UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
FORT LAUDERDALE DIVISION
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In re: TOUSA, INC., *et al.*, Debtors.	Chapter 11 Cases Case No. 08-10928-JKO Jointly Administered
OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF TOUSA, INC., *et al.*, Plaintiff, v. CITICORP NORTH AMERICA, INC., *et al.*, Defendants.	Adv. Pro. No. 08-01435

THE SECOND LIEN AGENT AND LENDERS'
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Trial in this cause was held from July 13-28, 2009 and August 28, 2009. The Second Lien Agent and Lenders[1] propose the following Findings of Fact and Conclusions of Law[2]:

[1] "Second Lien Agent" refers to Wells Fargo Bank, N.A., solely in its capacity as Successor Administrative Agent for the July 31, 2007 Second Lien Term Loan Credit Agreement (the "Second Lien Loan"). The Second Lien Lenders refer to the list of lending institutions found in Exhibit D of the Joint Stipulated Facts(D.E. 542).

[2] In lieu of providing the Court with a separate post-trial brief in addition to these proposed Findings of Fact and Conclusions of Law, the Second Lien Agent and Lenders refer the Court to their Pretrial Statement (D.E. 495), which is incorporated by reference as if fully set forth herein.

I.
FINDINGS OF FACT

1. The Second Lien Agent and Lenders incorporate by reference paragraphs 1-52, as well as Exhibits A-D, of the Joint Stipulated Facts ("JSF") filed by the parties on July 13, 2009. (D.E. 542).

Proposed Findings Regarding Real Estate Valuation:

2. Real estate valuation is the key to the solvency of both TOUSA, Inc. and the Conveying Subsidiaries[3] (collectively, "TOUSA"), prior to and after the July 31, 2007, transaction (the "Transaction" and the "Transaction Date").[4] TOUSA was a going concern business on the Transaction Date, selling its real estate inventory to homebuyers and acquiring new inventory in the ordinary course of its business. (Trial Tr. 1856:4-14; 1885:10-21). Accordingly, because TOUSA's solvency must be measured as of the Transaction Date for the purposes of this litigation, TOUSA, including its real estate inventory, should be valued as a going-concern, and not on a bulk sale liquidation basis. *See* ¶¶ 161-164 below.

3. On the critical issue of the fair market value of TOUSA's real estate inventory as of the Transaction Date, there is a striking difference in the source, approach and final value conclusions presented by the Plaintiff Official Committee of Unsecured Creditors of TOUSA, Inc. (the "Committee") and the Second Lien Agent and Lenders. *See* ¶¶ 7-21, 45-103 below.

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[3] "Conveying Subsidiaries" refers to those entities listed in Exhibit A of the JSF.

[4] There are three applicable tests for determining solvency for purposes of a fraudulent transfer analysis: (i) whether the debtor was insolvent based on a balance sheet analysis; (ii) whether the debtor would be left with unreasonably small capital after the transaction and (iii) whether the debtor would be able to pay its debts as they become due. 11 U.S.C. ¶ 548(a)(1)(B). The balance sheet analysis, a determination of whether the fair market value of the debtor's assets exceeds the value of its liabilities, is the critical standard in this case due to the nature of TOUSA's corporate structure and financial operations, as confirmed by the evidence put forth by the Committee itself. *See* ¶¶ 109-113 below.

4. One of the Committee's real estate witnesses is an accountant, Amy Benbrook ("Ms. Benbrook"), who ran thousands of pages of budget reports using TOUSA's accounting software to develop "cost-to-complete" data as of the Transaction Date. (Trial Tr. 1457:17 – 1458:19). Ms. Benbrook acknowledged that she was not an appraiser, certified or otherwise, nor a real estate valuation expert, and the Committee did not proffer her as such. (Trial Tr. 1485:4-8; Trial Exhs. 600, 613).

5. Ms. Benbrook acknowledged on cross-examination that she was unaware that the reports she relied upon from the TOUSA accounting system and TOUSA's HSP database were incapable of generating the necessary budget information to justify her analysis because those reports are not "static" in the sense that no reliable budget information "as of" a given date in the past can be generated. (Trial Tr. 1502:16 – 1503:9; 1505:12 – 1506:1; 1510:6 – 1511:19).

6. Following her examination on Day 5 of the trial, Ms. Benbrook generated thousands of pages of additional "comparison reports" from the TOUSA accounting system in an attempt to "corroborate" her initial report. (Trial Tr. 3390:17 – 3391:9; Trial Exhs. 4199-4222). These budget reports are also unreliable and provide no reasonable basis upon which to support the Committee's real estate valuation, provided by Charles Hewlett ("Mr. Hewlett"), who admits that his findings are entirely dependent upon the reliability of the "cost inputs" provided by Ms. Benbrook. (Trial Tr. 860:20 – 861:1).

7. Mr. Hewlett is a real estate "financial feasibility analyst" and is neither an appraiser (let alone a certified appraiser) nor an expert in real estate valuation. (Trial Tr. 591:8-18; 748:23 – 749:19; 849:25 – 850:4). He acknowledged that he did not apply the appraisal methodologies required to be applied by certified appraisers. (Trial Tr. 823:21 – 824:5; 849:11 – 850:4). Mr. Hewlett is not a licensed real estate appraiser in any state. Under Florida law, Mr.

Hewlett would not be permitted to use the term "appraisal" for the valuation results he produced. (Fla. Stat. § 475.612).

8. Mr. Hewlett used the unreliable cost-to-complete data from Ms. Benbrook, thereby making his own analysis unreliable. (Trial Tr. 777:9-15; 860:20 – 861:1; 1535:3-6).

9. Mr. Hewlett also made certain inappropriately pessimistic assumptions about average sales prices and absorption rates (among other things) derived from third party sources he considered "appropriate," but without specifying any methodology to his consideration. (Trial Tr. 606:6 – 607:12; 681:13 – 682:6; 682:16 – 683:18; 684:15 – 685:4; 761:4 – 775:9). He then performed a discounted cash flow analysis ("DCF Analysis") for each community owned by TOUSA. (Trial Tr. 607:4-7).

10. Mr. Hewlett's DCF Analysis assumed that TOUSA would sell its inventory in bulk to competing real estate developers rather than in the normal course of TOUSA's business of selling homes directly to homebuyers. (Trial Tr. 746:19 – 747:18). This assumption effectively produced a liquidation value for TOUSA's real estate inventory – not the going-concern value the Committee claims it presented at trial. This is because TOUSA is entitled to the profit margin generated by homes it sells directly to homebuyers, whereas Mr. Hewlett's approach contemplates that the competing real estate developers would be entitled to the profit margin. (Trial Tr. 2915:12 – 2919:1). Mr. Hewlett's errors were compounded because Ms. Benbrook's analysis (on which he relied) did not generate cost-to-complete values for a competing real estate developer or a purchaser of TOUSA's assets; instead, she provided cost-to-complete values only for TOUSA. (Trial Tr. 1482:20 – 1483:14). Therefore, there is a disconnect between the cost-to-complete values Ms. Benbrook provided and the DCF Analysis advanced by Mr. Hewlett.

11. Not surprisingly, the Benbrook-Hewlett team produced real estate "valuations" far below the expected range for conventional appraisals of a going concern business by certified appraisers, including findings that large tracts of land suitable for residential development and other uses had negative (rounded up to $0) values as of the Transaction Date. (Trial Tr.799:13 – 804:5; 819:2-19; 838:11 – 839:8; Trial Exh. 5401).

12. In sum, the Committee's two purported real estate valuation experts (i) are not certified appraisers; (ii) relied on data they later admitted was unreliable; (iii) did not state or apply consistent methodologies for determining which data they considered to be "appropriate;" (iv) ignored that TOUSA sold its real estate inventory directly to homebuyers, not to competing real estate developers; (v) concluded that large tracts of land had no value, not even "option value;" and (vi) produced valuations that were simply not credible.

13. On the other hand, Michael Y. Cannon ("Mr. Cannon"), a certified real estate appraiser with more than 40 years of experience and with numerous recognized industry qualifications, testified for the Second Lien Agent and Lenders. (Trial Tr. 2891:18 – 2893:7). Mr. Cannon is licensed in Florida (and elsewhere) and, therefore, is qualified to produce an "appraisal" under Florida law, unlike the Benbrook-Hewlett team. (Trial Tr. 2894:25 – 2895:3). Applying widely accepted and recognized and peer-reviewed appraisal valuation techniques, Mr. Cannon appraised each of the 24,000+ properties held by TOUSA. (Trial Tr. 2906:15-20).

14. Mr. Cannon applied conservative assumptions, including lower absorption rates than employed by appraisers reviewing the inventory in 2007, as used by AlixPartners in its solvency opinion on the Transaction Date. (Trial Tr. 2944:2 – 2948:4).

15. Mr. Cannon also was careful – unlike Mr. Hewlett – to perform a true "retrospective" appraisal, as required by industry standards, providing a real estate valuation as

of the Transaction Date, without being influenced by the disruptive events in the housing and credit markets soon to come. (Trial Tr. 2911:20 – 2912:6; 3151:11 – 3153:7). Stated differently, Mr. Hewlett took into account the post-Transaction Date disruptions in order to reduce his valuations as of the Transaction Date. Mr. Cannon, on the other hand, followed required industry standards by valuing the real estate inventory based on the state of the market on the Transaction Date, given that no one can ever predict with certainty whether values will go down (or up) in the future.

16. The extreme results obtained by Mr. Hewlett's non-appraisal approach to valuation are apparent when compared to (a) TOUSA's inventory book values; and (b) Mr. Cannon's appraisal, as shown in the following table [values given in millions]:

	TOUSA	Engle/Sun JV	Transeastern	TOUSA Homes
Book Value	$1,747[A]	$182	$150	$1,449[B]
Cannon	$1,353	N/A	$172	$1,080[C]
Hewlett	$862	$14	$28[D]	$551[E]

A. See Expert Report calculations of the Committee's solvency expert Kevin Clancy ("Mr. Clancy"), Trial Exh. 2241, showing TOUSA's 7/31/07 trial balance for inventory at $1,968 million, which he adjusts downward by $221 million to account for land bank inventory carried on the books as both an asset and a liability of TOUSA Consolidated Land Company, a subsidiary of TOUSA Homes, Inc. ("THI"). The resulting inventory figure for "hard" real estate assets is $1,747 million, as carried on the TOUSA trial balance sheet.

B. As discussed in table note A above, Mr. Clancy showed booked inventory at THI of $1,670, but this included all of the $221 million in "phantom" land bank assets on THI's books. The actual book value of "hard" real estate assets at THI is $1,449 million. (Trial Exh. 2241).

C. Mr. Cannon valued all TOUSA inventory, identifying it by Subdivision and Division. (Trial Exhs. 650, 652). As set out in Mr. Hewlett's April 6, 2009 Expert Report (Trial Exh. 616, at 16), THI is comprised of the following Divisions: Orlando, Virginia, Southwest Florida, Phoenix, Colorado (Denver), Jacksonville, Las Vegas, Engle Mid-Atlantic, South Florida, Dade and West Land Company. (Trial Exh. 616 at page 16). The chart attached hereto as Exhibit A, which is incorporated by reference as if fully set forth herein, adds the figures contained in Mr. Cannon's Expert Report to show totals by Division. The total for the 11 THI Divisions is $1,080,351,474.

D. Mr. Hewlett's extremely low valuation of the TE assets highlights the deficiencies in his analysis, as Courts should reject a valuation that is contradicted by market evidence of value. See ¶166 below.

E. Although Mr. Hewlett testified that he valued real estate assets at THI at $771,495,560 (Committee Hewlett Demonstratives at Page 1), this figure included the $221 million of booked land bank assets held by TOUSA Consolidated Land Company, a subsidiary of THI. Mr. Hewlett did not actually value these assets but simply added the booked values to the "hard" real estate assets that he valued at $551 million. See April 6, 2009, Hewlett Report (Trial Exh., at n. 2). Mr. Clancy determined that this $221 million was a mere GAAP entry with a corresponding liability entry, and did not represent true assets, so he deducted $221 million from Hewlett's valuation. (Trial Exh. 630, at 11).

17. As the above table reflects, Mr. Cannon, conducting a true retrospective appraisal, finds that the fair market value of TOUSA's real estate holdings was $1,353 million as of the Transaction Date. Mr. Hewlett, unaccountably, finds that TOUSA's real estate inventory was actually worth $491 million less than Mr. Cannon's valuation, or a total of only $862 million (a deduction of $885 million from inventory book values, which increases to $1,175 million after Mr. Hewlett reduced the value of the Engle/Sunbelt JV properties by $168 million and the Transeastern real estate inventory by $122 million, as discussed below).

