

1 in 2006, hints of a slowdown in the market start to appear and the company's fortunes
2 begin a long, increasingly steep, fall into bankruptcy. Who or what was at fault for this
3 drastic change of fortune? That is what this case is about.

4 This part of the case (Phase I) concerns whether an allegedly rogue employee in
5 the important position of Chief Financial Officer breached his fiduciary duties to the
6 company and caused its downfall, aided and abetted by the company's commercial bank
7 and its investment bank.¹ If the answer is yes, the case moves on to Phase II; if not, the
8 case will be over.

9 **II. Glossary**

10 This decision will use the following defined terms:

- 11 • ADP TotalSource (**ADP**).
- 12 • Alan Zeffer (**Zeffer**). Employee of Armand.
- 13 • Andrea Wood (**Wood**). President of Taylor Hart.
- 14 • Apex Fundamental Partners, LLC (**Apex**).
- 15 • Armand Group (**Armand**).
- 16 • Ashley Fickett (**Ashley Fickett**). Fickett's daughter and former RMMC employee.
- 17 • Asset purchase agreement (**APA**).
- 18 • Barry Fickett (**Fickett**). Former Director of Sales at RMMC.
- 19 • Ben Anderson (**Anderson**). Vice President Senior Account Manager GECD.
- 20 • Bill Luke (**Bill Luke**). Managing Partner of Eagle Mountain. Together with Steve
21 Luke (**Lukes**).
- 22 • Brian Foley (**Foley**). Senior Vice President - Group Manager Comerica.
- 23 • Caliber Advisors, LLC (**Caliber Advisors**).
- 24 • California Air Resource Board (**CARB**).
- 25 • Chief executive officer (**CEO**).
- 26 • Chief financial officer (**CFO**).
- 27 • Craig Sarna (**Sarna**). Employee GECD.
- 28 • Comerica Bank (**Comerica**). Comerica is a 65% participant in the Comerica
Loan.
- Comerica Bank first made a loan to RMMC and its affiliates in 2003. It was
administered internally at Comerica by the Heavy Equipment Group, primary
contact Foley, until February 2008, when the it was transferred to SAG and
assigned to Kain. (JPS (IV)(A)(6) and (7)) (**Comerica Loan**).
- Dante Ghilotti (**Ghilotti**). Owner of JS Cole.
- Darren Dierich (**Dierich**). Former CFO of RMMC.
- Dawn Jordan (**Jordan**). Former IT employee at RMMC.
- David Campbell (**Campbell**). Operations Manager - ABL Group GECD.
- David Gonzales (**Gonzales**). Owner of Caliber Advisors. Chief Restructuring
Officer/CFO RMMC.
- Dennis Mola (**Mola**). Managing Director of Armand.
- Don Taylor (**Taylor**). A business development associate with HIG.
- Doug Bishop (**Bishop**). CPA at the Auditors.
- Earnings before interest, taxes, depreciation, and amortization (**EBITDA**).

¹ The liability of the two corporate defendants, Comerica Bank and Moors & Cabot, is not directly at issue
in this portion of the trial. The subsequent phrase is added to give a complete sense of the overall claims.

- 1 • Eagle Mountain Partners, LLC (**Eagle Mountain**).
- 2 • Equipment Professionals Inc. (**EPIC**).
- 3 • FocalPoint Partners LLC (**FocalPoint**). An investment bank.
- 4 • Forbearance Agreements:
 - 5 ○ First Restated Limited Forbearance Agreement. (**First Forbearance**) (ex. 75).
 - 6 ○ Second Restated Limited Forbearance Agreement. (**Second Forbearance**) (ex. 97).
- 7 • General Electric (**GE**).
- 8 • GECF Preliminary Indicative Summary of Terms dated July 30, 2008 (**GE Term Sheet**). (ex. 71).
- 9 • GE Corporate Financial Services, Inc. (**GECF**). Branded in 2008 as GE Commercial Finance Corporate Lending. Now branded as GE Capital Corporate Finance Lending. (Deposition of Greg Miller-Jones, June 9, 2012, 18:2-12).
- 10 • General Electric Commercial Distribution Finance (**GECD**).² GECD is a 35% participant in the Comerica Loan.
- 11 • Grant Getman (**Getman**). Former CFO of RMMC.
- 12 • Greg Miller-Jones (**Miller-Jones**). Vice-president of GECF.
- 13 • HIG Capital (**HIG**). An \$8.5 billion PEG. (Deposition of Don Taylor, June 13, 2011, 10:4-13).
- 14 • Holding Company Management Incorporated (**HCMI**).
- 15 • Huron Consulting Group (**Huron**).
- 16 • Huron Liquidation Analysis March 2009 (**Huron Report**). (ex. 5152).
- 17 • Jay Dee Sale (**Sale**). Former Director of Parts & Service at RMMC.
- 18 • Jeff Whipple. (**Whipple**). Managing Director of M&C.
- 19 • Jim Maetzold (**Maetzold**).
- 20 • Joe Sullivan (**Sullivan**). Group Manger SAG Comerica Bank.
- 21 • Joint Pretrial Statement, April 23, 2012, at Dkt #629 (**JPS**).
- 22 • J.S. Cole Co. (**JS Cole**).
- 23 • Kyle Ross (**Kyle Ross**). Representative of Signature.
- 24 • Letter of intent (**LOI**).
- 25 • Lincolnshire Management, Inc. (**Lincolnshire**).
- 26 • Linda Cowing (**Linda Cowing**). 40% shareholder of RMMC and former wife of Owen Cowing.
- 27 • Liquidation Values:
 - 28 ○ Fair Market Value (**FMV**).
 - Orderly Liquidation Value (**OLV**).
 - Forced Liquidation Value (**FLV**).
- Management buyout (**MBO**).
- Moors & Cabot (**M&C**).
- Ninth Amended and Restated Master Revolving Note (**Ninth Amended Note**). (ex. 98).
- Oil Tools Sale/Rental Operations of HIG (**Oil Tools**).
- Orion Capital (**Orion**).
- Owen Cowing (**Cowing**). 60% shareholder of RMMC.
- Pat Faubion (**Faubion**). Comerica employee.
- Private equity group (**PEG**). "PEG" does not refer to any specific company or investor.
- Pitch Books:
 - January 26, 2009 pitch book (**Pitch Book One**). (ex. 163).
 - January 30, 2009 pitch book (**Pitch Book Two**). (ex. 166, 5140).
 - February 3, 2009 pitch book (**Pitch Book Three**). (ex. 170).
 - February 12, 2009 pitch book (Apex) (**Pitch Book Four**). (ex. 176).
 - February 12, 2009 pitch book (Comerica) (**Pitch Book Five**). (ex. 301).

² Not to be confused with GECF.

- **Project Padres** is a generic terms for the pitch books and the M&C sales effort.
- Ralph Bellizzi (**Bellizzi**). President of Aaron, Bell International, Inc. a middle-market investment banker.
- Red Mountain Machinery Company (**RMMC**).
- Ritchie Brothers Auctioneers (**Ritchie Brothers**).
- RM Partners (Darren Dierich & Jay Dee Sale) or Red Mountain Partners (**RM Partners**). (ex. 259) (ex. 258).
- Robin Kain (**Kain**). Vice-President SAG Comerica; Comerica's SAG representative to RMMC.
- Roger Chapman (**Chapman**). President of RN Industries.
- Ross Cowan (**Cowan**). Vice President of M&C.
- Rouse Appraisals:
 - Rouse appraisal for equipment of RMMC as of May 31, 2008 (**May 31, 2008 Appraisal**). (ex. 63).
 - Rouse appraisal for equipment of RMMC as of December 31, 2008 (**December 31, 2008 Appraisal**). (ex. 156).
 - Rouse appraisal for equipment of RMMC as of March 31, 2009 (**March 31, 2009 Appraisal**). (ex. 432).
- Rouse Asset Services (**Rouse**).
- Settlement offer by RMMC to Comerica dated April 17, 2009 (**April Settlement Offer**). (ex. 420).
- Signature Capital Partners (**Signature**).
- Special Assets Group of Comerica (**SAG**).
- Steven N. Berger (**Berger**). Former counsel for RMMC.
- Steve Boatwright (**Boatwright**). Attorney for HCMI and EPIC.
- Steve Luke (**Steve Luke**). Together with Bill Luke (**Lukes**).
- Superior Capital Partners, LLC (**Superior**).
- Theresa Wong (**Wong**). Business Analyst with GECF.
- The Taylor Hart Co. an HCMI Company (**Taylor Hart**).
- Troy Winger (**Winger**). Former accounting manager at RMMC.
- Valinda Cowing (**Valinda Cowing**). Owen Cowing's wife.
- Wallace Plese + Dereher, L.L.P., (**Auditors**). RMMC's auditing firm.
- Winstead PC (**Winstead**). Attorneys for Comerica.
- World Wide Machinery, Ltd. (**World Wide**).

III. Applicable Legal Principles

A. The Claims

The Third Amended complaint has 12 counts, of which only five are relevant to Phase I. These are:

- Count I. RMMC v Dierich for breach of fiduciary duty;
- Count III. RMMC v Dierich for non-disclosure;
- Count V. RMMC, Cowing and Linda Cowing v Dierich for fraudulent concealment;
- Count IX. RMMC v Dierich and others for intentional interference with business expectancies; and
- Count X. RMMC v Dierich for intentional interference with contract.³

³ Similar claims against Fickett were scheduled to be tried in Phase I. However, Plaintiffs and Fickett settled those claims before the commencement of the trial. Dkt. # 681.

1 It is important to note that Cowing and Linda Cowing stated no breach of
2 fiduciary duty claim against Dierich. Indeed, there is no suggestion in the record that
3 Dierich owed Cowing and Linda Cowing any duty, let alone a fiduciary duty; to the
4 contrary, it is clear that that duty ran only to RMMC. The only claim by Cowing and
5 Linda Cowing is Count V for fraudulent concealment, a claim that Plaintiffs concede
6 requires proof of clear and convincing evidence. (JPS IV(B), Issue #4).

7 To complicate Count V further, the briefing and evidence on the fact of damage to
8 Cowing and Linda Cowing is obscure. Plaintiffs make two points on damages: 1) Cowing
9 and Linda Cowing incurred unstated expenses related to the RMMC bankruptcy; and 2)
10 Cowing and Linda Cowing suffered a loss of reputation. There is no explicit argument
11 that Cowing and Linda Cowing were damaged by the loss of value of their equity interest
12 in RMMC, non-payment of their \$3 million unsecured loan advanced at the end of 2007,
13 or that Dierich's actions caused their guarantee obligations to remain outstanding.
14 (Neither Cowing or Linda Cowing have filed bankruptcy individually, at least not in this
15 district).

16 This lack of clarity in the record complicates the resolution of Cowing and Linda
17 Cowing's claims as plaintiffs in this case. In any event, for purposes of the applicable
18 legal standard, the Court will treat Cowing and Linda Cowing's claim as limited to
19 fraudulent concealment subject to the standards of proof set forth below.

20 **B. Breach of Fiduciary Duty**

21 The elements of a breach of fiduciary claim are:

- 22 a) Existence and scope of the duty;
23 b) Acts or omissions by defendant that breach that duty;
24 c) Proof that the breach described in b) caused damage to the plaintiff;
25 d) Damage in fact to the plaintiff.

26 RMMC must prove these elements by a preponderance of the evidence.

27 Broadly stated, RMMC's claim is that Dierich's breaches of his fiduciary duty,
28 acts of fraudulent concealment and non-disclosure caused damage to RMMC and that
Comerica and M&C aided and abetted those intentional torts. As noted above, only

1 Dierich's liability is at issue in this phase of the trial, given that if there is no actionable
2 breach, there is no tort that the other defendants could have aided and abetted. If
3 Plaintiffs succeed in Phase I, the remaining issues will be addressed in Phase II.

4 RMMC has insisted from the beginning, and the parties have stipulated, that these
5 claims are based not on negligence but are intentional torts. Thus, Plaintiffs assert that
6 Dierich intentionally breached his fiduciary duties by seeking to take over RMMC to the
7 detriment of RMMC, or, at the least, ignoring or inadequately addressing opportunities to
8 resolve the Comerica Loan in favor of pursuing options that would benefit him personally
9 at the expense of RMMC.

10 The existence and scope of the duty will be examined in this section. The acts and
11 omissions complained of will be examined in the Facts and Analysis sections. The
12 standards for causation and damage will be examined in this Section and applied to the
13 facts in the Analysis section.

14 C. Did Dierich owe RMMC a Fiduciary Duty?

15 The Defendants do not seriously dispute the existence of some duty from Dierich
16 to RMMC, acknowledging that all employees owe a duty of at least a limited sort under
17 Arizona law. The real battle is over the scope of the duty. The primary question is
18 whether the duty is limited because Dierich was neither a corporate officer or director but
19 only an employee.

20 On this point, the Court agrees with the Plaintiffs. The scope of a fiduciary duty is
21 driven by responsibilities and duties, not by titles. As more fully set below, the record is
22 clear that Dierich was a member of the senior management team responsible for all
23 financial matters, with junior employees reporting to him, and with him reporting directly
24 to the CEO.⁴

25
26 ⁴ The nature of his position creates some ironical discomfort for both sides; to wit, one of the Defendants'
27 underlying themes is that Cowing had completely turned over management of financial matters to Dierich
28 and thus Cowing was almost deliberately uninformed (but this does not square with their view of a limited
duty on Dierich's part), while one of the Plaintiffs' underlying themes is that Dierich misled RMMC by not
immediately sharing all financial or restructuring developments with Cowing (even though as CFO, with
the heightened duty, he was the one responsible for those tasks).

1 Thus, although not a corporate officer, he was CFO in both name and fact. As a
2 result, he had duties of loyalty and care of a confidential sort, to the same degree as a
3 corporate officer or director. The Court rejects Defendants' suggested formulation that:

4 While corporate officers and directors are subject to traditional fiduciary
5 duties of loyalty and care, employees are generally not held to be in such a
6 "confidential relationship" with their employers. *Rhoads v. Harvey*
7 *Publications, Inc.*, 145 Ariz. 142 (Ariz. App. 1984). Employees do,
8 however, owe their employer a common law duty of loyalty. *Evans v.*
9 *Valley Radiologists, Ltd.*, 127 Ariz. 177, 181 (1980). These duties are
10 limited. An employee only breaches these duties by taking adverse actions
11 for his personal benefit while acting in direct competition with his
12 principal. *Taser Int'l, Inc. v. Ward*, 224 Ariz. 389, 399-400 (Ariz. App.
13 2010).

14 Defendants' Closing Brief at 40, Dkt #733.

15 Rather, the Court finds that the record supports the adoption of the Plaintiffs'
16 formulation that:

17 As CFO and part of senior management, Dierich had a "duty to act with
18 entire good faith and loyalty for the furtherance of the interests of his
19 principal [RMMC] in all matters concerning or affecting the subject" of
20 those responsibilities. *Taser Int'l v. Ward*, 224 Ariz. 389, 394, ¶¶ 15, 27,
21 231 P.3d 921, 926 (App. 2010).

22 Plaintiffs' Closing Brief at 3, Dkt #732. It is against this standard that Dierich's actions
23 will be tested for purposes of the fiduciary duty claim.

24 D. What Are the Elements of Fraudulent Concealment and Non-Disclosure Claims?

25 Liability for fraudulent concealment requires knowledge of the false information
26 and action by the defendant that intentionally prevented the plaintiffs from finding the
27 truth and that caused harm to the plaintiffs in the context of a commercial transaction.
28 *Wells Fargo Bank v. Arizona Laborers, Teamsters & Cement Masons Local No. 395*
Pension Trust Fund, 38 P.3d 12, 35-36 (Ariz. 2002); Restatement (Second) Torts § 550.
JPS IV(B) Issue 7. This must be proven by clear and convincing evidence. JPS IV(B)
Issue 4.

This doctrine fits uncomfortably with the facts here, particularly as to Cowing and
Linda Cowing. In *Wells Fargo*, the claim arose out of a three-party agreement to which
both a bank (the construction lender) and a pension fund (the proposed permanent lender)

1 were parties. The fund alleged that the bank deliberately withheld material information
2 concerning the creditworthiness of the borrower to induce the fund to complete the
3 permanent loan, thus taking out the bank's position. A key fact was the existence of the
4 three-party agreement that created obligations between the bank and the fund in the
5 context of a commercial transaction. There is no such contract here, particularly between
6 Cowing and Linda Cowing, on the one hand, and Dierich, on the other. Neither is there a
7 business transaction within the broader meaning of that term.⁵

8 Thus, the weaknesses of Cowing and Linda Cowing's claims, from a legal
9 standpoint, are manifest: 1) there is no identifiable business transaction among these three
10 actors; 2) Arizona law, and the Restatement to which Arizona courts normally turn,
11 countenance this cause of action only where there is such a business transaction; 3) the
12 record and briefs are thin on the question of causation and fact of damages, and 4) even if
13 the Plaintiffs' theory can overcome these hurdles, it must be proven by clear and
14 convincing evidence. Nonetheless, the Court will examine whether the evidence
15 presented is sufficient to support such a claim in favor of Cowing and Linda Cowing.

16 RMMC's fraudulent concealment claim adds little, if anything, to the primary
17 claim of breach of fiduciary duty. If RMMC can prove by clear and convincing evidence
18 that Dierich caused RMMC harm by fraudulently concealing material information from it
19 relating to a commercial transaction, whether comprising his employment with RMMC or
20 one of the various deals, that level of proof and deceit would surely constitute a breach of
21 the duty of loyalty owed by a confidential member of senior management. Thus, the
22 analytical focus of this decision will be on the primary breach of fiduciary duty claim.

23 E. What Is The Standard For Proving Causation?

24

25

26 ⁵ Plaintiffs cite Nebraska authority to the effect that the employment relationship creates a "commercial
27 transaction" for purposes of non-disclosure. *Streeks, Inc. v. Diamond Hill Farms, Inc.*, 605 N.W.2d 110,
28 118 (Neb. 2000), *overruled on other grounds by Knight of Columbus Council 3152 v. KFS BD, Inc.*, 791
N.W.2d 317 (Neb. 2010). This is not what *Streeks* says. Rather, it merely stands for the unremarkable point
that a "business transaction" is a broader concept than a contractual relationship, with no reference to
employment relationships at all. But, whatever it says, *Streeks* does not assist the Plaintiffs in proving that
the necessary predicates for non-disclosure exist in this case.

1 The parties agree that it is RMMC's initial burden, at the least,⁶ to prove by a
2 preponderance of the evidence that Dierich's actions were the proximate cause of damage
3 to RMMC. In Arizona, "proximate cause" is defined as "that which, in a natural and
4 continuous sequence, unbroken by any efficient intervening cause, produces an injury,
5 and without which the injury would not have occurred." *Salica v. Tucson Heart Hosp.-*
6 *Carondelet, L.L.C.*, 231 P.3d 946, 950 (Ariz. App. Div. 2, 2010) (quoting *Robertson v.*
7 *Sixpence Inns of Am., Inc.*, 789 P.2d 1040, 1047 (1990)). As noted in *Salica*, "This
8 definition includes the element of causation in fact" as well as proximate causation. *Id.* at
9 950. Further, a "intervening cause" is defined as "an independent cause that intervenes
10 between defendant's original negligent act or omission and the final result and is
11 necessary in bringing about that result." *Robertson* at 1047.

12 In Plaintiffs' view, proximate causation may be proven if Dierich's action were a
13 "substantial factor in bringing about the harm." Plaintiffs' Closing Brief at 40, Dkt #132
14 citing *Firetrace*, 800 F. Supp.2d at 1052 and *Salica*. While the "substantial factor"
15 standard itself usually is applied where there are multiple potential tortfeasors and the
16 issue is whether the acts of one are sufficient in and of themselves to cause the damage
17 alleged, other cases, such as *Firetrace*, have also applied the standard to intentional torts.

18 Although the parties wrangle over the precise appropriate legal standard in the
19 case of breach of fiduciary duty, at the end of the day, it is this: a plaintiff must prove by
20 a preponderance of the evidence that defendant's acts: 1) in a natural and continuous
21 sequence, 2) unbroken by any efficient intervening cause, 3) were a substantial factor in
22 causing the harm, 4) without which the injury would not have occurred, and 5) that there
23 was injury in fact. Parts 1 and 2 comprise the notion of proximate cause, parts 3 and 4 the
24 notion of causation in fact, and part 5 the notion that some injury actually occurred. This
25 formulation is distilled from the relevant Arizona cases and the appropriate sections of
26 the Restatement.

27 Nevertheless, two additional glosses to this formulation are required.

28 _____
⁶ Plaintiffs argue that the burden subsequently shifted to the Defendants, a point that is discussed below.

1 First, causation cannot be speculative. As acknowledged by Plaintiffs:

2 The line between reasonable inference and prohibited speculation in
3 determining factual causation "is one of the more indistinct lines that exists
4 in law" and "it is not possible to state specific rules that locate the line
5 between permissible inference and prohibited speculation." *Restatement*
6 (*Third*) *of Torts: Phys. & Emot. Harm* § 28, cmt. b. Although there is no
7 bright line definition as to what amounts to too much speculation, it is
8 clear from the case law that the trier of fact is given substantial leeway to
9 determine whether the evidence supports a causal relationship between the
10 tortious conduct and the harm.

11 Plaintiffs' Closing Brief at 42, Dkt #732. Thus, the Court's task is to apply the facts
12 proven by a preponderance of the evidence against the standard of "reasonable inference
13 v. prohibited speculation" to determine whether "a causal relationship [exists] between
14 the tortious conduct and the harm.

15 Second is whether there is a role for "independent intervening cause" in the
16 context of an intentional tort. Plaintiffs argue "no", citing the Ninth Circuit's holding that
17 "the notion of independent intervening cause has no place in the law of intentional torts,
18 so long as there is a factual chain of causation." *Bank of New York v. Fremont General*
19 *Corp.*, 523 F.3d 902, 910 (9th Cir. 2008). In other words, "The fact that the actor's
20 conduct becomes effective in harm only through the intervention of new and independent
21 forces for which the actor is not responsible is of no importance." *Id.*

22 *Fremont* is neither particularly instructive nor controlling in this context. There,
23 an insurer ordered a wire transfer from a restricted account. When the funds were
24 transferred, the insurer claimed that the cause was not its direct order but rather the
25 failure of the bank officer to get proper authority to release the money. Not surprisingly,
26 the Court of Appeals found this argument unconvincing.

27 Here, the issue is not so much whether there was an independent intervening
28 cause, *i.e.*, the severe economic downturn, but rather whether Dierich's actions would
have made any difference in the end result. While Plaintiffs counter this argument by
saying that Dierich cannot "get a pass" because his bad acts occurred in a failing
economy, the real issue is whether causation based on his actions is too speculative to

1 give rise to liability. Whether this is couched in terms of an "intervening cause" or simply
2 that causation is too speculative is a distinction without a difference.

3 Plaintiffs suggest this case fits the Restatement example of two independently set
4 fires joining into one that thereafter damages plaintiff's property. *See* RESTATEMENT
5 (SECOND) OF TORTS § 432(2), Illustrations 3 and 4. The Restatement's answer is that both
6 fires caused the damage and each bad actor is liable. On the other hand, Defendants
7 suggest that this case fits the example of the poorly constructed dam overwhelmed by an
8 extraordinary 100 year flood, in which case the parties damaged downstream have no
9 claim against the dam builder because the negligent construction did not matter. *See*
10 RESTATEMENT (SECOND) OF TORTS § 432(2), Illustration 2.

11 Thus, at the end of the day, the real issue is whether this is a "two fires" or "flood
12 and dam" case.

13 F. What Is the Appropriate Standard for Damages?

14 For this phase, the amount and precise nature of damages are off the table but the
15 fact of damage remains part of the necessary proof in the sense that there must be proof
16 with "reasonable certainty" that RMMC actually suffered some type of damage.

17 This is an unusual case in this regard: The alleged harm at the center of the
18 Plaintiffs' case -- the takeover of RMMC by Dierich -- never occurred. Indeed, RMMC is
19 still operating under a confirmed Chapter 11 plan. Plaintiffs' theory of damages is two-
20 fold: first, RMMC should be reimbursed for salary and benefits paid to Dierich during his
21 faithless employment, plus the fees and costs incurred in the bankruptcy; and second, that
22 the reorganized business, even though operating, is less profitable, valuable and vigorous
23 than it would have been had Dierich not prevented advantageous refinancing. The record
24 on these points, obviously not fully developed because of the limited scope of the trial, is
25 nonetheless murky. Some of the proposed "deals" that Dierich allegedly thwarted might
26 well have led to a sale or merger of the company, although we will never know the
27 details. Had any of those deals occurred, would the "damage" have been averted? Is there
28 any way to know that any of the proposed refinancing transactions would have occurred

1 and, even if they had, would RMMC have been able to service the restructured debt so as
2 to have avoided bankruptcy in any event? Some of the deals might well have removed
3 Cowing from management and Cowing and Linda Cowing from ownership; if such had
4 occurred, would RMMC have been damaged?⁷ As stated previously, it is not now
5 Plaintiffs' burden to prove the amount and scope of damage but its case does require
6 proof that Dierich's acts were a "substantial factor" in causing some type of damage and
7 that it is a "reasonable certainty" that some damage did occur.

8 G. Does the Burden Shift?

9 The final discreet legal issue to address is Plaintiffs' argument that, for purposes
10 of proving causation, they are entitled to a presumption that the transactions that Dierich
11 allegedly "thwarted" would have "gone through," thus shifting the burden to the
12 Defendants to prove that they would not have. This is a critical point for the Plaintiffs
13 because of the difficulty of proving what did not happen as compared to proving what
14 did.

15 There is no Arizona case on this point.⁸ Their primary support comes from the
16 Restatement and two non-Arizona cases, *In re Dwight's Piano Co.*, 424 B.R. 260, 283
17 (S.D. Ohio 2009) and *Bomarko, Inc. v. Int'l Telecharge, Inc.*, 794 A.2d 1161, 1181 (Del.
18 Ch. 1999). The portion relied upon from the Restatement states:

19 [In] rare cases . . . characterized by a close relationship among the actors
20 who potentially caused the other's harm, the actors having superior
21 knowledge of the relevant circumstances, and the person harmed having
22 no reasonable prospect for obtaining evidence of causation . . . courts have
23 shifted the burden of proof on the aspect of causation that requires
24 identification of the actor who committed the tortious conduct—there
25 being adequate evidence that the tortious conduct caused the plaintiff's
26 harm.

27 RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 28, cmt. b. As is clear from
28 the quotation, this section of the Restatement addresses a different issue; that is, where
should the burden of proof lie among multiple tortfeasors to demonstrate which is most at

⁷ Whether any of the deals would have relieved the Cowings from their guarantee liability is not a factor in determining whether there was damage to RMMC caused by Dierich's actions. Although such a result would have benefited the Cowings personally, it would have been neutral vis-a-vis RMMC.

⁸ Plaintiffs rely on *Felder v. Physiotherapy Assoc.*, 158 P.3d 877, 885 (App. 2007) for this argument. But *Felder* is a damage case and is not helpful on applying this theory in the context of causation.

1 fault in a situation where *there is adequate evidence that the tortious conduct caused the*
2 *plaintiff's harm*. Thus, this section does not support the Plaintiff's contention that the
3 burden shifts on the *very issue* of causation. Instead, the Restatement support's the
4 conclusion that such burden remains with the Plaintiffs.

5 Both *Dwight's Piano* and *Bomarko* involve claims made against CEOs for
6 breaching their fiduciary duties of care and loyalty under Delaware law. These cases
7 discuss the standards for applying the entire fairness standard of review. The *Dwight's*
8 court put it this way: "When directors or officers are on both sides of a transaction, the
9 duty of loyalty is implicated and the 'entire fairness' standard of review applies." *In re*
10 *Dwight's Piano Co.*, 424 B.R. at 284. In such instances, the fiduciary then has the burden
11 of establishing the entire fairness of the transaction. *Id.*

12 The "entire fairness" standard is not at issue here and is a particular standard of
13 proof for a fundamentally different kind of case under Delaware corporate law, even if
14 some similar fact patterns are present. For example, in *Bomarko*, the defendant argued
15 that the transaction at issue was "entirely fair," even though certain refinancing did not
16 occur, because "there was no chance that ITI by itself could get the financing, so I was
17 not in any way taking an opportunity was ITI's and taking it for myself" 794 A.2d at
18 1181. In a memorable phrase, the Chancellor asked:

19 How am I to analyze this contention? Whether Bell Atlantic would have
20 financed ITI was a matter of uncertainty until Haan [the CEO] interfered
21 with the dealings between ITI and Bell Atlantic. . . . It was Haan's faithless
22 behavior thereafter that makes it difficult to know with any degree of
23 certainty whether or not ITI could have worked out a deal with Bell
Atlantic. . . . [T]here was *some* likelihood of ITI and Bell Atlantic
reaching an accord . . . [i]t was Haan's misconduct in regard to Bell
Atlantic that sunk any chance that ITI had of obtaining financing from that
source.

24 *Id.* (emphasis in the original). How then is the Court to analyze RMMC's contention that
25 this interpretation by the Delaware chancery court of the "entire fairness" standard is
26 sufficient to shift the burden of proof from the plaintiff to the defendant on this critical
27 issue?

28

1 While the language is persuasive, its application to this case is not. This standard
2 is applied in Delaware to a suit against a party in control of a corporation who engages in
3 a transaction involving self-dealing. Under Delaware law, the **defendant** [Haan] had the
4 initial burden of proof on the issue of whether or not the transaction was entirely fair. *Id.*
5 at 1180. That is the mirror image of what Plaintiffs are arguing here, where **they** have the
6 initial burden of proof. Thus, nothing about this case supports the notion that the
7 traditional burden of proof should be shifted in a breach of fiduciary duty case. Thus,
8 neither *Bomarko* nor *Dwight's Piano* applies to this case.

9 Therefore, the burden of proof on all aspects of the Plaintiffs' claims rests with the
10 Plaintiffs. As counsel for Comerica correctly said in closing argument: "We don't have to
11 prove anything."⁹

12 **IV. Background and Facts**

13 A. Methodology

14 The record in this case is voluminous, consisting of six and one-half days of
15 testimony and hundreds of exhibits, including deposition designations, emails, letters,
16 proposals, voice mails and other documents. Much of the testimony is inconsistent, both
17 internally (different statements of the same witness) and externally (sharp contradictions
18 of recollection between or among different witnesses). As an expected result, the parties
19 have distinctly different views of the credibility of certain key witnesses (in particular,
20 Dierich, Cowing, and Cowan) and vastly different takes on what actually happened. Not
21 surprisingly, this makes shaping a rationalized view of what did occur, and the legal
22 consequences flowing therefrom, in the time between Dierich's arrival at RMMC and the
23 filing of this bankruptcy case, a difficult task, at best. When faced with a record like this,
24 it is usually best to return to basic principles. Thus, the principles the Court has applied in
25 reaching its findings of fact here include:

- 26 • The written word is generally more credible than oral testimony.
27 Contemporaneously recorded statements made outside the shadow of pending
28 litigation in the form of emails, voice mails, letters and memoranda are generally

⁹ Trial Transcript of Closing Arguments by Thomas Tallerico, August 10, 2012, 42:5-6.

1 more likely to be true than later (sometimes years later) recollections made in the
2 cozy light of direct examination or under the glare of cross-examination.

- 3 • Long experience has taught that the ability of human beings to remember past
4 events with clarity and specificity is, frankly, limited and that recollections often
5 evolve to fit a desired outcome or are recorded in memory through lenses deeply
6 affected by an individual's personal bias, or put less harshly, point of view. That
7 this happens does not mean that the witness is a liar or a perjurer; to achieve that
8 status, one needs a degree of cold blooded intent that the Court's experience has
9 taught is less common than often generally believed. But it does mean that such
10 testimony may not be credible. The notorious unreliability of eye witness
11 identifications in the criminal context is an excellent example of this
12 phenomenon.
- 13 • Thus, in arriving at factual findings, the Court will rely more on the written record
14 than on the testimonial record.
- 15 • Nevertheless, the written record is often ambiguous, created in the context of
16 known circumstances that the correspondents intuitively understand but that the
17 written record does not reveal. Interpreting such a record can be both frustrating
18 and treacherous; nevertheless, it must be done, and, in such a case, testimony
19 explaining the context can be very useful.
- 20 • Credibility is a fragile thing. The trouble with a witness who remembers the same
21 thing in multiple ways, or constantly contradicts previous statements, is that, even
22 when he may finally tell the truth or remember what actually did happen, he can't
23 be believed.

