

Dated: March 7, 2012



George B. Nielsen

George B. Nielsen, Bankruptcy Judge

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

ICP D200, LLC, an Arizona limited liability
company,

Debtor.

ICP D200, LLC,

Plaintiff,

v.

MIDFIRST BANK,

Defendant.

In Proceedings Under Chapter 11
Case No. 2:09-bk-03499-GBN

Adversary No. 2:09-ap-00378-GBN

**STIPULATED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

I. SUMMARY AND PROCEDURAL POSTURE OF THE CASE.

A. Summary of the Adversary.

1. Filing of the Adversary Complaint by the Debtor Against MidFirst.¹

1. On April 10, 2009, ICP D200, LLC, the then Debtor-In-Possession (the “Debtor”) in Case No. 2-09-bk-3499 (the “Bankruptcy Case”), filed the *Adversary Complaint*

¹ These Findings of Fact and Conclusions of Law are supported by the record in the above-captioned bankruptcy case and adversary proceeding, including the documents attached as exhibits to the *Appendix of Exhibits in Support of Separate Statement of Material Facts in Support of Motion of MidFirst for Summary Judgment* (the “Appendix”) filed by MidFirst on May 23, 2011 at Adv. Dkt. # 50.

1 For: (1) Usury (A.R.S. § 44-1202); (2) Breach of Contract; (3) Breach of Covenant of Good
2 Faith and Fair Dealing; and (4) Unjust Enrichment (the “**Adversary Complaint**”). [Appendix
3 3]² In the Complaint (¶4), the Debtor asserted that the above-captioned adversary proceeding
4 (the “**Adversary**”) is a core proceeding within the meaning of 28 U.S.C. §157(b)(2)(A).

5
6 **a. Summary of claims asserted by the Debtor.**

7 2. Through the Adversary Complaint, the Debtor in effect asserts lender liability
8 claims (and corresponding claims for usury and unjust enrichment) based on alleged breaches by
9 MidFirst Bank (“**MidFirst**”) with respect to a \$15.5 million loan (the “**Loan**”) that was provided
10 in July 2007 to finance the construction of a 36 unit, high end condominium project in
11 Scottsdale, Arizona known as “Veritas at McCormick Ranch” (the “**Veritas Project**”). The
12 Debtor accuses MidFirst of having “lender’s remorse,” of “looking for ways...to evade its
13 funding obligations,” and of “manufacturing defaults,” all for the purpose of accelerating the
14 payments due on the Loan, demanding cash deposits, and charging interest at a rate higher than
15 the agreed upon rate under the Loan. *See, e.g.*, Adversary Complaint ¶9. [Appendix 1] In the
16 Complaint, the Debtor also accuses MidFirst of engaging in harassing litigation in Superior
17 Court and in the Bankruptcy Case (through what is described by the Debtor as “premature” stay
18 relief litigation and an “unduly burdensome” Bankruptcy Rule 2004 document production and
19 examination of the Debtor’s principal, Thomas Donahue (“**Donahue**”). *See, e.g.*, Adversary
20 Complaint at ¶¶14-17. [Appendix 3]

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24 ² Co-Counsel for the Debtor in the Bankruptcy Case and in the Adversary were the local
25 Deconcini McDonald firm (primarily through Tony Freeman) and the Los Angeles firm of
26 Reeder, Lu, and Green (primarily through Gabe Green, who continued to represent the Debtor in
the Bankruptcy Case and in the Adversary after he moved his practice to the Los Angeles firm of
Archer & Norris). Not coincidentally, the Adversary was filed approximately one (1) month
after the filing by MidFirst of the Guaranty Action described below.

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2. Response of MidFirst to the Adversary Complaint.

3. MidFirst filed an answer (the “**Adversary Answer**”) to the Adversary Complaint on May 11, 2009. In the Adversary Answer, MidFirst denied any and all liability to the Debtor, and MidFirst affirmatively stated that the Debtor was the party in default under the Loan Documents. [Adv. Dkt. # 4]

3. Motion for Summary Judgment filed by MidFirst.

4. MidFirst filed its *Motion of MidFirst Bank for Summary Judgment* (“**Motion for Summary Judgment**”) [Adv. Dkt. # 48], *Statement of Facts Separate Statement of Material Facts in Support of Motion for Summary Judgment* (“**MidFirst SSOF**”) [Adv. Dkt. # 49], and supporting Appendix on May 23, 2011.

5. Ford Elsaesser, the Court appointed Chapter 11 trustee (the “**Trustee**”) in this case, filed his *Response to the Motion for Summary Judgment* (“**Trustee’s Response**”) [Adv. Dkt. # 70] and *Statement of Facts in Support of Chapter 11 Trustee’s Objection to Motion for Summary Judgment* (“**Trustee’s SSOF**”) [Adv. Dkt. # 74] on behalf of the Debtor’s bankruptcy estate on August 11, 2011.

6. MidFirst and the Trustee have agreed to settle all of the claims and causes of action asserted by and between them in this Adversary, and after considering all of the arguments of MidFirst and the record in this Adversary, the Trustee has agreed to the entry of these Findings of Fact and Conclusions of Law by the Court in this Adversary.