18. Mr. Hewlett's valuation of the Engle/Sunbelt JV real estate inventory at only $14 million led Mr. Clancy to write off TOUSA's entire $89 million investment in that joint venture: because secured financing existed at the Engle/Sunbelt JV in the amount of $79 million, Mr. Clancy found the entire Engle/Sunbelt JV investment to be worthless. (Trial Tr. 915:23 – 916:14; 1091:20 – 1092:5). (Trial Ex. 630 at 11-12). While Mr. Cannon was not asked to value interests in joint ventures, the evidence is clear that Mr. Hewlett's valuation is a "joke," as it was described by Russell Devendorf ("Mr. Devendorf"), a former a vice president and treasurer of TOUSA, Inc. (Trial Tr. 1874:3-5; 1896:10 - 1898:1).

19. Particularly striking is Mr. Hewlett's valuation of the Transeastern JV real estate inventory, acquired by TOUSA as an integral part of the Transaction. TOUSA conducted an extensive review of these properties before and after the closing. The properties were carried on the Transeastern JV books at $284 million. (Trial Tr. 1893:14 – 1894:8). TOUSA, in combination with its accountants, closely evaluated these properties after the closing (when market conditions had deteriorated) to determine their value in the borrowing base of TOUSA's

revolving credit facility. TOUSA valued the properties at $150 million, applying fair market value, not book value, as the borrowing base required a figure at the lower of book or appraised value. (Trial Tr. 1894:13 – 1895:25). Ernst & Young reviewed the reasonableness of the valuation as late as September 2007 and agreed that TOUSA's valuation of the Transeastern assets was reasonable. (Trial Tr. 2510:9 – 2511:12; Trial Exh. 478). Mr. Hewlett, however, found these properties to be worth only $28 million. Mr. Cannon valued the total group of properties at $172 million. (Trial Tr. 2908:19 – 21).

20. THI, where approximately 80 percent of TOUSA's assets reside by legal title using Mr. Cannon's valuations, graphically underscores the extremely non-standard valuation methodology employed by Mr. Hewlett. (Trial Exh. 630, at 10). Mr. Hewlett's valuation for THI real estate is $529 million lower than Mr. Cannon's valuation and $898 million less than TOUSA's. (Trial Exhs. 616, 652, 2241).

21. While it may be impossible to fully account for the difference in valuation between Mr. Cannon and Mr. Hewlett given the inapposite methodology employed by Mr. Hewlett, three factors are clearly relevant: (a) Mr. Hewlett's and Ms. Benbrook's unreliable cost-to-complete data; (b) Mr. Hewlett's use of inappropriately pessimistic (as of the Transaction Date) forecasts regarding sales prices and absorption rates based on his retroactive application of the post-Transaction Date sharp decline in the housing markets; and (c) Mr. Hewlett's assumed sales to real estate developers, as opposed to ordinary course sales to homebuyers. All of these factors lead the Court to reject Mr. Hewlett's valuation as unreliable and not credible. Conversely, Mr. Cannon's qualifications and expertise, together with his industry-standard approach to valuation and his logical methodology, lead the Court to adopt the real estate appraisal presented by Mr. Cannon.

Proposed Findings Regarding Solvency

22. As demonstrated below, Mr. Clancy's expert report – presented by the Committee – demonstrates that TOUSA and THI (where approximately 80 percent of TOUSA's real estate assets are found according to Mr. Cannon's valuations), were solvent both before and after the Transaction when appropriate real estate appraisal valuations are used (specifically, the expert report of Mr. Cannon). Also, TOUSA Homes Florida, L.P. ("TOUSA Florida"), the entity created by TOUSA to hold the Transeastern JV real estate assets TOUSA acquired in the Transaction, is solvent when Mr. Cannon's valuation of those assets is applied. (Trial Exhs. 630, 631, 650, 652).

23. Trial Exhibit 2241, prepared by Mr. Clancy, presents his final numbers regarding his adjustments to the balance sheets of TOUSA and THI pre-Transaction (which is identical to Mr. Clancy's post-Transaction adjustments for THI):

	Pre			Total THI
	7/31/07 Book Balance	RCLCO FMV	Adjustment	
THI	$ 1,670	$ 772	$ (898)	$ (898)
Newmark, L.P.	284	303	19	
Tousa, Inc.	14	8	(6)	
	$ 1,968	$ 1,083	$ (885)	$ (898)
Land Banking			(221)	(221)
Total Inventory Adjustment			$ (1,106)	$ (1,119)

24. Looking at THI first, as explained in Mr. Clancy's initial Expert Report (Trial Ex. 630, at 10-11, 18) (with regard to THI), he subtracted $221 million of "phantom" land bank

assets from the $772 million of THI inventory (as valued by Mr. Hewlett) to arrive at a final value conclusion for "hard" real estate assets of $551 million. This resulted in a total negative adjustment to THI Book Balance of $1,119 million.

25. Mr. Clancy's Balance Sheet for THI reflects the final valuation for "hard" real estate assets at $551 million, as shown in his pre-Transaction THI Balance Sheet:

THI							
	Balance		Adjustments			Adj. Balance	
Assets							
Cash	$	(11)	$	11	**(a)**	$	-
Fixed Assets		15		-			15
Inventory		1,670		(1,119)	**(b)**		551
Other Assets		80		-			80
Investment in Subs		213		(211)	**(c)**		2
Investment in JV (and JV AR)		168		(89)	**(d)**		79
Goodwill		51		(51)	**(b)**		-
Financial Service Assets		-		45	**(f)**		45
Total	$	2,186	$	(1,414)		$	772
Liabilities							
AP	$	138	$	(24)	**(j)**	$	114
Customer Deposits		41		-			41
Obligations for Inv. Not Owned		227		(227)	**(b)**		-
I/C Notes		676		(676)	**(g)**		-
Bonds		-		595	**(i)**		595
Revolver		-		122	**(h)**		122
Financial Service Liabilities				23	**(f)**		23
Total	$	1,082	$	(188)		$	894
Net Equity	**$**	**1,104**	**$**	**(1,226)**		**$**	**(122)**

(Trial Exh. 2241, at 4).

26. Using Mr. Cannon's far more reliable real estate valuation of $1,080 million for THI inventory, THI's Net Equity would increase by $529 million (the difference between Mr. Hewlett's valuation of only $551 million versus Mr. Cannon's $1,080 million). Positive Net Equity pre-Transaction would be $407 million. In addition, Mr. Clancy eliminated $51 million in Goodwill from the THI Balance Sheet because he found that Mr. Hewlett's DCF Analysis incorporated Goodwill (Trial Exh. 630, at 12). Mr. Cannon, however, provided only a fair

market valuation for the real estate assets and was not asked to value Goodwill. (Trial Exh. 650). Because Goodwill is clearly a valuable asset in and of itself,[5] $51 million should be added back, resulting in positive Net Equity of $458 million for THI pre-Transaction.

27. Trial Exhibit 2241, at page 11, is Mr. Clancy's adjusted balance sheet for THI after the Transaction:

THI			
	Balance	Adjustments	Adj. Balance
Assets			
Cash	(11)	11	-
Fixed Assets	15	-	15
Inventory	1,670	(1,119)	551
Other Assets	80	-	80
Investment in Subs	213	(211)	2
Investment in JV (and JV AR)	168	(89)	79
Goodwill	51	(51)	-
Financial Service Assets		45	45
Total	2,186	(1,414)	772
Liabilities			
AP	138	(24)	114
Customer Deposits	41	-	41
Obligations for Inv. Not Owned	227	(227)	-
I/C Notes	676	(676)	-
Bonds	-	597	597
Revolver	-	118	118
Financial Service Liabilities	-	23	23
New Debt (1st and 2nd)	-	263	263
New Debt (PIK Notes)	-	11	11
Total	1,082	85	1,167
Net Equity	1,104	(1,499)	(395)

28. If, however, Mr. Cannon's valuation of $1,080 million for THI real estate were used, positive Net Equity results: an additional $529 million of real estate value results in positive Net Equity of $134 million. Adding back Goodwill, as explained above, results in positive Net Equity of $185 million for THI post-Transaction.

[5] In particular, "Engle" and "Newmark" are widely recognized and valuable trademarks that contribute substantial Goodwill value beyond the appraisal value of the real estate itself.

29. Trial Exhibit 2241, at page 12, is Mr. Clancy's adjusted balance sheet for TOUSA Florida:[6]

Tousa Florida			
	Balance	Adjustments	Adj. Balance
Assets			
Cash	38	(38)	-
Fixed Assets	1	-	1
Inventory	150	(122)	28
Total	189	(160)	29
Liabilities			
AP	30	-	30
Customer Deposits	2	-	2
Bonds	-	-	-
Revolver	-	5	5
New Debt (1st and 2nd)	-	10	10
New Debt (PIK Notes)	-	-	-
Total	32	15	47
Net Equity	157	(175)	(18)

30. If, however, Mr. Cannon's valuation of $172 million for TOUSA Florida's real estate inventory is used, instead of Mr. Hewlett's finding of $28 million (a difference of $144 million), <u>the result is positive Net Equity of $126 million for TOUSA Florida</u>.

31. Applying Mr. Cannon's far more reasonable and reliable valuations to Mr. Clancy's solvency analysis for TOUSA also results in a positive Net Equity for the enterprise. Mr. Clancy sets out the TOUSA balance sheet pre-Transaction at Trial Exhibit 2241, Page 3:

[6] Because TOUSA Florida was created as part of the Transaction, there is no balance sheet for TOUSA Florida pre-Transaction.

Tousa Inc. and Subsidiaries (Consolidated)							
	7/31/07 Balance		Adjustments			Adjusted Balance	
Assets							
Cash	$	25				$	25
Fixed Assets		29		-			29
Inventory		1,968		(1,106)	**(a)**		862
Other Assets		140		(25)	**(b)**		115
Investment in JV (and JV AR)		175		(89)	**(c)**		86
Tax Assets		244					244
Goodwill		63		(63)	**(d)**		-
Fin. Services Assets		47		-			47
Total	$	2,691	$	(1,283)		$	1,408
Liabilities							
AP		225		(24)	**(f)**		201
Customer Deposits		53		-			53
Accrued TE		386					386
Obligations for Inv. Not Owned		227		(227)	**(a)**		-
Bonds		1,061		-			1,061
Revolver		144		80	**(e)**		224
Financial Service Liabilities		23		-			23
Liabiliites	$	2,119	$	(171)		$	1,948
Net Equity	**$**	**572**	**$**	**(1,112)**		**$**	**(540)**

32. Applying Mr. Cannon's real estate valuation for non-Transeastern assets of $1,353 instead of Mr. Hewlett's $862 million ($491 million increase over Mr. Hewlett's number) and adding back Goodwill ($63 million), increases Net Equity by $553 million, resulting in Positive Net Equity of $14 million for TOUSA pre-Transaction.

33. Mr. Clancy sets out the TOUSA balance sheet post-Transaction at Trial Exhibit 2241 at Page 8:

Tousa Inc. and Subsidiaries (Consolidated)									
	7/31/07 Balance		TE Acquistion (a)		Adjustments			Adjusted Balance	
Assets									
Cash	$	25	$	38	$	(22)	**(b)**	$	41
Fixed Assets		29		1		-			30
Inventory		1,968		150		(1,228)	**(c)**		890
Other Assets		140		-		(25)	**(d)**		115
Investment in JV (and JV AR)		175		-		(89)	**(e)**		86
Tax Assets		244		-					244
Goodwill		63		-		(63)	**(f)**		-
Fin. Services Assets		47		-		-			47
Total	$	2,691	$	189	$	(1,427)		$	1,453
Liabilities									
AP	$	225	$	30	$	(24)	**(i)**	$	231
Customer Deposits		53		2		-			55
Accrued TE		386		-		(386)	**(g)**		-
Obligations for Inv. Not Owned		227		-		(227)	**(c)**		-
Bonds		1,061		-		-			1,061
Revolver		144		-		80	**(h)**		224
Financial Service Liabilities		23		-		-			23
New Debt (1st and 2nd)		-		500		-			500
New Debt (PIK Notes)		-		20		-			20
Total Liabiliites	$	2,119	$	552	$	(557)		$	2,114
Net Equity	**$**	**572**	**$**	**(363)**	**$**	**(870)**		**$**	**(661)**

34. Applying Mr. Cannon's real estate valuation for non-Transeastern assets of $1,353 million ($491 million increase over Mr. Hewlett's number), together with Mr. Cannon's real estate valuation for Transeastern assets of $172 million ($144 million increase over Mr. Hewlett's number) plus adding back Goodwill ($63 million), increases Net Equity by $698 million, <u>resulting in Positive Net Equity of $37 million for TOUSA post-Transaction</u>.