24 In applying these principles while reviewing the record, the Court has broken the
25 key events of this case into seven time frames, each corresponding to a major event in the
26 relationship between RMMC, Comerica, M&C, Cowing, and Dierich. These are:

- 27 • 2004 to April 2007. This is before Dierich has arrived on the scene. The
28 portion of the economy that fueled RMMC's business has gone from
explosive growth to the beginning of a precipitous decline. As Getman is
leaving RMMC and Dierich is assuming his position, the Comerica Loan,
for the first time, went into default, albeit a technical one;
- May 2007 to December 2007. This represents the first several months of
Dierich's tenure at RMMC. During this time, there were no major attempts
to sell RMMC or to refinance the Comerica Loan;
- January 2008 to September 15, 2008. During this period, RMMC's loan
was moved to SAG for resolution. Attempts to sell or refinance began in
earnest and the financial world was rocked by the collapse of Lehman
Brothers on September 15, 2008;
- September 15, 2008 to December 2008. During this period, RMMC
retained M&C and Dierich pursued what was eventually an
unconsummated PEG transaction. The Comerica Loan was in default and
subject to multiple forbearance agreements;
- January 2009 to March 2009. By now it is clear that something needed to
be done, and done quickly. Sales efforts proceeded in earnest culminating

1 in three offers, none of which were accepted, while Dierich began trying
2 to put together an EPIC transaction;

- 3 • April 2009 to June 2009. Cowing began working closely with JS Cole.
4 Dierich pursued more concretely the option of acquiring RMMC's assets
5 through his own vehicle. The EPIC transaction clearly took form; RMMC
6 discovered Dierich's attempt to acquire the assets of RMMC; Dierich left
7 RMMC; and
- 8 • July 2009 to the present. Dierich and Comerica continued to work towards
9 an agreement that was never consummated; RMMC filed for bankruptcy
10 and successfully confirmed a stand-alone plan of reorganization with
11 Cowing and Linda Cowing retaining their equity interests; this lawsuit was
12 filed.

13 Not unlike Akira Kurosawa's film *Rashomon*,¹⁰ the Court has looked at the facts,
14 in each of these time frames, from four different perspectives: 1) the economy; 2)
15 RMMC; 3) Dierich; and 4) the various "Deals" potentially available to RMMC. While
16 this approach creates a certain amount of duplication in recitation, it has the benefit of
17 isolating key facts during critical times.

18 B. Pre-Dierich

19 1. *The Economy*

20 Phoenix, Las Vegas, and Southern California were in an economic boom in the
21 early to mid-2000's. Between 2003 and 2006 the population of Phoenix, Riverside/San
22 Bernardino CA, and Las Vegas increased by 24.2%, 23.7%, and 29.2%, respectively. (ex.
23 5010 at '4414). Housing starts followed these population increases:

<u>Region</u>	<u>Year</u>	<u>Housing Starts</u>	<u>Percentage Increase/Decrease</u>
Phoenix	2003	53,900	
	2004	63,200	17.3%
	2005	65,200	3.2%
	2006	47,500	-27.1%
Las Vegas	2003	35,400	
	2004	38,300	2.6%
	2005	34,800	-4.1%
	2006	31,900	-8.3%
California	2003	195,700	
	2004	212,900	8.8%
	2005	208,900	-1.9%
	2006	154,300	-21.3%

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28 ¹⁰ *Rashomon* (1950) "A heinous crime and its aftermath are recalled from differing points of view."
<http://www.imdb.com/title/tt0042876/>

1 (ex. 5155 at '1491). The cracks in the economy, which began in 2005, were becoming
2 evident by the end of 2006.

3 2. *RMMC*

4 Cowing founded RMMC in 1986. (Trial Transcript of Owen Cowing, July 20,
5 2012 112:22-113:3). The growth of RMMC matched the communities it served. At its
6 peak, RMMC had about 150 employees and about 275 machines. (Trial Transcript of
7 Owen Cowing, July 25, 2012, 104:1-105-11). In 2005 and 2006, RMMC derived just
8 over 40% of its revenue from the residential construction markets. (ex. 15 at '15333-34).
9 Times were good for Cowing and Linda Cowing; between the two owners, over \$1.6
10 million in 2006 and \$1.2 million in 2007 were distributed to them from RMMC "for
11 living expenses." (ex. 83).

12 While RMMC's business grew, so did its debt. Prior to 2003, RMMC typically
13 financed machinery over five-year terms. (Trial Transcript of Grant Getman, July 13,
14 2012, 83:9-84:15). With Getman and Foley's help, RMMC refinanced the equipment with
15 two loans; one with GECD and one with Comerica (*Id.*) Eventually the loans grew to just
16 over \$41 million in 2006. (ex. 5085 at '2629). RMMC did not see the downturn coming
17 as it anticipated future growth. (Trial Transcript of Grant Getman, July 13, 2012, 163:6-
18 11). It bet big on this future growth when it purchased \$34 million in used equipment in
19 2005 and 2006. (ex. 5069 at '16203). In 2006, with Comerica's support, RMMC bought
20 and constructed a new facility in Las Vegas for approximately \$6,000,000. (Trial
21 Transcript of Grant Getman, July 13, 2012, 95:24-97:1).

22 However, as housing growths slowed in Phoenix, Las Vegas, and California, so
23 too did RMMC's business. For instance, Time vs. Dollar Utilization dropped steeply in
24 all markets from a peak in around August/September 2006 through the first quarter of
25 2007. In rough numbers, utilization dropped among all markets from 65% to 45%; in
26 Arizona from 70% to 55%; in Nevada from 65% to 33%; and in California from 65% to
27 30%. (ex. 5010 at '4009-4412). This drop is seen in other numbers as well. For instance,
28 Lost Rental Trending dropped from \$900,000 in September 2006 to under \$100,000 in

1 March 2007. (*Id.* at '4413). Finally, as a percentage of RMMC's business, housing
2 dropped from 41% in 2006 to 28% in the first quarter of 2007 as the company searched
3 for new market segments to take up the slack. (*Id.* at 4407-08).¹¹

4 This downturn was particularly harsh on RMMC because in prior downturns
5 RMMC could transfer equipment between markets to mitigate the impact; this downturn
6 hit all three markets at once. (Trial Transcript of Owen Cowing, July 25, 2012, 108:2-24).
7 RMMC experienced a loss for the first quarter of 2007 of \$159,000. (ex. 5010 at '4432).
8 As of March 31, 2007, RMMC was in default on the Comerica Loan because the
9 Tangible Net Worth Requirement was \$12,892,716, but the Actual Tangible Net Worth
10 was \$12,685,403 -- a default of \$207,313. (ex. 5007).

11 3. *Dierich*

12 RMMC hired Dierich as its CFO on April 23, 2007. (ex. 4).

13 4. *The Deals*

14 Cowing thought of selling RMMC as early as 2000. (Deposition of Jay Dee Sale,
15 December 7, 2011, 28:14-29:13).¹² The efforts to sell the company started before Getman
16 left and escalated once Dierich arrived. (Deposition of Jay Dee Sale, December 7, 2011,
17 36:9-15). Getman structured a potential sale to Sale and Fickett that encompassed a long
18 term payout to Cowing and Linda Cowing to avoid the tax consequences of a "large
19 check" sale. (Trial Transcript of Grant Getman, July 13, 2012, 100:21-105:16). Cowing
20 turned down the offer because he didn't want to pay someone to buy his own company
21 with what he thought were his profits. (*Id.* at 104:8-105:1). In fall 2006 and winter 2007,
22 RMMC sent LOIs to World Wide. (exs. 5003, 5005). Cowan testified that the attempt
23 was like a minnow trying to buy a whale. (Trial Transcript of Owen Cowing, July 20,
24 2012, 123:3-22). Maetzold was at World Wide at this time. (exs. 5003, 5005).

25 Throughout the relevant periods, Cowing was CEO and majority shareholder of
26 RMMC; Linda Cowing was minority shareholder. They were the only legal officers and

27
28 ¹¹ The exhibits, in black and white, were apparently produced from a color presentation. Fairly, the residential percentage at '4408 could be read as 29%, but in either event makes no material difference.

¹² The Plaintiffs object to the cited section on Relevance grounds. The objection is overruled.

1 directors of RMMC. (JPS Stipulated fact #5). They were previously married. Cowing had
2 guaranteed \$8 million of Comerica debt and Linda Cowing \$5 million.

3 C. May 2007 to December 2007

4 1. *The Economy*

5 The economy, particularly the housing sector, in the Southwest began seriously to
6 crumble during 2007:

<u>Region</u>	<u>Year</u>	<u>Housing Starts</u>	<u>Percentage Increase/Decrease</u>
Phoenix	2006	47,500	-27.1%
	2007	36,300	-23.6%
Las Vegas	2006	31,900	-8.3%
	2007	20,400	-36.1%
California	2006	154,300	-21.3%
	2007	113,000	-31.2%

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12 (ex. 5155 at '1491).

13 2. *RMMC*

14 Despite his title as CFO, Dierich has claimed that he was "only a bookkeeper."
15 (Deposition of Darren Dierich, November 14, 2011, 18:8-19).¹³ RMMC's CFO's duties
16 were spelled out by Getman in the job announcement. (ex. 338).

17 Job Summary: The Chief Financial Officer is responsible for:

- 18 • All financial issues
- 19 • All legal issues -
- 20 • Information Technology
- Human Resources

21 The essential duties and responsibilities (delegated to):

- 22 • Historical Financial Statement Preparation (Controller) and presentation.
- 23 • Prospective Financial Statement Preparation and maintenance (Assistant
Controller)
- 24 • Human Resources, including payroll, workers' comp insurance and
benefits (HR Director)
- 25 • Information technology - hardware, network, telephone systems and
utilitarian software (Information Technology Director)
- 26 • Operational Information Systems Reporting, including TrakQuip
(Information Services Director)
- 27 • Credit Facilities reporting and relationships
- Customer Billing (Assistant Controller), Credit and Collections,
including litigation
- Internal Controls

28 ¹³ During trial, Dierich attempted to clarify his deposition testimony. His explanation makes no sense.
(Trial Testimony of Darren Dierich, July 13, 2012, 248:18-249:21).

1 These duties and responsibilities are consistent with experience listed on Dierich's
2 resume. (ex. 1). Before RMMC, Dierich was the CFO at Clear Choice Financial where he
3 described his duties as:

4 Consummate senior finance executive merging strategic planning, analysis
5 and reporting with strong management credentials. Delivering tactical
6 actions impacting bottom-line efficiency, performance, and profitability.
7 Entrepreneurial minded with record of success leading start-ups, IPOs,
8 turnarounds and growth initiatives.

9 (ex. 1 at '436412). Dierich's annual salary was \$140,000 with a bonus up to \$60,000. (ex.
10 2). Dierich signed documents on behalf of the company as CFO throughout his term as
11 CFO. (*see, e.g.*, exs. 9,¹⁴ 411).¹⁵

12 Soon after Dierich started at RMMC, he, Cowing, and Getman met with
13 Comerica to give a presentation on the status of RMMC. (ex. 5010). RMMC predicted
14 that: the worst is behind RMMC (*Id.* at '4427); the Comerica Loan would be paid down to
15 \$34,502,163 by year end (*Id.* at '4431); net income would be \$2,301,136 (*Id.* at '4432);
16 and RMMC's tangible net worth would be \$14,008,978 by year end.¹⁶ (*Id.* at '4435).
17 During the meeting, RMMC asked Comerica to consider a different covenant regarding
18 cash flow.¹⁷ (*Id.* at '4429). Further, RMMC advised Comerica that new CARB
19 regulations will present a "large burden on investment in fleet in next two years." (*Id.* at
20 '4429). Finally, RMMC pointed out that the covenants in the Comerica Loan conflicted
21 with RMMC tax strategy. (*Id.* at '4437).

22 RMMC had a net loss on rental operations again in May 2007. (ex. 5014 at
23 '175463). In its June 19, 2007 Vital Factors Meeting, RMMC identified revenue and bank
24 covenants as critical issues. (*Id.*)

25 Problems continued according to the July 17, 2007 Vital Factors Meeting notes.
26 Again, RMMC had a net loss on rental operations. (ex. 5015 at '181446). Further, RMMC
27 had a net loss on rental operations and noted that the covenants are close. (*Id.*)

28 ¹⁴ September 10, 2007.

¹⁵ April 3, 2009.

¹⁶ According to the same report, the minimum tangible net worth requirement at year end of 2007 would be \$12,892,716.

¹⁷ The record is not clear what cash flow covenant change was requested and why RMMC wanted it.

1 By September 30, 2007, RMMC was out of compliance under three Comerica
2 Loan covenants: Tangible Net Worth Covenant, Debt-to-Tangible Net Worth Ratio
3 Covenant, and Interest Coverage Ratio Covenant. (ex. 11).

4 RMMC did react to the changing market it faced. By November 2007, it had
5 reduced the fleet, sold the Escondido office, reduced the number of employees, converted
6 to ADP to manage human resources, and returned and sold equipment. (ex. 15 at '15339).
7 These actions could not prevent a projected loss for 2007 of \$2,640,000, but led RMMC
8 to project a profit of \$170,000 for 2008 (*Id.* at '15348), even if that prediction turned out
9 to be unrealistic.

10 Comerica declared a default on the Comerica Loan on December 17, 2007 (ex. 19
11 at '2646), an event that Cowing agreed Dierich did nothing to cause. (Trial Transcript of
12 Owen Cowing, July 25, 2012, 122:9-123:2). The reasonable inference that the Court will
13 draw is that Comerica had no present intent at that time on enforcing any remedies but
14 rather declared the default in order to exert more immediate control over the credit.¹⁸

15 On December 20, 2007, Comerica made certain modifications to the Comerica
16 Loan, without waiving the existing defaults. (ex. 20). Under terms as outlined by
17 Comerica, by December 28, 2007, Comerica required Cowing and Linda Cowing to lend
18 \$3,000,000 in new money to RMMC to be subordinated to the Comerica Loan. Further,
19 the borrowing base would steadily decrease:

- 20 • October/November 2007 -- 95% of Cost;
- 21 • December 2007 -- 94% of Cost;
- 22 • January 2008 -- 93% of Cost;
- 23 • February 2008 -- 92% of Cost;
- 24 • March 2008 -- 91% of Cost; and
- 25 • April 2008 -- 90% of Cost.

24 (*Id.*) Thus, the inevitable and inexorable cash squeeze began.

25 The projected loss for 2007 of \$2,640,000 turned out to be much more than a little
26 understated. In fact, RMMC lost \$9,360,926; \$5,630,198 from operations (ex. 5085 at
27 '2630) and the remainder from capital write downs.

28 ¹⁸ For example, Comerica made substantial modifications to the loan in December and then a month or two
later, transferred the credit to SAG.

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3. *Dierich*

Fickett and Dierich began corresponding through personal email accounts. Fickett emailed Dierich RMMC documents to Dierich's Cox email account in July (ex. 6) and November (exs. 17, 18).

On September 3, 2007, RMMC, through Dierich, entered into an agreement with ADP to replace its own human resources department. (ex. 9). By all accounts, this was a good move that saved money. (*See e.g.*, ex. 15).

Dierich claimed in his deposition that he arrived at RMMC to find it insolvent. (Deposition of Darren Dierich, November 14, 2011, 28:22-29:4). At trial, he reiterated this position when he testified that he believed RMMC was insolvent shortly after being hired. (Trial Transcript of Darren Dierich, July 19, 2012, 4:23-5:1), However, during the meeting with Comerica, discussed *supra*, where RMMC predicted a modest profit, Dierich did not express his view to anyone at this meeting that these numbers were wrong and that RMMC was insolvent. (ex. 15).

4. *The Deals*

On October 10, 2007, Dierich reconnected with Cowan whom he knew from previous deals at other companies. (ex. 12).

D. January 2008 to September 15, 2008

1. *The Economy*

The economy in 2008 continued to decline:

<u>Region</u>	<u>Year</u>	<u>Housing Starts</u>	<u>Percentage Increase/Decrease</u>
Phoenix	2007	36,300	-23.6%
	2008	19,200	-47.1%
Las Vegas	2007	20,400	-36.1%
	2008	12,600	-38.2%
California	2007	113,000	-31.2%
	2008	65,300	-42.2%

1 (ex. 5155 at '1491). Remember, as recently as 2004, housing starts in Phoenix, Las
2 Vegas, and California were approximately triple the 2008 numbers: 63,200, 38,300, and
3 212,900 respectively.

4 2. *RMMC*

5 In January 2008, RMMC cut employees (ex. 5026), reduced high ranking
6 employee's pay by about 30% (Trial Transcript of Owen Cowing, July 25, 2012 148:4-6),
7 and expected further losses going forward. (ex. 5029 at '15700). It was in this
8 environment that Cowing, Foley, Sullivan, and Kain met on January 28, 2008. (*Id.*)
9 During this meeting, the parties discussed the need for additional capacity, RMMC's
10 likely move to SAG, and that the advance rate on OLV needed to decrease to 90% by
11 April 2008. (*Id.*)

12 On February 4, 2008, Foley advised Cowing that he could avoid having the
13 RMMC credit transferred to SAG if he came up with \$1,500,000. (ex. 5025).¹⁹ At the
14 time, Cowing testified that he and Linda did not have the capital to put more into RMMC.
15 (Trial Testimony of Owen Cowing, July 25, 2012, 151:18-22). On February 12, 2008,
16 Comerica continued to tighten the screws by transferring RMMC to SAG.²⁰ (ex. 5029).
17 Things got worse a couple of days later when RMMC's Auditors warned RMMC, and
18 Cowing specifically, of a possible going concern qualification to their opinion. (ex.
19 5028). Recognizing the situation with the bank, Cowing raised the possibility of
20 forbearance with Kain on March 4, 2008. (ex. 5031).

21 Things were still not going well as of late April and early May.²¹ In this time
22 frame, Cowing was worried that Comerica and GECD may not renew the Comerica Loan
23 when its current term expired in June and contacted GECD to take its pulse. (ex. 5043).

24 ¹⁹ The day before, February 3, Cowing purchased a 2005 Mercedes S500 for \$45,043.08, for which he
25 borrowed the entire amount, creating an \$881 monthly payment. (ex. 5185).

26 ²⁰ A separate internal Comerica document listed the SAG date as February 29, 2008. (ex. 523 at 33660).

27 ²¹ Around April 29, 2008, Dierich told Cowan that Comerica was going to require an extra \$10,000,000 in
28 equity to be paid or raised by Cowing. (ex. 367 at '2676). Nothing in the record independently verifies that
this number had been given to Cowing. As of May 6, 2008, Dierich told Cowan that this "hammer" had
been delivered to Cowing. (*Id.* at '2675). However, the first *real* indication that Comerica was going to raise
the issue of additional equity came in the email from Kain to Cowing on May 16, ex. 5045, discussed in the
text following this footnote. By August 5, there is no doubt that the number of \$15 million in new equity
required had been communicated to Cowing. (Ex. 76).

1 GE followed up with Comerica and learned that Comerica is "probably willing to stay in
2 but that the leverage is getting a little high for them." (*Id.*)

3 Kain, in anticipation of an upcoming meeting, laid out to Cowing the basic
4 conditions of extending the credit beyond the impending June 1, 2008 deadline:

- 5 • Obtain a new appraisal of the fleet
- 6 • Reduce commitment from \$50.0mm to \$35.0mm, with possible
additional reductions during the year
- 7 • Reduce advance rate to 87.5% at 5-31-08, with monthly reductions of
1.5% each month thereafter for the next 6 months
- 8 • Definitive plan for injection of additional equity from owners, investors,
refinancing of real estate and/or any other source
- 9 • Increase in interest rate for extended credit facility
- 10 • Also, we need to put on the table and discuss the Company engaging a
consultant to assist in an overall turnaround or survival plan that should
include:
 - 11 (a) developing and implementing a fleet reduction plan i/o to
improve equipment utilization
 - 12 (b) develop a strategic plan to turnaround the current net losses,
return to bottom-line profitability and survive the current market downturn
 - 13 (c) explore equity options
 - 14 (d) explore refinancing options and/or sale of the business if
necessary

15 (exs. 39, 5045).

16 Soon after the May 21, 2008 meeting, Campbell recapped the outcome:

- 17 • Comerica and GECF will offer a 45-60 day forbearance;
- 18 • Immediate reduction of facility to 88%;
- 19 • Increase interest rate to P+2% from P+.25%
- 20 • Target a reduction in advance rate to 80% of OLV; and
- 21 • Cowing proposes a pledge of the equity in AZ location (about \$4,000,000) in lieu
of reduction of advance rate. The Banks declined to include the property in the
borrowing base (as Owen had wanted) but agreed to consider how such a pledge
would affect the restructuring.

22 (ex. 5046). Separately, in a June 9, 2008 CQR Memo, Comerica summarized the same
23 meeting:

- 24 • OLV must reduced to 88% and step down to 80%
- 25 • Owen has talked to others about new equity who Cowing considered "bottom
fishers" and he is unwilling to give the company away
- 26 • Cowing and Linda Cowing do not have liquidity to contribute more
- Rate increase from Prime + .25% to 2%

27 (ex. 368 at '16043).

28

1 On May 27, 2008, Cowing purchased Rim Club Lot 137 in Payson, Arizona for
2 almost \$450,000, apparently with cash.²² (ex. 5185 at '1192).

3 Things took a decided turn for the worse in June 2008 when Cowing got very
4 sick. Cowing had been diagnosed with chronic lymphoid leukemia in May 2008 and in
5 June 2008, Cowing contracted, among other things, pneumonia leading to a nine day
6 hospitalization. (exs. 51, 5290, Trial Transcript of Owen Cowing, July 20, 2012, 197:14-
7 201:7). For seven of the days Cowing could not talk. (*Id.*)

8 As referenced in a June 26, 2008 email from Dierich to Cowing, Comerica did
9 extend the maturity date to August 4, 2008. (ex. 53). Dierich claimed that he had no
10 negotiating ability. Dierich summarized the terms of the Seventh Amended and Restated
11 Master Revolving Note:

12 A) Reduced the line to \$35M. Interest rate is going to be prime +2%. Our
13 default rate is going to be prime+ 5%. The extension matures on August 4,
14 2008.

14 B) Any and all references to LIBOR rates have been removed.

15 (*Id.*) Dierich summarized the Limited Forbearance Agreement terms:

16 A) Period June 1, 2008 - August 4' [sic] 2008 (Same as the Master
17 Revolving Note)

17 B) Swing Line Portion is terminated along with any Letter of Credit (This
18 is ok, as we have nothing outstanding)

18 C) Advance rate is going to be reduced by 1% - 89% in June and 88% July

18 D) We need to deliver the appraisal by August 4, 2008.

19 E) We now need to send utilization reports with the financial statements
30 days after month end.

20 (*Id.*) Upon reading the email, Cowing responded that "I will not be able to concentrate
21 that much on wordage, but are there any minimum pay downs?" (ex. 54).

22 For the six months ending June 30, 2008, RMMC lost \$1,581,833. (ex. 5063 at
23 '281131).

24 On July 10, 2008, Cowing paid the first of three payments totaling \$14,300 to
25 remodel his house and paint his bathroom. (ex. 5185 at '1191).

26 As part of the forbearance, a new appraisal was required. While Cowing was in
27 the hospital, he asked Dierich to contact Rouse for that purpose (Trial Transcript of Owen

28 _____
²² There is no mortgage holder listed for this property. (ex. 5189 at '1179).

1 Cowing, July 20, 2012, 205:1-7) and on July 16, 2008, Rouse delivered the May 31,
2 2008 Appraisal which showed:

- 3 • FMV = \$39,737, 500
- 4 • OLV = \$32,486,250
- FLV = \$25,492,750

5 (ex. 63). The key number, OLV, was slightly less than of the bank's outstanding debt of
6 \$33.4 million. (ex. 83). Not wanting Comerica is to pull the plug, the next day Cowing
7 emailed Dierich stating that "we need to convince the Bank that Auction Disposal is not
8 the way to liquidate the fleet." (ex. 5060).

9 On August 4, 2008, RMMC and Comerica entered into the First Forbearance
10 under which the parties changed the formula loan amount to 88% of OLV (\$28,581,900)
11 subject to reduction of \$325,000 on the first of the month. (ex. 75 at '37). By its terms, the
12 First Forbearance expired on September 4, 2008. On August 5, 2008, Chad Lancaster of
13 Comerica explained to Foley that the 30-day extension was given so that Cowing could
14 consider his options after his hospitalization. (ex. 76). These options include:

- 15 • Equity Investor - Cowing is meeting with someone but probably an
16 unlikely solution. SAG has told him that he would need to raise at
17 least \$15MM.
- Dierich has been in negotiations with a private equity group (while
18 Cowing was in the hospital) to buy the company. The sale would
19 include buying out our debt. Terms have not been specified.
- If he doesn't choose the above options then he will be forced to
begin liquidating his inventory with rapid paydowns made on the
line.

20 (*Id.*) The need to raise \$15 million was confirmed in an email exchange between Dierich
21 and Kain on August 13, 2008. (ex. 80).²³

22 By late August, Cowing was pinning much of RMMC's future on the hope that it
23 would win a bid in Texas that would generate \$500,000-600,000 per month in rental
24 income for 2009. (ex. 92). Cowing expressed this optimism to Kain on August 21, 2008,
25 (*Id.*), although the deal always appeared to be a long shot. (Deposition of Dante Ghilotti,
26 November 21, 2011, 392:1-24). In the end, RMMC did not win the bid. (Trial Transcript
27 of Owen Cowing 173:17-174:1).

28 ²³ This is the "NO NO, I need to be bleeping. He won't sell if you give him an inch!!!!" email. It is detailed
in the discussion regarding Dierich below.

1 On September 4, 2008, Comerica extended its forbearance to December 15, 2008.
2 (exs. 96, 5078) based on a pending sale to HIG which would pay down the debt by \$13
3 million. (ex. 5078 at '11863). Under terms of the Second Forbearance, the maximum
4 advance rate changed to 86% of appraised OLV with monthly principal reductions of
5 about 1% in November and December. (ex. 97). Cowing and Linda Cowing signed the
6 Ninth Amended Note as guarantors and on behalf of RMMC.²⁴ (*Id.*)

7 For the first six months of 2008, EBITDA equaled \$2.29 million but the company
8 incurred an adjusted net loss of \$1.23 million. (ex. 83).

9 3. *Dierich*

10 In early 2008, Dierich contemplated leaving RMMC after less than a year on the
11 job. (ex. 5029).

12 In January 2008, Dierich began communicating with the Lukes about RMMC and
13 HCMI, and sent them confidential financial information. On January 9, 2008, Steve Luke
14 asked Dierich for consolidated financial statements so his dad (Bill Luke) could start
15 trying to line up "CASH". (ex. 347). Apparently in response, Dierich sent RMMC's
16 consolidated financial statements to Steve Luke, but without any limitation on
17 confidentiality (ex. 21). By January 11, 2008, Fickett had joined in some of the
18 conversations with Steve Luke. (ex. 23). Dierich admitted that he cannot say that he had
19 permission to share the information with the Lukes. (Trial Transcript of Darren Dierich
20 July 19, 2012, 47:16-19).

21 As early as January 13, 2008, Steve Luke had envisioned a form of HCMI that
22 included Taylor Hart²⁵ and "Rent Big...Construction Equipment Rentals, etc." (ex. 25).

23 Around the same time, Dierich began discussions with Cowan that would
24 continue until RMMC filed for bankruptcy. On January 17, 2008, Dierich met with

25
26 ²⁴ Owen signed on behalf of Red Mountain Machinery Company as president. Owen and Linda signed as
27 members of Red Mountain Pacific LLC, Red Mountain Holdings, L.L.C., and BTH LLC. Each signed
28 separately as guarantors. Although Comerica's liability is not at issue in Phase I, the Court notes that the
Second Forbearance has the broad release language that was the subject of Comerica's motion for summary
judgment.

²⁵ Taylor Hart was an active company at this time or soon after. (*see e.g.*, ex. 48). "Rent Big" never came to
fruition as a subsidiary of HCMI.

1 Cowan for lunch to discuss PEGs and an MBO. (ex. 352). On January 24, 2008, Dierich
2 first raised with Cowan the possibility of starting his own company with help from
3 current management: "Swinging the thought process in another direction, would any of
4 your folks be interested in forming a new venture in this arena should current
5 management decide to leave and start another entity?" (ex. 354 at '4253). At this time
6 Dierich even mentioned that "I currently have a commitment for \$5M cash and the bank
7 of Red will provide a line for \$20M in equipment purchases, I'm just not a fund that has a
8 reputation and big bucks. Maybe we can discuss if you think it is worth it."²⁶ (ex. 354 at
9 '4252). Also in late January, Foley asked Dierich "Do you think that Owen will have an
10 interest in furthering your discussion at some point or do you think he is not going to
11 consider it as an option for the time being?" (ex. 27). This makes clear that Dierich had
12 raised the MBO issue with Comerica by January; the record reveals no direct response by
13 Dierich to Foley's question.²⁷

14 In early February, talks continued with both the Lukes and Cowan, who
15 apparently knew of each other. (ex. 29). On February 13, 2008, Dierich sent Steve Luke
16 the operating lease for Riverside, RMMC's new California location. (ex. 357). On
17 February 21, 2008, Dierich emailed Cowing telling him that he "ran into a friend at lunch
18 who did a few deals for me in the past...He asked if the ownership of RM ever thought of
19 selling or merging. I told him I was not aware of any plans right now, however, that I
20 would pass on the message..." (ex. 31). Cowing responded, "At this time I am open to all
21 alternatives." (*Id.*) It is unclear if the "old friend" is Cowan, one of the Lukes, an
22 amalgamation of all three, or someone different.

23 On February 14, 2008, the Auditors emailed Cowing and Dierich to state their
24 concern about the agreements with the Comerica and the RMMC's ability to continue as a
25

26 _____
27 ²⁶ The record does not independently support that either of these assertions was in fact true; the sentence is
not quoted for its truth but solely to give a flavor of what Dierich was saying to others at the time.

28 ²⁷ Foley explained that the comment meant that Dierich "would look at his sources, since he was in
investment banking, and try to find some capital for the company." (Deposition of Brian Foley, December
1, 2011, 103:12-104:23).

1 going concern. (ex. 5028 at '441343-44). The next day, Dierich forwarded the email to
2 Winger with the comment, "Lets [sic] discuss." (ex. 5028).

3 In mid-March 2008, Dierich set up a meeting with Cowan and Cowing. (ex.
4 5032). Prior to the meeting, Dierich suggested to Cowan (but not to Cowing) that they
5 discuss "the roll up strategy and the potential of Schwab being recapitalized" (ex. 32), but
6 stay away from a prior meeting with Fickett and financial statement disclosure. (ex. 33).
7 After the meeting, Dierich told Cowan that Cowing was excited about the roll up strategy
8 and asked Cowan to send an engagement agreement. (ex. 5034). Cowan stated that it
9 would take about a month to get the book together. (ex. 5034). Cowan sent Dierich an
10 engagement letter, with revisions suggested by Dierich, on March 24, 2008. (ex. 5035).

11 At least as of March 28, 2008, Comerica knew about HCMI and Dierich's hopes
12 to have it involved in solving the Comerica debt problem. On that date, Terry Yancey
13 from Comerica called Dierich asking for an address for HCMI for Foley to use on a visit
14 to Arizona. (ex. 358, 359). Soon after on March 31, 2008, Dierich asked Cowan if he
15 would be willing to meet with Comerica alone as a representative of "HCMI, (My
16 entity)," because Dierich was still CFO of RMMC and "I bring the conflict." (ex. 363).

17 On April 1, 2008, Dierich attempted, without success, to get Steve Luke, Foley,
18 and Cowan together at lunch. (ex. 364). A couple of days later, Dierich asked Cowan if
19 any of his people would be interested in a new venture with a roll-up in 12 months if
20 current management²⁸ decided to exit. Cowan said yes. (ex. 34). Soon after, on April 4,
21 2008, via a series of emails, Dierich received a confidentiality agreement from and
22 exchanged information with FocalPoint, the entity that assisted Schwab Sales. (exs. 5039,
23 5040, and 5041).

24 On April 9, Dierich and the Lukes discussed a conference call to judge HIG's
25 interest in RMMC. (ex. 35). The Lukes preferred a sell-side arrangement, *i.e.*, to be under
26 contract with RMMC as opposed to HIG: "There are a lot of PEGs out there and we can
27 generate a lot of interest if these guys back out. If our contract is with Red MT. we can

28 _____
²⁸ The context makes it clear that "current management" did not include Cowing.

