

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

IN RE:	§	
	§	
TODAY'S DESTINY, INC.	§	CASE NO. 05-90080-H1-7
	§	(Chapter 7)
DEBTOR	§	
_____	§	
	§	
JOSEPH M. HILL, TRUSTEE,	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 06-3285
	§	
MICHAEL DAY ET AL.,	§	
	§	
Defendants	§	
_____	§	

TRUSTEE'S SECOND AMENDED COMPLAINT

Plaintiff Joseph M. Hill, Trustee of Today's Destiny, Inc., files this second amended complaint:

Parties

1. Plaintiff Joseph M. Hill, Trustee is the court-appointed chapter 7 trustee of Today's Destiny, Inc.
2. Pursuant to this Court's Case Management Order entered on October 17, 2006, Plaintiff also identifies those persons or entities who have filed motions to intervene as additional plaintiffs in this case. Such persons and entities are listed on **Exhibit A**, which is attached and incorporated herein by reference.
3. Michael Day has appeared.
4. Max K. Day (also known as Max Day, Sr.) has appeared.

5. Max O. Day (also known as Max Day, Jr.) has appeared.
6. Jared Day was originally sued and dismissed without prejudice by order of this Court. Trustee names Jared Day as a party in this Second Amended Complaint. Jared Day can be served with process at his residence or place of business.
7. Medicus Marketing, Inc. failed to answer, and a default judgment has been entered against it.
8. Interactive Business Development, Inc. a/k/a IBD Marketing, Inc. (“IBD”) failed to answer, and a default judgment has been entered against it.
9. Straightway CA LLC d/b/a Straightway Chiropractic Affiliates (“Straightway”) failed to answer, and a default judgment has been entered against it.
10. Chaz Robertson is an individual who can be served with process at his residence or place of business.
11. Terry Vanderpool is an individual who can be served with process at 1973 Old Ranch Road, China Springs, Texas 76633.
12. Joshua Smith is an individual who can be served with process at his residence or place of business.
13. Advance Credit Leasing Corporation is a corporation that can be served with process at 1450 Channel Parkway, Marshall, Minnesota 56258, Attention: President or General Counsel.
14. American Enterprise Leasing, Inc. a/k/a AEL Financial, is an Illinois corporation which can be served with process at its headquarters at 600 North Buffalo Grove Road, Buffalo Grove, Illinois 60089, Attention: President or General Counsel.

15. Bankers Healthcare Group, Inc. is a Florida corporation which may be served with process at its offices at 113 Chapel St., Fayetteville, NY, 13066, Attn: President or General Counsel.

16. Bankers Leasing Company is an Iowa corporation which can be served by registered mail at its corporate address: 10052 Justin Drive, Suite A, Urbandale, Iowa 50323-7740, Attention: President or General Counsel.

17. CFC Investment Company, Inc., a subsidiary of Cincinnati Financial Corporation, a/k/a CFC Investments, Inc. and a/k/a Crest Capital, is an Ohio corporation which can be served with process at its offices at 6200 South Gilmore Road, Fairfield, Ohio 45014, Attention: President or General Counsel.

18. Citicorp Vendor Finance, Inc. is a foreign corporation that can be served with process through its registered agent, CT Corporation Systems, 350 North Saint Paul Street, Dallas, Texas 75201.

19. Crest Capital is a company that can be served with process at 920 Holcomb Bridge Road, Suite 250, Roswell, Georgia 30076, Attention: President or General Counsel.

20. Eastern Funding, LLC is a New York corporation which can be served with process at its offices at 213th West 35th Street, New York, New York 10001, Attention: President or General Counsel.

21. Financial Pacific Leasing, LLC is a Washington corporation which can be served with process through its registered agent, CT Corporation Systems, 350 North Saint Paul Street, Dallas, Texas 75201.

22. General Electric Capital Corporation a/k/a GE Capital is a corporation which can be served with process at its corporate address at 201 West Big Beaver Rd, Suite 1400, Troy, Michigan 48064, Attention: President or General Counsel.

23. Greater Bay Capital, Inc. is an Illinois corporation which may be served with process at its offices at 100 Tri-State International, Ste. 140, Lincolnshire, Illinois 60069, Attention: President or General Counsel.

24. Hewlett Packard Financial Services d/b/a HP Financial Services, Inc. and formerly known as Compaq Leasing is a corporation that can be served with process through its registered agent, CT Corporation, 1021 Main Street, Suite 1150, Houston, Texas 77002.

25. HPSC, Inc. is a Massachusetts corporation which may be served with process by through its registered agent, C T Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

26. Irwin Commercial Finance is a Washington corporation which may be served with process through its registered agent, C T Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

27. Leaf Financial Corp. is a corporation that can be served with process at 1818 Market Street, 9th Floor, Philadelphia, Pennsylvania 19103, Attention: President or General Counsel.

28. Lyon Financial Services, Inc. d/b/a U.S. Bancorp Business Equipment Finance Group a/k/a US Bancorp is a corporation that can be served with process through its registered agent, CT Corporation System, 350 N. St. Paul Street, Dallas, Texas 75201.

29. Pioneer Capital Corporation is a Texas corporation which can be served with process through its registered agent: John B. Boettigheimer, 15303 Dallas Parkway Suite 505, Addison, Texas 75001.

30. Puget Sound Leasing Company is a corporation that can be served with process at P.O. Box 1295, Issaquah, Washington 98027, Attention: President or General Counsel.

31. Sterling National Bank is a New York corporation which may be served with process at Sterling National Bank c/o Louis J. Cappelli, 500 Seventh Avenue, 11th Floor, New York, New York, 10018.

32. Susquehanna Patriot Commercial Leasing Company a/k/a Patriot Leasing Company a/k/a Patriot Leasing is a Pennsylvania corporation which can be served with process at its offices at 1566 Medical Drive, Pottstown, Pennsylvania 19464, Attention: President or General Counsel.