<u>Proposed Findings Regarding the Second Lien Loan</u>

35. Paul Berkowitz ("Mr. Berkowitz"), Executive Vice President and Chief of Staff at TOUSA, is a corporate lawyer with 30 years of experience. (Trial Tr. 1589:6-23). Mr. Berkowitz signed many of the corporate resolutions on behalf of the Conveying Subsidiaries authorizing the Transaction. (Trial Tr. 1591:12 – 1592:3). The corporate resolutions all stated that the Transaction was in the best interest of the individual Conveying Subsidiary, and Mr.

Berkowitz testified that he personally believed that to be true both at the time he signed the resolutions and at the time of his trial testimony on July 17, 2009. (Trial Tr. 1592:18-24). Mr. Berkowitz stated that he did not do a mathematical calculation of the benefit or harm of the Transaction on each Conveying Subsidiary because he did not believe it was possible to conduct such a stand-alone analysis for each member of the group due to the consolidated and entirely interdependent nature of TOUSA's operations. (Trial Tr. 1789:20 – 1791:8). Mr. Berkowitz indicated that, in his experience, corporate financings that utilize upstream and cross-stream guaranties (such as the First Lien Loan and Second Lien Loan in the Transaction, TOUSA's revolving credit facility, and TOUSA's unsecured bond debt) have been used in corporate finance since at least the mid-1970's. (Trial Tr. 1720:2 – 1721:3). Mr. Berkowitz's belief that the Transaction was in the best interest of the individual Conveying Subsidiaries for whom he signed corporate resolutions was based on his belief that the Transaction was beneficial for the entire TOUSA corporate enterprise. (Trial Tr. 1716:14 – 1722:10). Just as it made perfect sense that TOUSA's bond debt would be guaranteed by each member of the group and that the market would not have purchased the bonds but for such guarantees, so too it made perfect sense that the Second Lien Loan would be guaranteed by each member of the group and that the market would not have provided the Second Lien Loan but for such guarantees.

36. Under the terms of the Second Lien Loan, TOUSA could elect to pay interest quarterly in cash or in Payment In Kind ("PIK"). (Trial Exh. 361, at §2.9(d)). TOUSA elected to make all interest payments on the Second Lien Loan as PIK payments, and the Second Lien Lenders never received a cash payment for interest. (Second Lien Agent's Proof of Claim Number 2077 filed on May 16, 2008 in 08-10928-JKO).

37. The Transaction did not violate any of the restrictive covenants of TOUSA's various bond indentures, including the restrictions on the incurrence of new debt. (Trial Tr. 1671:25 – 1672:12). TOUSA had stress-tested the restrictive covenants and determined that, on a consolidated basis, it would not violate those covenants. (Trial Tr. 1774:25 – 1776:7).

38. Contrary to the assertions of the Committee, there was only a *de minimus* allocation of the Second Lien Loan to Lenders who also held Transeastern Loans.[7] (JSF, Exh. A; Trial Exh. 3359). Specifically, $290 million of the $300 million Second Lien Loan was provided by Lenders who did *not* hold Transeastern Loans.

Proposed Findings Regarding 2007 Market Changes

39. The changes in the credit market in August 2007 were sudden, unexpected by the Federal Reserve and other market participants, and long-lasting. (Trial Tr. 2130:15 – 2131:1). August 9, 2007 was "The Day That Changed the World," and the credit crisis that began in August 2007 has been described by Alan Greenspan as "a once in a century credit tsunami" and by Warren Buffet as an "economic Pearl Harbor." (Trial Exhs. 4168 – 4170).

40. Prior to August 2007, many credible and reliable market participants and respected market observers believed the housing market was bottoming out and would begin to recover in late 2007 or early 2008. These participants and observers believed the country was in a typical housing downturn that was only affecting the subprime mortgage market. (Trial Tr. 2131:18 – 2132:5).

41. The credit crisis that began in August 2007 dramatically and negatively impacted the housing and homebuilding sector. The credit crisis led to a liquidity crisis, or a difficulty in borrowing money, upon which the homebuilding industry is reliant. The credit crisis that began

[7] "Transeastern Loans" refers to the instruments defined as the "Transeastern Credit Agreements" in the JSF.

in August 2007 affected the entire housing market as opposed to just participants that had substantial positions in the subprime mortgage market. (Trial Tr. 2131:2-11).

42. The events on August 9 and 10, 2007, including, but not limited to, BNP Paribas' suspension of redemptions of certain funds containing mortgage-backed securities, the freezing of credit markets, and the injection of $130 billion into the Eurozone banking system and $24 billion into the United States banking system by the European Central Bank and Federal Reserve, respectively, were "Black Swan" events – highly unlikely, extraordinary events that are not part of any market participants' planning or investment decision. These events were just the beginning of a remarkably long period of tumult in the financial markets. (Trial Tr. 2133:1 – 2137:18).

43. The negative events in the credit markets that began in August 2007 were not the type of events market participants could reasonably expect or plan for. (Trial Tr. 2142:8-16).

44. Tightening of the credit markets affects homebuilders in two ways. First, it negatively impacts the homebuilders' ability to finance their inventory. Second, it affects home purchasers' ability to obtain financing to purchase homes. (Trial Tr. 2145:13 – 2146:10). In the second quarter of 2007, approximately 15% of mortgage lenders were tightening their standards; in the third quarter of 2007, that number rose to approximately 40%. (Trial Tr. 2153:8-19). After July 2007, house prices declined drastically and more steeply than before. (Trial Tr. 2160:9 – 2161:15).

<u>Additional Proposed Findings Regarding Mr. Cannon's Appraisal</u>

45. Mr. Cannon is an MAI certified real estate appraiser and market analyst. He is the executive director of Integra Realty Resources Miami. (Trial Tr. 2891:18 – 2893:19). Mr. Cannon is a licensed real estate appraiser and broker in Florida, and utilized licensed appraisers

from Integra's other offices to perform the appraisals of TOUSA's property located outside of Florida. (Trial Tr. 2894:25 – 2895:3; 2909:2-10).

46. Mr. Cannon was engaged by counsel for the First and Second Lien Lenders to appraise TOUSA's existing properties and the Transeastern properties that it acquired on the Transaction Date. (Trial Tr. 2903:16-25; Trial Exh. 652).

47. Mr. Cannon and his team conducted appraisals of each of TOUSA's properties, which consisted of over 24,000 individual properties, in accordance with the Uniform Standards for Professional Appraisal Practice ("USPAP") Standard Rule 6 for mass appraisals. (Trial Tr. 2906:15-20). USPAP provides certain quality control standards governing appraisals conducted in the United States, and lenders are required to utilize USPAP appraisals in connection with their lendings. (Trial Tr. 2901:6 – 2902:7). Mr. Hewlett readily acknowledged that his valuation analysis was not prepared in accordance with USPAP and, in fact, Mr. Hewlett's testimony makes clear that he does not entirely understand USPAP. (Trial Tr. 823:21 – 824:5; 849:11 – 850:4).

48. Mr. Cannon also conducted over 56 technical appraisal reviews of other appraisal reports that were performed on properties owned by TOUSA in the past in accordance with USPAP Standard Rule 3. (Trial Tr. 2910:10-25).

49. Mr. Cannon's appraisal report is retrospective as of the Transaction Date, meaning that the appraisals are based on facts and circumstances as they existed and were known on that date. Mr. Cannon stressed the importance of the retrospective, or inferred, analysis noting that it is important not to be influenced by factors that occurred after the valuation date because "[i]f you are influenced then you may contaminate the valuation." (Trial Tr. 2911:20 – 2912:6; 3151:11 – 3153:7). Mr. Hewlett, on the other hand, allowed events subsequent to the

Transaction Date to influence his decision to adopt the most pessimistic market views that existed prior to the Transaction Date. *See* ¶ 99 below. This hindsight bias belies Mr. Hewlett's claim of selecting mainstream views on the state of the housing market as of the Transaction Date.

50. Mr. Cannon concluded that the aggregate value of TOUSA's 24,348 properties was $1,525,667,490 as of the Transaction Date. (Trial Tr. 2907:22 – 2907:25). This Court agres with Mr. Cannon's appraisal valuation.

51. Of the total aggregate value, $1,353,374,030 was attributable to TOUSA's 20,228 properties and $172,303,460 was attributable to Transeastern's 4,120 properties. (Trial Tr. 2908:15-21).

52. Mr. Cannon testified that he conducted individual appraisals of each property based on market or retail value because TOUSA was a going concern as of the appraisal date. Mr. Cannon relies on the Financial Institutions Reform Recovery and Enforcement Act ("FIRREA") definition of market value, which focuses on the most probable price that a property should yield in a competitive and open market under all conditions requisite to a fair sale, the buyer and seller each acting prudently and knowledgeably, and assuming that the price is not affected by any undue stimulus. (Trial Tr. 2913:4-19; 2914:22 – 2915:10).

53. In contrast, Mr. Hewlett performed a subdivision analysis in which he valued the properties as though the whole subdivision or group of lots would be purchased by a single purchaser, such as another homebuilder or developer. (Trial Tr. 2916:12-19). Mr. Cannon testified that TOUSA did not operate in that manner and that transferring the property interests in a single transaction of a series of lots or subdivisions transfers the benefits of the profit reward to the third party, who will break up the lots for individual retail sale. According to Mr. Cannon,

such methodology is more appropriate for determining a bulk sale or liquidation value, where property is sold under duress, as opposed to determining the market value of a going concern, where property is transferred between a willing buyer and seller. (Trial Tr. 2914:22 – 2915:10; 2916:12 – 2919:1).

54. Mr. Cannon performed a price segmentation analysis, which involves comparing the volume of sales to the demographic profile to determine whether TOUSA was building a product suitable for its marketplace. Mr. Cannon concluded that 80% of TOUSA's product was priced below $400,000 with *de minimis* price levels of the higher priced market, and that TOUSA's properties were "very affordable and market acceptable." (Trial Tr. 2935:9 – 2936:9).

55. As part of the price segmentation analysis, Mr. Cannon conducted extensive market studies in each one of the subdivisions in the submarket areas of sales of not only TOUSA's previously sold homes, but also competing homebuilders in those market areas. (Trial Tr. 2939:3-10).

56. In contrast, Mr. Hewlett performed a housing affordability analysis where he considered metropolitan-level statistical figures, as opposed to county- or local-level, and reached the conclusion that TOUSA's home pricing was out of equilibrium by comparing the mortgage payment required to purchase the median home in a particular metropolitan statistical area ("MSA") to median incomes in the MSA. (Trial Tr. 2936:15 – 2937:7). Mr. Cannon testified that this approach is inappropriate, and this Court agrees, because the analysis is conducted at a macro level, which includes income levels of people that will not be buying homes as well as people of lower incomes and of people who would only be renting homes. (Trial Tr. 2936:15 – 2937:19).

57. Mr. Cannon assumed that absorption would decrease by 25% each of the first two years after the Transaction Date, and then return to historical levels, based on community level market research, as well a comparison of TOUSA's prior 10-Ks to those of competing homebuilders. Mr. Cannon considered the 25% decrease over two years to be a conservative estimate (meaning resulting in lower values) because his market research resulted in a lower percentage decrease but he rounded it up to 25% to be conservative. Mr. Cannon's choice of two years for the decrease in absorption was also conservative compared to the predictions of Mr. Hewlett, who had predicted the bottom of the housing market to be at some point in 2008 (Trial Tr. 2944:2 – 2948:4; Defense Cannon Demonstrative, at 11).

58. Contrary to assertions by Mr. Hewlett, Mr. Cannon included every category of property owned by TOUSA in his absorption analysis, including completed unsold and unsold under construction. (Trial Tr. 2966:7-22).

59. This Court agrees with Mr. Cannon's criticism of Mr. Hewlett's reliance on the S&P Case-Shiller Index and the OFHEO Index to project new housing prices because those indices do not include new housing, but rather focus on used housing and more recently have included foreclosures. TOUSA is engaged exclusively in the business of building and selling new homes. Mr. Cannon also notes that known economists have publicly criticized Case-Shiller for its unreliability. (Trial Tr. 2948:5 – 2950:17).

60. This Court agrees with Mr. Cannon's criticism of Mr. Hewlett's DCF Analysis of TOUSA's raw land parcels and Mr. Cannon's testimony that the sales comparison approach is more appropriate. According to Mr. Cannon, the sales comparison approach is most appropriate because it reflects what buyers and sellers pay for properties and assumes that the buyer has a vision for development, or holding the property for investment, and the seller would be selling

the land in its entirety. Mr. Cannon testified that the sales comparison approach reflects an analysis of the "highest and best use" for a piece of property. He further testified that the sales comparison approach is the most recognized approach under the definition of market value, and that he always starts with this analysis when valuing raw land – something he has done "hundreds and hundreds of times." (Trial Tr. 3016:2 – 3017:5).

