investigate or promptly correct or delete information after notice does not constitute willfulness."); *Casella, 56 F.3d at 476.*

The record also indicates that, for example, on June 26, 2002, Bank of America "reported to the [consumer reporting agencies] that the [Mortgage] was 'current' and/or 'paid or paying as agreed' even though [P]laintiffs were or recently had been in default." (Toboloski Decl. P 40; *see also id.* P 41 & Ex. N.) Bank of America's "course of conduct does not support the kind of conscious disregard or deliberate and purposeful actions necessary to make out a claim for willful noncompliance under the FCRA." *Casella, 56 F.3d at 476* (internal quotations and citation omitted).

Bank of America is also entitled [*25] to summary judgment on Plaintiffs' MCFA claim. "To show a violation of the [MCFA], Plaintiffs must demonstrate two elements: [i] there must be an intentional misrepresentation relating to the sale of merchandise, and [ii] the misrepresentation must have caused damage to the plaintiff." *Hopkins v. Trans Union, L.L.C., No. 03 Civ. 5433, 2004 U.S. Dist. LEXIS 16414, 2004 WL 1854191, at *6 (D. Minn. Aug. 19, 2004)* (internal quotations and citation omitted). Even assuming, *arguendo*, "that Plaintiffs can prove an intentional misrepresentation [by Bank of America prior to December 15, 2001], Plaintiffs have not demonstrated how they have been harmed by the misrepresentation," as described above. *Id.*; (*see also* June 28, 2006 Order at 15-16 (Plaintiffs' "MCFA claims based on [Bank of America's] activities that occurred after November 15, 2001 are . . . preempted" by the FCRA).) [7]

7 And, "[t]o bring a cause of action under [the MFCA, *Minn. Stat. § 325F.69*,] . . . [Plaintiffs] must satisfy the requirements of the Private Attorney General Statute, *Minn. Stat. § 8.31(3)*a," which requires that Plaintiffs "show that [their] cause [] of action benefit[s] the public." *Davis v. U.S. Bancorp, No. 02 Civ. 505, 2003 U.S. Dist. LEXIS 12930, 2003 WL 21730102 at *4 (D. Minn. July 23, 2003)* [*26] . Because "the damages that [Plaintiffs] request [] are for personal benefit only, [Plaintiffs] cannot meet this requirement, and [their MCFA] claim [] must be dismissed." *Id.*; *see also Antioch Co. v. Scrapbook Borders, Inc.,*

291 F. Supp. 2d 980, 1003-04 (D. Minn. 2003); (Am. Compl. at 14.)

(2) Attorney's Fees

Bank of America argues that it is entitled to attorney's fees and disbursements under *FCRA § 1681n(c)* because, among other things, " [P]laintiffs have always known that they could not have been denied any credit or suffered any damages as a result of [Bank of America's] alleged errors" and Plaintiffs' FCRA allegations are "purposefully misleading, harassing and knowingly unsubstantiated." (BOA Mot. at 28.) Plaintiffs counter, among other things, that Bank of America's application for attorney's fees and disbursements "should be denied as moot" because "Plaintiffs have established that [Bank of America's] unlawful foreclosure defense fails and that [Plaintiffs] are entitled to summary judgment." (Pls. Sur-Reply at 10.)

FCRA § 1681n(c) "provides for an award of fees associated with responding to an unsuccessful pleading or motion that was filed 'in bad [*27] faith or for purposes of harassment.'" *Edge v. Prof'l Claims Bureau, Inc., 64 F. Supp. 2d 115, 119 (E.D.N.Y. 1999)* (quoting *15 U.S.C. § 1681n(c)*). Bank of America must show that Plaintiffs "commenced and continued the litigation in bad faith or for purposes of harassment." *Id.*

The Court has reviewed the record and submissions of the parties and declines to award attorneys fees to either side in this case. *See Edge, 64 F. Supp. 2d at 119.* While Defendant argues that Plaintiffs filed their FCRA claim "in bad faith or for the purposes of harassment" as part of a "decades long crusade to frustrate the enforcement of Bank of America's [Mortgage]," (BOA Mot. at 27-28 (internal quotations and citations omitted)), Bank of America has not put forth sufficient evidence to establish that Plaintiffs' FCRA claim was filed in bad faith or for the purposes of harassment. *See Rogers v. Johnson-Norman, 514 F. Supp. 2d 50, 52-53 (D. D.C. 2007)*; *Stiff v. Wilshire Credit Corp., No. 05 Civ. 462, 2005 U.S. Dist. LEXIS 26356, 2005 WL 2886025, at *2 (D. Ariz. Nov. 1, 2005).* [8] And, while Plaintiffs' claims for summary judgment are unsupportable, because Plaintiffs are proceeding *pro se*, they "would not be entitled to recover attorney's [*28] fees even if [they] were successful on [their] . . . FCRA claims." *Menton v. Experian Corp., No. 02 Civ. 4687, 2003 U.S. Dist. LEXIS 3325, 2003 WL 941388, at *3 n.7 (S.D.N.Y. Mar. 6, 2003).*

8 (*Compare* BOA Mot. at 27-28 *with* June 28, 2006 Order at 1-2 n.1 ("Plaintiffs appear to have initiated other litigation involving real property in Dakota County, Minnesota and, on occasion, to have been criticized for litigation practices.")); *see also, e.g., Burns v. State of Minn., 61 F.3d 908, at *1* [published in full-text format at *1995 U.S. App. LEXIS 19172*] (8th Cir. 1995); *Matter of Burns, 542 N.W.2d 389, 390 (Minn. 1996)*; *Burns v. Ungerman, No. 04 Civ. 290, 2005 Minn. App. LEXIS 209, 2005 WL 468304 (Minn. Ct. App. Mar. 1, 2005)*; *Burns v. Ungerman*, No. 03 Civ. 17802, 2004 WL 848272 (Minn. Dist. Ct. Jan. 16, 2004); *Burns v. R.A. Ungerman Constr. Co.*, No. 03 Civ. 11603, 2003 WL 23335193, at *2 (Minn. Dist. Ct. July 1, 2003); *In re Barbara Burns*, No. 94 Civ. 19334, 1997 WL 33643279, at *1-3 (Minn. Dist. Ct. Apr. 2, 1997); *Burns v. R.A. Ungerman Constr. Co.*, No. 94 Civ. 13558, 1995 WL 17079249, at *1-4 (Minn. Dist. Ct. June 15, 1995).

(3) FDCPA Claims

Bank of America argues that neither Bank of America nor Bank of America Mortgage is liable under the FDCPA because, among other things, Plaintiffs "were well aware [*29] that Bank of America was their creditor and that Bank of America was collecting its own debts"; "Bank of America has fully and consistently disclosed its relationship with [Bank of America] Mortgage" in its correspondence to Plaintiffs; Plaintiffs "made various monthly payments by check drawn to the order of Bank of America, not [Bank of America] Mortgage"; Bank of America "cannot be held vicariously liable for the actions of Leonard, O'Brien, *i.e.*, the law firm it hired to foreclose the [P]laintiffs' defaulted [Mortgage]"; and "debt collection was not the main function of [Bank of America] Mortgage and it only collected debts for Bank of America as a servicer." (BOA Mot. at 14, 15, 17, 20.)

Plaintiffs counter that Bank of America is liable under the FDCPA because, among other things, "Plaintiffs have no business relationship with Bank of America that involves the [Minnesota Property]"; "the issue of whether the Plaintiffs were misled by the name '[Bank of America] Mortgage' is an issue of fact for the jury"; and "Bank of America is liable for unlawful acts committed by [Lawrence, O'Brien] at Bank of America's direction under well-established and time-honored legal

doctrines of respondeat [*30] superior . . . and ostensible agency." (Pls. Cross-Mot. at 24, 25.)

Bank of America

"The [FDCPA] is quite clear that it is directed at independent debt collectors and not creditors attempting to collect on their own debts." *Beck v. Alliance Funding Co., 113 F. Supp. 2d 274, 275 (D. Conn. 2000)*; *see also Maguire v. Citicorp Retail Servs., Inc., 147 F.3d 232, 235 (2d Cir. 1998)*. 9 The record shows that Bank of America "sought to collect its own [$ 111,000.00] debt from [P]laintiff" relating to the Minnesota Property; Bank of America "is in the business of, among other things, financing mortgages for home buyers"; and its "principal business is not debt collection." (Tobolski Decl. PP 11, 12; *see also Id.*, Exs. B, C.) Bank of America is not liable under the FDCPA because it "is clearly not a 'debt collector'; rather, it is the very party to whom the debt is due." *Macdermid v. Discover Fin. Servs., 488 F.3d 721, 735 (6th Cir. 2007)*; *see also Somin v. Total Cmty. Mgmt. Corp., 494 F. Supp. 2d 153, 160 (E.D.N.Y. 2007)*.

> 9 "Under *15 U.S.C. § 1692a(4)*, a 'creditor' is defined as 'any person who offers or extends credit creating a debt or to whom a debt is owed, but such term does not include any [*31] person to the extent that he receives an assignment or transfer of a debt in default solely for the purpose of facilitating collection of such debt for another.'" *Masudi v. Ford Motor Credit Co., 07 Civ. 1082, 2008 U.S. Dist. LEXIS 59074, 2008 WL 2944643, at *3 (E.D.N.Y. July 31, 2008)* (quoting *15 U.S.C. § 1692a(4)*).

Nor is Bank of America a creditor under the FDCPA "merely because [it] utilized a corporate affiliate [*i.e.*, Bank of America Mortgage] to collect its debts." *Harrison v. NBD Inc., 990 F. Supp. 179, 184 (E.D.N.Y. 1998)*; *see also Maguire, 147 F.3d at 235* ("[A] creditor becomes subject to the FDCPA if the creditor 'in the process of collecting his own debts, uses any name other than his own which would indicate that a third person is collecting or attempting to collect such debts.") (quoting *15 U.S.C. § 1692(a)(6)*). The record "dispel[s] any notion that [Bank of America Mortgage] might be a distinct third-party collection agency." *Button v. GTE Serv. Corp., No. 96 Civ. 383, 1996 U.S. Dist. LEXIS 16971, 1996 WL 943904, at *1 (W.D. Mich. Oct. 15, 1996)*. "Even the least sophisticated consumer . . . would be able to determine from cursory review of the correspondence" from Bank of America Mortgage to Plaintiffs "that [Bank of America [*32] Mortgage] is . . . related to [Bank of America]." *1996 U.S. Dist. LEXIS 16971, [WL] at *2*; *see also Maguire, 147 F.3d at 236*; (Tobolski Decl. P 14 & Ex. D (correspondence prominently displayed both Bank of America's corporate logo and the legend: "Bank of America Mortgage is a division of Bank of America, N.A.").) The "relatedness of the two entities would [also] be apparent from the similarity of the creditor's [Bank of America] and its affiliate's [Bank of America Mortgage] name." *Maguire, 147 F.3d at 236* (citing *Young v. Lehigh Corp., No. 80 Civ. 4376, 1989 U.S. Dist. LEXIS 11575, 1989 WL 117960, at *22 (N.D. Ill. Sept. 28, 1989)*). Plaintiffs do not even appear to allege that they "suffered confusion as to the relationship between [Bank of America] and [Bank of America Mortgage]." *Franceschi v. Mautner-Glick Corp., 22 F. Supp. 2d 250, 255 (S.D.N.Y. 1998)*; *see also Button, 1996 U.S. Dist. LEXIS 16971, 1996 WL 943904, at *3*; (Pls. Cross-Mot. at 22; Am. Compl. at 8-12; Tobolski Decl. P 15 & Ex. E.)

And, "a creditor that is not itself a debt collector is not vicariously liable for the actions of a debt collector it has engaged to collect its debts." *Doherty v. Citibank (South Dakota) N.A., 375 F. Supp. 2d 158, 162 (E.D.N.Y. 2005)*. There is no evidence that Bank of America [*33] "used [Leonard, O'Brien's] name to collect its debts, pretended to be [Leonard, O'Brien] or used an alias to that effect, or that [Bank of America] controlled almost every aspect of Leonard, O'Brien's] debt collection practice, rendering [Leonard, O'Brien Bank of America's] alter ego." *Mazzei v. Money Store, 349 F. Supp. 2d 651, 661 (S.D.N.Y. 2004)*; *see also Fouche' v. Shapiro & Massey L.L.P., 575 F. Supp. 2d 776, 2008 WL 3285742, at *5 (S.D. Miss. 2008)*; (Wilford Decl. P 4.)

Bank of America Mortgage

"[A] corporate affiliate is excluded from the [FDCPA's] coverage so long as it satisfies two conditions: [i] the affiliate collects debts only for entities with which it is affiliated or related; and [ii] the principal business of the affiliate is not debt collection." *Aubert v. Am. Gen. Fin., Inc., 137 F.3d 976, 978 (7th Cir. 1998)*; *see also Backuswalcott v. Common Ground Cmty. HDFC, Inc., 104 F. Supp. 2d 363, 366 (S.D.N.Y. 2000)*. The record demonstrates that, "[t]o the extent that [Bank of America] Mortgage engaged in debt collection, it did so solely for Bank of America and was, in fact, a corporate affiliate of Bank of America"; and Bank of

America Mortgage's "principal business [*34] was not debt collection." (Tobolski Decl. P 13.) Bank of America Mortgage thus "meets [the] requirements of [the corporate affiliate] exemption." *Backuswalcott, 104 F. Supp. 2d at 366*; *see also Byes v. Edison Bros. Stores, Inc., No. 94 Civ. 3100, 1995 U.S. Dist. LEXIS 5587, 1995 WL 244441, at *2 (E.D. La. Apr. 26, 1995)*.

(4) Minnesota State Law Claims of Conversion, Trespass, and Slander of Title [10]

10 This Court previously held that "[e]ven if Plaintiffs had asserted diversity jurisdiction, this action would appear more properly to have been filed and prosecuted in Minnesota." *Burns, 2003 U.S. Dist. LEXIS 22799, 2003 WL 22990065, at *3, vacated on other grounds, 115 Fed. Appx. 105 (2d Cir. 2004)*; (*see also* Nov. 19, 2008 Hearing Tr. at 6-7, 20-21.) And, although Minnesota likely remains an appropriate venue for Plaintiffs' conversion, trespass, and slander of title claims, the Court has addressed the merits of these claims in the interests of judicial efficiency and at the parties' request.

Bank of America argues, among other things, that Plaintiffs should be collaterally estopped from relitigating the validity of Bank of America's foreclosure of the Minnesota Property because "it has already been judicially determined by a final order of the [*35] Dakota County Minnesota District Court [in *In re R.A. Ungerman*] that [the] foreclosure was proper." (BOA Mot. at 25.) Plaintiffs counter, among other things, that collateral estoppel does not apply because Bank of America is citing "a proceeding involving different claims by different parties than the claims and parties to this case." (Pls. Cross-Mot. at 28.)

Under the Full Faith and Credit Act, *28 U.S.C. § 1738*, "federal courts must give state court judgments the same preclusive effect they would be given by other courts in the state from which the judgment emerged." *Postma v. First Fed. Savings & Loan of Sioux City, No. 93 Civ. 4058, 1995 U.S. Dist. LEXIS 20633, 1995 WL 807082, at *11 (N.D. Iowa Mar. 28, 1995), aff'd, 74 F.3d 160 (8th Cir. 1996)*. "Collateral estoppel is available where: [i] the issues are identical to those in a prior adjudication; [ii] there was a final judgment on the merits; [iii] the estopped party was a party or in privity with a party in the previous action; and [iv] the estopped party was given a full and fair opportunity to be heard on the adjudicated issues." *Lyon Fin. Servs., Inc. v. Waddill, 625 N.W.2d 155, 158-59 (Minn. Ct. App. 2001)*. [11]

11 "Unpublished cases from [the Court of Appeals [*36] of Minnesota] are not precedential but may be persuasive." *State v. Awad, No. 06 Civ. 2306, 2007 Minn. App. Unpub. LEXIS 1131, 2007 WL 4170822, at *3 (Minn. Ct. App. Nov. 27, 2007)* (citing *Minn. Stat. § 480A.08(3)(c)* (2006)).

