

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

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Building, Inc.

In Re:

LEONARD J. and ANGELA A. FARINOLA, and
UNITED MECHANICAL CONSTRUCTION CO,
LLC,

Debtors.

GERALDINE E. PONTO, Chapter 7 Trustee,

Plaintiff,

Vs.

BELLEVILLE ESTATES, LLC, HARRY
SEYMOUR, KATHLEEN SEYMOUR, SEYMOUR
HOLDING, INC., and SEYMOUR BUILDING, INC.,

Defendants.

Chapter 7

Case No. 05-29714 (KCF)

Adv. Pro. No.: 06-02617 -KCF

Hearing Date:

April 21, 2008 @ 11:00 a.m.

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

On the Brief:

Glenn R. Reiser

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PRELIMINARY STATEMENT

Plaintiff (sometimes referred to as the “Trustee”) has filed for partial summary judgment on certain portions of her Complaint against defendants Harry Seymour, Kathleen Seymour, Seymour Building, Inc., and Seymour Holding, Inc. (collectively the “Seymour Defendants”). In response, the Seymour Defendants submit the within Memorandum of Law, Certification of Harry Seymour (“Seymour Cert.”), Certification of Glenn R. Reiser (“Reiser Cert.”), and Response to Statement of Undisputed Material Facts.

Plaintiff’s motion essentially seeks summary judgment on four (4) separate issues; namely, 1) that Mr. Seymour’s 45% ownership interest in Belleville Estates, LLC (“Belleville Estates”), in which Angela Farinola bankruptcy estate holds a 55% interest, should be deemed forfeited for not making a capital contribution declared post-petition by plaintiff acting on behalf of the co-member Farinola; 2) alternatively valuing Mr. Seymour’s 45% ownership interest in Belleville Estates at \$6,126 – the amount of cash that he and/or his company contributed toward the expense of Belleville Estates; 3) declaring the Restated Operating Agreement for Belleville Estates (which the Trustee refers to as the “Seymour Document”) is null and void because it was not signed by the co-member Angela Farinola; and 4) that the Seymour Defendants’ Counterclaim against the Trustee should be dismissed for failure to state a claim.

The Trustee’s motion for partial summary judgment is premature and should be denied because genuine issues of material fact exist. Additional discovery is necessary in order for the Seymour Defendants to adequately defend this summary judgment motion, in particular establishing what the parties’ intent was in capitalizing Belleville Estates and in determining the value of each member’s capital account. The limited liability operating agreement does not list a value for each member’s capital account, and

the Debtor Angela Farinola admittedly did not make any personal capital contribution to Belleville Estates. Determining the parties' intent in forming Belleville Associates and evaluating the credibility of their testimony requires a full evidentiary hearing.

This case represents a complex web of transactions involving other persons who are named as defendants in related adversary actions brought by the Trustee. The Trustee is playing both sides of the fence in two (2) different lawsuits when it suits her advantage. For example, in this adversary case she takes the position that \$263,362.40 in funds drawn on checks from UMCC bank accounts bearing references to "Belleville Estates" in the memo portion should be counted toward Angela Farinola's capital contribution to Belleville Estates; these funds include \$216,000 deposited into Mr. Hanley's law firm's trust account by UMCC check # 889 marked "Settlement Belleville". However, in the related adversary action against Walter Hanley and his law firm, Adv. Pro. No.: 07-1867 (the "Hanley Adversary Proceeding"), the Trustee takes the position that UMCC received no benefit from these transfers, including the same \$216,000 transferred to Mr. Hanley's law firm by UMCC check # 889.¹

On November 14, 2007, the Seymour Defendants filed a motion to consolidate this Adversary Proceeding with several other related adversary proceedings including the Hanley Adversary Proceeding, and Joseph Scirica, Adv. Pro. No.: 07-1768 (the "Scirica Adversary Proceeding"). Messrs. Hanley and Scirica were integrally involved in key transactions involving Belleville Estates.

The parties met in good faith in an attempt to resolve the Seymour Defendants' consolidation motion. Pursuant to a Consent Order entered on January 31, 2008, the parties agreed to a reciprocal notice and exchange of all discovery, including advance

¹ The Court can take judicial notice of pleadings filed on the docket of this and all other related adversary proceedings, including the Hanley Adversary Proceeding NO.: 07-1867. In opposing Mr. Hanley's motion for summary judgment, the Trustee filed a Counterstatement of Material Facts which appears as docket entry # 15 filed on March 24, 2008.

notice of the scheduling of depositions, and to postpone the consolidation motion pending the completion of discovery in this Adversary Proceeding, the Hanley Adversary Proceeding, and the Scirica Adversary Proceeding. (Docket entry # 30).

The discovery end date in this Adversary Proceeding is June 16, 2008, and the trial date is presently scheduled for October 7, 2008. (Docket entry # 36). The depositions of Walter Hanley and Joseph Scirica have yet to be conducted. Recently, Walter Hanley obtained the Court's permission to file a Third Party Complaint against Harry Seymour in the Hanley Adversary Proceeding. The Seymour Defendants previously subpoenaed Walter Hanley's deposition last July 2007, but agreed to adjourn it at the request of Hanley's bankruptcy counsel. Since then, Mr. Hanley filed a motion for summary judgment to dismiss the Trustee's claims against him and it was agreed that all depositions would be put on hold pending the outcome of Mr. Hanley's summary judgment motion.²

The Trustee's motion for partial summary judgment is premature because the depositions of Messrs. Hanley and Scirica remain to be conducted in conjunction with all three (2) adversary actions. The testimony of these witnesses is believed to be critical to the ability of the Seymour Defendants to oppose the Trustee's motion for partial summary judgment; in particular the testimony of Walter Hanley, the lawyer who drafted the corporate documents for Belleville Estates, who met with Harry Seymour on multiple occasions, and prepared the LLC's tax returns in the years 2002 and 2003 which state dollar capital contribution amounts for each member of Belleville Estates in stark contrast to the blank spaces appearing in the LLC's Operating Agreement. Further, it is anticipated that Walter Hanley will notice Harry Seymour's deposition in the context of the Hanley Adversary Proceeding.

² The Court denied Mr. Hanley's summary judgment motion by Order entered on April 7, 2008.

COUNTER-STATEMENT OF FACTS

The Seymour Defendants have separately filed a Response to the Trustee's Statement of Undisputed Material Facts. In addition, the Seymour Defendants respectfully submit the following additional counter-statement of facts in response to the Trustee's motion for partial summary judgment:

1. In the course of Harry Seymour's business relationship with Lenny Farinola and UMCC, beginning in or around 2001 they had discussions about forming a partnership to purchase and develop certain property located at 13 Valley Street and 60 and 66 William Street, Belleville, New Jersey (the "Property"). At that particular time, the Property was owned by Joseph Scirica who is Lenny Farinola's brother-in-law. In Mr. Seymour's discussions with Lenny Farinola, he made it clear that he did not want to be listed as a partner because he was involved in an ongoing dispute with his ex-wife about alimony payments and had outstanding tax liabilities to the Internal Revenue Service. It is for these same reasons that Lenny Farinola put his wife Angela Farinola a/k/a Angela Freschi on the corporate papers for UMCC, even though she never had any experience in the construction industry. (Seymour Cert., at ¶ 4).

2. It was expressly understood between Angela Farinola, Lenny Farinola and Mr. Seymour that Mr. Seymour's role in Belleville Estates would be to supervise and manage the entire development of the Property, and that his capital contribution would include his time and expertise. Neither Operating Agreement reflects the parties' mutual understanding about the members' capital contribution in Belleville Estates. (Seymour Cert., at ¶ 5).

3. It was also agreed between Lenny Farinola, Angela Farinola and Mr. Seymour's capital contribution to Belleville Estates would include funds that UMCC owed to him and/or his company as part of their ongoing business relationship where

Mr. Seymour was assisting UMCC in certain projects, including the Hobby World Project in Little Ferry, New Jersey. (Seymour Cert., at ¶ 6).

4. At the time Mr. Seymour and Ms. Farinola agreed to buy out Mr. Scirica's 30% interest in Belleville Estates, LLC it was agreed between Mr. Farinola and Mr. Seymour that the \$119,567.50 owed by United Mechanical to Mr. Seymour and his company, Seymour Building, Inc. would be retained by United Mechanical and would serve as a capital contribution by Mr. Seymour to Belleville Estates, LLC. (Seymour Cert., at ¶ 4).

5. An operating agreement initially was drafted by Walter Hanley, III, Esq., which set forth the members of Belleville Estates and their respective ownership interests as follows: Joseph Scirica 30%, Angela Freschi 40%, and Harry Seymour 30%. This agreement was never signed, but it accurately reflects what Mr. Seymour understood would be the members and their proportionate ownership interests. (Seymour Cert., at ¶ 8, referencing **Exhibit 3**).

6. Shortly thereafter, Mr. Scirica decided that he did not want to be partners with Angela Farinola. Accordingly, Angela Farinola and Mr. Seymour agreed to purchase Mr. Scirica's share of Belleville Estates. (Seymour Cert., at ¶ 10).

7. Pursuant to a Limited Liability Company Purchase Agreement and Memorandum of Closing dated May 1, 2003, entered into between Scirica, as Seller, and Belleville Estates, as Purchaser, Belleville Estates redeemed Scirica's 30% membership interest for the sum of \$75,000. *See* Exhibit J to Declaration of Mark B. Conlan ("Conlan Dec."); (Seymour Cert., at ¶ 11).

8. Pursuant to the Purchase Agreement, effective January 1, 2003, Angela Farinola held a 55% interest in Belleville Estates and Mr. Seymour held a 45% interest in Belleville Estates. (Seymour Cert., at ¶ 12).

9. As part of the restructuring of Belleville Estates, Walter Hanley, III, Esq., who seems to have represented every person associated with this adversary action and other related adversary cases, drafted an Operating Agreement for Belleville Estates listing Angela Farinola as holding a 55% interest and Mr. Seymour holding a 45% interest (See Exhibit A to Conlan Dec.).