61. According to Mr. Cannon, the four criteria for highest and best use, which is the foundation of all real estate valuations, are that the use must be: (i) physically possible; (ii) legally permissible; (iii) financially feasible; and (iv) maximally productive. One of the requirements for determining whether a potential use is financially feasible is that the use must produce a profit. (Trial Tr. 3042:25 – 3045:23).

62. Because Mr. Hewlett's DCF Analysis of raw land failed to consider comparable sales, Mr. Cannon characterizes the approach as "highly speculative," and this Court agrees. (Trial Tr. 3019:17 – 3020:5).

63. An authoritative text on land valuations, Land Valuation, by James Boykin, also provides that "[t]he subdivision development method [which was utilized by Mr. Hewlett] can produce unrealistic indications of market value when applied improperly. In fact, it is probably the least accurate raw land valuation technique." (Trial Tr. 3040:20 – 3041:24; Trial Exh. 4159).

64. Mr. Cannon testified, and this Court agrees, that inaccuracies in budget and cost-to-complete data will result in inaccurate discounted cash flows because the information has to be site-specific, as opposed to taken from another source. He saw no data in the TOUSA records that there was any cost or budgets for any of the raw land to be developed. He testified that there was "no pro formas made, no marketing program, no marketing studies. It was what it was:

Land for future development." Further, even if he had a general idea of what would be done with the land, those ideas would be inappropriate inputs for a DCF model. (Trial Tr. 3042:4-19).

65. Mr. Cannon criticized Mr. Hewlett's conclusion of zero or negative value for 83% of TOUSA's parcels of raw land (and 60% of the communities with raw land parcels) (*see* Defendants' Hewlett Demonstratives), and this Court agrees. According to Mr. Cannon, in practice there are a few extreme examples of when a property would have zero or negative value, such as when there is environmental contamination, which was not the case for any of the TOUSA properties. In the absence of such infirmities an appraiser would "look at the property for an alternative use and conduct a highest and best use analysis under various scenarios." (Trial Tr. 3023:7 – 3025:6).

66. For example, Mr. Hewlett concluded that a TOUSA property known as Canyon Crossroads had a value of negative $8.1 million. Mr. Cannon valued Canyon Crossroads at $12,250,000 as of the Transaction Date. (Trial Tr. 3026:2-22). In fact, TOUSA actually sold Canyon Crossroards in December 2007 for $12.8 million. (Trial Tr. 3026:23 – 3027:4). The subsequent sale of Canyon Crossroads was not known to or considered by Mr. Cannon when he did his original retrospective valuation, but was only considered after he completed his report to validate the reasonableness of his conclusions. (Trial Tr. 3026:2 – 3028:1).

67. Mr. Cannon further testified, and this Court agrees, that real estate is a cyclical industry and the typical length of a downturn is two to three years. According to Mr. Cannon, the existing market for new homes experienced a downturn beginning in 2005 such that by the Transaction Date the market was about two years into the downturn. (Trial Tr. 2930:15 – 2932:24).

68. According to Mr. Cannon, "[t]he effects that occurred after July 31, 2007 leading up to the financial crisis was not predicted, nor myself, by anyone. That came as a very big surprise." (Trial Tr. 2932:17-20).

Additional Proposed Findings Regarding Ms. Benbrook's Cost-to-Complete and Comparison Analyses

69. Ms. Benbrook was originally charged with determining "horizontal" (land under development) costs-to-complete and developing "cost inputs" for Mr. Hewlett's analysis of "vertical" construction costs as of the Transaction Date. However, in some instances, Ms. Benbrook used information not available to TOUSA as of the Transaction Date, including, but not limited to, impairment calculations. (Trial Tr. 1457:17-22; 1458:14-19; 1519:13 – 1521:3).

70. Ms. Benbrook is not an appraiser or a real estate valuation expert. (Trial Tr. 1485:4-8). Ms. Benbrook has never conducted a cost-to-complete analysis for a homebuilder with thousands of properties like TOUSA. (Trial Tr. 1485:20 – 1486:11).

71. Although originally tasked with analyzing over 400 of TOUSA's communities, Ms. Benbrook only analyzed 292 of TOUSA's communities in her cost-to-complete analysis, 30 of which were just raw land. (Trial Tr. 1501:3-11; 1530:17 – 1531:10).

72. Ms. Benbrook's primary data source for her cost-to-complete analysis was TOUSA's HSP accounting software. (Trial Tr. 1463:9-20).

73. Ms. Benbrook's cost-to-complete analysis is TOUSA-specific; she did not analyze the cost-to-complete if another builder had purchased TOUSA's assets. (Trial Tr. 1482:20 – 1483:22).

74. In her cost-to-complete analysis, Ms. Benbrook assumed that labor and material costs would remain constant even when the housing industry was experiencing a downturn. (Trial Tr. 1517:10-16).

75. The budget information that Ms. Benbrook relied upon is critical to her cost-to-complete analysis for horizontal development and is critical to the analysis of vertical cost-to-complete that Mr. Hewlett undertook. (*See*, *e.g.*, Trial Tr. 1464:5-22; 1469:2-16; 1471:19 – 1472:3; 1487:8-14; 1492:1-13).

76. Ms. Benbrook used inconsistent inputs for vertical construction costs and average square foot calculations in her cost-to-complete analysis. (Trial Tr. 1512:20 – 1513:18; 1518:19 – 1519:12; 1524:23 – 1530:3; Trial Exhs. 600, 601, 609, 4004).

77. One of the reports Ms. Benbrook used in her cost-to-complete analysis was a Land Development Cost Code Report ("LDCC Report") generated from TOUSA's HSP accounting software. (Trial Tr. 1490:11-18). Ms. Benbrook was never trained by TOUSA on the use of the HSP system and instead relied upon her team to train her. That training session lasted half of one day, and Ms. Benbrook never received her own credentials to log on to TOUSA's database. Notes provided from the training sessions attended by the Committee's experts' teams reflect that they were informed about a Query system, which is capable of providing budget data from TOUSA's system for vertical construction costs as of the Transaction Date. (Trial Tr. 4213:6 – 4214:3).

78. Ms. Benbrook used LDCC Reports for all of TOUSA's communities that she analyzed that needed to be developed. (Trial Tr. 1491:14-16). Most of the LDCC Reports used by Ms. Benbrook in her cost-to-complete analysis were generated in October 2008. (Trial Tr. 1491:17-20; 1492:1-4).

79. Ms. Benbrook claims to have run all of the reports she relied upon more than once; however, she only produced one copy of each report to the Defendants and she acknowledges that she did not keep the allegedly redundant runs of the reports. (Trial Tr. 1509:13-20; 1543:9 – 1544:8).

80. In performing her cost-to-complete analysis, Ms. Benbrook believed that the budget information in the LDCC Reports was static, which means she believed the budget figures did not vary depending on the date the LDCC Reports were run. (Trial Tr. 1502:21 – 1503:3). Ms. Benbrook was shocked to learn that the LDCC Reports were non-static. (Trial Tr. 4166:25 – 4167:10).

81. The budget figures in the LDCC Reports are non-static – the budget figures can vary depending on the date the LDCC Report is run. (Trial Tr. 1503:10 – 1505:18; Trial Exh. Nos. 4004, 4179-4198). Accordingly, Ms. Benbrook's testimony as to the static nature of the budget information was incorrect.

82. Howard Weber ("Mr. Weber") is a Certified Public Accountant and Certified Fraud Examiner, who is currently a Senior Associate at BDO Seidman, LLP. Mr. Weber received training on TOUSA's HSP system and is familiar with the reports that can be generated from the HSP system, including LDCC Reports and Job Cost Detail Reports ("JCD Reports"). (Stipulation and Order Regarding Testimony of Howard Weber of BDO Seidman ("Weber Stip.") (D.E. 568), at ¶ 1-2).

83. Mr. Weber ran certain LDCC Reports between April and July 2009 with "as of" dates of July 31, 2007 and compared those reports to the corresponding LDCC Reports ran by Ms. Benbrook in October 2008. A comparison of those reports confirms that the budget information contained in the LDCC Reports is non-static. The LDCC Reports, when run on

different dates with the same "as of" July 31, 2007 parameter, will reflect differences in and/or revisions, if any, to TOUSA's budget information that were made after July 31, 2007. (Weber Stip., at ¶ 3-4; Trial Exhs. 4004, 4179-4196).

84. Ms. Benbrook originally testified that she believed the reports run by Mr. Weber were unreliable because they may have been run with different queries than she used to run her reports, including possible issues with start dates, pagination, cost codes and the number of subdivisions. (Trial Tr. 1538:11 – 1542:8). Ms. Benbrook later testified that her criticisms of Mr. Weber's reports were incorrect. (Trial Tr. 4221:5 – 4224:4).

85. Mr. Devendorf is familiar with TOUSA's HSP database and how TOUSA's budget information is reflected in the reports run from the HSP database. (Trial Tr. 1901:16-24). The budget information in the LDCC Reports is not static and can change over time as the budget information is updated. (Trial Tr. 1906:4 – 1907:23; 4167:23 – 4168:23). TOUSA frequently updated its budgets when they were developing a piece of land. (Trial Tr. 1960:24 – 1961:2).

86. It is improper to rely upon LDCC Reports run after July 31, 2007 to perform a cost-to-complete analysis as of July 31, 2007. (Trial Tr. 1909:2-12).

87. After Ms. Benbrook's original testimony, she conducted a second comparison analysis in an attempt to confirm the accuracy of her original analysis. Ms. Benbrook started her analysis on July 18, 2009 and completed it on July 26, 2009. Ms. Benbrook had four members of her team run additional LDCC reports. (Trial Tr. 4167:23 – 4168:23; 4186:4-9; 4203:24 – 4204:6).

88. Ms. Benbrook began working on the comparison analysis because, as a result of cross-examination, she realized some of her testimony regarding the static nature of the budget reports was incorrect. (Trial Tr. 4201:18 – 4203:5).

89. The comparison budget reports generated by Ms. Benbrook are merely a comparison of budget reports generated in October 2008 to reports generated in July 2009. Ms. Benbrook admitted she did not and could not generate such budget reports "as of" July 31, 2007. (Trial Tr. 4186:4 – 4187:20).

90. TOUSA was engaged in substantially more development in July 2007 than it was in October 2008 through July 2009. In fact, in October 2008 through July 2009, TOUSA was scaling back its development operations, was not acquiring more land and was selling off its inventory and winding down its operations. (Trial Tr. 4225:21-24; 4226:8-11, 21-23; Trial Exh. 5046). Consequently, TOUSA was not revising its budgets nearly as often in October 2008 forward as it was in July 2007. Thus, it is likely that the differences in the budget reports between July 2007 and October 2008 would be substantially larger than the differences in the budget reports from October 2008 to July 2009. Accordingly, this Court finds that Ms. Benbrook's analysis of the changes in budget information from October 2008 to July 2009 is not an accurate or reasonable comparison to the budget revisions that may have occurred between July 2007 and October 2008.

91. Ms. Benbrook testified that her comparison of budget data from October 2008 to TOUSA's historical information (including, but not limited to, TOUSA's CIP site relief information, TOUSA's impairments, TOUSA's land acquisition information and TOUSA's borrowing base) was based purely on her subjective thoughts as to which historical information was accurate and followed no reasonably consistent or supportable methodology or process.

(Trial Tr. 4235:21 – 4245:17). As a result, Ms. Benbrook's decisions on which information to consider and exclude in this analysis was completely subjective and unsupportable.

92. Ms. Benbrook's comparison of TOUSA's budget data from October 2008 to various historical data contained numerous mistakes and miscalculations, which render her entire analysis unreliable. (*See, e.g.*, Trial Tr. 4189:21 – 4198:25).

93. 36.4 percent of the communities analyzed by Ms. Benbrook in her July 2009 comparison analysis had a variance of more than 5 percent when compared to her October 2008 analysis. (Trial Tr. 4200:18 – 4201:10). This variance in a period of very little homebuilding activity underscores the unreliability of the Ms. Benbrook's analysis, as there is no way to know how large the variance may be when compared to the actual July 2007 budget figures. (Trial Tr. 4201:6-14).

94. The fact that the LDCC Reports are non-static renders Ms. Benbrook's cost-to-complete analysis unreliable. (Trial Tr. 1511:6-14).

95. Ms. Benbrook's comparison analysis was not accurate to a reasonable degree of accounting certainty. (Trial Tr. 4187:25 – 4188:25).

96. Ms. Benbrook's original cost-to-complete analysis and subsequent comparison analysis contained numerous errors and were not completed to a reasonable degree of accounting certainty.

