

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRESCIENT ACQUISITION GROUP, INC.
d/b/a Prescient Capital Corp.,

Plaintiff,

-against-

MJ PUBLISHING TRUST, MJ-ATV
PUBLISHING TRUST, NEW HORIZON
TRUST, and MICHAEL J. JACKSON,

Defendants.

05 Civ. 6298 (PKC)

Declaration of David Zaslowky

DAVID ZASLOWSKY declares under the penalty of perjury:

1. I am a Member of the Bar of the State of New York and of this Court. I am also a Member of the firm of Baker & McKenzie LLP, attorneys for defendant New Horizon Trust in this action.

2. Annexed hereto as Exhibit 1 is a true and correct copy of Plaintiff's Second Amended Complaint dated April 3, 2006. That complaint alleges a single cause of action against New Horizon Trust, for fraudulent conveyance. I submit this declaration in support of New Horizon Trust's motion for summary judgment with respect to that cause of action for fraudulent conveyance.

3. The facts underlying this motion are based to a large extent on contract documents concerning a number of loans made to the Defendants. I set forth below the history of the transaction based on those documents and attach the documents as Exhibits hereto. To the extent that an assertion is based on something other than a contract document, the specific source is identified.

A. The Parties

4. Prescient Acquisition Group, Inc. (“Prescient” or “Plaintiff”) purports to be a New York corporation. Ex. 1, ¶ 5.

5. MJ Publishing Trust (“MJPT”) is a common law trust that was created on or about February 20, 1997 pursuant to a trust agreement under the laws of the State of Delaware. See the Third Amended and Restated Trust Agreement between Michael Joseph Jackson (“MJJ”), John Branca, Myung-Ho Lee, and Commonwealth Trust Company, dated September 29, 1999, a true and correct copy of which is annexed hereto as Exhibit 2 (the “MJPT Trust Agreement”). MJJ is the 100 percent beneficial owner of MJPT. *Id.*, § 1.1.

6. MJ-ATV Publishing Trust (“MJ-ATV”) (MJPT and MJ-ATV are referred to hereinafter collectively as the “MJ Trusts”) is a Delaware statutory trust that was created on or about February 1, 1999 pursuant to a trust agreement under the laws of the State of Delaware. See the Trust Agreement between Wilmington Trust Company and MJJ, dated February 1, 1999, a true and correct copy of which is annexed hereto as Exhibit 3 (the “MJ-ATV Trust Agreement”). MJJ is the 100 percent beneficial owner of MJ-ATV. *Id.*, § 2.02.

7. New Horizon Trust is a Delaware statutory trust that was formed on or about February 10, 2006, pursuant to a trust agreement under the laws of the State of Delaware. See the Amended and Restated Trust Agreement among Citigroup Global Markets Inc., MJPT, MJ-ATV, and Wells Fargo Delaware Trust Company (“Wells Fargo”), dated as of March 31, 2006, a true and correct copy of which is annexed hereto

as Exhibit 4 (the “Amended New Horizon Trust Agreement”). New Horizon Trust’s 100 percent beneficial owners are MJPT (15%) and MJ-ATV (85%). Id., § 3.1.

B. The MJPT Loan

8. On or about September 29, 1999, Bank of America, N.A. (“BOA”) made an initial loan to MJPT. Through a number of subsequent agreements, the principal amount of the loan was increased and the due date extended. Ultimately, under an agreement dated March 25, 2004, BOA wound up lending an aggregate principal amount of \$72,500,000 to MJPT (the “MJPT Loan”). See § 2(A) of the Third Amended and Restated Loan Agreement between BOA and MJPT, dated March 25, 2004, a true and correct copy of which is annexed hereto as Exhibit 5 (the “MJPT Loan Agreement”).

9. The MJPT Loan bore interest at an annual rate equal to one month LIBOR + 3.00%. See the Fourth Amended and Restated Promissory Note by MJPT to the order of BOA, a true and correct copy of which is annexed hereto as Exhibit 6. See also, Ex. 5, § 1(B). Upon an Event of Default, the MJPT Loan bore a default interest rate of prime + 4.00% per annum. Ex. 6.

10. The MJPT Loan was due and payable in full, together with all accrued and unpaid interest thereon, on December 20, 2005 Ex. 5, §§ 2(G)(1), 1(UU).