10. Subsequent thereto, it was agreed by and between Lenny Farinola, Angela Farinola and Harry Seymour that the Operating Agreement would be amended to reflect a change in the amount of voting percentages held by Angela Farinola and Mr. Seymour, and that Mr. Seymour's membership interest would be transferred to Seymour Holding, Inc. See Exhibit C to Conlan Dec., document identified as "Farinola 17" with Bate Stamp P00796 appearing in the lower right hand corner). The agreement was signed by Lenny Farinola on behalf of Angela Farinola as noted by the initials "AF" appearing on the signature line for Ms. Farinola. (Seymour Cert., at ¶ 18).

11. It was standard procedure for Angela Farinola to allow Lenny Farinola to sign her name to UMCC checks because she was essentially an absentee owner of UMCC, only coming in about once a week to sign checks by affixing the initials "AF". On numerous occasions Mr. Seymour personally witnessed Lenny Farinola signing UMCC checks and other documents for Angela by affixing "AF". (Seymour Cert., at ¶ 18).

12. The initials "AF" also appear on UMCC's bank account authorizations. See Exhibits B, C & D to the Certification of Glenn R. Reiser ("Reiser Cert."), as well as on actual checks drawn on UMCC bank accounts. (Seymour Cert., at ¶ 18, referencing Exhibit 4).

13. The Revised Operating Agreement was prepared by Charles Sgro, Esq., a New Jersey lawyer who is deceased. Lenny Farinola's mother was Mr. Sgro's

secretary. Mr. Sgro initially represented the Farinolas in their personal joint bankruptcy filing. (Seymour Cert., at ¶ 20).

14. Ms. Farinola did virtually nothing when it came to the business operations of Belleville Estates. She did not contribute any capital nor devote much time toward the business operations of Belleville Estates. (Seymour Cert., at ¶ 22).

15. Angela Farinola did not personally contribute any capital to Belleville Estates. (Deposition of Angela Farinola, July 11, 2007, Tr. 36, L. 7-9, a true copy of which is annexed as Exhibit A to Reiser Cert.).

16. Angela Farinola did not have any discussions with Harry Seymour or Joseph Scirica concerning Belleville Estates at the time the company was formed. (Exhibit A to Reiser Cert., Tr. 36, L. 7-9).

17. Angela Farinola permitted her husband to sign checks, contracts and letters on behalf of UMCC. (Exhibit A to Reiser Cert., Tr. 17, L 6 to Tr. 22, L 24).

18. Angela Farinola never attended any meetings at Mr. Hanley's law office regarding Belleville Estates, and never met with attorneys regarding the zoning approval process for the Property. (Exhibit A to Reiser Cert., Tr. 36, L. 7-9; Tr. 39, L 25 to Tr. 40, L 2).

19. Angela Farinola did not meet with any engineers or environmental consultants regarding any part of the zoning approval process for the Belleville Estates Property. (Exhibit A to Reiser Cert., Tr. 40, L3-7).

20. One of the reasons why Angela Farinola agreed to be Mr. Seymour's partner in Belleville Estates was because of his building experience. (Exhibit A to Reiser Cert., Tr. 54, L14-20).

21. Angela Farinola understood Mr. Seymour's role in Belleville Estates would be to oversee everything that needed to be done to building the project. (Exhibit A to

Reiser Cert., Tr. 54, L. 23 to Tr. 55, L 3).

22. In response to a question about what her understanding was about Mr. Seymour's financial contribution to Belleville Estates was supposed to be, Angela Farinola testified as follows:

In the beginning it would be his knowledge of the business and what we were going to do. And then in the end when it would be over, that whatever monies were put in by UMCC, being United Mechanical, would be given back to the company. And through the profits of the sales, we would first pay back whatever monies my company put out, and then pay the bills and then divide it. We didn't come to an agreement of a percentage, but divide it accordingly, whatever the profits were.

(Exhibit A to Reiser Cert., Tr. 54, L. 23 to Tr. 55, L 3).

23. Angela Farinola testified that her husband Lenny Farinola did not want to get involved in any business because he had problems with the IRS, to wit:

Q. Did you ever have any discussions with your husband about your serving as the owner of Penico because he had tax obligations to the IRS?

A. At the time Lenny was in his own investigation and had problems with the IRS, so he did not want to get involved with any type of involvement in any kind of business.

* * *

Q. You just testified that he didn't want to have an involvement with Belleville Estates for the same reason he didn't want to have involvement with United Mechanical, correct?

A. No.

Q. That's not what you said?

A. Not correct.

Q. What's not correct about that?

A. I said that he did not want to be in any business at that time because he had his own problems going on.

Q. And these problems included the IRS?

A. Yes.

(Exhibit A to Reiser Cert., Tr. 65, L 7 to Tr. 66, L 14).

24. Mr. Seymour devoted a significant amount of his time in connection with Belleville Estates. In summary, in an effort to develop the property owned by Belleville Estate Mr. Seymour met with engineers, lawyers, environmental consultants, attended planning board meetings, communicated with potential lenders to finance the project, and spent money cleaning up the property when asked to do so by the plaintiff. (Seymour Cert., at ¶ 33.

25. The following is a chronology of Mr. Seymour's day-to-day contributions to advance the development of the Property owned by Belleville Estates:

- 10/7/03 - Meet with Cozzarelli, site engineer, traffic study engineer, go to zoning meeting for approval of 24 units at 13-11 Valley St. When we found out we were not going to be heard at that meeting we requested a special zoning meeting for 10-21-03.
- 10/21/03 - 7:00 P.M. Special Meeting: we got approved for 18 units, meeting ending 12:00 A.M. we had to come back on 11/6/03 with new plans.
- 10/22/03 - Meet with Jose Carballo 8:00 A.M., go over new plans for two-stories with 16 units at three stories with 18 units need plans by Friday, 10/24/03.
- 10/23/03 - Meet with Frank Cozzarelli, go over paperwork needed for 11/6/03 to be heard.
- 10/24/03 - Go to Jose Carballo's office to pick up new plans for new layout. NOT READY.
- 10/27/03 - Pick up plans for 16 units and 18 units, bring to Frank Cozzarelli office and review.
- 10/30/03 - Meet with Jose Carballo, come up with budget for 18 units.

- 10/31/03 - Meet with Jose Carballo to pick up 12 sets of plans, no budget, go meet Walter Hanley with plans and my budget.
- 11/1/03 - Make 5 different budgets for different scenarios.
- 11/3/03 - Call Jose for breakdown, call John Hoffman for engineer report, call Jeff Clark for site plan.
- 11/4/03 - Pick up breakdown from Jose, rework my budgets.
- 11/5/03 - Call Stuart Campbell for meeting for construction loan.
- 11/6/03 - Zoning meeting 7:00 P.M. - we got approved for 18 units, (9) 1 bedrooms, (9) 2 bedrooms.
- 11/7/03 - Meeting at PNC Bank in Hoboken at 3:00 P.M. for construction loan.
- 11/10/03 - Call Johnson Soils for boring tests, call John from the gas part of PSE&G, call for mark out of site at 11 - Valley.
- 11/11/03 - Meet with Stuart Campbell at Belleville site for tips on construction loan, meet with Giovanna from Weichert Real Estate.
- 11/12/03 - Meet John at site, John didn't show will come tomorrow, meet Jose to go over changes to plans.
- 11/13/03 - Call engineer, Charlie and Pete for price, meet Jose to change plans 7:00 P.M.
- 11/14/03 - Meet Joe Scirica to dig test pits.
- 11/15/03 - Got mark out, Joe is digging test pits.
- 11/17/03 - Pick up new plans from Jose, get prices from M&M Plumbing for fixtures, price from Charlie for engineering, call Dev & Rich for site plans, send plans to Doreen Thornton, and meet Greg from GMS for temp. electric.
- 11/18/03 - Meet Johnson Soils for Soil Tests.
- 11/19/03 - Meet PSE&G, go over site, get approvals from Weichert for new layout, clean out garages.
- 11/20/03 - Meeting in Hoboken HUB for construction loan, meet Greg, drop off temporary permits.

- 11/21/03 - Meet site engineer to start plans, complete estimate, meet Ted's friend for construction loan.
- 11/22/03 - Meet Walter Hanley at site, Joe Scirica back-filled holes.
- 11/24/03 - Pick up plans from Jose, set up Doreen with Jose, call Ken Meile for scrap removal.
- 11/25/03 - Pick up sewer map, call in survey, meet Battery man to pick up batteries left in building, set up electric for Monday with car wash and Greg, call PSE&G to remove gas meters.
- 11/26/03 - Johnson Soils dropped off samples at site, meet with Ken Meile from DPW, meet Walter and Doreen.
- 11/28/03 - Call Joe Scirica, no answer.
- 11/29/03 - Meet with Joe to go over excavation numbers, no show again, meet Brian to remove scrap.
- 12/1/03 - Set up temp. electric, PSE&G removed electric meter.
- 12/2/03 - Drop off dirt for perk test at Johnson Soils, meet Doreen and go over site plans.
- 12/3/03 - Call Stuart about application fees.
- 12/4/03 - Call all banks for application papers HUB, Todd, Leo, NorCrown, Meet Walter to put financial packages together.
- 12/5/03 , 12/6/03 - Heavy snow.
- 12/8/03 - Go to town hall, pick up tax map, go to meet Doreen to pick up site plans and drop off by Frank Cozzarelli, call Jose for plans for tomorrow, call PSE&G gas is complete will get on electric tomorrow, pick up plans from Jose and bring to Cozzarelli and sign soil contract.
- 12/9/03 - Got perk test from Johnson Soils.
- 12/10/03 - Call Cozzarelli for update, call Doreen, meeting with engineer went okay.
- 12/11/03 - Drop off check to Cozzarelli for HEPSCD \$550.00.
- 12/12/03 - PSE&G said next week.
- 12/13/03 - Meet with Joe Scirica to take trucks off site, wait for meeting with Walter NO SHOW.