1 develop a number of potential buyers. If we have a contract with HIG we will only be
2 able to represent them." (*Id.*) Dierich was confident he can get "Red" under contract, but
3 stated that we "need to move fast as there are other firms in the fold that will get the deal
4 done. Owen is meeting with FocalPoint which has a large fee associated with the deal and
5 frankly cannot serve the interest of the surviving entity, which will be educational for
6 him." (*Id.*) A few weeks later, Bill Luke introduced himself to Cowing on behalf of Eagle
7 Mountain via a FedEx letter letting him know they have been approached by a potential
8 buyer and wanting to know if he ever considered selling. (ex. 37). Dierich was not
9 mentioned in the letter. (*Id.*) Dierich testified that Cowing either received it directly or
10 Dierich put it on his desk. (Trial Transcript of Darren Dierich, July 24, 2012, 236:2-
11 236:19). Cowing testified that he never received the letter. (Trial Transcript of Owen
12 Cowing, July 25, 2012, 178:23-179:13).²⁹

13 Dierich was still communicating with Cowan at the end of April and start of May.
14 In an email string, Cowan told Dierich that Cowing was not interested in selling or using
15 RMMC to expand. "The lack of a big pop for a buyout coupled with the tax consequences
16 make it very unattractive for him. Which I totally understand." (ex. 367). The tone of
17 Cowan's message makes clear that he believed the RMMC deal was now dead, at least as
18 far as M&C were concerned.³⁰ Dierich replied that Cowing's attitude may change because
19 the bank would be requiring \$10 million in equity. Dierich also told Cowan that "the
20 Bank has lost faith in his ability to lead the organization, which is the cause of their
21 discomfort." (*Id.*)

22 On May 22, 2008, Dierich met with Anderson of GECD. (ex. 41). The next day
23 Dierich sent information to Anderson for his review. (*Id.*) A week later, Dierich and
24 Cowan exchanged emails in which Dierich raised the thought of buying World Wide and
25 moving the majority of RMMC people to the new entity. (ex. 42). In the same email,
26 Dierich noted that Cowing was having lunch with FocalPoint. (*Id.*) The next day, Bill

27
28 ²⁹ The Court finds that Cowing did receive the letter.

³⁰ "I greatly appreciated your help and introduction to Owen. I look forward to future deals and dealings with you." (ex. 367).

1 Luke sent Dierich an email laying out the basic framework of a possible roll-up.³¹ (ex.
2 44).

3 In mid-June, Dierich and Anderson set up a meeting for them and Miller-Jones.
4 (ex. 46). On June 15, 2008, Fickett told Dierich about the newest equipment values -- \$22
5 million -- scaring "them into hanging to the bitter end rather than pushing for action." (ex.
6 5053). Dierich met with Anderson and Miller-Jones on June 24, 2008. (ex. 52). In the
7 days following the meeting, Dierich, at Miller-Jones' request, sent GEFCF the requested
8 information. (exs. 52, 55-60).

9 On June 25, 2008, Dierich received forbearance documents from Kain. (ex. 50).
10 Dierich expressed doubt as to RMMC's negotiating power which Kain confirmed.
11 Dierich asked Kain to call. (*Id.*) Dierich claimed that he did indeed have no negotiating
12 power with Kain. (Trial Transcript of Darren Dierich, July 19, 2012, 91:1-13; ex. 53).

13 On July 3, 2008 Dierich told Kain "I have my PEG's agreement to bring you guys
14 down to 60% which is good news!!!!!" Kain responded, "Outstanding!!!! What about
15 Owen and how does Linda feel about getting bought out?" Dierich replied: "Linda wants
16 out yesterday. Owen I don't know yet. I tried to have a conversation with him this
17 morning, however, he fell and hit his head on the sink and is now to the nerve doctor.
18 Feel bad for him." Kain closed "Sure hope someone else is driving him. Maybe I better
19 come play grim reaper before its [sic] too late." (ex. 374).

20 On July 8, 2008, Dierich sent Steve Luke confidential financial information. (ex.
21 61). A week later, the Lukes and Dierich set up a call with HIG. (ex. 5059). Two days
22 later, Dierich sent Cowan the May 31, 2008 Appraisal.³² (ex. 63). On July 21, 2008,
23 Dierich and Cowan re-opened discussions on a transaction for RMMC, including a target
24 sale price of RMMC and what Cowing would need out of the deal. They eventually
25 settled on a \$42.4 million which meant that, after paying for debt and other liabilities,
26 \$3.4 million would remain in net proceeds, likely in the form of a seller carryback note

27 _____
28 ³¹ Details discussed *infra*.

³² Cowan testified that the appraisal was sent "out of the blue." (Trial Testimony of Ross Cowan, July 23, 2012, 314:17-20).

1 payable to Cowing. (exs. 65, 68). The next day, when Cowan asked if they are going to
2 be working on the deal in detail this week, Dierich responds, "I hope so, emotions on this
3 end need to clear." (ex. 68) The same day, Dierich sent Miller-Jones the May 31, 2008
4 Appraisal. (ex. 5062).

5 In anticipation of their meeting with Chapman on July 24, 2008, Dierich sent
6 Cowing an email of a talking points model to discuss. (ex. 5063). On July 30, 2008,
7 Miller-Jones sent Dierich the GE Term Sheet.³³ (ex. 72). Within hours, Dierich forwarded
8 the GE Term Sheet to Kain "OFF THE RECORD." (ex. 73). At trial, Dierich said he
9 printed the GE Term Sheet out and showed it to Cowing on July 31, 2008. (Trial
10 Transcript of Darren Dierich, July 19, 2012, 97:25-104:18). Dierich's testimony is
11 inconsistent with his deposition testimony on this point. At that time, Dierich testified to
12 a number of different dates when he discussed the GE Term Sheet with Cowing: among
13 them July 30, 31, August 6, and "two or three weeks" later. Although the dates vary
14 widely, the testimony remained that he did share the GE Term Sheet with Cowing. (Trial
15 Testimony of Darren Dierich, July 19, 2012, 97:4-104:18). On the other hand, Cowing's
16 testimony is that Dierich never did so. (Trial Testimony of Owen Cowing, July 20, 2012,
17 216:9-220:21).

18 On July 31, 2008, Dierich and Cowing met with Chapman.³⁴ (*Id.*) On the same
19 day, Bellizzi sent Dierich information regarding a potential sale of or possible investment
20 in RMMC.³⁵ (ex. 74).

21 Communications began among Dierich, Winger, and the Auditors regarding the
22 use of the GE Term Sheet to avoid a going concern qualification in early August. (ex.
23 5067). Dierich, Winger, and Bishop continued discussing the use of the GE Term sheet as
24 part of the Auditor's report into September. (exs. 5071, 5072, 5074, 5075, 5079, and
25 5080).

26
27
28 ³³ Details of the GE Term Sheet will be discussed *infra*.

³⁴ Details of this meeting discussed *infra*.

³⁵ Details of the Bellizzi sales pitch are discussed *infra*.

1 On August 4, 2008, Dierich sent Chapman the May 31, 2008 Appraisal. (ex.
2 5065). On August 8, 2008, Dierich informed Cowan that "Owen gave the go on
3 marketing the company for sale. :) Only catch is I need to bump the guy in Utah out of
4 the way."³⁶ (ex. 77). Dierich wondered if "we should get a jump on the book" to which
5 Cowan replied "Of course not. Books are easy, just tell me when to go." (*Id.*) On August
6 11, 2008, Dierich and Chapman exchanged emails about a potential LOI and what
7 information Chapman needed about RMMC. (ex. 5064). The same day, Dierich told Kain
8 "I hope to get an LOI signed this week from my guys and bump UT out."³⁷ (ex. 78).

9 On August 13, 2008, Kain advised Dierich that RMMC was "out of formula."³⁸
10 This seemed to surprise Dierich. (ex. 80). Kain responded "you were also over the
11 bleeping formula by \$2.8mm. This way you're back in 'bleeping formula'. All for the
12 price of a chicken fried and \$325m reduction 9-1-08." (*Id.*) Dierich replied, "NO NO, I
13 need to be bleeping. He won't sell if you give him an inch!!!!" (*Id.*) Kain countered, "we
14 have an expiration of the forbearance agmt on 9-4-08, at which time the banks expect to
15 know his plan for injecting \$15mm - \$16mm of new equity. A bleeping over formula
16 would be the least of his problems. But if its [sic] that important, then I'll reinvent the flat
17 tire." (*Id.*) Thus, at this point, Dierich's focus was on keeping the pressure on Cowing to
18 do a deal; but which deal?³⁹

19 Two days later, Dierich sent the Lukes a copy of a RMMC investment
20 summary.⁴⁰ (ex. 83). The same day, 2008, Dierich told Fickett to draft a business plan for
21 an MBO of RMMC. (ex. 85). On the same day, Dierich asked Kain if they wanted to be
22 paid down -- \$15 million -- or did Comerica want out of the loan completely? (ex. 86).
23 Kain responded that he needed more information on who owned the company, what the
24 company would look like post-Cowing, and more. Kain suggested that it might be easier

25 ³⁶ There is nothing else in the record to suggest that Cowing told Dierich to "bump Utah."

26 ³⁷ If by "my guys", Dierich meant the HIG deal through the Lukes, there is absolutely no basis to conclude
that there was ever a deal anywhere close to being signed.

27 ³⁸ In this context, "out of formula" means that the principal amount of the loan exceeded the percentage of
borrowing base allowed under the current agreement.

28 ³⁹ Plaintiffs argue the deal must be the one with "his PEG." But, as noted below, that deal was, to use
Cowing's term, "pie in the sky."

⁴⁰ Details discussed *infra*.

1 to just get out. Dierich replied that he would shoot for a total payoff, but that he was
2 hoping for a 60% carry over the next 12 months. Dierich advised that he was putting
3 together a business plan. (*Id.*) Also on the 15th, Dierich forwarded an email from Bellizzi
4 to Cowing with the comment "You didn't really speak to him, correct?" (ex. 82).

5 On August 19, 2008, Bellizzi sent Dierich more information. (ex. 87). Dierich
6 responded that he would sign a nondisclosure agreement and fax it over to Bellizzi. (ex.
7 90). A week later, Dierich emailed himself a copy of the business plan prepared by
8 Ashley Fickett; the business plan continually referred to Red Mountain in the text, but
9 showed "Rent Big" on the heading of the body. (ex. 93). The next day, Dierich forwarded
10 an email from Orion, forwarded to him by Cowing, to Steve Luke with the comment "It's
11 coming." (ex. 5070). The following day, Kain inquired whether Dierich or Cowing told
12 "UT that the number was \$42mm?" (ex. 95). Dierich responded that Cowing did. (*Id.*) On
13 August 29, 2008, the Lukes told Dierich that HIG was passing "for now," but there still
14 may be hope with other entities related to HIG. (ex. 382).

15 On September 10, 2008, Dierich received a voicemail from Bellizzi who said that
16 if he did not hear back from Dierich, he would stop calling. (ex. 99).

17 4. *The Deals*

18 A. THE LUKES/EAGLE MOUNTAIN

19 Discussions between the Lukes and Dierich began as early as January 8, 2008.⁴¹
20 (exs. 347, 21). Within a few days, the Lukes had lined up a potential PEG that "not only
21 buys 100% of a company but provides financing and will do Management Buy-Outs."
22 (ex. 350). Soon after, Steve Luke told Fickett, "It appears there are some very exciting
23 times ahead. I look forward to getting to know you better soon." (ex. 22). On January 13,
24 2008, Dierich forwarded "LLC Distributions Thru 2005" to Steve Luke. (ex. 24). The
25 same day, Steve Luke sent Dierich the HCMI organizational chart showing Rent Big as
26 one of the entities.⁴² (ex. 25).

27
28 ⁴¹ Interestingly, Steve Luke's email address is "steve@akaRED.com".

⁴² Details discussed *supra*.

1 Things laid relatively dormant with the Lukes until April when on the 9th, Bill
2 Luke sent Dierich and Steve Luke an email outlining a phone meeting with HIG: the plan
3 was to discuss 2007 EBITDA, the structure of a PEG supported MBO, and other issues.
4 (ex. 35). Dierich stated that he was confident that he could get "Red under contract" but
5 they needed to move fast because Cowing was talking with FocalPoint. (*Id.*) At the end
6 of the month, Eagle Mountain sent the introduction letter to Cowing.⁴³ (ex. 37). A week
7 later, at the end of an email string between the Lukes and Dierich, Dierich asked "Did
8 you ever get a call from Owen?" (ex. 5044). The next day, Bill Luke sent Dierich an
9 email laying out the basic framework of a possible roll-up: four companies might be open
10 to consolidation -- RMMC, World Wide, Western Power Equipment, and Oil Tools. Bill
11 Luke identified HIG as \$7.5 billion PEG that has all the capital needed to do the roll-up.
12 Bill Luke noted that "This idea came from both of you and I'm just working on it."
13 Dierich replies that "this may work with the exception of RMMC." (ex. 44). The results
14 of this call, if it occurred, are not revealed in the record.⁴⁴

15 Things remained quiet until July. There is an unsigned July 3, 2008 letter from
16 Eagle Mountain addressed to Cowing which has a client agreement regarding the
17 proposed sale of RMMC. (ex. 5057). Cowing claims that he never received this letter.⁴⁵
18 (Trial Transcript of Owen Cowing, July 25, 2012, 179:15-24). Around this same time-
19 frame, Dierich forwarded Steve Luke "confidential" information (ex. 61) and a statement
20 of operations for 2007. (ex. 66).

21 By early August, Dierich was hopeful that he would have a signed LOI by the end
22 of the week allowing him to bump Utah out. (ex. 78). Dierich sent the Lukes a copy of an
23 RMMC investment summary. (ex. 83). Under terms of the investment summary, as of
24 July 31, 2008, the bank debt was \$33,000,000 at an interest rate of 7%. (*Id.*) Management
25 needed \$10-15 million for new equipment purchases and an additional \$10,000,000 to

26 _____
27 ⁴³ Details discussed *supra*.

28 ⁴⁴ While he recalled generalized conversations with the Lukes, Taylor testified that he does not remember talking with Dierich or that HIG was ever involved with a roll up of heavy equipment companies. (Deposition of Donald Taylor, June 13, 2011, 16:14-17:14, 18:5-15, 36:8-37:24).

⁴⁵ The Court finds that he did not receive the letter.

1 pay down the line of credit with the banks. (ex. 84). On August 19, 2008, HIG turned
2 down the deal, noting that a heavy equipment company with "\$8M of EBITDA has a
3 much smaller free cash flow. For example, they are talking about \$10M+ of capex next
4 year." (ex. 88). An internal HIG sales force document refers to the current owner as
5 terminally ill with cancer and having alcoholism⁴⁶ and the "post mortem" section states
6 that HIG withdrew because it was too small. (ex. 381). After Bill Luke provided
7 additional information on the need for capital expenditures, HIG quickly passes again on
8 the opportunity. (ex. 5077). Taylor testified that he passed the RMMC transaction on to
9 others as courtesy, but it went nowhere.⁴⁷ (Deposition of Donald Taylor, June 13, 2011,
10 27:13 - 28:23).

11 By late August, Bill Luke stated that other PEGs were still possibly in the mix
12 (ex. 382) but there is nothing else in the record to suggest that there was any substance to
13 that statement.

14 B. MOORS & CABOT

15 In January, 2008, Cowan and Dierich discussed several forms of potential deals
16 involving RMMC including the possibility of an MBO or starting a new entity. (exs. 352,
17 354). By February, Cowan wanted to know "when are we getting together with the
18 management?" (ex. 29). The introduction resulted in a meeting between Cowan, Cowing,
19 and Dierich. (ex. 5032). Before the meeting, Dierich suggested to Cowan that they stay
20 away from discussing their meeting with Fickett and financial statement disclosure;
21 instead they should focus on the roll up strategy, exit and small opportunity for potential
22 participation by equity. (ex. 33). After the meeting, Dierich asked if Cowan can meet
23 with Comerica as his representative for HCMI.⁴⁸ (ex. 363).

24 By the start of April, Cowing decided that he would hold off on deal with M&C
25 while RMMC pursued FocalPoint. (ex. 5037). Despite Cowing's passing on M&C,

26 ⁴⁶ Taylor testified that this information had been provided by the company through the Lukes and via
27 information on RMMC's website. It was not independently created or reviewed by HIG. (Deposition of
28 Don Taylor, June 13, 2011, 52:23-54:7.

⁴⁷ A review of the documentation and testimony reveals that the whole notion that there could be real deal
with a PEG through the Lukes was a "HIGment" of Dierich's imagination.

⁴⁸ The "I bring the conflict" email.

1 Dierich kept communication lines open with Cowan asking about the possibility of a roll
2 up (ex. 34). After talking with Cowing upon the advice of Dierich, Cowan reported back
3 that Cowing was not interested in selling or using RMMC as a platform to grow due to
4 the lack of big pop for buyout and the tax consequences of selling.⁴⁹ (ex. 367).

5 Things remained relatively quiet with M&C until July 21, 2008, when Dierich
6 forwarded equipment appraisals (ex. 63) and an income statement (ex. 64) to Cowan. The
7 same day, Cowan and Dierich exchanged the emails discussing numbers for a sale of
8 RMMC for \$42 million.⁵⁰ (exs. 65, 68). By August, Dierich advised Cowan that Cowing
9 gave the go ahead to market RMMC. (ex. 77).

10 C. DIERICH/HCFI

11 In late January, Faubion asked Foley if Cowing talked about selling the company
12 as an option. (ex. 355). Foley responded that "he would entertain it. Said he had one offer
13 but seemed pie in the sky. He did not mention Darrens [sic] offer. Darren told me
14 yesterday he was resigning this week." (*Id.*)

15 The Arizona Corporation Commission received HCFI's application for authority
16 on February 12, 2008. (ex. 524) and Publication of Application for Authority on March
17 17, 2008. (ex. 524).

18 In March, Dierich and Foley try to, but apparently do not, meet to discuss HCFI
19 and Comerica.⁵¹ (exs. 358, 359, 363).

20 D. GECF

21 Cowing and Linda Cowing had known Anderson for some time (Trial Transcript
22 of Owen Cowing, July 25, 2008, 202:22-25) and it was Linda Cowing who introduced
23 Anderson to Dierich. (Trial Transcript of Owen Cowing, July 25, 2008, 203:15-18).
24 Dierich and Anderson met with each other in late May 2008. (ex. 41). About a month
25 later, Dierich, Miller-Jones, and Anderson met again. (ex. 52). Based on the meeting,
26 Miller-Jones requested RMMC-related materials (*Id.*) which Dierich sent. (ex. 55-60, 62).

27
28 ⁴⁹ Discussed more fully *infra*.

⁵⁰ Discussed more fully *supra*.

⁵¹ Discussed more fully *supra*.

1 Miller-Jones testified that he met Linda Cowing in Dierich's office and, at that time,
2 Dierich told Linda Cowing that "we were looking at a possible financing opportunity."⁵²
3 (Deposition of Greg Miller-Jones, June 9, 2011, 32:22-33:6).

4 On July 8, 2008, Miller-Jones contacted Wong to review and rate a possible
5 refinance of RMMC's Comerica debt. (ex. 5058). Two weeks later, Dierich forwarded the
6 May 31, 2008 Appraisal to Miller-Jones. (ex. 69, 5062). The next day, Wong laid out the
7 first set of possible numbers noting that a more aggressive scenario would make \$32
8 million available to RMMC at a 90% advance rate. (ex. 5062). Miller-Jones raised the
9 possibility of a second lien as collateral for the deal.⁵³ (*Id.*) On July 30, 2008, Miller-
10 Jones sent Dierich the GE Term Sheet.⁵⁴ (ex. 71). Under the GE Term Sheet:

- 11 • GEFCF would extend a \$50 million credit line, with \$26.5 million
12 available at close;
- 13 • The lending formula would make available up to the sum of
14 eighty-five percent (85%) of Borrower's eligible accounts
15 receivable and up to the lesser of the Borrower's eligible inventory,
16 (i) eighty-five percent (85%) of its orderly liquidation value (OL
17 V) as determined by an appraisal firm acceptable to Lender, or (ii)
18 or sixty percent (60%) of its cost;
- 19 • Equipment availability will amortize by 1.00% per month;
- 20 • The loan would mature in three years;
- 21 • Interest rate would be the three month LIBOR +4%;
- 22 • There would be a 1% closing fee;
- 23 • Unused Facility Fee would equal 37.5 bps;
- 24 • Security would include:
 - 25 ▪ Fully perfected first priority security interest in all existing
26 and after acquired assets of Borrower and the Guarantors.
27 All Collateral would be free and clear of other liens, claims
28 and encumbrances. Except permitted liens and
encumbrances acceptable to GE Capital; and
 - In addition GE Capital shall receive, a pledge by the
Borrower and the Guarantors of all of the issued and
outstanding capital stock of their respective subsidiaries;
and

23 ⁵² Miller-Jones testified that this meeting took place in July or August 2008.

24 ⁵³ Cowing made a similar proposal on May 21, 2008 in connection with the Comerica Loan. (ex. 40).

25 ⁵⁴ Miller-Jones made it clear that a term sheet (a shorthand term for Preliminary Indicative Summary of
26 Terms) was just the first step in a long process toward funding a loan. A term sheet is only issued after the
27 basic terms have been laid out (a "four blocker") and reviewed for pricing and risk. He called a term sheet
28 "a mere interest and it's typically a placeholder to begin further diligence." After issuance, a term sheet
could lead to a proposal (with additional revisions, approvals and the need for a deposit to cover the cost of
formal underwriting) which, if accepted, could lead to a credit document to be submitted to the credit
committee. If approved, that could lead to a commitment. The commitment would likely have pre-
conditions and other contingencies and would then lead to the preparation of formal documentation and the
satisfaction of any conditions precedent. In short, no deal would be final until actually funded. (Deposition
of Greg Miller-Jones, June 9, 2011, 109:13-113:2).

1 • The conditions precedent to closing included a junior capital
 2 and/or equity infusion of \$6 million prior to close.
 3 Dierich followed up with Miller-Jones about the GE Term Sheet in mid-August to
 4 express concerns about the 1% curtailment. (ex. 79). As late as September 10, 2008,
 5 according to an internal GE email, Dierich indicated that he would like to go with the GE
 6 Term sheet, but needed to hear back from Cowing. (ex. 385). The email also indicated
 7 that RMMC might stay with Comerica as RMMC was marketing the company for sale.
 8 (*Id.*)

9 Miller-Jones testified that in a typical year he reviews 120 deals, 40 of which go
 10 to term sheet, of which ten go the proposal stage, of which two actually close. From this,
 11 he agreed that this deal had a 2% chance of closing (before the Lehman Brothers
 12 collapse), that the chances would have gone down from that point post-Lehman. In any
 13 event, he testified that a deal would not have closed before January 2009. (Deposition of
 14 Greg Miller-Jones, June 9, 2011, 219:21-222:12).

15 E. CHAPMAN & ZACHARY CONSTRUCTION

16 On July 24, 2008, Cowing set up a meeting with Chapman in Salt Lake City for
 17 August 1, 2008. (ex. 70). During the meeting, Cowing's asking price for RMMC was
 18 about \$50 million.⁵⁵ (Deposition of Roger Chapman, December 14, 2011, 13:19-25). On
 19 August 21, 2008, Cowing advised Kain that Utah is still in the works, but RMMC just
 20 needed to get the Zachary Construction contract. (ex. 92, Trial Transcript of Owen
 21 Cowing, July 25, 2012, 192:22-193:7). The need for the Zachary Construction contract
 22 was reflected in a letter, sent August 27, 2012, Cowing sent to Chapman which includes
 23 the following table:

	<u>2008 Annualized</u>	<u>Projected 2009 w/Texas</u>
24 EBIT[D]A	\$3,040,933	\$8,074,183
25 Selling P (5x)	\$15,204,666	\$40,370,916
26 Less Debt	(\$33,048,517)	(\$33,048,517)
27 OLV	\$32,486,250	\$32,486,250
28 Proceeds	\$14,642,399	\$39,808,649
	\$3,000,000	\$3,000,000
	\$17,642,399	\$42,808,649

⁵⁵ Chapman "vaguely" remembers this amount and believed it much too expensive, at least for his purposes.

1 (ex. 94). Cowing noted that "Obviously, there is a significant difference in the two
2 numbers, and over the next six weeks we should have a good idea which way the
3 numbers are going to go." (*Id.*) Cowing closed with "good luck on your own sale." (*Id.*) If
4 RMMC had won the Zachary Construction contract it would have garnered \$600,000 a
5 month in rental revenue. (Trial Transcript of Owen Cowing, July 20, 2012, 172:15-
6 174:21). Ghilotti was skeptical that anything would ever come of the project. (Deposition
7 of Dante Ghilotti, November 21, 2011, 392:1-24). And, in fact, RMMC did not get the
8 contract with Zachary Construction. (Trial Transcript of Owen Cowing, July 20, 2012,
9 172:15-174:21).

10 In retrospect, Cowing realized that his calculations in Exhibit 94 made no sense
11 and were incorrectly done.⁵⁶ (Trial Transcript of Owen Cowing, July 25, 2012, 212:3-
12 214:5). His explanation that his purpose was not to suggest a value or a price is not
13 credible in light of the fact that the letter was sent to Chapman to provide him with
14 information before a meeting where exactly those two things -- value and price -- were to
15 be the main topics. Plus, Chapman testified that Cowing suggested a \$50 million price tag
16 for the company in the July 31 meeting. This letter is most certainly evidence of what
17 Cowing thought his company was worth.

18 F. BELLIZZI

19 After speaking with Dierich, on July 31, 2008, Bellizzi sent Dierich preliminary
20 information about his company. (ex. 74). Of note, Bellizzi noted that his client was
21 looking for a profitable company in the heavy equipment rental industry with an
22 EBITDA between \$3 million and \$25 million. (*Id.*) Bellizzi claimed that his "client has
23 over \$2 billion to invest in acquisitions and growth." (*Id.*) A couple weeks later, Bellizzi
24 sent an update that the "buyer wants an additional company with annual EBITDA from
25

26 ⁵⁶ Although the record is scant on what he believed his mistake to have been, one item that jumps out is that
27 his table seem both to capitalize EBITDA *and* add in the value of the collateral to come to an overall value.
28 In other words, Cowing assumed the collateral would pay off the debt and there would still be millions of
dollars in EBITDA, even though the equipment needed to produce those earnings would be gone. Perhaps
this exhibit is most important in terms of Cowing's state of mind; it reflects his view that the equity was still
worth something between \$17 and \$42 million as late as August 2008. In truth, by then, there was no value
for equity in excess of the existing debt.

1 \$5 million to \$30 million." (ex. 81). Dierich forwarded this email to Steve Luke. (*Id.*) A
2 couple days later, Dierich forwarded an email from Bellizzi to Cowing in which Bellizzi
3 claimed to have two potential buyers: one with \$2 billion; the other with \$12 billion. (ex.
4 82). Cowing testified that he received the email. (Trial Transcript of Owen Cowing, July
5 20, 2012, 223:11-25).

6 On August 19, 2008, Bellizzi sent Dierich another email. (ex. 87). A few days
7 later, Dierich said that he was still putting together a "one pager" and agreed to sign a
8 non-disclosure agreement and fax it over to Bellizzi. (ex. 90). On September 10, 2008,
9 Bellizzi left Dierich a voicemail stating that he was still waiting for a one pager, had an
10 all cash buyer that would get rid of the debt and leave management in place, felt like he is
11 being a pain in the neck, and would drop the project if he did not hear back. (ex. 90).

12 G. FOCALPOINT

13 On the first of April, 2008, FocalPoint introduced itself to Cowing as an
14 investment bank that attempted to facilitate the sale of Schwab Sales and was involved in
15 raising debt capital for the original transaction. (ex. 5036). Soon after, Cowing asked
16 Dierich to initiate contact with FocalPoint. (*Id.*, ex. 5037). Dierich forwarded the email to
17 Cowan with the comment that "Based on FocalPoints [sic] past deal with Schwab, I am
18 confused and concerned that Cowing would even entertain a discussion with these folks."
19 (*Id.*) FocalPoint sent Dierich and Cowing a confidentiality agreement the same day. (ex.
20 5038). Soon after, Dierich sent Dan Conway of FocalPoint an email attempting to set up
21 a meeting with Cowing. (ex. 5041). Cowing had lunch with FocalPoint at the end of May.
22 (ex. 42). Dierich testified that the FocalPoint deal died because FocalPoint, from its
23 perspective, did not have the expertise or ability to market RMMC.⁵⁷ (Trial Transcript of
24 Darren Dierich, July 24, 2012, 231:6-232:3).

25 H. ORION CAPITAL

26
27
28 ⁵⁷ The Court also notes that FocalPoint died around the same time that Cowing told Comerica the he
"talked to potential investors, who in his opinion are bottom-fishers. He is unwilling to 'give the co. away.'" (ex. 368).

1 On August 27, 2008, Orion sent Cowing an email with the subject line, "Thought
2 of selling REd [sic] Mountain Machinery?" (ex. 5070). Cowing forwarded the email to
3 Dierich who forwarded it to Steve Luke. (ex. 5070). Dierich spoke with Neil Shroff of
4 Orion who sent Dierich follow up documents based on their conversation. (ex. 5073).

5 E. September 15, 2008 to December 31, 2008

6 1. *The Economy*

7 Lehman Brothers collapsed on Monday, September 15, 2008 after which "There
8 was pause for concern and anxiety." (Deposition of Greg Miller-Jones, June 9, 2011,
9 59:22-60:7). The credit criteria at GECF increased significantly after September 15,
10 2008. (DD Greg Miller-Jones, June 9, 2011, 60:20-61:1).

11 2. *RMMC*

12 For the nine months ending September 30, 2008, RMMC suffered a net loss of
13 \$2,262,157; across all Red Mountain Companies, the loss totaled \$1,844,161. (ex. 121 at
14 '455).

15 On October 1, 2008, RMMC and M&C entered into a retention agreement. (ex.
16 105). A few weeks later, Cowing purchased a 2008 Cadillac EXT for \$70,442.63 for
17 which he borrowed \$63,000 and incurred monthly payments of \$1,700.35 (ex. 5185).

18 On November 1, 2008, RMMC could not make its full principal payment of
19 \$325,000. (ex. 133). Rentals dropped to 50 units for the months of November and
20 December; RMMC blamed the drop on banks pulling financing of current building
21 projects. (ex. 5106). December rental income was \$600,000. (*Id.*) Between October and
22 December, RMMC cut staff from 52 to 44 people. (*Id.*) As of December 15, 2008, after
23 planned expense cuts, the company hoped to break even on a monthly basis. (*Id.*)

24 RMMC advised Comerica and GE that "private sector business has 'dried -up' due
25 to lack of financing for projects." (ex. 396 at '2524). Although public projects were still
26 active, they could not make up for the drop in private projects. (*Id.*) A/R collections were
27 behind because of the lack of liquidity in the market. All this caused cash flow shortfalls
28 for RMMC. (*Id.*)

1 3. *Dierich*

2 On September 17, 2008, Kain left a voicemail for Dierich stating that he had
3 talked with Cowing at the airport who said it was okay to talk to Dierich about "his deal,"
4 that Cowing would engage the broker, and sign the LOI. (ex. 99). At trial, Cowing denied
5 having had this conversation.⁵⁸ (Trial Transcript of Owen Cowing, July 25, 2012, 225:22-
6 227:4). A week later, Ashley Fickett sent Dierich an "executive summary" containing the
7 biographies of Dierich, Fickett, and Sale; Cowing is not listed. (exs. 101, 102).

8 On October 1, 2008, Dierich sent Kain a retention letter from Snell & Wilmer for
9 the sale of RMMC. (ex. 106). Dierich forwarded the M&C retention letter to Kain that
10 day. (ex. 105). On the same day, Kain asked Dierich for an LOI. Dierich said he could get
11 him one if it was important, but they only cared about the broker retainer. (ex. 109).
12 Apparently based on the information given by Dierich, Kain reported the following false
13 information to others in the bank about a pending sale:⁵⁹

- 14 • Ownership has agreed to sell to a PEG that has raised \$100 million to buy three
- 15 • The PEG would pay down debt by \$13 million which Comerica would consider;
- 16 • Dierich will provide due diligence by October 7, 2008;
- 17 • The First draft of the LOI would be coming on October 15, 2008;
- A Rouse appraisal has been ordered and is due on November 1, 2008; and
- The target close date is December 31, 2008.

18 (ex. 110).

19 Though a deal was supposedly in process, Cowan sent the first draft of the pitch
20 book to Dierich on October 12, 2008. (ex. 111). A week later, GEFCF offered "staple
21 financing"⁶⁰ for M&C deal. (ex. 113).

22 On October 21, 2008, Kain asked if a draft of the APA went out on the 15th. (ex.
23 115). That same day, Dierich sent Kain an illegitimate APA which shows a purchase
24 price of \$42 million, plus assumption of the \$33 million bank debt, for a total purchase
25 price to \$75 million. (ex. 116). Kain couldn't believe that someone would pay \$75 million

26 ⁵⁸ The Court finds that a conversation did occur based on the Kain voicemail.

27 ⁵⁹ The details of this purported transaction are set out in the "deals" section *infra*.

28 ⁶⁰ "Staple financing" is a proposal from a third party lender to fund a particular deal put together by an investment banker, so-called because the term sheet can be "stapled" to the investment banker's proposal to be sent to potential bidders. The purpose is to demonstrate to the bidder that financing is available to close the deal. (Deposition of Greg Miller-Jones, June 9, 2011, 191:10-192:6)

1 for RMMC. (ex. 117). At trial, Dierich testified that the document was just an APA form,
2 although it was neither presented as such nor appeared to be such.⁶¹ (Trial Transcript of
3 Darren Dierich, July 19, 2012, 144:6-145:14).