Plaintiffs' Minnesota state law conversion, trespass, and slander of title claims clearly appear to involve issues previously adjudicated by the Minnesota District Court in *In re R.A. Ungerman, i.e.*, whether there is a "recorded assignment . . . that establishes [Bank of America] as assignee [] of the [Mortgage] or which authorizes [Bank of America] to foreclose the [Mortgage]" and/or whether Bank of America satisfied statutory "pre-requisites" to "a lawful foreclosure action" against the Minnesota Property. [12] (Pls. Cross-Mot. at 27); *see also Holasek v. First Nat. Bank of Rochester, 278 N.W.2d 519, 522 (Minn. 1979)*; *In re Sina, No. 06 Civ. 200, 2006 Minn. App. Unpub. LEXIS 1094, 2006 WL 2729544, at *3 (Minn. Ct. App. Sept. 26, 2006)*; *Boerboom v. Travelers Ins. Co., No. 92 Civ. 2456, 1993 Minn. App. LEXIS 525, 1993 WL 152300, at *1 (Minn. Ct. App. May 11, 1993)*.

12 It appears that the same issues underlying Plaintiffs' conversion claim also form the basis of Plaintiffs' trespass and slander of title claims. (*See* Pls. Cross-Mot. at 8, 9, 13, 15, 26-27; Pls. [*37] Sur-Reply 5-8.)

Collateral estoppel applies against the Plaintiffs here. That is, in *In re R.A. Ungerman*, the Minnesota District Court determined that the "foreclosure and Sheriff sale by [Bank of America] Mortgage . . . was proper in every material respect" and the Court there ordered the issuance of a new Certificate of Title to the Minnesota Property in favor of R.A. Ungerman. [13] (Wilford Decl., Ex. 1 at 7); *see In re Sina, 2006 Minn. App. Unpub. LEXIS 1094, 2006 WL 2729544, at *3*; *see also Burns v. Chubb Ins. Cos.*, No. 04 Civ. 1284, 2007 WL 1484480, at *1 (N.J. Super. Ct. App. Div. May 23, 2007). The Minnesota District Court's decisions constitutes a final judgment on the merits. (*See Id.* at 1); *see also McWhinney v. Gage, 183 Minn. 141, 235 N.W. 676, 677-78 (Minn. 1931)*. And, Plaintiffs were parties to the proceedings in *In re R.A. Ungerman* and had a full and fair opportunity to contest the validity of the foreclosure before the Minnesota District Court. (*See Wilford Decl.*, Ex. 1 at 1, 4-6.) As the

Minnesota District Court made clear, Plaintiffs were served with two orders to show cause; Barbara Burns had "purposefully been avoiding service" but had "actual knowledge of the pendency of this matter"; and Kevin Burns appeared in [*38] court at the December 24, 2003 hearing to contest personal jurisdiction. (*Id.* at 5-6); *see also Postma, 1995 U.S. Dist. LEXIS 20633, 1995 WL 807082, at *13.*

13 The Minnesota District Court explicitly considered the Report of the Examiner of Titles and the Certificate of Title to the Minnesota Property, (*see Wilford Decl.*, Ex. I at 1-3), and determined that Bank of America possessed a valid and enforceable mortgage interest in concluding that the foreclosure was proper. *See In re Kress Rd. Partnership, 134 B.R. 301, 309 (Bankr. N.D. Ill. 1991)*; *In re Sina, 2006 Minn. App. Unpub. LEXIS 1094, 2006 WL 2729544, at *2* ("A party claiming to be the assignee of a mortgage must have a legal assignment thereof, duly recorded, before he can foreclose it by advertisement.") (internal quotations and citation omitted); *see also In re Metro Siding, Inc., 624 N.W.2d 303, 308 (Minn. Ct. App. Apr. 3, 2001).*

Even assuming, *arguendo*, that collateral estoppel did not apply to the issues underlying Plaintiffs' conversion, trespass, and slander of title claims, Plaintiffs have "not proffered any competent evidence which would create a genuine issue of material fact" to prevail on these claims. *Dixon v. Deutsche Bank Nat. Trust Co., No. 06 Civ. 2858, 2008 U.S. Dist. LEXIS 67289, 2008 WL 4151835, at *5 (D. Minn. Sept. 3, 2008).*

Conversion

Conversion [*39] "is defined as an act of willful interference with personal property, done without lawful justification by which any person entitled thereto is deprived of use and possession." *DLH, Inc. v. Russ, 566 N.W.2d 60, 71 (Minn. 1997)* (internal quotations and citation omitted).

Plaintiffs' conversion claim fails as a matter of law, *see AIIR Constr., Inc. v. Dixon, No. 06 Civ. 1554, 2007 Minn. App. Unpub. LEXIS 880, 2007 WL 2417083, at *3 (Minn. Ct. App. Aug. 28, 2007)*, because, among other things, the record indicates that "[o]n July 5, 2002, the [Mortgage] was in default, and it remained in default [in the amount of approximately $ 99,994.51] through the date of the foreclosure sale" on December 5, 2002. (BOA 56.1 P 21; *see also* Wilford Decl., Ex. H.) As a result of Plaintiffs' default (and their failure timely to cure the default), the terms of the Mortgage authorized Bank of America to accelerate the remaining payments and "invoke the power of sale and any other remedies permitted by applicable law." (Tobolski Decl., Ex. A P 19; *see also id.* P 20 (right of possession upon acceleration). There is no evidence indicating that the foreclosure and Sheriff's sale by Bank of America failed to comply with Minnesota law. Quite the [*40] contrary. (*See* Wilford Decl. PP 6-14; *see also* Wilford Decl., Ex. I at 3-4); *Dixon, 2008 U.S. Dist. LEXIS 67289, 2008 WL 4151835, at *4-5* (defendants "submitted evidence that Dixon defaulted on the Mortgage, that the Mortgage was recorded, and that there has been no action [at law] to recover the debt from Dixon"). [14]

14 Plaintiffs cite to an undated deposition of Sharon K. Hills, who Plaintiffs claim is an "attorney for the City of Apple Valley, Minnesota," presumably for the proposition that the Minnesota Property was "owned and in the possession of the Plaintiffs at all legally relevant times." (Pls. Cross-Mot. at 26, *see also id.* at 8 n.6, 18-19, 27.) The deposition does not appear to have been conducted in this case. (*See* B. Burns Certification P 9; *see also* Order, dated Jan. 22, 2008 (Francis, M.J.), at 1; Order, dated Feb. 15, 2008 (Francis, M.J.), at 2 ("The discovery deadline was extended to January 31, 2008 solely for purpose of taking [Ms. Hills's] deposition. However, [P]laintiffs chose to depose her in a different case and failed to subpoena her for deposition in this case.").

Trespass

"Trespass encompasses any unlawful interference with one's person, property, or rights, and requires only two essential [*41] elements: [i] a rightful possession in the plaintiff and [ii] unlawful entry upon such possession by the defendant." *Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 792-93 (Minn. Ct. App. 1998).*

The record does not support a finding that Bank of America trespassed upon the Minnesota Property. *See Thompson v. First State Bank of Fertile, 709 N.W.2d 307, 312 (Minn. Ct. App. 2006).* Minnesota law provides that "[i]f premises described in a mortgage . . . are vacant or

unoccupied, the holder of the mortgage . . . or the holder's agents and contractors may . . . enter upon the premises to protect the premises from waste." *Minn. Stat. § 582.031* (2008). The record shows that "[a]t all material times, Fisher Pratt performed services to prevent waste to [the Minnesota Property]" and that, as noted above, *see supra* p. 6, the Minnesota Property was vacant each time Fisher Pratt entered upon premises between September and December 2002. (Smith Decl. PP 17; *see also id.* PP 7-16 & Exs. A-B; Tobolski Decl., Ex. L; Wilford Decl., Ex. F.); *Thompson, 709 N.W.2d at 312*; *AHR Constr., 2007 Minn. App. Unpub. LEXIS 880, 2007 WL 2417083, at *1-2.* [15] Once Plaintiffs' defaulted on the Mortgage in July 2002, (*see* BOA 56.1 P 21), Bank [*42] of America was authorized under the Mortgage to "do and pay for whatever [was] necessary to protect the value of the [Minnesota] Property and [Bank of America's] rights in the [Minnesota] Property." (Tobolski Decl., Ex. A P 7); *see also State Bank of Loretto v. Dixon, 214 Minn. 39, 45, 7 N.W.2d 351 (Minn. 1943)*; *Thompson, 709 N.W.2d at 312* ("if the secured party has a privilege to enter another's land to take possession of collateral after default, the entry is not a trespass").

15 Plaintiffs allege that in or about October 2004, Bank of America damaged the Minnesota Property by, among other things, "dismantl[ing] the . . . water softener and otherwise damag[ing] the Burns's personal property." (Am. Compl. at 15.) Plaintiffs offer no documentary evidence to support these contentions or that Bank of America exceeded its authority to protect the Minnesota Property from waste, *see AHR Constr., 2007 Minn. App. Unpub. LEXIS 880, 2007 WL 2417083 at *3*; *see also Williams v. The Thomson Corp., No. 00 Civ. 2256, 2003 U.S. Dist. LEXIS 4481, 2003 WL 1571559, at *15 (D. Minn. Mar. 21, 2003)*. And, Plaintiffs' self-serving and unsubstantiated deposition testimony is insufficient to create a triable issue of fact as to the existence and amount of any alleged damages. (*See,* [*43] *e.g.*, K. Burns Dep. at 36-38; B. Burns Dep. at 41-43,45); *see also Central Mfg., Inc. v. Brett, 492 F.3d 876, 883 (7th Cir. 2007)* ("Self-serving deposition testimony is not enough to defeat a motion for summary judgment.").

Slander of Title

"The elements required for a slander of title claim are: [i] [t]hat there was a false statement concerning the real property owned by the plaintiff; [ii] [t]hat the false statement was published to others; [iii] [t]hat the false statement was published maliciously; [iv] [t]hat the publication of the false statement concerning title to the property caused the plaintiff pecuniary loss in the form of special damages." *Paidar v. Hughes, 615 N.W.2d 276, 279-80 (Minn. 2000)*; *see also In re Nielsen, No. 96 Civ. 47257, 1998 Bankr. LEXIS 816, 1998 WL 386384, at *4 (Bankr. D. Minn. July 9, 1998)* ("in a slander of title case, a finding of malice requires that the disparaging statements be made without a good faith belief in their truth").

Bank of America's November 14, 2002 publication (in connection with the foreclosure proceedings) that it held the Mortgage as "successor in interest to Goldome Realty Credit Corporation" was not a false statement. (*See* Wilford Decl., Ex. D; *see also* [*44] BOA 56.1 PP 4-5; Tobolski Decl. PP 4-9 & Exs. B, C; Wilford Decl., Ex. I (attached Certificate of Title to Minnesota Property).); *see also Burgmeier v. Bjur, No. 02 Civ. 743, 2003 Minn. App. LEXIS 12, 2003 WL 42178, at *2 (Minn. Ct. App. Jan. 7, 2003)* ("Because [the quitclaim deed] is not false, there can be no publication of a false statement."). Plaintiffs fail to produce specific, admissible evidence to show that a genuine issue of material fact exists regarding any bad faith on the part of Bank of America. *See Davidson v. DeVoe, No. 90 Civ. 2228, 1991 Minn. App. LEXIS 199, 1991 WL 26056, at *2 (Minn. Ct. App. Mar. 5, 1991)*; *see also Palatine Nat. Bank v. Olson, No. 95 Civ. 924, 1995 Minn. App. LEXIS 1456, 1995 WL 697520, at *2 (Minn. Ct. App. Nov. 28, 1995)*; *Wenner v. Ploske, No. 90 Civ. 89, 1990 Minn. App. LEXIS 885, 1990 WL 128290, at *4 (Minn. Ct. App. Sept. 11, 1990)* (if "defendant files a . . . lien [] on a piece of property in good faith, believing that he has rights to the property, then there is no malice, and thus no slander of title").

And, Plaintiffs fail to show that the alleged false publication by Bank of America caused them pecuniary loss in the form of special damages. *See Burgmeier, 2003 Minn. App. LEXIS 12, 2003 WL 42178, at *2.* For example, there is no admissible evidence that the Minnesota [*45] Property would have been sold by Plaintiffs to any specific individual or entity but for Bank of America's allegedly false publication. *See Haasken v. Haefele, No. 96 Civ. 1370, 1997 Minn. App. LEXIS 346, 1997 WL 132973, at *2 (Minn. Ct. App. Mar. 25, 1997).* And, *pro se* Plaintiffs would not be entitled to attorney's

fees. *See White v. Armontrout, 29 F.3d 357, 361-62 (8th Cir. 1994).*

(5) Bank of America's *Fed. R. Civ. P. 37* Application

Bank of America argues, among other things, that "[d]uring their respective depositions, [P]laintiffs agreed to produce [certain] documents, which they claim existed, but they never did" and Plaintiffs "should be precluded . . . from offering any evidence not previously disclosed in discovery." (BOA Mot. at 7.) Plaintiffs counter, among other things, that "most of the allegedly 'withheld evidence' . . . consists of materials accessible to [Bank of America] from third parties . . . or in [Bank of America's] own possession." (Pls. Cross-Mot. at 19.)

In light of the Court's ruling on the parties' cross-motions for summary judgment, the Court denies as moot Bank of America's application. *See Trustees of Teamsters Union Local 142 Pension Trust Fund v. JGM, No. 06 Civ. 58, 2007 U.S. Dist. LEXIS 9687, 2007 WL 489226, at *6 (N.D. Ind. Feb. 8, 2007).*

Plaintiffs' [*46] *Fed. R. Civ. P. 11* and *37* Applications

Plaintiffs argue that sanctions are warranted against Bank of America under *Fed. R. Civ. P. 11* and *37* because, among other things, Bank of America took "an unsuccessful legal position on . . . appeal"; filed "two unsuccessful motions to dismiss" reflecting "knowing, purposefully misleading Defendant statements and actions"; and "withheld copies of . . . subpoenaed Chase documents from the Plaintiffs in an attempt to thwart supplemental . . . discovery." (Pl. Cross-Mot. at 18, 30.) 16 Bank of America counters, among other things, that Plaintiffs "improperly seek [*Fed. R. Civ. P. 11* and *37*] sanctions against Bank of America and its counsel through [P]laintiffs' cross-motion [for summary judgment] rather than by separate motion on proper twenty-one days' notice" and Bank of America's motion for summary judgment "is grounded in fact and warranted by existing law." (BOA Reply at 8 & n.10.)

16 To the extent that Plaintiffs are referring to the appeal of this Court's ruling on December 18, 2003, *see Burns, 2003 U.S. Dist. LEXIS 22799, 2003 WL 22990065*, Plaintiffs "mischaracterize the Second Circuit's ruling in this case, [*Burns, 115 Fed. Appx. 105*], as having rejected [Bank of America's] [*47] motion to dismiss and its substantive arguments on the merits." *Burns, 2007 U.S. Dist. LEXIS 40037, 2007 WL 1589437, at *10 n.9.* In fact, the Court of Appeals accepted Bank of America's arguments, but in light of the Plaintiffs' *pro se* status, deemed it prudent to allow the Plaintiffs an opportunity to amend their complaint. *See id.*; (*see also* Nov. 19, 2008 Hearing Tr. at 18-19.)

Even assuming, *arguendo*, that Plaintiffs' motion for *Fed. R. Civ. P. 11* sanctions had complied with applicable procedure (which it does not), "sanctions should be imposed with caution" and the Court sees no basis for them here. *U.S. Media Corp. v. Edde Entm't Corp., No. 94 Civ. 4849, 1998 U.S. Dist. LEXIS 10985, 1998 WL 401532, at *28 n.43 (S.D.N.Y. July 17, 1998)* (internal quotations and citations omitted). A review of the record demonstrates that Bank of America did not violate *Fed. R. Civ. P. 11*, *Wilson v. Subway Sandwiches Shops, Inc., 823 F. Supp. 194, 200 (S.D.N.Y. 1993)*, nor does "the behavior of [Bank of America's] attorneys warrant the imposition of sanctions." *Bolden v. Morgan Stanley & Co., Inc., 765 F. Supp. 830, 834 (S.D.N.Y. 1991).*

Plaintiffs present no evidence to support the conclusion that Bank of America failed to produce documents in discovery. *See* [*48] *Barnes v. City of Chicago, No. 98 Civ. 5590, 2000 U.S. Dist. LEXIS 17214, 2000 WL 1745180, at *1 (N.D. Ill. Nov. 27, 2000).* 17

17 Plaintiffs' unsubstantiated allegations that Bank of America withheld discovery have been addressed in several earlier discovery orders. (*See, e.g.*, Order, dated Mar. 27, 2008 (Berman, J.); Order, dated Feb. 21, 2008 (Berman, J.); Order, dated December 14, 2007 (Francis, M.J.); *see also* Hearing Tr., dated Apr. 3, 2008, at 5, 7-8.)