- 12/15/03 - Meeting with Walter at site until 7:30 P.M., he needs a check.
- 12/17/03 - Call PSE&G electric - will be here tomorrow.
- 12/22/03 - Got fax from PSE&G - okay to demo.
- 12/23/03 - File permits for demolition, call Joe - trucks still on site.
- 12/29/03 - Spoke to PSE&G about overhead wires - supervisor will call me.
- 12/30/03 - Pick up demo permits, call Joe about trucks to get off site, got letter from Cozzarelli - we didn't make Jan. 6, 04 meeting, I called back Frank - no answer.
- 12/31/03 - Went to Frank's office and called him - he wasn't in.
- 1/6/04 - Zoning meeting.
- 1/7/04 - Frank will call back with special meeting date.
- 1/9/04 - We still don't have Angela's paperwork for bank loan.
- 1/12/04 - No answer from Frank about meeting and Jose needs 10 days to be notified before meeting.
- 2/3/04 - Go to Zoning meeting.
- 2/4/04 - Go to Franks zoning official with two checks for \$2400.00 for engineer and fees, drop off and go to see Frank Cozzarelli - not in, go back to Frank at zoning office - not in, go back to Cozzarelli at 5:15 P.M. - not in.
- 2/6/04 - Go to Frank at Bldg. Dept. - not in, see Lois, all plans are in.
- 2/6/04 - Go to Charlie Sgro with operation agreement for Bellville Estates to change addresses.
- 2/9/04 - Call Frank from zoning, send letter for special meeting, meet PSE&G to move pole.
- 2/10/04 - Meet PSE&G, Mr. Miles send letter for special meeting.
- 2/12/04 - Communicate with faxes to Frank Cozzarelli.
- 2/13/04 - Go to zoning office, see Frank, no answer on special meeting yet.

- 2/17/04 - Call Frank at zoning office - no answer on special meeting.
- 2/19/04 - Meet with Ted & Leo, no good news on loan, Meet PSE&G \$12,000 to move wires, Call Charlie okay survey.
- 2/20/04 - Call Cozzarelli, meeting is on Monday with Tara, meet Maryann PSE&G needs ESI check, Call Walter for Belleville Search.
- 2/23/04 - Pick up property deeds, pick up copy of taxes for last 5 years, meet Charlie Sgro about PSE&G.
- 2/27/04 - Tara called, we are #4 for Tuesday night meeting.
- 2/28/04 - Tara called Frank wants to meet 5:30 at his office on March 2, 2004, I called Doreen and Jose.
- 2/29/04 - Put together another package for Lenny for loan, Leo went to HUB.
- 3/2/04 - Meeting 5:30 at Frank Cozzarelli's office.
- 3/3/04 - Town engineer not ready, measure out all openings within 200 feet, go to Jose to start foundation plans.
- 3/4/04 - Fax sketches to Doreen.
- 3/5/04 - Pick up 20 copies of survey, call PSE&G Miles about pole.
- 3/8/04 - Call Miles at PSE&G and call Doreen, Call Jose for foundation plans and Jersey City job.
- 3/9/04 - Miles called back, will move overhead wires not pole, needs \$12,000.00 to remove poles, call Doreen plans and copies will be done on Thursday.
- 3/11/04 - Meet Jose about site and foundation plans (He will know today), pick up final site plans from Doreen 12:00 P.M. (No Good).
- 3/12/04 - Doreen delivered site plans.
- 3/15/04 - Called engineer for lots, call Cozzarelli for lots, called Jose structural and engineering for lots.
- 3/19/04 - Call Jose for engineering price, call engineer, call engineer for letter.

- 3/22/04 - Lenny called and told me to make my checks from Seymour to Belleville \$500.00 to Board attorney, \$150.00 to Board Secretary, \$225.00 to Board Stenographer, bring checks to Town Hall \$875.00.
- 3/23/04 - Call Leo for loan, Doreen engineering and Jose for Structural engineering, no answers.
- 3/25/04 - We got site plan approved.
- 3/29/04 - Called Jose for structural engineering plans will take 2 weeks, call Walter about Cozzarelli bill.

(Seymour Cert., at ¶ 33).

26. Without Mr. Seymour's continued efforts over a several year period, Belleville Estates would not have secured certain zoning approvals from the Township of Belleville. (Seymour Cert., at ¶ 33).

27. Mr. Seymour communicated frequently with attorneys representing Belleville Estates – Walter Hanley and Frank Cozzarelli. (Seymour Cert., at ¶¶ 36-61).

28. Mr. Seymour communicated with several lenders in an effort to obtain financing to develop the property owned by Belleville Estates. (Seymour Cert., at ¶¶ 62-71).

29. Mr. Seymour communicated with engineers and architects in an effort to develop the property owned by Belleville Estates. (Seymour Cert., at ¶¶ 72-99).

30. Mr. Seymour communicated with the Bellville Zoning Board of Adjustment, met with attorneys representing Belleville Estates regarding completing and filing applications requesting certain approvals, and attended zoning board meetings. (Seymour Cert., at ¶¶ 100-104).

31. Mr. Seymour frequently corresponded with Angela Farinola regarding their ongoing disputes pertaining to Belleville Estates. (Seymour Cert., at ¶¶ 105-119).

32. Mr. Seymour prepared budgets for the development of the property owned by Belleville Estates. (Seymour Cert., at ¶¶ 120-123).

33. Mr. Seymour applied for and obtained a construction permit in December 2003 pertaining to the development of the property owned by Belleville Estates. (Seymour Cert., at ¶ 124).

34. A 2002 federal income tax schedule for Belleville Estates produced in the course of pretrial discovery by the Trustee reflects that Mr. Seymour's capital account in Belleville Estates was valued at \$112,500. (Seymour Cert., at ¶ 127).

35. A 2002 federal income tax schedule for Belleville Estates produced in the course of pretrial discovery by the Trustee reflects that Angela Farinola's capital account in Belleville Estates was valued at \$137,500. (Seymour Cert., at ¶ 127).

36. A 2003 federal income tax return for Belleville Estates produced in the course of pretrial discovery by the Trustee (and containing the signature of Walter Hanley with a date of April 10, 2004) reflects partners' capital accounts of \$250,000. (Seymour Cert., at ¶ 130).

37. A 2003 federal income tax Schedule K-1 for Belleville Estates produced in the course of pretrial discovery by the Trustee shows that Angela Farinola's capital account in Belleville Estates was "crossed out" in handwriting and changed from \$137,500 to \$148,500. (Seymour Cert., at ¶ 131).

38. A 2003 federal income tax Schedule K-1 for Belleville Estates produced in the course of pretrial discovery by the Trustee shows that Mr. Seymour's capital account in Belleville Estates was "crossed out" in handwriting and changed from \$112,500 to \$1,500. (Seymour Cert., at ¶ 132).

39. On June 16, 2006, Mr. Seymour signed an agreement that the Trustee presented to him providing his consent to allow the Trustee to retain a real estate broker

and to take such other actions as may be necessary to accomplish the sale and closing of title to the Belleville Estates Property. (Seymour Cert., **Exhibit 97**.)

40. At no point in time prior to December 5, 2007 had plaintiff ever asked Mr. Seymour to make a capital contribution to Belleville Estates. It was not until the after the Property was sold under Court auction that Mr. Seymour received a demand from plaintiff to contribute capital to Belleville Estates in the form of her December 5, 2007 correspondence addressed to Mr. Seymour's counsel. (Seymour Cert., at ¶ 134).

41. The Court previously entered an Order requiring the Trustee to hold the net proceeds of Mr. Seymour's 45% interest in Belleville Estates in escrow. (Seymour Cert., at ¶ 134).

42. There is no longer an ongoing business operation of Belleville Estates. (Seymour Cert., at ¶ 134).

43. Effective January 16, 2007 Belleville Estates was considered an inactive company, and its charter was revoked on March 8, 2008. (Seymour Cert., **Exhibit 98**).

44. UMCC never listed Mr. Seymour or his company, Seymour Building, Inc., as a creditor in its bankruptcy petition. Consequently, Mr. Seymour never received notice of the claims bar date in the UMCC bankruptcy case. (Seymour Cert., at ¶ 139).

45. Bankruptcy counsel for the Seymour Defendants did not receive notice of the claims bar date in the UMCC bankruptcy case. (Reiser Cert., at ¶ 25).

46. During the course of the bankruptcy proceedings, the Seymour defendants called upon the Trustee to conduct a special meeting of the members of Belleville Estates to discuss a pending tax foreclosure suit and other issues pertaining to the marketing and sale of the property owned by Belleville Estates. This request was ignored. (Reiser Cert., at ¶ 12).

47. By Order entered on October 1, 2007, the Court approved the sale and auction procedures for the Belleville Estates property. Pursuant to paragraph 11 of this Order, the Trustee is required to hold Mr. Seymour's 45% interest of the net sale proceeds, net of all expenses associated with the preservation of zoning approval extensions and sale of the Belleville Property, pending further Order of the Court. (Docket entry # 386).

48. By Order entered on October 23, 2007, the Court approved the sale of the Belleville Property to Steven Fortunato for the total purchase price of \$506,000. (Docket entry # 398).

In addition to the foregoing, the Seymour Defendants rely upon certain factual statements contained in the Trustee's Counterstatement in Opposition to the Hanley Defendants' motion for summary judgment, filed on March 24, 2008 in the Hanley Adversary Proceeding, to wit: paragraphs 4, 7, 10, 12, 15, 18, 19, 20, 28, 30, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 64, 72, and 77. For the convenience of the Court and opposing counsel, a true and complete copy of the Trustee's Counterstatement filed in the Hanley Adversary Proceeding is annexed hereto as Exhibit A.

LEGAL ARGUMENT

POINT I

THE TRUSTEE HAS NOT MET HER BURDEN OF PROOF BECAUSE THERE ARE GENUINE ISSUES OF MATERIAL FACT REGARDING THE VALIDITY OF THE RESTATED OPERATING AGREEMENT OF BELLEVILLE ESTATES, LLC, AND THE VALUE OF THE MEMBERS' RESPECTIVE OWNERSHIP INTERESTS IN BELLEVILLE ESTATES, LLC.

