

**UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF MINNESOTA**

M&I Marshall & Ilsley Bank,
a Wisconsin state chartered bank,

Case No. _____

Plaintiff,

COMPLAINT

v.

Allied Health Care Services, Inc.,
a New Jersey corporation,

and Charles K. Schwartz,
a New Jersey resident,

Defendants.

Plaintiff M&I Marshall & Ilsley Bank (“M&I”) for its complaint against Allied Health Care Services, Inc. (“Allied”) and Charles K. Schwartz (“Schwartz”), states and alleges as follows:

Parties

1. M&I is a Wisconsin state chartered bank with its principal place of business in Milwaukee, Wisconsin, with an office in Minneapolis, Minnesota.
2. Allied is a New Jersey corporation with its principal place of business located at 89 Main Street, Orange, New Jersey.
3. Schwartz is an individual resident of New Jersey with a principal residence located at 37 Timberline Drive, Sparta, New Jersey.

Jurisdiction

4. Jurisdiction in this case is proper pursuant to 28 U.S.C. § 1332 in that there is complete diversity between Plaintiff and Defendant and the amount in controversy exceeds

\$75,000 in value, exclusive of interest and costs.

Venue

5. Venue is proper in the District of Minnesota pursuant to 28 U.S.C. §1391 in that this is the judicial district and venue in which both Allied and Schwartz have consented to jurisdiction, and that a substantial part of the events or omissions giving rise to this action occurred in this judicial district.

Background

6. This lawsuit arises out of a series of interrelated transactions between M&I, First Premier Capital, LLC n/k/a Commend Capital, LLC (“First Premier”), Allied, and Schwartz.

7. M&I made multiple loans to First Premier pursuant to a master security agreement. First Premier ultimately acquired certain equipment, including LifeCare ventilators. M&I financed First Premier’s acquisition of that equipment. First Premier then leased that equipment to Allied, pursuant to a master lease agreement between First Premier and Allied. As part of the lease agreement, Allied was required to make certain payments to First Premier in Minnesota.

8. As security for these transactions, Schwartz executed a personal guaranty of Allied’s obligations to First Premier.

9. As further security, First Premier granted a security interest to M&I including, without limitation, the right to exercise First Premier’s rights and remedies against Allied and Schwartz in the event Allied and/or Schwartz defaulted under the lease agreements between Allied and First Premier and the guaranty between Schwartz and First Premier.

10. Finally, First Premier assigned all of its right, title, and interest in the lease agreement and guaranty to M&I; First Premier continued to service the lease payments on behalf of M&I; Allied continued to make payments to First Premier after the assignment.

11. Allied has now failed to make payments under the assigned lease agreement and, therefore, is in default.

12. M&I then notified Schwartz of Allied's default and demanded that Schwartz honor his personal guaranty and pay M&I all amounts owed to it by Allied. Despite due demand, Schwartz has failed to comply with his personal guaranty, has failed to pay M&I anything and, therefore, is also in default under his personal guaranty.

Specific Transactions at Issue

13. First Premier is a South Dakota limited liability company with an office located in Minnesota.

14. M&I, as lender, and First Premier, as borrower, entered into a Security Agreement dated as of October 12, 2007 (the "Security Agreement"). A true and correct copy of the Security Agreement is attached hereto as **Exhibit A**, and the terms and defined capitalized terms of the Security Agreement are incorporated herein by reference.

15. Pursuant to the terms of the Security Agreement, M&I made at least three Loans to First Premier. First Premier's indebtedness to M&I for three Loans(s) are presently evidenced by: (a) a Nonrecourse Promissory Note signed by First Premier on or about June 3, 2008, made by First Premier to the order of M&I in the principal amount of \$250,000.00 (the "Lease Schedule 17 Note"); (b) a Nonrecourse Promissory Note signed by First Premier on or about August 22, 2008, made by First Premier to the order of M&I in the principal amount of \$250,000.00 (the "Lease Schedule 19 Note"); and (c) a Nonrecourse Promissory Note signed by

First Premier on or about November 12, 2008, made by First Premier to the order of M&I in the principal amount of \$250,000.00 (the "Lease Schedule 21 Note") (sometimes collectively referred to herein as the "Notes"). A true and correct copy of the Notes are attached hereto as **Exhibit B**, and the terms of the Notes are incorporated herein by reference.