<u>Additional Proposed Findings Regarding Mr. Hewlett's Valuation</u>

97. Mr. Hewlett did not perform a real estate appraisal or valuation. (Trial Tr. 1967:13 – 1968:7).

98. Mr. Hewlett's analysis failed to account for the option value of TOUSA's properties. Mr. Hewlett's opinion is that if it is not economical to build out a piece of land today,

that land should be assigned a value of $0.00, which fails to account for other uses to which the land could be put either now or in the future. (Trial Tr. 1967:13 – 1968:7; 1969:7 – 1970:25).

99. There were a range of opinions in the market regarding the future of the housing market as of the Transaction Date. Instead of considering this range of opinions for the future of the housing industry, Mr. Hewlett chose only one model. (Trial Tr. 1972:24 – 1973:4; 1980:18 – 1981:10). Mr. Hewlett's selective emphasis on pessimistic commentary on the outlook of the housing market and his use of Moody's Economy.com forecasts reflect hindsight bias and led him to render biased conclusions. Instead, Mr. Hewlett should have looked at summaries of a variety of market participants contemporaneous with the Transaction Date. (Trial Tr. 2132:8-21).

100. Mr. Hewlett ultimately wrote-down TOUSA's inventory assets by $885 million, resulting in a value of $862 million. (Trial Exh. 2214). TOUSA ascribed a value of $1,968 million to those same inventory assets in its June 30, 2007 10-Q (Trial Exh. 93), which included $221 million of land bank assets written off as invalid by Mr. Clancy, or an adjusted total of $1,747 million.

101. Mr. Hewlett relied upon Ms. Benbrook's cost-to-complete analysis in performing his cash flow analysis. (Trial Tr. 685:5 – 686:14; 775:20-24; 776:13-24; 777:9-15; 778:11 – 779:10; 789:19 – 790:14; 860:6-19; 1534:23 – 1535:2). Mr. Hewlett generally accepted the cost inputs provided by Ms. Benbrook without verifying the accuracy of her work. (Trial Tr. 777:9-15). The errors contained in Ms. Benbrook's cost reports affect the accuracy of Mr. Hewlett's analysis and renders his analysis unreliable. (Trial Tr. 860:20 – 861:1; 1535:3-6).

102. Mr. Weber ran certain JCD Reports in July 2009 with "as of" dates of July 31, 2007 and compared those reports to the corresponding JCD Reports ran by Mr. Hewlett.

Comparing those sets of reports confirms that the budget information contained in the JCD Reports are non-static. The JCD Reports, when run on different dates with the same "as of" July 31, 2007 parameter, will reflect differences in and/or revisions, if any, to TOUSA's budget information that were made after July 31, 2007. (Weber Stip., at ¶ 3, 5; Trial Exhs. 4004, 4197-4198).

103. Mr. Devendorf testified that Mr. Hewlett's $14 million valuation of the Engle/Sunbelt joint venture was "a joke." Mr. Devendorf further testified that in early 2008, TOUSA received offers in the $70-$80 million range for the Engle/Sunbelt joint venture. Mr. Devendorf further testified that Mr. Hewlett's $28 million valuation of the Transeastern assets was "hard to believe" and was also a "joke." Mr. Devendorf further testified that Mr. Hewlett's write-down of approximately $1 billion of TOUSA's assets was "very surprising" considering the multitude of professionals working with the Debtors – including Citibank and its appraisers, Crown Appraisal, Alvarez & Marsal, FTI Consulting, Deutsche Bank, Capstone, AlixPartners, TOUSA's internal team, and attorneys for many of these entities – none of whom even brought up the issue of whether TOUSA's assets were overvalued by a billion dollars. (Trial Tr. 1896:10 – 1897:14; 1898:5 – 1900:7). This Court agrees with Mr. Devendorf that Mr. Hewlett's valuation for the Engle/Sunbelt joint venture and his $1 billion write-down of TOUSA's assets are not credible.

Additional Proposed Finding Regarding Mr. Clancy's Insolvency Opinion

104. Mr. Clancy is not a valuation expert. (Trial Tr. 1128:11-14).

105. Mr. Clancy's solvency opinion relied upon Mr. Hewlett's cash flow analysis. (Trial Tr. 880:9-24; 887:14 – 888:8; 896:5-8; 915:23 – 916:14; 917:10-25; 918:9-17; 925:3-9; 958:3-12; 959:15 – 961:24). Mr. Clancy did not verify the accuracy of Mr. Hewlett's numbers or

methodology. (Trial Tr. 960:21 – 961:2). Mr. Clancy agreed that the most significant reason for his finding of insolvency was Mr. Hewlett's "huge" write-down of TOUSA's assets. (Trial Tr. 972:5-15).

106. Mr. Clancy did not discount the contingent liability associated with TOUSA's bond debt. (Trial Tr. 1128:18-23). The Court finds that contingent liabilities should be discounted for the purpose of a solvency analysis. *See* ¶ 167 below.

107. TOUSA reported $577 million worth of positive equity on its June 30, 2007 10-Q, but Mr. Clancy finds negative $540 million in equity prior to the Transaction – a difference of over $1 billion. (Trial Tr. 971:21 – 972:4; Trial Exhs. 93, 630, 5041). This Court does not find Mr. Clancy's analysis to be credible.

108. Mr. Cannon conservatively valued TOUSA's inventory at $1,353,374,030. (Trial Tr. 2908:15-21). This Court finds that it is appropriate to apply Mr. Cannon's valuation of TOUSA's inventory to Mr. Clancy's consolidated solvency analysis, which results in a finding that TOUSA and THI were solvent immediately before the Transaction Date and that TOUSA, THI and TOUSA Florida were all solvent after the Transaction Date. (Trial Exh. 2411).

Proposed Findings Regarding Mr. Derrough's Solvency Analysis

109. William Derrough ("Mr. Derrough"), solvency expert for the Committee, concluded that TOUSA – on a consolidated basis only - was insolvent under each of the three bankruptcy standards: (i) balance sheet analysis of whether liabilities are greater than assets; (ii) whether the company has unreasonably small capital to continue its business and (iii) whether the company has an ability to pay its debts as they become due. (Trial Tr. 1191:9 – 1192:14; 1283:6 – 1284:12; 1288:24 – 1290:23).

110. As part of his balance sheet analysis, Mr. Derrough calculated what he characterized as the "total enterprise value" of TOUSA, Inc., which he indicated involves adding the market value of TOUSA's public equity to the market value of TOUSA's public debt and then subtracting out cash and cash equivalents. Mr. Derrough then took that figure – his so-called total enterprise value – and subtracted the face value of the debt. According to Mr. Derrough, "[i]f you have a positive number, you should be solvent; if you have a negative number, you would be insolvent." (Trial Tr. 1197:5 – 1198:12). Mr. Derrough admits that this approach is not routinely used to determine solvency and that it values the company and not the individual assets. (Trial Tr. 1325:24 – 1327:9; 1329:2 – 1329:19).

111. In reaching his conclusion of insolvency under each of the three standards, Mr. Derrough conducted the analysis on a consolidated basis, with no independent calculations or analysis relating to the Conveying Subsidiaries. (Trial Tr. 1192:4-14; 1288:7-23; 1295:3-17). Mr. Derrough testified that when he attempted to examine TOUSA's intercompany balances, he found them to be "a huge pile of tangled spaghetti." (Trial Tr. 1400:23 – 1401:8). Mr. Derrough reasoned that "to the extent that on a consolidated basis the parent is insolvent, logic must hold that the subsidiaries are insolvent because of the nature of the joint and several guarantees, and everyone is basically required to finance the shortfall of the other guy." (Trial Tr. 1192:9-14). He relies on this reasoning to conclude, without even attempting individual calculations, that the Conveying Subsidiaries were also insolvent under each of the three tests. (Trial Tr. 1192:4-14; 1288:7-23; 1295:3-17). This Court finds that, while in many circumstances it is true that the solvency (or insolvency) of a consolidated group's parent company is determinative of the solvency (or insolvency) of the subsidiaries in such group, this Court disagrees with Mr.

Derrough's methodology for determining solvency as to applied to the facts and circumstances of this case.

112. Mr. Derrough's analysis and ultimate conclusion regarding TOUSA's insolvency on a consolidated (or total enterprise value) basis necessitates an identical, consolidated basis analysis of reasonably equivalent value. *See* ¶¶ 114-145 below. An analysis of reasonably equivalent value on a consolidated basis clearly shows TOUSA received such value in the Transaction. See ¶¶ 114-145 below.

113. Mr. Clancy does not offer an opinion on unreasonably small capital or ability to pay debts as they become due, either on a consolidated or on an individual subsidiary basis. (Trial Tr. 1024:3 – 1025:1). He testified that he could not prepare an opinion on whether individual entities could pay their debts as they became due because "[t]he company only did projections on a consolidated basis." (Trial. Tr. 1025:18 – 1026:5).

Proposed Findings Regarding Valuation of Benefits Received in the Transaction

114. Morton Mark Lee ("Mr. Lee") has over 38 years of experience in business valuations and is a principal in the valuation group of Eisner LLP's Litigation Consulting and Forensic Accounting Department. (Trial Tr. 2792:14 - 2793:21).

115. Mr. Lee was engaged by counsel for the Second Lien Agent and Lenders to determine (i) whether TOUSA and its subsidiaries should be considered a single enterprise or a collection of individual companies and (ii) whether, from a financial point of view, the financial benefits received by TOUSA exceeded the financial consideration given in the Transeastern settlement. (Trial Tr. 2801:4 – 2804:13; Trial Exh. 640).

116. Mr. Lee testified that a determination of the first question, including an analysis of how TOUSA was organized and how it operated, was the starting point in answering the

second question and determining how to value the benefits received in the settlement. (Trial Tr. 2802:13 – 2803:18). This Court agrees.

117. Mr. Lee concluded that TOUSA should be considered a single integrated enterprise or a single integrated business. (Trial Tr. 2803:24 – 2804:1). This Court agrees.

118. Mr. Lee also concluded, based on an analysis of "hard benefits that could be quantified" that the benefits received in the Transeastern settlement exceeded the financial consideration given by TOUSA. (Trial Tr. 2804:14-24). This Court agrees.

119. In determining that TOUSA should be considered a single integrated business, Mr. Lee considered the centralized nature of TOUSA's key management functions, with TOUSA, Inc. management overseeing key functions and key controls and individual divisions conducting homebuilding operations. (Trial Tr. 2810:12-23). TOUSA, Inc. maintained responsibility for financing, cash management, budgeting monitoring inventory, investment guidelines and approval of all land transactions. TOUSA, Inc. also maintained control over negotiating national purchasing contracts, which brought economies of scale to the company. (Trial Tr. 2811:19 – 2812:17; Trial Exh. 5046).

120. Mr. Lee testified that THI, the entity that held the most real estate, had very few employees as the majority of TOUSA's employees were employed by TOUSA Associates Services Company. Therefore, THI was not a single operating entity with its own management and employees. In addition, TOUSA, Inc. approval was required for hiring, firing, salaries and bonuses for all employees. (Trial Tr. 2813:8 – 2814:2; Trial Exh. 3117). Mr. Berkowitz confirmed TOUSA's employee structure. (Trial Tr. 1673:14 – 1675:1).

121. Mr. Lee also testified that, like other large homebuilders, land management was closely managed by TOUSA, Inc., which set policies for land acquisitions. The divisions were

responsible for identifying targets for acquisition and developing a land submission package for TOUSA, Inc. approval. The Asset Management Committee at the TOUSA, Inc. level was responsible for reviewing and approving land submission packages. Land purchases between $10 million and $50 million required CEO approval and land acquisitions above $50 million required the board of directors' approval. (Trial Tr. 2814:17 – 2815:22).

122. Mr. Lee testified that actual home construction was supervised by the divisions, which also maintained control over home design in accordance with local tastes. Raw materials and products with high transportation costs were purchased locally, whereas high-value items for which national purchasing contracts were available were purchased at the TOUSA, Inc. level. TOUSA, Inc. also maintained control of a central database of design plans as well as the centralized surety bond program, which the divisions relied on for homebuilding operations. (Trial Tr. 2817:11 – 2818:7). Mr. Berkowitz confirmed Mr. Lee's testimony. (Trial Tr. 1676:9-20).

123. Mr. Lee also considered TOUSA's cash management system in reaching his conclusion that TOUSA should be considered a single integrated business. He found that cash flowed in directly to TOUSA from the customers, and the cash was swept up to the central account, which was controlled by the parent, TOUSA, Inc. All expenditures had to be verifiable within TOUSA's budget. Funding for operations came down from TOUSA, Inc. through TOUSA's revolving credit facility. TOUSA, Inc. maintained control of SEC financial reporting for the consolidated business as well. (Trial Tr. 2818:19 – 2820:9). Mr. Berkowitz confirmed Mr. Lee's testimony. (Trial Tr. 1675:15 – 1676:4).