33. Tiger Leasing LLC is a New York corporation which can be served with process at its corporate address: 157 Chambers St., 10th Floor, New York, New York 10007, Attention: President or General Counsel.

34. U.S. Bank Portfolio Services is a corporation that can be served with process at 1310 Madrid Street, Suite 103, Marshall, Minnesota 56258.

35. The companies identified as defendants in paragraphs 13 through 34 above are collectively referred to in this complaint as the “Lenders.”

SUBJECT MATTER JURISDICTION AND VENUE

36. This Court has subject matter jurisdiction of the issues raised in this proceeding pursuant to 28 U.S.C. § 1334 and 28 U.S.C. § 157(b)(2)(A) and (O). This is a civil proceeding arising under the Bankruptcy Code, or this action arises in or relates to this Chapter 7 case under

the Bankruptcy Code. This action is a core proceeding under 28 U.S.C. §§ 157(b)(2)(A) and (O).

37. Venue is proper in this district under 28 U.S.C. § 1409.

FACTUAL BACKGROUND

The Days, Their Companies, and Their History of Fraudulent Conduct

38. During the years 1997 through 2005, Today's Destiny – in concert with the persons and entities named as defendants in this action – perpetrated a fraud of massive proportion against innocent service professionals across the nation. The scam involved the sale by Today's Destiny of worthless marketing equipment to the innocent purchasers, who were induced to finance their purchase through third-party lenders who conspired with Today's Destiny to defraud the service professionals. Today's Destiny made millions of dollars when the Lenders paid it the full purchase price for the marketing system, and the Lenders made millions on the principal repayment and interest exacted on the worthless products and undelivered services.

39. The scam began with Max K. Day (also known as Max Day, Sr.) and his brother, Michael Day (the "Days"). The Days have a history of perpetrating fraudulent acts on the public. In the early 1990s, the Days and their companies advertised a 900 telephone number for customers who wanted to secure a Visa or MasterCard. The customers were told that they were "guaranteed" to receive a Visa or MasterCard in exchange for the \$50.00 fee or, if the card could not be issued, they would receive a "full refund." Instead of receiving a credit card, the customers received only booklets with general consumer credit information and a list of banks that offered such credit cards. No refunds were made when the guaranteed cards were not issued.

40. In February 1992, the Federal Trade Commission sued Max K. Day and Michael Day, and their companies, M.D.M. Interests, Inc. and Southwestern Media Group, Inc., as a result of the fraudulent credit card enterprise. The FTC obtained a preliminary injunction prohibiting Michael and Max K. Day from further acts relating to the deceptive marketing of credit cards.¹ Ultimately, the Days and their companies agreed to a consent order and permanent injunction, including **a prohibition against making misrepresentations as to material facts about any product or services.**

41. Less than five years later, the Days returned to prey upon a different segment of the public – service professionals – through the guise of their new company, Today’s Destiny, also known as TNG. As set forth below, after several years of defrauding customers under the names Today’s Destiny and TNG, the Days formed additional companies – Interactive Business Development, Inc. a/k/a IBD Marketing, Inc. (“IBD”) and Medicus Marketing (“Medicus”) – to carry on the business of Today’s Destiny under new names not yet associated with the fraudulent conduct. The parties that contracted with Today’s Destiny, IBD, and Medicus are referred to in this complaint as “Customers.” When the context requires, the term “Customers” is also intended to include all persons who executed guaranties of indebtedness related to those purchases.

42. Brothers Max K. Day and Michael Day formed Today’s Destiny as a Texas corporation in January 1997. They owned the company. Michael Day served as president, chief executive officer and chairman of the board. Max K. Day was senior vice president and chief operating officer. Max O. Day was a vice president, and Chaz Robertson was the vice president

¹ This action was styled “*Federal Trade Commission v. MDM Interests, Inc.*,” Civil Action No. H-92-0485 (FTC Matter No. X920018) in the United States District Court for the Southern District of Texas, Houston Division.

of sales. Joshua Smith served as vice president of operations. Jared Day worked in the “Sales” department of Today’s Destiny and, as with Max O. Day, was generally known as the “closer” who had final conversations with the Customers and presented contract and “leasing” documents to them to sign. Terry Vanderpool served as General Counsel to Today’s Destiny. Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Jared Day, Joshua Smith and Terry Vanderpool are sometimes referred to in this complaint as the “Insiders.”

43. Today’s Destiny did business under the name TNG, Inc. or TNG Systems (“TNG,” which is an acronym for “The Next Generation”). Throughout this complaint, TNG and Today’s Destiny are used interchangeably to mean the same thing.

44. IBD was formed as a Delaware corporation in October 1997. Recently, Joshua Smith was the president and CEO of the company, although Michael and Max K. Day formed the company, owned it, controlled it, and were the initial officers and directors.

45. Medicus Marketing was formed as a Texas limited liability company in 2005. Defendant Joshua Smith was an owner, manager and/or president of the company. Medicus was owned and controlled, however, by Michael Day and Max K. Day.

The Today’s Destiny/TNG Scam

46. Today’s Destiny held itself out to the public as a company that performed and provided marketing services on behalf of its clients. In addition to providing traditional direct mail advertising, Today’s Destiny supplied “predictive dialing equipment” to be used to contact prospective customers. Predictive dialing equipment consists of computer hardware and software intended to telephone individuals in a certain market or area code, playing a pre-recorded marketing message regarding the professional services. TNG targeted primarily

chiropractors and dentists, but also other service providers such as lawn maintenance companies and karate schools.

47. Today's Destiny purported to sell to its customer marketing and coaching programs, marketing services, and an automated computer and software that contacted individuals in a specified zip code and played a script to market particularized services. Today's Destiny referred to this hardware and software as the "Program" and the "System." TNG advertised its products and services in trade journals published in the various industries it targeted, including publications directed to chiropractors and dentists. TNG also directly made marketing calls to and other written contacts with prospective customers to persuade them to purchase the Program and the System. Many of the "cold calls" were initially rebuffed by the Customers, but TNG's salesmen persisted in regaling the benefits and "no risk" aspects of the System, promising "money back guarantees." In at least one instance, Michael Day himself told a Customer that he would personally guarantee the performance of the System.