16. First Premier, as lessor, and Allied, as lessee, entered into a Lease Agreement dated as of February 22, 2007 (the "Lease Agreement"). A true and correct copy of the Lease Agreement is attached hereto as **Exhibit C**, and the terms of the Lease Agreement are incorporated herein by reference.

17. The Lease Agreement required Allied to make certain payments to First Premier at its Minnesota office.

18. The Lease Agreement also requires Allied to pay First Premier's attorney's fees, expenses, and other costs of collection in connection with a breach of the Lease Agreement.

19. Section 16 of the Lease Agreement also specifically provides, in pertinent part, as follows:

This Lease Agreement, the Lease Schedule(s), attached riders, and any documents or instruments issued or executed pursuant hereto shall be governed by the laws of the State of Minnesota The parties hereto submit to the jurisdiction of the courts of the State of Minnesota and [Allied] hereby waives local venue with respect to claims arising out of this Lease Agreement.

20. In connection with the Lease Agreement, First Premier leased various equipment to Allied pursuant to the terms of (a) Lease Schedule No. 017, executed on or about June 1, 2008; (b) Lease Schedule No. 019, executed on or about August 1, 2008; and (c) Lease Schedule No. 021, executed on or about October 1, 2008. A true and correct copy of Lease Schedule Nos. 017, 019, and 021 are attached hereto as **Exhibit D**, and the terms of the Lease Schedules are incorporated herein by reference.

21. In connection with the Lease Agreement, First Premier, as lessor, and Schultz, as guarantor, entered into an Absolute, Unconditional and Continuing Guaranty Agreement dated as of February 27, 2007 (the "Guaranty"). A true and correct copy of the Guaranty is attached hereto as **Exhibit E**, and the terms of the Guaranty are incorporated herein by reference.

22. Pursuant to the Guaranty, Schultz absolutely and unconditionally guaranteed the full and prompt payment and performance of the "Obligations" described in the Guaranty including, without limitation, all liabilities of Allied to First Premier under the Lease Agreement.

23. The Guaranty requires Schwartz to pay First Premier's attorney's fees, expenses, and other costs of collection in connection with a breach of the Guaranty.

24. Section 13 of the Guaranty also specifically provides, in pertinent part, as follows:

This Guaranty shall be governed by the laws of the State of Minnesota. [Schwartz] and [First Premier] hereby consent to the jurisdiction of any Federal or State Court located in Hennepin County for a determination of any dispute, outside of those that are resolved in arbitration, as to any matters whatsoever arising out of or in any way connected with this Guaranty and authorize service of process on [Schwartz] by certified mail sent to [Schwartz] at the address for [Schwartz] as set forth herein below.

25. Allied failed to make payments due and owing to First Premier at its Minnesota office under the Lease Agreement, including without limitation payments under Lease Schedules Nos. 017, 019, and 021.

26. First Premier assigned all of its right, title, and interest in the Lease Agreement and Lease Schedule Nos. 017, 019, 021, including without limitation the right to payment, to M&I. A true and correct copy of the assignment from First Premier to M&I, dated June 3, 2008, with respect to Lease Schedule 017, is attached hereto as **Exhibit F**, and its terms are incorporated herein by reference. A true and correct copy of the assignment from First Premier to M&I, dated August 22, 2008, with respect to Lease Schedule 019, is attached hereto as

Exhibit G, and its terms are incorporated herein by reference. A true and correct copy of the assignment from First Premier to M&I, dated November 11, 2008, with respect Lease Schedule 021, is attached hereto as **Exhibit H**, and its terms are incorporated herein by reference.