124. Based on all of his findings regarding TOUSA's structure and operations, Mr. Lee concluded, and this Court agrees, that the TOUSA organization was integrated, such that certain

entities have certain functions but all have the common purpose of building and selling homes at a profit. (Trial Tr. 2810:12 – 2811:13). He drew a distinction between integrated businesses like TOUSA and companies with a traditional parent-subsidiary structure where the operating entities are treated as separate investments or engage in separate lines of business. He also testified that the degree of control that corporate at TOUSA, Inc. maintains over the entities led to his conclusion of a single integrated business. (Trial Tr. 2820:10 – 2822:16).

125. Mr. Berkowitz testified that his responsibilities were not compartmentalized and that he signed resolutions on behalf of numerous subsidiaries. The subsidiaries did not have their own board meetings or management. (Trial Tr. 1677:3 – 1678:2). Mr. Berkowitz also testified that a bankruptcy of TOUSA, Inc. would have made it difficult-to-impossible for the subsidiaries to exist on their own. He testified that it would have been difficult for the subsidiaries to obtain their own financing, unless they had unencumbered assets and were able to get approval from their existing secured revolver lenders and unsecured bondholders.[8] (Trial Tr. 1678:3 – 1680:17). Mr. Devendorf confirmed that the subsidiaries "absolutely could not" obtain their own financing because their assets were encumbered by the secured revolver and because they did not have their own audited financial statements. (Trial Tr. 1877:5-18). This Court agrees with Messrs. Berkowitz and Devendorf that TOUSA's subsidiaries were so integrated with the corporate group that they could not have survived or obtained financing on their own.

126. Mr. Lee used his conclusion that TOUSA should be considered a single integrated business to determine how to value and quantify the consideration given and benefits received in

[8] The joint ventures to which TOUSA was a party, such as Transeastern and the Engle/Sunbelt JV, have a different relationship to TOUSA than the Conveying Subsidiaries. For example, Transeastern was a wholly separate venture, with its own management and financing. Engle/Sunbelt, like other joint ventures, would have one of the joint venture partners serve as the managing member, who would provide corporate services to the joint venture. (Trial Tr. 1680:22 – 1681:25).

the Transaction. He testified that if he had found that TOUSA was a collection of individual companies, as opposed to a single integrated business, his answer to the valuation question may have been different "if the consideration given and received only reflected one entity." (Trial Tr. 2822:17 – 2823:23).

127. Mr. Lee concluded, based on the closing statement for the Transaction and TOUSA's September 30, 2007 10-Q, that the financial consideration given in the settlement was $583.1 million. The $583.1 million was comprised of: $400 million paid out to the senior facilities; $20.8 million in interest on the senior facilities; $51.7 million paid out to Falcone for his expenses as land banker; $5.6 million for the Kendall settlement; $3.9 million for legal fees of the joint venture lenders; $9.1 million in senior subordinated PIK notes issued; $84 million in PIK preferred stock issued; and $8 million in warrants issued. (Trial Tr. 2823:17 – 2824:22; Trial Exh. 5042). This Court finds Mr. Lee's conclusion to be credible and supported by the evidence.

128. Mr. Lee valued the settlement of the Transeastern JV bank debt at $521.9 million, based on the $400 million paid to the senior facilities, $20.8 million interest on the senior facilities and the $9.1 million in PIK notes, $84 million in PIK preferred stock and $8 million in warrants issued. (Trial Tr. 2825:2-17).

129. Mr. Lee provided a low and high dollar value range for the assets received by TOUSA in the transaction based on the asset valuations and appraisals conducted by Mr. Hewlett, Mr. Cannon, Clarion and TOUSA. Based on TOUSA's September 30, 2007 10-Q, Mr. Lee considered the value of the restricted and unrestricted cash and property, plant and equipment received by TOUSA, against the liabilities acquired (accounts payable and customer deposits). He then considered the inventory values ascribed by TOUSA ($149.9 million), Mr.

Hewlett ($33.3 million), Mr. Cannon ($172.3 million) and Clarion ($146.5 million) to come up with a valuation of assets received of $33.3 million at the low end and $180.6 million at the high end. The assets acquired include real estate assets that came from Transeastern to the TOUSA group. (Trial Tr. 2826:5 – 2827:25; Trial Exh. 5042)

130. Mr. Lee explained that, although the face amount of the Transeastern debt was approximately $680 million and the claims of the Transeastern lenders were up to $2 billion, he took a conservative approach and valued the settlement at the amount that resulted from months of negotiations between the parties as willing buyers and sellers. (Trial Tr. 2829:9 – 2830:18).

131. Mr. Lee calculates the financial benefits received in the Transaction by combining the value of settling the Transeastern JV bank debt ($521.9 million), the current income tax benefit[9] ($54.8 million) and the net assets acquired (ranging from $33.3 million to $180.6 million) to conclude that the benefits received ranged from $610.0 at the low end, to $757.3 at the high end. (Trial Tr. 2830:19 – 2831:4). This Court agrees with Mr. Lee's calculations.

132. Mr. Lee then subtracted the amount of financial consideration paid from the amount of benefits received and reached the conclusion that the benefits outweighed the consideration by $26.9 million at the low end and $174.2 million at the high end. (Trial Tr. 2831:5-20). This Court finds Mr. Lee's conclusion to be credible and supported by the evidence.

133. Mr. Lee concluded that there were other benefits of the settlement, including those associated with settling the Transeastern Litigation,[10] that he did not quantify because he

[9] Mr. Lee did not independently calculate the tax benefit, but rather accepted counsel's representation that the settlement enabled the company to realize tax benefits. Mr. Lee's tax partner advised that the assumption was not unreasonable. (Trial Tr. 2828:13 – 2828:14).

[10] "Transeastern Litigation" refers to the Prepetition Transeastern Litigation, as defined in the Third Amended Adversary Complaint (D.E. 243).

wanted to show "hard calculations" and when he looked at those "hard calculations" the benefits exceeded the consideration given. (Trial Tr. 2832:2 – 14).

134. Mr. Berkowitz testified that the Transeastern lenders were seeking repayment of the entirety of their debt "[a]nd then some" in the Transeastern Litigation. (Trial Tr. 1605:11-15). He also testified regarding a meeting that TOUSA had with White & Case, counsel for the mezzanine lenders, where TOUSA was told that the Deutsche Bank lenders had four theories of the case and only needed to win on one of the four theories in order to be "totally and completely victorious." Mr. Berkowitz walked out of that meeting thinking that he "wasn't prepared to bet the company on winning four out of four." (Trial Tr. 1613:24 – 1616:9). The Committee did not present any evidence to contradict this testimony.

135. Mr. Berkowitz also testified regarding numerous negative effects that the Transeastern Litigation was having on TOUSA's business: TOUSA experienced difficulty obtaining financing for the Sunbelt JV; national vendors were asking about the litigation at trade shows; regional executives were commenting that the Transeastern Litigation was affecting their business; management was spending significant time and effort on the litigation; and there was a concern that an adverse judgment would affect TOUSA's ability to obtain surety bonds, which would have drastic negative effects on homebuilding operations (a concern which was realized with TOUSA ultimately filed bankruptcy – they were unable to obtain surety bond financing without posting 100% collateral). (Trial Tr. 1618:10 – 1621:4; 1628:13 – 1630:13; 1638:12 – 1639:20). The Committee did not present any evidence to contradict this testimony.

136. Mr. Lee testified that failure to settle the Transeastern Litigation could have resulted in a loss or reduction in bonding capacity or triggered the default and acceleration of over $1 billion of debt of the company's homebuilding operations. Though he did not quantify

that benefit, he testified that settling the Transeastern Litigation was a "very material" benefit to the group and difficult to quantify because "it was not a solid number as the other benefits that were qualified [sic]." (Trial Tr. 2832:15 – 2833:19). In fact, an adverse judgment in the Transeastern Litigation in excess of $10 million would have accelerated TOUSA's $800 million secured revolver and over $1 billion in unsecured bond debt. (Trial Exhs. 4045, 4049, 4055-4059). The Committee did not present any evidence to contradict this testimony.

137. Mr. Berkowitz testified that a voluntary bankruptcy filing by Transeastern, as opposed to settlement, would have triggered TOUSA's "100% obligation" to pay debts owed pursuant to carve-out guarantees as well as performance under completion guarantees. (Trial Tr. 1595:4 –1601:19; 1623:17 – 1624:21). Mr. Berkowitz further testified that had TOUSA, Inc. filed for bankruptcy, the $800 million secured revolver and over $1 billion in unsecured bond debt would have been accelerated, and that both the bondholders and secured lenders could have sought to recover the assets of the subsidiaries that guaranteed and/or were co-borrowers under those debt instruments. (Trial Tr. 1678:3 – 1679:3). The Committee did not present any evidence to contradict this testimony.

138. Mr. Lee testified that in his 38 years of valuation experience, when dealing with a single integrated business, he has never determined, nor has he seen anyone determine, that the benefits of a particular transaction should be evaluated at the subsidiary level. (Trial Tr. 2833:25 – 2834:7). The Committee did not present any evidence to contradict this testimony.

139. Mr. Lee testified, and this Court agrees, that it would be inappropriate to evaluate how those benefits would have flowed down to the subsidiaries because any method of evaluation would be "based on assumptions" and "would be completely arbitrary." He would not have advised TOUSA to consider the benefits to the Conveying Subsidiaries had he been its

consultant at the time of the Transaction, nor would he have considered the benefits to the Conveying Subsidiaries in rendering a fairness opinion. (Trial Tr. 2834:8-21; 2805:4-13). Mr. Berkowitz similarly testified that he did not conduct a mathematical analysis of the benefits or drawbacks for each one of the Conveying Subsidiaries, but that he still believed the settlement benefited TOUSA as a whole. (Trial Tr. 1721:16 – 1722:2).

140. Mr. Lee testified that TOUSA's approach to valuing the benefits of the settlement, as "maximizing the value of the enterprise," confirms his valuation approach and conclusions. (Trial Tr. 2835:24 – 2837:10; Trial Exh. 255). Mr. Berkowitz signed resolutions on behalf of a number of the Conveying Subsidiaries approving the settlement and transaction in terms of benefiting "each of the entities and the enterprise as a whole." (Trial Tr. 1716:10 – 1721:6). Mr. Berkowitz also confirmed his belief that settlement was in the best interests of TOUSA, including its stockholders and creditors. (Trial Tr. 1688:1 -1689:25). This Court agrees.

141. TOUSA engaged in "hard-fought, difficult negotiations" in reaching the decision to settle the Transeastern Litigation and acted on the advice of a "series of advisors," which included Lehman Brothers ("Lehman"), AlixPartners, and three nationally prominent law firms, Kirkland & Ellis LLP ("Kirkland"), Greenberg Traurig, LLP and Quinn Emanuel Urquhart Oliver & Hedges, LLP. (Trial Tr. 1611:11 – 1612:8; 1617:11-13).

142. On June 20, 2007, Lehman made a presentation to the TOUSA Board of Directors in which it discussed, among other topics, the rationale for global settlement, commercial reasonableness of the settlement, affordability and impact of the settlement, alternatives to settlement and key risks to TOUSA following the settlement. (Trial Tr. 1621:5-19; Trial Exhs. 187, 255).

143. At the same meeting, attorneys from Kirkland addressed the likelihood of success on the various claims in the Transeastern Litigation, the range of potential damages in connection with the litigation and the risks attendant to a failure to settle, including the potential impact on outstanding bonds, credit agreements and ability to continue to transact business. (Trial Exh. 255). Kirkland advised the board that settling the Transeastern Litigation was likely a better outcome than proceeding with full litigation because, among other reasons, (i) the litigation would be a drain on TOUSA's time, effort and resources; (ii) the litigation would be "highly destabilizing" for TOUSA's business; (iii) TOUSA faced a "substantial risk of an adverse judgment" in excess of the amount of the settlement; and (iv) an adverse judgment in the litigation could cause TOUSA to default on more than $1 billion in bond debt. (Trial Exh. 187).

144. A major risk of proceeding with the Transeastern Litigation was the potential entry of a judgment in excess of $10 million, which would have triggered a default under $1.06 billion of TOUSA bond indebtedness. Such default could have led to acceleration of the bonds and a Chapter 11 filing as TOUSA was "unlikely to be able to refinance [the bond] debt" at the time of the board meeting and presentation. (Trial Tr. 1623:6 - 1624:21; Trial Exh. 187).

145. At the end of the board meeting, and based upon the advice of counsel and advisors, the TOUSA Board of Directors unanimously approved the Transaction. (Trial Exh. 255). Mr. Berkowitz testified that, in signing the corresponding resolutions on behalf of the Conveying Subsidiaries, he was trying to do what the he perceived as "saving the company." (Trial Tr. 1656:23 – 1657:4).