4 In early November, Dierich sent Steve Luke more financial information and
5 organizational charts. (exs. 121, 122). About a week later, Dierich, Cowan, Fickett, and
6 Ashley Fickett exchanged emails about the growth strategy for RMMC. (exs. 123, 124,
7 134, 135, 142). On November 19, 2008, Dierich told Sarna that a portion of the due
8 diligence has been completed. (ex. 5095). Around the same time, Dierich created a fake
9 appraisal that he sent to Kain on November 20, 2008. (ex. 128, 129). The numbers were
10 significantly lower than the numbers from the May 31, 2008 Appraisal.⁶² The same day,
11 Dierich received a voicemail from Bill Luke stating that HIG might still be interested.⁶³
12 (ex. 5096). A day later, November 21, 2008, Dierich and Kain exchanged various emails
13 regarding the HIG transaction.⁶⁴ (exs. 131, 132, 136, 137, 393). Specifics, including
14 dollar amounts, status of PEG roll up, and proposed talking points with GECD are
15 discussed. A few days later, Bill Luke set up a call with Mola of Armand Group to
16 discuss an MBO. (ex. 5100).

17 An early December meeting was scheduled with Campbell, Cowan, Dierich, and
18 Cowing. Before the meeting, Kain left a voicemail for Campbell asking him to stay away
19 from the topic of the PEGs because Dierich gave the information to Kain on a
20 confidential basis and that it was not need to know for Cowing so they probably just
21 should not mention it on the phone call with Cowing.⁶⁵ (ex. 138). Meanwhile, Kain told
22 Cowing that the purpose of the meeting was to "discuss Co. Plan B 'if' the pending sale of
23 the co. does not get done." (ex. 140). An obviously concerned Dierich asked Kain if he
24

25
26 ⁶¹ The court finds that Dierich presented this APA to others with the intent of demonstrating that an actual
deal was in process, not as a "form."

27 ⁶² For example, the OLV is \$10 million, or 31%, lower than the May 31, 2008 Appraisal.

28 ⁶³ The voicemail is quoted in its entirety *infra*.

⁶⁴ Terms of the HIG transaction are discussed *infra*.

⁶⁵ This reinforces the fact that Cowing in fact did know that a sale of the company was on the table, even if
some of the details may have been kept from him.

1 talked to GECD. Kain replied that he has not, but he left a phone message and thought
2 that GECD will comply accordingly. Dierich replied "God I hope so." (ex. 140).

3 In early December, Dierich continued communication with M&C when Dierich
4 told Cowan that it would be better for Ashley Fickett to meet with Whipple at Cowan's
5 office because Cowing would be in the RMMC office. (ex. 141). Dierich then sent
6 Ashley Fickett an updated Growth Strategy excel spreadsheet and Growth Strategy word
7 document. (ex. 142). Around this same time, Bill Luke emailed Dierich and Steve Luke
8 letting them know that Mola called and that he wanted a meeting with Dierich, RMMC's
9 management, and the Lukes. (ex. 143). Bill Luke reported that Mola had told him that
10 Armand had a plan that would take out Comerica and fund current operations, and that,
11 after the meeting, Mola would want to talk with the bank and Linda Cowing. (*Id.*) Dierich
12 forwarded the email to Kain with the comment "I assume he is going to want to talk to
13 you. This is outside my deal, so I can prep you if you want."⁶⁶ (ex. 144).

14 On December 12, 2008, Kain, Sarna, Cowing and Dierich held a phone meeting.
15 (ex. 5106). According to Sarna's internal email, RMMC told the bankers that the attempts
16 to raise funds for the sale of the company had fallen through. Cowing wanted time to
17 return to profitability, but if a sale was possible in six months they would proceed down
18 that path. Cowing told the bankers that he could make the interest payments, but was
19 going to have trouble with the curtailments and that he could try to cover the shortfall of
20 the curtailments, but didn't have enough money to make a large capital contribution. Kain
21 asked for an updated personal financial statement. (*Id.*)

22 The day prior to this teleconference, Comerica, through Kain, and its participant,
23 GECD, exchanged emails about the timing of the call. (ex. 5015). The tone is telling. By
24 this point, it is apparent that Kain was frustrated and perhaps even disgusted with the lack
25 of detail or reality on the deals Dierich had been discussing with him. It is as if Kain was
26 finally realizing that Dierich had pulled the wool over his eyes. Correctly labeling

27 _____
28 ⁶⁶ This comment exemplifies the two faces of Dierich: on the one hand, he forwarded this information to Kain so that Comerica could follow up with a deal that would take them out, even if it wasn't the deal that Dierich wanted, and on the other, it was not something he would push because it "wasn't his deal."

1 Dierich's proposal "the phantom Plan B," Kain advised his participant that, "in the
2 absence of something realistic, I will ask for \$2mm - \$3 mm more capital from Owen &
3 Linda Cowing (ex) in order to pay our mo. curtailments and provide oper. capital through
4 the winter – mid 2009." To this suggestion, Campbell wondered if they had the money to
5 do that and whether bankruptcy was an option.⁶⁷ (ex. 5105).

6 A few days later, Zeffer of Armand told Dierich that he wanted to talk to
7 Comerica. (ex. 149). Dierich forwarded the request to Kain, told him "I will see what I
8 can get accomplished and if they insist, talk to you. Cool? (I told them, absolutely not to
9 speak to GE.)" (*Id.*) In response to the same email forwarded to Kain, Dierich told
10 Armand, "I have already sent the questions to Comerica, he is working on the answers
11 and wants to run them by me, once I agree a potential call will be entertained." (ex. 150).
12 Later in the same email string, Dierich told Armand, "I am trying to get on the banker's
13 schedule to discuss and schedule. In this group, we have learned to be very patient."⁶⁸
14 (ex. 150).

15 4. *The Deals*

16 A. THE LUKES/ARMAND GROUP

17 On November 21, 2008, Bill Luke left the following voicemail for Dierich:

18 Darren, I talked to Don Taylor this morning at HIG, and they still have an
19 interest. And I told them that you have a management buyout business
20 plan now. And he said that he's got partners who would be interested in
looking at it. And so just wanted to talk to you to see what -- what you
were doing, what -- how he was doing, what is what. Give me a call. Bye.

21 (ex. 5096, Trial Transcript of Darren Dierich, July 19, 2012, 162:18-163:19). Thereafter,
22 Bill Luke set up a call with Mola, Steve Luke, and Dierich "to discuss a way for
23 management to buy Red. . . . At this point I suggest you leave the CEO matter until
24 later."⁶⁹ (ex. 5100). About a week later, Bill Luke advised Dierich and Steve Luke that
25 Mola had a plan to take out Comerica and fund current operations. (ex. 143). A few days

26 _____
27 ⁶⁷ It's not clear whether Campbell is referring to RMMC, Cowing, Linda Cowing, or all three.

28 ⁶⁸ Consistent with his previous reaction to Armand, this shows Dierich moving on Armand, but slowly and unenthusiastically. After all, it's not "his deal."

⁶⁹ The Court interprets Luke's comment about the "CEO matter" to mean that Luke advised Dierich not to push Armand to install Dierich as CEO in a post-Armand acquisition RMMC.

1 later, Zeffer sent Dierich a list of questions Armand would like Comerica to answer on a
2 conference call. (ex. 150).

3 B. MOORS & CABOT

4 RMMC engaged M&C on October 1, 2008 to begin work on what becomes
5 "Project Padres" nearly a year after Dierich first reconnected with Cowen and just over
6 six months after Cowan first met with Cowing. (exs. 104, 107). On October 12, Dierich
7 sent Cowan a rough draft of a pitch book. (ex. 111).

8 C. GEFC

9 In October, GEFC, through Miller-Jones, expressed interest in providing staple
10 financing for whatever deal M&C puts together. (ex. 113).

11 D. CHAPMAN

12 Chapman told TJ Maloney of Lincolnshire that RMMC owed about \$32 million
13 with an asset value at auction of \$23 million. He also stated that "Owen wanted to sell his
14 business for approximately 50M. (nice dream) According to inside information, the banks
15 are going to seize assets on Dec 14 2008. [sic]" (ex. 5090).⁷⁰

16 E. LINCOLNSHIRE MANAGEMENT

17 In November, Charles Mills of Lincolnshire contacted Cowing. (ex. 5092).
18 Dierich, at Cowing's direction, forwarded financial statement to Lincolnshire. (ex. 5091).

19 F. THE MYSTERY DEAL

20 By October 2008, there was no buyer for RMMC. Nonetheless, Dierich and
21 others had numerous communications as if there was a deal pending.

22 In early October, Dierich sent Kain an ASA closing outline (with an M&C logo)
23 (ex. 104) and a retention agreement with Snell & Wilmer (ex. 106) that Dierich admitted
24 at trial were not in effect. (Trial Transcript of Darren Dierich, July 19, 2012, 133:13-
25 137:15). A couple of weeks later, Dierich sent an APA to Kain with the buyer assuming
26 the \$33 million bank note and paying a purchase price of \$42 million. (ex. 116). GECD
27 questioned the legitimacy of the alleged transaction, noting that "There has to be
28

⁷⁰ This is cited not for the truth of the matter asserted but to show Chapman's state of mind.

1 something that was signed or a proposal or something other than them saying it is going
2 forward." (ex. 5087). The next day, Kain further questioned the \$75 million purchase
3 price in a doubtful tone in a message left with Dierich. (ex. 117). On October 22, 2012,
4 the same day as Kain's voicemail, Dierich sent Kain a timeline for Project Padres;⁷¹ Kain
5 forwarded the email to GECD. (ex. 392). The same day, Kain advised GECD that the
6 buyer was a consortium of twelve PEGs of which HIG was the lead or agent. (ex. 5088).

7 In early November, Kain asked Dierich if Cowing got the APA. (ex. 5089).
8 Dierich did not answer the question, but instead stated that he was heading for a
9 conference call with HIG. (*Id.*) Taylor testified he had no memory of ever having had this
10 or a similar phone call. (Deposition of Don Taylor, June 13, 2012, 36:8-37:24; 38:22-
11 39:5; 39:13-40:19; 41:3-12). On November 13, 2008, Kain left a message for Dierich
12 asking for "something definitive" on the pending transaction. (ex. 5094). Around the
13 same time, Sarna asked Dierich if the due diligence has been completed. (ex. 5095).
14 Dierich responded that for one portion yes, but as additional sponsors come in, they
15 would have their own procedures. (*Id.*) On November 21, 2008, Bill Luke contacted
16 Dierich advising him that Bill Luke talked with Taylor who would be interested in
17 looking at Dierich's MBO proposal.⁷² (ex. 5096). The same day, Kain sent Dierich a
18 summary of the deal as he understands it:

- 19 • The PEG has raised \$45MM of \$100MM goal;
- 20 • Amounts in excess of the \$18MM will be used to acquire RMMC;
- 21 • No payout to Cowings;
- 22 • Amount raised will be used to pay our debt down;
- 23 • If \$90-100MM raised the banks can expect to be paid in full;
- 24 • PEGs don't want RMMC without having closed the linchpin;

23 (ex. 393). When informed that this summary has been sent to Kain's boss, Dierich
24 responded "It is sent, so..... Doing my best to get it done..." (*Id.*) A few days later, Kain
25 prepared a summary of the transaction for GE and asked for Dierich's feedback:

- 26 • The sale of the company is dependent upon (1) the broker and CFO raising
27 additional equity and (2) because of the drop in equip values, the Cowings will

28 ⁷¹ Dubbed "Project Padres" because Cowing's favorite team is the San Diego Padres. (Trial Transcript of
Ross Cowan, July 23, 2012, 279:1-9.)

⁷² Quoted *supra*.

1 not receive any monetary value for their co. Compensation will effectively be
2 getting them off their guaranty.

- 3 • The PEGs have raised \$45mm of the \$100mm goal. They have closed on one
4 small co. and need another \$18mm to close on the linchpin co. Equity raised by
5 the PEGs in excess of \$18mm will be used to acquire Red Mtn by paying our debt
6 and working capital. If \$90mm- \$100mm is raised, then we should expect to be
7 fully paid. If the PEGs don't raise enough equity to payoff our debt, we will be
8 asked to carry the balance until they are able to refinance.
- 9 • The broker and CFO will be in Dallas during the 1st week of Dec to meet with
10 party(ies) that have expressed an interest of \$45mm. An additional meeting is
11 scheduled in NY later in the mo.
- 12 • The PEGs don't want Red Mtn without having closed the linchpin co.

13 (ex. 136). Dierich signed off on the summary. (*Id.*)

14 In early December Campbell, Cowan, Dierich, and Cowing met.⁷³ An internal
15 Comerica memo summarized the call by first recapping the business problems faced by
16 RMMC. (ex. 396 at '2524). The summary then stated:

17 The primary purpose of this phconv [sic] was to discuss a Plan B in the
18 event that the pending sale of the co. does not close. Thus far in 2008,
19 ownership has attempted to raise additional equity from investors and is
20 now attempting to sell the co. Consequently, Owen Cowing does not have
21 a viable alternative plan. We have asked the co. to propose a plan that
22 substantially reduces the subject debt but enables it to maintain a viable
23 business that will generate sufficient cash flow to service obligations and
24 survive.

25 (*Id.*) The mystery deal never happened and, in fact, never even existed.

26 F. January 2009 to March 2009

27 1. *The Economy*

28 The economy in 2009 continued to its downward spiral.

<u>Region</u>	<u>Year</u>	<u>Housing Starts</u>	<u>Percentage Increase/Decrease</u>
Phoenix	2008	19,200	-47.1%
	2009	10,800	-43.8%
Las Vegas	2008	12,600	-38.2%
	2009	4,300	-65.9%
California	2008	65,300	-42.2%
	2009	[not in the report]	

29 (ex. 5155 at '1491).

30 ⁷³ This is the meeting where Kain left a voicemail, discussed *supra*, for Campbell beforehand telling him to
31 stay away from the topic of PEGs as it was not "need to know" for Cowing.

1 2. *RMMC*

2 As the New Year dawned, Comerica saw four main issues that RMMC was
3 facing: a reduced demand for equipment, stretched A/R, insufficient liquidity and equity,
4 and a lack of financial support. (ex. 154). At this point, Comerica saw the cause of the
5 over-advance as a significant devaluation of the pledged equipment. As such, Comerica
6 believed an appropriate facility size would be \$10 million and was therefore not
7 interested in maintaining the loan, but instead wanted to be taken out. At bottom,
8 RMMC's current EBITDA forecast, Comerica concluded, was insufficient to support the
9 current leverage. This day of reckoning had been coming for some time, as operations
10 continued to deteriorate, the market continued to plummet and alternatives continued to
11 be both elusive and illusive.

12 On January 6, 2009, Rouse released the December 31, 2008 Appraisal. It showed:

- 13 • FMV: \$35,398,000
14 • OLV: \$29,202,605
 • FLV: \$23,122,600

15 (ex. 156). A couple weeks later, Dierich emailed Cowing the 2009 cash projections which
16 showed RMMC running out of cash in June. (ex. 161).⁷⁴

17 RMMC's yearend financials came out on February 12; they showed a net loss of
18 \$3,958,326 for 2008. (ex. 5120 at '16742).

19 On February 18, 2009, Comerica, in a letter to Cowing and Linda Cowing,
20 proposed an extension of the Second Forbearance to March 31, 2009 if:

- 21 • By February 28, 2009, RMMC engages an outside consultant to formulate a
22 liquidation plan;
23 • Establish a cash collateral account with Comerica;
24 • Submit a weekly written update on the status of the sales efforts; and
25 • Submit an LOI or definitive APA by March 20, 2009

26 _____
27 ⁷⁴ Plaintiffs contest the accuracy of this conclusion, in light of Comerica's willingness finance Dierich's
28 entity post-foreclosure based on projections using RMMC's historical performance. *See* Plaintiffs' Closing
Brief at 35-36, Dkt #732. But a "new" RMMC would have a different capital structure and debt repayment
obligations that do not match with "old" RMMC. So, while the projections may be evidence of some other
fact in this case, they are not evidence that old RMMC was not running out of cash.

1 (ex. 179). Cowing testified that he received the letter and agreed to the terms, except for
2 submitting an LOI since he claimed there wasn't one.⁷⁵ (Trial Transcript of Owen
3 Cowing, July 20, 2012, 244:11-245:20).

4 Between February 4, 2009 and the end of June 2009 Cowing did not recall
5 meeting with the bankers from Comerica. (*Id.*) (242:24-245:20)

6 3. *Dierich*

7 In early January, Kain sent Dierich a copy of the answers Kain sent Armand. (ex.
8 154). On January 12, 2009, Dierich and Cowan discussed the need to work at Cowan's
9 office if Cowing was in at RMMC. (ex. 157). The next day, Dierich suggested stalling the
10 Armand Group; Cowing agreed. (ex. 158). The purpose behind the delay was to see what
11 other offers came in from the pitch book.⁷⁶ (Trial Transcript of Darren Dierich, July 19,
12 2012, 190:16-191:11; Trial Transcript of Owen Cowing, July 20, 2012, 227:21-228:10).
13 Around this time, Cowing, Dierich, Steve Luke, and Armand met. (Trial Transcript of
14 Owen Cowing, July 20, 2012, 226:13-227:20). A week later, Dierich advised Kain that
15 RMMC had 48 investment groups lined up and that closing on a potential deal was an
16 estimated 30 days, depending on funding.⁷⁷ (ex. 5113). The next day, Dierich told Kain:

17 My personal opinion is that perhaps CMA and GE would prefer
18 that Ross and I just pull out and let Red Mountain figure out the next step?
19 I understand the need to pay off the debt, but the more writing I do the
20 [more] CMA/GE allows less time to make shit smell like roses. If
21 CMA/GE can't agree on an extension, I would suggest closing on the
22 collateral and the Cowing's [sic] filing BK.
23 What do you think?

24 (ex. 160).

25 A day later, Dierich sent the 2009 projections to Cowing and Kain via separate
26 emails. (exs. 161, 162). The projections showed some serious cash flow problems
27 beginning in March. The email to Cowing stated, "The bottom portion of this shows
28 cashflow." (ex. 161). Kain's version contained the comment "Company is dead by

26 ⁷⁵ In fact, that seems correct, as the deals Dierich had purportedly been working on had little or no
27 substance.

27 ⁷⁶ Plaintiffs suggest the real reason Dierich wanted to stall Armand was to allow the HIG deal to come to
28 fruition. That is unlikely as the HIG deal was dead by now, even though it had a brief renaissance. By this
time, the Court finds that even Dierich had given up on HIG.

⁷⁷ This is one more example of Dierich's penchant for fantasy.

1 March." (ex. 162). At the end of the month, Dierich told Kain that RMMC has no LOIs;
2 Kain responded "None ? NONE ? NADA ?" (ex. 165).⁷⁸ The same day, Dierich told
3 Cowing that whoever buys RMMC would probably recognize and honor the loan that he
4 and Linda Cowing had made (ex. 167) and sent Cowing a draft of the pitch book. (ex.
5 166).

6 On February 2, 2009, Dierich told Cowing the he was going to move Armand
7 along now, just to prove to the bank that they were doing something. (ex. 168). The next
8 day, Dierich, Cowan, and Whipple exchanged emails about the meeting with Comerica.
9 Dierich gave M&C some talking points and "stay away" items, including a potential
10 haircut to the bank and money to Cowing to Linda Cowing. Whipple responded that this
11 was "kinda wimpy." The meeting was held that night. (ex. 169).

12 The same day, Cowan sent Dierich a new version of the pitch book -- notably
13 absent was a biography of Cowing and the sale numbers are markedly different.⁷⁹ (ex.
14 170). A few days later, Cowan asked if he should send a copy of the pitch book to Miller-
15 Jones; Dierich told him to hold off. On the same day, Dierich sent Kain a list of key terms
16 for negotiation discussion between RMMC and an undisclosed purchaser showing a
17 purchase price of about \$33 million.⁸⁰ (ex. 173).⁸¹

18 In the same time frame, Dierich and Kain exchanged emails about waiting to give
19 Kain's phone number to Armand at a time he would be out of the office. (ex. 401). A
20 week later, Armand expressed concern that they had not received a call back from Kain.
21 Dierich told them just to bypass him and he would not have hurt feelings.⁸² (exs. 403,
22 404). Later in the month, Dierich and Cowan talked about World Wide, seemingly to
23 resurrect talks that had surfaced in 2007 where RMMC signed an LOI for World Wide.
24 (ex. 5121).

25
26 ⁷⁸ This reaction underscores the fact that Kain was finally realizing that throughout 2008 he had been taken
27 in by Dierich's assurances that a deal was right around the corner.

⁷⁹ Differences between pitch books are discussed further in the Deals section *infra*.

⁸⁰ More fantasy?

⁸¹ The name of "MG", the purchasing company, is scratched out on the exhibit.

⁸² Armand's attempted contacts with Comerica are discussed more fully *infra*.

1 In mid-February, Dierich told Wood that since the lease would be up at Taylor
2 Hart, she could move into an office at RMMC in March because "this thing should be
3 closed by then." (ex. 178). Also in mid-February, Sullivan asked Dierich for a written
4 update from the investment banker on the status of the sale: how many parties were
5 actually interested, how would they narrow the potential suitors down, sales prices, etc.
6 (ex. 5122).

7 Towards the end of February, Dierich sent Kain a draft of an update of a sales
8 offer and stated that RMMC expected an offer with these terms:

- 9 • Sales Price \$30,937,980
- 10 • Debt/Expenses: \$30,700,000
- Net Proceeds: \$237,980.

11 (ex. 407). Dierich later sent the same summary to Cowing. (ex. 181). The next day,
12 Dierich and Cowan spoke via instant messages about needing to close this deal, but that it
13 would be difficult because the pipeline had dried up considerably because funding had
14 fallen through on various construction projects. Dierich says that he needed to "move
15 Cowing and sales out of the way" to get the deal done. During the same instant message
16 string, APEX popped up on the scene as a potential suitor. (ex. 5124).

17 On March 3, 2009, Kain asked Dierich if he was in his office; Dierich replied yes,
18 and that he would call once Cowing started hitting the bottle. (ex. 185). The next day,
19 Dierich told Kain "Ross and I will call you . . . Just be prepared, we might be pulling
20 out." (ex. 188). A day later, Dierich told Wood that he was trying like hell to close the
21 RMMC deal by the end of the month.⁸³ (ex. 191).

22 In early March, 2009, Dierich sent memos to Kain recapping RMMC's sales
23 efforts. According to Dierich, RMMC marketed itself to numerous funds, visited some in
24 Texas and received LOIs from funds in Michigan and Florida. (exs. 5127, 5130). On
25 March 9, 2009, Kain asked Dierich for a list of all the LOI's, or at least copies of those
26 that he had received. (ex. 5129). A couple of days later: Cowan sent the LOIs to Dierich
27 and Cowing (ex. 193); Dierich sent Kain a rough draft of a cover letter regarding the
28

⁸³ It is not clear which "deal," if any, Dierich is referring to.

1 LOIs (ex. 5131); Kain returned it with revisions (ex. 192); Dierich then sent the revised
2 letter to Cowing with the comment "Here is the draft. It has not been sent thus if you have
3 any comments let me know." (ex. 5133); Minutes later, Dierich sent the cover letter to
4 Kain on RMMC letterhead. (ex. 5132). The letter summarized the marketing effort as
5 follows:

6 Robin, if you recall from the onset of the marketing, it was our intent to
7 find a viable source to refinance the entire debt complete an asset purchase
8 resulting in the entire payoff of the outstanding amount due to Comerica.
9 Based on the market conditions, fragile state of the economy and the
current state of Red Mountain and declining sales below 500,000 per
month, the reality of finding a buyer willing to purchase and pay an
amount above the offer's [sic] attached is unlikely and not probable.

10 (*Id.* at 380563). The letter closed with the following comment: "In summary, it is my
11 belief; the attached offers will be *the best and only option for a transaction to occur*. I
12 await your decision and feedback."⁸⁴ (*Id.* (emphasis supplied)).

13 In mid-March, Dierich was carbon copied on an email of a Comerica demand
14 letter which Dierich forwarded to Cowan. (ex. 194). Cowing, Linda Cowing, Dierich, and
15 M&C held a meeting regarding the proposals on March 16, 2009. (Trial Transcript of
16 Ross Cowan, July 23, 2012, 284:8-286:13). On the 20th, Dierich contacted Armand to
17 see if they would be close to an offer soon as he wanted to make a decision by next
18 Friday. (ex. 195). Zeffer advised Dierich that the Armand offer would be at some
19 discount to par for Comerica. (*Id.*) On the same day, Cowing sent Dierich a scanned copy
20 of a Ritchie Brothers auction proposal. (ex. 196). On the 23rd, Huron Consulting sent
21 Cowing and Dierich a copy of the Huron Report. (ex. 5144). A couple of days later, Kain
22 forwarded to Dierich, who forwarded to Cowan, a copy of Comerica's internal
23 correspondence regarding RMMC liquidation options. (ex. 198). Key findings included:

24 ⁸⁴ Is this letter just cover for Dierich's real intentions or is it sincere? Was Dierich really trying to close one
25 of the M&C deals? Was this letter written for the benefit of Kain's superiors to get them to agree to
26 Signature or was just another example of Dierich's deviousness? Did he want the M&C deals to fail so that
27 he could trigger his master plan of taking over the company? It's an important point to decide as Dierich's
28 motives are important to this case. On balance, the Court finds that Dierich had a dream but not a master
plan. He had hoped for a deal that put him in the driver's seat but that hope did not drive all of his decisions.
The reality is that Signature was the best deal available and he tried to get it to closure but the gap between
what Comerica wanted, what Signature wanted and what Cowing was willing to do was too great -- so the
deal collapsed on its own weight. Once that deal turned to dust, the bank was left only with the choice of
foreclosure and that is the point at which Dierich's interests further deviated from RMMC's.

- Superior is the highest offer; thinks they can get it up to \$20,000,000;
- Auction through Ritchie will bring them between \$16,000,000-17,950,000; and
- Huron thinks an auction will net \$18,700,000.

(*Id.*) The next day, Dierich and Kain planned to talk under the orange tree. (ex. 199). The same day, Whipple sent Dierich a spreadsheet discounting the Ritchie Brothers proposal. (ex. 5146). On March 30, 2009, Dierich, Cowan, and Cowing had a conference call to discuss the efforts to sell the company. (ex. 5147). On the last day of March, Signature sent notice to Dierich, Cowing, and M&C that they upped their offer to \$16.5 million for the debt purchase. (ex. 5148). Cowing told Dierich that the only way that this was going to work would be if a potential buyer could see RMMC as it could be, not in the shape it was actually in then. (ex. 5150).

4. *The Deals*

A. THE MYSTERY DEAL

In mid-January, Dierich advised Kain that Cowan was in his office at that moment, Cowing is on his way and Cowan thought a deal might get done. Kain asked if this was a resurrection of the "big enchilada combo?" Dierich replied "Maybe, seems like a little more cash is available than we thought. Now we need to hold off the other group."⁸⁵ (ex. 399). The "big enchilada combo" was not in the cards; on February 9, 2009, HIG passed on RMMC as "Too small for platform, not a fit with Redfish."⁸⁶ (ex. 5119, Deposition of Don Taylor, June 13, 2011, 60:2-63:16).

B. MOORS & CABOT

M&C prepared multiple versions of a pitch book. (exs. 163, 166, 170, 176, 301). One was the version shared internally at M&C, Pitch Book One, on January 26, 2009:

Management Bios:	Barry Fickett, General Sales Manager Jay Dee Sale, Director of Service Darren Dierich, Chief Financial Officer
Investment:	\$5-10 million
Facility Size:	\$31,000,672.10
Advance Rate:	75% of Eligible A/R; under 60 Days Aged

⁸⁵ Dierich testified that "the other group" was Armand. (Trial Transcript of Darren Dierich, July 19, 2012, 189:10-17.)

⁸⁶ This is a separate sales force document from the one that turned down the first deal in August 2008, but the result was the same. Cowan brought this opportunity to HIG in March 2008.

1 **Interest Rates:** 80% of Gross OLV of Eligible Equipment
2 Pay Rate: Libor -1.5 + .5%
3 Applied Rate - Daily Libor +5%

4 **Estimated Sources**
5 **Senior Credit Facility:** \$32,000,000
6 **Seller Note:** \$2,000,000
7 **Equity Investment:** \$6,621,985
8 **Total:** \$40,621,985

9 **Estimated Uses**
10 **Debt Payoff at Close:** \$31,448,000
11 **Cash to Seller at Close:** \$4,173,985
12 **Seller Note:** \$2,000,000
13 **Working Capital/Cap Ex:** [not listed]
14 **Fees and Expenses:** \$3,000,000
15 **Total:** \$40,621,985

16 (ex. 163). On January 30, 2009, Dierich forwarded Pitch Book Two (but for Management
17 Bios, virtually identical to Pitch Book One) to Cowing with the comment "Keep an open
18 mind when reading."

19 **Management Bios:** General Sales Manager
20 Director of Service
21 President
22 **Investment:** \$5-10 million
23 **Facility Size:** \$31,000,672.10
24 **Advance Rate:** 75% of Eligible A/R; under 60 Days Aged
25 80% of Gross OLV of Eligible Equipment
26 **Interest Rates:** Pay Rate: Libor -1.5 + .5%
27 Applied Rate - Daily Libor +5%

28 **Estimated Sources**
29 **Senior Credit Facility:** \$32,000,000
30 **Seller Note:** \$2,000,000
31 **Equity Investment:** \$6,621,985
32 **Total:** \$40,621,985

33 **Estimated Uses**
34 **Debt Payoff at Close:** \$31,448,000
35 **Cash to Seller at Close:** \$4,173,985
36 **Seller Note:** \$2,000,000
37 **Working Capital/Cap Ex:** [not listed]
38 **Fees and Expenses:** \$3,000,000
39 **Total:** \$40,621,985

40 (ex. 166). On February 3, 2009, Cowan sent Dierich Pitch Book Three:

41 **Management Bios:** General Sales Manager
42 Director of Service
43 Chief Financial Officer

1 **Investment:** \$5-10 million
2 **Facility Size:** \$31,000,672.10
3 **Advance Rate:** 75% of Eligible A/R; under 60 Days Aged
 80% of Gross OLV of Eligible Equipment
4 **Interest Rates:** Pay Rate: Libor -1.5 + .5%
 Applied Rate - Daily Libor +5%

5 *Estimated Sources*
6 **Senior Credit Facility:** \$19,000,000
7 **Seller Note:** \$2,000,000
8 **Equity Investment:** \$8,000,000
9 **Total:** \$29,000,000

10 *Estimated Uses*
11 **Debt Payoff at Close:** \$22,000,000
12 **Cash to Seller at Close:** \$1,000,000
13 **Seller Note:** \$2,000,000
14 **Working Capital/Cap Ex:** \$2,000,000
15 **Fees and Expenses:** \$2,000,000
16 **Total:** \$29,000,000

17 (ex. 170). On February 12, 2009, Whipple sent Bruce Ferguson of Apex Pitch Book Four:

18 **Management Bios:** General Sales Manager
19 Director of Service
20 Chief Financial Officer

21 **Investment:** \$5-10 million
22 **Facility Size:** \$31,000,672.10
23 **Advance Rate:** 75% of Eligible A/R; under 60 Days Aged
 80% of Gross OLV of Eligible Equipment
24 **Interest Rates:** Pay Rate: Libor -1.5 + .5%
 Applied Rate - Daily Libor +5%

25 *Estimated Sources*
26 **Senior Credit Facility:** \$19,000,000
27 **Seller Note:** \$2,000,000
28 **Equity Investment:** \$10,000,000
 Total: \$31,000,000

29 *Estimated Uses*
30 **Debt Payoff at Close:** \$25,000,000*
31 **Cash to Seller at Close:** \$1,000,000
32 **Seller Note:** \$2,000,000
33 **Working Capital/Cap Ex:** \$1,000,000
34 **Fees and Expenses:** \$2,000,000
35 **Total:** \$31,000,000

36 *Current debt holder will be willing to negotiate lower payoff.

37 (ex. 176). On February 12, 2009, Cowan sent Dierich Pitch Book Five:

38 **Management Bios:** General Sales Manager
 Director of Service
 Chief Financial Officer

1	Investment:	\$5-10 million
2	Facility Size:	\$31,000,672.10
3	Advance Rate:	75% of Eligible A/R; under 60 Days Aged 80% of Gross OLV of Eligible Equipment
4	Interest Rates:	Pay Rate: Libor -1.5 + .5% Applied Rate - Daily Libor +5%

5	<i>Estimated Sources</i>	
6	Senior Credit Facility:	\$16,000,000
7	Seller Note:	[none]
8	Equity Investment:	\$18,000,000
9	Total:	\$34,000,000

10	<i>Estimated Uses</i>	
11	Debt Payoff at Close:	\$31,000,000
12	Cash to Seller at Close:	[none]
13	Seller Note:	[none]
14	Working Capital/Cap Ex:	\$1,000,000
15	Fees and Expenses:	\$2,000,000
16	Total:	\$34,000,000

12 (ex. 301). Under the heading "Transaction," each of the pitch books stated "Management
13 seeks to partner with a financial sponsor to facilitate a management led buyout of current
14 ownership . . ." (*see e.g.*, ex. 166 at '351346). Dierich forwarded Pitch Book Five to Kain
15 on February 17, 2009. (ex. 301). On March 13, 2009, Cowing forwarded Pitch Book Two
16 to Andy Jackson. (ex. 5140). Kain forwarded Pitch Book Five to Foley on June 11, 2009.
17 (ex. 301).