B. Appointment of the Trustee, and replacement of the Debtor by the Trustee as the Plaintiff in the Adversary.

1. Circumstances leading up to the appointment of the Trustee.
a. Stay relief granted to MidFirst.

7. The Debtor commenced its Bankruptcy Case on February 27, 2009 (the “**Petition Date**”) by filing a voluntary petition for Chapter 11 bankruptcy relief. Shortly thereafter,

1 MidFirst filed its *Motion For Relief From Stay And Other Related Relief* (the “**Stay Relief**
2 **Motion**”) on March 11, 2009 seeking relief from all applicable stays and injunctions, including
3 the automatic stay of Bankruptcy Code § 362(a), so that MidFirst could enforce all rights and
4 remedies against the primary asset of the estate, the Veritas Project. [Dkt. # 20]

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6 8. After the Debtor failed to provide adequate security for the Veritas Project, and a
7 lapse in landscaping and pool services occurred at the Veritas Project, MidFirst filed an
8 *Emergency Motion To Take Protective Custody of Collateral* (the “**Protective Custody**
9 **Motion**”) on March 30, 2009, so that MidFirst could employ Vermilion Partners, LLC to protect
10 and preserve the Veritas Project. [Dkt. # 36]

11 9. At the preliminary hearing on the Motion for Stay Relief and the Protective
12 Custody Motion on April 14, 2009, the Debtor admitted that services at the Veritas Project had
13 lapsed, but assured the Court that they would be provided going forward. [Dkt. # 63] The Court
14 continued the stay relief hearing to May 15, 2009. The Debtor and MidFirst subsequently agreed
15 to vacate the May 15, 2009 continued stay relief hearing. [Dkt. # 74]

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17 10. In June 2009, services at the Veritas Project lapsed again, and MidFirst renewed
18 its Protective Custody Motion (the “**Renewed Motion**”). [Dkt. # 88] The Debtor initially
19 opposed the Renewed Motion. [Admin. Dkt # 92] A final hearing on the Renewed Motion was
20 set for July 31, 2009 (the “**Final Hearing**”). At the Final Hearing, the Debtor stipulated to relief
21 from all applicable stays and agreed to the appointment of a receiver over the Veritas Project
22 pursuant to the *Agreed Order Granting Motion by MidFirst Bank for Relief from the Automatic*
23 *Stay and Other Related Relief* (the “**Stay Relief Order**”) [Dkt. # 145], which was entered by the
24 Court on August 5, 2009. MidFirst completed foreclosure of the Veritas Project by trustee’s sale
25 (the “**Trustee’s Sale**”) on January 27, 2011.
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1 11. On November 7, 2009, MidFirst filed a motion to convert (the “**Motion to**
2 **Convert**”) the Bankruptcy Case from a case under Chapter 11 to a case under Chapter 7. [Dkt. #
3 169] During the hearing on the Motion to Convert on December 15, 2009, the Debtor agreed
4 that it would not be able to reorganize, and stipulated to the appointment of a Chapter 11 trustee
5 to pursue the preference action pending before the Bankruptcy Court as adversary case number
6 2:09-ap-01109-GBN (the “**Corcoran Litigation**”). [Dkt. # 185] The United States Trustee
7 moved the Bankruptcy Court to appoint Ford Elsaesser as Chapter 11 trustee. [Dkt. # 186] The
8 Court appointed the Trustee on January 8, 2010. [Dkt. # 187]

10 **2. Independent review by the Trustee of the claims asserted by the**
11 **Debtor.**

12 **a. Review of the record and assessment of the case by the**
13 **Trustee.**

14 12. The Trustee, an experienced bankruptcy attorney, performed his own,
15 independent assessment of the merits of the Adversary. Among other things, the Trustee
16 reviewed matters of record in the Adversary and in the Guaranty Action (referenced below), and
17 the Trustee reviewed excerpts of depositions and documents produced by the parties in the
18 Adversary and in the Guaranty Action (including the documents and record excerpts that are
19 contained in the Appendix).

20 **C. Procedural posture of the administrative case.**

21 **1. The inability of the Debtor to confirm a Plan.**

22 13. The Debtor filed its *Chapter 11 Plan Of Reorganization* (the “**Plan**”) on May 28,
23 2009, [Dkt. # 81] and its *Disclosure Statement for Debtor's Plan Of Reorganization Dated May*
24 *28, 2009* (“**Disclosure Statement**”) on June 22, 2009. [Dkt. # 103] A hearing on the adequacy
25 of the Disclosure Statement was held on July 31, 2009 at the same time that the Court conducted
26 the Final Hearing on the Renewed Motion filed by MidFirst. [Dkt. # 138] During the hearing,

1 the Debtor withdrew its Plan and Disclosure Statement, and stated its intention to re-file an
2 amended plan and disclosure statement. *Id.* An amended plan and disclosure statement was
3 never filed by the Debtor, and no plan for reorganization is currently in prospect.

4 **2. Corcoran preference suit as the only remaining asset of the case.**

5 14. According the status reports filed by the Trustee in the Bankruptcy Case, there is
6 less than \$1,000 of funds in the estate, and there is no anticipation of any funds being available
7 absent a settlement of the Corcoran Litigation. [Dkt. # 200, 203, 241] With the completion of
8 the Trustee’s Sale of the Veritas Project in January 2011, the Corcoran Litigation is the last and
9 only remaining asset in the Bankruptcy Case
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11 **3. Desire of Trustee to bring closure to the case.**

12 15. In light of the scarce estate assets and the mounting administrative fees incurred
13 by the estate, the Trustee is eager to bring closure to this Bankruptcy Case by resolving all
14 pending litigation.
15

16 **D. The Guarantor Action removed to this Bankruptcy Court.**

17 16. On March 6, 2009, MidFirst filed its *Complaint* (the “**Guaranty Complaint**”),
18 thereby commencing Case No. CV2009-007632 in the Superior Court of Arizona (the
19 “**Guaranty Action**”).³ Through the Guaranty Complaint, MidFirst sought the recovery of sums
20 owed under guaranties of the Loan that were signed by ICP and Tom Donahue (and his wife).⁴
21

22 [Appendix 1]
23

24 ³ The Guaranty Action was removed to this Court on May 24, 2011 and is pending as adversary
Case No. 2:11-ap-00944-GBN.

25 ⁴ The Guaranty Action initially included as defendants Jeffrey and Cynthia Krajewski (the
26 “**Krajewskis**”) who also guaranteed repayment of the Loan. The Krajewskis filed for personal
bankruptcy early in the Guaranty Action, and therefore the claims of MidFirst against them were
stayed.