<u>Proposed Findings Regarding Preference Claim</u>

146. The Committee did not introduce any opinions, valuations, testimony or other evidence at trial with respect to the Bankruptcy Code § 547(b)(5) requirement that the

Committee prove that the defendants received more by way of the challenged tax refund than they would have received if TOUSA's cases were filed under Chapter 7 of the Bankruptcy Code as of the Petition Date, January 29, 2008.

147. TOUSA, Inc.'s substantial tax refund assets will remain at TOUSA, Inc., and the Court finds that the Conveying Subsidiaries do not have the ability to avoid the lien at the TOUSA, Inc. level. (Trial. Tr. 1133:9 – 17).

Proposed Findings Regarding Claim To Disgorge Interest Payments

148. The Second Lien Agent and Lenders deny receiving any cash interest payments and the Committee did not introduce any evidence to the contrary.

Proposed Findings Regarding Claim To Disgorge Professional Fees

149. On April 25, 2008, the Debtors filed a Motion for Authority To Use Cash Collateral (D.E. 880)[11], which was supplemented by the Debtors' Supplement to Debtors' Motion for Authority to Use Cash Collateral filed on May 19, 2008 (D.E. 999).

150. At hearings held on May 22, 2008 and June 10, 2008, the Court stated that "my view is that the professionals should and will get paid….[T]hat's one of the principles that I will govern myself by" and "I don't believe that professionals should be engaged in the business of funding a reorganization . . ." (D.E. 1076, at 253-54; D.E. 1215, at 271:14-16).

151. On June 20, 2008, the Court entered the Stipulated Final Order (I) Authorizing Limited Use of Cash Collateral Pursuant to Sections 105, 361 and 363 of the Bankruptcy Code, and (II) Granting Replacement Liens, Adequate Protection and Super Priority Administrative Expense Priority to Secured Lenders (the "Final Cash Collateral Order") (Trial Exh. 3242; D.E. 1226). The Final Cash Collateral Order has been extended numerous times in the case.

[11] References to docket entries in this section refer to docket entries in Cause No. 08-10928-JKO unless otherwise noted.

152. In its Third Amended Complaint in the Adversary Proceeding, one of the remedies sought by the Committee is enforcement of paragraph 16(d) of the Final Cash Collateral Order "to modify or eliminate the Adequate Protection Liens and Adequate Protection Claims as defined in that order, and requiring disgorgement from Pre-Petition Secured Parties, as that term is defined in that Order, any payments made as Adequate Protection under that Order." (D.E. 243) in Cause No. 08-01435.

153. Paragraph 16(d) of the Final Cash Collateral Order provides that "[i]n the event of a successful Challenge, nothing herein shall be deemed to limit (a) the ability of this Court to modify the scope of the Adequate Protection Liens and Adequate Protection Claims granted hereunder against a Debtor that is determined not to be liable for all or a portion of the Prepetition Secured Indebtedness or (b) the rights of any Prepetition Agent or Secured Lender to oppose such modification." (Trial Exh. 3242; D.E. 1226, at ¶ 16(d)).

154. Under the terms of the Final Cash Collateral Order, "Adequate Protection" includes reasonable and documented fees and expenses of professionals engaged by the Second Lien Agent and Lenders. (Trial Exh. 3242; D.E. 1226, at ¶ 7(c)).

155. Regardless of whether the Court sets aside the liens and claims of the Second Lien Agent and Lenders against the Conveying Subsidiaries in this Adversary Proceeding (which it should not do, based upon the evidence at trial), the Final Cash Collateral Order grants Adequate Protection in favor of the Second Lien Agent and Lenders not only as against the Conveying Subsidiaries, but also against TOUSA, Inc. The Committee purposely chose not to pursue lien and claim avoidance actions on behalf of TOUSA, Inc., which is not a named Plaintiff in this Adversary Proceeding. Moreover, the evidence at trial is clear that TOUSA, Inc.'s substantial tax refund assets, which have been used to fund the fees and expenses of

professionals in this case, will remain at TOUSA, Inc. (Trial. Tr. 1133:9 – 17). As there is no claim for avoidance of liens and claims at TOUSA, Inc., there exists no standing by the Conveying Subsidiaries to seek "disgorgement" of those professional fees and expenses funded by TOUSA, Inc.

Proposed Findings Regarding Equitable Subordination

156. The Committee has not presented any evidence as to any possible inequitable conduct by the Second Lien Agent or Lenders or as to any other factor that would support a claim for equitable subordination.

II.
CONCLUSIONS OF LAW

Solvency/ Valuation of Assets

157. Both solvency and reasonably equivalent value must be determined as of the time of the transfer in question based on the facts and circumstances as they then exist. *See In re R.M.L., Inc.*, 92 F.3d 139, 152-54 (3d Cir. 1996); *see also Mellon Bank, N.A. v. Metro Communications, Inc*. 945 F.2d 635, 649 (3d Cir. 1991) ("[I]nsolvency is to be measured at the time the debtor transferred the value or incurred the obligation.").

158. Courts consider a number of factors in deciding whether to consolidate the corporate family for the purpose of determining solvency, with each of the factors focusing on whether the corporate entities operated on a group or divisional level, or operated as stand-alone entities. *See, e.g., Cissell v. First Nat'l Bank of Cincinnati*, 476 F. Supp. 474, 478-80 (S.D. Ohio 1979); *Tryit Enterp. v. Gen. Electric Cap. Corp. (In re Tryit Enterp.)*, 121 B.R. 217, 223-24 (Bankr. S.D. Tex. 1990).

159. Modern corporate finance practices consistently contemplate financing corporate groups on a group basis – something the Third Circuit Court of Appeals has called "Lending

101." *In re Owens Corning*, 419 F.3d 195, 212 (3rd Cir. 2005) ("parent/subsidiary borrowing structure is "the 'deal world' equivalent of 'Lending 101.' . . . This kind of lending occurs every day.") TOUSA itself has consistently obtained financing on a group basis, including all of its senior and subordinated note issuances, which have the benefits of the same upstream guarantees as were provided to the First and Second Lien Lenders.

160. An entity is insolvent if its debts are greater than its assets, at a fair valuation, exclusive of property exempted or fraudulently transferred. 11 U.S.C. § 101(32)(A); *In re Transit Group, Inc.*, 332 B.R. 45, 55 (Bankr. M.D. Fla. 2005).

161. Valuation of a business's assets should be made from the perspective of a going-concern, as opposed to liquidation value, unless the business is "on its deathbed" as far as operations. *See In re DAK Industries, Inc.*, 195 B.R. 117, 124 (Bankr. S.D. Cal 1996); *In re American Classic Voyages Co.*, 367 B.R. 500, 508 (Bankr. D. Del. 2007) ("Before the going concern valuation is to be abandoned, the debtor must be wholly inoperative, defunct, or dead on its feet.").

162. If liquidation in bankruptcy was not clearly imminent on the date of an allegedly fraudulent transfer, the debtor should be valued as a going concern for purposes of determining its solvency. *In re American Classic Voyages Co.*, 367 B.R. at 508.

163. In deciding whether a debtor was on its financial deathbed at the time of an allegedly fraudulent transfer, courts should exercise caution not to consider a debtor's business as "dead" merely because hindsight teaches that the debtor was "traveling on road to financial ruin." *In re DAK Industries, Inc.*, 195 B.R. at 124.

164. When a debtor-business is a going concern, fair value is determined by the fair market price of the debtor's assets that could be obtained if they were sold in a prudent manner

within a reasonable period of time to pay the debtor's debts. *In re Roblin Industries, Inc.*, 78 F.3d 30, 35 (2d. Cir. 1996).

165. In the context of a solvency analysis, "fair valuation" of real estate assets is indistinguishable from "fair market value." *In re Duque Rodriguez*, 75 B.R. 829, 831 (Bankr. S.D. Fla. 1987).

166. Courts should reject an expert's property value estimates where such estimates are contradicted by real market evidence as to what the debtor was actually paid for a certain property. *In re WRT Energy Corp.*, 282 B.R. 343, 373 (Bankr. W.D. La. 2001).

167. "It makes no difference whether a firm has a contingent asset or a contingent liability; the asset or liability must be reduced to its present, or expected, value before a determination can be made whether the firm's assets exceed its liabilities." *In re Xonics Photochemical, Inc.*, 841 F.2d 198, 200 (7th Cir. 1988).

168. Even if the solvency of each Conveying Subsidiary could be determined separately, the Committee's own solvency witness (Mr. Derrough) claims that the solvency of the parent must *per se* mean that each Conveying Subsidiary is solvent due to rights of reimbursement, contribution and subrogation.

169. TOUSA and the Conveying Subsidiaries were solvent immediately before and immediately after the Transaction.

<u>Reasonably Equivalent Value</u>

170. Hindsight is inappropriate in determining whether reasonably equivalent value was received for a certain transfer. *In re R.M.L., Inc.*, 92 F.3d at 151-52. *See also ASARCO LLC v. Ams. Mining Corp.*, 396 B.R. 278, 337 (S.D. Tex. 2008) (in analyzing whether the debtor

received reasonably equivalent value at the time of the transfer, "courts avoid valuing an asset 'through the 20/20 vision of hindsight.'").

171. Benefits comprising "value" for the purposes of determining "reasonably equivalent value" can consist of both "direct benefits" and "indirect benefits." Even if there have been no loan proceeds transferred directly to a guaranteeing subsidiary, "indirect benefits" may provide reasonably equivalent value in exchange for the subsidiary's guarantee of an obligation of its parent corporation. *See In re Image Worldwide, Ltd.*, 139 F.3d 574, 578 (7th Cir. 1998); *In re R.M.L., Inc.*, 92 F.3d at 149-50.

172. There is no *per se* rule requiring a precise calculation of the cash value of intangible costs and indirect benefits.[12] *See In re R.M.L., Inc.*, 92 F.3d at 151 (discussing "potential, intangible benefits that, although incapable of precise measurement, conferred value on [the debtor] despite their failure to materialize."); *see also Xonics Photochemical*, 841 F.2d at 202 (finding indirect benefits constituted reasonably equivalent value without quantifying those indirect benefits); *In re Fairchild Aircraft Corp.*, 6 F.3d 1119, 1126 (5th Cir. 1993) (finding indirect benefits constituted reasonably equivalent value without quantifying those indirect benefits).

173. Courts have repeatedly considered the avoidance or deferral of bankruptcy as a valuable and substantial benefit that should be considered in a fraudulent transfer analysis, even though they have not required a dollar-for-dollar quantification of such benefit. *See e.g., Williams v. Twin City Co.*, 251 F.2d 678, 681 (9th Cir. 1958) (benefit of avoiding bankruptcy is

[12] In discussing the modern practice of intercorporate guarantees, a recent journal article noted that: "[m]odern court decisions have steered away from a hard-line, mathematically-precise determination of reasonably equivalent value…Instead, courts are looking on a case-by-case basis to determine whether the guarantor received any 'indirect benefits' or shared an 'identity of interest' with the borrower to find reasonably equivalent value." Monika Sanford, *Lenders Beware: Can Intercorporate Guaranty Withstand a Fraudulent Transfer Attack?*, 28-4 ABIJ 40, 41 (2009).

value to be considered in fraudulent transfer analysis); *In re Applied Theory Corp.*, 330 B.R. 362, 364 (S.D.N.Y. 2005) (holding that financing that provided debtor ability to avoid bankruptcy even if it "proved to be only short-lived" provides "reasonably equivalent value.").

174. Examples of indirect benefits that can satisfy the reasonably equivalent value requirement include the business synergies and operational interdependence of affiliated entities;[13] access to efficient financing;[14] avoidance of bankruptcy;[15] rights of reimbursement, contribution, exoneration and subrogation;[16] and upstream financing of parent acquisitions.[17]

175. Transfers related to "investments that fail to stabilize or improve the debtor's condition can confer value within the meaning of § 548(a)(2)[18] of the Bankruptcy Code." *In re*

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[13] See In re R.M.L., Inc., 92 F.3d at 152; Metro Communications, 945 F.2d at 647; In re Xonics, 841 F.2d at 202; Telefest, 591 F.Supp. at 1381; Pembroke Dev. Corp. v. Commonwealth Sav. & Loan Ass'n (In re Pembroke Dev. Corp.), 124 B.R. 398, 400-01 (Bankr. S.D. Fla. 1991); Lawrence Paperboard Corp. v. Arlington Trust Co. (In re Lawrence Paperboard Corp.), 76 B.R. 866, 874 (Bankr. D. Mass. 1987); Howco Leasing Corp. v. Alexander Dispos-Haul Sys., Inc. (In re Alexander Dispos-Haul Sys.), 36 B.R. 612, 17 (Bankr. D. Or. 1983); Garrett v. Falkner (In re Royal Crown Bottlers of N. Ala., Inc.), 23 B.R. 28, 30 (Bankr. N.D. Ala. 1982); Aalbregtse, Upstream Financing and Use of the Corporate Guaranty, 53 NOTRE DAME L. 840, 847 (1977-78).