48. The Today's Destiny telemarketing product was fairly simple, comprised primarily of computers, or "dialers," which were made up of inferior technology purchased at minimal cost to TNG. Despite TNG's actual cost of less than \$2,000 for the hard assets allegedly delivered, Today's Destiny sold the products along with promised services to its customers at a price between \$18,000 and \$80,000. The sales amounts varied by customer and were not uniform despite the vast similarities in what was sold. The variety of sums charged for the same standard equipment and promised services indicates that Today's Destiny charged whatever it thought it could get from the unsuspecting customer. *See Exhibit B*, copies of several invoices provided to different Customers charging varying amounts for the same equipment.

49. Today's Destiny sold its products and services through a series of representations and guarantees made in written advertisements and oral communications. Attached as **Exhibit C** and excerpted below is a copy of a TNG advertisement published in *The Chiropractic Journal*, July 2002, boasting the products' virtues and value:

It's crazy but it works. . . \$60,000 Dollars of revenue the first two weeks. . . It's
*GUARANTEED!

NOBODY IN HIS/HER RIGHT MIND WOULD TURN DOWN THIS
*GUARANTEED OFFER.

It is quickly becoming the Chiropractor's secret to an amazing boost in revenues and profits. Some Chiropractors are using this system to double or triple revenues in just a matter of days.

This advertising and marketing method can not be duplicated anywhere. It will deliver more qualified prospects daily than any other method for less money per month than a newspaper ad costs for one day. The amazing part is that they all are ready to set an appointment!

Urgent! I can only take a limited number of companies per area according to population. It would not be fair to offer this highly profitable revenue generator to more than the market can bear.

Emphasis in original. In the advertisement, Max K. Day's picture appears to be that of "Dr. Forenza," and, in different advertisements, his picture is used to represent other doctors giving testimonials. These representations were made in July 2002 even though, by that time, numerous lawsuits had been filed against Today's Destiny for fraud and failure to deliver the promised services.

50. In a popular dentistry publication, *Dental Economics Magazine*, Today's Destiny/TNG represented that its System would "boost" sales revenues and "give you that 'almost unfair' advantage." In other dental trade publications, TNG claimed that it could give dentists "an amazing boost in revenues" and that the products and services were "guaranteed or you don't pay." TNG published testimonials from purported clients stating that "TNG over

delivers on its guarantee. It's like having an ATM in the office, just turn it on and watch the new patient come into your office." Today's Destiny presented its Program as a guaranteed marketing service that the customer could cancel if the Program failed to operate as promised.

See Exhibit D.

51. In written marketing materials provided directly to the prospective customers, TNG claimed:

- a. TNG will purchase a "Comprehensive Database" of the customer's marketing territory (including phone numbers, addresses, ages, income and homeowner's status) and "then begin a series of text marketing to insure a successful, targeted marketing campaign rollout that focuses on specialties that may differentiate you from your competitors"
- b. TNG will provide "Marketing & Tracking Software" that "tracks all current prospects and marketing sources" and "manages current patient database, weekly revenue reports, marketing values, and the amount of patients obtained per marketing campaign"
- c. "TNG will assign you your own Personal Practice Trainer from our Coaching Division to train your office on converting the highest number of patients from all of your marketing campaigns." Coaching sessions "will be weekly for the first 90 days, then throughout the remainder of the year they will convert to monthly training sessions . . . [to] ensure that you and your staff will be successful in learning the skills necessary to convert patient prospects to new patients.
- d. "All marketing & training that we do for your practice is backed by our guarantee of . . . **'10 Patients Every Month Or You Don't Pay'**"
- e. TNG will implement a Direct Mail Campaign in which TNG handles "all creation, printing, postage, and delivery" of direct mail – promised to be 200,000 pieces of "Customized Direct Mail to be delivered to your selected zip codes"
- f. TNG "will custom design your brochures, business cards, newsletters, post cards, and other material for your referral program"
- g. TNG has "test marketed what works best in every media market across the nation"
- h. "TNG will also introduce you to our Practice Management Programs as needed, including "Case Presentation Training, Front Desk Training, and Billing, Coding & Collections modules to ensure that every aspect of your practice is well managed"

- i. “OUR PRIMARY OBJECTIVE IS TO HELP YOU MAXIMIZE YOUR ABILITY TO GET PATIENTS. TNG CUSTOM TAILORS EACH INDIVIDUAL PROGRAM TO SUIT YOUR PRACTICE NEEDS”
- j. “Over the last two decades, the owners of TNG Systems have been the International Leaders in providing Advanced Marketing Training, Consulting, Coaching, and Practice Management Solutions for practices of every description”

See **Exhibit E** (true and correct copies of TNG promotional materials).

52. The representations and guarantees continued into the written documents prepared by Today’s Destiny and presented to the Customers. Attached as **Exhibits F and G** are two contracts that Today’s Destiny entered into with its customers: a “Marketing Program and Equipment Agreement,” with its exhibit, “Marketing/Training Program (Exhibit B),” and a “Software License.” The representations made throughout these documents (explicit or implied) are incorporated herein by reference and include these:

- a. As a result of the customer’s purchase and use of the TNG products, the customer would receive a guaranteed number of new customers each month (the number of guaranteed leads varied from 5 to 100 per month)
- b. In the event that the guaranteed number of new customers was not attained as a result of TNG’s program within 60 days of working with TNG’s Marketing and Training program, TNG would rebate its customer part of the monthly “lease” payments or, under other contracts, a rebate of up to \$1,000 per month pro-rated. This rebate was good for 60 months (the length of the alleged warranty)
- c. If TNG were required to pay the customer rebates totaling \$1,000 (or different amounts under other contracts) because of a failure to attain the guaranteed new customer results, TNG would buy the customer out of the marketing and coaching program
- d. If the customer were not satisfied after a period of time (sometimes 90 days, sometimes six months, sometimes no limitation), the customer could receive a full refund of the purchase price from TNG
- e. If a customer were dissatisfied with the product and wanted to return it, TNG would either buy the Program back or assist the customer in selling it to a new TNG customer
- f. TNG’s “coaches will train you and your staff on our 14 Step Referral Plan,” providing “live campaign follow-up and handouts” for this plan