1 17. On May 8, 2009, ICP and the Donahues answered the Guaranty Complaint, and
2 asserted as defenses what in effect are the same types of lender liability claims that are asserted
3 in the Adversary. *See Answer to Complaint* (the “**Guaranty Answer**”). No counterclaims were
4 filed by ICP or the Donahues in the Guaranty Action.⁵ [Guaranty Action Dkt. # 8 at Ex. 12].
5

6 18. In December of 2009, MidFirst amended the Guaranty Complaint to assert claims
7 of misrepresentation and fraud against the Donahues for (among other things) failing to disclose
8 the true cost to construct the Veritas Project, and for misrepresenting compliance with a \$2
9 million liquidity covenant in the Loan Agreement. *See Second Amended Complaint* dated
10 December 22, 2009. [Guaranty Action Dkt. # 12 at Ex. 26]. The Guarantors denied the claims
11 of fraud and misrepresentation raised by MidFirst in the amended Guaranty Complaint. *See Rule*
12 *26.1 Initial Disclosures of International Capital Partners, LLC, Thomas Donahue and*
13 *Jacqueline Donahue* dated May 17, 2010 and submitted in the Guaranty Action (the
14 “**Guarantors’ Rule 26.1 Disclosure**”). [Appendix 2]
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16 19. Extensive discovery has been conducted in the Guaranty Action, most of which is
17 germane to the issues raised in the Adversary. The claims of MidFirst against ICP and the
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22 ⁵ Recently, the remaining Guarantors in the Guaranty Action decided to recast their defenses into
23 counterclaims, and have asked the Superior Court for leave to amend their answer to assert the
24 counterclaims against MidFirst. *See Motion for Leave to Amend Answer and to Add*
25 *Counterclaim* filed on February 22, 2011 (the “**Motion for Leave**”). [Guaranty Action Dkt. # 18
26 at Ex. 84] As is explained in further detail below, the counterclaims the Guarantors have raised
in the Motion for Leave are essentially carbon copies of the claims set forth in the Adversary,
which the Debtor (through its same counsel in the Bankruptcy Case, the Adversary, and the
Guaranty Action) concedes are core claims that belong to the estate in the Bankruptcy Case that
is being administered now by the Trustee.

1 Donahues (collectively, the “**Donahues**” or the “**Guarantors**”) continue to be prosecuted in the
2 Guaranty Action.⁶

3 **II. FACTUAL FINDINGS.**

4 **A. Background on the Parties.**

5 **1. MidFirst.**

6 20. MidFirst is a federally chartered savings association that does business in
7 Arizona. Adversary Complaint ¶2. [Appendix 3]

8 **2. The Debtor.**

9 21. The Debtor, ICP D200, LLC, is a Delaware limited liability company that was
10 formed for the purpose of developing and selling the Veritas Project. *See* Guarantors’ Rule 26.1
11 Disclosure. [Appendix 2] Adversary Complaint ¶5. [Appendix 3]

12 **3. Principals and Affiliates of the Debtor.**

13 22. The Debtor was managed by International Capital Partners, LLC, an Arizona
14 limited liability company (“**ICP**”) and its principal, Thomas Donahue (“**Tom Donahue**”). ICP
15 and Tom Donahue initially provided investment capital to third party companies. Eventually,
16 and for at least 15 years prior to the Loan, ICP and Tom Donahue have raised investment capital
17 for their own use in the development of real estate projects in Arizona and around the Southwest.
18 *See* Transcript of Examination of Jeffrey A. Newman dated October 27, 2010 (the “**Newman**
19 **TR**”) at 52:8-9. [Appendix 5]

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⁶ Additional discovery was conducted in conjunction with receivership litigation that was commenced by MidFirst against the Debtor in Superior Court Case No. CV2008-0033070 (the “**Receivership Action**”). The Bankruptcy Case was filed before MidFirst could obtain in the Receivership Action appointment of a receiver for the Veritas Project. As a consequence, the Receivership Action was stayed, and ultimately was dismissed.

1 23. ICP and Tom Donahue purportedly raised approximately \$6.7 million of equity
2 provided by investors (the “**Investor Equity**”) for use in the acquisition and development of the
3 property that comprised the Veritas Project. *See* Investor package prepared by ICP dated 2/12/07
4 (the “**Investor Package**”). [Appendix 6, Bates ICP01064-97]⁷ The Investor Equity was
5 expected to cover “30% of the total project costs” of the Veritas Project. Construction financing
6 of approximately \$15.3 million was expected to cover the balance of the “total cost” of the
7 Veritas Project. *Id.* at Bates ICP01070.⁸

9 **B. The Loan from MidFirst to the Debtor.**

10 **1. Summary of the basic Loan terms.**

11 24. The Debtor and MidFirst executed the *Loan Agreement* (the “**Loan Agreement**”)
12 on July 26, 2007. [Appendix 7 (Adversary Complaint at ¶6 and Ex. A), Bates MID001767-
13 1827]. Through the Loan Agreement, MidFirst agreed to fund up to \$15.5 million for the
14 construction and operation of the “Improvements” at Veritas Project, which, combined with the
15 Investor Equity (of \$6.617 million) was estimated at a total cost of \$22,177,000 according to the
16 *Project Budget* (the “**Project Budget**”) that was attached as Exhibit B to the Loan Agreement.
17 [Appendix 7, Bates MID001818]

19 25. Under the Loan Agreement, the Improvements were set forth in the “Plans and
20 Specifications” (the “**Plans and Specs**”) that were delivered by the Debtor to MidFirst. The
21 Plans and Specs that were delivered by the Debtor to MidFirst in connection with the Loan were
22 prepared by the architects of the Veritas Project, Vincent/Goldstein Architects. [Appendix 16,
23 Bates MID2570-2682 and ICP02290-2439]

25 _____
26 ⁷ The Investor Package also bore Bates MID2728-60.

⁸ Thirty percent (30%) of total project costs of approximately \$22.3 million would produce the need for the \$6.7 million of Veritas Equity assuming available debt financing of \$15.3 million.