11. There were numerous agreements that were entered into in connection with the MJPT Loan, including, among others, the MJPT Trust Agreement, and a Security Agreement between BOA and MJPT, dated September 29, 1999 (the “MJPT Security Agreement”), a true and correct copy of which is annexed hereto as Exhibit 7.

12. Section 1.1 of the MJPT Trust Agreement provided that MJPT’s principal assets consisted of a music publishing catalog known as the “MIJAC Catalog” and the

right to receive payments under a number of administration agreements between MJPT and third parties for the administration of the MIJAC Catalog (the “Administration Agreements”). Ex. 2, § 1.1. See also, the letter agreement between Broadcast Music, Inc. and Michael Joe Jackson, dated March 31, 2003, a true and correct copy of which is annexed hereto as Exhibit 8; the Agreement between Warner Bros. Music and Michael Jackson, dated June 30, 1983, a true and correct copy of which is annexed hereto as Exhibit 9. The MIJAC Catalog is comprised of, *inter alia*, the songs of MJJ and a number of other well-known artists. Ex. 2, § 1.1.

13. As part of the consideration for the MJPT Loan, MJPT assigned and pledged to BOA MJPT’s right, title and interest in and to the MIJAC Catalog and the Administration Agreements. Ex. 7, §§ 2, 3; Ex. 2, §§ 2.2, 5.1(f), 10.3. As a result, MJPT was restricted in its ability to convey, dispose of, or transfer all or any portion of the MIJAC Catalog or the Administration Agreements. Id. Section 6(A) of the MJPT Loan Agreement provided, in relevant part:

Until full payment and performance of all Obligations of [MJPT] under the Loan Documents ... [MJPT] will not, without the prior written consent of ... [BOA] ... [s]ell, lease, assign, trade or otherwise dispose of or transfer all or any portion of its assets; provided, that [MJPT] may sell, assign or otherwise dispose of or transfer the Mijac Catalog so long as concurrently with the consummation of such transaction the Obligations are paid in full.

Ex. 5, § 6(A). Section 11(I) of the MJPT Security Agreement stated, in relevant part:

[MJPT] shall not, (i) sell, assign (by operation of law or otherwise) or otherwise dispose of, or grant any option with respect to, any of the Collateral, provided, that [MJPT] may make dispositions of Collateral permitted by Section 6.A. of the [MJPT] Loan Agreement, [or] (ii) create or permit to exist any lien, security interest, option or other charge or

encumbrance upon or with respect to any of the Collateral
....

Ex. 7, § 11(I). The MJPT Security Agreement further provided, in relevant part, that
BOA,

after the occurrence and during the continuance of a Default, without liability to [MJPT] may ... take control of proceeds; release Collateral in its possession to [MJPT], temporarily or otherwise; ... and take control of funds generated by the Collateral, such as cash dividends, interest and proceeds or refunds from insurance, and use same to reduce any part of the Secured Obligations and exercise all other rights which an owner of such Collateral may exercise, except the right to vote or dispose of Collateral before an Event of Default and after an Event of Default any right not described in Section 13 below.

Id., § 12.

14. Section 7(A) of the MJPT Loan Agreement provided an Event of Default occurred where MJPT or MJJ failed to “(i) pay in full when due any principal due on any Loan when the same becomes due and payable, (ii) pay any interest on any Loan within three (3) Business Days after the same becomes due and payable” Ex. 5, § 7(A). An Event of Default also occurred where MJPT failed to comply with Section 6(A) of the MJPT Loan Agreement quoted above. Id., § 7(B).

15. BOA’s remedies upon an Event of Default included, among other things, its “right to resort to any or all of the Collateral and to exercise any or all of the rights of a secured party pursuant to applicable law.” Id., § 8(B). Further, MJPT would be obligated to pay to BOA a default fee of \$10 million and BOA could, at its discretion, publicly or privately sell the MIJAC Catalog and the Administrative Agreements upon such terms as BOA deemed commercially reasonable. Id., § 8(B); Ex. 7, § 13(A).

C. The MJ-ATV Loan

16. On or about December 23, 1998, BOA made an initial loan to MJ-ATV in the principal amount of \$140 million. Through a number of subsequent agreements, the principal amount of the loan was increased and the due date extended. Ultimately, under an agreement dated as of September 30, 2002, BOA wound up lending an aggregate principal amount of \$200 million to MJ-ATV (the “MJ-ATV Loan”) (collectively, the MJPT Loan and the MJ-ATV Loan are referred to as the “BOA Loans”). See § 2(A) of the Amended and Restated Term Loan Agreement between BOA and MJ-ATV, dated as of September 30, 2002, a true and correct copy of which is annexed hereto as Exhibit 10 (the “MJ-ATV Loan Agreement”).