Summary judgment is proper only when there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *See Fed. R. Civ. 56*, made applicable to adversary proceedings pursuant to *Fed. R. Bankr. P. 7056*; Celotex

Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986);

Wisniewski v. Johns-Manville, 812 F.2d 81, 83 (3d Cir.1987). Fed. R. Civ. P. 56(c)

states the following:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56(c). The facts must be viewed in a light most favorable to the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); Celotex Corp. v. Catrett, 477 U.S. at 322. At the summary judgment stage, “the judge’s function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial.” Anderson v. Liberty Lobby, Inc., 477 U.S. at 249. Summary judgment should not be granted if a reasonable jury based on that evidence could return a verdict for the nonmoving party. In re CitX Corp., Inc., 448 F.3d 672 (3rd Cir. 2006); Tran v. Metropolitan Life Ins. Co., 408 F.3d 130, 135 (3rd Cir. 2005). Whenever there is even the “slightest doubt regarding the facts of a case, summary judgment should not be granted.” Tomalewski v. State Farm Life Ins. Co., 494 F.2d 882, 884 (3rd Cir. 1984).

Facts are material if they could alter the outcome, and “disputes are genuine if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct.” Horowitz v. Federal Kemper Life Assur. Co., 57 F.3d 300, 302 n.1 (3rd Cir. 1995).

As demonstrated herein, application of the foregoing standards demonstrates the existence of numerous genuine issues of material fact precluding the award of summary judgment to the plaintiff Trustee.

A. The Trustee's motion for partial summary judgment is premature pursuant to Fed. R. Civ. P. 56(f), because the Seymour Defendants have yet to have an opportunity to depose key witnesses in related adversary proceedings filed by the Trustee.

As previously stated, the discovery end date in this case is June 16, 2008. Pursuant to Fed. R. Civ. P. 56(f), made applicable to these proceedings by Fed. R. Bankr. P. 56, if discovery is incomplete and the part opposing summary judgment demonstrates that it is unable to present essential facts to justify its opposition, the Court may elect to do either one of the following:

- (1) deny the motion;
- (2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or
- (3) issue any other just order.

“The purpose the affidavit is to ensure that the nonmoving party is invoking the protection of Rule 56(f) in good faith and to afford the trial court the showing necessary to assess the merit of a party's opposition.” Radich v. Goode, 866 F.2d 1391, 1394 (3rd Cir. 1989). Beyond the requirement of an affidavit, a party seeking additional time for discovery “must identify with specificity “what particular information is sought; how, if uncovered, it would preclude summary judgment; and why it has not been previously obtained.” Lunderstadt v. Colafella, 885 F.2d 66, 71 (3rd Cir. 1989)(quoting Dowling v. City of Philadelphia, 855 F.2d 136, 140 (3rd Cir. 1988). The Seymour Defendants have satisfied the affidavit requirement as per the Reiser Cert.

Since the discovery period does not expire until June 16, 2008, it is respectfully submitted that the Seymour Defendants be given the opportunity to conduct discovery with respect to Mr. Scirica's knowledge and communications concerning the players involved with Belleville Estates. In the absence of further discovery, the Seymour Defendants will be severely prejudiced and unable to adequately respond to the Trustee's

partial summary judgment motion seeking to compel a forfeiture of Mr. Seymour's ownership interest in Belleville Estates, or to determine the value of such interest and that of Angela Farinola's bankruptcy estate.

As previously mentioned, the Trustee has filed separate adversary proceedings against Walter Hanley III, Esq. and Joseph Scirica, each of whom was involved in critical transactions involving Belleville Estates. The Seymour Defendants intend to depose both Mr. Hanley and Mr. Scirica in an effort to further develop facts that are relevant to the issues raised in the Trustee's motion for partial summary judgment. The discovery end date in this Adversary Proceeding is June 16, 2008.

In particular, with regard to Mr. Hanley there are critical issues that need to be explored relative to his understanding of what the parties' intent was in forming Belleville Estates and in capitalizing the company. The gravamen of the plaintiff's motion is a valuation of the members' capital accounts, but the Operating Agreement drafted by Mr. Hanley and advanced by the Trustee does not even define either member's capital account. In addition, a 2002 federal income tax return for Belleville Estates presumably prepared by Mr. Hanley and produced by the Trustee in pretrial discovery initially identifies Angela Farinola's capital account as \$137,500 and Mr. Seymour's capital account as \$112,500. A subsequent 2003 federal income tax return for Belleville Estates, also presumably prepared by Mr. Hanley and produced by the Trustee in pretrial discovery, shows that the numbers appearing next to each member's capital account were "crossed out" so that Angela Farinola's capital account was increased to \$248,500 while Mr. Seymour's capital account was reduced to only \$1,500. The information appearing on these tax returns creates genuine issues of material fact with regard to the capitalization of Belleville Estates that need to be further explored and developed in pretrial discovery.

As mentioned in the Preliminary Statement, supra, Mr. Hanley's deposition had been previously noticed by the Seymour Defendants on July 12, 2007. *See* Exhibit L to Reiser Cert. Counsel agreed to postpone the deposition at the request of Hanley's counsel. Close to the same time period, in the latter part of June 2007, the Trustee filed the Hanley Adversary Proceeding which the Seymour Defendants thereafter moved to consolidate with this and other related adversary cases. Then, the Hanley defendants issued several depositions subpoenas, and filed a motion for summary judgment against the Trustee. The parties agreed to postpone the depositions subpoenaed by Hanley pending the outcome of his summary judgment motion, which was recently denied on April 7, 2008.

Most recently, the Court granted Mr. Hanley leave to file a Third Party Complaint against Harry Seymour. Thus, there will be additional litigation between Mr. Hanley and Mr. Seymour which involves overlapping questions over the same transactions that the Trustee is litigating here with the Seymour Defendants. It is particularly worth mentioning here that in the Hanley Adversary Proceeding the Trustee takes the position that UMCC did not receive any benefit from the over \$300,000 in funds deposited into the Hanley firm's trust account, the majority of which was disbursed to the Township of Belleville to enable Belleville Estates' acquisition of real estate. In opposing the Hanley defendants' summary judgment motion, the Trustee emphasized the timing of substantial payments that UMCC received from Hobby World shortly before UMCC transferred substantial funds to the Hanley firm's trust account for the purpose of financing the acquisition of property by Belleville Estates. (Trustee's Counterstatement in the Hanley Adversary Proceeding, at ¶¶ 42-53). Yet in the Seymour case, the Trustee sees fit to take the position that these very same funds siphoned from UMCC through the Hanley firm's trust account should be counted toward Angela Farinola's capital contribution in

Belleville Estates. The Trustee's conflicting positions most certainly create genuine issues of material fact regarding the propriety of Angela Farinola's actions in using UMCC funds to finance her personal obligations to Belleville Estates.³

Mr. Scirica's deposition is also crucial to several of the factual issues raised in the Trustee's motion for partial summary judgment. Mr. Scirica, who is Lenny Farinola's brother-in-law, is likely to have communicated with Mr. Hanley, Lenny Farinola and Angela Farinola regarding the formation of Belleville Estates, its capitalization, Belleville Estates acquisition of the real estate, and other related issues. Since the discovery period has yet to expire, it is respectfully submitted that the Seymour Defendants be given the opportunity to conduct discovery with respect to Mr. Scirica's knowledge and communications concerning the players involved with Belleville Estates.

In the absence of further discovery, the Seymour Defendants will be severely prejudiced and unable to adequately respond to the Trustee's partial summary judgment motion seeking to compel a forfeiture of Mr. Seymour's ownership interest in Belleville Estates, or to determine the value of such interest and that of Angela Farinola's bankruptcy estate.

B. Extrinsic evidence to the operating agreements of Belleville Estates demonstrates that its Members never intended to strictly abide by all of its terms.

In looking to substance rather than form, equity views the parties' intentions as "the dominant test for evaluating the legal effect of a particular instrument." Bruen v. Switlik, 185 N.J. Super. 97, 103 (App. Div. 1982), certif. denied, 91 N.J. 539 (1983)(other citations omitted). As noted by one New Jersey court:

The courts of equity in New Jersey, and elsewhere, have never hesitated to look behind the form of a particular corporate transaction and find that it

³ The doctrine of judicial estoppel precludes a party from arguing a position inconsistent with a position that the party took in a previous proceeding. See Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 419 (3rd Cir. 1988), cert denied, 488 U.S. 967, 109 S.Ct. 495 (1988).

constituted a corporate merger, if in fact and in substance it was a merger, regardless of its deceptive outward appearance.

Applestein v. United Board & Carbon Corp., 60 N.J. Super. 333, 348-349 (Ch. Div. 1960, aff'd o.b., 33 N.J. 72 (1960).

Generally, our courts will “consider all of the relevant evidence that will assist [them] in determining the intent and meaning of [a] contract.” Conway v. 287 Corp. Ctr. Assocs., 187 N.J. 259, 269 (2006).

“This is so even when the contract on its face is free from ambiguity. The polestar of construction is the intention of the parties to the contract as revealed by the language used, taken as an entirety; and, in the quest for the intention, the situation of the parties, the attendant circumstances, and the objects they were thereby striving to attain are necessarily to be regarded. The admission of evidence of extrinsic facts is not for the purpose of changing the writing, but to secure light by which to measure its actual significance. Such evidence is adducible only for the purpose of interpreting the writing—not for the purpose of modifying or enlarging or curtailing its terms, but to aid in determining the meaning of what has been said. So far as the evidence tends to show, not the meaning of the writing, but an intention wholly unexpressed in the writing, it is irrelevant. The judicial interpretative function is to consider what was written in the context of the circumstances under which it was written, and accord to the language a rational meaning in keeping with the expressed general purpose.”

[*Ibid.* (quoting Atl. N. Airlines v. Schwimmer, 12 N.J. 293, 301-02 (1953)).]