1 26. The Loan Agreement called for completion of the Veritas Project according to the
2 “Construction Schedule” (the “**Construction Schedule**”) that was attached as Exhibit “D” to the
3 Loan Agreement. Under the Loan Agreement, the Improvements had to be completed within 15
4 months of the closing of the Loan (defined in the Loan Agreement as the “Completion Date”) or
5 by the end of October 2008. Loan Agreement ¶¶1.2 and 7.2. [Appendix 7, Bates MID001768
6 and MID001794]
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8 27. The Loan Agreement (§7.17) also required that the Debtor have sufficient funds
9 to pay the total cost of completion of the Veritas Project. [Appendix 7]

10 28. In addition to a loan to cost ratio requirement, the Loan Agreement (§7.20) also
11 required the Debtor to remargin the Loan if the loan exceeded 65% of the value of the Veritas
12 Project. [Appendix 7, Bates MID001797] The initial appraisal used for purposes of the loan to
13 value covenant in the Loan Agreement was prepared by Cushman & Wakefield in late 2006 (the
14 “**Appraisal**”) which estimated the as complete value of the Veritas Project at \$25.1 million.
15 [Appendix 19, Bates ICP00218-353]
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17 29. The Loan Agreement (*e.g.*, §§2.2, 2.3, 2.5-2.13) called for monthly Advances
18 conditioned on (among other things) preparation of draw requests that showed compliance with
19 the Project Budget and Construction Schedule. Interest accrued on Advances made on the Loan
20 at prime and LIBOR based rates that were very favorable to the Debtor. *See Loan Agreement*
21 [Appendix 7, Appendix 1 (Adversary Complaint ¶7)]
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23 30. Under the Loan Agreement (§7.29), the Debtor and Guarantors of the Loan
24 (which included Tom Donahue) had to have available, combined, unencumbered liquid assets in
25 an amount of at least \$2 million (the “**Liquidity Covenant**”) until such time as all indebtedness
26 owing under the Loan was repaid to MidFirst. [Appendix 7, Bates MID001798-99].

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2. The lien of MidFirst on the Veritas Project as security for repayment of the Loan.

31. As security for repayment of the Loan, MidFirst was granted a first lien on the real property and Improvements that comprised the Veritas Project. *See* Deed of Trust dated July 26, 2007 [Appendix 21, MID001842-1867]

3. Guaranties of the Loan by ICP and the Donahues.

32. Repayment of the Loan was guaranteed by ICP, Tom Donahue and his wife (Jacqueline), and by then CFO and 25% member/owner of ICP, Jeff Krajewski (“**J Krajewski**”), and his wife (Cynthia). *See* Loan Agreement §1.1 [Appendix 7, Bates MID001768-69]

4. Intent of the parties regarding completion of the Veritas Project from proceeds of the \$15.5 million MidFirst Loan and the \$6.7 million Investor Equity.

33. In an attempt to support its claim in the Adversary that MidFirst breached its obligations under the Loan Agreement, the Debtor claimed that the intent of the parties all along was for the Loan to fund construction only of the exterior “shell” of the Veritas Project. According to the Debtor, the balance of the cost of completing the “Interior Finishes” of the Veritas Project (estimated at over \$7 million) would come from additional equity or financing obtained by the Debtor, or from proceeds of sales of units in the Veritas Project. *See, e.g.* Guarantors’ Rule 26.1 Initial Disclosure. [Appendix 2]

34. The claim by the Debtor that the \$15.5 million MidFirst Loan was intended to finance only construction of the exterior “shell” of the Veritas Project is undermined by (among other things) the following:

1 sold units had to be paid to MidFirst until the full amount of the Loan was repaid. *See Loan*
2 *Agreement* §1.1 (definition of “Release Price”). [Appendix 7, Bates MID001771]

3 **b. Evidence that the MidFirst Loan was intended to cover**
4 **the total project costs (including Interior Finishes)**
5 **revealed through internal documents prepared or**
6 **maintained by the Debtor.**

7 42. The Investor Package prepared by the Debtor for purposes of raising the Investor
8 Equity contained a construction budget substantially similar to the Project Budget attached to the
9 Loan Agreement, along with an investor return proforma based on a budget that contemplated
10 “total project costs” of \$22,232,342, slightly less (\$22,197,870) of total project equity and debt
11 “(Maximum),” and construction costs of approximately \$14,000,000 for the Veritas Project. *See*
12 *Investor Package* at 6-8 and 32. [Appendix 6, Bates ICP01069-71 and ICP01095] The budget
13 set forth in the Investor Package was essentially the same as the cost breakdown used in the Loan
14 Term Sheet.

15 43. A pro forma (the “**6/29/07 Proforma**”) prepared by Madison Bornemann, a
16 Senior Financial Analyst with ICP (“**M Bornemann**”), less than a month before the MidFirst
17 Loan was closed, showed direct costs for the exterior and interior of the Veritas Project, and was
18 based on the \$15.5 million of construction financing that the Debtor expected to receive from
19 MidFirst. *See* Email of June 29, 2007 from M Bornemann to Tom Donahue and others at ICP,
20 and attached pro forma. [Appendix 15, Bates ICP04245-46]

21 44. The 6/29/07 Proforma was submitted by the Debtor to MidFirst. Most of the cost
22 figures contained in the 6/29/07 Proforma, including the exact cost figures for the exterior
23 (\$7,202,047) and interior (\$4,050,000) contained in the 6/29/07 Proforma, were incorporated two
24 (2) weeks later into a budget summary prepared by MidFirst for the Veritas Project. *See* Email
25 of July 13, 2007 from Danny Hanson (“**D Hanson**”) to Julie Chapin. [Bates MID000980-982]
26