17. The MJ-ATV Loan bore interest at 6.16% per annum with respect to \$140 million; 7.14% per annum with regard to the next \$45 million; one month LIBOR + 2.00% per annum in respect of the next \$11.65 million; and one month LIBOR + 2.00% per annum with respect to the final \$3.35 million. See the Amended and Restated Note dated February 12, 1999, a true and correct copy of which is annexed hereto as Exhibit 11; the Promissory Note dated December 27, 2000, a true and correct copy of which is annexed hereto as Exhibit 12; the Promissory Note, dated September 30, 2002, a true and correct copy of which is annexed hereto as Exhibit 13; and the Promissory Note, dated May, 2005, a true and correct copy of which is annexed hereto as Exhibit 14. Upon an Event of Default, the interest rate under the MJ-ATV Loan increased by 2.00% per annum. Ex. 11, 12, 13, 14.

18. The MJ-ATV Loan was due and payable in full, together with all accrued and unpaid interest thereon, on December 20, 2005. Ex. 10, §§ 2(C), 1(RR).

19. There were numerous agreements that were entered into in connection with the MJ-ATV Loan, including, among others, the MJ-ATV Trust Agreement, and a Security Agreement between BOA and MJ-ATV dated as of February 12, 1999, a true and correct copy of which is annexed hereto as Exhibit 15 (the “MJ-ATV Security Agreement”).

20. Section 1.1 of the MJ-ATV Trust Agreement provided that MJ-ATV’s principal asset was a 50% interest in Sony/ATV Music Publishing LLC (“Sony/ATV”), a 50-50 joint venture between MJJ, on the one hand, and Sony Music Entertainment Inc. and various other Sony affiliates (“Sony”), on the other hand. Ex. 3, § 1.1. Sony/ATV holds a large musical publishing catalog, which includes the songs of well-known artists including, *inter alia*, songs of the Beatles and, is therefore referred to colloquially as the Beatles Catalog. See the Operating Agreement of Sony/ATV Music Publishing LLC between Sony and MJJ, dated November, 1995, a true and correct copy of which is annexed hereto as Exhibit 16.

21. As part of the consideration for the MJ-ATV Loan, MJ-ATV assigned and pledged to BOA MJ-ATV’s right, title and interest in and to Sony/ATV. Ex. 15, §§ 2, 3; Ex. 3, §§ 2.04(a). Thus, MJ-ATV was restricted in its ability to convey, dispose of, or transfer all or any portion of its interest in Sony/ATV. Id. Section 6(A) of the MJ-ATV Loan Agreement provided, in relevant part:

Until full payment and performance of all Obligations of [MJ-ATV] under the Loan Documents ... [MJ-ATV] will not, without the prior written consent of [BOA] ... [s]ell, lease, assign, trade or otherwise dispose of or transfer all or any portion of its assets.

Ex. 10, § 6(A). Section 11(H) of the MJ-ATV Security Agreement stated, in relevant

part:

[MJ-ATV] shall not (i) sell, assign (by operation of law or otherwise) or otherwise dispose of, or grant any option with respect to, any of the Collateral or (ii) create or permit to exist any lien, security interest, option or other charge or encumbrance upon or with respect to any of the Collateral, except for the security interest granted under this Agreement, other than simultaneously with the payment or prepayment of the Secured Obligations in full.

Ex. 15, § 11(H). The MJ-ATV Security Agreement further provided, in relevant part, that BOA,

before or after default, without liability to [MJ-ATV] may ... take control of proceeds; release Collateral in its possession to [MJ-ATV], temporarily or otherwise; ... and take control of funds generated by the Collateral, such as cash dividends, interest and proceeds or refunds from insurance, and use same to reduce any part of the Secured Obligations and exercise all other rights which an owner of such Collateral may exercise, except the right to vote or dispose of Collateral before an Event of Default and subject to the other relevant provisions hereof, including without limitation, Section 3.A(i) and 13.F.

Id., § 12.