When examining the extrinsic evidence to interpret a contract, a court may consider “ ‘the particular contractual provision, an overview of all the terms, the circumstances leading up to the formation of the contract, custom, usage, and the interpretation placed on the disputed provision by the parties' conduct.’ ” *Ibid.* (quoting Kearny PBA Local # 21 v. Town of Kearny, 81 N.J. 208, 221 (1979)). “ ‘Semantics cannot be allowed to twist and distort [the words'] obvious meaning in the minds of the parties.’ Consequently, the words of the contract alone will not always control.” *Id.* at 269-70 (quoting Schwimmer, supra, 12 N.J. at 307).

In actions brought by the trustee as successor to the debtor's interest under 11 U.S.C. § 541, the “ ‘trustee stands in the shoes of the debtor and can only assert those causes of action possessed by the debtor. [Conversely,] [t]he trustee is, of course, subject to the same defenses as could have been asserted by the defendant had the action been instituted by the debtor.’ ” Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 885 F.2d 1149, 1154 (3rd Cir.1989) (internal citation omitted).

Here, notwithstanding the terms of the Operating Agreements⁴ both members of Belleville Estates agreed that Mr. Seymour’s capital contribution would include his time and expertise in the construction industry. For example, at her deposition Angela Farinola explained that her understanding of Mr. Seymour’s financial contribution to Belleville Estates was, as follows:

In the beginning it would be his knowledge of the business and what we were going to do. And then in the end when it would be over, that whatever monies were put in by UMCC, being United Mechanical, would be given back to the company. And through the profits of the sales, we would first pay back whatever monies my company put out, and then pay the bills and then divide it. We didn’t come to an agreement of a percentage, but divide it accordingly, whatever the profits were.

(Exhibit A to Reiser Cert., Tr. 54, L. 23 to Tr. 55, L 3). This admission by Angela Farinola is consistent with Mr. Seymour’s position, to wit:

It was expressly understood between Angela Farinola, Lenny Farinola and I that my role in Belleville Estates would be to supervise and manage the entire development of the Property, and that my capital contribution would include my time and expertise.

Seymour Cert., at ¶ 5.

The Trustee, standing in Ms. Farinola’s shoes, is consequently bound by Ms. Farinola’s understanding. Since Ms. Farinola was not expecting Mr. Seymour to make a cash contribution to Belleville Estates, thus demonstrating her intent not to be bound by

⁴ Both Operating Agreements at issue contain the same provisions for capital contributions. So for purposes of this analysis, it is not necessary for the Court to make a determination on which of the 2 Operating Agreements is enforceable.

the Operating Agreement(s), then the Trustee cannot insist on strict adherence to its terms in her efforts to compel either a forfeiture of Mr. Seymour's ownership interest or a valuation based on his actual cash contributions.

Assuming *arguendo* that this Court is inclined to summarily enforce the Trustee's version of the Operating Agreement as it is written and regardless of the parties' intentions, then it should not escape the Court's attention that the Operating Agreement does not specify what each Member's capital contribution was. In fact, the amount is left blank next to each Member's name. Further, it is undisputed that Ms. Farinola never contributed a single dime in capital to Belleville Estates. All of the checks which the Trustee relies upon in arguing that Ms. Farinola's capital contribution should be valued at \$263,362.40 were drawn on the checking accounts of UMCC, which is not a member of Belleville Estates. In other words, the Trustee merely assumes that funds coming from a non-member (UMCC) should be attributed to Angela Farinola's capital account. Most respectfully, it would be inappropriate to draw such a conclusion here considering that the major creditor in this case (Hobby World) has alleged that UMCC and the Farinolas misappropriated over several million dollars pertaining to the construction project in Little Ferry which has been referenced in various pleadings as the "Hobby World Project".⁵

Taking the Trustee's arguments to their most logical conclusion, this Court would have to ignore the fact that Angela Farinola misappropriated over \$200,000 from UMCC so that she could satisfy a personal obligation to fund her capital account for Belleville Estates. A party who misappropriates corporate funds to pay a non-company personal debt exposes the party to criminal liability. See In re Imbriani, 149 N.J. 521, 524-525

⁵ In fact, this Court can also take judicial notice of the criminal guilty plea entered by Leonard Farinola in the United States District Court for the District of New Jersey for conspiracy to commit mail fraud in Case No.: 2:03-cr-136, Doc. No. 9.

(1997). The Trustee, standing in Ms. Farinola's shoes, must explain to this Court why funds diverted from UMCC's major creditor Hobby World and used by Ms. Farinola to satisfy her personal obligations as a Member of Belleville Estates should be counted towards Ms. Farinola's capital account with Belleville Estates. Since the Operating Agreement which the Trustee relies upon does not identify UMCC as a member of Belleville Estates, the Trustee clearly has not met her burden here on this material factual dispute.⁶

C. Defendant Harry Seymour performed his obligations as a co-member of Belleville Estates in good faith

In New Jersey the covenant of good faith and fair dealing is contained in all contracts and mandates that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract."

Sons of Thunder v. Borden, Inc., 148 N.J. 396, 420 (1997); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130 (1965).

The implied covenant of good faith and fair dealing has evolved to the point where it permits the adjustment of the obligations of contracting parties in a number of different ways. Some cases have focused on a plaintiff's inadequate bargaining power or financial vulnerability in order to avoid an inequitable result otherwise permitted by a contract's express terms ... Other decisions have revolved around the expectations of the parties, generating a need to contrast those expectations with the absence of any express terms. See e.g., Onderdonk v. Presbyterian Homes, 85 N.J. 171 (1981).

Seidenberg v. Summit Bank, 348 N.J. Super. 243, 254 (App. Div. 2002).

Here, a genuine issue of material fact exists as to whether the Trustee has breached the contractual covenant of good faith and fair dealing through her self-serving actions in calling for a capital contribution post sale of Belleville Estates' only asset

⁶ As previously mentioned, in successfully defeating summary judgment in the Hanley Adversary Proceeding the Trustee herself has raised concerns about the propriety of the Hanley defendants' actions in running over \$300,000 through their firm's trust account to pay for personal obligations of the Farinolas.

notwithstanding the liquidation mode of the company and the fact that Mr. Seymour's 45% interest is tied up in escrow pursuant to a prior Court Order, and ignoring Mr. Seymour's request for a special meeting of the members of Belleville Estates made several months earlier to discuss tax foreclosure issues and the marketing and sale of the LLC's real estate (*see* Exhibit J to Reiser Cert.). Mr. Seymour agreed to cooperate with the Trustee early on in these proceedings by signing a letter agreement authorizing the Trustee to take all such reasonable measures necessary to market and sell the Belleville Estates Property. (See Exhibit 97 to Seymour Cert.). In return for his cooperation and willingness to allow the Trustee to assume the duties of marketing and selling Belleville Estates' only asset, she now seeks to unfairly burden Mr. Seymour by holding "hostage" his interest in the net sale proceeds from the sale of the Belleville Estates' Property while at the same time trying to compel a forfeiture of his interest by demanding that he contribute money to capitalize a company whose charter has been revoked!

Additionally, there is a genuine issue of material fact concerning Mr. Seymour's good faith reliance on the mutual understanding between him and Ms. Farinola that his value as a member of Belleville Estates would consist of his time and expertise devoted to developing the Belleville Estates Property. In furtherance of their mutual understanding, Mr. Seymour devoted a significant amount of his time communicating and assisting attorneys for Belleville Estates in completing zoning board applications and attending meetings before the local zoning board, preparing construction budgets, meeting with engineers, architects, planners and surveyors, pursuing financing for the project, etc., all of which he documents in explicit detail in the Seymour Cert. Conversely, the motion record submitted by the Trustee is virtually devoid of any proof

of what efforts Ms. Farinola made, if any, to advance the development of the Belleville Estates Property.

D. There are genuine issues of material fact regarding the validity of the Seymour Document based on Angela Farinola's admissions that she permitted her husband Lenny Farinola to sign her name on corporate documents, and that Lenny Farinola did not want to be involved in any businesses because of tax problems with the IRS

The outcome of this disputed document depends upon the credibility of the witnesses involved, and thus requires an evidentiary hearing. The Seymour Defendants question whether the determination of this document's validity is necessary given that the LLC's only asset has been sold and the 45% ownership interest allotted to Mr. Seymour never changed; only the membership changed from him to Seymour Holding, Inc. At this point the parties are merely left to dispute the distribution of the proceeds of the sale. Litigating which Operating Agreement is valid is immaterial to the distribution that either member is entitled to receive.

In any event, while the Seymour Defendants readily admit that Angela Farinola did not sign the Restated Operating Agreement (or the Seymour Document as it is labeled in the Trustee's moving papers), the Seymour Defendants maintain that Lenny Farinola executed this document with his wife's consent. Despite Angela Farinola's denial of this accusation, she nevertheless conceded at her July 11, 2007 deposition that she frequently permitted her husband to sign documents on her behalf. (Exhibit A to Reiser Cert., Tr. 17, L 6 to Tr. 22, L 24). Mr. Seymour also certifies that Angela Farinola permitted Lenny Farinola to sign her initials "AF" to UMCC checks. (See Exhibit 4 to Seymour Cert.). In point of fact, the initials "AF" appear on UMCC's bank account authorizations. (See Exhibits B-d to Reiser Cert.)

Given that Lenny Farinola essentially defrauded everyone who came in his path, has pleaded guilty to committing federal crimes, and perjured himself before this Court in

lying about his band equipment when testifying at his creditors' meeting, there certainly exist genuine issues of material fact as to whether Mr. Farinola signed the Seymour Document with his wife's consent.

POINT II

THE TRUSTEE, WHO STANDS IN THE SHOES OF ANGELA FARINOLA, CANNOT TERMINATE THE SEYMOUR DEFENDANTS' OWNERSHIP INTEREST IN BELLEVILLE ESTATES, LLC PREMISED ON A LACK OF CAPITAL CONTRIBUTION FROM THE SEYMOUR DEFENDANTS BECAUSE ANGELA FARINOLA MADE NO CAPITAL CONTRIBUTIONS TO BELLEVILLE ESTATES.