[14] *See Metro Communications*, 945 F.2d at 647; *Tryit Enterp.*, 121 B.R. at 224.; Kenneth J. Carl, *Fraudulent Transfer Attacks on Guaranties in Bankruptcy*, 60 AM. BANKR. L.J. 109, 111 (1986).

[15] See Williams, 251 F.2d at 681; Geron v. Palladin Overseas Fund, Ltd, et al. (In re Appliedtheory Corp.), 330 B.R. 362, 364 (S.D.N.Y. 2005); Garrett, 23 B.R at 30.

[16] See Metro Communications, 945 F.2d at 648; Telefest, Inc. v. VU-TV, Inc., 591 F.Supp. 1368, 1375 n. 5 (D.N.J. 1984); Lawrence Paperboard Corp.., 76 B.R. at 875 n.7; Howco, 36 B.R. at 616; Carl, Fraudulent Transfer Attacks on Guaranties in Bankruptcy, 60 AM. BANKR. L.J. at 111-15.

[17] See In re Xonics, 841 F.2d at 202; Jones v. Nat'l City Bank of Rome (In re Greenbrook Carpet Co., Inc.), 722 F.2d 659, 660-61 (11th Cir. 1984); Telefest, 591 F.Supp. at 1379-80.

[18] Florida's laws regarding the avoidance of fraudulent transfers are set forth in Florida Statutes §§ 726.105(1)(b) and 726.106(1), part of the Florida Uniform Fraudulent Transfer Act ("FUFTA"). *See* Fla. Stat. §§ 726.101 *et seq.*; *In re Tower Envtl., Inc*., 260 B.R. 213, 221 (Bankr. M.D. Fla. 1998). In all material respects, FUFTA is analogous "in form and substance" to section 548 of the Bankruptcy Code. *In re Tower Envtl., Inc.*, 260 B.R. at 222; *citing In re United Energy Corp*., 944 F.2d 589, 594 (9th Cir. 1991). The Committee also alleged violations of New York Debtor and Creditor Law sections 273, 274, 275 and 278. *See* N.Y. DEBT. & CRED. LAW §§ 273, 274, 275, 278 (2009). While Section 548 of the Bankruptcy Code requires a debtor who relinquishes an interest in property to receive "reasonably equivalent value" in return, the New York statute requires "fair consideration." *See* N.Y. DEBT. & CRED. LAW §§ 273, 274. Because these terms are generally used interchangeably by courts, the provisions of both New York and Federal law may be analyzed simultaneously. *See In re Applied Theory Corp.*, 330 B.R. 362, 363 n.3 (S.D.N.Y. 2005).

R.M.L., Inc., 92 F.3d at 151-52; *see also In re Xonics*, 841 F.2d 198 (upholding upstream guaranty where guarantor and primary obligor filed for bankruptcy three months after transaction).

176. The ability to obtain financing for the corporate group on terms that might not otherwise be obtainable to any single member of the group is a significant benefit to all members of the corporate group. *See In re Tryit Enterp.*, 121 B.R. at 223-24.

177. "Consummating a transaction which will improve a corporation's public image might also be said to benefit [a guarantor subsidiary]." *In re Miami General Hospital, Inc.*, 124 B.R. 383, 393 (Bankr. S.D. Fla. 1991), quoting *Telefest, Inc. v. VU-TV, Inc.*, 591 F.Supp. 1368, 1378 (D.N.J. 1984) (internal citations omitted).

178. "Where there are indicia of a bona fide financing arrangement, not designed as a shield against other creditors, the lack of perceptible 'direct' benefit to a subsidiary guaranteeing the loan of its parent should not be viewed as tantamount to a lack of 'fair consideration' . . . .Indirect benefit provides the necessary 'fair consideration.'" *In re Miami General Hospital*, 124 B.R. at 394.

179. In finding that there was no fraudulent conveyance where an entity paid the debt for which an affiliated entity was the borrower, the *Miami General Hospital* court focused on the following factors: the entities had a "symbiotic relationship"; both entities were represented by the same individuals who signed on each entity's behalf in connection with the loan repayment; the same individuals were principally involved in each entity's decision-making process; the salary of the individual who served as general counsel to both entities was exclusively paid by only one of the entities; and the guarantor entity would be benefited by the borrowing entities buying power as a result of repaying the loan. *Id.* at 388-389.

180. Another relevant factor is "the nature of the transferor's business and its relationship with its parent." *Telefest*, 591 F. Supp. at 1378. In *Telefest*, the transferor and its parent were both providers of cable television services. The Court held that "[m]onies loaned to [the subsidiary's] parent to purchase a cable television system or for other moves directed toward expansion would most probably provide an additional and obviously secure market for [the subsidiary]." *Id* at 1379. While the consideration for the subsidiary's guarantee may not have been a direct benefit, "it was a specific enough benefit for a reasonable trier of fact to conclude that fair consideration inhered in the conveyance." *Id.*

181. Like the Court in *Miami General Hospital*, this Court "cannot help but focus on the inter-relationship and interplay among" TOUSA, Inc. and the Conveying Subsidiaries. *Id*. at 387. The testimony in this case clearly establishes that TOUSA functioned as a single business enterprise with the corporate parent providing numerous centralized services to the subsidiaries. Continuation of financing and centralized services without sudden interruption due to bankruptcy of TOUSA, Inc. was a significant benefit to the Conveying Subsidiaries.

182. The Conveying Subsidiaries received reasonably equivalent value for the guaranties they gave as part of the Transaction.

<u>Identity of Interest</u>

183. Some courts treat "identity of interest" as a factor in the "indirect benefits" analysis. *See, e.g.*, *In re Pembroke*, 124 B.R. at 400. In other cases, however, "identity of interest" is treated as a separate, stand-alone theory to uphold intercorporate guaranties by consolidating the corporate structure solely for the purpose of fraudulent transfer analysis.[19] *See*

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[19] Where an identity of interest is found because the subsidiary is dependent on the parent for financing, advertising, supplies, and/or management, these benefits should be considered by the court as sufficient to meet the "direct benefits test." *See* Aalbregstse, *Upstream Financing and Use of the Corporate Guaranty*, 53 NOTRE DAME L. 840 at 847.

In re Miami General Hospital, 124 B.R. at 393-95; *Lawrence Paperboard Corp.*, 76 B.R. at 873-74; *In re Gerdes*, 246 B.R. 311, 314 (Bankr. S.D. Ohio 2000).

184. If related corporate entities share an identity of interest, funds advanced to one will be equivalent value for a payment, security interest or guarantee given by the other. *See In re Miami General Hospital, Inc.*, 124 B.R. at 393-94; *Telefest*, 591 F.Supp. at 1368 ("if the debtor and the third party are so related or situated that they share an 'identity of interests,'…what benefits one, will in such case, benefit the other to some degree."); *Howco*, 36 B.R. at 616-17 (finding "that there was sufficient identity of interest between [owner of Debtor] and [Debtor] to regard the entire consideration given by the [lender] to Debtor's owner as "reasonably equivalent value given in exchange" for [the Debtor's] guarantees…").

185. Where a debtor and a related corporation operate as an integrated enterprise, and therefore possess an "identity of interest," courts are inclined to hold that reasonably equivalent value for a transfer exists, without quantifying indirect benefits. *See In re Alexander Dispos-Haul*, 36 B.R. 612, 617-18 (Bankr. D. Or. 1983); *In re Xonics*, 841 F.2d at 202; *Garrett*, 23 B.R. at 30; *In re Tryit Enterp.*, 121 B.R. at 223-24.

186. Courts finding identity of interest do not require the more stringent showing required to prove alter ego or piercing the corporate veil. *See In re Alexander Dispos-Haul*, 36 B.R. at 617.

187. TOUSA, Inc. and the guaranteeing subsidiaries of TOUSA, Inc. shared an identity of interest.

Expert Testimony

188. "[A]ny step that renders [an expert's] analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology

or merely misapplies that methodology." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994). See also *Kallas v. Carnival Corp.*, 2009 U.S. Dist. LEXIS 33797 (S.D. Fla. Mar. 30, 2009) (citing *Paoli* and granting a Daubert motion to exclude expert testimony because it concluded that there was too great an analytical gap between the data and opinion offered).

189. The Committee fully acknowledges Ms. Benbrook erred in assuming that TOUSA's budgets were static and that Mr. Hewlett relied on Ms. Benbrook's cost-to-complete analysis. The Committee argues, however, that Ms. Benbrook's *ex post facto* reconsideration of the data demonstrate that the errors resulted in relatively minor variances, although the Court notes that the Second Lien Agent's second cross-examination of Ms. Benbrook strongly disputed that point. Regardless, it was the Committee that selected Ms. Benbrook as its expert and it is the Committee that acknowledges she erred. Thus, whether the variances were major or minor misses the point: her analysis was unreliable and is therefore properly rejected by this Court.

The Preference Claim

190. 11 U.S.C. § 547(b) sets forth five affirmative elements that must be demonstrated in order for a transfer to be preferential (subject to any affirmative defenses set forth in Bankruptcy Code § 547). Pursuant to Bankruptcy Code § 547(g), the Committee has the burden of proving each of the five elements. As this Court found in its Order Denying Creditors' Motion for Summary Judgment on Count XIX of the Third Amended Adversary Complaint and Granting Plaintiff's Cross Motion for Partial Summary Judgment (D.E. 379), the Committee as of that time had not yet met its burden of proving the element set forth in Bankruptcy Code § 547(b)(5). (D.E. 379, at 10-11).

191. In order for a plaintiff to meet its burden of proving the element set forth in Bankruptcy Code § 547(b)(5), the plaintiff must adduce evidence as to the liquidation value of

the creditor's collateral as of the petition date, in this case, January 29, 2008. *Biggs v. Capital Factors (In re Herb Goetz & Marlen Horn Assocs.)*, 1997 U.S. App. LEXIS 19191, *3 (9th Cir. 1997) (affirmed bankruptcy court's ruling that plaintiff failed to meet its burden under § 547(b)(5) when it failed to present any evidence about the debtors' assets, liabilities and claims from which the court could construct a hypothetical distribution, noting that "the bankruptcy court was unable to determine whether [the defendant] received more than other creditors in its class would have received" under a liquidation). As the Committee did not present any reports, testimony or other evidence of values as of the petition date, the Committee has failed to meet its burden of proof on its Preference Claim.

The Disgorgement Claims

192. The Second Lien Agent and Lenders did not receive any cash interest payments and, therefore, there are no interest payments to disgorge.

193. As to the claim for disgorgement of professionals fees, disgorgement is "a harsh remedy that should only be applied in extreme situations." *In re CHC Indus., Inc.*, No. 8:03-bk-20776-PMG, 2006 Bankr. LEXIS 4468, *13 (Bankr. M.D. Fla. Sept. 5, 2006) (quoting *In re LTV Steel Company, Inc.*, 288 B.R. 775, 779 (Bankr. N.D. Ohio 2002)).

194. Disgorgement is "a harsh remedy, one that should be applied only when mandated by the equities of a case." *Id*. (quoting *In re Anolik*, 207 B.R. 34, 39 (Bankr. D. Mass. 1997)).

195. Generally, "compelling circumstances must be shown to warrant the exercise of the Court's discretion regarding disgorgement." *Id.* (citing *In re Kids Creek Partners, L.P.*, 236 B.R. 871, 875 (Bankr. N.D. Ill. 1999)).

196. It would be improper to disgorge the fees paid by TOUSA, Inc., because the Second Lien Agent's and Lenders' liens are valid as to that entity and it is the only source of

adequate protection payments under the Cash Collateral Order. *Chrysler Credit Corp. v. Ruggiere (In re George Ruggiere Chrysler-Plymouth, Inc.)*, 727 F.2d 1017 (11th Cir. 1984) (discussing the requirement of adequate protection in the context of a motion to use cash collateral). *See also* 11 U.S.C. § 363(c)(2) and (e).

<u>Equitable Subordination</u>

197. The Committee presented no evidence at trial as to any of the elements of an equitable subordination claim. As a result, the equitable subordination claim is deemed abandoned and, in any event, is without merit.

Dated: September 4, 2009

Respectfully submitted,

I hereby certify that I am admitted to the Bar of the United States District Court for the Southern District of Florida and I am in compliance with the additional qualifications to practice in this court set forth in Local Rule 2090-1(A).

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