18 As part of the background of the company sent to potential investors inquiries,
19 M&C used a document that stated that "Ownership was absent and provided no guidance
20 to core operators other than a bi weekly telephone call." (exs. 186, 190).

21 On March 11, 2009, Dierich sent Kain a memo summarizing the result of the
22 M&C marketing effort and shared three offers:

- 23 • Superior offers to purchase the assets of RMMC for \$16-19 million.
- 24 • Apex offers to purchase the debt and guarantees directly from Comerica for \$15
25 million. Using their position as the secured note holder, they will negotiate the
26 exit of current ownership.
- Signature proposes to purchase the debt and guarantees from Comerica for \$14.2
million. Using their position as the secured note holder, they will negotiate the
exit of current ownership.

27 (ex. 192). Cowing was "Grossly disappointed" with the offers. (Trial Transcript of Owen
28 Cowing, July 25, 2012, 253:12-13). Comerica saw the Superior offer as the best offer.

1 (ex. 198). At the end of March, Apex sent a follow up letter to M&C proposing new
2 terms:

- 3 • \$12,000,000million cash
- 4 • \$6,000,000million in contingent payment notes
 - 5 ○ Interest rate 6%
 - 6 ○ Paid at a rate if 50% of excess cash flows (EBITDA) in excess of \$4.5MM per annum for a period of 4 years.

6 (ex. 200).

7 Another lead, Silvertip, came into the picture in late March. (ex. 203).

8 On March 31, 2009, Cowan reported to Whipple that Comerica would accept
9 \$19.5 million "for everything out the door", citing Kain as the source. (ex. 5149)

10 c. GECF

11 In February, Miller-Jones checked in on the progress of the pitch books with
12 Cowan; Dierich told Cowan not send Miller-Jones a pitch book. (ex. 172).

13 d. RITCHIE BROTHERS

14 On March 20, 2009, Ritchie Brothers sent Cowing a proposal for an auction in
15 May (ex. 196). Ritchie Brothers anticipated a gross selling price of \$20,000,000 for the
16 equipment and gave RMMC three options:

- 17 • Option 1 -- Straight Commission
 - 18 ○ 7.8% commission on lots over \$2500
 - 19 ○ 25% on lots at/below \$2500
 - 20 ○ \$500,000 for prep work
- 21 • Option 2 -- Guarantee
 - 22 ○ Guaranteed minimum of \$18,000,000
 - 23 ○ Deduction from Guarantee of 10.8% commission
 - 24 ○ \$500,000 deduction for prep work
 - 25 ○ Amount above \$18MM would be an 80/20% split RMMC/Ritchie Bros.
- 26 • Option 3 -- Purchase
 - 27 ○ Ritchie Brother would purchase assets straight out for \$16,000,000

28 (ex. 196). Comerica made the following internal analysis of the Ritchie Brothers proposal
29 on March 25, 2009:

- 30 • Straight Sale
 - 31 ○ Estimated selling price: \$20,000,000
 - 32 ○ Net to Seller: \$17,950,000
- 33 • Auction Sale w/ guarantee
 - 34 ○ Minimum: \$18,000,000
 - 35 ○ Potential Net to Seller: \$17,165,000
- 36 • Purchase by Ritchie Bros.: \$16,000,000
- 37 • Huron Consulting Orderly Liquidation:

1 o Net to Seller: \$18,700,000

2 (ex. 198). Kain sent the letter to Dierich, who sent the letter to Cowan. (*Id.*) Dierich did
3 his own analysis on March 26, 2009 which he shared with M&C:

- 4 • Cash Purchase
5 o Net: \$15,880,000
6 o After Wind Down: \$16,432,000
7 • Auction w/guarantee
8 o Net: \$15,436,000
9 o After Wind Down: \$15,820,000
10 • Auction/Sales=20Mil:
11 o Net: \$16,820,000
12 o After Wind Down: \$17,204,000
13 • Auction with no Guarantee
14 o Net: \$17,820,000
15 o After Wind Down: \$18,204,000

16 (ex.5146).

17 E. COMERICA

18 By the start of 2009, Comerica wanted to separate from RMMC. (ex. 5109). Kain
19 reported that he had told Dierich that an acquisition of RMMC would require a payoff of
20 the debt. Kain doubted that Cowing had a viable plan B which would be the basis for
21 recommending a 90-120 extension of forbearance. Comerica believed that RMMC should
22 initiate an orderly liquidation of the pledged equipment. (*Id.*)

23 F. ARMAND GROUP

24 In the beginning of January, Dierich advised Kain that Armand planned "on being
25 in our office on January 8th now to present an offer and Agreement to Linda and Owen."
26 (ex. 155, Trial Transcript of Darren Dierich, July 19, 2012, 161:15-162:8). A meeting
27 was held with Cowing, Dierich, Steve Luke, Mola, and possibly others. (Trial Testimony
28 of Owen Cowing, July 20, 2012, 226:16-227:1). The meeting, in Mola's view, went well.
(exs. 158, 5110).

 On January 13, 2009, Cowing agreed with Dierich that RMMC should stall
Armand. (exs. 158, 5110). A couple weeks later, Dierich suggested that RMMC should
move faster with Armand "just so I can prove we are doing something." (ex. 168). The
next day, in reference to the Armand Group, Dierich asked Kain "What if I just give him

1 your office number and you can ignore the call or call him when you want?" (ex. 401).
2 The same day, Dierich told Zeffer "I just communicated with him and he is expecting a
3 call." (ex. 403). A week later, Zeffer let Dierich know that Kain had not responded. (*Id.*)
4 Dierich replied "Robin has been out ill. He promises to return your call." (*Id.*) A week
5 later, after finding out that Kain still had not called, Dierich suggested that Zeffer "move
6 on." (ex. 404). The next day, Dierich sent Kain an email giving RMMC's express
7 permission to talk with a representative from Armand. (ex. 405). Kain testified that
8 Dierich asked Kain repeatedly to talk to the Armand Group, but he didn't because "it's the
9 policy of the bank that I don't respond to credit inquiries. And, quite frankly, there wasn't
10 anything positive I could tell them."⁸⁷ (Deposition of Robin Kain, September 15, 188:21-
11 189:23, 190:2-8).

12 On March 20, Zeffer gave Dierich an update: Armand never heard back from
13 Comerica so it is now working with other banks, including GE, to refinance the debt; the
14 refinance would be at some discount to par for Comerica; and once financing was in
15 order, Armand would make an offer for RMMC. (ex. 195). Dierich testified that nothing
16 came of Armand because they couldn't complete their due diligence. (Trial Transcript of
17 Darren Dierich, July 24, 2012, 282:1-4).

18 G. HURON CONSULTING

19 Huron sent Cowing and Dierich an initial draft Huron Report on March 23, 2009.
20 (ex. 5144). According to the draft report:

- 21
- 22 • Auction No Guarantee: \$16,068,503
 - Going Concern Sale: \$17,000,000
 - Orderly Liquidation: \$19,000,000

23 (*Id.* at '587).

24 G. April 2009 to June 2009

25 I. *RMMC*

26 The engagement agreement with M&C expired on March 31, 2009. (JPS
27 Stipulated Fact #8).

28 ⁸⁷ Dierich testified that Kain told him as much. (Trial Transcript of Darren Dierich, July 24, 2012, 320:1-321:7)

1 According to the Huron Report issued on April 2, 2009 Comerica could expect
2 the following proceeds:

- 3 • Auction - No Guarantee: \$15,930,809
- 4 • Going Concern Sale: \$16,810,000
- Orderly Liquidation: \$18,719,938

5 (ex. 5152 at '4278). According to the Huron Report, RMMC expected an \$800,000 loss in
6 2009 and a return to profitability by 2010. (*Id.* a5 '4279).

7 Cowing paid off a mortgage for \$297,000 with Union Bank of California on April
8 13, 2009. (ex. 5185 at '1192). RMMC began laying off employees, starting with sales, on
9 April 24, 2009 (ex. 5174) -- including Fickett. (ex. 5181).

10 In the first week of May, Rouse released the March 31, 2009 Appraisal showing a
11 FLV of \$19,428,700. (ex. 432 at '4264). On May 22, 2009, RMMC laid off most
12 employees with only a skeleton crew remaining. (ex. 263).

13 On June 5, 2009, Comerica sent formal notice that the Comerica Loan was due.
14 (ex. 283). A week later, Comerica sent notice that a foreclosure sale was scheduled for
15 June 30, 2009. (ex. 303). The same day, Winstead sent Berger a letter advising that
16 Comerica wanted to avoid the expense of an auction; other parties were welcome to make
17 an offer to buy the collateral; and, though it turned down the previous settlement offer,
18 Comerica welcomed a new offer. (ex. 304).

19 On Sunday the 14th, Cowing and Gonzales of Caliber Advisors discovered some
20 of the emails between Dierich and Kain and changed Dierich's email password. (Trial
21 Transcript of David Gonzales, July 23, 2012, 39:8-41:5). RMMC retained Caliber
22 Advisors on Monday morning. (*Id.* 41:6-7). Dierich failed to show up to work that day.
23 He did not return and was terminated effective June 15, 2012. (ex. 332).

24 On June 22, 2009, Gonzales, Cowing, Valinda Cowing, Kain, Faubion, Sullivan,
25 and Foley had a teleconference where Kain advised Cowing that his dealings with JS
26 Cole could be detrimental to RMMC. Cowing disagreed, characterizing his dealings as a
27 normal, professional relationship. Kain then stated that the purpose of the call was to
28 solicit Cowing's cooperation with the upcoming foreclosure sale. Specifically, Kain

1 wanted assurances that Cowing would cooperate with a transfer of the equipment (up to
2 60 days) to the buyer's new location. Kain stated, after being asked directly by Cowing,
3 that no agreement for the sale of assets had been reached. (ex. 322).

4 On June 24 and 25, 2009 RMMC's lawyers sent Comerica's lawyers threatening
5 letters advising Comerica of Kain and Dierich's activities. (ex. 494 at 1-2). A standstill
6 agreement between Comerica and RMMC began to form on June 29, 2009. (ex. 5259).
7 There was no foreclosure sale on June 30, 2009.

8 2. *Dierich*

9 Conversations between Dierich and Kain by the tree picked up significantly
10 beginning on April 1, 2009. (See, *e.g.*, exs. 204, 208, 211, 217, 229). Kain and Dierich
11 had conversations by the tree so Linda Cowing and Cowing couldn't overhear them: "If
12 owens [sic] not there, why do you have to go to the o.tree i/o for us to talk in the next 5
13 min." Kain to Dierich. The answer was: "LINDA" Dierich to Kain. (ex. 229).

14 Also on April 1, 2009, Dierich told Kain that he sent Cowan to Los Angeles to see
15 if Signature would take the deal. "Cross your toes and fingers." (ex. 5151). On the same
16 day, Cowing asked Dierich and others for information to give to Silvertip. (ex. 203). The
17 next day, Dierich included the Huron Report as part of the analysis for Silvertip. (ex.
18 5152). That day, Dierich, Cowan, and Kyle Ross from Signature talked about getting a
19 deal done. Kyle Ross said that he presented Comerica's "ask" (presumably \$19.5 million)
20 to his partners, but did not think that was a reasonable price. (ex. 5154). Later in the
21 week, Dierich sent Kain his new 12 month cash projections. (ex. 413).

22 On the 8th, Dierich let Kain know that he had learned that Cowing was meeting
23 with a "white knight" who would offer \$17 million. (ex. 207). The same day, Kain told
24 Dierich that any sale of the note would require the guarantors to go along with the deal
25 and Comerica would have to agree to a settlement of the guarantees. Dierich responded
26 "So I'm screwed?" Kain said no. Dierich headed out to the tree. (ex. 211).⁸⁸

27 ⁸⁸ This exchange merits further consideration. While a stock sale, an asset sale or a refinance would
28 obviously require the active consent of RMMC, the same is not true for a sale of the note. Indeed,
Comerica could sell its loan package any time it wanted so long as the price was right. The issue here is
that Comerica was insisting either that the price had to include consideration for the guarantees (something

1 Later, Dierich asked for an official response from Kain to the Signature proposal.
2 (ex. 212). Also on the 8th, Dierich told Cowan he needed "a few questions answered
3 from Signature before I can support the move forward to Comerica." In short, Dierich
4 wanted to know what Sale's, Fickett's, and his role would be because this was not an
5 MBO. (ex. 414). Cowan responded that Signature:

- 6 • and Maetzold were discussing a partnership, with Maetzold contributing his
7 machines to RMMC;
- 7 • planned on retaining the three key managers: Dierich, Sale, and Fickett;
- 8 • would give management an opportunity to invest;
- 8 • planned on holding onto RMMC as an investment for 5-8 years; and
- 9 • expected the Comerica loan balance to be greatly reduced, but the company
9 would still be required to service some of the debt.

10 *Id.*

11 On April 9, 2009, Dierich asked Kain to instruct Winstead to send a letter to
12 Cowing and Linda Cowing demanding interest.⁸⁹ (ex. 213). On the same day, Dierich
13 told Kain that Comerica needed to stop Cowing from auctioning machines through
14 Ritchie Brothers because if Comerica sold too many, Signature would walk. (ex. 214).
15 Later that day, Kain officially informed Cowan that Comerica was rejecting the Signature
16 deal, together with a request to Cowan to continue negotiations to include value for both
17 the guarantees and the accounts receivable. Cowan forwarded the email to Dierich. (ex.
18 215). The next day, Signature asked Dierich for information about the foreclosure process
19 such as who was the bank's counsel and what notices Comerica had sent. (ex. 415). The
20 same day, Cowing sent Dierich an email asking Dierich his thoughts on Cowing's plan to
21 reorganize RMMC by selling \$8 million of equipment, consolidating operations and
22 sharply reducing staff. (ex. 216).⁹⁰

25 Signature was highly unlikely to pay) or the Cowings had to kick in some cash to settle their guarantees to
26 make it work; without such consideration, this email makes clear that the bank would not sell. Thus,
27 Dierich's discomfort; he did not believe that Cowing would agree to the Signature deal, particularly once it
28 became clear that Maetzold would be sitting in the CEO chair. Why Kain thought this was not true (i.e.,
what was discussed in the conversation under the tree) is not revealed in the record.

⁸⁹ In the context of the guarantee discussion above, the most plausible explanation for this bizarre email is
Dierich trying to think of ways to put pressure on Cowing to agree to the Signature deal, if it ever came
together.

⁹⁰ Discussed more fully *infra*.

1 Early the next week, Dierich was carbon copied on an email from Cowing to
2 Berger outlining Cowing's basic concept of what would become the April Settlement
3 Offer. (ex. 220). Dierich forwarded the email to Kain, without any apparent authority or
4 concern for the confidential nature of its content.⁹¹ (*Id.*) Two days later, RMMC, Ritchie
5 Brothers, and Comerica had a conference call to discuss what the heavy equipment
6 market was like and whether a Ritchie Brothers auction should proceed. (ex. 418).
7 Dierich summarized the conference call for Cowan -- Comerica was leaning towards just
8 sending everything to auction and gambling for higher proceeds, Cowing's \$17 million
9 offer was not in writing nor understood by Comerica, and that if Signature had any pull
10 with Comerica they should call it in, because otherwise it was not looking good for
11 getting the deal done.⁹² (ex. 5161).

12 On April 20, 2009, Cowing forwarded an auction proposal from Ritchie Brothers
13 to Dierich who then forwarded it to Cowan. (ex. 5164). The next day, Cowing sent
14 Dierich an excel spreadsheet entitled "Reorganization Payroll". (ex. 224). On the same
15 day, Kain sent Dierich bullet points for a potential counteroffer to the April Settlement
16 Offer totaling \$18 million. (exs. 5169, 225). Dierich forwarded it to Cowan and they
17 discussed a deal structure that could increase the Signature deal to \$18 million. (ex. 225,
18 5170). A day later, Dierich sent Cowan an advertisement for a new yard "just in case."
19 (ex. 226). On the 23rd, Cowing told Dierich to get layoff packages ready; Dierich
20 forwarded to Kain with the comment "Boy here we go. He is destroying this place...."
21 (ex. 227). On the same day, Dierich told Cowing and Berger that GE was trying to take
22 full control of RMMC's operating cash and asked each if they had any thoughts,
23 suggestions, or proposed actions. (ex. 5175). The next day, Dierich told Kain that Cowing
24 was "cleaning house" starting with the sales department, effectively killing the Signature

25 ⁹¹ Not only did the message include attorney/client privileged information, but also commercially sensitive
26 concerning negotiation strategies with the very party with whom it was shared.

27 ⁹² Again, this email reflects Dierich's and Cowan's strong desire to do the Signature deal rather than have
28 the collateral go to auction. Dierich's motivation is crystal clear; regardless of which deal would yield more
proceeds for the bank, Signature would have a continuing business with a job for him. For Cowan, the
Signature deal would generate a substantial fee, but an auction would not. In short, at this point in time, an
auction would be the end of the line. The idea of a private foreclosure sale with EPIC as the pre-arranged
buyer had not yet taken shape.

1 deal, and that there was nothing more Dierich could do to make him keep sales personnel.
2 Dierich wondered if Kain had any ideas on how to keep it together.⁹³ (ex. 5174). On the
3 25th, Whipple asked Dierich for some information on "RMMC Partners." (ex. 230). That
4 same day, Dierich and Fickett talked about meeting for breakfast to discuss RMMC
5 Partners. Fickett agreed to meet but clearly did not understand what the meeting would be
6 about. (ex. 424).⁹⁴

7 In late April, Dierich and Fickett discussed the inventory to be moved, not
8 including outside owner equipment. (ex. 231). On April 29, 2009, Dierich and Fickett
9 continued to talk about their new entity. Fickett said he could get numbers for them off of
10 the RMMC due diligence site and Dierich complained that Cowing was in the office and
11 that made planning for the new entity difficult. (ex. 426). Also on the 29th, Fickett
12 updated Dierich on the search for a new yard. (exs. 233, 234). The next day, Fickett
13 complained to Dierich that he could not log into the RMMC due diligence site. (ex. 235).
14 That day, Miller-Jones asked Darren what was in the works and if there was anything that
15 GECF could do to facilitate any debt needs. (ex. 428). Cowing asked Dierich to scan and
16 email guarantees and other documents to him for a meeting with a personal attorney in
17 San Diego (5182), and Dierich and Cowan continued to discuss touching base with
18 Signature. (ex. 5183).

19 Fickett had picked up industry rumors and relayed them to Darren that the "deal
20 with J.S. Cole is going down." (ex 426).⁹⁵ Although not without doubt, the most plausible
21 explanation is that the "deal" was Owen's going to work for Cole, perhaps with some
22 equipment in tow. The point is not the truth of the rumor but that it existed.

23 Dierich's communications continued at a heavy pace as May 2009 began. On May
24 1, 2009, Dierich sent Fickett's six month operating plan to Whipple. (ex. 236). A few
25 days later, Dierich and Kain discussed whether Cowing had begun work at JS Cole.
26 Dierich didn't think so. Kain told Dierich that he was going to call Cowing regarding

27
28 ⁹³ See footnote 92.

⁹⁴ The Court admitted ex. 424, but not for the truth of the matter asserted.

⁹⁵ Admitted, but not for the truth of the matter asserted.

1 auction evaluations. "Your [sic] calling Owen?" Dierich responded. "Oh crap, then he is
2 going to call me."⁹⁶ (ex. 237).

3 The next day, Dierich asked Kain what direction GECD was moving in so he can
4 let Signature go. Kain responded that GECD was crunching the numbers and that he
5 expected to hear back from them. (ex. 5184). At Whipple's request for the titles of the
6 management team, Dierich provided the following:

7	Darren Dierich	President
8	Jay Dee Sale	VP-Operations
	Barry Fickett	VP-Sales ⁹⁷

9 (ex. 239).

10 A few days later, Dierich and Kain discussed the budget, but from the office
11 because it was too hot to stand under the tree. (ex. 240). Dierich sent Kain a weekly cash
12 budget for RMMC. (ex. 5190). The same day, Whipple asked Dierich where he was with
13 the pro forma financials and the 90 day plan because he had two lenders that wanted to
14 see them. (ex. 5191). The next day, Dierich sent Kain detailed questions and comments
15 about the closing of operations and sale of equipment. (ex. 5193).

16 No later than May 14, 2009, Dierich and Kain had begun discussing ongoing
17 financing by Comerica of the entity that would become EPIC. On May 14, 2009, Dierich
18 and Kain discussed the possibility of a soft note (ex. 429); Kain advised Dierich that he
19 would support taking the risk if the value of the equipment was sufficient to cover the
20 soft note. (ex. 242). The same day, Dierich forwarded to Kain a message between
21 Cowing and Ritchie Brothers concerning the JS Cole/Ritchie Brothers auction with the
22 comment "What do you want me to tell him?" (ex. 241). Later in the day, Kain sent
23 Dierich a copy of the official rejection of the April Settlement Offer. (ex. 243).

24 While clearly May 15th was a busy day, the record is confusing about what
25 actually occurred. At times, Kain and Dierich were not on the same page about what an
26 EPIC deal would look like. Dierich had some unusual thoughts, such as apparently

27
28 ⁹⁶ This exchange illustrates the two different mind sets of Dierich and Kain at this point in time. Kain was trying to figure out how to get paid; Dierich was concerned with the deal he was constructing with Fickett.

⁹⁷ There is no context for which entity that these parties will be the management team.

1 wanting equity (i.e. himself) to get an interest in the collateral.⁹⁸ The exchanges between
2 them are open to numerous interpretations; without a clear compass, the Court will
3 simply lay them out. Kain forwarded Dierich the recapitulation of the Rouse appraisal
4 showing a FLV of \$19.4 million. (ex. 432). Dierich asked Kain why he was moving so
5 fast and "not filing suit against the Cowings? 'Sucker born everyday?'" (ex. 434). Kain
6 responded that he just turned them down yesterday and that their attorney was posturing.
7 "Besides, I have to concentrate on not having to wear the equip and do all the good
8 thinking or you'll blow it." (*Id.*) Around noon, Dierich sent Kain a Deal Structure Excel
9 spreadsheet with a target sale price of \$22,500,000.⁹⁹ (ex. 246). Later in the day, Kain
10 asked Dierich why he wasn't just sending "JD" to auction and starting "Newco" without
11 all this debt. (exs. 247, 248). Kain said it would be quicker and easier to have Comerica
12 finance than to raise more equity. (exs. 247, 248). In one response, Dierich said yes,
13 quick is the ultimate goal. (ex. 247). In a separate response Dierich said that this way they
14 would get the asset structure, equipment records, and some of the people. (ex. 248).
15 Dierich and Kain haggled, but Kain pointed out that Dierich is already getting a below
16 market interest rate and no curtailments, etc. Dierich closed with the comment, "We will
17 get this done one way or the other. Hell, worse [sic] case scenario, you don't have to write
18 this off for another year." (*Id.*) The dialogue ended with no clear arrangement.

19 Around the same time, Dierich and Kain discussed Cowing's next move. Dierich
20 thought Cowing would throw in the keys and go work for JS Cole. Kain said that this
21 should work out for Dierich, making it easier to keep RMMC together and hit the ground
22 running.¹⁰⁰ (ex. 249). Dierich and Kain continued to discuss details of the new deal with
23 both saying that they would be working on it over the weekend -- Whipple and Cowan
24 would be working too.¹⁰¹ (ex. 250).

25 ⁹⁸ At one point, Kain wrote: "equity holders don't get paid until the end- that's why they're called 'equity'
26 holders." (ex. 248).

27 ⁹⁹ Details of the "Deal Structure" are discussed more fully *infra*.

28 ¹⁰⁰ However, a month later, on the June 22nd conference call with several of his fellow bankers on the line, Kain switched gears and strongly suggested that he believed Cowing was working for JS Cole and that this was bad for RMMC and inconsistent with his obligations. Cowing took offense at the suggestion he was trying to undermine the deal and the bankers backed down.

¹⁰¹ May 15, 2009 was a Friday.

1 On Monday, May 18, Cowing asked Dierich about timing and personnel on the
2 layoff list. (ex. 5196, 5197). Dierich asked Rouse for the OLV numbers from the
3 appraisal sent to Comerica. (ex. 435). Cowing sent Berger and Dierich an email advising
4 them that JS Cole had offered to purchase some RMMC machinery for \$3.5 million to be
5 used towards debt pay down; Dierich forwarded the email to Kain with the comment
6 "Please, Please, Please don't allow him to buy these." (ex. 251). That afternoon, Comerica
7 turned down the proposal; Cowing forwarded the turn down to Dierich. (ex. 253).

8 On Tuesday, Dierich, Boatwright, and M&C set up a phone meeting. (ex. 255).
9 Dierich and Fickett then discussed what would be needed to get the customers back, what
10 equipment would be needed, etc. (ex. 5198). On May 20, 2012, Kain forwarded Dierich
11 communication between GECD and Comerica about the deal. "Risk"¹⁰² was concerned
12 about using the sale of equipment to repay the bridge loan. Dierich asked Kain to ask him
13 if he could send an LOI that day.¹⁰³ (ex. 256). Boatwright emailed Dierich a retention
14 agreement for HCMI that day. (ex. 257).

15 By May 21, 2009, Comerica, through Kain, was "all in" on the plan to finance
16 Dierich's venture. Kain told Dierich that Comerica's attorney hadn't received anything
17 from Boatwright. Dierich responded that he still needed to give Boatwright some
18 material. (ex. 261). Later in the day, Dierich emailed Kain "I think it will be in our best
19 interest if Winstead sends a letter to the [sic] Linda and Owen, REMINDING them all
20 assets are to be kept in place and not sold, removed or otherwise disposed of." (ex. 437).
21 The same day, Cowing left Dierich a voicemail to discuss the layoffs the next day. (ex.
22 5200). A couple days later, Dierich asked Kain if he could go month to month for a while
23 on the new yard. (ex. 264).

24 The Tuesday after Memorial Day was another busy day. Dierich sent M&C and
25 Boatwright a copy of the proposed LOI with a few changes and asked for feedback. At
26 this point, the deal was structured as an asset sale by Comerica to EPIC to occur after
27

28 _____
¹⁰² This presumably refers to Comerica's risk department.

¹⁰³ The meaning of this odd email is unclear but whatever it was made Boatwright "[fall] off his chair."

1 Comerica acquired RMMC's assets through foreclosure.¹⁰⁴ The basic terms of the deal
2 included: \$25 million sale price, \$5 million in cash and \$20 million in an 18 month note
3 at 4% per annum. (ex. 265). Dierich asked Wood if she wanted to look for a new office
4 for HCMI as it would "finally" be purchasing the assets of RMMC. (ex. 266). Kain sent
5 Dierich a copy of the letter to RMMC Properties requiring it to allow people access to the
6 premises as part of their continued financing through the wind down. (ex. 267). Kain
7 wanted Dierich to sign the letter as an agent for RMMC. (ex. 438). Dierich sent Fickett a
8 new security token to access the RMMC network. Dierich's signature line reads "Darren
9 Dierich, Comerica Bank, N.A." (ex. 268).

10 The next day, Boatwright sent his changes to the LOI to Dierich, Whipple, and
11 Cowan. (ex. 5204). Dierich forwarded information on a rental call to Fickett. (ex. 440).
12 Dierich sent the EPIC LOI to Kain saying that this was confidential, time sensitive, and
13 he desired a quick close. (ex. 269). A day later, Kain redlined the letter, sent it back and
14 stated that because Comerica was only a lien holder, it cannot sell assets that it did not
15 own and would not exclusively negotiate with any one party.¹⁰⁵ (ex. 270). On May 29,
16 2009, Dierich and Jordan discussed domain names for EPIC. (ex. 271). The same day,
17 EPIC formally engaged M&C on a completely contingency basis; M&C would get paid if
18 the deal was consummated. (ex. 272). The same day, Cowing sent Dierich a CAT
19 Auction Services appraisal with commentary on the numbers. (ex. 441). On May 31,
20 2009, Dierich, Cowing and Guy Cowing discussed setting up an LLC for protecting
21 Cowing's personal assets. (ex. 5211).

22 On June 1, 2009, Dierich asked Kain if he had any ideas on how to secure new
23 rentals and get them past Cowing. (ex. 275). Fickett asked Dierich if they were ready to
24 reveal the new name and start in response to a request for a rental quote. (ex. 442). The
25 next day, Dierich sent Kain a statement of operations. (ex. 276). A day later, Dierich let
26 Kain know that he had to rent some machines to a large client. (ex. 443). On the same

27 ¹⁰⁴ Later, the structure was refined to be a private foreclosure sale directly to EPIC. This avoided the
28 possibility that a third party might appear at the sale and make a cash offer that Comerica might accept
(rather than increasing its credit bid.)

¹⁰⁵ Was this retrenchment the result of direction from Kain's supervisors? The record is silent.

1 day, Dierich emailed Kain telling him that Kain needed to tell Cowing to keep the
2 machines intact and that "he is meeting with maintained to transfer the dealership to js
3 cole, which is a huge loss for us!"¹⁰⁶ (ex. 277). Later that day, Cowan sent Dierich a fully
4 executed engagement agreement for EPIC and M&C and asked what he could do to help
5 in the process with Kain. (ex. 278).

6 On June 4, 2009, Kain asked Dierich to send over a list of Cowing's activities that
7 were detrimental to RMMC. Dierich replied: 1) taking the qualcoms off of the machines,
8 2) transfer of the maintainer dealership to JS Cole, 3) trying to replace on rent machines
9 with JS Cole machines, and 4) introducing RMMC accounts to JS Cole sales team.
10 Dierich promised to let him know of any others he found. (ex. 279). That day, Dierich
11 sent Whipple new projections, business models, and ideas (exs. 281, 282). A day later,
12 Boatwright called Dierich to get some documents so the transaction could close by June
13 30, 2009. (ex. 284). The next day, Dierich and Kain discussed the projections. Kain told
14 Dierich that he must have failed accounting 101, but that the LOI was ready to send to
15 GECD. Kain signed off "Love and Kisses." (ex. 285)

16 On June 8, 2009, Dierich and Kain discussed ways to get the deal done. Kain
17 wanted the pitch book and to understand how the equity holders could be secured -- that
18 would almost be a deal killer. Dierich suggested securing them with the AR. (ex. 287).
19 Dierich and Kain also set the goodwill at somewhere between \$6 and \$7 million. (ex.
20 448). While more details of the deal were discussed, Kain noted that someone called to
21 ask about the equipment. Kain said that he won't be answering his phone until after the
22 30th. (exs. 288-291).

23 On the 9th, Dierich sent Fickett several RMMC forms including insurance
24 requirements, credit agreements, application letters, and more. (ex. 293). That day,
25 Fickett sent Dierich an application and paperwork for a rental with Grey Mountain. (ex.
26 294). Dierich told Kain that he told Cowing that the machine was sold just to keep him
27 off the trail so that he couldn't give the deal to JS Cole. (ex. 451). Dierich sent Kain more
28

¹⁰⁶ The meaning of the term "meeting with maintained" is not clear.

1 monthly operating statements, but also stated "DO NOT UNDERESTIMATE
2 OWEN!!!!!" (ex. 295). The next day, Dierich and Kain discussed a variety of information
3 about EPIC including incorporation, officers, address, selling points, and sales pipeline.
4 (exs. 296-299).

5 On June 11, 2009, Dierich forwarded to Kain, who forwarded to David Campbell,
6 the draft of a strongly worded letter by Berger questioning Comerica about the private
7 foreclosure sale and why Comerica refused to negotiate in a "business like" manner
8 regarding the guarantees.¹⁰⁷ (ex. 300). The same day, Fickett and Dierich discussed new
9 credit applications for EPIC (ex. 302) and Dierich forwarded Fickett another rental
10 request. (ex. 455).

11 On June 15, 2009, Dierich did not show up to work. (ex. 332). The next day,
12 Gonzales asked Kain what was going on with the unit that left the Chandler yard and
13 wanted to know what kind of security Comerica wants for its collateral. Kain forwarded
14 the email to Dierich, who forwarded it to Fickett. (exs. 310, 459). The same day Dierich
15 told Kain that the EPIC articles of incorporation would be online and sent a copy of IRS
16 documentation for an employment number for EPIC. (ex. 311).