A bankruptcy estate succeeds only to the nature and the rights of property interest that the debtor possessed pre-petition. Integrated Solutions, Inc. v. Service Support Specialties, Inc., 124 F.3d 487, 495 (3rd Cir. 1997). It is well recognized that bankruptcy courts are courts of equity. *Pepper v. Litton*, 308 U.S. 295, 304, 60 S.Ct. 238, 84 L.Ed. 281 (1939) ("...a bankruptcy court is a court of equity at least in the sense that in the exercise of the jurisdiction conferred upon it by the act, it applies the principles and rules of equity jurisprudence ."). Forfeitures of property interests are generally labeled as an equity remedy of last resort. As it is often said, "equity abhors a forfeiture." Therefore, courts will strictly construe forfeiture clauses against the parties seeking their enforcement. See e.g., Walle v. Board of Adj. of Twp. Of So. Brunswick, 124 N.J. Super., 244 (App. Div. 1973).

Here, Angela Farinola unequivocally testified, and the documents produced by the Trustee confirm, that she made no capital contribution to Bellville Estates pre-petition. Whatever prepetition capital contributions made by UMCC, which is not a defined member of Belleville Estates under either Operating Agreement, should not be attributable to Angela Farinola's capital account in Bellville Estates, especially considering that the Trustee herself is heard to complain about the very same conduct in

the Hanley Adversary Proceeding. In reviewing the Trustee's opposition to summary judgment in the Hanley Adversary Proceeding, it is hard to ignore the nexus that she makes between the Farinolas and UMCC misappropriating over \$2 million dollars on the Hobby World Project and the delivery of over \$300,000 to Mr. Hanley's law firm to fund the acquisition of the Belleville Estates real estate. Surely, the UMCC Funds which the Trustee claims should be considered capital contributions from Angela Farinola were part and parcel of the funds which Hobby World claims were misappropriated.

It would also be unfair to terminate Mr. Seymour's 45% ownership interest in Belleville Estates based on the Trustee's self-serving demand made on December 5, 2007, well after LLC's only asset was sold and despite the LLC having no ongoing business operations. Furthermore, the company's charter was revoked effective March 8, 2008. Mr. Seymour is willing to make his pro rata post-petition contribution from the funds which the Trustee is holding in escrow pursuant to the Court's October 1, 2007 Order, and it is respectfully submitted that such a remedy would level the playing field and produce a just result that is fair and equitable. Especially considering that early on in the main bankruptcy case, Mr. Seymour consented to allowing the Trustee to market and sell the Belleville Estates property. The Trustee took it upon herself to make certain expenditures toward Belleville Estates without consulting Mr. Seymour and without asking for any contribution from him until well after the property was sold at auction.

POINT III

THE SEYMOUR DEFENDANTS SHOULD BE GRANTED LEAVE TO FILE AN AMENDED COUNTERCLAIM

As stated in the Preliminary Statement, supra, the Seymour Defendants must concede that the Trustee's analysis under Fed. R. Bankr. P. 7013, Fed. R. Civ. P. 12(b)(6) and Fed. R. Civ. P. 12(c) is correct – that the Seymour Defendants' Counterclaim for

recovery of approximately \$119,000 in unpaid invoices from UMCC fails to state a claim upon which relief may be granted insofar as the Trustee is not an “opposing party” to such a claim.

However, Fed. R. Bankr. P. 7015, which incorporates Fed. R. Civ. P. 15, allows a party to seek leave of Court to file amended and supplemental pleadings. Pursuant to Fed. R. Civ. P. 15(a) a party wishing to amend a pleading must seek leave of the court to do so. Leave to amend a pleading “shall freely be granted when justice so requires”. “Generally, the moving party ought to test its claim on the merits, if the underlying facts and circumstances may be a proper subject for relief”. Foman v. Davis, 371 U.S. 178 (1962). Motions to amend should only be denied where there is a finding of “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed undue prejudice of the opposing party by virtue of allowance of the amendment, [or] futility of amendment”. *Id.* Discretion of the court must be analyzed with considerations of prejudice to the non-moving party. Prejudice is undue where the opponent shows it would be unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered. Harrison Beverage Co. v. Dribeck Importers, Inc., 133 F.R.D. 463, 468 (D.N.J. 1990). It is improper to deny leave to amend if the proposed amendment is not clearly futile. *Id.*

The claims set forth in Defendant’s Counterclaim are more appropriately tied to the issue of determining the value of Mr. Seymour’s capital account with Belleville Estates. Time limitations imposed on counsel in responding to the Trustee’s extensive and detailed summary judgment motion pleadings did not allow for the preparation of a cross-motion for leave to file an amended Counterclaim, which must also include a copy of the proposed amendment. Therefore, the Seymour Defendants reserve their right to

seek such leave either at the hearing date for this summary judgment motion, or by formal motion if the Court so requires.

CONCLUSION

For the foregoing reasons and authorities cited, the Seymour Defendants respectfully submit that the Trustee has not met her burden of proof to establish the lack of genuine issues of material fact justifying an award of partial summary judgment on those counts of her Amended Complaint relating to Mr. Seymour's interest in Bellville Estates, and the validity of the Restated Operating Agreement of Belleville Estates. The Seymour Defendants concede that the Trustee has met her burden with respect to dismissing the Seymour Defendants' Counterclaim. However, the Seymour Defendants reserve their right to request leave to amend their Counterclaim either at the hearing or by formal motion.

Respectfully submitted,

LOFARO & REISER, L.L.P.
Attorneys for Defendants, Harry Seymour,
Kathleen Seymour, Seymour Holding, Inc,
and Seymour Building, Inc.

By: /s/ Glenn R. Reiser
Glenn R. Reiser

Dated: April 14, 2008

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Chapter 7 Trustee

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW JERSEY**

In re:

Leonard J. and Angela A. Farinola and
United Mechanical Construction Co., LLC,

Debtors.

Geraldine E. Ponto, Chapter 7 Trustee for the
estates of Leonard J. and Angela A. Farinola and
United Mechanical Construction Co., LLC,

Plaintiff,

v.

Walter Hanley, III, Esq. And Fuhro Hanley &
Beukas, LLP, as Successor to Fuhro & Hanley,

Defendants.

Jointly Administered Under
Case No. 05-29714 (KCF)

Chapter 7

Adv. Proc. No. 07-1867 (KCF)

**THE TRUSTEE'S COUNTERSTATEMENT IN OPPOSITION TO DEFENDANTS'
LOCAL RULE 56.1 STATEMENT OF UNDISPUTED FACTS**

In opposition to defendants' motion for summary judgment, Geraldine E. Ponto, chapter 7 Trustee (the "Trustee") for the estate of United Mechanical Construction Co., LLC ("UMCC"), by her attorneys Gibbons P.C., submits this counter-statement to defendants' Local Rule 56.1 Statement of Undisputed Facts ("Defendants' 56.1 Statement"). The Trustee does not presently

EXHIBIT A

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dispute the facts set forth at paragraphs numbered 1-12, 14-18, 20-22, 24-25, 27-28, 30-31, 33-34, for the purposes of her opposition to this motion, although they are not otherwise admitted. The Trustee submits that the alleged facts set forth at paragraphs 16, 19, 26, 29, 32 and 35 are disputed for the reasons set forth in her brief submitted herewith, which relies in part on the facts set forth in this Counter-statement as follows:

1. In 2000, Walter Hanley, III, Esq. (“Hanley”) formed Belleville Estates,¹ LLC, for Angela Farinola and Joseph Scirica. See transcript of Joseph Scirica’s testimony (“Scirica Tr. at”) given at a deposition on June 20, 2005 in the case of United Mech. Const. Co. v. Ocean Church Found., et al., Superior Court of New Jersey, Bergen County, Law Div., Doc. No. BER-L-2584-03 (the “State Court Litigation”) at 127:15-128:7.²

2. Hanley is the registered agent of Belleville Estates. (Conlan Cert., Exh. B, ¶ 3 Belleville Estates Certificate of Formulation)

3. In June of 2001, Belleville Estates acquired real property in Belleville New Jersey from V.J. Valley Corp. See Deed dated June 1, 2001 (“Deed”), attached to the Conlan Cert. as Exh. C.

4. Hanley acted as the attorney for both Belleville Estates, (Conlan Cert., Exh. A, Scirica Tr. 134:13) and V.J. Valley Corp. and prepared the deed conveying the real property in consideration for \$250,000. (Hanley Answer, ¶ 21; Conlan Cert., Exh. C, Deed)

¹ All capitalized terms not defined herein shall have the meaning ascribed to such terms in the Trustee’s Memorandum of Law filed concurrently herewith in support of the Trustee’s Opposition.

² A copy of the relevant pages of the Scirica Tr. is attached to the Certification of Mark B. Conlan (“Conlan Cert.”) filed concurrently herewith as Exh. A.

5. Joseph Scirica executed the deed as the President of the grantor, V.J. Valley Corp. (Hanley Answer, ¶ 22; see also Conlan Cert., Exh. C, Deed)

6. Hanley certified the grantor's signature in the transfer between V.J. Valley and Belleville Estates. (Conlan Cert., Exh. C, Deed)

7. Scirica is a client of Hanley's. Hanley Aff. ¶ 7.

8. Hanley prepared an agreement dated January 1, 2003, entitled the "Belleville Estates, L.L.C. Restated Operating Agreement" (the "Restated Operating Agreement"). See Hanley Answer, ¶ 28; see also transcript of Angela Farinola's testimony given at a deposition on July 11, 2007 ("A. Farinola Tr. at ___") at 48:20 to 49:11.³

9. In the Restated Operating Agreement, Angela Farinola was designated as the Managing Member of and 55% interest holder, and Harry Seymour was designated as the other member and 45% interest holder in Belleville Estates. (Conlan Cert., Exh. E, Restated Operating Agreement, ¶¶ 3, 8(a))

10. Hanley concurrently represented A. Farinola and H. Seymour as the members of Belleville Estates with respect to their respective rights and interests in Belleville Estates and the preparation and execution of the Restated Operating Agreement. (See transcript of Jose Carballo's testimony given at a deposition in the State Court Litigation on April 20, 2005 (Carballo Tr. at ___") at 110:22-23)⁴; Conlan Cert. Exh. C, A. Farinola Tr. at 51:9-11)

11. Also in 2003, approximately two years after Valley Corp. conveyed the Belleville Property to Belleville Estates, Hanley prepared an agreement dated May 1, 2003, between Belleville Estates and Scirica entitled the Limited Liability Company Purchase Agreement and

³ A copy of the relevant pages of the A. Farinola Tr. is attached to the Conlan Cert. as Exh. D.