Plaintiffs' *Fed. R. Civ. P. 56(f)* Application

Plaintiffs argue, among other things, that they "cannot present facts essential to justify [their] opposition on the basis that [Bank of America has] refused to participate in authorized, court-ordered discovery, including, but not limited to, deposition and cross-examination of . . . Wilford"; and Bank of America has "gone to almost comical lengths to prevent Wilford from being placed under oath and preventing damaging admissions by Wilford that Bank of America and [Bank of America] Mortgage were not of record and not empowered to foreclose a mortgage on the [Minnesota

Property]." (Pls. Cross-Mot. at 11-12; Pls. Sur-Reply at 8 n.14.)

Plaintiffs' *Fed. R. Civ. P. 56(f)* application is denied on procedural grounds because [*49] the parties' summary judgment motions were filed after the January 31, 2008 discovery deadline. *See Little v. City of New York, 487 F. Supp. 2d 426, 436 (S.D.N.Y. 2007)* ("*Rule 56(f)* applications are for summary judgment motions made *before* discovery has concluded") (emphasis in original). And, Plaintiffs did not submit appropriate *Rule 56(f)* affidavits in support of their discovery claim. *See AAI Recoveries, Inc. v. Pijuan, 13 F. Supp. 2d 448, 452 (S.D.N.Y. 1998)*. "It is well settled in this Circuit that a motion for further discovery under *Rule 56(f)* may not be granted unless the moving party submits an affidavit satisfactorily explaining [i] the nature of the uncompleted discovery; [ii] how the facts sought are reasonably expected to create a genuine issue of material fact; [iii] what efforts the affiant has made to obtain those facts; and [iv] why those efforts were unsuccessful." *Bussey v. Phillips, 419 F. Supp. 2d 569, 591 (S.D.N.Y. 2006)*; *see also Sundsvallsbanken v. Fondmetal, Inc., 624 F. Supp. 811, 814 (S.D.N.Y. 1985)* ("*Rule 56(f)* is not a shield against all summary judgment motions").

The materials which Plaintiffs have submitted are insufficient. That is, Kevin Burns states [*50] in his affidavit, dated June 2, 2008, that he served a subpoena to depose Wilford "at [Wilford's] offices at Woodbury, Minnesota on June 21, 2007 and on at least two occasions thereafter," and that Wilford objected "that he was not subject to the jurisdiction of the New York federal court" and "made a number of [other] technical objections to the subpoena." (Aff. & Certification of Kevin E. Burns, dated June 2, 2008 ("K. Burns Aff."), PP 27, 30.) Barbara Burns states in her affidavit (undated and unsworn) that she "personally discussed various objections [by Wilford] to the validity of the . . . subpoena" with the state court in Washington County, Minnesota and was "told by the Court Administrator and her Chief Deputy on two separate occasions between the dates of June 27, 2007 and August 30, 2007" that the subpoena "was valid and 'should be obeyed.'" (B. Burns Certification P 5.) But, Plaintiffs' affidavits do not, among other deficiencies, satisfy their "burden of showing how the [Wilford] deposition . . . would produce material evidence which would be potentially favorable to them." *Contemporary Mission, Inc. v. New York Times Co., 665 F. Supp. 248, 269 (S.D.N.Y. 1987)*.

In any event, [*51] since at least June 2006, Plaintiffs have had ample "opportunity to seek the testimony . . . of [Wilford] prior to the [January 31, 2008] close of discovery" and to enlist Magistrate Judge Francis in such an effort. *Williams v. Bank Leumi Trust Co. of New York, No. 96 Civ. 6695, 2000 U.S. Dist. LEXIS 4102, 2000 WL 343897, at *5 (S.D.N.Y. Mar. 31, 2000)*; *see also Little, 487 F. Supp. 2d at 435-36*. It appears that Plaintiffs may have served Wilford with a defective subpoena, ostensibly "issued by the Clerk of the Southern District of New York on October 20, 2006." *Burns, 2007 U.S. Dist. LEXIS 40037, 2007 WL 1589437, at *7*. Wilford objected that "the subpoena was not properly issued from the district court for the district where the deposition was to take place, in this case Minnesota; that the subpoena provided insufficient notice, as it was received on November 20 and set a deposition date only four days later (and for the day after Thanksgiving); and that the [P]laintiffs failed to provide witness fees." *Id.* On or about November 21, 2006, Plaintiffs "issued" a second subpoena purporting "to issue from the District Court for the District of Minnesota," setting "the same deposition time and place," and "signed not by the Clerk of the court [*52] but by [P]laintiff Barbara R. Burns." *Id.* (emphasis added). And, in fact, Magistrate Judge Francis determined that "both of the subpoenas issued by the [P]laintiffs were invalid." *2007 U.S. Dist. LEXIS 40037, [WL] at *8*; (*see also* Order, dated July 18, 2007 (Berman, J.), at 8-9; Order, dated August 2, 2007 (Francis, M.J.), at 2; Order, dated Feb. 21, 2008 (Berman, J.), at 5-6.)

Amendment

This Decision and Order is final. *See Ansam Assocs., Inc. v. Cola Petroleum, Ltd., 760 F.2d 442, 446 (2d Cir. 1985)*; *Vaughn v. Consumer Home Mortg. Co., Inc., No. 01 Civ. 7937, 2006 U.S. Dist. LEXIS 54267, 2006 WL 2239324, at *14-15 (E.D.N.Y. Aug. 4, 2006)*. Plaintiffs presented no argument in their papers to support further leave to amend -- and no such leave is granted. *See DiPace v. Goord, 308 F. Supp. 2d 274, 289 (S.D.N.Y. 2004)*. Following the December 14, 2004 decision of the United States Court of Appeals for the Second Circuit, Plaintiffs were provided with the opportunity to file an amended complaint, which they did on or about August 2, 2005 -- well before each side sought summary judgment. *See Burns, 115 Fed. Appx. 105*; *see also Han Jie Yang v. New York City Transit Auth., No. 01 Civ. 3933, 2002 U.S. Dist. LEXIS 20223, 2002 WL 31399119,*

*at *2 (E.D.N.Y. Oct. 24, 2002)*. Finally, permitting [*53] further amendment would be prejudicial to Bank of America given the fact that discovery has already been completed and Bank of America and Plaintiffs have filed their respective motions for summary judgment. *See Ansam Assocs., 760 F.2d at 446.*

V. Conclusion and Order

For the foregoing reasons, Bank of America's motion for summary judgment [# 182] is granted as to all of Plaintiffs' Federal and Minnesota state law claims, and denied as to Bank of America's application for attorney's fees under *FCRA § 1681n(c)* and Bank of America's *Fed. R. Civ. P. 37* application. Plaintiffs' cross-motion for summary judgment [# 186] is denied in its entirety.

The Clerk of Court is respectfully requested to close this case.

Dated: New York, New York

December 4, 2008

/s/ RMB

RICHARD M. BERMAN, U.S.D.J.

H

THIS DECISION IS UNCORRECTED AND SUBJECT TO REVISION BEFORE PUBLICATION IN THE NEW YORK REPORTS.

David A. Kipper, M.D., Appellant,
et al., Plaintiff,
v. NYP Holdings Co., Inc., & c., Respondent.
No. 54

Court of Appeals of New York.
Decided April 30, 2009

David Jaroslawicz, for appellant.

Slade R. Metcalf, for respondent.

CIPARICK, J.:

In this appeal, we must determine whether the summary judgment record contains clear and convincing evidence that defendant published a false and defamatory statement concerning the revocation of plaintiff's medical license with "actual malice," as defined in *New York Times Co. v. Sullivan* (376 U.S. 254 [1964]). Because it does not, we affirm the Appellate Division's grant of summary judgment to defendant.

I.

On December 7, 2003, page 24 of the New York Post's Sunday edition carried a short, eight-paragraph, "rewrite" of a 98-paragraph article taken from the Los Angeles Times's wire service. The Times article, entitled "Harsh Reality of 'Osbournes' No Laughing Matter," described the rock-singer John "Ozzy" Osbourne's allegations that his former physician, plaintiff David A. Kipper, had overprescribed various medications to him during the time that Osbourne starred in a television reality series. [FN1] In addition, the Times article accurately stated that the California Medical Board had "moved to revoke" plaintiff's license due to his alleged gross negligence in the treatment of other patients. But the Post article, which appeared under the inaccurate headline "Ozzy's Rx doc's license pulled," contained an error. Despite clearly indicating that it was based upon "Los Angeles Times reports," the sixth paragraph of the Post rewrite incorrectly stated that "the state medical board revoked Kipper's license."

FN1. Because Supreme Court dismissed claims brought on behalf of Dr. Kipper's professional corporation, all references to "plaintiff" herein are to Kipper in his individual capacity.

The circumstances surrounding the Post's erroneous statement are not entirely clear. The record reveals that, sometime during the evening of December 6, a Post editor assigned the task of rewriting the wire service story to a then-part-time reporter, Lyle Hasani Gittens. According to Gittens, the Post re-write was slated to appear in the second edition of the paper, the usual deadline for which was "around 8:00 to 9:00 o'clock." Gittens swore in an affidavit and testified at his deposition that he did not recall writing and did not think he wrote that plaintiff's license was revoked, a statement that defendant concedes was both false and defamatory. He speculated that the error might have occurred during the editing process.

After Gittens prepared the re-write on a personal computer, he transmitted it to an electronic "basket" where it was reviewed by an editor. Gittens was aware that editors sometimes altered the text of articles and, as typical of such editing, he cited stylistic changes to an article's lead, or first, paragraph. But he denied having any knowledge that Post editors deliberately changed the facts of stories.

The record sheds no light on the actual editing of Gittens's rewrite. The editor responsible for it, Todd Venezia testified that he would "never deliberately" falsify information pertaining to a doctor's licensure, but he could not offer any specific details pertaining to his review of the December 7 re-write. Moreover, the record does not contain the original draft that Gittens submitted to Venezia. [FN2]

FN2. At his deposition, Gittens stated that the original draft might have been "purged" from one of the Post's electronic file directo-

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ries.

An affidavit submitted by the Post's Metropolitan Editor, Jesse Angelo, does, however, set forth the path that a rewrite generally travels after editorial review. At that point, it is sent to the copy desk for additional checking of grammar, punctuation and accuracy as well as any reduction in text necessary to fit the paper's layout requirements. The copy desk is also responsible for preparing headlines before the article is processed by the production department for page-setting and transmission to the printer. How these steps were accomplished prior to publication of the "Ozzy" rewrite is not revealed by the record.

Apparently, the sole source material for Gittens's rewrite was the Los Angeles Times wire service story. Gittens testified that he "did not recall" making any independent effort to verify the status of plaintiff's license prior to publication of the Post article. Additionally, Gittens remarked that Post editors would "[n]ot necessarily" engage in additional fact-checking after an article's submission unless "something very conspicuous ... leap[t] out at them." Accepting the substance of a wire service story was not unusual, according to Angelo. He averred that the Post occasionally reprints stories disseminated on reputable wire services, such as that of the Los Angeles Times, verbatim and that additional research regarding the factual accuracy of such stories is not generally undertaken. With respect to the Los Angeles Times wire service dispatch relevant here, Angelo stated that "this is not the kind of story that [the Post] would have expected a reporter to do additional research [on]."

Nonetheless, Angelo explained that a reporter performing a rewrite may make "minor editorial changes," including "more interesting word selection," before publication in the Post. During his deposition, Gittens provided additional details about the rewriting process, stating that it essentially entailed shortening the length of a wire service dispatch and changing its "lead" paragraph "to make it more Post-like," by which he meant "less boring than the Los Angeles Times" or "[a] better read." The lead paragraph in the rewrite of which plaintiff complains, however, correctly stated that plaintiff was "under investigation for over-prescribing drugs."

On January 30, 2004-nearly two months after it was published-counsel for plaintiff wrote to the Post asserting that the December 7 re-write was false and defamatory and "published with reckless disregard for the truth." The letter demanded a retraction within 14 days. The Post complied, publishing a "Correction," on page 26 of its February 9 edition, which stated that the state medical board had "moved to revoke [plaintiff's] license, although no action has as yet been taken." Plaintiff then commenced this libel suit on November 23, 2004, almost a year after the Post rewrite was first published and more than nine months after publication of the requested retraction.

Following discovery, defendant moved for summary judgment. As relevant here, Supreme Court denied the motion, reasoning that defendant bore the burden of demonstrating that its misstatement regarding the status of plaintiff's license was not published with actual malice as defined by *New York Times*-i.e., with knowledge of falsity or a reckless disregard for the truth. FN3 A unanimous Appellate Division reversed, granting defendant summary judgment and dismissing the complaint (*see* 47 AD3d 597, 598 [1st Dept 2008]). We granted leave to appeal and now affirm.

> FN3. The actual malice standard applies here because, as Supreme Court held, plaintiff is "unquestionably a public figure" due to the extensive media coverage of his detoxification practice, his more than 100 television appearances as a medical expert, and his roles as a doctor in several films (*see* *James v. Gannett Co.*, 40 N.Y.2d 415, 422 [1976]).

II.

As set forth in *New York Times Co. v. Sullivan* (376 U.S. 254 [1964]) and its progeny, the U.S. Constitution's First Amendment bars a public figure from recovering damages in a libel action unless clear and convincing evidence proves that a false and defamatory statement was published with " 'actual malice'-that is, with knowledge that it was false or with reckless disregard of whether it was false or not" (*id.* at 279-280, 285-286; *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 [1991]; *Harte-Hanks Communications, Inc. v Connaughton*, 491 U.S. 657, 666-667 [1989]; *Bose Corp. v Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 [1984]). The clear and convincing evidence standard is applicable to a trial

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court's assessment of a libel defendant's motion for summary judgment (*see* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 [1986]; *see also* Freeman v. Johnston, 84 N.Y.2d 52, 57 [1994]). In such a posture, the question is "whether the evidence in the record could support a reasonable jury finding either that the plaintiff has shown actual malice by clear and convincing evidence or that the plaintiff has not" (Anderson, 477 U.S. at 255-256).

Thus, a libel defendant's burden in support of summary judgment is not, as Supreme Court reasoned, to prove as a matter of law that it did not publish with actual malice, but to point to deficiencies in the record that will prevent plaintiff from proving that fact by clear and convincing evidence (*cf.* Roche v. Hearst Corp., 53 N.Y.2d 767, 769 [1981]; Millus v. Newsday, Inc., 89 N.Y.2d 840, 843 [1996]). On appeal, our task is to undertake an independent review to determine whether the record evidence is capable of demonstrating actual malice with "convincing clarity" (*see* Freeman, 84 N.Y.2d at 56-57). We turn then to plaintiff's argument that the record contains evidence sufficient for a reasonable jury to find that the Post published the erroneous statements regarding his license with reckless disregard for the truth.

Although incapable of "one infallible definition .... reckless conduct is not measured by whether a reasonably prudent [person] would have published, or would have investigated before publishing" (*see* St. Amant v. Thompson, 390 U.S. 727, 730-731 [1968]). Instead, to cross the constitutional threshold of actual malice, there must be "clear and convincing evidence that the author in fact entertained serious doubts as to the truth of his publication or acted with a high degree of awareness of ... probable falsity" (*see* Masson, 501 U.S. at 510 [internal citations and quotations omitted]). [FN4] The inquiry is thus a subjective one, focusing upon the state of mind of the publisher of the allegedly libelous statements at the time of publication (*see* Bose Corp., 466 U.S. at 511 n 30; Harte-Hanks, 491 U.S. at 689). [FN5] This decidedly high standard of culpability has been set because "it is essential that the First Amendment protect some erroneous publications as well as true ones" (*see* St. Amant, 390 U.S. at 732). The actual malice standard recognizes that falsehoods relating to public figures are "inevitable in free debate" and that publishers must have sufficient "breathing space" (*see* Hustler Mag. Corp. v. Falwell, 485 U.S. 46, 52 [1988]) so that the First Amendment's commitment to "the principle that debate on public issues should be uninhibited, robust, and wide-open" will be realized (*see* Sullivan, 376 U.S. at 270).

FN4. The sort of actual malice required under *New York Times* "should not be confused with the concept of malice as an evil intent or a motive arising from spite or ill will" (*see* Masson, 501 U.S. at 510-511). While such motivations are not irrelevant to the actual malice inquiry (*see* 2 Smolla and Nimmer On Freedom of Speech § 23:3, 23-17 [2008] [hereinafter Smolla & Nimmer]), there is no evidence in this record that defendant was motivated by an intent to injure plaintiff.