22. Section 7(A) of the MJ-ATV Loan Agreement provided that an Event of Default would occur where MJ-ATV failed to “pay in full when due any principal or interest due under any Loan Document when the same becomes due and payable.” Ex. 10, § 7(A).

23. BOA’s remedies upon an Event of Default included, among other things, BOA’s “right to resort to any or all of the Collateral and to exercise any or all of the rights of a secured party pursuant to applicable law” Id., § 8(C). Further, BOA could, at its discretion, sell MJ-ATV’s interest in Sony/ATV upon such terms as BOA deemed commercially reasonable. Ex. 15, § 13(A).

D. The Assignment of the BOA Loans

24. BOA assigned the MJPT Loan to Fortress Music Trust III pursuant to an Assignment and Assumption Agreement dated as of May 3, 2005, a true and correct copy of which is annexed hereto as Exhibit 17.

25. BOA assigned the MJ-ATV Loan to Fortress Music Trust I and Fortress Music Trust II pursuant to two Assignment and Assumption Agreements dated as of May 3, 2005, true and correct copies of which are annexed hereto as Exhibits 18 and 19. (The Fortress entities are hereinafter referred to collectively as “Fortress”).

E. The Branca UCCs

26. On September 27, 2005, John Branca (“Branca”), a former attorney of MJJ and the MJ Trusts, filed UCC Financing Statements as against the MJ Trusts, true and correct copies of which are annexed hereto as Exhibits 20 and 21.

27. Branca claimed 5% of MJ-ATV’s membership interest in Sony/ATV and 5% of general intangibles, accounts receivable, payment intangibles owed to or owned by MJ-ATV and any other rights to payment of all sums otherwise payable to MJ-ATV under its Operating Agreement with Sony, or otherwise payable to MJ-ATV on account of or as a result of MJ-ATV’s membership interest in Sony/ATV. Ex. 20.

28. Branca also claimed 5% of MJPT’s interest in the MIJAC Catalog and 5% of general intangibles, accounts receivable, payment intangibles, and any proceeds, products or rents arising therefrom and owed to or owned by MJPT, and any other right to payment on account of or arising as a result of MJPT’s interest in the MIJAC Catalog. Ex. 21.

F. The Default on the BOA Loans

29. The MJ Trusts did not repay the BOA Loans when they matured on December 20, 2005, thus putting the loans in default. See p. 164:6-25 of the Deposition of Daniel Gropper dated April 13, 2006 and May 8, 2006, copies of the relevant pages of which are annexed hereto as Exhibit 22.

30. The MJ Trusts did not have sufficient funds to repay the loans at that time. See pp. 15:8-12 and 16:1-2 of the Deposition of Michael Joseph Jackson, dated June 12-13, 2006, copies of the relevant pages of which are annexed hereto as Exhibit 23; and ¶ 5 of the Declaration of Villiers Terblanche, dated April 7, 2006, a true and correct copy of which is annexed hereto as Exhibit 24. See also, Ex. 22, p. 164:9-10.

G. The Forbearance Agreements

31. On December 20, 2005, the MJ Trusts acknowledged that the BOA Loans were “fully due and payable,” that they had “failed to pay amounts due under the Facilities,” and that they were “unable to pay amounts due under the [BOA Loans].” See §§ 2(b) and (c) of the letter agreement among Fortress Music Trust I, Fortress Music Trust II, Fortress Music Trust III, MJJ, MJPT, and MJ-ATV, dated December 20, 2005, a true and correct copy of which is annexed hereto as Exhibit 25 (the “Forbearance Agreement”).

32. Fortress agreed to “forbear from any enforcement action based on defaults existing as of the date [thereof] with respect to the [BOA Loan Facilities], for a period from and after the date of this letter ... through and including January 19th, 2006” Id., § 3. In exchange, the MJ Trusts agreed to pay to Fortress an amount equal to 1% of the outstanding balance of the BOA Loans. Id., § 4.

33. The Forbearance Agreement also provided that the MJ Trusts granted to Fortress a right of last offer to match any bona fide written offer to refinance the BOA Loans (“Right of Last Offer”). *Id.*, § 5.

34. The Forbearance Agreement further provided that Fortress was not obligated to accept payment from any individual or entity of any amounts due under either of the BOA Loans unless such individual or entity acquired both of the BOA Loans or paid both of the BOA Loans in full. *Id.*, § 7.