⁴ A copy of the relevant pages of the Carballo Tr. is attached to the Conlan Cert. as Exh. F.

Memorandum of Closing (the "Purchase Agmt."), pursuant to which Belleville Estates purportedly acquired a 30% interest in Belleville Estates from Scirica for \$75,000. (Conlan Cert. Exh. G, Purchase Agmt., ¶ 1)

12. Hanley represented Scirica as seller and Belleville Estates as purchaser with respect to a buyout of Scirica's supposed 30% interest in Belleville Estates. (Conlan Cert., Exh. A, Scirica Tr. 134:4-13, Exh. C, A. Farinola Dep. at 120:17-20; see also Hanley Answer, ¶ 38; Conlan Cert., Exh. H (Note) and Exh. I (Mortgage))

13. The Purchase Agreement provided that in exchange for Scirica's sale of his purported 30% interest in Belleville Estates to Belleville Estates, Scirica would receive a promissory note made by Belleville Estates in the amount of \$75,000. (Conlan Cert., Exh. G, ¶ 2) Hanley also prepared this Promissory Note, dated May 9, 2003 (the "Note"), in favor of Scirica, which was signed by the two members of Belleville Estates. See Note attached to the Conlan Cert. as Exh. H.

14. Pursuant to the Promissory Note, Belleville Estates purportedly incurred indebtedness to Scirica, individually, for a "loan" in the principal amount of \$75,000. Id.

15. Hanley signed the Note and Mortgage between Scirica and Belleville Estates, while representing both of them. (Conlan Cert., Exh. A, Scirica Tr. 134:4-13; Exh. D, A. Farinola Tr. at 120:17-20; see also Hanley Answer, ¶ 38; Conlan Cert., Exh. H (Note) and Exh. I (Mortgage)).

16. The indebtedness under the Note was secured by a mortgage dated May 9, 2003 on Belleville Estates' sole asset, the Belleville Property (the "Mortgage").

17. Hanley prepared the Mortgage. (Hanley Answer, ¶ 38; Conlan Cert., Exh. I)

18. Hanley represented both Scirica and Belleville Estates with respect to the purported transactions described in the Note and Mortgage. See Conlan Cert., Exh. H (Note) and Exh. I (Mortgage).

19. Hanley was involved with the Belleville Estates development, with numerous meetings with the project's architect, with Leonard Farinola and with Seymour. (Conlan Cert., Exh. F, Carballo Tr. at 111:1 - 112:10.)

20. Approximately four months after Hanley handled the conveyance of the Belleville Property to Belleville Estates and formed Belleville Estates, Hanley formed UMCC as a New Jersey limited liability company, on October 17, 2001. See UMCC Certificate of Formation attached to the Conlan Cert. as Exh. J.

21. The Certificate of Formation for UMCC states that Hanley is UMCC's Registered Agent. Id., ¶ 3.

22. Angela Farinola was the sole and managing member of UMCC from the date it was formed until UMCC's Petition Date. (Hanley Aff., ¶¶ 9, 11, 13, 15, & 18)

23. UMCC was engaged by Hobby World Development, Inc. ("Hobby World") to construct a new 38,750 square foot building, starting in the spring of 2002, located at 120 Industrial Avenue, Little Ferry, New Jersey ("Hobby World Project"), at an estimated cost of approximately \$4,500,000. (See AIA Contract (as defined below) attached to the Conlan Cert. as Exh. K, ¶ 8.1)

24. UMCC functioned as a subcontractor on the Hobby World Project without a written contract from the spring of 2002 until Hobby World suspended construction in August, 2002. See transcript of Michael Graf's testimony given at a deposition on September 7, 2007 ("Graf Tr. at ___") attached to the Conlan Cert. as Exh. L, at 72:21-73-9, 75:2-12.

25. On or about October 15, 2002, Hobby World entered into an American Institute of Architects contract with UMCC for the estimated contract price of approximately \$2,500,000, for completion of the construction work on the Hobby World Project (“AIA Contract”). (Conlan Cert., Exh. K)

26. Under the AIA Contract, UMCC became the general contractor on the Hobby World Project. See id.

27. On or about the time UMCC entered into the AIA Contract and thereafter, UMCC failed to pay subcontractors. (Conlan Cert., Exh. L, Graf Tr. at 152:3-12)

28. Angela Farinola had no prior experience in the construction field, in managing a construction company or with performing as a general construction contractor on a project of this size. (Conlan Cert. Exh. M, Transcript of testimony given at the 341(a) meeting of creditors held on September 23, 2005 (“9/23 Tr. ___”), at 81:4 - 83:3)

29. The Hobby World Project was never completed by UMCC. (Conlan Cert., Exh. L, Graf Tr. at 121 - 125.13)

30. Hobby World is the principal creditor of the UMCC estate. See UMCC’s Schedule F, filed along UMCC’s petition for relief pursuant to Fed. R. Bankr. P. 1007; see also proof of claim filed by Hobby World Dev., Inc. in the amount of \$2,000,000, identified on the Claims Register maintained by the Clerk of the Court as Claim No. 15-1.

31. On July 17, 2000, Hanley incorporated Fresco Air Company, Inc. (“Fresco Air”) as a New Jersey corporation. A copy of the Fresco Air Certificate of Formation is attached to the Conlan Cert. as Exh. N.

32. The Fresco Air Certificate of Incorporation states that Hanley is also Fresco Air’s registered agent. Id.

33. The Certificate of Incorporation for Fresco Air shows that Leonard Farinola is its sole director.

34. Fresco Air was in the heating and air conditioning business and has ceased business operations. Conlan Cert., Exh. M, 9/23 Tr. at 54:12-16.

35. West Milford Estates, L.L.C. (“West Milford Estates”), was formed as a New Jersey limited liability company, on January 17, 2003, by Pasquale F. Giannetta, Esq., an attorney who maintains an office with Hanley.⁵ See Hanley Answer, ¶ 51.

36. West Milford Estates subsequently purchased an undeveloped parcel of real property located on Papscoe Road in West Milford, New Jersey (the “West Milford Property”) from Leonard Farinola, individually. Hanley Answer, ¶ 52.

37. Hanley prepared an agreement dated February 4, 2003, entitled “Operating Agreement for West Milford Estates, L.L.C.” (“West Milford Operating Agreement”).⁶ Id., ¶ 53.

38. Angela Farinola signed the West Milford Operating Agreement as the sole and managing member of West Milford Estates. Conlan Cert., Exh. P, West Milford Operating Agreement at 6.

39. The West Milford Operating Agreement states that Hanley is the registered agent for West Milford Estates. See id., ¶ 4.

40. Hanley concurrently represented L. Farinola, West Milford Estates and, indirectly, Angela Farinola as its sole and managing member in the conveyance of the West

⁵ A copy of the West Milford Estates Certificate of Formation is attached to the Conlan Cert. as Exh. O.

⁶ A copy of the West Milford Operating Agreement is attached to the Conlan Cert. as Exh. P.

Milford Property from Leonard Farinola to West Milford Estates. See West Milford Estates HUD-1 Settlement Statement dated February 4, 2003, attached to the Conlan Cert. as Exh Q.

41. Throughout the period from July 17, 2000 through May 9, 2003, when Hanley and his firm were forming and/or representing, as applicable, Valley Corp., Belleville Estates, West Milford Estates, Fresco Air, UMCC and Scirica, they also represented Angela Farinola (the managing member of Belleville Estates, West Milford Estates and UMCC) and/or Leonard Farinola (the sole director and shareholder of Fresco Air), individually, in numerous real property transactions. (See, e.g., HUD-1 Uniform Settlement Statements attached to the Conlan Cert. as Exh. Q for the real properties located at 211 Cliff Street, Cliffside Park, N.J.; 44 Main Street, Lodi, N.J.; 648 Prospect Avenue, Fairview, N.J.; 700 Sewall Avenue, Asbury Park, N.J.; 197 Baystream Drive, Toms River, N.J.; 705 Sewall Avenue, Asbury Park, N.J.; 930 Bangs Avenue, Asbury Park, N.J.; and 345 Rumson Road, Little Silver, N.J. (collectively “HUD Statements”))

42. Between the dates of March 14, 2002 to May 29, 2003, UMCC made payments to the Fuhro, Hanley & Beukas attorney trust account in the total amount of \$305,728.68. See Schedule of transfers to Fuhro, Hanley & Beukas’ attorney trust account attached to the Complaint as Exh. B.⁷

43. The Trustee demanded an accounting of UMCC’s funds paid to Hanley’s firm. By letter dated October 25, 2006,⁸ Fuhro Hanley & Beukas provided a letter response as follows:

⁷ Between the dates of October 2, 2002 and January 19, 2004, Angela Farinola caused UMCC to make certain payments directly to Fuhro Hanley & Beukas in the total amount of \$29,001.32. See Schedule of transfers to Fuhro, Hanley & Beukas attached to the Complaint commencing this adversary proceeding as Exh. A. Hanley’s summary judgment motion does not address the payments from UMCC for his firm’s counsel fees.

⁸ A copy of the October 25, 2006 letter from Patrick Minter, Esq., is attached to the Conlan Cert. as Exh. R.