17 On June 18, 2009, Dierich and M&C were trying to put a deal together to present
18 to Kain, who told Dierich that he would try his best to get the deal done.¹⁰⁸ They
19 scheduled a meeting early the next morning to discuss the rewrites of the term sheets. (ex.
20 468). The same day, Gonzales sent Kain a list of the inventory and asked what to do
21 about the units out on rent; Kain forwarded it to Dierich, who sent it to Fickett. (ex. 313).
22 On that day, Comerica sent EPIC and Dierich the term sheet offering a \$23 million loan
23 with a two year maturity day and covenants to be determined. (ex. 316). Later, Dierich
24 told Kain: "I am not an employee anymore." (ex. 317). Dierich and Kain discussed the
25 potential problems with the yard because it was still owned by RMMC and Cowing (*Id.*)

26 _____
27 ¹⁰⁷ While still in draft form, this document also obviously is protected by the attorney client privilege and
should not have been forwarded to Kain.

28 ¹⁰⁸ As will become even clearer as the summer grinds on, Comerica never finally agreed to the terms of a
financed sale to EPIC. Kain, the workout guy, was trying to put it together but final approval always rested
with the new business side of the bank.

1 In the afternoon, Winstead sent the EPIC closing checklist; Dierich forwarded it to M&C.
2 (ex. 319). The next day, Kain suggested that Comerica take \$1 million and finance \$24
3 million. (ex. 320).¹⁰⁹ Later, Dierich let Kain know that he would give updates on
4 Cowing's activities with JS Cole. (ex. 5247).

5 On June 22, 2009, Dierich and Kain discussed how the capital structure will work,
6 including how Dierich would pay off the note. (ex. 323). Additionally, Dierich and
7 Fickett discussed the issues with getting the yard in shape to rent machines. (ex. 472).
8 That day, Kain sent Dierich a revised term sheet that contained the changes that Dierich
9 and Kain discussed including a three year Comerica loan of \$24 million. (ex. 325, 5250).
10 Dierich and Kain then discussed the new term sheet with Dierich having problems with
11 the A/R provision and the fact that the loan was no longer interest only. (ex. 326).

12 On June 25, 2009, Dierich sent Whipple EPIC's kickoff plan including the
13 language "As with every hostile takeover opportunity..." (ex. 329 at '8369). Whipple
14 liked it, saying that it helped. (ex. 330). The next day, Dierich and Cowan discussed when
15 they could raise the money and get the deal done. Dierich wanted to step in and take
16 control of the collateral as soon as they could because it would make things easier. (ex.
17 331).

18 3. *The Deals*

19 A. RITCHIE BROTHERS

20 On April 6, 2009, Dierich told Kain that Cowing told Ritchie Brothers not to meet
21 with Comerica. (ex. 208). A few days later, Kain and Dierich exchanged emails
22 discussing the Ritchie Brothers proposal: Dierich wanted to stop the deal; Kain believed
23 that Ritchie Brothers couldn't sell without Comerica's approval; Dierich was concerned
24 that if the deal was approved, Signature would walk. (ex. 214). A few days later, Cowing
25 signed off on a meeting with Ritchie Brothers. (ex. 218). The meeting happened on April
26 16, 2009. (ex. 418). In any event, the proposed Ritchie Brothers sale did not occur.

27 On June 1, 2009, Ritchie Brothers made another auction/sale proposal:

28 ¹⁰⁹ This proposal recognizes the reality that Dierich and EPIC never had the \$4 to 5 million originally
discussed. There is no evidence he had the \$1 million referred to here.

- 1 • Anticipated gross sale price is over \$18,000,000
- 2 • Straight commission proposal
 - 3 ○ Sell equipment at auction
 - 4 ○ 7.8% commission on equipment over \$2,500
 - 5 ○ 25% on equipment less than \$2,500
 - 6 ○ \$100 minimum
 - 7 ○ \$500,000 prep work
- 8 • Purchase proposal
 - 9 ○ Ritchie buys equipment for \$14,800,000
 - 10 ○ 80/20 Split for sale over \$17,200,000

11 (ex. 5212).

12 B. MOORS & CABOT

13 Based on the Huron Report, GE advised Comerica that it preferred an orderly
 14 liquidation over a short sale as arranged by M&C. (ex. 5156). On April 8, 2009, M&C
 15 championed the Signature proposal to Comerica with the following analysis:

- 16 • Cash Sale: \$14,767,456
 - 17 ○ Risk premium: \$363,000
 - 18 ○ Business Sale: \$14,704,456
- 19 • Auction with Guarantee: \$14,955,456
 - 20 ○ Risk Premium: \$363,000
 - 21 ○ Business Sale: \$14,592,456
- 22 • Auction/Guarantee/\$20MM: \$16,555,456
 - 23 ○ Risk Premium: \$1,900,000
 - 24 ○ Business: \$14,655,456
- 25 • Auction No Guarantee: \$17,339,456
 - 26 ○ Risk Premium: \$2,700,000
 - 27 ○ Business Sale: \$14,639,456
- 28 • Sales
 - Signature:
 - Total @close: \$15,174,000
 - Silvertip:
 - Total @close: \$14,100,000
 - Apex:
 - Total @close: \$11,750,000
 - Soft Note: \$6,000,000

29 (ex. 210).

30 If the Signature deal went through, Cowan believed that Maetzold would likely be
 31 the new CEO; All three managers (Sale, Fickett, and Dierich) would be retained;
 32 Signature would give management the opportunity to invest side by side with Signature;
 33 Signature only expected to collect interest for the next 18 to 24 months, leaving a bigger
 34 equity pop down the road. (ex. 414). Cowing testified that he didn't like the thought of

1 Maetzold occupying his chair and that he preferred bankruptcy to that. (Trial Transcript
2 of Owen Cowing, July 26, 2012, 4:14-5:21). This attitude was confirmed by Sale who
3 testified that Cowing found out that the Signature deal would install Maetzold as CEO
4 and that Cowing thought that Robert Schwab was financing the deal. According to Sale,
5 "Owen made the comment that he would put the company in bankruptcy before he would
6 ever sell it to let Robert Schwab and Jim Maetzold have anything to do with Red
7 Mountain." (Deposition of Jay Dee Sale, December 7, 2011, 45:5-21).

8 On April 9, 2009, Dierich expressed concern that selling too many machines
9 meant Signature would walk. (ex. 214). Later that day, Comerica rejected the Signature
10 offer believing that \$16.5 million did not cover the value of the equipment and other
11 secured assets and that the value of the guarantees were not considered as part of the
12 purchase price. (ex. 215).

13 A few days later, Signature apparently considered bypassing RMMC and dealing
14 directly with Comerica. Signature sent M&C a draft of a letter addressed to Comerica
15 under which Signature would buy the assets at a foreclosure sale and Comerica would
16 keep the guarantees. The letter was not signed and there is no evidence it was ever sent.
17 (ex. 221). As of April 16, 2009, Dierich was still pushing for the Signature deal with
18 Cowan. (ex. 5161).

19 On April 21, 2009, while discussing the April Settlement Offer Cowan threw out
20 the following hypothetical:

- 21 • \$16.5 million from Signature +
- 22 • \$1 million in A/R -
- 23 • \$900,000 M&C fee =
- 24 • \$16.6 million,
- leaving Linda Cowing writing a check for \$1.4 million,
- meaning that Comerica gets \$18 million.

25 (ex. 5170). A few days later, Whipple sent an email to Dierich referencing "RMMC
26 Partners".¹¹⁰ (ex. 230). A couple weeks later, RM Partners and M&C entered into
27 engagement agreement. (ex. 259).

28 _____
¹¹⁰ RMMC Partners and EPIC are the same.

1 A month later, M&C was heavily involved with the EPIC deal. (ex. 330, 331). As
2 of June 26, 2009, M&C thought it needed 30 more days to come up with the \$1 million
3 needed to close. (ex. 331).

4 C. COMERICA

5 An internal Comerica CQR Summary Memo showed the following
6 recommendation as of April 30, 2009, under a reserve and charge-off analysis:

7 Recommend a partial charge of \$3,474m, which reduces CMA book
8 balance to \$17.363m, which consists of (1) \$463m balance of the RMMC
9 RIE loan and (2) the \$16,900m prorata amount expected from a pending
10 sale of pledged personal property assets for \$25mm gross (CMA \$16,250)
11 plus settlement of the guarantee of Linda Cowing for \$1.0mm (CMA
12 \$650m). Additionally, based on estimated liquidating values of pledged
13 assets plus settlement of the guaranty of Linda Cowing, an individual
14 reserve of \$5,475m is recommended in order to fully cover CMA credit
15 exposure/SOAL in the event that the expected sale does not close.

16 (ex. 445). Comerica's action plan, also dated April 30, was to:

- 17 1) Obtain updated proposals from auction companies.
- 18 2) Market pledged assets for sale via UCC private foreclosure sale with
19 target foreclosure date of 6-30-09.
- 20 3) Track assembly of equipment, collection of A/R and fund wind-down
21 expenses of Co. i/a/w acceptable weekly budgets.
- 22 4) Pursue guarantors for deficiency balance.

23 (ex. 523 at ' 33661).

24 On June 11, 2009, Dierich sent Kain a draft of a letter by Berger outlining
25 RMMC's confusion and concerns regarding Comerica's collection efforts. (ex. 300).
26 Moreover, the letter stated that RMMC "learned by happenstance that Comerica has
27 published notice of a 'private sale' of the equipment for June 30." (*Id.*) The next day,
28 Comerica sent a sale notice to RMMC on June 12, 2009. (ex. 303). The same day,
Winstead sent RMMC's attorney a letter: looking to avoid the expense of an auction;
asking RMMC if it knew a party who wants to buy the equipment to let Comerica know;
and welcoming a new offer, though a settlement offer was turned down. (ex. 304). The
next day, Foley sent an internal email stating that Project Padres was as sensitive of a
deal as Comerica has ever done. (ex. 458). On June 17, 2009, Comerica listed the
following Sources and Uses involving the EPIC deal:

Sources		Uses	
Senior Credit Facility	\$23,000,000	Debt Payoff at close	\$31,344,000
Sponsor Contribution	\$4,000,000		
CMA/GE Discount to Loan	\$4,344,000		
Total Cash Sources	\$31,344,000	Total Cash Uses	\$31,344,000

(ex. 315). The next day, Comerica sent EPIC a term sheet offering a \$23 million dollar loan. (ex. 316). The same day, Kain told Gonzales to "consider all opportunities to lease additional equipment." (ex. 5244). On June 23, 2009, a day after a phone call among Gonzales, Cowing, Kain, Sullivan, Faubion, and Foley, Kain sent Gonzales an email inviting JS Cole to submit a competing bid at the June 30, 2009 auction. (ex. 526).

D. GECF

At the end of April, Miller-Jones asked Darren about what was in the works at RMMC to see if GECF could facilitate any debt needs. (ex. 428).

E. OWEN COWING AND JS COLE

On April 2, 2009, Cowing told Dierich that Ghilotti "is very interested." (ex. 205). The next day, RMMC and JS Cole entered into a confidentiality agreement. (ex. 411). On April 10, 2009, Cowing proposed to Dierich:

- Sell off \$8MM worth of equipment to pay down debt
 - Less depreciation
 - Less Interest
- Reduce employees
 - Shut down Las Vegas
 - Reduce Arizona's sale department by four
- Make other reductions
- Rental volume = unchanged. \$400-500k per month
- Sell LV machines or move to AZ
- Might get us a forbearance for a few months

(ex. 216).

On April 14, 2009, Ghilotti sent Cowing an equipment list. (ex. 219). The same day, after noting that the best offer so far is \$16.5 million, Cowing proposed an idea with Berger for what eventually became the April Settlement Offer:

- Sell \$5MM equipment to JS Cole
 - No commission
 - No refurbishment
 - \$1 million dollars higher than Ritchie Brothers guarantee because I promised to consult with JS Cole after the transaction
- \$12MM guarantee from Ritchie
- Anything over \$13.75MM gets split with the Bank

- Means minimum \$17MM goes to the bank
- Receivables to Comerica after paying certain expenses
- We have a shortfall on LV facility meaning we have negative net worth

(ex. 220). Dierich forwarded this email to Kain. (*Id.*) A couple days later, after adding \$800,000 worth of A/R, \$200,000 from the guarantors with the guarantees extinguished to Cowing's original outline, Berger sent the April Settlement Offer to Comerica. (ex. 420). The April Settlement Offer contained no mention of consulting with JS Cole. Then, on the April 17, 2009, JS Cole sent RMMC a letter offering \$5 million for specified equipment. (ex. 5162).

Kain floated a potential counter offer to the April Settlement Offer with Dierich on April 21:

- Ritchie Brothers up the guaranteed minimum to \$13 million
- JS Cole can replace equipment out on rent
- Bank ends up with \$18MM
- Facilitate wrap up package
- Force settlement with guarantors for Cowing to get a job v. having to file suit.

(ex. 5169, 225). Dierich forwarded the potential counter offer to Cowan who concluded "we just need a chance to respond and put the real math on the table for Robin. We'll win." (ex. 5169). In a separate email chain, Dierich told Kain that "We can consider it and see if the wrap up goes, but that auction isn't until June if I recall. I'll be 41 by then. If you need 18m I can see if sig will pop in more. I can get linda [sic] to settle tomorrow, but can't get her out of red." (ex. 225). Kain responded that \$18 million would be net of expenses and that M&C commission and \$1MM from A/R "should be the winner of the chicken dinner. That would leave the bank with the feathers and the guarantors." (*Id.*) Dierich forwarded this response to Cowan and they discussed the possibility of a soft note. (*Id.*) Campbell and Kain agreed on a straight turn down of the offer. (ex. 5173). On May 14, 2009, Comerica formally turned down the proposal. (ex. 243, 5194).

On May 12, 2012, JS Cole ordered business cards for Cowing:

Owen Cowing
Vice President
Mailing Address: PO Box 5368, Novato, CA 94948
Yard Address: 5190 Wilson Street, Riverside, CA 92509
Cell: (760) 807-8568
Office: 888-764-5232

1 Fax: (415) 883-4105
ocowing@jscole.com

2 (ex. 5189). On May 18, 2009, Cowing proposed selling \$3.5 million in equipment to JS
3 Cole internally with Berger and Dierich. (ex. 251). Dierich forwarded the proposal to
4 Kain stating "Please, Please, Please don't allow him to buy these." (*Id.*) Berger proposed
5 the sale to Comerica. (ex. 252). Comerica turned it down. (ex. 253).¹¹¹

6 Cowing contemplated forming a new LLC as a legal vehicle for his personal use
7 to shelter income from creditors, particularly Comerica, at the end of May and start of
8 June 2009. (ex. 5211).

9 During late May and into June, Cowing set up sales calls with Ghilotti (ex. 5202,
10 5203), arranged a job for Craig Summers (ex. 5205), received JS Cole sales quotes, (ex.
11 5213), went on JS Cole sales calls (ex. 5215), and engaged in other JS Cole activities
12 (exs. 5216, 5217, 5218, 5220, 5222, 5223, 5224, 5226, 5229, and 5231). In this time
13 frame, JS Cole listed Cowing as a new hire. (ex. 5221). On June 12, 2009, JS Cole again
14 ordered business cards for Cowing. (ex. 5233). Around this time, Cowing forwarded
15 RMMC emails to JS Cole: the "wind down" specialist email from Dierich (ex. 5234, June
16 12, 2009), private sale letter from Berger (ex. 5235, June 12, 2009), notice of disposition
17 letter (ex. 5236, June 12, 2009), an inventory report (ex. 5239, June 17, 2009), and
18 Berger's private sale letter draft (ex. 5253, June 24, 2009). In mid-June, at Cowing's
19 urging, BTS outside owner machines switched from RMMC to JS Cole. (ex. 5247).

20 On June 19, 2009, JS Cole sent an internal email stating that if anyone asked,
21 Cowing was not an employee, but worked with them; even though he was called an
22 employee internally, "but to the rest of the world he does not work for us but with us."
23 (ex. 5249). Ghilotti testified that Cowing asked not to be paid until he resolved his legal
24 issues, which the court finds to mean his guarantee liability. (Deposition Designation
25 Dante Ghilloti, November 21, 2011, 343:2-16).¹¹² A few days later, JS Cole applied for
26 business credit with RMMC. (ex. 5251). On June 25, 2009, RMMC rents equipment to JS
27 Cole. (ex. 5258).

28 ¹¹¹ These emails are discussed more fully *infra*.

¹¹² Plaintiffs' objection is overruled.

1 F. DIERICH/RED MOUNTAIN PARTNERS/HCFMI/EPIC

2 On May 15, 2009 Dierich sent Kain a Deal Structure Excel spreadsheet:

- 3
- 4 • Target Price: \$22,500,000
 - 5 ○ FLV: \$19,428,700
 - 6 ○ Less Tier 0 Exit: \$3,500,000
 - 7 • Borrowing Base: \$15,928,700
 - 8 • Bridge Note: \$2,500,000
 - 9 • Pref. Shares \$4,000,000

10 (ex. 246). Thereafter, email traffic between Dierich and Kain spiked. (exs. 246, 247, 248,
11 249, 250). On Monday the 18th, Cowing sent Dierich an email at 8:09 a.m. in which JS
12 Cole offered to purchase equipment for \$3.5 million. (ex. 251). Dierich forwarded the
13 email to Kain at 10:11 a.m. with the comment "Please, Please, Please don't allow him to
14 buy these." (*Id.*) Berger emailed Winstead the offer at 2:25 p.m. (ex. 252). Winstead, on
15 behalf of Comerica, turned down the offer at 4:37 p.m. (ex. 253). Cowing forwarded the
16 turn down to Dierich with the comment "Please call." (*Id.*) On the 20th, Boatwright sent
17 Dierich an engagement letter for HCMI's purchase of RMMC. (ex. 257). The same day,
18 Cowan sent Dierich a draft LOI from RM Partners to Comerica; key terms included:

- 19
- 20 • Equipment sold via foreclosure
 - 21 • Cowings guarantees remain
 - 22 • Purchase price
 - 23 ○ \$18.5MM credit line
 - 24 ○ \$6.5MM cash at closing
 - 25 • Dierich is the authorized signatory

26 (ex. 258).

27 Also on the 20th, Cowan sent RM Partners an engagement agreement with M&C
28 (ex. 259), and Boatwright drafted an LOI. (ex. 260). The next day, Dierich told Kain "I
think it will be in our best interest if Winstead sends a letter to the Linda and Owen,
REMINDING them all assets are to be kept in place and not sold, removed or otherwise
disposed of." (ex. 437). About a week later, Dierich returned an LOI to M&C and
Boatwright with his changes:

- Purchase price = \$25,000,000
 - Cash = \$5,000,000
 - Loan = \$20,000,000

1 (ex. 265). "HCMI is buying the assets of RED. Finally here!!!" exclaimed Dierich to
2 Wood on May 26, 2009. (ex. 266).

3 On May 27, 2009, Dierich sent the LOI to Kain. (ex. 269). Kain sent back a
4 redlined version, noting that Comerica couldn't agree to anything until foreclosure, but
5 did not change the cash or loan amount. (ex. 270). A few days later, Dierich told Kain
6 that they needed a strategy to secure new rentals to get them past Cowing. (ex. 275). By
7 the weekend, Kain forwarded the LOI to Campbell. (ex. 286). Negotiations continued
8 into June. (exs. 287- 291, 297- 299).

9 In mid-June, EPIC began business activities by renting to Grey Mountain (exs.
10 450, 309) obtaining a tax ID (ex. 311), and filing articles of incorporation. (ex. 312).

11 On June 15, 2009, Kain passed the deal on to Chad Lancaster in Heavy
12 Equipment group by which time it had turned into a sale for \$25 million of which
13 Comerica and GE will carry \$23 million. (ex. 307). Two days later, Comerica listed the
14 following Sources and Uses involving the EPIC deal:

Sources		Uses	
Senior Credit Facility	\$23,000,000	Debt Payoff at close	\$31,344,000
Sponsor Contribution	\$4,000,000		
CMA/GE Discount to Loan	\$4,344,000		
Total Cash Sources	\$31,344,000	Total Cash Uses	\$31,344,000

18 (ex. 315). The next day, Comerica formally offered EPIC a term sheet for \$23 million.

19 (ex. 316). The day after, Kain indicated that the lenders might take \$1 million down and
20 finance \$24 million. (ex. 320). On the 22nd, the deal was still in flux. Dierich proposed:

- 21 • \$3.5MM preferred
- 22 • \$500k Note
- 23 • 1M to Comerica
- 24 • \$500k to M&C

25 (ex. 323). Kain then sent a new term sheet for \$24 million:

- 26 • \$24,000,000
- 27 • 3 year term
- 28 • Interest
 - \$10,000,000 at cost of funds + 2%
 - \$14,000,000 at Daily Adjusting Libor + 2%

1 (ex. 5250). Kain and Dierich, soon after, began bickering over the terms. (ex. 326). On
2 June 25, 2009, Dierich sent Whipple the EPIC kickoff letter. (ex. 329). The next day
3 Cowan told Dierich that M&C needed 30 more days to come up with the \$1 million. (ex.
4 331).

5 H. July 2009 to Present

6 1. *The Economy*

7 The housing market slide was predicted¹¹³ to continue in 2009, but begin to
8 recover in 2010:

<u>Region</u>	<u>Year</u>	<u>Housing Starts</u>	<u>Percentage Increase/Decrease</u>
Phoenix	2009	10,600	-43.8%
	2010	14,800	+35.2%
Las Vegas	2009	4,300	-65.9%
	2010	8,000	+86.9%
California	2009	[not in the report]	
	2010	[not in the report]	

9
10
11
12
13
14
15 (ex. 5155 at '1491). From a peak of 65,200 housing starts in 2005, the Phoenix housing
16 market was anticipated to bottom out in 2009 with 10,600 housing starts -- an 83.7%
17 drop. (*Id.*) From a peak of 38,300 housing starts in 2004, the Las Vegas housing was
18 anticipated to bottom out in 2009 with 4,300 housing starts -- an 88.8% drop. (*Id.*)
19 Though the anticipated bottom was not stated in the Huron Report, California housing
20 starts fell from a high of 212,900 in 2004 to 65,300 in 2008 -- a 69.3% drop.¹¹⁴ (*Id.*)

21 2. *RMMC, Dierich, and the Deals*

22 After June 30, 2009, the separate tracks of RMMC, Dierich, and the Deals, though
23 always interconnected, clearly merged.

24 On July 1, 2009, Dierich, Whipple, and Boatwright discussed whether Comerica
25 would go through with the transaction -- Dierich began to think they would back out. (ex.
26 489). On July 2, 2009, RMMC notified Dierich that his employment with RMMC has

27
28 ¹¹³ The 2009 and 2010 numbers in the Huron Report are forecasts.

¹¹⁴ Using the 2008 housing starts in Phoenix and Las Vegas as a bottom point shows drops of 70.1% and 67.1% respectively.

1 been terminated as of June 15, 2009 as a result of his job abandonment. (ex. 332). In this
2 same time period, Dierich emailed Jerry Herling about his receivable with RMMC and
3 advised Herling him that he was no longer with RMMC. (ex. 491).¹¹⁵ A week later,
4 Winstead advised RMMC that Comerica believed there was no wrongful conduct by
5 Comerica in its dealings with RMMC.¹¹⁶ (ex. 494 at 4). Comerica stated that it remained
6 interested in pursuing a business solution with RMMC, Cowing, Linda Cowing, GE, and
7 EPIC. (*Id.* at 5)

8 On July 5, 2009, after a call with Comerica, Gonzales summarized the positions
9 of Comerica, RMMC, Linda Cowing, and Cowing in an email to Cowing and Berger.
10 (ex. 5260). According to Gonzales: Comerica, during the conversation, did not address
11 the guarantees, but were focused on their balance sheet accounting; Dierich's deal would
12 give them \$26 million whereas, RMMC's deal would give them \$18 million; on a \$32
13 million loan, the loss with Dierich is \$6 million compared to a \$14 million loss with
14 RMMC. The email indicated that Cowing was dead set against working with Dierich's
15 group, but Linda Cowing would be willing to consider the idea if it met her goals.
16 Gonzales did not think Dierich had a deal. David Gonzales observed:

17 The owners need to process the reality that Comerica could push this sale
18 to the Darrin [sic] Group and our only response is a Chapter 11. We need
19 to balance this cost with the ability to walk. If the bank wants the
accounting result with Darrin [sic] they may deliver on our core goals.

20 (*Id.*) In response to Gonzales' email, Cowing asked. "Is there a way to make an offer that
21 looks better than ours but in truth has outs that do not obligate us to the whole thing?"

22 (*Id.*) Gonzales replied "I thought the same thing but it has the effect of costing you more
23 than the biz is now worth."¹¹⁷ (*Id.*) Cowing forwarded the email string to Ghilotti, with
24 the comment "I would like your thoughts. If I walk We [sic] have another competitor. A
25 lot of questions on PG if I fight it. I think I would be OK, but Linda could be exposed."

26 (*Id.*)

27 ¹¹⁵ Only the first page of ex. 491 ('2576-0001) is in evidence.

28 ¹¹⁶ The letter foreshadowed the case currently before the Court.

¹¹⁷ This is evidence of the fact that Gonzales, and by extension Cowing, knew that the EPIC offer was for more than RMMC was worth.

1 Boatwright and Winstead continued negotiations for the EPIC deal on July 15,
2 2009. (ex. 501). The next day, Dierich sent Sullivan an email detailing Cowing's
3 involvement with JS Cole. (ex. 5264). A day later, Dierich sent Whipple a current
4 pipeline for re-renters and noted that Cowing had restarted California which "makes it
5 tough for us to compete." (ex. 333). A few days later, Whipple and Dierich exchanged
6 emails including the EPIC Operational Plan. (ex. 334). According to the first paragraph
7 of the plan, "The legacy company was managed to finance its past owners lifestyle and
8 ego. EPIC's operational plan will create a cultural change that will instill pride in the
9 employees, value to its clients and generate significant returns for its shareholders." (*Id.*
10 at '2218). The plan stated that EPIC had negotiated a new loan separated into two parts:
11 1) a traditional asset backed loan and 2) a contingent loan where the company makes
12 principal payments through excess cash flows in years two and three. (*Id.*) At the end of
13 the month, Whipple sent Dierich an executive summary of EPIC for potential investors
14 detailing the loan terms, capital structure, and other pertinent information.¹¹⁸ (ex. 5268).
15 On July 30, Dierich and Fickett continued negotiating for a new lot. (ex. 504).

16 At the end of July, EPIC received word that RMMC would like to negotiate a sale
17 directly with EPIC, instead of through foreclosure. (ex. 335). At the start of August,
18 Dierich, Boatwright, and M&C discussed RMMC's request to sell outside of the private
19 foreclosure sale. (ex. 5270). EPIC offered to buy RMMC's assets directly from RMMC
20 on August 6, 2009 for \$25 million with a target closing date of September 15, 2009. (ex.
21 518). The next day, Comerica cut off RMMC's access to cash. (ex. 516). On August 10,
22 2009, RMMC advised Comerica that it would have liked to consider the offer, but that
23 Comerica cutting off cash "makes that nearly impossible." (ex. 518).

24 RMMC filed for bankruptcy on August 11, 2009. (ex. 5271). Cowing testified that
25 he did not want to file bankruptcy. (Trial Transcript of Owen Cowing, July 23, 2012,
26 13:15-24). Gonzales testified that the bankruptcy has resulted in actual costs to RMMC

27
28 ¹¹⁸ Note that this is the end of July. The original deal was to close on June 30. EPIC was still nowhere close
to having the resources available to do the deal Dierich had been dreaming about for months.

1 (such as attorney's fees) and lost opportunities (such as rentals from equipment that had
2 to be sold.)¹¹⁹ (Trial Transcript of David Gonzales, July 23, 2012, 83:14-88:15).

3 On August 12, 2009, RMMC sent out a letter advising its customers that it filed
4 bankruptcy. (ex. 5272). That day, Cowing advised Ghilotti that he had to create rental
5 income for the first two to three months of bankruptcy. (ex. 5273) Ghilotti was very
6 angry because Cowing had promised not to solicit rentals. (*Id.*) Cowing replied that "this
7 is a [sic] intermediate thing to survive for 60 to 90 days. . . . I just have to find a way to
8 survive until we can get to a point to merge." (*Id.*) Dierich forwarded the RMMC
9 customer bankruptcy letter to Whipple that day. (ex. 336).

10 On September 24, 2009, RMMC moved to sell certain equipment to Ritchie
11 Brothers for \$5,040,000 plus a split on proceeds at auction of more than \$5,945,000.
12 (Administrative Case, Dkt #99). In support of RMMC's sales motion, Gonzales declared:

13 In order to further their Contemplated Plan, the Debtors require the sale of
14 the Equipment sooner rather than later because: (i) the Debtors' continued
15 operations do not require the Equipment; (ii) a delay in sale of the
16 Equipment will result in significant operating expenses for the
17 maintenance, security and storage of the Equipment, including the
18 incurrence of administrative expenses for ongoing rent at their California
19 and Nevada locations; and (iii) the Equipment is not necessary for the
20 Debtors' ability to effectuate a plan of reorganization, including the
21 Contemplated Plan.

22 (Administrative Case, Dkt #100). At trial, David characterized the sale as cutting off your
23 arm to save the rest of your body. (Trial Transcript of David Gonzales, July 23, 2012,
24 85:2-88:16). Comerica credit bid \$7 million for the equipment in the sales motion. (ex.
25 523 at '33655). As of September 30, 2009, Rouse valued the remaining equipment at:

- 26 • OLV \$10,065,000
- 27 • FLV \$8,946,000

28 (ex. 523 at '33657). The plan was confirmed based on those values.

29 **V. Analysis of Breach of Fiduciary and Related Claims**

30 **A. Methodology**

31 ¹¹⁹ Of course, any lost opportunities assume another deal could have been done that would have left the
32 fleet intact *and* the company with debt it could have serviced, both speculative assumptions.

1 As noted above, there are four elements to the RMMC breach of fiduciary duty
2 claims. These are: 1) the existence and scope of the duty; 2) acts or omissions by
3 defendant that breach that duty; 3) proof that the breach caused damage to the plaintiff;
4 and 4) damage in fact to the plaintiff. The existence and scope of the duty has been
5 addressed above. The Court's task in the next section is to determine if any acts or
6 omissions rise to the level of a breach.

7 B. Acts and Omissions¹²⁰

8 1. *Pre-April 2007*

9 This time period is important only for historical perspective. RMMC had been a
10 highly successful company that thrived during the construction boom years of the early to
11 mid-2000's. This led to free spending, both at the company level and in terms of
12 distributions to equity holders.¹²¹ The change from the more cumbersome process of
13 separate asset financing to consolidated fleet-based financing that occurred in 2003
14 simplified the liability side of the balance sheet but also turned the debt collateralized by
15 RMMC's equipment into longer term obligations that did not turn over naturally as the
16 equipment aged. In addition, as Gonzales testified, the company had a "want" culture
17 rather than a "need" culture.¹²² As detailed above, the downturn hit RMMC hard and
18 quickly. By the time Dierich was on the scene, the bottom was dropping out of RMMC's
19 market, rental income was plummeting, expenses were growing and debt remained high.
20 The first ever technical default under the Comerica Loan occurred as Dierich's
21 predecessor was walking out the door.

22 2. *April 2007 to December 2007*

23 During this period, RMMC's financial condition continued to deteriorate and
24 Comerica began to take serious notice of it. There was no question the recession had
25 begun and was affecting the construction sector severely. Management also knew it; the

26 ¹²⁰ While acts and omissions inconsistent with Dierich's fiduciary duties are often called "breaches" in this
27 decision, it is important to remember that any such "breaches" only lead to liability if the other elements of
the tort are proven, in particular causation and damages.

28 ¹²¹ For instance, in 2006 and 2007 RMMC distributed a total of \$2.8 million to Cowing and Linda Cowing
for "living expenses." (ex. 83).

¹²² See Trial Testimony of David Gonzales, July 23, 2012, 126:14-127:10.

1 Vital Factors minutes reflect the need to address a net loss on rentals and continued
2 deterioration in the market. By September, the company had tripped three loan covenants,
3 reduced its fleet, sold the Escondido office, and reduced its work force. The company still
4 suffered a substantial loss. By the end of the year, the bank had declared a default and
5 demanded that Cowing and Linda Cowing inject \$3 million into RMMC. They were able
6 to lend the \$3 million from the proceeds of selling the Escondido property.

7 During this period, Dierich was just doing his job. Aside from emailing
8 documents to Fickett's personal email address in July and meeting with Cowan in
9 October, Plaintiffs do not seriously suggest that Dierich had yet taken any concrete step
10 in contemplation of a take-over scheme.

11 His job, it must be noted, was that of CFO. Dierich accepted the position of CFO,
12 acted as a CFO, and knew he was the CFO of RMMC until the day no longer worked for
13 RMMC. His claim that he was "only a bookkeeper" was a fantasy that he either made up
14 or convinced himself of after-the-fact to justify his actions while employed at RMMC.¹²³

15 At this time, there is no evidence of acts or omissions sufficient to breach his duty
16 to RMMC.

17 3. *January 1, 2008 to September 15, 2008*

18 A. JANUARY TO MAY 2008

19 Everything changed in January, 2008. The loan was in default and there was
20 uncertainty whether it would be renewed. Although the company had projected a small
21 profit for 2008, that result was both unlikely and unrealistic given the continued
22 deterioration in the economy. The work force was cut again and high-level salaries were
23 slashed by 30%. But the bigger blow was yet to come.