35. On January 13, 2006, the MJ Trusts and Fortress agreed to extend the Forbearance Agreement to February 18, 2006. See Recital F of the Amended and Restated Put Extension Agreement between Fortress Music Trust I, Fortress Music Trust II, Fortress Music Trust III, Sony, MJ-ATV, MJPT, and MJJ, dated January 13, 2006, a true and correct copy of which is annexed hereto as Exhibit 26 (the “Put Extension Agreement”).

36. Like the Forbearance Agreement, the Put Extension Agreement provided that Fortress was not obligated to accept payment from any individual or entity of any amounts due under either of the BOA Loans or to sell or otherwise transfer either of the BOA Loans to any individual or entity, unless such individual or entity acquired both of the BOA Loans from Fortress or paid both loans in full. Ex. 26, § 2.

H. The Refinancing of the BOA Loans

(i) The Citigroup Proposal

37. Due to the risk of foreclosure on the assets of MJJ and the MJ Trusts by their secured creditors, in early January 2006, the MJ Trusts invited bids from various financial institutions to refinance the BOA Loans. Ex. 24, ¶¶ 6-7. Five financial

institutions conveyed expressions of interest. Id., ¶ 7. Among these was Citigroup Global Markets Inc (“Citigroup”) which, on January 31, 2006, extended a commitment to refinance the BOA Loans (the “Citigroup Proposal”). Id., ¶ 12; Ex. 22, p. 174:22-175:13.

38. Citigroup proposed a “bankruptcy remote” structure to refinance the BOA Loans in an amount of \$300 million. Ex. 24, ¶ 7-10. Citigroup proposed that a newly organized Delaware statutory trust be established to which the assets of the MJ Trusts would be conveyed in return for the beneficial ownership of the new trust. Id., ¶¶ 9, 12. Citibank, N.A. would then loan the newly organized trust \$300 million, secured by the assets conveyed by the MJ Trusts to the newly organized trust. Id., ¶ 13. The proceeds of the Citigroup loan would then be distributed to repay the existing indebtedness of the MJ Trusts under the BOA Loans. Id., ¶ 13.

39. The newly organized Delaware statutory trust proposed by Citigroup took the form of New Horizon Trust. See the Trust Agreement between Citigroup and Wells Fargo, dated February 10, 2006, a true and correct copy of which is annexed hereto as Exhibit 27 (the “Original New Horizon Trust Agreement”).

(ii) The Fortress Refinancing

40. On February 14, 2006, Fortress exercised its Right of Last Offer provided in § 5 of the Forbearance Agreement and matched the terms of the Citigroup Proposal (the “Fortress Refinancing”). See the letter from Fortress Credit Corp. to MJJ, dated February 14, 2006, a true and correct copy of which is annexed hereto as Exhibit 28. See also, Ex. 22, pp. 55:4-59:22, 175:9-13; Ex. 24, ¶ 14.

41. By exercising its Right of Last Offer under the Forbearance Agreement,

Fortress effectively stepped into Citigroup's shoes and agreed to make a \$300 million loan under the terms and conditions of the Citigroup Proposal. Ex. 22, p. 57:3-6. Among other things, Fortress' matching of the Citigroup Proposal required it to undertake a substantially identical bankruptcy remote transaction structure to that contained in the Citigroup Proposal. Ex. 24, ¶ 14.

42. Annexed hereto as Exhibit 29 and 30 respectively are slides that illustrate schematically the structure of the Fortress Refinancing.

43. To effect the Fortress Refinancing, numerous agreements were executed including, among others: the Amended New Horizon Trust Agreement; the Trust Assignment and Acceptance Agreement between MJ-ATV and New Horizon Trust, dated as of March 31, 2006, a true and correct copy of which is annexed hereto as Exhibit 31; the Trust Assignment and Acceptance Agreement between MJPT and New Horizon Trust, dated as of March 31, 2006, a true and correct copy of which is annexed hereto as Exhibit 32; the Credit and Security Agreement among New Horizon Trust, Fortress Credit Corp., and certain Lenders, dated as of March 31, 2006, a true and correct copy of which is annexed hereto as Exhibit 33; and the Payout, Termination and Release Agreement between MJJ, MJPT, MJ-ATV, Fortress Music Trust I, Fortress Music Trust II, Fortress Music Trust III, New Horizon Trust, and Fortress Credit Corp., dated as of March 31, 2006, a true and correct copy of which is annexed hereto as Exhibit 34.