1 45. An internal email prepared by Tom Donahue to J Krajewski and other ICP
2 representatives intimately involved with the Veritas Project confirms that the construction budget
3 produced for MidFirst was supposed to cover the costs on Interior Furnishings, but omitted up to
4 \$10 million in major project costs, including costs associated with the interiors of the Veritas
5 Project. *See* Email of January 19, 2008 from Tom Donahue to J Krajewski, Kevin DeRocili, and
6 Tony Kupstis. [Appendix 23, Bates ICP04227-28]

7
8 46. The 6/29 Proforma also was shared by the Debtor with certain of its suppliers
9 (including a tile supplier). *See* Email of July 24, 2007 from M Bornemann to Vicia Nunley.
10 [Bates ICP05505-06]

11 47. To support its claim that Interior Finishes were excluded from the costs covered
12 by the MidFirst Loan, the Debtor contended that, in a project like the Veritas Project, all Interior
13 Finishes were selected by buyers of the units and thus would not be procured until after units
14 were sold. *See* Veritas Marketing Plans. [Bates MID001588-1591] Contrary to its position, and
15 without a single unit sale on the horizon, the Debtor ordered custom sinks, faucets, bath tubs,
16 towel bars, and other related Interior Finishes for the Veritas Project two (2) months after the
17 Loan closed. *See* Invoice dated 9/27/07 issued by Westar Kitchen & Bath Corporation.
18 [Appendix 32, Bates MID4279-91]

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21 **c. All ICP witnesses (other than Tom Donahue) confirmed**
22 **that the Project Budget must have included the costs of**
23 **the Interior Finishes; otherwise the Investor Package**
24 **would have been materially misleading.**

25 48. Adrian Evarkiou, the Director of Development for ICP, was unwavering in his
26 belief that the budget contained in the Investor Package was for the entire Veritas Project, and
that excluding the cost of Interior Finishes would have made the Investor Package misleading.

1 See Transcript of Deposition of Adrian Evarkiou dated August 11, 2010 (the “**Evarkiou TR**”) at
2 50:20-53:22. [Appendix 10]

3 49. Thomas Popa, who was brought into ICP by Tom Donahue specifically to assist
4 with the development and sale of the Veritas Project, echoed the testimony of Adrian Evarkiou,
5 and agreed the Investor Package very clearly stated that the budget was for the “total costs” of
6 the Veritas Project, and nothing should have been omitted from the budget in the Investor
7 Package. See Transcript of Deposition of Thomas Popa dated September 2, 2010 (the “**Popa**
8 **TR**”) at 39:10-46:23. [Appendix 11]

10 50. Rodney Prokop, the Chief Financial Officer and Senior Vice President of
11 Development for ICP, shared the same expectation that the budget in the Investor Package
12 covered the total costs of the Veritas Project, including costs associated with Interior Finishes.
13 See Transcript of Deposition of Rodney Prokop dated August 25, 2010 (the “**Prokop TR**”) at
14 99:13-100:6 and 110:14-17. [Appendix 12]

16 51. Under oath, M Bornemann confirmed his belief that the budget contained in the
17 Investor Package, like the 6/29/07 Proforma, contained all of the costs of the Veritas Project,
18 including Interior Finishes. See Transcript of Deposition of M Bornemann dated August 27,
19 2010 (the “**Bornemann TR**”) at 70:3-71:19; 73:9-76:18; 77:1-80:9; and 80:23-82:24. [Appendix
20 13]⁹

25 _____
26 ⁹ The Investor Package also had a stated investor rate of return which could not be calculated
unless all costs associated with the Veritas Project were included in the Investor Package.
[Appendix 6]

1 55. Inclusion of Interior Finishes in the Plans and Specs for the Veritas Project was
2 confirmed by Kevin DeRocili, the ICP project manager for the Veritas Project. *See* Transcript of
3 Deposition of Kevin DeRocili dated September 17, 2010 (the “**DeRocili TR**”) at 147:3-150:10
4 and 196:5-197:12. [Appendix 17]

5
6 56. Tom Donahue never mentioned to MidFirst that the Project Budget excluded
7 Interior Finishes and only covered the exterior “shell” of the Veritas Project until months after
8 the Loan closed. *See* 3/31/09 Donahue TR at 86:6-87:5. [Appendix 4]¹⁰

9 57. No other ICP employee ever told MidFirst that the Loan was intended only for
10 construction of the exterior “shell” of the Veritas Project.

11 **5. Lack of credible evidence presented by Borrower that the Loan made**
12 **by MidFirst was intended to fund completion of only the exterior**
13 **“shell” of the Veritas Project.**

14 58. The following, isolated pieces of evidence propounded by the Debtor do not
15 overcome the preponderance of the evidence that the Loan and the Investor Equity were intended
16 to fund the total costs of the Veritas Project:

17 59. The “shell” reference in the Completion Date definition relates only to the timing
18 for the delivery of a building permit. Completion of the Improvements requires the delivery of a
19 final Governmental Authority Approval (i.e., a certificate of occupancy), that only can be
20 delivered upon completion of the Interior Finishes as well as the exterior of the Veritas Project.
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23 _____
24 ¹⁰ Jeff Krajewski never told MidFirst that the Project Budget did not include the cost of Interior
25 Finishes. MidFirst maintains that it did not learn of the Debtor’s position regarding funding only
26 of the exterior “shell” of the Veritas Project until February 2008, in a meeting with
representatives of the Debtor. In any event, the evidence is clear that MidFirst (and essentially
everyone associated with ICP other than Tom Donahue) understood and relied on the fact that
the Debtor’s budget for the Veritas Project covered Interior Finishes in conjunction with the
closing of the Loan.