24 Cowing traveled to Texas to meet with Comerica at the end of January. Such
25 meetings were usually predictable rituals, including presentation of current financial
26 results, forecasts for the coming year, and dinner among friends. This one was different.

27 _____
28 ¹²³ The Court is compelled to note that it puts little weight on Dierich's testimony. His answers were evasive, incomplete, and inconsistent with prior testimony. His repeated inability to remember events and facts when called upon casts doubt on the other events and facts he could remember.

1 Non-cash write-offs had increased the overall 2007 loss from \$3.5 million to \$7.8
2 million, a shockingly high number. RMMC's regular loan officer, Foley, raised a number
3 of uncomfortable options: 1) more equity; 2) transfer to SAG; and 3) exploring all
4 options for the sale of the company. On the last point, Cowing even mentioned he had
5 one "pie in the sky" offer, although Cowing doesn't remember that.¹²⁴ A couple of weeks
6 later, the transfer to SAG occurred and Kain and Sullivan appeared on the scene. The
7 relationship with Comerica had morphed from lending to collection; the advance rate
8 against the collateral was decreased, the interest rate increased and more belt-tightening
9 was required.

10 Back in Arizona, Cowing told the team that he was tapped out and he advised
11 them that the future could be uncertain. It was no surprise to him that people might start
12 thinking about their options. (Trial Transcript, Owen Cowing, July 25, 2012, 149:2-
13 150:24). But this bleak scenario didn't deter Cowing from buying a \$45,000 Mercedes on
14 February 3, although he didn't have the \$1.5 million necessary to avoid having the
15 RMMC credit being transferred to SAG.

16 Unquestionably, this is the time when Dierich began thinking about his own
17 future and a potential purchase of the assets of RMMC. He told Foley that he was
18 resigning as CFO of RMMC He formed HCMI on February 12, 2008, reconnected with
19 Cowan, an investment banker he had met through other deals, now with M&C, and struck
20 up a conversation with the Lukes, other acquaintances with access to sources of money.
21 These activities were not concrete enough and Dierich was not sophisticated enough, to
22 be part of a grand plan to take over RMMC without the knowledge or consent of Cowing.

23 Cowan was the first of the potential deal makers to arrive -- as early as October
24 2007.¹²⁵ It is neither abnormal nor suspicious that Dierich began a relationship with an
25 investment banker in October 2007; indeed, it is consistent with the troubles RMMC
26 faced. Namely, by September 30, 2007, RMMC was out of compliance under three

27
28 ¹²⁴ This is an example of where the Court finds the written record more credible than the trial testimony.

¹²⁵ And one of the last to leave -- Cowan was discussing the EPIC deal with Dierich and others just before RMMC filed for bankruptcy

1 Comerica Loan covenants: Tangible Net Worth Covenant, Debt-to-Tangible Net Worth
2 Ratio Covenant, and Interest Coverage Ration Covenant. Further, RMMC's losses
3 continued to slide as the economy crumbled.¹²⁶ Reaching out to Cowan at this time was
4 consistent with Dierich's duties to RMMC as CFO of RMMC.

5 Nonetheless, some of Dierich's dealings with Cowan were questionable. He and
6 Cowan had met with Fickett before Cowan ever met with Cowing and Dierich had given
7 Cowan confidential information without any non-disclosure protection. Dierich discussed
8 with Cowan several different possibilities for RMMC, including an MBO. Eventually,
9 after prodding from Cowan, Dierich set up a meeting with Cowan and Cowing but with a
10 proviso: do not discuss the meeting with Fickett or the sharing of financial statements;
11 instead, focus the roll up strategy, exit and small opportunity for Cowing to receive a
12 potential participation. (ex. 33). Recollections of that meeting diverge, not surprisingly,
13 but the fact is that Cowan pitched M&C to Cowing and later sent an engagement letter.
14 Afterwards, Dierich asked Cowan to represent HCMI's interests with Comerica,
15 acknowledging that he had a conflict of interest. (ex. 363). After the meeting, Cowing
16 decided not to engage M&C, but instead to pursue FocalPoint, another money source.

17 The record is sparse as to what happened with FocalPoint from that point forward.
18 In late May, Cowing apparently had a lunch with representatives of FocalPoint. There is
19 no documentation that Cowing followed up with his May luncheon with anyone --
20 including Dierich.¹²⁷

21 Cowing's original rebuff did not dampen Cowan and Dierich's relationship.
22 Dierich kept sharing information with Cowan. Cowan told Dierich why Cowing didn't

23 ¹²⁶ As of November 1, 2007, RMMC projected a 2007 loss of over \$2.5 million.

24 ¹²⁷ The Court must digress. Much of this case centers on what Dierich did or did not do in his role as a CFO
25 to find financing for the company. The same question can be asked of Cowing in his role as CEO. Surely,
26 as the chief executive, he had a responsibility to solve the Comerica problem at least on par with Dierich's,
27 if not greater. But, the record is primarily silent on his communications with potential investors. There is:
28 no follow up email with Dierich about Orion; no thank you note to FocalPoint for lunch; no "who's this
Bellizzi guy" reply to Dierich's email; no "what's going on" phone calls to M&C come November 2008.
But for two parties -- Chapman and JS Cole -- the record is devoid of Cowing's efforts to save what he sees
as HIS company. His actions remind the Court of the CEO of Enron denying all responsibility for its
downfall by blaming the accounting department. In short, the record is thin at best on whether Cowing ever
stepped up to take some responsibility as the CEO of RMMC on these critical, all-important issues, at least
until much later in 2009 when the end was in sight.

1 want to sell and that he, Cowan, understood the reasons. Eventually, in July, Dierich and
2 Cowan discussed a \$42 million asking price for RMMC (ex. 68) -- the exact price
3 Cowing asked for with Chapman.

4 The sharing of confidential documents and the "do's and don'ts" directive may
5 have been technically inconsistent with Dierich's duty, but, as the subsequent discussion
6 will show, nothing came of these acts. Dierich did not hide his relationship with Cowan;
7 indeed, he was the one who set up a meeting between Cowan and Cowing. While Cowing
8 initially chose FocalPoint instead of M&C, that relationship went nowhere. The likely
9 explanation is that Cowing determined, as he told Cowan, that any such deal would not
10 yield much for him personally¹²⁸ and there were adverse tax consequences of selling.¹²⁹
11 There certainly is no evidence of any potential deal that Cowan had garnered for RMMC
12 that Dierich did not pass on to Cowing at this stage of the game.

13 Likewise, while the record primarily focuses on the Lukes' relationship with HIG
14 (discussed more fully below), such a financing entity could do a deal purely for the
15 benefit of RMMC, as well as finance a Dierich buyout. Indeed, the Lukes' entity, Eagle
16 Mountain, sent a solicitation package directly to Cowing at the RMMC offices. While
17 Cowing denies having received it, the Court finds it more likely than not that it found its
18 way to the intended recipient.

19 Of course, the formation of HCMI was purely for Dierich's benefit and not for any
20 benefit of RMMC. While the formation of a corporation is not sufficient to prove a
21 breach, it is suggestive of a first step. In any event, there is other evidence of Dierich's
22 intentions and state of mind during the early part of 2008. First is ex. 363, an email from
23 Dierich to Cowan that exhibits his awareness that proceeding with HCMI while still CFO
24 at RMMC creates a conflict of interest:

25 The ball seems to shift every second. Comerica would love to meet with
26 you only as I am **still CFO here and I bring the conflict**. I don't know if
your [sic] comfortable doing that as a representative of HCMI, (My entity)

27
28 ¹²⁸ The lack of a "big pop."

¹²⁹ Although the evidence never addressed what those consequences might be, it is likely they related to depreciation recapture.

1 or not. I don't know why he decided to spring this on me at the last second.
2 In any event, let me know your thoughts.

3 (*Id.*) (emphasis added). This email also reveals that Dierich was considering, and had
4 likely spoken with Cowan about, the possibility that M&C would represent HCMI rather
5 than RMMC. We know that the existence of conflict had been on his mind, as
6 demonstrated by the fact that he told Comerica a month before, at the time of the transfer
7 of the RMMC credit to SAG, that he was leaving the company,¹³⁰ a reasonable inference
8 of which is that he knew he needed to cure the conflict if he was to pursue RMMC on his
9 own. The fact that he had informed Comerica of HCMI is confirmed by Terry Yancey's
10 voice mail of March 28, asking to confirm HCMI's address in advance of a visit by Foley
11 to the Valley.

12 At the same time, Dierich was in contact with Cowing. He emailed Cowing to
13 advise that a "friend" had asked if current ownership ever thought of selling or merging,
14 to which Cowing responded: "I am open to all alternatives," and later set up the meeting
15 with Cowing and Cowan described above.

16 This is a good time to pause and think about the big picture. The reality is that any
17 MBO, roll up, or other merger or sale transaction could not be done without the
18 cooperation of Cowing and, probably, Linda Cowing. They owned 100% of the equity
19 and constituted the board of directors.¹³¹ Although the EPIC "kick off" plan of a year and
20 half later used the term "hostile takeover", the truth is that, for a closely held business like
21 this one, any deal at this time had to be approved by Cowing. RMMC was not a public
22 company for which a rival or minority shareholder could launch a proxy fight. If RMMC
23 was to be sold, merged or rolled up (whether to a third party or to existing management),
24 that road ran straight through Cowing.¹³² It is fair to infer that Cowan knew that, that the
25 Lukes knew that, and that the people behind every other deal that was considered in the

26 _____
27 ¹³⁰ Exhibits 355, 5029.

28 ¹³¹ There is no evidence that the board actually ever functioned as such.

¹³² Of course in 2009, the focus shifted to acquiring assets through a foreclosure by Comerica but there was no whiff of that scenario in the first half of 2008. Comerica could, of course, sell its loan to a third party without Cowing's agreement, but that would not result in a change in management or ownership.

1 next few months knew that. At bottom, Dierich had to know that too.¹³³ Thus, Dierich's
2 plans at this point necessarily had to include getting Cowing to go along with any deal he
3 presented, whether it was "his deal" or a third party's deal. As time went on, that calculus
4 would change, particularly once Comerica moved toward a solution that would involve
5 liquidation of its collateral, in one manner or another. But that time had not yet come.

6 Viewed against this backdrop, the Court finds that Dierich's actions as of the first
7 half of 2008 had not yet fully ripened into a breach of fiduciary duty. He knew the
8 company needed a financial fix, he knew that the Comerica loan was in default and in the
9 hands of the work out folks, he had tapped into known sources (Cowan and the Lukes) to
10 look for a solution, and he knew that any solution would have to be approved by Cowing.
11 At the same time, he also knew that he was swimming in deep waters and that a conflict
12 of interest was staring him in the face.¹³⁴ With this in mind, the analysis turns to the
13 second half of 2008.

14 B. JUNE TO SEPTEMBER 15, 2008

15 The next period was one of intense activity. The SAG group at Comerica
16 continued to apply pressure to reduce the credit facility and impose further conditions on
17 extending the existing forbearance agreement beyond June 1. The value of the equipment
18 inventory slid further as the market contracted and equipment supply exceeded demand.
19 The outcome of discussions with Comerica in May was 1) a proposed forbearance of 45
20 to 60 days; 2) a reduction of the advance rate to 88% with a target of 80% (going in, the
21 bank wanted 87.5% with a monthly curtailment of 1.5% for 6 months), 3) an increase in
22 the interest rate, and 4) the need for some plan for new equity. Cowing and Linda Cowing
23

24 _____
25 ¹³³ In addition, there is plenty of evidence in the record that Cowing was ready to sell if the deal was right
26 or if the crumbling economy/deteriorating company left him no choice. When times were good, he was
27 ready to entertain an MBO with Grant Getman but didn't want the purchase price to be paid by future
28 profits of the company; in his view of things, this would mean he was paying himself. A good example of
his state of mind in 2008 is in Chapman's deposition: "[H]e expressed a desire to slow down or sell out part
of his company or all of it." Deposition of Roger Chapman, December 14, 2011, 11: 22-24. Yes, Cowing
would sell, but only if it were the right deal.

¹³⁴ In retrospect, of course, resigning in the first quarter of 2008 would have been the right thing to do, for
himself and the company.

1 made it clear they had nothing more to contribute, although Cowing did find the time and
2 money to buy a \$450,000 lot in Payson, Arizona on May 27.¹³⁵

3 Dierich appeared to be obsessed with HIG. This deal started percolating in
4 January 2008 but lay more or less dormant until April. In that month, the Lukes sent a
5 package of information on their company, Eagle Mountain, to Cowing. The Lukes told
6 Dierich they wanted a "sell side" arrangement with RMMC so that they wouldn't be
7 limited to representing HIG. Dierich apparently believed there would a spot for him post-
8 acquisition, although probably no immediate equity, but the record is devoid of any
9 rational basis for this belief. During this time frame, the structure of four company roll up
10 was discussed with RMMC being the last entity to be purchased, subject to the raising of
11 adequate capital and closing on another of the companies, considered by HIG to be the
12 linchpin. In reality, HIG's actual level of interest was extremely low as RMMC's
13 EDIBTDA was below their threshold and the company was anticipating substantial
14 capital expenditure in the next year; indeed, by August, HIG had passed on the deal.¹³⁶

15 It is stunning how flimsy the HIG transaction was in reality. The entire record
16 consists of two internal documents with virtually no detail, (exs. 381, 5119) plus the
17 designations from the Taylor deposition. The unvarnished truth is that there was no HIG
18 deal; it was never even close to description, let alone consummation. Exhibit 381 put
19 RMMC's chance of doing a deal with HIG at anywhere between 0% and 10% and that
20 seems generous. It was a dream, a chimera, never taken seriously by what Dierich
21 described as "my PEG." Nothing in the record suggests any direct contact between
22 Dierich and HIG; the only dealings were a few phone calls between Bill Luke and Taylor.

23 It is unknown what Dierich would have gotten from this non-existent deal. It's
24 described as an LBO but there is no indication of whether HIG would be asked to invest

26 ¹³⁵ Cowing and Valinda Cowing were in Payson on April 1 looking at properties. Ex 5037. This latter point
27 is not meant to be gratuitous; rather it is further evidence of Cowing's intent to step away from the business
28 and of his view of the type of lifestyle he wanted to have, notwithstanding the precarious condition of
RMMC and his outstanding \$8 million guarantee.

¹³⁶ Indeed, HIG doesn't leave Dierich's mind until the start of 2009. The Court will analyze this transaction
more fully below.

1 debt or equity or whether management (Dierich and other managers) would get equity or
2 even a job. In short, it's all pure speculation.

3 What about the Bellizzi opportunity? Dierich did not hide Bellizzi from Cowing.
4 On August 15, 2008 Dierich forwarded an email with the heading "buyer options" from
5 Bellizzi to Cowing with pertinent information in Bellizzi's email -- Bellizzi has two all
6 cash buyers; one with \$2 billion cash and another with \$12 billion available. Cowing
7 admits that he received this email. Cowing, as the CEO, had all the material information
8 to decide whether a follow up should happen, but there is no evidence that he ever did.
9 Here, it is apparent to the Court that both Cowing and Dierich made the business decision
10 not to pursue Bellizzi.

11 What did Dierich do or not do with the GECF deal? Based on the facts laid out
12 above, the Court concludes that Dierich did delay making a meaningful response to the
13 GE Term Sheet while he waited for a definitive response on his illusory HIG deal. GECF
14 delivered the GE Term Sheet on July 30, 2008. Dierich got an initial turn down from HIG
15 in mid-August and another turndown in late-August. Ben "ha[d] a nice talk" with Dierich
16 on September 10 who said that Dierich thought they should go with GE but he needed to
17 hear from Cowing, adding that maybe they would just sell the whole company and stay
18 with Comerica in the interim.¹³⁷ Nothing occurred thereafter.

19 Did Dierich share the GE Term Sheet with Cowing? There's no credible definitive
20 evidence that he did. But, was Dierich hiding it? No. Dierich shared it with the Auditors
21 and Winger, plus Linda Cowing knew about the meeting with GECF. In fact, according
22 to Winger, it was Dierich's idea to include the GE Term Sheet in the report.¹³⁸ Unlike
23 Comerica and GECD, Dierich made no attempt to control the Auditors with a "no need to
24 know for Owen" type email. If there had been such an effort, it would have surely failed.

25 Dierich's interaction with GECF must be put into the larger context of RMMC.
26 By this point, Dierich had brought M&C and Eagle Mountain to Cowing, who decided to

27 ¹³⁷ This phantom sale could be any number of parties: HIG? Chapman? M&C deal? HCMI?

28 ¹³⁸ Trial Transcript Troy Winger, July 23, 2012, 188:22-19:10. It was Bishop who determined not to include a reference to the GE Term Sheet in the audited financial statements. (*Id.*, 192:6-18, Trial Transcript Doug Bishop, July 13, 2012, 193:1-194:23, 196:24-197:3).

1 pursue FocalPoint instead. FocalPoint never went anywhere. Cowing, over the spring and
2 summer had fallen ill, and at this point was just recovering. When the GE Term Sheet
3 came in, Cowing was pursuing a deal with Chapman; Dierich thought he was pursuing a
4 deal with HIG. The status of RMMC was so fluid at this point that the Court finds that
5 Dierich's delay was not an act or omission that breached his duty to RMMC.

6 *4. September 15, 2008 to- December 2008.*

7 The HIG deal refused to die, at least in Dierich's mind. By October/November of
8 2008, internal bank documents show that Comerica was still waiting to see if this
9 transaction would close because it was projected to pay off the bank in full. But, by then,
10 it had become a "mystery transaction" that truly had no substance. There was no LOI,
11 there was no commitment -- the PEGs had passed. One of the few clues that there was
12 still a flicker of hope was a phone message on November 21 from Bill Luke suggesting
13 that HIG might still have some interest in an MBO. But nothing came of that, either.
14 Clearly, by February the "second" HIG deal was officially dead: "Too small for platform,
15 not a fit with Redfish."¹³⁹

16 What did Cowing know about all of this? Everything -- or nothing, depending on
17 your point of view. What does the record tell us? According to Kain, he got the go ahead
18 on "Darren's deal" directly from Cowing at a chance meeting in an airport in September.
19 Cowing denies any such contact and denies knowledge of any such deal. The only deal he
20 knew about, per his testimony, was the engagement of M&C. We know from internal
21 bank documents that representatives from Comerica and GECD spoke with Cowing as
22 late as December 1 to get an update, a bleak one as it turned out, on the company's
23 operations. But

24 The primary purpose of this phconv was to discuss a Plan B in the event
25 that **the pending sale of the co. does not close**. Thus far in 2008,
26 ownership has attempted to raise additional equity from investors and **is**
27 **now attempting to sell the co.** Consequently, Owen Cowing does not
28 have a viable alternative plan. We have asked the co. to propose a plan
that substantially reduces the subject debt but enables it to maintain a
viable business that will generate sufficient cash flow to service
obligations and survive.

¹³⁹ Redfish was an existing company in which HIG had an interest.

1 (ex. 523) (emphasis supplied). The Plan B focus (and the "pending sale") was explained
2 to Cowing in an email from Kain right before the call. However, we also know that, prior
3 to this telephone conference, Dierich asked Kain to keep mum about the PEG as Cowing
4 was not in "need to know" status¹⁴⁰ and to advise GE to do the same. When Kain wrote to
5 Dierich that he thought GE got and understood this message, Dierich's response was
6 telling: "God I hope so." In short, Dierich desperately wanted to make sure that the HIG
7 deal was not openly discussed between the banks and Cowing.¹⁴¹

8 Thus, at this time, Dierich was working on the HIG deal through the Lukes that he
9 believed would finance an MBO that would leave him, if not in a position of authority, at
10 the least with a job -- and the gratitude of a paid off bank. Dierich believed that if Cowing
11 found out about the deal too early, Cowing would squelch it because it did not fit in his
12 personal plans.¹⁴² But the plan needed Comerica's blessing, so he shared it with Kain. In
13 fact, he shared not only the facts of the deal but his fabricated version of how close it was
14 to reality. He told Kain on July 3, 2008 the truly stunning lie that "I have my PEG's
15 agreement to bring you guys down to 60% which is good news!!!!!" (ex. 374). To
16 accomplish this, he falsified a number of documents, from the Snell & Wilmer
17 engagement letter to the closing agenda. This held the banks at bay while he feverishly
18 tried, to use his term, to make s*** smell like roses.¹⁴³ Meanwhile, Cowing knew that
19 M&C was still around and authorized the signing of the engagement letter. The banks
20 would have been delighted to get paid in full from the HIG deal but they also hadn't seen
21 any detail and understood that, even in the best case, there were a number of significant
22 contingencies. So they kept focusing on Plan B and trying to get the credit reduced as
23 much as possible.

24 But what about the fact that "all roads lead through Cowing," as explained above?
25 It is unlikely that Dierich thought he could do a deal without Cowing. More likely is that

26 _____
27 ¹⁴⁰ There is not a benign explanation for this request from Dierich.

28 ¹⁴¹ As noted above, the HIG transaction was illusory; in a real sense, this was much ado about nothing.

¹⁴² Add to it, Dierich's description of Cowing as an alcoholic and the "need to know" nature of the deal becomes even more apparent.

¹⁴³ His attempt at horticulture will be discussed more thoroughly below.

1 he believed that if he was able to put together a firm deal that was satisfactory to the
2 banks, part of which would be the release of Cowing's and Linda Cowing's guarantees as
3 suggested in a number of internal bank documents, then Cowing would have no choice
4 but to agree, even if it meant he would be shown the door. In answer to Kain's question
5 how Cowing and Linda Cowing would feel about being bought out,¹⁴⁴ he said on July 3,
6 2008: "Linda wants out yesterday. Owen I don't know yet. I tried to have a conversation
7 with him today"

8 Were Dierich's actions in connection with the supposed HIG transaction a breach
9 of his fiduciary duty to RMMC? He was actively misleading the CEO of his company
10 and withholding from him critical information on what appeared to be major transaction.
11 He was lying to the banks about how close the deal was to getting done. But the deal was
12 illusory. It may have been feckless, but it was not a breach of Dierich's duty *to the*
13 *company* to spend time and resources on a fool's errand merely because it demonstrated
14 that he was interested in an MBO that didn't include Cowing.

15 This highlights a critical issue in this case: it is important not to conflate RMMC's
16 interests with Cowing and Linda Cowing's interests. As noted, Dierich had no fiduciary
17 duties to Cowing and Linda Cowing. An MBO through HIG, however much a fantasy,
18 could have been a good result for RMMC, whether Cowing remained or not. But because
19 it died on the vine, we'll never know; and it died not because of Dierich's efforts but
20 because it was never a real transaction.

21 In sum, the Plaintiffs ask the Court to believe that Dierich made up the second
22 HIG transaction to keep alive his ultimate dream of EPIC's taking over RMMC. The
23 Defendants ask the Court to believe the Dierich made up the transaction because he knew
24 it was the only way he could stave off foreclosure by Comerica, an obvious benefit to
25 RMMC. In the end, the Court finds that at this point in time, the mystery HIG transaction
26 -- as fallacious as it may have been -- was the only opportunity then under discussion. Its
27 most significant effect was to persuade Comerica to forestall collection efforts; it did not

28 ¹⁴⁴ This is another indication that Kain believed that Cowing was in the loop, at least to some extent.

1 impede other options for the company. This was not a breach of Dierich's fiduciary duty
2 to RMMC.

3 5. *January 2009 to March 2009*

4 The beginning of 2009 was a critical time for RMMC. The market remained in
5 the tank and Comerica was breathing down RMMC's neck. Yet Cowing remained oddly
6 disengaged. Despite having a history of fairly regularly visiting Dallas when times were
7 good to meet with the Comerica,¹⁴⁵ now that RMMC is up against the wall, he testified
8 that he had no meetings, phone calls, or other personal contact with his bankers from
9 February through June 2009. (Trial Transcript, Owen Cowing, July 20, 2012, 242:24-
10 245:20). The responsibility of dealing with Comerica and M&C was put squarely on
11 Dierich's shoulders. What did Dierich do with this responsibility? He stalled Armand --
12 the only interested party clearly in the pipeline -- so RMMC could find out what offers a
13 pitch book would bring. Cowing agreed with this decision.

14 During this time frame, January 20, 2009, Dierich wrote Kain:

15 My personal opinion is that perhaps CMA and GE would prefer
16 that Ross and I just pull out and let Red Mountain figure out the next step?
17 I understand the need to pay off the debt, but the more writing I do the
18 [more] CMA/GE, allows less time to make shit smell like roses. If
19 CMA/GE can't agree on an extension, I would suggest closing on the
20 collateral and the Cowing's [sic] filing BK.
21 What do you think?

22 (ex. 160). This email is key. It shows Dierich's state of mind as he came to the point
23 where he must make public his desire to sell RMMC. This email shows where Dierich's
24 loyalties lay while he and Cowan finalized the pitch books.

25 Did they lie with Comerica, as Dierich has claimed, the creditor of any allegedly
26 insolvent corporation? No. Dierich was seriously considering pulling out, leaving
27 Comerica to deal directly with Cowing, but no longer with Dierich. When Dierich finally
28 told Kain that there are no LOIs as of January 30, Kain reacted in anger and amazement:
"None ? NONE ? NADA ? Wasn't that the whole point of not coming Friday ? You

¹⁴⁵ As late as May 2008, Cowing would pick up the phone to call his banker. (*see* ex. 5043).

1 would be too busy reeling 'em in ? I've already fended off Craig Sarna for you and you
2 don't even have ONE LOI !!!!!" (ex. 165).

3 What then of RMMC? He convinced Cowing, his CEO, to defer Armand to see
4 whether M&C could bring in an offer. But, at this point, a pitch book had not even been
5 finalized. What offers, exactly, could Dierich have been waiting on? In this email to
6 Kain, Dierich suggested that if an extension couldn't be agreed upon Comerica should
7 close on the collateral and force the shareholders of RMMC into bankruptcy. These are
8 not the actions of a loyal CFO.¹⁴⁶

9 Who then was Dierich loyal to? Himself and M&C. The January 20 email
10 contemplated that "Ross and I just pull out and let Red Mountain figure out the next
11 step?" M&C was RMMC's agent, not Dierich's. But apparently Dierich saw this
12 differently. This viewpoint is confirmed when in March Dierich told Kain "Ross and I
13 will call you . . . Just be prepared, we might be pulling out." (ex. 188). By the end of
14 January, Dierich thought he and Cowan were a team. And unlike earlier in his tenure at
15 RMMC, Dierich put his thoughts into clear, concrete action with the preparation of the
16 pitch books. Indeed, it was at this point that Dierich tried to make s*** smell like roses.
17 He did so by identifying three different parties and authorizing a different pitch book for
18 each: RMMC, potential investors, and Comerica.¹⁴⁷

19 Key to the task of sale or refinancing RMMC was the preparation of the pitch
20 books. In these 18 days between January 26, 2009 and February 12, 2009,¹⁴⁸ at least five
21 different pitch books were prepared.

23 ¹⁴⁶ Do not mistake the Court's analysis as conflating a duty to RMMC with a duty to Cowing and Linda
24 Cowing. The Court is simply pointing out Dierich's state of mind and his lack of loyalty to RMMC.

25 ¹⁴⁷ The Court notes that any reference to "the pitch book" in the singular is a misnomer. There was no one
26 pitch book; instead, multiple versions were produced at trial. As Cowan testified, there were many drafts
27 exchanged. (Trial Transcript, Ross Cowan, July 23, 2012, 277:11-14).

28 ¹⁴⁸ The Court does not fully understand why it took so long for pitch books to be sent out. In an email in
March 2008, Cowan told Dierich that creating pitch books would take about a month. In fact, an early
version of a pitch book was created no later than October 12, 2008; a mere eleven days after engagement.
Yet, no pitch book was sent to Cowing until the end of January 2009. Cowan testifies that this was due to
usual downturn in investor interest around the holidays. (Trial Transcript, Ross Cowan, July 23, 2012,
277:15-278:13). Ultimately, while this is a plausible explanation under normal circumstances, this approach
makes little sense for a company that is in such dire need of investment or a sale.

1 Pitch Book One, exchanged internally at M&C, showed Fickett, Sale, and Dierich
2 under "Management Bios." Pitch Book Two, sent from Dierich to Cowing, showed
3 General Sales Manager, Director of Service, and President under "Management Bios,"
4 without names. Subsequent versions of pitch books sent out by Dierich or Cowan did not
5 have Cowing or his position listed, but instead had Chief Financial Officer listed under
6 "Management Bios." The Plaintiffs make much of the omission of Cowing from the pitch
7 books sent out to third parties while the one given to Cowing included his name as part of
8 continuing management.¹⁴⁹ While these changes are indeed true, the Court finds it
9 curious that no party discussed the ever shifting numbers in the pitch books. These
10 numbers paint a clearer picture of Dierich's motives in pursuing a sale.

11 Pitch Book One proposed a transaction with a senior credit facility of
12 \$32,000,000, a carryback note to the seller of \$2,000,000, and an equity investment of
13 \$6,621,985. This total investment of \$40,621,985 would have yielded cash to the seller of
14 \$4,173,985, payment in full of the \$31,448,000 Comerica Loan, and a commission to
15 M&C of \$3,000,000. These exact same numbers are shared with Cowing in Pitch Book
16 Two. These numbers were no accident. Dierich knew from the trip to Utah that Cowing
17 wanted around \$42 million dollars for his company. That was also the number that
18 Dierich and Cowan discussed in the summer of 2008. The number in Pitch Book One and
19 Two, while a million and a half less, is still within the ball park of Cowing's asking price.
20 Note that in addition to paying off RMMC's debt and wiping out the owner's guarantees,
21 the seller (read Cowing and Linda Cowing) would receive \$4,173,985 in cash, plus a
22 \$2,000,000 note, allowing them to recover their \$3 million loan. Dierich told Cowing as
23 much when he said that he thought that any buyer would honor the loan. Even if the new
24 buyer wanted Cowing out -- a reality that he should have known by now was probable --
25 he would have some future stream of payments from the buyer. Moreover, a sale
26 involving a note would avoid certain tax consequences, as Grant testified when

27 ¹⁴⁹ The Court finds that importance of the differing bio pages to be overstated. Pitch Book Two described
28 the transaction as "Management seeks to partner with a financial sponsor to facilitate a management led
buyout of current ownership . . ." Surely, upon reading this, Cowing should have realized that if the
transaction went through, he might no longer be an owner of RMMC.

1 describing his proposed sale. Remember, Cowan knew that one of Cowing's concerns
2 with a sale was the tax consequences. Make no mistake; Cowing relied on Pitch Book
3 Two. He sent it to Andy Jackson on March 13, 2009. Pitch Book Two had enough
4 perfume to entice Cowing, RMMC's CEO, to authorize its release.

5 After sending Cowing Pitch Book Two, Dierich, Cowan, and Whipple game
6 planned for a dinner meeting with Comerica to make it feasible that a sale could occur.
7 Dierich decided that topics to stay away from during the meeting included: a haircut for
8 Comerica, the purchase price, and money to Cowings. Whipple noted, rightly so, "kinda
9 wimpy." Why were these stay aways? By this point, Dierich knew that a \$40 million
10 asking price was too high and Comerica would see right through it. He also knew that
11 Comerica wanted a total payoff. (ex. 5109). Additionally, Dierich knew that Comerica
12 was not going to let Cowing and Linda Cowing get paid before Comerica's debt was paid
13 off. So what did Dierich do? He sent Comerica Pitch Book Five under which: the
14 investors were asked for a total of \$34,000,000 (\$16,000,000 via a senior credit facility
15 and \$18,000,000 in equity), the debt would be paid off (\$31,000,000), RMMC would get
16 working capital (\$1,000,000) and M&C got paid (\$2,000,000). Pitch Book Five smelled
17 good enough to Comerica to propose an extension of the Second Forbearance the next
18 day.¹⁵⁰

19 So what happened between the time Dierich sent Book Two to Cowing and Book
20 Five to Comerica? Dierich reviewed and approved a pitch book to be sent to investors
21 (Pitch Book Three) and Whipple sent a different pitch book to a party who ultimately
22 made an offer (Pitch Book Four).

23 The numbers in Pitch Book Three were remarkably lower than those in Pitch
24 Books One and Two. In Pitch Book Three: the total asking price dropped almost \$12
25 million to \$29 million (\$19,000,000 senior credit facility, \$2,000,000 seller note, and
26 \$8,000,000 in equity); the debt payoff dropped to \$22 million, leaving Comerica \$9
27 million short in a loan repayment; the cash to seller dropped to \$2 million; capital
28

¹⁵⁰ Comerica was still using Pitch Book Five as late as June 11, 2009 when Kain forwarded it to Foley.