- g. TNG would provide “ongoing service” by updating its media concepts designed for the customer, “including yellow page ads, newspaper ads, direct mail ads, TV & Radio spots”
- h. TNG will provide “ongoing marketing/consulting, coaching, technical support, practice management, continued education and updates on an as needed basis”
- i. The Today’s Destiny supplied equipment was warranted against defects in workmanship and materials for 12 months

53. Today’s Destiny’s “guarantee” and the representations it made to its clients were fraudulent. Today’s Destiny began its fraudulent campaign in 1997. As early as 1998, multiple lawsuits had been filed against Today’s Destiny alleging breach of contract, fraud, and deceptive trade practices. In fact, Today’s Destiny first considered filing for bankruptcy protection in 1998 because of the large number of claims filed against it. Despite these troubles, Today’s Destiny made money, so it expanded its target to include different industries and continued its false representations that its Program and System were guaranteed to work or “you don’t pay.”

54. As set forth more fully herein and detailed in the Appendix (which is attached as **Exhibit I** and fully incorporated herein by reference), Today’s Destiny and its principals and agents made these representations without intending to fulfill the promises, and they did not fulfill the promises. The representations, guarantees, and warranties were all part of a fraudulent scheme to induce a targeted audience to pay exorbitant sums of money to Today’s Destiny for worthless computer hardware, software and services that were never delivered. For instance, each Marketing Contract contained a clause setting forth “minimum operating requirements” which required each Customer continuously to provide Today’s Destiny with data identifying the customers generated by the Today’s Destiny marketing program. Complete adherence to the terms of the minimum operating requirements clause was impossible, however, due to the actions of Today’s Destiny, Medicus and IBD. This “requirements” clause was expressly incorporated into the Marketing Contracts as a means for Today’s Destiny and Medicus and IBD

to avoid their contractual obligations. In fact, during weekly sales meetings between 1997 and 2005, Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Terry Vanderpool, Joshua Smith and other Today's Destiny representatives joked that the guarantees would never be honored because Today's Destiny had created so many loopholes in the contracts.

Medicus and IBD Continue the Fraud

55. After several years of defrauding customers under the name TNG, Max K. Day, Michael Day, Max O. Day and other Today's Destiny representatives decided to continue the same fraudulent scheme under two new company names unknown to the public, Medicus Marketing and IBD.

56. Medicus Marketing was formed in 2005 and allegedly purchased TNG's business in 2005. Despite that, it represented to the public that it was established in 1991. In various publications, Medicus Marketing claimed that it was developed and refined with professionals with over 50 years of combined experience in the marketing, consulting, and advertising industry. Max Day and Michael Day and others from Today's Destiny regularly met with representatives of the Lenders in the process of transferring assets and business from Today's Destiny to Medicus and IBD.

57. Interactive Business Development is, in fact, one and the same as Medicus Marketing. IBD maintained the same address and bank accounts as Medicus Marketing. Further, some of the same persons who worked at Medicus/IBD were the same persons who sold services and made misrepresentations to former TNG clients. These persons included Max O. Day, who maintained the alias of Moe O'Neil while working for Medicus Marketing or IBD. This alias is an amalgamation of his actual name, Max O'Neil Day. The maintenance of this

alias was intended to mislead any former Today's Destiny clients that contacted Medicus/IBD trying to voice complaints, obtain technical support, or request rebates and refunds.

The Lenders' Involvement in the Scheme

58. A further part of the scheme of Today's Destiny and its affiliates involved the use of Lenders to finance Customers' purchase of the System and Program.

59. Based upon the material factual misrepresentations, hundreds of Customers (including dentists, chiropractors, and other service providers) entered into contracts for the Program and System with Today's Destiny, Medicus, or IBD. Many of these Customers paid cash to receive the Program and System and to participate in the 60-month marketing program. Most of the Customers, however, borrowed money to acquire the Program and System, "financing" their participation through a scheme orchestrated by Today's Destiny, Medicus, IBD and the Lenders. With limited exceptions, each of the Customers who financed their purchase from Today's Destiny, Medicus, or IBD were directed to one of the Lenders by Today's Destiny and its agents, including Michael Day, Max K. Kay, Max O. Day, Jared Day, and Chaz Robertson.

60. This is how Today's Destiny typically maneuvered the sales transaction to surprise the Customer and bring the Lender into the scheme: after convincing the Customer that the Program/System was "satisfaction guaranteed" and would "pay for itself," Today's Destiny would tell the Customer that certain contracts were needed, including a promissory note to Today's Destiny if the customer did not want to pay cash. Requests to view the contract documents were ignored or an excuse given for why they were unavailable. When a Today's Destiny representative arrived at the Customer's place of business to install the System/Program,

the representative provided a “leasing agreement”² with a third-party Lender with whom Today’s Destiny had pre-arranged financing. When the Customer inquired about the lease, Today’s Destiny representatives would explain that the “leasing company” was a division of Today’s Destiny. The Today’s Destiny representative insisted on the Customer’s execution of the lease before installing the Program, rushing the Customer and claiming that the representative had a plane to catch. Today’s Destiny denied all Customer requests to see the paperwork in advance, creating an excuse for its unavailability.

61. In this way, some customers who thought they were buying the System and Program (with all of the promised support and materials) for a fixed sum – say \$50,000 – ended up with a 60-month lease obligation to another entity and significantly greater financial commitment. As the Today’s Destiny Insiders and representatives intended, in most cases the Customer did not have the opportunity to review the contract documents carefully or to consult a lawyer about the terms of the documents. And, in most cases, the Customer did not know who the Lender was.