FN5. The dissent does not quarrel with this point (*see* dissenting opn, at 5). Nor could it (*see* 2 Smolla & Nimmer at § 23:3, 23-15 [noting that the U.S. Supreme Court has "repeatedly emphasized the subjective nature of the actual malice standard"]). Recognizing the rule that the actual malice inquiry necessarily entails consideration of a defendant's subjective mental state, does not, however, inevitably place the outcome of a libel case within a defendant's "unilateral control" (*see* dissenting opn, at 5 [internal quotation omitted]). That result would only obtain if a libel defendant's mere assertion of good faith publication, despite clear and convincing circumstantial evidence of actual malice, would suffice to permit summary judgment. As the dissent correctly points out, this Court has never sanctioned such a rigid rule (*see* Prozeralik v Capital Cities Communications, Inc., 82 N.Y.2d 466, 478 [1993]). And we do not do so here. Instead, we acknowledge that "mere protestations of good faith by a defendant do not preclude establishing actual malice through other inferential or circumstantial proof" (*see* Smolla & Nimmer at § 23:3, 23-18). But we conclude that the facts and circumstances adduced by plaintiff in this case could not clearly and convincingly prove actual malice to the satisfaction of a reasonable jury.

We agree with the Appellate Division that the present

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record lacks the clear and convincing evidence necessary for a jury to conclude that defendant's inaccurate statements were published with actual malice. As an initial matter, plaintiff's reliance upon the Post's failure to employ fact-checkers, to attempt to verify the status of his license prior to publication, or to identify those individuals responsible for the false headline and statement is misplaced. Put simply, such proof of "[m]ere negligence does not suffice" to establish actual malice by clear and convincing evidence (*see Masson,* 501 U.S. at 510). Conceivably, in an extreme case, a failure to investigate could be so gross as to prove a willful avoidance of knowledge (*cf. Harte-Hanks,* 491 U.S. at 690-693), but this is not that case.

We are concerned here with whether there is "concrete" or "affirmative evidence" (*see Anderson,* 477 U.S. at 256, 257) in the record that would allow a jury to conclude with "convincing clarity" (*see Freeman,* 84 N.Y.2d at 56) whether the Post's employees actually entertained serious doubts about the truth of the rewrite's inaccurate headline and sentence or that they published those statements with a high degree of awareness of their falsity. Plaintiff argues that a jury applying the *New York Times* actual malice standard could find in his favor because the record establishes that a Post editor fabricated the facts concerning plaintiff's licensure to make Gittens's rewrite "more sensational[ ]" and thereby generate increased sales. Other than the fact that the rewrite contains two erroneous statements, however, there is no evidence that Gittens, his editor Venezia, or anyone else at the Post seriously doubted the truth of the complained-of statements or was highly aware that they were incorrect prior to publication. Evidence of falsity does not equate with proof of actual malice (*see Mahoney v. Adirondack Publ. Co.,* 71 N.Y.2d 31, 39-40 [1987]).

Given this lack of concrete proof, plaintiff relies heavily upon Gittens's testimony that the lead paragraph of a wire service article was usually edited to make it "more Post-like." But the full context of Gittens's testimony along with his affidavit, Angelo's affidavit, and Venezia's testimony, demonstrate that this short-hand phrase referred to stylistic alterations and not to the fabrication of facts. A writer can make an article a "better read" and engage in "more interesting word selection" without sacrificing factual integrity. Clearly, the First Amendment offers no shield to "calculated falsehoods" (*see Harte-Hanks,* 491 U.S. at 687 n 34, *quoting Garrison v. Louisiana,* 379 U.S. 64, 75 [1964]; *Cantrell v. Forest City Publ. Co.,* 419 U.S. 245, 253 [1974]), but at no point does this record even suggest that the Post set out to falsely defame plaintiff in this instance, or other individuals regularly, to increase its sales. [FN6] Moreover, plaintiff's heavy reliance on the "more Post-like" testimony is flawed since Gittens's deposition indicates that he was using that jargon to refer to changes made to a rewrite's lead paragraph. Here, however, plaintiff does not contend that that paragraph is inaccurate.

FN6. In this connection, the U.S. Supreme Court has concluded that a defendant's profit motive in publishing allegedly false and defamatory material does not "suffice to prove actual malice" (*see Harte-Hanks,* 491 U.S. at 667).

We recognize the danger of awarding summary judgment solely upon the defendant's professions of good faith in publishing libelous material (*see St. Amant,* 390 U.S. at 731-732). But the U.S. Supreme Court has instructed that a plaintiff must be held to the burden of adducing clear and convincing evidence of actual malice at the summary judgment stage so long as there has been a "full opportunity to conduct discovery" (*see Anderson,* 477 U.S. at 257). Here, there was such an opportunity. But this public figure plaintiff has come forward with nothing more than a mere hope that a jury would discredit the Post employees' testimony. This is insufficient (*see Anderson,* 477 U.S. at 256-257, *quoting Bose Corp.,* 466 U.S. at 512 ["discredited testimony is not normally considered a sufficient basis" for defeating a proper summary judgment motion] [internal quotation and alteration omitted]). As we stated in *Trails West, Inc. v. Wolff* (32 N.Y.2d 207 [1973]), it is "not enough" for a libel plaintiff resisting a motion for summary judgment to rely upon "suspicion, surmise, and accusation" (*see id.* at 221 [internal quotation omitted]).

Rather, as in *Prozeralik v Capital Cities Communications, Inc.* (82 N.Y.2d 466 [1993]), a plaintiff seeking jury resolution must point to facts and circumstances that could prove actual malice under the *New York Times* standard. In that case, there was evidence that a television and radio broadcaster's news em-

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ployees had surmised that plaintiff was a victim of a beating and abduction possibly orchestrated by members of organized crime solely because he, like "countless" other individuals, was a restauranteur in the Niagara region (*see id.* at 475-476). This assumption was sheer "rootless speculation," lacking any "basis or source whatsoever" (*id.*). Although the defendant claimed to have verified the plaintiff's identity as the victim with a spokesperson for the Federal Bureau of Investigation prior to issuing broadcasts relaying that information to the public, the FBI's spokesperson denied having made any such confirmation (*id.*). Furthermore, the broadcasts occurred during a period when the defendant's stations were engaged in a ratings competition for advertising revenues and after a rival television station had already announced the name of the actual victim the night before the defendant's newscasts (*id.*). And although the defendant did broadcast a retraction after being made aware of its error, the retraction claimed that the FBI had previously confirmed the plaintiff's status as the victim even after the FBI spokesperson expressly told the broadcaster's news director that this had not occurred (*id.*). In light of these facts and circumstances, we concluded that "[w]hile falsity alone and negligence alone would not be sufficient to sustain plaintiff's burden, there is enough in this case to submit the issue of actual malice to a jury for factual resolution"(*id.* at 476).

The same cannot be said here. First, the possible revocation of defendant's license was accurately mentioned in a lengthy Los Angeles Times wire service article. Thus, plaintiff's license controversy was not thrust into the public eye merely on defendant's whim. Second, there is no evidence that defendant's employees intentionally or recklessly fabricated the relevant false statements. Although the actual status of plaintiff's license could be verified through an accurate reading of the Times article, this potentiality does not negate the possibility that Gittens or his editors, all working under a deadline, simply misperceived the correct statement in the Times article or draft rewrite (*cf.* Mahoney, 71 N.Y.2d at 40). Certainly, there is no evidence that any Post employee deliberately avoided consulting the Times article so as to publish a more sensational, albeit concocted, story with an untarnished mental state (*cf.* Harte-Hanks, 491 U.S. at 690-693 [along with other circumstantial evidence, newspaper's failure to interview key witness or to listen to available tape recordings that would verify or refute account of newspaper's source constituted an actionable "purposeful avoidance of the truth"] [internal citation omitted]).[FN7]

FN7. According to the dissent, the Post's actions in this case are "more egregious" than those at issue in *Prozeralik* because there, although an accurate report was broadcast before defendant's erroneous one, a reporter disputed the FBI spokesperson's claim that the plaintiff's identity had not been confirmed before the defendant's inaccurate report was aired (*see* dissenting opn, at 7). But "a highly and significantly discrete feature" identified by this Court in refusing to dismiss for lack of the requisite proof of actual malice was that "plaintiff's name was initially injected randomly by defendant's own employees merely because he happened to be a Niagara restauranteur" (*see* Prozeralik, 82 N.Y.2d at 477). Moreover, the FBI employee's testimony, "categorical[ly]" denying the purported confirmation, provided "[d]irect evidence" that would permit a jury to infer that the defendant " 'knew or suspected' " that its statement was false (*see id.* at 477-478). There is simply no indication in *Prozeralik* that the presence of an accurate news report, contradicting defendant's, would have been enough to permit jury resolution of the actual malice question. It was simply one factor that served to corroborate other record evidence that supported an inference of actual malice (*see id.*).

Here, plaintiff's license controversy was a matter of public knowledge prior to publication of the Post rewrite. And there is not even circumstantial, let alone "direct," evidence which could clearly and convincingly establish that defendant's inaccurate rewrite was published with actual malice. The relevant evidence is simply that the Los Angeles Times article was correct, that for some unexplained reason defendant's re-write was not, and that defendant usually makes certain stylistic edits in the course of preparing a rewritten wire service story for publication in its newspaper. This is not enough.

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Third, to the extent that plaintiff contends that the Post's editors were motivated to "spice up" articles with invented facts in order to increase the newspaper's paid circulation, the December 7 rewrite would be a particularly poor vehicle for advancing that goal. The rewrite was inconspicuously placed on page 24 of the defendant's publication, where it appeared dwarfed in size by an adjacent, large-scale advertisement for home furnishings and was positioned above a blotter-style column entitled "Weird But true." In this context, it is highly unlikely that any member of the purchasing public would have chosen to buy the Post based on the complained-of rewrite. Even within the rewrite itself, the sentence relevant to plaintiff's licensure did not appear in the lead paragraph but was buried in the article's sixth of eight paragraphs. In fact, the lead paragraph correctly stated that plaintiff was "under investigation." Finally, unlike in *Prozeralik*, when plaintiff's counsel confronted the Post with the inaccuracy of its headline and sentence, the paper issued a full retraction within plaintiff's requested timeframe. [FN8]

> FN8. Unlike the retraction in *Prozeralik*, the Post's "Correction," which was located in a portion of the paper similar to that where the December 7 rewrite was placed, does not purport to be based on the Post's "independent investigation" (*compare* dissenting opn, at 2 *with* Prozeralik, 82 N.Y.2d at 470). Rather, it accurately states that the Post subsequently learned of its error after attributing an erroneous report to the Los Angeles Times.

In sum, a reasonable jury confronted with these facts and circumstances could not find with convincing clarity that defendant's erroneous statements were published with actual malice. Rather, the record bespeaks non-actionable mistake or negligence. [FN9] Thus, a grant of summary judgment in defendant's favor was appropriate.

> FN9. Contrary to the dissent's assertion, we do not "conclude[ ] that the erroneous statements must have been published as a result of mere mistake or negligence" (*see* dissenting opn, at 8). Our holding is limited to what the record reveals. It was plaintiff's burden to demonstrate that a reasonable jury assessing this evidence could find actual malice by clear and convincing evidence. He has failed to do so.
>
> The dissent would "infer[ ]" actual malice from the Post's access to the accurate Los Angeles Times article, its inability to explain how its error occurred, and from the affidavit of a "journalism expert," opining that "no rational journalist could have" made the same mistake that the Post did (*see id.* at 7-8 & n *). At most, this constitutes evidence of the discrete libel element of falsity, which is uncontested here, and of a failure to adhere to some objectively reasonable standard of reporting, which, standing alone, does not constitute clear and convincing evidence of actual malice.

Accordingly, the order of the Appellate Division should be affirmed, with costs.

Kipper v NYP Holdings Co., Inc. d/b/a The New York Post

No. 54

PIGOTT, J.(dissenting):

I respectfully dissent. The undisputed facts are relatively simple: The New York Post took a factually-accurate Los Angeles Times article, which stated that the California Medical Board had "moved to revoke" plaintiff's license, and rewrote the article to falsely state, in the headline and in the body of the article, that plaintiff's license had been "pulled" and "revoked". In my view, these facts raise, at the very least, a question of fact as to whether the Post acted with "actual malice".

I.

On December 7, 2003, the LA Times ran a 98-paragraph story entitled:

"HARSH REALITY OF 'OSBOURNES' NO LAUGHING MATTER"

The article stated that, "The state medical board last week moved to revoke Kipper's license, accusing him of gross negligence in his treatment of other pa-

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tients".

The Post obtained the LA Times story from the wire service and edited it from 98 paragraphs to eight. Apparently not satisfied with the headline, the Post changed it to falsely read:

"OZZY'S RX DOC'S LICENSE PULLED"

and reported: "Last week, the state medical board *revoked* Kipper's license, accusing him of gross negligence in his treatment of other patients, according to the Los Angeles Times" (emphasis supplied).

Plaintiff's attorneys wrote to the Post and advised it that the article stating that plaintiff's medical license had been revoked was "false and defamatory" and "published with reckless disregard for the truth." The letter demanded that the Post publish "a clear and unequivocal retraction of the ... falsehoods" in a manner, size and placement comparable to those of the defamatory article."

The Post subsequently printed a correction on page 26. The correction was in incredibly small print, situated among mostly ads, and stated as follows:

CORRECTION

On Dec. 7, 2003, The Post reported that, according to The Los Angeles Times, Dr. David Kipper, Ozzy Osbourne's doctor, had his license revoked by the California Medical Board. The Post has since learned that the board is still investigating Kipper's alleged practice of overprescribing drugs to celebrity patients and has moved to revoke his license, although no action has as yet been taken.

A fair reading of this "correction" is that the LA Times had made a mistake and further investigation by the Post had ferreted out the truth, a fact the Post is pointing out in an obscure part of its newspaper.

Supreme Court held that the Post's motion for summary

judgment should be denied because it "has not presented evidence that proves, as a matter of law, that the false statements in the Article were published in good faith, the result of an inadvertent misreading or miscopying that would be considered an excusable mistake." In making this determination, Supreme Court pointed to the deposition testimony of Post reporter Lyle Hasani Gittens that the Post's editors sometimes changed articles submitted by reporters and that, when editing wire service articles, the Post reporters routinely shortened them and changed the lead paragraph "to make it more Post-like," that is, "less boring than the Los Angeles Times". The Appellate Division reversed and dismissed the complaint.

II.

In support of its contention that the record fails to contain evidence establishing actual malice with "convincing clarity," the Post relies on remarkably foggy testimony of the very people from whom the falsity originated, its own employees. Gittens, the reporter who edited the LA Times story for publication in the Post, testified that, because it came from the wire service, the LA Times article had likely already been fact-checked. Rather than exonerate the Post, this testimony underscores the significance of its conduct in printing false information, since defendant admits that the LA Times article was factually accurate before the Post edited it. Notwithstanding this fact, Gittens claims that he does not know how the false statement about plaintiff's license having been revoked found its way into the article, nor does he recall editing the story to include that information. Todd Venezia, a reporter charged with editing Gittens's version of the story, testified that he occasionally edits the stories of other reporters but that he does not recall the specifics of the article at issue here.

The majority takes the position that based on the aforementioned testimony, there is a "lack of concrete proof" as to whether the Post "seriously doubted the truth of the complained-of statements or was highly aware that they were incorrect prior to publication" (maj op at 10-11). But the issue is not whether the Post doubted the truth or was aware of an incorrect statement here; it is conceded that the Post created the statements that, as the majority notes, are false and defamatory. A defendant should not be allowed to point to alleged deficiencies in the record that are the product of its employees' claimed inability to recall the circumstances surrounding the editing of the article and be awarded summary judgment.

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The majority correctly observes, "[t]he circumstances surrounding the Post's erroneous statement are not entirely clear" (maj op at 2). But it is that lack of clarity upon which the majority relies in concluding that the record is devoid of any evidence that would permit a jury to find that the Post published the article with actual malice. In my view, the fact that defendant took a factually-accurate article and edited it to reflect something completely untrue constitutes sufficient evidence from which a jury could infer that defendant " 'in fact entertained serious doubts as to the truth of [its] publication' (St. Amant v. Thomson, 390 U.S. 727, 731 [1968]) or acted with a 'high degree of awareness of ... probable falsity' (Garrison v. Louisiana, 379 U.S. 64, 74 [1964])" (Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 [1991]).

The majority asserts that an inquiry into such matters is a subjective one that requires this Court to focus on the state of mind of the author at the time of the publication (maj op at 8-9). But this Court has held that to "conclude that no prima facie case was even presented [against a defendant] because its employees might have held an untarnished subjective state of mind" is not compelled by federal or state jurisprudence, and has cautioned that such an "approach and analysis ... would erect a logically impossible test which, by its practical application of governing precedents, would inevitably result in no defamation case ever qualifying for jury resolution" (Prozeralik v Capital Cities Communications, Inc. (82 N.Y.2d 466, 478 [1993]). Essentially, the majority's opinion does what this Court sought to prohibit in *Prozeralik:* it places the disposition of defamation cases "into the unilateral control of defendant[ ]"(*id.*).