- (a) By Check No. 310, dated May 17, 2002, UMCC transferred \$20,000 to the Fuhro Hanley & Beukas attorney trust account. The firm subsequently issued checks from its attorney trust account during the period from May 18, 2002 through July 2, 2002 to various third parties in the total amount of \$20,000 in connection with personal real estate transactions of Angela Farinola, including 700 and 705 Sewall Avenue, Asbury Park, listed above, for which Hanley acted as Angela Farinola's attorney;
- (b) By Check No. 749, dated November 19, 2002, UMCC transferred \$10,000 to the Fuhro Hanley & Beukas attorney trust account. Subsequently, by Check No. 707, dated December 27, 2002, UMCC transferred another \$10,000 to the Fuhro Hanley & Beukas trust account. The firm subsequently issued (i) a check in the total amount of \$19,233.90 from its trust account to cover an installment loan payment owed by Fresco Air for a light duty truck, and (ii) a check in the amount of \$766.10, made payable to Leonard Farinola;
- (c) By Check No. 889, dated January 27, 2003, UMCC transferred \$216,000 to the Fuhro Hanley & Beukas attorney trust account. The memo portion of that check states that it was for "Belleville Settlement" (the "Belleville Settlement"). According to the Fuhro Hanley & Beukas's response, three days after receipt of this check from UMCC, the firm issued Check No. 6537, made payable to the Township of Belleville in the amount of \$215,257.49, in payment of (i) certain tax lien certificates dating from before 1999 when Scirica owned the Belleville Property, which encumbered the Belleville Property in the total amount of \$211,206.61, (ii) then unpaid but current real estate taxes owed on the Belleville Property in the amount of \$2,258.66, and (iii) water and sewer charges owed on the Belleville Property in the amount of \$1,792.22. Two checks totaling \$1,071.32 were drawn from the proceeds of the Belleville Settlement check and were applied to Fuhro Hanley & Beukas's counsel fees;
- (d) By Check No. 917, dated February 4, 2003, UMCC transferred \$17,250 to the Fuhro Hanley & Beukas attorney trust account. According to the Fuhro Hanley & Beukas response, the firm subsequently issued checks from its attorney trust account during the period from February 4, 2003 through February 20, 2003 to various third parties, in the total amount of \$17,250 in payment for the purchase of the West Milford Property by West Milford Estates from Leonard Farinola, individually;
- (e) By Check No. 375, dated June 19, 2002, UMCC transferred \$30,000 to the Fuhro Hanley & Beukas attorney trust account. With additional funds provided by Joseph Scirica, UMCC's funds were paid out to the Borough of West Paterson Tax Collector to redeem tax sale certificates on property owned by Scirica;
- (f) By Check No. 106, dated May 29, 2003, UMCC transferred \$3,550 to the Fuhro Hanley & Beukas attorney trust account. According to the firm's response, it

subsequently issued checks in the total amount of \$3,550 to the Township of Belleville, New Jersey, on behalf of Belleville Estates in connection with planning board approval for the Belleville property.

44. The largest payment to Hanley from UMCC was \$216,000 by Check No. 889 on January 27, 2003. Hanley Aff. ¶ 14.

45. These funds were paid to the Township of Belleville Tax Collector for the Belleville Property held by Belleville Estates. Id.

46. Smaller portions were paid to the firm itself for its fees and \$13,500 was paid directly to Angela Farinola. Id.

47. UMCC received no value in exchange for any of the transfers set forth above.

48. Within one week of Fuhro Hanley & Beukas making the payments to the Township of Belleville with the proceeds UMCC's January 27, 2003 check, by letter dated February 7, 2003, Hobby World advised UMCC, among other things, that it (i) had paid UMCC approximately \$500,000 for materials that had not been delivered, (ii) demanded copies of receipts and itemized expenses purportedly incurred by UMCC on the Hobby World Project to date, and (iii) further demanded proof of payment to any subcontractors by UMCC. (Conlan Cert., Exh. S)

49. Approximately two weeks after the transfer of the Belleville Settlement check from UMCC to Fuhro Hanley & Beukas, by letter dated February 11, 2003, Hobby World advised UMCC, among other things, that it was concerned about a disbursement in the amount of \$216,000 that was supposed to be used for permit, architecture and engineering expenses on the Hobby World Project and demanded an accounting of UMCC's disbursements. (Conlan Cert., Exh. T)

50. By letter dated February 13, 2003, Hobby World again referenced the \$216,000 payment and demanded proof of payment from UMCC of certain materials and demanded that certain subcontractors be paid. (Conlan Cert., Exh. U)

51. By letter dated March 3, 2003, Hobby World advised UMCC that it was experiencing difficulties with unpaid subcontractors and liens. (Conlan Cert., Exh. V) Hanley received a copy of each of UMCC's letters inquiring about the fate of its funds. (Conlan Cert., Exhs. S, T, U and V)

52. On or about April 9, 2003, Hobby World, believing that it had been defrauded of progress, change order and other payments that had been made to UMCC, as well as construction materials for the Project that were paid for but were unaccounted for, filed certain counterclaims against UMCC, among others, in the State Court Litigation in connection with the Hobby World Project.

53. At least \$305,728 of Hobby World's money was moved out of UMCC, through Hanley's trust account and disbursed among the Farinolas' various business interests and associates. See Complaint Exh. B; Conlan Cert., Exh R, and Hanley Aff.

54. Hanley represented Leonard Farinola and Harry Seymour as well. (Conlan Cert., Exh. F, Carballo Tr. 110:22-23)

55. Angela Farinola kept no records of the disbursements by UMCC on behalf of Belleville Estates beyond its bank statements. (Conlan Cert., Exh. D, A. Farinola Tr. at 18:15-18, 22:25-23:19)

56. Angela Farinola was unable to testify why Scirica received a \$75,000 mortgage and note from Belleville Estates, only that "Walter put this mortgage together, but what he was

owed for, like if he was owed for the property itself or -- I don't know why he was owed that \$75,000." (Id. at 120:17-20)

57. Angela Farinola had no involvement with preparing or reviewing the proposals to Hobby World. (Id. at 84:1-10; 85:15-17)

58. Angela Farinola did not herself sign the AIA contract with Hobby World, rather Leonard Farinola signed her name with her authorization. (Id. at 85:1-17)

59. Ms. Farinola never communicated with Hobby World, or Mr. Graf, its project manager. (Id. at 86:3-8)

60. Angela Farinola worked as a billing manager for an eye doctor, had no construction experience, and no vocational training in any trades. (Conlan Cert. Exh. M, 9/23 Tr. at 81:4 - 83:3)

61. Angela Farinola never inspected the Hobby World construction. (Id. at 171:16 - 172:6)

62. Angela Farinola had no knowledge of what supplies or subcontractors were needed for the Hobby World project. (Id. at 176:25 - 177:1, 177:12-18)

63. Angela Farinola left all negotiations relative to UMCC to others. (Id. at 179:15-16)

64. Hanley was involved at all levels with the Belleville Estates development, reviewing plans and even meeting with and telephoning the architect on numerous occasions. (See Conlan Cert., Exh. F, Carballo Tr. at 108:24 to 109:6, 109:18 to 110:7, 111:10 to 112:10).

65. Hobby World's project manager, Michael Graf visited Hanley's office "many times." (Conlan Cert., Exh. L, Graf Tr. at 52:8-53-3.

66. Hanley prepared the AIA Contract between UMCC and Hobby World for the Hobby World project. (Conlan Cert., Exh. D, A. Farinola Tr. at 124:13-16; Exh. L, Graf Tr. at 53:4-6)

67. Angela Farinola, the sole managing member of UMCC, never spoke to Hanley about the substance of the AIA contract. (Conlan Cert., Exh. D, A. Farinola Tr. at 124:17-19)

68. Hanley represented Hobby World. (Conlan Cert., Exh. L, Graf Tr. at 54:19-22; 57:18-20)

69. Hanley's representation of Hobby World included regulatory work in connection with environmental permits and real estate transactional services. (Id. at 58:20-24, 59:9-18; 60:13-14)

70. UMCC constructed the cement floor of the Hobby World Project four inches too low. (Id. at 99:13-20)

71. Hanley represented Hobby World before the Hackensack Meadowlands Development Commission. (Id. at 101:1-4)

72. Hanley paid off unpaid taxes on the Belleville property, among other things, with the proceeds of the transfer of \$216,000 from UMCC. Conlan Cert., Exh. R, ¶ 5.

73. The \$216,000 payment was called for in the AIA contract prepared by Hanley and intended to cover permitting costs. (Conlan Cert., Exh. L, Graf Tr. at 154:2-11)

74. The Hobby World representative testified that Harry Seymour presented Hobby World with a forged document indicating that the payment had been made. (Id. at 156:14-23).

75. When Hobby World found that no permit had been issued, it had to pay again. (Id. at 154:12-19).

76. Hanley negotiated a dispute over a truck for Leonard Farinola that was compromised with the transfer of UMCC funds to Fresco Air. (Conlan Cert., Exh. W, 10/3/06 from Patrick Minter letter with attachments)

77. Angela Farinola testified that they used UMCC to pay the expenses of Belleville Estates. (Conlan Cert., Exh. D, A. Farinola Tr. 38:2-25)

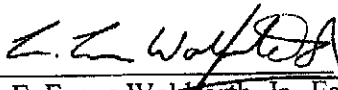
78. Hanley's father was UMCC's accountant (Id. at 86:19 to 87:18), handling all of UMCC's financial reporting (Id. at 121:24 to 123:1), and preparing tax returns for Belleville Estates and Angela Farinola. (Id., at 114:5-9)

79. Hanley's father was the accountant for Fresco Air. (See Conlan Cert., Exh. Y, transcript of Leonard Farinola's testimony given at a deposition on February 5, 2004, at 61:1-2)

80. Scirica did construction work, gratis, on Hanley's house. Conlan Cert., Exh. A, Scirica Tr. 170:23-173:24.

Dated: March 24, 2008
Newark, New Jersey

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