27. On May 12, 2010, First Premier delivered a notice of default letter to Allied and Schwartz, informing them Allied was in default under the Lease Agreement for failure to make payments. A true and correct copy of the May 12, 2010 notice of default letter from First Premier to Allied and Schwartz is attached hereto as **Exhibit I** and the terms of the notice of default letter are incorporated herein by reference.

28. Allied failed to cure the default.

29. On August 4, 2010, M&I delivered a demand letter to Schultz, notifying Schultz that M&I had exercised its right to accelerate and cause to become immediately due and payable all amounts due and likely to become due under Lease Schedule Nos. 017, 019, and 021. M&I further demanded Schultz to honor his obligations under the Guaranty and make payment in full to M&I for all amounts due and owing. As of the date of the demand letter, the full amount due and owing was \$642,969.42, plus per diem interest that continues to accrue at \$127.68/day. A true and correct copy of the August 4, 2010 demand letter is attached hereto as **Exhibit J**, and the terms of the demand letter are incorporated herein by reference.

30. Schultz has failed and refused to pay M&I pursuant to the Guaranty.

31. Schultz is now in default of his obligations under the Guaranty.

COUNT I
Breach of Contract
(Allied)

32. M&I incorporates by reference all other allegations and claims for relief asserted in this Complaint.

33. Pursuant to the Lease Agreement Allied entered into with First Premier, including without limitation Lease Schedule Nos. 017, 019, and 021, Allied was contractually obligated to make certain payments to First Premier at its Minnesota office.

34. Allied also promised to pay First Premier's attorney's fees, expenses, and other costs of collection in connection with a breach of the Lease Agreement.

35. Allied is in breach of and has failed to perform its obligations under the Lease Agreement including, without limitation, payments required by the Lease Agreement.

36. First Premier assigned its rights to enforce the Lease Agreement to M&I.

37. M&I is entitled to a judgment against Allied as a result of its breach of the Lease Agreement in an amount substantially in excess of \$75,000, exclusive of interest, costs, disbursements, and attorney's fees.

COUNT II
Breach of Guaranty
(Schwartz)

38. M&I incorporates by reference all other allegations and claims for relief asserted in this Complaint.

39. Pursuant to the Guaranty Schwartz entered into with First Premier, Schwartz absolutely, unconditionally, and irrevocably guaranteed payment and performance of all Allied's liabilities and obligations to First Premier under the Lease Agreement, including without limitation Allied's obligation to make payments to First Premier at its Minnesota office, as well as all other liabilities and obligations with respect to Lease Schedule Nos. 017, 019, and 021.

40. Allied also promised to pay First Premier's attorney's fees, expenses, and other costs of collection in connection with a breach of the Guaranty.

41. First Premier assigned its rights to enforce the Guaranty to M&I.

42. Schwartz is in breach of and has failed to perform his obligations under the Guaranty by failing to make payment to M&I of the amount guaranteed by Schwartz.

43. M&I is entitled to a judgment against Schwartz as a result of his breach of the Guaranty in an amount substantially in excess of \$75,000, exclusive of interest, costs, disbursements, and attorney's fees.

WHEREFORE, M&I demands judgment against Allied and Schwartz as follows:

1. On Count I of the Complaint, awarding judgment in favor of M&I and against Allied in an amount in excess of \$75,000.00, together with interest, costs, disbursements, and attorney's fees as provided by the contract;
2. On Count II of the Complaint, awarding judgment in favor of M&I and against Schwartz in an amount in excess of \$75,000.00, together with interest, costs, disbursements, and attorney's fees as provided by the contract; and
3. Awarding M&I any other relief that the Court deems just or equitable.

Dated: August 13, 2010

FABYANSKE, WESTRA, HART & THOMSON, P.A.

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