In my view, our Court's decision in *Prozeralik* compels the denial of the Post's motion for summary judgment. There, the defendant's news and radio casts identified the plaintiff-a public figure-as the victim of an abduction, and reported that the FBI was investigating whether said abduction was the result of the plaintiff having owed money to a criminal enterprise. There was a dispute, however, between the FBI and the defendant's reporter as to whether the FBI confirmed the plaintiff as the victim. Just hours after defendant last ran the inaccurate story, it was confirmed that the plaintiff was not the victim of the abduction, and the plaintiff subsequently filed a defamation suit against the defendant, eventually obtaining a favorable verdict.

This Court refused to grant the defendant's motion to dismiss the plaintiff's case, holding that the plaintiff met his "evidentiary burden of establishing actual malice sufficient to allow the jury ... to find that defendant acted with a high degree of awareness of 'probable falsity' or entertained 'serious doubts' as to the truth of the broadcasts," stating that the plaintiff "adduced cogent, direct evidence from which a jury could have *inferred* that defendant knew or suspected that the [plaintiff] was not the victim" (Prozeralik, 82 N.Y.2d at 475 [emphasis supplied] [internal citations omitted]). Such evidence included proof that a competing news station ran a story the previous evening identifying someone other than the plaintiff as the victim, speculation by the defendant's employees that the plaintiff was in fact the victim, and the disagreement between the FBI and the defendant's reporter as to whether the FBI told the reporter that he could " "go with [the plaintiff's] name" if the FBI did not call the reporter back (*id.* at 475-476).

Here, as in *Prozeralik,* another media outlet reported a factually-accurate account of events the day before the false information was published by the Post. In my view, the conduct of the Post in this case is more egregious than the conduct of the defendant in *Prozeralik* because there is no dispute between the Post and the LA Times concerning the accuracy of the original article. Unlike the disagreement between the FBI and the reporter in *Prozeralik,* it is undisputed that plaintiff's license had not been revoked, and the Post concedes that those parts of the story concerning the revocation were in fact false. Moreover, it can be inferred from the mere fact that the substance of the LA Times article was changed-without explanation-to erroneously reflect that plaintiff's license had been revoked that the Post entertained serious doubts as to the truthfulness of the article. Unlike the reporters in *Prozeralik* who speculated that the plaintiff was the victim, the Post *knew* or *should have known* from the body of the LA Times article that plaintiff's license had not been revoked.

As the majority states, more than "[m]ere negligence is required to prove actual malice" (Masson, 501 U.S. at 510). Whether defendant acted with mere negligence or actual malice, under the circumstances of this case, should be submitted to a jury, because an inference can be drawn from the facts in the record, with convincing clarity, that the Post acted with ac-

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tual malice in publishing the article (i.e., it either knew that it was false or acted with reckless disregard of whether it was false or not). [FN1] Rather than allowing a jury to make that determination, however, the majority relies on the inability of the Post's employees to recall exactly how the false publication made it to print, and then concludes that the erroneous statements must have been published as a result of mere mistake or negligence (maj op at 15). In my view, this is error and deprives plaintiff of an opportunity to have a jury evaluate the credibility of the Post's employees. Therefore, I would reverse the order of the Appellate Division and reinstate plaintiff's complaint.

> FN1. It is important to note that plaintiff did not stand mute in the face of defendant's motion for summary judgment; but submitted, among other things, the affidavit of a journalism expert who averred that no rational journalist could have confused the meaning of the LA Times article with the meaning of the Post article and the only inference that could be drawn from that alleged mix-up (and the defamatory headline) was that the action was intentional.

****

Order affirmed, with costs. Opinion by Judge Ciparick. Chief Judge Lippman and Judges Graffeo, Read, Smith and Jones concur. Judge Pigott dissents and votes to reverse in an opinion.

N.Y.,2009.
Kipper v. NYP Holdings Co., Inc.
--- N.E.2d ----, 2009 WL 1148653 (N.Y.), 2009 N.Y. Slip Op. 03407

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H

United States District Court, District of Columbia.
LIBERTY LOBBY, INC., et al., Plaintiffs,
v.
Jack ANDERSON, et al., Defendants.
Civ.A. No. 81-2240.

May 1, 1991.

Mark Lane, John L. McGann, Washington, D.C., for plaintiffs.
Michael D. Sullivan, Ross, Dixon & Masback, Washington, D.C., for defendants.

MEMORANDUM OPINION

AUBREY E. ROBINSON, Jr., Chief Judge.
*1 Plaintiff Liberty Lobby, Inc. ("Liberty Lobby") is a not for profit corporation and a self-described "citizens lobby" engaged in the espousal of causes. Plaintiff Willis Carto is its founder, treasurer and principal lobbyist. Plaintiffs charge that defendants Jack Anderson and *The Investigator* magazine published defamatory portrayals of Carto and Liberty Lobby as neo-nazi, fascist, anti-semitic and racist. The portrayals form the basis for plaintiffs, complaint.

In 1983 the District Court held that plaintiffs failed to establish actual malice and entered summary judgment in favor defendants. *Liberty Lobby, Inc. v. Anderson*, 562 F.Supp. 201, 203 (D.D.C.1983). On appeal the Circuit Court found, upon *de novo* review, that there were material issues involving the state of mind of the defendants and in particular that the district court had erred in granting summary judgment with regard to 9 of 30 allegations of libel. The Court of Appeals reversed as to the nine allegations and remanded to the district court. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1577,*rev'd on other grounds*, 477 U.S. 242 (1986).

On appeal to the Supreme Court, *certiorari* was granted [FN1] on the "question whether the clear-and-convincing-evidence requirement must be considered by a court ruling on a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure in a case to which *New York Times* applies." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986).

The Supreme Court reversed the Court of Appeals because it failed to apply the correct standard- "whether the evidence presented is such that a reasonable jury might find that actual malice has been shown with convincing clarity." *Id.* at 257.

In so doing, the Court held that the materiality of any fact should be determined by the substantive law of the case. *Id.* at 248. The Court stated that the test for deciding a motion for summary judgment is the same as that for a directed verdict motion, *id.* at 252, i.e., there is no issue for trial, unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. *Id.* The Court also said that "the mere existence of a scintilla of evidence in support of plaintiff's position will be insufficient; there must be evidence upon which the jury could reasonably find for the plaintiff." *Id.*

Significantly, the Court added that in this case it was not enough for plaintiffs to contend that issues concerning "state of mind" were presented. *Id.* at 256. Nor was it enough to impeach the credibility of movants' evidence without making a demonstration by credible and substantial evidence that plaintiffs would be able to meet the burden of proof at trial, *id.* at 256-57; "[i]nstead, Plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment. This is true even where the evidence is likely to be within the possession of the defendant, as long as plaintiff has had a full opportunity to conduct discovery." *Id.* at 257. Finally, the Supreme Court held that where the non-moving party must meet a higher than usual burden of proof during the trial

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stage, he must meet the same burden in resisting the summary judgment motion. *Id.* The Court cautioned that a trial on affidavit was not justified and that summary judgment should be granted with circumspection. *Id.* at 255.

I. The Cause of Action

*2 In order for a public official or a public figure plaintiff to establish liability for defamation in a matter of public concern, he must prove the following elements: (1) that the allegedly defamatory statement was published by the defendant to a third party; (2) that the statement has a defamatory meaning which was attributed to it by the recipient; (3) that the statement was false; (4) that the statement was made with the actual malice, i.e. "with knowledge that it was false or with reckless disregard of whether it was false or not." *New York Times Co. v. Sullivan,* 376 U.S. 254, 280 (1964).

A. Publication

It is undisputed that the allegedly defamatory statements were published by the defendants. The two articles giving rise to this lawsuit were published in the October 1981 issue of *The Investigator* magazine by defendant Investigator Publishing Company. Defendant Jack Anderson was publisher of the magazine. Defendant Bill E. Adkins was the president and Chief Executive officer of Investigator Publishing Company. The two articles, "Yockey: Profile of an American Hitler" and "The Private World of Willis Carto," were authored by Charles Bermant and edited by Jack Anderson. The articles were introduced by a section signed by "The Editors": "Did *Mein Kampf* Spawn Yockey's *Imperium,* a Book Revived by Carto's Liberty Lobby? The two articles "recount the history of Carto and Liberty Lobby and convey statements expressed by many organizations and individuals describing Carto and Liberty Lobby's views. Without a doubt plaintiffs are referred to as neo-nazi, fascist, anti-semitic and racist." *Liberty Lobby, Inc. v. Anderson,* 562 F.Supp. 201, 205 (D.D.C.1983).

B. Defamatory Meaning

"The question of whether or not the meaning of a particular communication is defamatory is one for the Court...." W. Prosser, W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Torts* § 111, at 774 (5th ed.).

In *Washington Post v. Chaloner,* 250 U.S. 290 (1919), the Supreme Court delineated the responsibilities of the judge and the jury in a defamation action:

> A publication claimed to be defamatory must be read and construed in the sense in which the readers to whom it is addressed would ordinarily understand it.... When thus read, if its meaning is so unambiguous as to reasonably bear but one interpretation, it is for the judge to say whether that signification is defamatory or not. If, upon the other hand, it is capable of two meanings, one of which would be libelous and actionable and the other not, it is for the jury to say, under all' the circumstances surrounding its publication, including extraneous facts admissable in evidence, which of the two meanings would be attributed or by whom it may be read.

Id. at 293 (quoting *Commercial Publishing Co. v. Smith,* 149 F. 704, 706-07 (6th Cir.1907)).

The defendants argue that the nine allegations, taken together, are not actionable, either because their defamatory implications are not actionable, i.e., a plaintiff cannot state a claim based on an alleged inaccuracy of some detail in the defamatory allegation if the "derogatory implication of the dispatch statement is undisputedly correct," *Tavoulareas v. Piro,* 817 F.2d 762, 788 (D.C.Cir.1987) (*en banc*), *cert. denied,* 56 U.S.L.W. 3247 (Oct. 6, 1987) (citations omitted), or alternatively, under the rational that "--- even those [statements] that might be found to have been published with actual malice — should not be actionable if they merely imply the same view and

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they are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." *Herbert v. Larado*, 781 F.2d 298, 311 (2d Cir.), *cert. denied*, 476 U.S. 1182 (1986).

*3 The defendant's argument fails for two reasons.[FN2] First, in this case the nonactionable allegations have not been determined to be "undisputedly correct" as was the case in *Tavoulareas*, 817 F.2d at 788. second, our Circuit has recognized that the inquiry as to the individual allegations "cannot be conducted in gross. It is the individual allegedly libelous statement (taken in its proper context), rather than the accuracy of the publication as a whole, which is on trial. A falsehood published with actual malice is no less actionable for being surrounded by an array of well documented and carefully researched allegations. The accompanying truth cannot eliminate the libel, and is indeed the most effective means of increasing its harm by increasing its credibility." *Liberty Lobby*, 746 F.2d at 1574.

Viewed in this light it is clear that none of the nine allegations at issue can be said to be subsidiary to claims "upon which it has been held there can be no recovery." *Herbert v. Lando*, 781 F.2d 298, 312 (2d Cir.1986). Nor can they be said to merely "give rise to defamatory inferences that are only supportive of inferences that are not actionable." *Id.*

C. Falsity

In *Old Dominion Branch No. 496, National Association of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264 (1974), the Supreme Court held that "a public official [is] allowed the civil [defamation] remedy only if he establishes that the utterance was false." *Id.* at 284. The Court also held that 11[b]efore the test of recklessness or knowing falsity can be met, there must be a false statement of fact." *Id.* The Supreme Court's recent decision in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986), held that the Constitution requires the burden of proof on the issue of truth or falsity to be placed on the plaintiff in a defamation action where the speech involves an issue of public concern. *Id.* at 776-77. The plaintiffs allege, and the defendants do not deny, that seven of the nine allegations, statements which had been presented as absolute fact, were false. The two other acts of defamation consisted of drawings that depicted Mr. Carto spying on his employees, wearing a mustache in the style of Adolf Hitler, and raising his arm in a Nazi-like salute. These drawings were utilized to provide support for the false anecdotal material and were entirely fictional.

D. Actual Malice

New York Times Co. v. Sullivan, 376 U.S. 254 (1964), and its progeny establish that a public official or public figure suing for libel must bear the burden of showing that the defendants acted with "actual malice." *Id.* at 279-80. Actual malice is defined as publishing a statement "with knowledge that it was false or with reckless disregard of whether it was false or not." *Id.* at 726. The standard for actual malice is subjective: "There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publications." *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968). The Court must look to the defendants' own actions or statements, the dubious nature of his sources, the inherent improbability of the story or other circumstantial evidence to determine whether the defendant entertained a "high degree of awareness of ... probable falsity." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974) (quoting *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) and *Garrison v. Louisiana*, 379 U.S. 64, 74 (1964)); *see also* *Liberty Lobby, Inc. v. Dow Jones & Co., Inc.*, 838 F.2d 1287, 1293 (D.C.Cir.1988).

*4 In *St. Amant* the Court also held that in order to support a libel judgment there must be clear and convincing evidence of reckless disregard. 390 U.S. at 731. Reckless disregard is not measured by a reasonably prudent person standard but rather the

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plaintiff must demonstrate that the defendant himself "in fact entertained serious doubts as to the truth of his publication." *Id.*

II. DISCUSSION

The issue to be decided by this Court is whether the evidence in the record could support a reasonable jury finding that the plaintiffs have shown actual malice by "clear and convincing evidence." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The clear-and-convincing standard has been defined as "that measure or degree of proof which will produce in the mind of the trier of facts a firm belief or conviction as to allegations sought to be established." *Hobson v. Eaton*, 399 F.2d 781, 784 (6th Cir.1968). "It is intermediate, being more than a mere preponderance, but not to the extent of such certainty as is required beyond a reasonable doubt as in criminal cases. It does not mean clear-and-unequivocal." *Id.*

In *St. Amant*, the Supreme Court offered examples of the kind of proof that might suffice to show reckless disregard in a publication and support a finding of actual malice. The Court cited as examples evidence establishing that the story was either "fabricated", "so inherently improbable that only a reckless man would have put [it] in circulation," or "based wholly on an unverified anonymous telephone call" or some other source that the defendant had "obvious reasons to doubt." 390 U.S. at 732. In that case the defendant's failure to investigate was deemed insufficient to support a finding of actual malice where the plaintiff had failed to show that there existed "a low community assessment of [the source's] trustworthiness or unsatisfactory experience with him by St. Amant." *Id.* at 733.

The affidavit of Charles Bermant, an investigative reporter employed by defendant Jack Anderson and author of the articles at issue, indicates that one Robert Eringer is the sole source for five of the nine allegations. The five allegations include:

13. the statement that Carto "conducts his business by way of conference calls from a public telephone," which arguably suggests criminality;

14. the claim that in 1968 a Carto front organization "used a direct mail blitz to support G. Gordon Liddy's Congressional campaign in New York" (since Liddy was later convicted of a felony in connection with political activities, the allegation could be considered defamatory);

17. the illustration showing Carto secretly observing prospective employees through a one-way mirror;

23. the one-way mirror allegation, in text;

27. the claim that a lead story in an issue of *The Spotlight* was a total hoax.

Applying the incorrect preponderance standard, the Court of Appeals found that "Bermant made these allegations with a disregard for their truth or falsity that constituted actual malice." *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1578,*rev'd*, 477 U.S. 242 (1986). The Court distinguished Bermant's dealings with Eringer from his dealings with sources for the nonactionable allegations on the following basis: First, the fact that "there is only Bermant's word for the fact that Eringer ever said anything that supports those statements." *Id.* at 1578. Second, Bermant's failure to investigate or inquire how Eringer came to know these details of Carto's operation. Third, Anderson's admission that he did not care whether Eringer was reliable. Finally, the Court's conclusion that Eringer's absence from the country made him unavailable for deposing. *Id.* at 1579.

*5 The Court likened the above factors to the "hypothetical case of actual malice that the Supreme Court described in *St. Amant:* "a story 'based wholly on the unverified anonymous telephone call.' " *Id.* (citing *St. Amant*, 290 U.S. at 732). Bermant asserts the defense of good faith reliance on reputable sources (Eringer), which ',if es-

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tablished, unquestionably eliminates the necessary element of actual malice." *Liberty Lobby,* 746 F.2d at 1574.