1 See Loan Agreement §1.1 (definition of “Maturity Date” (a)(v). [Appendix 7, Bates
2 MID001770]

3 60. The argument was made by the Debtor that, in normal, custom residential
4 projects, the developer uses some of the sales proceeds to complete the interior finishes. The
5 Loan Agreement required all of the net sales proceeds to be paid to MidFirst. See Loan
6 Agreement §1.1 (definition of Release Price). [Appendix 7, Bates MID001771] Accordingly,
7 proceeds from the sale of units at the Veritas Project would not be available to fund the cost of
8 Interior Finishes.
9

10 61. Despite the ambiguities concocted by the Debtor and Tom Donahue, and fleeting
11 references to “shell” in various documents, the fact remains that the Debtor did not have
12 sufficient funds to complete the Veritas Project, and thus was in default of its obligations to
13 MidFirst under §7.17 of the Loan Agreement.
14

15 **a. Whether the Loan was for the exterior shell or for the**
16 **entire Veritas Project, a number of ICP employees**
17 **shortly after construction started believed that the**
18 **Veritas Project should be scrapped because it was not**
19 **financially feasible.**

20 62. The evidence also established that the ultimate cost of the Veritas Project would
21 not be able to meet the loan to cost and loan to value requirements of §7.20 of the Loan
22 Agreement of the funding requirement of the Loan Agreement.
23

24 63. In October of 2007, a few months after the Loan closed and construction on the
25 Veritas Project began in earnest, Adrian Evarkiou called a meeting of the ICP representatives
26 involved in the project. The meeting, described as “heated,” was called to discuss the viability of
the Veritas Project. Based on increasing costs, and the lack of sales of comparable product at
prices that would even approach what the Veritas Project would have to command given its cost,

a number of ICP representatives, including Mr. Evarkiou, recommended that the project be
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1 scrapped. Shortly after the meeting, Mr. Evarkiou was fired. *See* Evarkiou TR at 31:13-40:24.
2 [Appendix 10]

3 64. At a meeting with MidFirst attended by a number of ICP employees in late
4 January 2008, Tom Donahue admitted that the Project Budget submitted to MidFirst mistakenly
5 omitted nearly \$7 million in costs to complete the Interior Finishes of the Veritas Project. As a
6 consequence, the budget to complete the total Veritas Project according to Tom Donahue
7 exceeded \$30 million, which was roughly \$5 million more than the appraised value of the
8 Veritas Project. *See* Appraisal [Appendix 19]; *See* 3/31/09 Donahue TR at 84:2-6; 94:8-95:17;
9 126:17-127:3. [Appendix 4]

11 **6. The Lack of feasibility of the Veritas Project was Reinforced by an**
12 **Experienced Broker Hired by Tom Donahue.**

13 65. Just before filing the Adversary, the Debtor and Donahue engaged Walt Danley,
14 an experienced, high end residential real estate broker in the Phoenix metropolitan area, to
15 provide an assessment of the Veritas Project. According to Danley, the “very challenging real
16 estate market” with “competing product [at] an all time high” required pricing of the Veritas
17 Units at a fraction of their cost to construct, and required the scale down of the of the proposed
18 “finishes” to a much more modest level. *See* Letter of February 17, 2009 from Walt Danley to
19 Tom Donahue. [Appendix 35, Bates ICP05866-67]

21 **C. Uncured Defaults by the Debtor under the Loan Documents.**

22 **1. Failure to obtain sufficient funding to complete construction of the**
23 **Improvements at the Veritas Project.**

24 66. At no time during the life of the Loan did the Debtor have funds sufficient “to pay
25 the total cost for completion of the Improvements” (which the Debtor through Tom Donahue
26 acknowledged to be in the vicinity of \$30 million months after the Loan closed). As a

1 consequence, the Debtor breached its obligations under §7.17 of the Loan Agreement, resulting
2 in a default under §11.1(b) of the Loan Agreement.

3 **2. Failure to comply with the Liquidity Covenant.**

4 67. On numerous occasions throughout the life of the Loan, and particularly after
5 Tom Donahue revealed that the Debtor did not have the \$30 million required to defray the total
6 costs of the Veritas Project, MidFirst insisted that the Debtor and the Guarantors comply with the
7 Liquidity Covenant contained in §7.29 of the Loan Agreement. *See, e.g.*, Series of emails
8 between late February 2008 and early April 2008 between and among MidFirst representatives
9 and ICP representatives (many of which were received by Tom Donahue) [Appendix 37, Bates
10 MID000795-803; MID000805-06; MID000808-14; MID000870-72; MID000697-98; and
11 MID000663]
12

13 68. On May 15, 2008, Tom Donahue delivered a written Compliance Certificate
14 stating that the Liquidity Covenant under §7.29 of the Loan Agreement had been met through the
15 deposit of \$2 million in cash in a Wells Fargo Bank account. *See* Email of May 9, 2008 from
16 Tom Donahue to Scott Willits and Kevin Schillig and Compliance Certificate signed on May 15,
17 2008 by Tom Donahue. [Appendix 24, Bates MID001251-52 and MID001059-63]
18

19 69. Discovery in the Adversary and the Guaranty Action revealed that the Debtor in
20 fact did not have unencumbered funds in an amount of \$2 million to satisfy the Liquidity
21 Covenant as represented by Tom Donahue. Instead, the Debtor signed (among other things) an
22 Escrow Agreement and a Promissory Note in favor of the Corcoran 2003 Family Trust
23 (“**Corcoran**”) and obtained \$2 million in funds from Corcoran. The Escrow Agreement
24 provided that the funds could not be accessed by ICP without the express written authorization
25 from Corcoran *See Promissory Note* dated May 13, 2008 and *Escrow Agreement* dated May 14,
26

1 2008 between the Debtor and Corcoran. [Appendix 26, Bates ICP05883-84] [Appendix 38,
2 Bates ICP05880-81]

3 70. Anthony Kupstis (“A Kupstis”), the Debtor’s accountant, testified that Tom
4 Donahue directed him to show the \$2,000,000 as Equity (a capital contribution), and not as a
5 Liability (a loan), on the financial statement attached to the compliance certificate. [Appendix 25
6 at 128:4-129:18].

7
8 71. As a consequence, the Debtor breached its obligations under §7.29 of the Loan
9 Agreement, resulting in a default under §11.1(b) of the Loan Agreement.