62. Several Lenders provided blank documents to the Days and other Today’s Destiny representatives to deliver directly to the Customer. Several Lenders paid incentives to the Days and other Today’s Destiny representatives to obtain the signed documents.

63. In other instances, Today’s Destiny simply referred its Customers to various Lenders, with whom the Customers dealt directly. Today’s Destiny (including Max K. Day,

² The use of the word “lease” and its related words (“leasing,” “lessor,” “lessee,” “rent,” etc.) is for brevity and reference only and is based upon the caption on the document. Neither these terms on the document nor the use of the terms in this complaint is intended to be or is an admission or acknowledgement that such transaction is a “true lease” or “finance lease” as opposed to a conditional sale or secured transaction. Bankers Healthcare provided and used promissory notes and security agreements as opposed to lease forms. The allegations in this complaint regarding disguised leases are not made as to Bankers Healthcare.

Michael Day, Max O. Day, and Jared Day) represented that the Lenders were related in some way to Today's Destiny.

64. The contract documents provided by the Lenders, other than Bankers Healthcare, were denominated as "leases" but were actually disguised secured loans. Because of their problems with the Federal Trade Commission, Michael Day and Max Day could not have been employed by a bank or finance company, but they were able (and encouraged) through their arrangements with the Lenders to create loan transactions.

65. Many of the Lenders have been involved in other bankruptcy cases arising out of lending transactions and fraudulent products. The largest of these lease disasters to date is the *NorVergence* bankruptcy and scandal currently pending as Case No. 04-32079 pending in the United States Bankruptcy Court for the District of New Jersey. Many of the Lenders in this action are defendants in adversary proceedings pending in *Norvergence* because of the same kinds of predatory lending practices employed in the Today's Destiny lending: the Lenders received a high rate of return on oppressive "equipment leases" created by their "vendor," here, Today's Destiny. The Lenders characterized the lending transaction as an "equipment lease" for many thousands of dollars when, in truth, the equipment was worth a fraction of the loan. The Lenders then sought to enforce the obligations of the innocent Customer without regard to the fraudulent conduct of the "vendor."

66. Under this scheme, the sellers (Today's Destiny, Medicus, or IBD) received the entire amount of the sales price in full from the Lenders whenever a professional financed his or her purchase through one of the Lenders. As a result, Today's Destiny, Medicus and IBD made millions of dollars a year based on hundreds of sales. The Lenders benefited as well: they obtained credit-worthy customers able to make installment payments – including interest – on

equipment and software and services that the Lenders did not themselves provide. Moreover, pursuant to the terms of most of the “leases,” the Today’s Destiny customers were required to continue to pay the Lenders even when Today’s Destiny failed to provide the promised goods and services.

67. Some Lenders placed the actual lease documents in the hands of Today’s Destiny to be signed by the Customers, making Today’s Destiny their agent. Others provided the boilerplate for the lease documents supplied to the Customers by Today’s Destiny, Medicus, and IBD. The Lenders permitted and encouraged Today’s Destiny, Medicus, and IBD to obtain executed agreements without regard to the false representations made by Max K. Day, Michael Day, Max O. Day, Chaz Robertson, Joshua Smith, Jared Day and other agents who sold the product.

68. Each Lender “referral” that Today’s Destiny, Medicus and IBD made was in actuality a pre-arranged agreement between one of the Lenders and Today’s Destiny, Medicus, or IBD. Under this arrangement, Today’s Destiny and one of the Lenders conspired to create false and fraudulent lease agreements by which Today’s Destiny sold and the Lender financed the Customer’s purchase of illusory marketing equipment in the form of a grossly over-valued generic personal computer. In every instance, the Lenders’ lease of the equipment was at the identical price of the five-year marketing service contract charged by Today’s Destiny, Medicus, or IBD. In other words, the Lender financed the Customer’s purchase of services to be provided by Today’s Destiny as well as the equipment that was sold as part of the Program.

69. This financing arrangement was orchestrated between one of the Lenders and Today’s Destiny, Medicus, or IBD as a means by which the Lenders “leased” the computer/software equipment to the contracting Customer under what purported to be a 60-

month “equipment lease.” In reality, the Lenders funded the Marketing Contract enrollment fee to Today’s Destiny, Medicus, or IBD, but thereafter required the contracting professional to assume the financial obligations to pay off a 60-month “equipment lease” for computer and software equipment that was either non-existent or worth but a fraction of the actual represented value under the lease. In each instance, one of the Lenders and Today’s Destiny, Medicus, or IBD colluded to fraudulently arrange financing for the cost of the Customers’ marketing services contract under the guise of an equipment lease.

70. Unbeknownst to the Customers, the Lenders entered into “Master Agreements” or similar contracts with Today’s Destiny to finance the Customers’ purchase of the System and Program based upon referrals from Today’s Destiny. The Lenders knew at the outset that Today’s Destiny was selling equipment and services – the System and Program – and not simply equipment. Through this arrangement, Today’s Destiny ensured that it did not bear the risk of nonpayment when the System and Program failed to deliver the promised results. And Today’s Destiny and the Lenders ensured that the Customer/borrower became indebted to a Lender that had no apparent obligation to stand behind Today’s Destiny’s promises.

71. To promote Today’s Destiny’s referral of business to them, the Lenders paid kickbacks to Today’s Destiny and its salespeople. These kickbacks were in the form of “commissions” paid for referring the innocent Customers as borrowers. Likewise, the Lenders promoted their own sales people’s entry into these fraudulent lending arrangements by paying them commissions on the Today’s Destiny customer loans. This mutually beneficial arrangement between Today’s Destiny and the Lenders resulted in the exchange of significant consideration between them for placing the innocent Customers into lending transactions designed to defraud them.