This Court's inquiry, in accordance with the Supreme Court's holding, is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby,* 477 U.S. 242, 251-52 (1986). This Court finds that there is insufficient support in the record to sustain a reasonable jury finding that the plaintiffs have shown actual malice by clear and convincing evidence as to the allegations numbered 13, 14, 17, 23 and 27.

The plaintiffs have failed to produce any evidence that might impeach the truthfulness of Bermant's deposed testimony. Thus, to find actual malice, the Court must determine whether Bermant's reliance on Eringer as a source presents "sufficient evidence to permit the conclusion that the defendant *in fact* entertained serious doubts as to the truth of his publications" and therefore acted with "reckless disregard." *St. Amant,* 390 U.S. at 731 (1986) (emphasis added).

The record shows that Eringer was not an "anonymous" informant. Rather, Eringer was a freelance writer who, in Bermant's view, was a "professional reporter" and an "impressive source." Eringer was known to Bermant as the author of a book and an investigative article on Liberty Lobby which had appeared in *Mother Jones,* a national magazine. Transcript of Deposition of Charles Bermant, Aug. 20, 1982, at 71-72.

Consequently, in the absence of clear and convincing evidence that would tend to show that Bermant was on notice that there was "a low community assessment of [Eringer's] trustworthiness or unsatisfactory experience with him by [Bermant]," *St. Amant,* 390 U.S. at 733, there is no basis for a finding of reckless disregard indicative of actual malice.

Further, given that Bermant had independently corroborated much of Eringer's key information on Liberty Lobby through other sources including the *National Review* and the *Washington Post,* Bermant Dep. Tr. at 71-72, he can hardly be said to have had "particular reasons to doubt [his] sources." *St. Amant,* 390 F.2d at 732; *accord Tavoulareas v. Piro,* 817 F.2d 762, 790 (D.C.Cir.1987). Moreover, reliance on a single source does not alone indicate actual malice, particularly where that source has no apparent motive for misleading the reporter. *New York Times v. Connor,* 365 F.2d 567, 576 (5th Cir.1966).

Nor can the information on Liberty Lobby supplied by Eringer have seemed "so inherently improbable [to Bermant] that only a reckless man would have put [it] in[to] circulation." *St. Amant,* 390 U.S. at 732. Given what scurrilous allegations Bermant had obtained from independent sources,[FN3] the above allegations, based on Eringer's article, could "not have seemed unreasonable to one familiar with ... prior publicized statements on the underlying controversy." *Associated Press v. Walker,* 388 U.S. 130, 159 (1967).

*6 Bermant's independent sources, for example, confirmed that plaintiffs used illegal lie detector and voice stress tests on current and prospective employees as a means of ensuring "loyalty and operational security." Bermant Aff.App. at 25-26; *see Liberty Lobby,* 746 F.2d at 1577. Allegations 17 and 23, reporting that Carto watched "prospective employees through a two-way mirror," similarly suggesting that Carto's obsession with internal security led him to adopt intrusive measures to guard against disloyalty, cannot have seemed to Bermant as a "fabrication" or a story so "inherently improbable" as to demonstrate actual malice. *See St. Amant,* 390 U.S. at 732.

The same is true of Allegations 13, 14 and 27. Bermant obtained from alternative, reliable sources information that Carto was planning to establish a dictatorship in the United States, *Liberty Lobby,* 746 F.2d 1577; that he uses "front" organizations to

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advance his political goals, Bermant Aff.App. at 7; and that he had in the past used "gimmicks" and "hoaxes" in connection with his lobbying activities, Bermant Aff.App. at 18-25. In light of the confirmative nature of this information, it cannot be said that Allegations 13, 14, 23 and 27 represent evidence of defendants' extreme "departure from the standards of investigation and reporting adhered to by responsible publishers." *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 155 (1967).

The Court of Appeals also found evidence of the defendants' "disregard for the truth" where Bermant "never even looked the unknown Eringer in the eye until after the story was published, but spoke to him only once over the telephone." *Liberty Lobby*, 746 F.2d at 1579. Bermant's testimony, however, shows that he relied upon Eringer's written work and not solely upon verbal communications. Whether the two men ever met is only of tangential relevance to the issue of Bermant's good faith reliance on Eringer's materials.

Finally, the Court of Appeals cites Eringer's supposed unavailability for deposition as additional evidence of his unreliability as a source. *Id.* In fact, although Eringer was absent from the country, his address was known to the plaintiffs FN4 and nothing prevented them from taking his deposition. This Court has previously noted that "[i]n 1981 plaintiffs had ample opportunity to develop their case and depose these individuals prior to the filing of dispositive motions." Order Denying Further Discovery, July 10, 1987, at 5.

With respect to Jack Anderson's admission that he did not care whether Eringer was reliable, since the Court of Appeals had found earlier in its opinion that "Anderson was entitled to rely upon Bermant's research unless he had reason to doubt Bermant's accuracy," *Liberty Lobby*, 746 F.2d at 1575, it follows that his lack of concern about Eringer's reliability is not evidence of reckless disregard. Nor can "actual malice" be found where a publisher relied on the investigative methods of his reporters and had no reason to believe that those methods were unsound. *St. Amant*, 390 U.S. at 733. In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 332 (1974), the publisher's failure to investigate did not alone establish actual malice. Here, the plaintiffs have failed to put forth any evidence showing that Anderson had reason to doubt either Eringer's reliability as a source or Bermant's dependability as a reporter.

*7 Allegation 11, the final allegation for which Eringer was a source, asserts that "Liberty Lobby occupies a building in Washington, D.C., owned by the Government Educational Foundation, '[t]he chairman and owner of [which] is Willis Carto, who bought the building with money contributed by many of Liberty Lobby's members in response to an urgent appeal'; and that Liberty Lobby pays the Government Educational Foundation $6,000 per month rent. The implication is that plaintiff Carto derives personal profit from the excessive rent charged to Liberty Lobby." *Liberty Lobby*, 746 F.2d at 1577.

Eringer's information supporting this allegation was partially corroborated in the *Washington Post* and the *National Review*, which reported that the Government Educational Foundation ("GEF") is "Liberty Lobby's landlord" and the sole owner of Liberty Lobby's building and that "Carto signed as Chairman of GEF when it purchased the Liberty Lobby building." Bermant Aff.App. at 11-12. As noted above, this Court finds that to the extent that Eringer's information was inaccurate, Bermant's good faith reliance upon it is not impugned. This Court has found "woefully short and border[ing] on the frivolous" claims that actual malice was shown by: (1) allegations of bias; (2) destruction of notes; (3) limited investigation; and (4) claims that the publisher should have demanded specific substantiation because the author of the article could not have been expected to do much fact checking for a $20 fee. *Joseph v. Xerox Corp.*, 594 F.Supp. 330, 335 (D.D.C.1984).

Allegation 15 asserts that Carto "organized and promoted the Joint Council for Repatriation" and that

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by "repatriation" Carto meant the "forced deportation of all blacks to Africa." *Liberty Lobby,* 746 F.2d at 1578. The Court of Appeals found that "[t]he published sources relied upon by the defendants support the assertion that Carto created this organization and that its purpose was to "send[ ] American blacks back to Africa." *Id.* The Court reasoned that since no source explicitly established that "forced deportation" was the goal of the Joint Council for Repatriation and since the defendants were aware of at least one source which "asserted that Carto (overtly, at least) only sought 'voluntary' repatriation," there was, under the preponderance standard, sufficient evidence to send to the jury the question "whether this allegation, if false, was made with actual malice." *Id.*

The defendants offer evidence of Bermant's good faith reliance on a reputable source in the person of William Cox, a Justice Department official, who declared that the "Joint Council for Repatriation" was "for the deportation of American blacks to Africa." Bermant Aff.App. at 10. The cox allegation is cited in conjunction with an excerpt from a report in the *National Review* that quoted Carto's correspondence on the subject:

"The revolutionists have seen to it, Carto wrote the racist author Earnest Sevier Cox in 1955, "that only a few Americans are concerned about the inevitable niggerification of America." But Carto had a plan, for a "flank attack." He established, and promoted secretly, the Joint Council for Repatriation-a send-em-back-to-Africa movement with an added benefit: of ... such a movement would be the strongest blow against the power of organized Jewry that can be imagined."

*8 Simonds, "The Strange Story of Willis Carto," National Review, Sept. 10, 1971, at 979; Bermant Aff.App. at 14.FN5

This Court finds that Bermant's reliance upon the above sources, coupled with what Bermant's investigations had revealed to him about Carto's virulent racism and Nazism, is evidence sufficient to rebut plaintiff's evidence in support of a claim of actual malice as to this allegation.

With regard to the evidence indicating that defendants were aware of the *Washington Post* article contradicting the published allegation, this Court notes that consistent with the definition of actual malice in *St. Amant,* courts have held that a plaintiff does not create a jury issue of actual malice by demonstrating that a publisher misinterpreted his source material, *Time, Inc. v. Pape,* 401 U.S. 279, 290 (1971); or by offering other evidence of "reportorial negligence," *Pauling v. Globe-Democrat Publishing Co.,* 362 F.2d 188, 198 (8th Cir.1966) (Blackmun, J.) (cited with approval in *Greenbelt Cooperative Publishing Association v. Bresler,* 398 U.S. 6, 9 (1970)), *cert. denied,* 388 U.S. 909 (1967); *Dacey v. Florida Bar, Inc.,* 427 F.2d 1292 (5th Cir.1970).

This Court finds that defendants' knowledge of the existence of a contradictory source, without more, does not constitute clear and convincing evidence of actual malice. *Brown v. Herald Co.,* 698 F.2d 949, 951 (8th Cir.1983). Indeed, given that the "send-em-back-to-Africa" language quoted above arguably implies the use of force, it cannot be said that Bermant's interpretation of it was other than one "possible rational interpretation [ ]," giving this Court no basis for a finding of actual malice. *Bose Corporation v. Consumers Union,* 446 U.S. 485, 512-13 (1984) (quoting *Time Inc. v. Pave,* 401 U.S. 279, 290 (1971)). In *Bose,* the Supreme Court held that malice may not be inferred from inaccurate language chosen to describe an event where the description is " 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities.' " *Id.* Nor, for example, can malice be shown where the quoted language does not contain the exact words used by the plaintiff, provided that the fabricated quotations are either "rational interpretations" of ambiguous remarks made by the public figure, *Dunn v. Garrnett New York Newspapers, Inc.,* 833 F.2d 446, 452 (3d Cir.1987), or do not "alter the substantive content" of unambiguous re-

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marks actually made by the public figure. *Hotchner v. Castillo-Puche,* 551 F.2d 910, 914 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.,* 434 U.S. 834 (1977).

Finally, this Court must consider whether the record supports a finding of actual malice by clear and convincing evidence as to Allegation 19, "the illustration suggesting that Carto emulated Hitler, " and Allegation 29, "that Carto joined in the singing of 'Hitler's "Horst Wessel Lied" ' and delivered a speech in an attempt to emulate Hitler' s style and charisma." *Liberty Lobby,* 746 F.2d at 1578.

*9 The Court finds that the implication that Carto emulates Hitler in appearance or action is defamatory and that the record could support a reasonable jury finding that the defendants published these allegations with actual malice.

The defendants do not deny that the illustration identifies Carto. Nor do they produce any evidence that Carto has ever sported facial hair or that he is given to addressing audiences with a Nazi salute. Their sole defense argues that since "the plaintiff did not prevail on the allegation that Carto greatly admired Hitler and sought to succeed him, they can scarcely prevail merely because the illustration might bring home the link between Carto and Hitler more vividly to the reader." Defendants' Memorandum in Support of Renewed Grant of Summary Judgment at 20.

The defendant's argument is plainly without merit. It is one thing to assert that someone admires a historical figure-infamous though he may be. It is quite another to accuse someone of emulating that person in appearance or action. The latter allegation not only suggests that Carto is a Nazi but also implies, among other things, that he is deluded and perhaps insane. These are implications that a reasonable jury might find to be defamatory and to have been published with actual malice.

With regard to the description of Carto joining in the singing of a Hitlerian song and making a speech emulating Hitler, the Court of Appeals' conclusion that the defendants were on notice as to the probable falsity of this allegation is fully supported by the evidence and is unaffected by the new standard to be applied.

These allegations were previously published in *True* magazine and were co-authored by Joseph Spear, an editor of *The Investigator.* The information was taken from an article which had been the subject of a prior lawsuit. While this may not be, in and of itself, evidence indicative of actual malice, it should nonetheless have given defendants pause prior to publishing information based solely on that article.

This Court finds that the defendants' proffered evidence corroborates the *True* article allegations that Carto had been a guest of honor at a gathering at which guests sang the "Horst Wessel Lied" and that Carto thereafter delivered an anti-semitic speech. Bermant Aff.App. at 36-37. Those sources, however, do not corroborate the substance of the present allegations. Rather, these allegations are "fabrications" from an obviously doubtful source and are clear examples of details that could demonstrate actual malice. *St. Amant,* 390 U.S. at 732.

This Court concludes that Allegations 19 and 29 are defamatory and that the evidence in the record could support a reasonable jury finding that the plaintiffs have shown, by clear and convincing evidence,that the statements were published actual malice; this Court further holds that the record fails to support a finding that Allegations 11, 13, 14, 15, 17, 23, and 27 were published with actual malice and therefore the defendants' Motion for Summary Judgment is granted as to those allegations only.

*10 An appropriate Order accompanies this Memorandum opinion.

FN1. *Anderson v. Liberty Lobby, Inc.,* 471 U.S. 1134 (1985).

FN2. This Court and the Court of Appeals

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have found nonactionable, *inter alia*, defendant's allegations that Carto is the "leading anti-semitic in the country", *Liberty Lobby*, 746 F.2d at 1576; that he is a "Hitler fan", a "neo-fascist", *id.*; that he had a plan to "establish a dictatorship" in the United States, *id.* at 1577; and that "Liberty Lobby was infiltrated by Nazis who revere the memory of Hitler" and who constitute "a neo-nazi underground" whose members "control a publishing propaganda network stretching to the far corners of America,"*id.* at 1575.

FN3. Bermant Dep. Tr. at 73, 116; Affidavit of Charles Bermant p. 5, and Appendix [hereinafter Bermant Aff.App.] (giving specific sources for each published allegation complained of as libelous by defendants).

FN4. Supplemental Answers to First Set of Plaintiffs' Interrogatories to Investigator Publishing Company, July 19, 1982.

FN5. The Court of Appeals has recognized that Bermant was entitled to rely on the Simonds article. *Liberty Lobby*, 746 F.2d at 1576.

D.D.C.,1991.
Liberty Lobby, Inc. v. Anderson
Not Reported in F.Supp., 1991 WL 186998 (D.D.C.), 19 Media L. Rep. 1011

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
H. Alton NEFF, SRV Marine Engines, Inc., and 1107 North West Central Avenue, Inc., Plaintiffs-Appellants,
v.
George COATES a/k/a George J. Coates, Coates International, Ltd., Defendants/Third-Party Plaintiffs-Respondents,
and
Well to Wire Energy, Inc., Defendant-Respondent,
and
Coates Enterprises, Ltd., Coates Precision Engineering, Ltd., Coates Automotive, Ltd., Coates Engine Manufacturing, Ltd., Coates Technologies, Ltd., Coates Trusts, a Trust duly organized pursuant to the laws of the State of New Jersey, Bernadette Coates, Yvonne Murphy, Sean Murphy, Michael Panabianco, Dr. Richard Evans, Gregory M. Coates, Paul V. Sheridan, Gus Suckow, Paul Casagrande, Thomas Taylor, William Cavanaugh, Henry R. Carter, Shigeru Wakabayashi, Shirley Naidel, John Nicholson, Lawrence J. Schmertzer, Joseph Tomasek, Defendants,
v.
Gary Sommer, Third-Party Defendant-Appellant.
Argued April 8, 2008.
Decided May 9, 2008.

On appeal from the Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-977-04.
Peter A. Ouda argued the cause for appellant H. Alton Neff (Mr. Neff and Mr. Ouda, on the brief).

Donald E. Taylor argued the cause for appellants SRV Marine Engines, Inc., 1107 North West Central Avenue, Inc. and Gary Sommer (Wilentz, Goldman & Spitzer, P.A., attorneys; Mr. Taylor, on the brief).

William J. Wolf argued the cause for respondents Coates International, Ltd. and George Coates (Bathgate, Wegener & Wolf, P.C., attorneys; Mr. Wolf, on the brief).

John F. Gelson argued the cause for respondent Well to Wire Energy, Inc. (McLaughlin, Gelson, D'Apolito & Stauffer, LLC, attorneys; Mr. Gelson, of counsel; Richard J. Shaklee, on the brief).

Before Judges SKILLMAN, YANNOTTI and LeWINN.