10 **3. Misrepresentation of the costs to construct the Improvements.**

11 72. Through the Project Budget that was attached as Exhibit B to the Loan
12 Agreement, and through the definition of Improvements (which incorporated the Plans and Specs
13 delivered by the Debtor to MidFirst in conjunction with the Loan), the Debtor represented that
14 the total cost of the Veritas Project would be \$22,177,000. The Debtor knew that the total costs
15 for the Veritas Project exceeded the costs reflected in the Project Budget. As a consequence, the
16 Debtor violated §6.26 of the Loan Agreement, resulting in a default under §11.1(b) of the Loan
17 Agreement.
18

19 **D. Other defaults of the Debtor under the Loan existing in December 2008.**

20 **1. Lapse in insurance coverage.**

21 73. The Debtor allowed insurance to lapse on the Veritas Project, thereby violating
22 §§7.8 and 11(b)(2) of the Loan Agreement. It was not until after MidFirst placed insurance on
23 the Veritas Project at a cost of over \$44,000 that the Debtor obtained insurance. *See* Email of
24 December 19, 2008 from Kevin DeRocili to D Hanson, Bill Rasure and Glen Shipley.
25 [Appendix 28, Bates MID004715-20]
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2. The filing of mechanics liens on the Veritas Project.

74. The Debtor also violated §§5.2, 8.1(a) of the MidFirst Deed of Trust, and 11(b)(2) of the Loan Agreement, when it allowed mechanics liens to be filed against the Veritas Project in November of 2008. *See Claim of Lien (Mechanic’s)*, recorded August 22, 2008 as Instrument No. 20080733964, in the Office of the County Recorder of Maricopa County, Arizona, dated August 21, 2008 (the “**Mechanic’s Lien**”). [Appendix 30]

3. The material adverse change experienced by the Donahues as a result of a \$2.4 million judgment.

75. In violation of §11.1(q) of the Loan Agreement, the Donahues experienced a material adverse change in their financial condition when a \$2.4 million judgment was entered against them on November 26, 2008 in the case of *National Bank of Arizona v. Thomas Donahue, et.al.*, No.CV2008-005612 (Superior Court of Arizona) (the “**NBA Litigation**”). [Appendix 31]

4. The failure of the Debtor to meet the Construction Schedule under §2.7 of the Loan Agreement.

76. In violation of §2.7 of the Loan Agreement, the Debtor did not keep pace with the Construction Schedule for the Veritas Project that was attached as Exhibit D to the Loan Agreement. Tom Donahue admitted that the Construction Schedule, which required completion of Interior Finishes at the Veritas Project prior to November 2008, was not met. *See 3/31/09 Donahue TR at 171:8-178:12* [Appendix 4] and Loan Agreement, Ex. D. [Appendix 7, Bates MID001821-27].

1 **E. Lack of defaults by MidFirst which would excuse performance by the Debtor**
2 **under the Loan Agreement.**

3 **1. Lack of evidence supporting the “slow funding” claim raised in the**
4 **Complaint.**

5 77. Any delay in funding by MidFirst in the course of the Loan was based on defaults
6 by the Debtor or failure of the Debtor to satisfy the conditions for Advances. *See, e.g.*, Series of
7 emails between late February 2008 and early April 2008 between and among MidFirst
8 representatives and ICP representatives (many of which were received by Tom Donahue).
9 [Appendix 37]

10 **2. The right of MidFirst to withhold funding until conditions were met**
11 **or defaults were cured by the Debtor.**

12 78. Under oath, Tom Donahue confirmed that MidFirst was justified in withholding
13 Advances whenever the Debtor or the Guarantors were in default of their obligations under the
14 Loan Agreement or whenever the Debtor or Guarantors failed to satisfy conditions for Advances.
15 Indeed, Tom Donahue confirmed that MidFirst had no obligation to fund Advances under the
16 Loan nearly from closing because the Debtor and he never satisfied the Liquidity Covenant
17 under the Loan Agreement. *See* 3/31/09 Donahue TR at 230:12-231:6 [Appendix 4]

18 **3. The failure of the Debtor to establish any harm caused by any delayed**
19 **funding by MidFirst (rightly or wrongly).**

20 79. The evidence is unrefuted that any real or imaginary delays in funding by
21 MidFirst under the Loan had no adverse effect on the Debtor or on the Veritas Project.

22 80. Joel Spencer of Summit Construction confirmed that his firm and all of the
23 subcontractors involved with the Veritas Project continued to perform work on the project
24 according to the Construction Schedule without any stoppages associated with the timing of
25 Advances under the Loan until late December 2008 when MidFirst justifiably refused to fund
26 any more Advances under the Loan. *See* Spencer TR at 128:19-129:10. [Appendix 18]

1 81. In their answers to question 6 of Interrogatories propounded in the Guaranty
2 Action, the Tom Donahue and the other Guarantors failed to identify any work stoppages at the
3 Veritas Project based on delayed on unfunded draws under the Loan. *See Thomas and*
4 *Jacqueline Donahue’s Response to MidFirst Bank’s First Set of Interrogatories* dated July 19,
5 2010 and submitted in the Guaranty Action (the “**Guarantors’ Response to Interrogatories**”).
6 [Appendix 38]
7

8 **4. The funding of over \$13 million under the Loan before MidFirst**
9 **rightfully withheld advances following the default by the Debtor and**
 the acceleration of the Loan amount.