72. The leases that the Lenders presented to the Customers were unconscionable in that they contained terms that were unreasonably harsh and one-sided in favor of Today's Destiny and the Lenders. In fact, included in the fine print of the leases are provisions that purported to:

- a. Remove any obligations of the Lenders to the Customers
- b. Characterize the fees agreed to by the Customers as payments for the actual computer and other "marketing" equipment, which fees grossly exceeded the equipment's actual price and value
- c. Create confusion by characterizing the lease as a "true lease" and not a sale of equipment, but then also characterizing the lease as a finance lease under UCC Article 2A in an unconscionable attempt to gain the protection of equipment finance leases when, in fact, Today's Destiny's agreements with its Customers were primarily for marketing services
- d. Make the obligation to pay rent unconditional
- e. Waive all of the Customers' defenses to demand for payment, even if the promised goods and services were not provided

See **Exhibit H**, copies of various lending documents between the Lenders and the Customers.

73. As set forth above, the Lenders would typically enter into a Master Agreement with Today's Destiny the governed the terms under which Today's Destiny would refer prospective borrowers to the Lenders. The Master Agreement did not identify the sales price of the "Program" and "System" that Today's Destiny sold. Rather, it acknowledged that the Lender could choose the amount of its lending based on the Customers' qualifications. Some Master Agreements provided a cap on the amount to be lent.

74. The Lenders knew or should have known about their role in this fraudulent scheme for at least these reasons:

- a. In all instances, the Lenders knew that the amount of money to be lent to the Today's Destiny Customers had no relation whatsoever to the value of the equipment. They knew that the "equipment" was a low-grade personal computer

with the typical accessories (monitor, keyboard, mouse, speakers) and basic software (Microsoft Office, PC Anywhere).

- b. Allegedly, the “equipment” also contained TNG’s proprietary marketing software.
 - c. In all instances, the Lenders knew that Today’s Destiny charged some of its Customers dramatically more for the “System” and “Program” than it charged others; in other words, the Lenders knew that Today’s Destiny was charging each Customer what it thought it could exact from that Customer, without regard for the value of the equipment or services to be rendered. When two leases were sold for identical pieces of equipment and software, the Lenders knew or should have known that Today’s Destiny was engaged in fraudulent activity.
 - d. When equipment that was purchased for less than \$2,000 was leased to a Customer from between \$18,000 to \$80,000, the Lenders knew or should have known that Today’s Destiny was engaged in fraudulent activity.
 - e. The Lenders did not inspect the equipment to ensure that it was as represented. They failed to conduct basic due diligence because they knew or suspected that Today’s Destiny was an illegitimate sham to perpetrate a fraud on the unsuspecting Customers.
 - f. When the Customers called the Lenders to complain that Today’s Destiny had failed to deliver the promised goods and services, the Lenders turned a deaf ear – insisting on payments and continuing to lend money to new Customers notwithstanding their awareness that Today’s Destiny was not delivering a reliable product or service.
 - g. When the Customers started to default on their payments and refused to pay, the Lenders turned another deaf ear – insisting on payments and continuing to lend money to new Customers notwithstanding their awareness that Today’s Destiny was not delivering a reliable product or service.
 - h. The Lenders were aware of Today’s Destiny’s shift of the business to Medicus Marketing and IBD following the federal government’s institution of the “No Call List,” just as they were aware of Today’s Destiny’s attempts to create the appearance that IBD and Medicus Marketing were new entities unrelated to Today’s Destiny, whose reputation for failing to make good on its promises was growing.
75. The Lenders’ representatives either knew about this fraudulent conduct or ignored obvious warning signs of fraud in continuing to do business with Today’s Destiny, Medicus and IBD.

Examples of Actual Customers' Experiences with Today's Destiny and the Lenders

76. As set forth above, in many cases, TNG marketed its System/Program to chiropractors and dentists (although other service providers were also customers). Typically, the initial introduction was through an advertisement or cold call touting the "no risk" nature of the product and guaranteeing new patients or a refund or rebate. The Today's Destiny salespeople and the Days reiterated these guarantees in person or over the telephone and in additional written marketing materials. In many instances, the Today's Destiny representative encouraged the Customer to contact "references" to confirm the benefits of the Program. Most of these references were actually on TNG's payroll.

77. Following the Customer's decision to purchase the Program, a technician would arrive with the paperwork, which included a five-year "lease" with a Lender. The TNG representative rushed the Customer to sign the paperwork and refused the Customer the opportunity to review it carefully, usually claiming that the technician had to get back to the airport or mail the signed documents back to the home office.

78. To operate the System/Program, the Customer was allegedly required to install extra telephone lines to help implement the equipment (basically, a desktop computer). In most cases, the equipment did not work as "guaranteed:" new patient or customer leads were not generated; "do not call" lists were not implemented; laws regarding the use of telemarketing devices were ignored; promises of the Customer's exclusive coverage in certain areas were broken; and other marketing services were not provided (or in cases where print advertisements were provided, TNG would print and mail coupons for free or discounted services from the Customer without the Customer's permission). The Customer received little or no support from TNG, and frequent Customer calls to TNG for assistance and relief were not returned. In those

few instances in which TNG agreed to buy back the Program, it insisted on a \$5,000 “restocking” fee. Customers who returned the equipment typically received no refund or acknowledgement of any kind.

79. Trustee offers the following specific examples detailing the experiences of seven Today’s Destiny Customers. The story of the fraud perpetrated on the approximately 900 Customers identified by Trustee is very similar to these narratives in large part, with specific differences only as to the timing and various amounts paid. This basic account is substantiated by the more than 300 individual stories set forth in the Appendix (Exhibit I) to this complaint, in which Trustee presents to the Court as more evidence of the fraud.

80. Dr. Kurt Adams purchased the System from TNG for \$26,500. The TNG salesperson, Clyde Lawson, told Dr. Adams that he needed an 8-line system to qualify for the guaranteed 100 positive leads per month. TNG forwarded Dr. Adams the single-page “Response Agreement” that outlined the guarantees and warranties. When TNG came to install the equipment, the TNG installation “technician” gave Dr. Adams more documents to sign and insisted that he sign them before the equipment could be installed. The System never worked. Dr. Adams called TNG and spoke with multiple persons but was ultimately referred to Joshua Smith and Max Day, Jr. Smith and Max, Jr. told Dr. Adams that they would work on a new proposal and continued to operate the system as had been recommended. Smith and Max, Jr. never called Dr. Adams back, however, despite several attempts from Dr. Adams to contact them. Eventually, Dr. Adams was put in touch with “Coach Carl” at TNG who informed Dr. Adams that he had voided his warranty for not following the usage requirements.