PER CURIAM.

*1 Plaintiffs H. Alton Neff (Neff), SRV Marine Engines, Inc. (SRV), and 1107 North West Central Avenue, Inc. (1107) appeal from an order entered on February 13, 2007, and thereafter amended, which dismissed their complaint and suppressed their answers and defenses to the counterclaim filed by defendants Coates International, Ltd. (CIL) and George J. Coates (Coates). Third-party defendant Gary Sommer appeals from the provisions of the February 13, 2007 order suppressing his answer and defenses to CIL's and Coates' third-party complaint. Neff, SRV, 1107 and Sommer also appeal from an order entered on April 30, 2007, which denied their motions for reconsideration. We affirm in part, reverse in part, and remand for further proceedings.

I.

This matter commenced on March 29, 2004, when Neff filed a pro se complaint against CIL, Coates, Well to Wire Energy, Inc. (Well to Wire), Joseph Tomacek (Tomacek), and numerous other defendants. The complaint later was amended to include SRV and 1107 as plaintiffs. The claims set forth in the complaint arose from contracts dated March 22, 2002, between 1107 and CIL, relating to the Coates Spherical Rotary Valve (CSRV) combustion engine that was invented by Coates and his family members.

According to the complaint, CIL agreed to sell and 1107 agreed to purchase, an exclusive license to market the CSRV technology to Ford Motor Company for use by Ford in the manufacture and sale of its automobiles throughout the world. CIL also agreed to sell, and 1107 agreed to purchase, an exclusive li-

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cense to sell the CSRV technology for use in the manufacture of certain marine craft. 1107 agreed to pay CIL $25 million for each license. 1107 paid CIL a total of $500,000 as down payments on the licenses and transferred its rights in the agreements to SRV. SRV subsequently "assigned all of those rights" to Neff.

Because CIL allegedly failed to tender the final licenses and related escrow agreements, SRV demanded the return of the deposits, but CIL refused to return the money. Plaintiffs alleged, among other things, that 1107 entered the agreements, and others provided monies for the deposits made by 1107, in reliance upon certain false and misleading statements made by Coates and others concerning the CSRV technology and CIL's agreements related thereto.

Based on these allegations, plaintiffs asserted various causes of actions, specifically claims for consumer fraud in violation of the Consumer Fraud Act (CFA), *N.J.S.A. 56:8-1* to-20; fraud and misrepresentation; negligent misrepresentation; negligence; breach of contract; breach of the implied covenant of good faith and fair dealing; and legal malpractice. Plaintiffs sought rescission of the agreements, compensatory damages, treble damages pursuant to the CFA, punitive damages, attorneys' fees, costs of suit, and "[s]uch other relief as may be just and proper."

On December 27, 2004, Coates, CIL, Tomacsek, and certain other defendants filed an answer in which they generally denied plaintiffs' allegations, and asserted cross-claims for indemnification against all of the other defendants. In addition, CIL and Coates asserted counterclaims against Neff, SRV and 1107, and third-party claims against Sommer for tortious interference with current and prospective business relationships, trade disparagement, and defamation.

*2 The trial judge entered a case management order on March 10, 2005, which established a discovery end date of December 30, 2005. The order required the parties to serve additional interrogatories by March 30, 2005, plaintiffs to answer interrogatories and a demand for the production of documents by March 30, 2005, CIL to answer interrogatories by April 15, 2005, and the completion of depositions of the parties and fact witnesses by September 30, 2005.

Thereafter, Coates, CIL, Tomacek, and certain other defendants filed a motion for partial summary judgment. The trial judge entered an order on March 17, 2005, which granted in part, and denied in part, the relief sought. The order essentially provided that Neff could pursue his contractual claims against CIL and Coates, and 1107 could pursue certain tort claims against Well to Wire, CIL and Coates. Plaintiffs' legal malpractice claim against Tomacek was dismissed with prejudice.

Although the March 17, 2005 order dismissed certain claims asserted by SRV and 1107 without prejudice, and allowed SRV and 1107 to file an amended complaint with more specific allegations, it appears that they did not do so. Nevertheless, SRV remained in the case because it had been named in CIL's and Coates' counterclaim.

SRV and 1107 did not file an answer to the counterclaim, and Sommer did not answer the third-party complaint. Accordingly, default was entered against them. Thereafter, SRV, 1107 and Sommer moved to vacate the default, allow SRV and 1107 to file an answer to the counterclaim, allow Sommer to answer the third-party complaint, and permit Sommer to file a counterclaim against Coates and CIL. Apparently, the proposed answers and counterclaim were submitted to the court with the motion papers.

On February 15, 2006, the trial judge heard argument on the motion. The judge granted the motion to vacate the default. The judge allowed SRV and 1107 to file an answer to the counterclaim, and Sommer to answer the third-party complaint. However, the judge stated on the record that Sommer's counterclaim against Coates and CIL did not "add anything" and Sommer's motion for leave to file the counterclaim would be denied. Despite the judge's statement that Sommer would not be permitted to file his counterclaim, the court entered an order on February 27, 2006, which declared that the answer and the counterclaim had been filed.

By letter dated March 21, 2006, William J. Wolf, counsel for CIL and Coates, advised Angela White Dalton, who was counsel for plaintiffs and Sommer at the time, that the court's February 27, 2006 order erroneously stated that Sommer's counterclaim was filed. However, it appears that neither Ms. Dalton nor Mr. Wolf brought the matter to the court's attention or otherwise took any action to correct the error.

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The judge entered another case management order on June 16, 2005, which established a new discovery schedule. The parties thereafter engaged in some discovery. The parties exchanged answers to interrogatories, and plaintiffs produced certain documents. In addition, Mr. Wolf endeavored to schedule depositions for Neff and Sommer; however, the depositions were not scheduled.

*3 On February 16, 2006, the judge entered another case management order, which established a new discovery end date of September 30, 2006. The order required plaintiffs to serve additional discovery requests by February 24, 2006, and included a schedule for the depositions of Neff, Coates, Sommer and other fact witness. The order additionally provided that plaintiffs' expert could pick up at Coates's "establishment" a Ford Mustang with an engine, a "disassembled V-8 engine," and a V-6 engine "found in a Mercedes-Benz vehicle" for examination and testing. The order required plaintiffs to return the vehicles and engines immediately "upon completion of the testing." The order also required the parties to produce their expert reports by specified dates, and mandated the completion of the experts' depositions by August 31, 2006.

In response to this order, the parties engaged in additional discovery. Plaintiffs' expert picked up CIL's automobiles and engines for inspection; however, they were not returned to CIL as required by the order. Neff was deposed in March and April 2006 but his deposition was not completed. Sommer and Coates were not deposed. Depositions were scheduled for certain third-party witnesses but the depositions were cancelled and not rescheduled. Plaintiffs did not produce their expert reports by April 15, 2006, and the experts' depositions were not completed within the time mandated by the court.

The judge entered an order on September 26, 2006, which required plaintiffs to produce certain documents and materials by October 4, 2006. The judge entered another order on September 26, 2006, which required plaintiffs to return the Ford Mustang to CIL by October 15, 2006. This order also provided that, in the event plaintiffs wanted to test the Mercedes-Benz, they were to advise defendants and the court by October 4, 2006 "whether or not [plaintiff's expert] is able to test the vehicle and what specific mechanical devices he needs to complete testing of the vehicle."Thereafter, plaintiffs did not inform the court or defendants that they wanted to conduct further tests of the Mercedes-Benz.

The judge entered an order on September 29, 2006, which required, among other things, that Neff be deposed by October 16, 2006 and Sommer be deposed by October 31, 2006. Plaintiffs were ordered to return the Mercedes-Benz to CIL within fifteen days. Plaintiffs also were ordered to furnish their expert reports by October 30, 2006. In addition, defendants were required to provide their expert reports by December 15, 2006, and the depositions of all experts were to be completed by January 15, 2007. The order designated February 15, 2007 as the new discovery end date.

On October 31, 2006, Coates and CL moved pursuant to *Rule* 4:23-2 to dismiss plaintiffs' complaint and suppress Sommer's answer and defences to the third-party complaint with prejudice. In a certification submitted in support of the motion, Mr. Wolf stated that he had attempted to schedule depositions for Neff and Sommer on various dates in October 2006 but counsel for Neff and Sommer did not respond, and Neff and Sommer did not appear for their depositions. In addition, Mr. Wolf asserted that the court had ordered plaintiffs to produce certain documents by October 4, 2004, and plaintiffs had not done so. Mr. Wolf also stated that CIL's automobiles and engines had not been returned by October 15, 2006, as required by the court's order.

*4 The judge heard argument on the motion on January 19, 2007, and filed a letter opinion dated January 22, 2007, in which he noted that Mr. Wolf's assertions were uncontroverted. The judge stated that plaintiffs and Sommer had not explained why they did not comply with the court's orders. The judge stated:

> The Case Management Orders were specific in nature and were intended to accommodate the needs of both the [p]laintiff[s] and the [d]efendant. More importantly, the discovery Orders of February 16, 2006, September 26, 2006 and September 29, 2006 were prepared by the Court to emphasize to the attorneys the necessity of complying with discovery orders. A comparison of the February 16, 2006 Case Management Order and the September 26 and

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> 29, 2006 Case Management Orders reflect that very little was accomplished in that period of time and nothing was accomplished between September 29, 2006 and January 19, 2007, the date of oral arguments.

The judge stated that an evidentiary hearing was required to determine the appropriate sanctions for the discovery violations. The judge noted that it was necessary to determine "the full extent of" the parties' failure to comply with the court's orders. The judge stated that defendants had been prejudiced because they had been required to incur legal fees to defend the "substantial" claims asserted against them. The judge also stated that, although imposition of counsel fees was an available remedy, without a hearing, he could not determine whether such a remedy would "ameliorate" the prejudice to defendants.

The judge conducted the evidentiary hearing on February 5, 2007. Mr. Rihacek, who represented plaintiffs and Sommer in September and October 2006, testified at the hearing. Neff also testified. The judge filed another letter opinion on February 13, 2007, in which he stated the following:

> Subsequent to the Court's Case Management Orders of September 26, 2006 and September 29, 2006, [p]laintiff's attorney, Mr. John T. Rihacek, notified his client, and more particularly, Mr. H. Alton Neff, of the requirements contained within the Case Management Orders. He specifically advised Mr. Neff to return the vehicles as per the Court Order. Mr. Neff disregarded instructions not only of the Court, but that of his own counsel.
>
> On October 4, 2006, [Mr. Wolf] notified the Plaintiff's counsel of available dates for the taking of the deposition of Mr. Neff and Mr. Sommer. No response was provided to Mr. Wolf and no explanation was given as to why the depositions had not been completed. In fact, as of the date of the plenary hearing, the Plaintiff has failed to abide by the terms of the Orders, or provide an explanation that justifies disregarding the Court's Orders. I find that the actions of the Plaintiff were, in fact, deliberate and contumacious.

The judge noted that dismissal with prejudice is the most severe sanction that could be imposed for a discovery violation but he concluded that no lesser sanction would suffice. The judge wrote that the sanction would properly penalize the parties who had "caused the difficulty[,]" but also deter others "who might be tempted" to violate court orders. The judge accordingly entered an order dated February 13, 2007, which granted the motion to dismiss plaintiffs' complaint and suppress Sommer's answer and defenses to the third-party complaint.

*5 On March 8, 2007, SRV and Somer filed a motion for reconsideration. In a certification submitted in support of the motion, Sommer said that his attorney had never advised him that the court had entered the case management orders in September 2006. Sommer stated that he was not aware of the orders until January 2007. Neff also submitted a supplemental certification, in which he stated that Sommer had not been involved in the handling of the litigation. Neff asserted that he had not discussed "any aspects of the litigation" with Sommer.

On March 30, 2007, the judge heard argument on the reconsideration motion and placed his decision on the record. The judge rejected Sommer's assertion that he was unaware of the court's September 2006 orders. The judge stated:

> ... [Neff] and [Sommer] do have a relationship here. [Neff] is, in fact, a principal in the plaintiff corporation.... I know he's a principal. There aren't a lot of principals in that [company]. He's a substantial investor in that company, and I am convinced there were communications between [Neff] and [Sommer] as to the status of the litigation. I can't for the life of me believe that that never happened.... [T]here's nothing before me that would indicate that I should change my ruling....

On April 30, 2007, the judge entered an order denying the motion for reconsideration. The judge also filed an order dated April 30, 2007, which amended the February 13, 2007 order to state that "the motion to dismiss the complaint and suppress the answer and defenses of [the] Third-Party Defendant and the answer and defenses to the counterclaim is hereby granted."

Neff filed a notice of appeal on June 12, 2007. SRV, 1107, and Sommer filed a notice of appeal on June 14, 2007. We entered an order on August 13, 2007, consolidating the appeals.

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II.

We first consider whether the orders entered on February 13, 2007 and April 30, 2007 are final orders that may be appealed pursuant to *Rule* 2:2-3(a)(1). Under that rule, appeals may be taken to the Appellate Division "as of right" from a "final judgment" of the trial court. Janicky v. Point Bay Fuel, Inc., 396 N.J.Super. 545, 549 (App.Div.2007)."To be a final judgment, an order generally must 'dispose of all claims against all parties.' " *Ibid.* (quoting S.N. Golden Estates, Inc. v. Cont'l Cas. Co., 317 N.J.Super. 82, 87 (App.Div.1998)).

As stated previously, the orders entered on February 13, 2007 and April 30, 2007 dismissed plaintiffs' complaint, suppressed plaintiffs' answer and defenses to the counterclaim, and suppressed Sommer's answer and defenses to the third-party complaint. On May 11, 2007, the parties filed a stipulation of dismissal, which states that the counterclaim and third-party complaint are dismissed without prejudice "subject to being reasserted only" if the order "dismissing [plaintiffs'] complaint and suppressing the answer and defenses to the counterclaim and/or [the] third-party complaint is reversed on appeal [.]" The parties apparently assumed that this stipulation disposed of all claims as to all parties in the action.

*6 However, Sommer's counterclaim against CIL and Coates remained pending in the trial court. As noted previously, the judge had entered an order on February 27, 2006, which declared that Sommer's counterclaim was "filed." The judge had inadvertently signed that order despite his statement on the record on February 15, 2006 that he would not permit Sommer to file the counterclaim.

We are satisfied that although Sommer's counterclaim was technically filed in this action, the pleading was filed in error. Thus, the May 11, 2007 stipulation of dismissal disposed of the claims that were pending in the trial court.

The question remains, however, as to whether the May 11, 2007 stipulation represents the sort of manufactured finality criticized in Ruski v. City of Bayonne, 356 N.J.Super. 166 (App.Div.2002). In that case, the trial court granted summary judgment to two defendants, the City of Bayonne and the Bayonne Police Department. *Id.* at 167.Previously, the court had granted summary judgment to other public entity defendants. *Id.* at 168.The court entered a consent order dismissing without prejudice the one remaining claim against a non-public-entity defendant. *Ibid.* The consent order stated that the complaint could be reinstated upon completion of "all appeals of or involving the other defendants/co-defendants to the within action previously joined."*Ibid.*

In *Ruski,* we stated that the consent order was "manifestly an improper maneuver to evade the rule against interlocutory appeals in the absence of leave granted."*Ibid.* We said:

> A conditional dismissal in these terms creates only the illusion of finality. The literal terms of the consent order would permit plaintiff, after failing on the merits of this appeal, to refile the complaint against the remaining defendant. This would confirm, after the fact, that the appeal was interlocutory all along. In the face of the condition contained in the consent order, plaintiff's attempt to couch this appeal as from a final order can only be seen as an effort to circumvent the standards governing appellate procedure. It violates the spirit and intent of the court rules, and it interferes with this court's ability to manage its docket.
>
> A trial court may be tempted to enter a dismissal order of this type because it would dispose of a case at least temporarily, but case disposition for disposition's sake is not the goal of our system. A trial judge should not encourage or participate in such tactics. After the last summary judgment order was entered, the remaining parties had a choice of settling the issues between them, obtaining a dismissal with prejudice, or proceeding to trial. They were not entitled to craft a mechanism that manipulated the provisions of the court rules governing eligibility to appeal to this court as of right. *See R.* 2:2-3.

[*Id.* at 168-69.]

Although there are some similarities between the stipulation of dismissal filed in this case and the consent order involved in *Ruski,* there is a difference. The stipulation filed in this matter dismissed the counterclaim and third-party complaint without

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prejudice and allows the re-filing of those pleadings only if the order "dismissing the complaint and suppressing the answer and defenses to the counterclaim and/or the third-party complaint is reversed on appeal[.]"