1 expenditures, a new category, was funded at \$2 million, and fees and expenses dropped
2 to \$2 million. Pitch Book Three was circulated four days after Cowing was shown Pitch
3 Book Two. Ten days later, Whipple sent Apex Pitch Book Four which had similar,
4 though slightly higher, numbers than Pitch Book Three. A critical difference in Pitch
5 Book Four was a notation added to the debt payoff amount of \$25 million: "current debt
6 holder will be willing to negotiate lower payoff."

7 What did Pitch Books Three and Four communicate that the others did not? For
8 one, they told investors that they could negotiate a haircut with the Comerica. Second,
9 while they still asked for a return to the sellers, it was half of what Cowing had been told.
10 Nonetheless, the \$3 million to the seller (\$1 million cash; \$2 million note) was likely no
11 accident -- it was the exact amount of Linda Cowing and Cowing's loan. Finally, the
12 latter pitch books told investors that some of their money would be used for working
13 capital to improve the business the investors would be buying. Pitch Books Three and
14 Four artfully balanced the Cowing's wants, Comerica's needs, and the realities of the
15 market; a balancing act that, if done correctly, actually could have resulted in a sale. In
16 short, Dierich authorized pitch books that could pass the investors' sniff tests.

17 The pitch books resulted in three proposals, the most promising of which was
18 from Signature.¹⁵¹

19 Dierich's preparation and distribution of different pitch books were acts
20 inconsistent with his duty to RMMC, well beyond what he had done in the past.
21 Dierich's acts in 2008, as objectionable as they may seem, were at bottom attempts to
22 garner a buyer for RMMC (*e.g.*, his dealings with HIG) or to stave off foreclosure by
23 Comerica (*e.g.*, his falsification of documents). Starting in January 2009, Dierich
24 purposefully misled the CEO of RMMC and RMMC's bankers about a concrete
25 marketing effort designed to sell RMMC with the primary goal of achieving a result for
26 his own benefit whether or not it was the best deal for RMMC.

27 6. *April 2009 to June 2009*

28 _____
¹⁵¹ The details of the three offers and their presentation to the relevant parties are set forth elsewhere.

1 From April to June 2009, the CEO and CFO of RMMC were working at cross
2 purposes in their efforts to satisfy the Comerica Loan. Cowing pursued a transaction to
3 integrate some of RMMC's machinery and personnel into JS Cole. Dierich pushed for
4 the Signature transaction and then, when it became obvious that the Signature deal was
5 dead, chased a deal for his own company EPIC.

6 Once brutally aware of the true value of RMMC, Cowing also made a decision.
7 He would take RMMC into bankruptcy before letting someone else occupy his chair.
8 Cowing's reaction to the Signature proposal is consistent with his past approach to selling
9 what he viewed as his company. He wouldn't sell RMMC to Sale and Fickett because he
10 didn't want them to pay for it using "his money." He told Cowan that he wasn't interested
11 in selling RMMC due to the lack of a big pop coupled with the adverse tax consequences
12 of a buyout. He asked Chapman for \$42 million for RMMC -- an amount that Chapman
13 found unrealistic. When the Signature deal came, he decided that he'd take the company
14 into bankruptcy before selling it to Robert Schwab and Maetzold. Cowing may have been
15 justifiably shocked by how low the offers were (after having been given Pitch Book
16 Two), but the cold, hard reality was that in March 2009 RMMC was only worth, at best,
17 \$16-25 million. The fact that Cowing wouldn't agree to sell RMMC, a company he had
18 spent over 20 years building, on anyone's terms but his own is consistent with his past
19 approach.

20 Based on this decision, Cowing took action by putting together the April
21 Settlement Offer that, in his mind, topped Signature's highest offer of \$16.5 million by
22 \$1.5 million. The April Settlement Offer and all subsequent dealings with JS Cole were
23 attempts to integrate the operations of RMMC into JS Cole.¹⁵² Cowing worked hard to
24 make this integration a reality. He went on sales calls, arranged interviews for ex-RMMC
25 employees, directed RMMC customers to JS Cole, and assisted in transferring outside
26 owners from RMMC to JS Cole. Cowing's decision to lay off RMMC's sales staff was no

27 ¹⁵² Much is made by the parties of whether Cowing was an employee, independent contractor or something
28 else with JS Cole. Regardless of the label, Cowing's motive was to bring in some RMMC machinery,
employees, independent owners, customers, and, most importantly, himself into JS Cole. These efforts
continued post-bankruptcy.

1 happenstance either. This decision coincided with his game plan of an RMMC/JS Cole
2 integration.

3 Dierich fought the JS Cole integration actively, yet surreptitiously. Immediately
4 upon learning of the framework for the April Settlement, Dierich violated the
5 attorney/client privilege and forwarded the proposal to Kain, thereby giving Comerica
6 advance warning of a forthcoming offer from RMMC. Additionally, the forwarded email
7 contained a tidbit that is not part of the April Settlement: \$1 million worth of the \$5
8 million price tag from JS Cole was Cowing's agreement to be a consultant. After
9 receiving the April Settlement from Berger, Kain outlined parameters of a potential
10 counteroffer:

- 11 • Ritchie Brothers up the guaranteed minimum to \$13 million
- 12 • JS Cole can replace equipment out on rent
- 13 • Bank ends up with a net \$18MM
- 14 • Facilitate wrap up package
- 15 • Force settlement with guarantors for Cowing to get a job v. having to file suit.

16 Dierich told Kain that we would consider it and see if Signature can pop in more. Dierich
17 and Cowan then discussed how to increase the Signature offer so that it would be better
18 than the April Settlement. Remember, as of March 31, 2009, Cowan knew that Comerica
19 would take \$19.5 million for "everything out the door." It wasn't until mid-May that
20 Comerica officially turned down the April Settlement.

21 Dierich's handling of the April Settlement Offer breached his duty to RMMC. The
22 April Settlement and Kain's counteroffer show that RMMC and Comerica were
23 potentially close to a deal.¹⁵³ RMMC had offered Comerica \$18 million. Kain thought
24 that \$18 million net might get the deal done. Cowan, Whipple and Dierich¹⁵⁴ believed
25 that Comerica would take \$19.5 million for everything out the door. The sharing by a
26 CFO of his CEO's outline of a proposed settlement offer with the opposing party is a

26 ¹⁵³ How close? An email exchange between Kain and Campbell shows that it was a "non-starter" and a
27 "straight turn-down" was in order. (ex. 5173). Surely, Cowing was no help to himself in Comerica's
28 decision to turn down the offer. While RMMC default with Comerica grew worse, Cowing's financial
statement shows that he bought cars, paid his golf club membership, bought real property, remodeled his
home, and paid off a mortgage. By comparison, Linda Cowing made no such big ticket purchases.

¹⁵⁴ Although there is no direct evidence of Dierich's knowledge, the Court finds by a preponderance of all
the evidence that he knew.

1 breach. Additionally, a CFO who doesn't relay a counteroffer to a settlement offer to his
2 CEO commits a breach.

3 In April, Dierich actively supported the Signature deal, especially after being told
4 the he would be retained as CFO with some possibility of ownership. While his support
5 of the Signature deal is suspicious, especially in light of his undermining the April
6 Settlement Offer, it is not a breach. Signature was the first concrete offer for RMMC
7 throughout Dierich's employment. Discussions on how to increase the Signature offer to
8 exceed the April Settlement Offer could have been a benefit to RMMC. It is important to
9 note that the Signature offer did not guarantee Dierich employment, much less ownership
10 of RMMC. Undoubtedly, the structure of the deal was not the MBO that Dierich had
11 allegedly been pursuing during his entire tenure at RMMC; if the Signature deal went
12 through, Dierich would start out as nothing more than an employee.

13 By the end of April, the Signature deal was all but dead. But, just as the Signature
14 deal was dying, the EPIC deal was coming to life. RMMC laid off the sales department
15 on April 24, 2009 in an action that, according to Dierich, would kill the Signature deal
16 and therefore kill RMMC. The next day, Whipple emailed Dierich an email concerning
17 RMMC Partners.¹⁵⁵ Thus begins the saga that is the true rub of this case: Dierich, M&C,
18 and Comerica working together in an attempt to fund EPIC's purchase of RMMC.

19 During this period, and while still CFO of RMMC, in addition to ongoing
20 discussions with Cowan, Whipple, Kain, and Fickett, Dierich or an entity he controlled:
21 1) gave Fickett access to RMMC's computer system; 2) communicated about yard cites
22 with Fickett; 3) created operating plans; 4) discussed detailed terms of Comerica
23 financing EPIC with Kain; 5) received an appraisal showing the FLV of RMMC at \$19.4
24 million; 6) encouraged Kain to file suit against Cowing and Linda Cowing; 7) begged
25 Kain not to allow a sale of equipment to RMMC go through; 8) engaged an attorney to
26 negotiate the EPIC purchase; 9) asked that Winstead send a letter to Cowing and Linda
27 Cowing reminding them not to sell or otherwise dispose of equipment; 10) exchanged

28 _____
¹⁵⁵ RMMC partners eventually morphed into EPIC.

1 LOIs with Comerica; 11) discussed domain names for EPIC with RMMC's IT staff; 12)
2 entered into a retention agreement with M&C; 13) engaged in rental activities; 14) failed
3 to disclose a planned June 30, 2009 private foreclosure to Cowing; and 15) forwarded
4 privileged RMMC communication to Comerica.

5 The Defendants ask the Court to view these actions in two ways: 1) as mere
6 preparation to compete; and 2) as a reaction to Cowing's winding down of RMMC and
7 working with JS Cole. Neither of these views excuse Dierich's actions.

8 As to the first, these actions go beyond mere preparation. Dierich took concrete
9 steps to form a competing business to RMMC -- whether as it existed or one integrated
10 with JS Cole. While some actions might be acceptable standing alone, others (such as
11 giving computer access to Fickett, renting equipment, having RMMC staff work on
12 domain names, and forwarding privileged communication) cannot be justified on even an
13 isolated basis. Taken together, the record supports the conclusion that Dierich breached
14 his duty during this period.

15 As to the second, this is an appealing, but in the end unavailing, excuse. Yes,
16 Cowing was working to integrate RMMC into JS Cole and RMMC was in wind down
17 mode. But, for a good portion of this time, Comerica had not formally turned down the
18 April Settlement Offer. In fact, as late as June 12, 2009, (Dierich's last day at RMMC)
19 Comerica invited RMMC to make a follow up global settlement proposal. Further,
20 Cowing was in the dark about the facts of his negotiating position. Cowing thought that
21 his \$18 million offer was the best Comerica had received -- \$1.5 million more than the
22 Signature offer -- and he didn't know what Dierich knew, that Comerica had an FLV
23 estimate of \$19.4 million at auction and the possibility of a \$25-27 million deal with
24 EPIC.

25 On Sunday June 14, 2009, Gonzales and Cowing discovered some of Dierich's
26 communications. Dierich didn't show up to work the next day. By the end of the month,
27 Dierich's activities were out in the open. As a result, either totally or partially, the
28 scheduled June 30, 2009 sale did not happen.

1 7. *July 2009 to Present*

2 By July 2009, the following had occurred: 1) Comerica postponed the June 30
3 foreclosure sale; 2) Dierich began to think that Comerica would back out of the EPIC
4 deal; 3) RMMC told Dierich that he had been terminated as of June 15, 2009; 4) RMMC
5 disclosed the unearthed communications between Dierich and Kain to Comerica, and; 5)
6 Comerica expressed an interest in reaching a business solution with RMMC, Cowing,
7 Linda Cowing, and EPIC.

8 With these key facts in mind, did Dierich have a continuing duty to RMMC and,
9 if he did, did he commit acts or omissions in violation of those duties?

10 Under Arizona when a fiduciary resigns or is removed his fiduciary relationship
11 ceases in most circumstances. *Standage v. Planned Inv. Corp.*, 772 P.2d 1140, 144 (Ariz.
12 App. 1988). "However, where a transaction has its inception while the fiduciary
13 relationship is in existence, an employee cannot by resigning and not disclosing all he
14 knows about the negotiations, subsequently continue and consummate the transaction in a
15 manner in violation of his fiduciary duties." *Id.* Essentially, this is a five prong test: 1) the
16 prior existence of the fiduciary relationship, 2) resignation or removal, 3) nondisclosure
17 of all material facts of the negotiation, 4) continuation of the transaction, and 5)
18 consummation of the transaction. Prongs one and two have already been easily shown in
19 this manner. Prongs three and four are akin to an act or omission in violation of the duty
20 and prong five represents causation and damages.

21 Despite the fact that Dierich's formerly surreptitious pursuit of RMMC through
22 EPIC became public knowledge, Dierich did not share all material facts of his negotiation
23 with RMMC. How could he? It is apparent that Dierich stopped communicating with
24 RMMC as of June 15. Non-disclosure (prong three) was an omission by Dierich which
25 constitutes a breach of his ongoing duty to RMMC.

26 Equally obvious, Dierich continued the negotiations with Comerica right up until
27 the verge of bankruptcy. This cannot be disputed. Continuing the transaction (prong four)
28 was an act by Dierich which constitutes a breach of his ongoing duty to RMMC.

1 While the first four prongs have been met, the final one has not. No transaction
2 was consummated. Therefore, the post-resignation acts cannot amount to a breach of his
3 pre-existing fiduciary duty.

4 8. *The Bottom Line on Dierich's Acts and Omissions*

5 To summarize: From the time of his hiring to the end of 2007, there is no credible
6 evidence that Dierich committed any acts inconsistent with his fiduciary duty. During
7 2008, his actions became questionable, highly so at times, but for the reasons stated
8 above, the Court finds that such acts did not rise to the level of a breach. From the
9 beginning of 2009 until his resignation in June, his acts and omissions were inconsistent
10 with and a breach of his duty. After his resignation, though he continued to act in much
11 the same way, the failure of any transaction to be consummated precludes the finding of a
12 breach that caused damages.

13 C. Causation

14 The Court will analyze the "damages" alleged to have been caused as listed in the
15 Plaintiff's issues of fact in the JPS. To wit, Plaintiffs allege that Dierich caused:

- 16 1. RMMC to suffer in the amount of compensation and benefits paid to Dierich
17 during the course of his disloyal behavior;
- 18 2. RMMC and the Cowings to incur significant expenses related to the
19 bankruptcy and this litigation in order to stop [his] tortious conduct;¹⁵⁶
- 20 3. RMMC to lose refinancing, sale or reorganization opportunities;
- 21 4. Harm to RMMC's goodwill;
- 22 5. RMMC to change its position and file for Chapter 11 bankruptcy to stop the
23 sale of RMMC and/or its assets to EPIC;
- 24 6. RMMC to lose profits and earning capacity;
- 25 7. Harm to RMMC's and the Cowings' reputation.

26 As to issue 1, the Court notes that this is not the crux of the Plaintiffs' case, but an
27 important point in any event. As the Defendants have pointed out:

28 The Restatement provides, in part, that "[a]n agent is entitled to no
compensation for conduct which is disobedient or which is a breach of his
duty of loyalty . . ." Comment d of the Restatement specifically provides
that the fact that an agent "has been disloyal or insubordinate in one
transaction does not disentitle him to indemnity [i.e., compensation] on
account of other transactions."

¹⁵⁶ The Court understands the phrase "this litigation in order to stop [his] tortious conduct" means to stop his attempted purchase of RMMC -- an act that can only be judged in connection with the bankruptcy filing.

1 Defendants Pre-Trial Brief (Dkt # 665) at 12 (citing to RESTATEMENT (SECOND) OF
2 AGENCY § 469, *Id.* at cmt. d.) The Court also notes that "An agent is entitled to no
3 compensation for a service which constitutes a violation of his duties of obedience. *See* §
4 385. This is true even though the disobedience results in no substantial harm to the
5 principal's interests and even though the agent believes that he is justified in so acting."
6 *Id.* at cmt. a. Further, "A serious violation of a duty of loyalty or seriously disobedient
7 conduct is a willful and deliberate breach of the contract of service by the agent, and, in
8 accordance with the rule stated in Section 456, the agent thereby loses his right to obtain
9 compensation for prior services, compensation for which has not been apportioned." *Id.*
10 cmt. b. The Court will consider disgorgement of Dierich's compensation using the
11 Restatement as a guide, but only after considering the entire timeline of Dierich's
12 activities.

13 As to issues 4 and 7, goodwill and reputation damages are somewhat speculative
14 by nature as "goodwill is the most intangible of the intangibles." *Warne Investments, Ltd.*
15 *V. Higgins*, 195 P.3d 645, 652 (Ariz. App. Div. 1 2008). The existence of goodwill is a
16 question of fact. *Carriker v. Carriker*, 727 P.2d 349, 350 (Ariz. App. 1986) Here, the
17 alleged loss of goodwill and reputation are, in this case, too speculative to exist
18 independently, but instead are necessarily are tied to the loss of refinancing, etc. or the
19 filing of the bankruptcy. They *may* be a measure of damages only if some other cause is
20 shown.

21 While the filing of the bankruptcy (issues 2 and 5) may be a specie of damage,
22 Dierich's actions must be shown to be in natural and continuous sequence, unbroken by
23 any efficient intervening cause all the way to the filing of the bankruptcy. Thus, a
24 majority of the Court's analysis will rest on refinancing, sale or reorganization
25 opportunities (issue 3) and RMMC's profits and earning capacity (issue 6). This is
26 entirely sensible as the gravamen of the Plaintiffs' claims and Defendant's defenses rests
27 on these two issues, especially issue 3.

28

1 Causation is the crucial link between Dierich's breaches and potential damage to
2 RMMC. While the Court has found that there were no actionable breaches prior to
3 January, 2009, this decision will nevertheless first consider the issue of causation during
4 that time frame as if such breaches occurred. The purpose of this exercise is to examine
5 whether liability would lie even if the Court had decided that the period of breach
6 commenced earlier.¹⁵⁷

7 It must be noted that any potential deal pursued before September 15, 2008 would
8 have needed to close before September 15, 2008. Whether it was GE CF, Chapman,
9 Bellizzi or others,¹⁵⁸ there is no evidence to suggest, first, that any of those deals was
10 sufficiently non-speculative to support a finding of causation and, second, that even if a
11 deal might have been likely, any of them would have met that timeline. Thus, even if
12 Dierich had committed a breach prior to September 15, 2008, such breach would not have
13 caused RMMC damage. Why is that?

14 The world-wide financial crisis that still haunts us today was largely triggered by
15 the failure of Lehman Brothers that day. The impact was swift and brutal. Credit
16 markets froze; lending decisions were almost uniformly put on hold; and the very
17 stability of the international financial system hung in the balance. At worst, by mid-
18 September 2009, Dierich had built a poorly constructed dam intended to keep GE CF at
19 bay while he pursued an MBO that would have put him in control. However, the wave
20 that came on September 15 would have not only have obliterated any dam he built, but
21 also any dam that was built on a deal that had been robustly pursued. This conclusion
22 doesn't "give Dierich a pass" but simply recognizes the reality of refinancing the

23 ¹⁵⁷ Of course, the preponderance of the evidence standard is far from a certainty, sometimes referred to as a
24 matter of 51%/49%. Thus, although the finding of no breach stands, the Court acknowledges that
obviously there was evidence to the contrary.

25 ¹⁵⁸ The Court concludes that the GE Term Sheet was the only deal that was even arguably non-speculative
26 as of September 15, 2008. However, the reality of the GE Term Sheet, along with the rest of the World,
27 changed on Monday, September 15, 2008. On that day, the GE Term Sheet moved from speculative to
impossible. The Court is unconvinced that that absent Lehman Brothers, RMMC would have been able to
28 consummate the transaction. Remember, the GE Term Sheet required at least \$6 million cash. Cowing did
not have the ability to invest \$1.5 million to avoid SAG. How would he have the \$6 million the GE Term
Sheet required? Further, the GE Term Sheet contained serious curtailments; curtailments that were roughly
on par with the First and Second Forbearance Agreements; payments that RMMC eventually could not
make.

1 Comerica Loan in a post-Lehman world. Remember, Miller-Jones would have loved to
2 consummate the GE Term Sheet and make the commission, but significant hurdles were
3 put in place after September 15, 2008. Accordingly, the Court concludes that Dierich
4 could not have caused damages to RMMC, unless he thwarted a deal that could have
5 closed prior to September 15, 2008.

6 In a similar vein, Dierich's continued pursuit of the HIG deal, which spanned both
7 sides of September 15, 2008, may have been a fool's errand. But, it was a fool's errand
8 which caused no harm to RMMC. There is no evidence of an alternative deal that Dierich
9 ignored while pursuing the illusory HIG transaction that would have had any remote
10 prospect of consummation. The HIG deal, however flimsy it may have been, was the only
11 deal in the RMMC pipeline and, as noted above, it was at best a dream.

12 Undoubtedly, in the year 2008, Dierich was a bad CFO. He: 1) shared confidential
13 information without any confidentiality agreements; 2) considered leaving RMMC to
14 pursue a deal via HCMI; 3) asked if Cowan could represent HCMI in a transaction with
15 Comerica; 4) gave Cowan a list of stay-aways for their meeting with Cowing; 5)
16 acknowledged that as the CFO he brought "the conflict" to any transaction in which he
17 would be a principal; 6) asked Cowan if any of his people would be interested in forming
18 a heavy-equipment startup; 7) found out that Comerica was going to drop the hammer on
19 RMMC, but didn't share the information with Cowing; 8) sent "off the record" emails to
20 Kain; 9) did not move quickly on the GE Term Sheet; 10) talked about bumping
21 Chapman out; 11) told Kain "NO NO, I need to be bleeping. Owen won't sell if you give
22 him an inch!!!!"; 12) told Fickett to draft an MBO business plan; 13) falsified an APA,
23 retention agreement and appraisal; 14) sent the documents he falsified to Comerica; 15)
24 deceived Comerica on the existence of a PEG transaction; 16) told Kain not to discuss the
25 PEG with Cowing; and 17) ran interference between Armand and Comerica.

26 The year 2008 was also bad for RMMC. It: 1) cut executive pay by 30%; 2) saw
27 Comerica move its loan into SAG; 3) had its credit commitment reduced from \$50
28 million to \$35 million; 4) was warned of a possible going concern qualification by its

1 auditors; 5) had its majority shareholder get very ill; 6) went into forbearance on the
2 Comerica Loan; 7) did not win a potentially company saving rental bid in Texas; 8) could
3 not make principal pay down payments starting in November; 9) saw equipment rentals
4 drop precipitously; 10) cut staff; and 11) lost almost \$4 million.

5 Externally, things were no better. In 2008, the economy fell off a cliff. Housing
6 starts in Phoenix, Las Vegas, and California fell to 19,200, 12,600, and 65,300. In 2004
7 housing starts in the same markets were 63,200, 38,300, and 212,900 -- drops of 70%,
8 67%, and 69% respectively. The credit markets froze on Monday, September 15 causing
9 any deals in the pipeline to vanish that day; they did not begin to reappear until early
10 2009.

11 Against this background, the Court finds that had Dierich's actions breached his
12 duty during 2008, they would not have caused RMMC to lose profits or earning capacity
13 at this point. As bad as Dierich's actions may seem in retrospect, the causal link between
14 act and damage is closer to "prohibited speculation" on the legal spectrum than to
15 "permissible inference", given the overall performance of the company, the external
16 impact of the economic downturn and the other factors more fully discussed herein.

17 The Court also concludes that Dierich did not cause RMMC to lose refinancing,
18 sale or reorganization opportunities during this period. Dierich did bring sale
19 opportunities to the CEO's attention: M&C, Eagle Mountain, and Bellizzi. He also
20 followed up on opportunities brought to his attention by Cowing and Linda Cowing:
21 FocalPoint, GECE, Chapman, and Orion. Dierich did not actively hide the GE Term
22 Sheet from his CEO. And, even though he may have delayed consideration of the GE
23 Term Sheet, the numbers were too remote to work for RMMC. More importantly, as
24 remote a possibility (perhaps a 5% chance at best) as the GE Term Sheet was before
25 September 15, 2008, it became practically, and more likely literally, impossible after
26 September 15, 2008. Though he may have wanted to bump Chapman out of the way,
27 there is no evidence that Dierich's actions accomplished that goal. Chapman passed on
28 the deal by his own volition.

1 In sum, had a breach occurred during 2008, causation of cognizable damage was
2 simply too speculative and therefore, the breach of fiduciary duty claim would have
3 failed in any event.

4 The Court has concluded that as of January 2009, Dierich breached his fiduciary
5 duty to RMMC. But, by this time, the market forces working against RMMC were
6 largely beyond Dierich's influence or control. Housing starts continued to crumble into
7 2009. Credit markets were in shambles. The fear of an economic collapse was palpable.
8 As 2009 began, RMMC was an overextended company in a quickly contracting industry
9 leaving RMMC with five options for its future:

- 10 • refinance the Comerica Loan, if possible at all, probably at disadvantageous
11 terms;
- 12 • sell RMMC, with no guarantee that Cowing would remain in control;
- 13 • file for bankruptcy;
- 14 • convince Comerica to sell the Comerica Loan at a discount to a third party¹⁵⁹; or
- 15 • have its equipment and other assets foreclosed on by Comerica.

16 The first three options were choices that Cowing, the CEO of RMMC, would have to
17 make. Unless there was a complete payoff, the first two options required sign off by
18 Comerica and GECD. The fourth option was in Comerica's discretion. The only way for
19 RMMC to stop the fifth option was via one of the first four options.

20 At the financial helm was Dierich. He was deceitful, two-faced, and had only a
21 fleeting acquaintance with the truth. He was gullible, superficial and not particularly
22 sophisticated, neither delving into nor understanding the HIG deal sufficiently to
23 understand that it was a mirage. He was clearly contemptuous of Cowing and his abilities
24 as CEO. He created misleading pitch books for both RMMC's CEO and Comerica.

25 Despite these bad acts, at some point in late 2008 or early 2009, the dam had been
26 overrun. The flood was coming. No doubt, Dierich *was* stringing everyone¹⁶⁰ along --
27 Comerica by convincing it of the viability of a HIG deal and Cowing by giving him Pitch
28 Book Two that shows that he would get a return out of a sale. Neither of these things was

¹⁵⁹ This option would only benefit RMMC if the take-out lender agreed to service the loan at the new, lower principal amount rather than the face amount of the purchased note.

¹⁶⁰ Except, perhaps, M&C.

1 true -- the HIG deal was never more than a fantasy and there never was enough value in
2 RMMC to pay the bank off in full. But the effect of the lies was that Comerica held off
3 on exercising its remedies until March 2009.¹⁶¹ At this point, Cowing, RMMC's CEO,
4 made a choice: He would orchestrate integration with JS Cole or take RMMC into
5 bankruptcy before he let someone he didn't respect run it.¹⁶²

6 How Dierich reacted to Cowing's decision to integrate RMMC with JS Cole was
7 boneheaded. Instead of respecting his CEO's decision and assisting him with an
8 integration or quitting and begin pursuing a deal of his own (EPIC), he stayed and was
9 disloyal to RMMC. As concluded earlier, sharing of privileged documents, giving
10 computer access to Fickett, renting out RMMC machinery on behalf of EPIC, etc. are all
11 disloyal acts. But again, these acts caused no discernable harm. The June 30, 2009 sale
12 did not happen. Cowing, independent of Dierich's formation of EPIC, had decided to
13 wind down RMMC and integrate it with JS Cole. At this time, Cowing was making no
14 attempt to find a buyer for RMMC or refinance its debt. Instead, he was actively pursuing
15 different options to liquidate the company. Cowing made this choice. He was forced to
16 make this choice not because Dierich was working on EPIC, but because the construction
17 market in Phoenix, Las Vegas, and Southern California had cratered. Outside forces
18 caused most of the economic harm to RMMC.

19 Dierich did cause some damage, but it was limited to his salary and benefits.
20 Beginning in January 2009, Dierich engaged in behavior that was disloyal to RMMC. As
21 such, he is not entitled to payment during this time period and must disgorge the amount
22 of compensation he received. *See Jet Courier Service, Inc. v. Mulei*, 771 P.2d 486, 499-
23 500 (Colo. 1989).

24 As for causing the bankruptcy, Dierich did nothing to cause RMMC to be
25 overleveraged when the housing bust and subsequent recession hit. The economic bind
26 that RMMC found itself in was not due to Dierich's acts or omissions. Instead it was

27
28 ¹⁶¹ Certainly Comerica was tired of the credit by the end of December 2008 and was contemplating pursuing its remedies.

¹⁶² Dierich, with good reason, falls into the category of people Cowing did not respect.

1 caused by economic forces far beyond RMMC's control, RMMC's decision to request
2 the Comerica Loan, and Comerica and GECD's decision to fund the Loan. Dierich did
3 not cause Cowing and Linda Cowing to lack the liquidity for more investment when
4 demanded by the Comerica. Dierich did not cause the "lost" opportunities to refinance
5 the Comerica Loan. Instead, any that could have been consummated evaporated on
6 September 15, 2008 with the collapse of Lehman Brothers.

7 Yes, during 2008 Dierich chased the HIG transaction with quixotic zeal, but so
8 what? The "deals" that were before Cowing were ignored (Bellizzi), not pursued (Eagle
9 Mountain, FocalPoint, Armand, and Signature), or a dream (Chapman). These market
10 conditions and business decisions led to two non-speculative outcomes by the summer of
11 2009 -- liquidation by Comerica or the filing of bankruptcy by RMMC.

12 Cowing tried to control the liquidation outcome through his integration plan with
13 JS Cole, but this was always going to be unacceptable to Comerica because the bank
14 thought that it could garner more money via liquidation or a sale to EPIC. As Gonzales
15 knew by July 2009, EPIC too was never a real option for Comerica. Why? Dierich's
16 company EPIC could not even garner \$1 million, much less the \$5 million, it needed to
17 consummate the transaction even if it had been finalized. In August, Comerica simply
18 grew tired of trying to collect on its debt and cut off RMMC's cash -- an action it was
19 entitled to take. The lack of cash caused RMMC to file bankruptcy. RMMC's lack of
20 cash was not caused by Dierich (or Comerica). RMMC lacked cash because it had the
21 wrong credit position at the wrong time in the wrong place. In short, the Plaintiffs have
22 not shown by a preponderance of the evidence that Dierich caused RMMC to file
23 bankruptcy.¹⁶³

24 **VI. Analysis of Fraudulent Concealment and Non-Disclosure Claims**

25 These are the only claims asserted individually by Cowing and Linda Cowing.
26 The relevant legal standard was set out above prior to the extensive review of the facts.

27 ¹⁶³ This finding does not address whether filing bankruptcy actually damaged RMMC and to what extent,
28 but rather assumes that it did for purposes of this decision. Without the record reserved for Phase II, it is
admittedly hard, and indeed not necessary, to determine if the bankruptcy harmed RMMC -- but there is a
strong suggestion even in this record that it did not.

1 As noted, a critical element of any fraudulent concealment claim is the existence of a
2 commercial transaction between the parties. The record reveals that there is none here;
3 by definition, the claim must fail. As further noted, the record is scant on the fact of
4 damage to the individual plaintiffs, let alone causation; certainly, whatever evidence there
5 is does not rise to the level of clear and convincing. And, to the extent the acts of Dierich
6 are asserted to have caused loss of value of equity in the company, or led to the failure to
7 do a transaction that would have paid off the guarantees, there is ample evidence that no
8 such potential transactions actually ever were possible. In short, these claims not only
9 fail because of the lack of a necessary predicate (no commercial transaction) but also for
10 the same factual inadequacies that exist for the corporate claims.

11 Therefore, judgment will be given on the individual claims to the Defendants.

12 **VII. Conclusion**

13 This is a "flood and dam" case, not a "two fires" case. Dierich's activities fall
14 short of what they should have been and the Court has found that some of those activities
15 breached his fiduciary duty to RMMC. Indeed, in the many ways, the facts are so
16 egregious that ever recurring questions are -- can't something be done about this? Isn't
17 there some remedy for what he did? How can it be right for him to "get a pass?"

18 But the law requires more than bad acts. It insists that those bad acts be the cause
19 of concrete damage to the plaintiff. And, in this case, the proof is just not there on this
20 critical point, except to the extent Dierich was paid during 2009 by RMMC while at the
21 same time acting in his own interests.¹⁶⁴

22 For these reasons, judgment will be given to the Defendants on all claims other
23 than for salary disgorgement during 2009. The parties are to meet and confer to consider
24 whether, and to what extent, further trial is needed on the remaining claims and whether,
25 and to what extent, the outstanding motions for summary judgment should be ruled on.

27 ¹⁶⁴ Who's to say that, in the final analysis, the EPIC deal would have been a bad result for RMMC? Indeed,
28 RMMC was open to, and in fact suggested, a direct deal with EPIC even after the full extent of Dierich's
activities was pretty much known. But for Comerica's decision to cut off the company's cash, that might
have been the surprising end of this saga.

1 After consultation, they are to contact the courtroom deputy at their earliest convenience
2 to arrange a status hearing on further proceedings, including entry of a judgment.

3
4

5 **So ordered.**

6 Dated: September 21, 2012.

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CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

10

11 COPY of the foregoing mailed by the BNC and/or
12 sent by auto-generated mail to interested parties.

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