81. Dr. Pankaj Narkhede responded to an advertisement he saw in a dental trade publication. Dr. Narkhede called and talked to Liz Castro, who told him that he would have over

100 new patients and that he would have to hire more office staff just to handle them. Castro gave Dr. Narkhede the impression that TNG linked a system to Dr. Narkhede's office, which TNG controlled, and that supported and promoted his office. When the TNG representative came to install the equipment, he arrived with the contracts. The TNG representative would not install the equipment before the documents were signed, and he rushed Dr. Narkhede to sign the contracts, representing that he was in a hurry to FedEx the signed contracts back to the Lender. The TNG representative refused to allow Dr. Narkhede to contact his accountant. Among the documents signed by Dr. Narkhede was the five-year lease agreement from Greater Bay. There was no other option for payment.

82. Dr. Narkhede called TNG and talked to Mr. Lawson and Max Day, Jr. Lawson and Max, Jr. guaranteed that Dr. Narkhede would get 100 calls each month, and if he did not, TNG would refund his money. When Dr. Narkhede did not get the guaranteed leads, he called Lawson and Castro. Max, Jr. told Dr. Narkhede that he should not call them. Dr. Narkhede then complied with the process set forth in his contracts, which entitled him to a rebate of \$1,000 for each month that he did not get 100 calls, and then a complete refund on the third time that a rebate was warranted. Although Dr. Narkhede followed the requirements, no one from TNG returned his calls or provided any compensation. Greater Bay has informed Dr. Narkhede that he must pay on his five-year lease despite TNG's failures.

83. Rafael A. Rios, II, DC, was promised that TNG would generate at least 10 new leads per month for his practice. TNG represented that it would handle the "call backs" and also provide marketing in the form of print advertising and direct mailings. When the "trainer" came in to install the equipment and train Dr. Rios and his staff, he presented Dr. Rios with a stack of documents to sign. Dr. Rios was pressured into signing the documents quickly because the

trainer stated that he had to get back to the airport to catch his flight. TNG also required that the equipment be financed through Banker's Healthcare Group, which Dr. Rios believed to be the same as TNG. After Dr. Rios did not have the 10 new leads generated after the first month, he contacted TNG about his promised refund and was told that he voided his warranty by not using the equipment properly. TNG also told Dr. Rios that their printer was currently not working and they could not perform the mailings. The system never worked, the mailings were never performed, and Dr. Rios' calls were not returned.

84. Dr. Sean Strelec purchased a System from TNG, and Max Day, Jr. made the usual guarantees to Dr. Strelec, including that he would receive 100 positive patient inquiries a month. Dr. Strelec did not receive the inquiries. Additionally, it was brought to his attention after approximately six months of usage that such telemarketing procedures are illegal in California, so he stopped using the equipment. Although Max, Jr. offered to negotiate a "buy-back" from the leasing company, it never happened, and Max, Jr. stopped returning Dr. Strelec's calls.

85. Similarly, TNG sold a System to Dr. Matthew Simonson in Louisiana, where such telemarketing systems are illegal. TNG (through several representatives, including Max K. and Michael Day) made the usual representations and guarantees, including that the System would generate a minimum number of patients or leads a month, or there would be a rebate, and that TNG would perform marketing services. TNG also represented that it had removed the numbers from the "do not call" list, but it had not. Additionally, TNG continued to represent that it was legal to use the System in Louisiana, even after the state board had been contacted about the issue. Dr. Simonson was referred to TNG's lawyer, Terry Vanderpool, who offered to try to get someone else to buy the equipment for a significant fee or to sublease the equipment.

86. Similarly, Dr. Gabriel Isioye was referred to Terry Vanderpool, who claimed that he arranged for TNG to purchase back the equipment after it did not work. In order to receive the refund, Vanderpool demanded that Dr. Isioye pay a \$5,000 fee and ship the equipment via UPS 2nd day air, insured for \$5,000, and that the equipment be in good working order. Vanderpool still stated that Dr. Isioye may want to check with the leasing company. Dr. Isioye returned the equipment according to Vanderpool's instructions, but did not receive a refund and is still obligated to pay the remainder of the lease to Patriot Leasing Company.

87. Dr. Robert G. West received an advertisement from TNG in the form of an unsolicited fax. He called the number on the top of the fax and spoke with a salesperson who told him about TNG's System and that they guaranteed that the System would generate a minimum of 15 new customers a month with the possibility of 30 or more.

88. Dr. West called the Better Business Bureau in Texas and did not find anything negative. Next, Dr. West contacted references provided by TNG. The references also provided favorable reports.

89. After Dr. West had four additional phone lines installed for the System, TNG sent its technician to install the equipment and train Dr. West on its use. During the installation of the machine, the technician had Dr. West fill out the necessary forms for the lease. While filling out the forms, Dr. West asked the technician for a copy of the guarantee, and the technician said that he neglected to bring a copy of it. Dr. West was on the verge of canceling the transaction, but the technician got Michael Day on the phone, who then persuaded Dr. West that the guarantee was valid and that they would send him a copy immediately. The technician then picked up all of the paperwork, told Dr. West that his copies would be sent in a package along with the guarantee

and went home. Dr. West never received copies of the original paperwork. Dr. West did everything that TNG asked of him and never got more than 2 sales a month out of the system.

90. TNG did not inform Dr. West about the telemarketing laws. Dr. West received a cease and desist letter from the state of Nebraska for using the System. Dr. West was forced to move his office to Iowa where the laws permitted telemarketing. The amount of time, effort and money spent by Dr. West on the System finally put him out of business. He closed his business approximately four years ago. Dr. West borrowed the initial down payment for the System from his father-in-law, and still owes \$15,000 to his father-in-law.