10 82. Despite the numerous defaults by the Debtor (and the Guarantors), and with
11 appropriate reservations of rights, MidFirst nevertheless funded Advances for the Veritas Project
12 in an amount of at least \$13,192,932.99 through November 2008. *See Request for Loan Advance*
13 *(Draw Request # 17)* sent by Kevin DeRocili of ICP to MidFirst on January 15, 2009.
14 [Appendix 20, Bates ICP 4934-38]
15

16 83. Most of the balance of the Loan has been released in the form of retainage to
17 Summit. Thus, as of the commencement of the Bankruptcy Case, MidFirst was owed at least
18 \$13,965,561.77 under the Loan. [*See Proof of Claim filed by MidFirst at Claim No. 14*]

19 **III. CONCLUSIONS OF LAW.**

20 Based on the foregoing Findings of Fact, the Court concludes as follows:

21 **1. Incorporation of Findings and Conclusions.**

22 84. The Findings of Fact set forth above are incorporated into these Conclusions. To
23 the extent that a Finding of Fact is more appropriately considered a Conclusion of Law, it will be
24 a Conclusion of Law. To the extent that a Conclusion of Law is more appropriately considered a
25 Finding of Fact, it will be a Finding of Fact.
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2. Core proceeding.

85. As alleged by the Debtor in the Adversary Complaint, this Adversary constitutes a core proceeding over which the Court has jurisdiction to enter a final judgment pursuant to 28 U.S.C. §§157(b)(2)(A), (B), and (O).

3. Property of the Bankruptcy Estate.

86. The lender liability claims, along with the related claims for usury, breach of contract, and unjust enrichment raised by the Debtor in the Adversary (the “Adversary Claims”) are property of the Debtor’s estate in the Bankruptcy Case within the meaning of 11 U.S.C. §541(a). See *Cusano v. Klein*, 264 F.3d 936, 945 (9th Cir.2001); *Sierra Switchboard Co. v. Westinghouse Elec. Corp.*, 789 F.2d 705, 707 (9th Cir. 1986); *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n. 9, 103 S.Ct. 2309, 2313 n. 9, 76 L.Ed.2d 515 n. 9 (1983) (citing to comments made in the House and Senate Reports on the Bankruptcy Code, “[t]he scope of this paragraph [§ 541(a)(1)] is broad. It includes all kinds of property, including tangible or intangible property, causes of action (see Bankruptcy Act § 70a(6)), and all other forms of property currently specified in section 70a of the Bankruptcy Act. H.R.Rep. No. 95-595, p. 367 (1977); S.Rep. No. 95-989, p. 82 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5868, 6323.”); *In re Moore*, 110 B.R. 924, 925-926 (Bankr.C.D.Cal.1990)(lender liability action by debtor against bank is estate property).

4. Exclusive Power of the Trustee with Respect to the Adversary Claims.

87. Only the Trustee has the right to prosecute, settle, or otherwise resolve the Adversary Claims. See 11 U.S.C. §§1104 and 1106. See also *Kane v. Nat'l Union Fire Ins. Co.*, 535 F.3d 380, 385 (5th Cir. 2008) (“trustee, as the representative of the bankruptcy estate ... is the only party with standing to prosecute causes of action belonging to the estate once the bankruptcy petition has been filed”); *In re Curry & Sorensen, Inc.*, 57 B.R. 824, 828 (B.A.P. 9th

1 Cir. 1986)(same); *Parker v. Wendy's Int'l, Inc.*, 365 F.3d 1268, 1272 (11th Cir. 2004) (“a pre-
2 petition cause of action is the property of the ... bankruptcy estate, and only the trustee in
3 bankruptcy has standing to pursue it”).

4 88. As a consequence, the Guarantors are enjoined from attempting to assert the
5 Adversary Claims in the Guaranty Action.
6

7 **5. Defaults by the Debtor and Guarantors under their Loan Obligations**
8 **to MidFirst.**

9 89. As set forth above in the Findings of Fact, the Debtor defaulted under a number of
10 material obligations under the Loan Agreement, including (among other things): (i) failing to
11 obtain funding sufficient to pay the total costs of the Improvements in violation of §7.17 of the
12 Loan Agreement; (ii) failing to comply with the Liquidity Covenant under §7.29 of the Loan
13 Agreement; (iii) failing to maintain the loan to value and loan to cost of the Veritas Project in
14 violation of §7.20 of the Loan Agreement; (iv) misrepresenting the costs to complete the Veritas
15 Project in violation of 6.26 of the Loan Agreement; (v) failing to maintain insurance on the
16 Veritas Project in violation of §7.8 of the Loan Agreement; (vi) allowing the filing of mechanics
17 liens against the Veritas Project in violation of §5.28 and 8.1 of the Deed of Trust; (vii) allowing
18 the entry of the \$2.4 million judgment against the Guarantors in the NBA Litigation; and (viii)
19 failing to adhere to the Construction Schedule, in violation of §2.4 of the Loan Agreement. The
20 defaults by the Debtor excused MidFirst from the performance of its obligations to the Debtor
21 under the Loan Agreement. *See Zancanaro v. Cross*, 85 Ariz. 394, 400, 339 P.2d 746, 750
22 (1959) (“the victim of a material or total breach is excused from further performance”);
23 *Specialized Commercial Services, Inc. v. Welsh*, 1 CA-CV 08-0181, 2009 WL 532603 (Ariz. Ct.
24 App. Mar. 3, 2009) (“when one party materially breaches, the other party’s duty to perform is
25 suspended”) (citing Restatement (Second) of Contracts § 237 (1981) (“ it is a condition of each
26

1 party's remaining duties to render performances to be exchanged under an exchange of promises
2 that there be no uncured material failure by the other party to render any such performance due at
3 an earlier time").

4 **6. No Defaults by MidFirst under its Loan Obligations to the Debtor.**

5 90. MidFirst did not commit any defaults under the Loan Agreement.

6 **7. Judgment in Favor of MidFirst.**

7
8 91. Based on the foregoing Findings of Fact and Conclusions of Law, there is no need
9 for additional evidence for MidFirst to prevail in this Adversary. Thus, Judgment will be entered
10 in favor of MidFirst, and the claims asserted by the Debtor (now owned by the Trustee) in the
11 Adversary Complaint will be dismissed with prejudice.

12 **DATED AND SIGNED ABOVE.**