44. The MJ Trusts transferred their assets to New Horizon Trust in exchange for 100 percent beneficial interest in New Horizon Trust – 15 percent for MJPT and 85 percent for MJ-ATV. Ex. 31, §§ 1, 2; Ex. 32, §§ 1, 2; Ex. 4, § 3.1. See also, page 24 of the opinion by White & Case LLP, dated April 13, 2006, a true and correct copy of which

is annexed hereto as Exhibit 35. The parties agreed that, following the repayment of the loan to be made by Fortress, the assets conveyed to New Horizon Trust by the MJ Trusts would be re-distributed back to the MJ Trusts. Ex. 4, § 7.1.

45. Fortress loaned \$300 million to New Horizon Trust (the “\$300 Million Loan”). Ex. 33, §§ 1.01, 2.01. To secure the loan, New Horizon Trust pledged to Fortress the MIJAC Catalog, the Administration Agreements, and the 50% interest in Sony/ATV. *Id.*, § 7.01.

46. The Fortress Loan bears interest at the rate of one month LIBOR + 1.50% and matures on March 2, 2008, *Id.*, §§ 1.01, 2.05(a).

47. The proceeds of the \$300 Million Loan were used “in such a way as to repay all outstanding obligations” under the BOA Loans. *Id.*, § 2.11.

48. New Horizon Trust distributed to the MJ Trusts a portion of the proceeds of the \$300 Million Loan, which, in turn, the MJ Trusts used to repay their debts under the BOA Loans. Ex. 34. Fortress acknowledged that it “received the Repayment Funds and the payment of such Repayment Funds constitute[d] the payment and satisfaction in full of all of the Obligations” of the MJ Trusts under the BOA Loans. *Id.*, § 1. Fortress also terminated and released “[a]ny and all security interests and liens securing the Obligations under the” BOA Loan Facilities. *Id.*, § 2.

I. Plaintiff’s Motion to Enjoin the Fortress Refinancing

49. On April 3, 2006, Plaintiff moved to enjoin the MJ Trusts from completing the Fortress Refinancing. See Plaintiff’s Memorandum of Law in Support of Motion to Amend the Complaint and for TRO and Preliminary Injunction Against Fraudulent Transfers, dated April 3, 2006, a true and correct copy of which is annexed

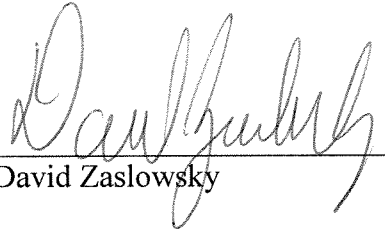
hereto as Exhibit 36. See also, Plaintiff's Reply Memorandum of Law in Further Support of Motion to Amend the Complaint and for TRO and Preliminary Injunction Against Fraudulent Transfers, dated April 10, 2006, a true and correct copy of which is annexed hereto as Exhibit 37; and the Reply Declaration of Steven Altman, dated April 10, 2006, a true and correct copy of which is annexed hereto as Exhibit 38.

50. The motion was resolved by consent between the parties, as reflected in two hearings before this Court on April 11, 2006. See the transcripts of the hearings before the Honorable P. Kevin Castel at 2:15 p.m. and 10:00 a.m. on April 11, 2006, true and correct copies of which are annexed hereto as Exhibits 39 and 40.

51. A deposition of Plaintiff's purported "expert," Richard Broude, took place on November 20, 2006. True and correct copies of the relevant pages of the Broude Deposition are annexed hereto as Exhibit 41.

52. Certain of the loan agreements at issue in this case bore interest rates tied to the 30-day LIBOR rate and to the prime rate. Annexed hereto as Exhibits 42 and 43 are excerpts from the website www.bankrate.com, which I searched and printed from on December 18, 2006. The information from that website indicates that, on December 13, 2005, one week before the maturity of the BOA Loans, the prime rate was 7.25 % and the 30-day LIBOR rate was 4.34%. Ex. 42, 43. Annexed hereto as Exhibit 44 is an excerpt from the website www.efanniemae.com, which I searched and printed from on December 19, 2006. The information from that website indicates that, on March 31, 2006, the effective Closing Date of the Fortress Refinancing, the 30-day LIBOR rate was 4.83%.

I declare under penalty of perjury that the foregoing is true and correct. Executed on
January 5, 2007.



David Zaslow