*7 In any event, even if we were to conclude that the May 11, 2007 stipulation only created an illusion of finality, we would grant leave to appeal *nunc pro tunc* pursuant to *Rule* 2:4-4(b)(2). The parties have fully briefed the issues raised in these appeals and the interest of justice warrants their resolution at this time. *R.* 2:2-4.

III.

We next consider whether Sommer's and SRV's appeals are moot. It is well-established that New Jersey courts will not consider an action "when a controversy no longer exists and the disputed issues have become moot." DeVesa v. Dorsey, 134 N.J. 420, 428 (1993) (citing Oxfeld v. N.J. State Bd. of Educ., 68 N.J. 301, 303-04 (1975)). An issue is "technically moot when the original issue presented has been resolved[.]" *Ibid.*

The trial court's March 17, 2005 order essentially dismissed all of SRV's affirmative claims, and thereafter SRV remained in the case only because it had been named in the counterclaim. The dismissal of the counterclaim did not make SRV's appeal from the suppression of its answer to that pleading moot because the counterclaim may be re-filed, depending on the outcome of SRV's appeal. Similarly, the dismissal of the third-party claim against Sommer did not render his appeal from the suppression of his answer to that pleading moot. The third-party claim may be re-filed if Sommer prevails on his appeal.

Indeed, the stipulation of dismissal filed in this matter does not preclude SRV and Sommer from pursuing their appeals. The stipulation recognizes that the appeals will go forward and provides that if the February 13, 2007 and April 30, 2007 orders are reversed, CIL and Coates may reinstate their claims. Clearly, the stipulation of dismissal did not resolve the controversy between these parties regarding the suppression of SRV's and Sommer's pleadings. Therefore, we conclude that Sommer's and SRV's appeals are not moot.

IV.

We turn to Neff's appeal from the order dismissing his claims and suppressing his answer and defenses to the counterclaim.

Rule 4:23-2(b) authorizes a trial court to impose sanctions when "a party or an officer, director, or managing or authorized agent of a party ... fails to obey an order to provide or permit discovery[.]" The rule provides that, in these circumstances, the judge may entered such orders "as are just," including:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting the introduction of designated matters in evidence;

(3) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

*8 (4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The Supreme Court has stated that the "ultimate sanction" of dismissal of a complaint with prejudice should be imposed "only sparingly." Zaccardi v. Becker, 88 N.J. 245, 253 (1982). The " 'dismissal of a party's cause of action, with prejudice, is drastic and is generally not to be invoked except in those cases in which the order for discovery goes to the very foun-

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dation of the cause of action, or whether the refusal to comply is deliberate and contumacious.' " Abtrax Pharm., Inc. v. Elkins-Sinn, Inc., 139 N.J. 499, 514 (1995) (quoting Lang v. Morgan's Home Equip. Corp., 6 N.J. 333, 339 (1951)). In addition, because " 'dismissal with prejudice is the ultimate sanction, it will normally be ordered only when no lesser sanction will suffice to erase the prejudice suffered by the non-delinquent party, or when the litigant rather than the attorney was at fault.' " *Ibid.* (quoting Zaccardi, supra, 88 N.J. at 253).

The standard that applies to our review of an order dismissing or suppressing pleadings for "discovery misconduct is whether the trial court abused its discretion[.]"*Id.* at 517.We may not intervene "unless an injustice appears to have been done."*Ibid*.

Moreover, we must defer to the trial court's findings of fact and conclusions of law " 'unless we are convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.' " Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (quoting Fagliarone v. Twp. of No. Bergen, 78 N.J.Super. 154, 155 (App.Div.), *certif. denied*, 40 N.J. 221 (1963)).

We are convinced that the trial judge did not abuse his discretion by ordering the dismissal with prejudice of Neff's claims and suppressing his answer and defenses to the counterclaim. The trial judge found that Neff failed to appear for a deposition as required by the September 26, 2006 order, and failed to return CIL's property as required by the court's September 26 and September 29, 2006 orders. The judge additionally found that Neff's failure to comply with the court's orders was deliberate and contumacious. In our view, there is sufficient credible evidence in the record to support the judge's findings.

As we stated previously, Mr. Rihacek was the attorney for the plaintiffs and Sommer at the time the court entered the September 2006 orders. Mr. Rihacek also represented these parties in October 2006. Mr. Wolf, who was counsel for CIL and Coates, wrote to Mr. Rihacek and attempted to scheduled Neff's deposition within the time required by the September 29, 2006 order. According to Mr. Wolf, Mr. Rihacek did not respond to his letter, and Neff never appeared for his deposition.

*9 At the February 5, 2007 hearing, Mr. Rihacek stated that Neff did not appear for the deposition because Neff "was sick at the time." In addition, Neff testified that he had surgery in December 2005 to remove certain "stones." Neff also had prostate surgery in January 2006. Neff asserted that after the January 2006 surgery, he was on "doctor's orders to be on a very reduced schedule."Neff said that he had a recurrence of his medical problems in November 2006, and he had additional prostate surgery in January 2007.

Although Neff's testimony indicates that he experienced medical problems at various times in 2006, Neff failed to establish that he was too ill to appear for a deposition in October 2006 as ordered by the court. Indeed, in his testimony at the February 5, 2007 hearing, Neff conceded that he continued to practice law after the January 2006 surgery, and his practice included real estate closings and engaging in litigation as a sole practitioner.[FN1]

> FN1. We note that Neff submitted certain doctor's notes to substantiate his assertions regarding his medical problems. The notes do not state that Neff was too ill to appear for a deposition in October 2006.

Even if Neff had been on a "very reduced schedule" as he claimed, he failed to explain why he could not fit a deposition in this "reduced schedule." Furthermore, Neff's claim that he was too sick to appear for a deposition in October 2006 is inconsistent with his assertion at the hearing that he would have appeared for his deposition "if someone had scheduled it[.]" The record therefore supports the judge's finding that Neff failed to appear for his deposition as required by the court's order and his failure to do so was deliberate and contumacious.

The record also supports the judge's finding that Neff deliberately and contumaciously failed to comply with the court's orders requiring the return of CIL's automobiles and engines. At the hearing, Mr. Rihacek testified that he advised Neff to comply with the court's orders but Neff refused to do so, insisting instead that Mr. Rihacek prepare a motion to sequester CIL's property based on a claim of spoliation of evidence. The motion was never filed and CIL's automobiles and engines were not returned to CIL until

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March 2007.

The evidence establishes that Neff knew about the court's orders requiring that plaintiffs return CIL's property and chose not to comply. The record also establishes that neither Neff nor his attorney ever advised the court that they had objections to the return of the property. The record therefore supports the judge's finding that Neff failed to comply with the court's orders requiring the return of CIL's property and his non-compliance with those orders was deliberate and contumacious.

Neff argues, however, that the judge abused his discretion by imposing the "ultimate sanction" of dismissal with prejudice for his discovery violations. Neff contends that defendants were not prejudiced by his failure to comply with the court's orders. We disagree.

As Coates pointed out in his certification filed on February 1, 2007, this litigation has placed a significant burden upon CIL and the employees of that company. CIL has incurred counsel fees in endeavoring to have Neff and the other plaintiffs comply with the court's orders. Moreover, Coates asserted that CIL has been harmed by what he views as groundless allegations. Coates says that the delay in resolving plaintiffs' claims has harmed the company and impaired its ability to raise capital. In our view, Coates' assertions are credible and they provide sufficient support for the judge's finding that CIL and Coates were prejudiced by the discovery violations.

*10 Neff also argues that, even if CIL and Coates were prejudiced, any such prejudice could have been fully addressed by monetary sanctions. Again, we disagree. Even if CIL and Coates had not been prejudiced by Neff's failure to comply with the court's orders, dismissal with prejudice can be ordered "when the litigant rather than the attorney was at fault." *Zaccardi, supra,* 88 *N.J.* at 253. Because Neff's failure to comply with the court's orders was his fault, and not the fault of his attorney, dismissal of Neff's pleadings with prejudice was not an abuse of discretion, regardless of whether defendants suffered any prejudice.

Accordingly, we affirm the provisions of the February 13, 2007 order, as amended, dismissing Neff's claims and suppressing his answer and defenses to the counterclaim with prejudice.

V.

We next consider the appeals by SRV, 1107 and Sommer. These parties maintain that the judge abused his discretion by dismissing and/or suppressing their pleadings. SRV, 1107 and Sommer argue that they could not have deliberately or contumaciously violated the court's September 2006 discovery orders because they were not aware of those orders. SRV and 1107 further maintain that the judge made no specific findings that Sommer, either individually or as president of the corporations, deliberately or contumaciously failed to comply with the court's orders.

We agree with SRV, 1107 and Sommer that the judge mistakenly exercised his discretion by dismissing and/or suppressing their pleadings with prejudice. It is clear from the record that plaintiffs and Sommer violated the court's orders. However, while the record supports a finding that Neff deliberately and contumaciously violated the orders, the evidence does not support similar findings regarding SRV, 1107 or Sommer. The evidence also does not justify imputing Neff's wrongful conduct to SRV or 1107.

At the February 5, 2007 evidentiary hearing, Mr. Rihacek testified that Neff was his primary contact in handling the litigation. Although Sommer did not testify at the hearing, he submitted a certification in support of the motion for reconsideration of the February 13, 2007 order. In his certification, Sommer stated that he was never advised about the court's September 2006 discovery orders. Sommer also asserted that he did not know about the court's orders until sometime late in January 2007, when he learned about the motion to dismiss plaintiffs' complaint for failure to comply with those orders.

In a supplemental certification dated March 23, 2007, Neff stated that Sommer was not in court when the September 2006 orders were entered. Neff asserted that after Mr. Rihacek took over as counsel for plaintiffs and Sommer, Sommer was not involved in the handling of the case. Neff stated that he did not discuss the litigation with Sommer "at any time".

Neff additionally asserted that Mr. Kennedy, the attorney who replaced Mr. Rihacek, provided Sommer

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with a copy of the court's September 2006 orders. However, Mr. Rihacek did not withdraw from the case until November 2006. Therefore, if Mr. Kennedy had provided the orders to Sommer, that would have occurred after the deadlines established by the court's September 2006 orders.

*11 The trial judge found that, despite Sommer's assertions to the contrary, Neff and Sommer had a close relationship during the litigation and that Neff and Sommer had communicated with each other as to the status of the litigation. Although the record suggests there may have been some communication between Neff and Sommer regarding the litigation, there is no direct evidence which establishes that Sommer had specific knowledge of the court's September 2006 discovery orders and deliberately chose not to comply with them.

In addition, the evidence does not warrant a finding that Sommer deliberately violated the court's orders. Neff was the party who directed Mr. Rihacek not to comply with the court's order requiring the return of CIL's property. There is no evidence that Sommer instructed Mr. Rihacek to disregard the judge's orders. There also is no evidence that Sommer deliberately refused to appear for a deposition, or instructed Neff not to appear for his deposition.

Furthermore, there is insufficient evidence to justify imputing Neff's wrongful conduct to SRV and 1107. Although Neff may have been a principal of the corporations, and Neff may have been Mr. Rihacek's primary contact person for the litigation, there is no direct evidence that the corporations delegated any binding decision-making authority to Neff for the handling of the case. Even if the corporations had delegated some decision-making responsibility to Neff for the lawsuit, there is no evidence that the corporations authorized Neff to deliberately and contumaciously disregard the court's discovery orders.

We therefore conclude that the judge mistakenly exercised his discretion by dismissing SRV's and 1107's claims, suppressing their answer and defenses to the counterclaim, and suppressing Sommer's answer and defenses to the third-party complaint.

We add, however, that while the trial judge erred by imposing the "ultimate sanction" of dismissal with prejudice upon SRV, 1107 and Sommer, that does not preclude the judge from considering on remand whether monetary sanctions are warranted in this matter. Although the failure by SRV, 1107 and Sommer to comply with the court's September 2006 discovery orders was not deliberate and contumacious, the fact remains that these parties did not comply with the court's orders and their failure to comply prejudiced defendants by causing them to incur costs and expenses that they would not have otherwise incurred.

Rule 4:23-2(b) permits a trial court to order a delinquent party to pay the reasonable expenses, including attorneys' fees, caused by the party's failure to comply with a court's discovery order, "unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." *Ibid.* On remand, the trial judge may consider whether SRV, 1107 and Sommer should be required to bear the costs and expenses incurred by defendants due to the failure by SRV, 1107 and Sommer to comply with the court's orders. The judge also may consider whether Neff should bear some part of those expenses. The rule permits the court to impose monetary sanctions upon a delinquent party in addition to the dismissal of the party's pleadings with prejudice. *Ibid.*

*12 Affirmed in part, reversed in part, and remanded for further proceedings in conformance with this opinion. We do not retain jurisdiction.

N.J.Super.A.D.,2008.
Neff v. Coates
Not Reported in A.2d, 2008 WL 1988022 (N.J.Super.A.D.)

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UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Superior Court of New Jersey,
Appellate Division.
Stephanie SKIDMORE and Michael Skidmore, her husband, Plaintiffs-Appellants,
v.
WALL STADIUM CONCESSIONS, INC., Wall Stadium Enterprises, Inc., Wall Stadium; Tucker Nicol; Thomas Nicol; and Concession Supply Co., Inc., Defendants,
and
William JOHNSON; and B.J.'S Concessions Corp, Defendants-Respondents.
Argued Feb. 15, 2006.
Decided March 8, 2006.

On appeal from Superior Court of New Jersey, Law Division, Ocean County, Docket No. L-1460-01.
George W. Conk argued the cause for appellants (Hanna & Anderson and Tulipan & Conk, attorneys; Mr. Conk, of counsel and on the brief; Douglas B. Hanna, on the brief).

George A. Prutting, Jr. argued the cause for respondents William Johnson and B.J.'s Concession Corp. (Prutting & Lombardi, attorneys; Mr. Prutting, Jr., of counsel and on the brief).

Before Judges SKILLMAN and PAYNE.

PER CURIAM.

*1 Plaintiffs appeal from a summary judgment dismissing their complaint against defendants B.J. Concessions, Inc. and one of its principals, William J. Johnson.

On June 6, 1999, plaintiff Stephanie Skidmore suffered personal injuries from an electric shock in the course of her employment as a concession stand worker at Wall Stadium. The electric shock occurred when plaintiff came into contact with a three-prong electric cord of a pretzel warmer that was allegedly plugged into an ungrounded two socket extension cord.

B.J. Concessions supplied the pretzel warmer and the pretzels sold at the stadium to plaintiffs' employer, and it received 75% of the proceeds from the sale of the pretzels. Although Johnson and other B.J. Concessions employees were sometimes present at Wall Stadium when the pretzels were being sold, discovery did not reveal any evidence that B.J. Concessions played a role in determining the location of the pretzel warmer plaintiff operated or in connecting the warmer to the electrical receptacle. Discovery also did not reveal any evidence that B.J. Concessions was aware that the three-prong electrical cord on the pretzel warmer was allegedly connected to a two-prong ungrounded extension cord or that this alleged hazardous condition would have been visible to B.J. Concession's employees. In fact, plaintiff did not present any evidence that the extension cord was even in use at the time of her accident.

In granting summary judgment, Judge O'Brien stated in a written opinion:

> The plaintiff contends that the defendants used an improper extension cord that caused the plaintiff's injuries. However, the plaintiff has failed to identify who plugged in the extension cord and when it was used. All of the defendants deny ever seeing the extension cord before, as does the plaintiff. None of the defendants know how the extension cord got there and who decided to use it. The defendants testified that they did not sign for the pretzel warmer nor place it in its location. Rather, they opine that the maintenance supervisor of the Stadium probably signed for and placed the unit where it is. The plaintiff

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> has failed to identify who was responsible for the installation of the pretzel warmer with the extension cord. When viewing the facts in the light most favorable to the plaintiff, the facts indicate that [Wall Stadium's employees] placed the pretzel warmer in its current location.
>
> ... There are simply no facts to support a claim that the defendants were responsible for the placement of the extension cord or that they even knew about it. The plaintiff relies on mere speculation and assumption to conclude that one of the defendants placed the extension cord or [was] responsible for its placement.

We affirm the summary judgment in favor of B.J. Concessions and Johnson substantially for the reasons expressed by Judge O'Brien. We also note that plaintiff did not allege that there was any defect in the pretzel warmer and did not assert any products liability claim. We reject plaintiff's argument, raised for the first time on appeal, that B.J. Concessions had a duty to inspect the area where plaintiff's employer placed the pretzel warmer to determine whether there was a hidden hazardous condition.

*2 Affirmed.

N.J.Super.A.D.,2006.
Skidmore v. Wall Stadium Concessions, Inc.
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