91. Ironically, toward the end of his experience with TNG, Dr. West received a phone call from a TNG salesperson who wanted Dr. West to be a reference for TNG. TNG offered Dr. West a monthly payment of \$250.00 to make favorable reports of the System to prospective customers. Only then did Dr. West realize why he had received favorable reports from the references he contacted: they had been paid by TNG.

Today's Destiny's Failure to Deliver as Guaranteed

92. As the examples above demonstrate, and as the dozens of additional accounts attached in Exhibit I confirmed, Today's Destiny failed to deliver as represented. Among other things, Today's Destiny failed to:

- provide working equipment and software
- honor rebate and refund obligations
- honor buy-back promises
- provide technical support and coaching
- deliver promised direct mail
- provide exclusivity in promised market areas

- locate new buyers to purchase dissatisfied Customers' Program and System

In addition to its failures, Today's Destiny actively took steps in continuation of its fraudulent scheme to create the appearance of performance of its obligations under the marketing contracts. For instance, in direct mail advertising for one of the dentist Customers, Today's Destiny distributed thousands of flyers to customers advertising "free teeth cleaning services" to recipients of the advertisements. The Customer did not authorize Today's Destiny's offer of these free services. Additionally, Today's Destiny actually provided "debit cards" or similar coupons for prepaid services to randomly selected prospective customers to create the appearance that its marketing system worked. Most of these prospective customers were unable to pay the full cost of the services provided and had to be turned away at great embarrassment to the Customers.

93. As more and more Customers began to complain, Today's Destiny – through the Insiders and the company's agents and employees – attempted to avoid its obligations by failing to return telephone calls and letters, evading Customers through ruses of "unavailability," and developing delay tactics of all sorts to dodge Customers. Relying upon their "built-in defense," Today's Destiny representatives (including or with the knowledge of and at the direction of Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith, and Terry Vanderpool) informed numerous Customers that they had forfeited their rights to rebates and refunds because the Customers did not comply with the reporting and other requirements of their contracts with Today's Destiny. Representatives of Today's Destiny also responded aggressively to Customer complaints: threatening Customers with libel and slander suits for posting comments on websites and complaining to the Better Business Bureau.

94. Ultimately, Today's Destiny simply moved its assets and fraudulent business scheme to new entities, Medicus Marketing and IBD – in an effort to avoid creditors. Today's Destiny then filed its chapter 7 bankruptcy case on October 13, 2005.

CAUSES OF ACTION

Trustee's Claim for Breach of Fiduciary Duties **(As to Defendants Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith, and Terry Vanderpool)**

95. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

96. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the direct harm imposed by these Defendants on Today's Destiny as well as for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

97. Defendants, as actual or *de facto* officers and directors of Today's Destiny, owed fiduciary duties of obedience, loyalty, due care, and utmost good faith to Today's Destiny.

98. Moreover, Defendants owed fiduciary duties to the creditors of Today's Destiny when they engaged in conduct designed to defraud the creditors.

99. Additionally, when Today's Destiny entered the zone of insolvency, Defendants' duties extended to Today's Destiny's creditors.

100. Defendants breached their fiduciary duties to Today's Destiny and to its creditors.

101. Defendants' breaches of fiduciary duties injured Today's Destiny and its creditors by causing the demise and subsequent bankruptcy of Today's Destiny, which resulted in damages to Today's Destiny, as described throughout this complaint, and left creditors with claims against Today's Destiny without recourse for payment.

102. Trustee is entitled to recover damages suffered by Today's Destiny because of Defendants' breaches of fiduciary duty.

103. Additionally, Trustee is entitled to recover damages suffered by the creditors of Today's Destiny because of Defendants' breaches of fiduciary duty.

104. Defendants' breaches of fiduciary duty to Today's Destiny and to its creditors were made knowingly and maliciously, and such conduct entitles Trustee to recover punitive damages.

105. On this cause of action, Trustee prays for an award of his actual damages, punitive damages, and pre- and postjudgment interest.

Trustee's Claim for Aiding and Abetting Breach of Fiduciary Duties
(As to Defendants Jared Day and the Lenders)

106. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

107. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the direct harm imposed by these Defendants on Today's Destiny as well as for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

108. As set forth above, Defendants Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith and Terry Vanderpool were either actual or *de facto* officers and directors of Today's Destiny.³

109. Defendants Jared Day and each of Lenders aided and abetted the breaches of fiduciary duty of Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith and

³ In the event that Chaz Robertson, Joshua Smith, Terry Vanderpool or any of the other defendants alleged to owe fiduciary duties denies that they were officers and/or directors with fiduciary duties, Trustee includes them in this Cause of Action for Aiding and Abetting Breaches of Fiduciary Duties.

Terry Vanderpool. They were aware virtually from the company's inception (if not before) that Today's Destiny was formed to perpetrate a fraud on innocent purchasers of the worthless System/Program. Despite their complete awareness of the fraudulent scheme and their knowledge of the company's mounting debts and claims against it, Defendants Jared Day facilitated the officers' and directors' breaches of fiduciary duty by working at Today's Destiny and contributing to the charade that Today's Destiny was a legitimate enterprise selling valid goods and services.

110. Each of the Lenders also aided and abetted the breaches of fiduciary duty by Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith and Terry Vanderpool. Eager to make money by lending money to hapless Customers, the Lenders facilitated the sale of the Program/System and gave it an air of credibility by appearing to lend against the equipment which, a Customer would presume, was worth at least the amount of money the Customer could borrow against it. In reality, the Lenders knew that they were not making legitimate "equipment loans" and that Today's Destiny was defrauding the Customers. The Lenders knew or should have known about the Today's Destiny fraud for all the reasons set forth above: the Customers' complaints, the excessive amount charged to the Customers for the substandard computer equipment, the variances in the amounts charged for the same equipment, their lack of due diligence, the public record of Michael and Max K. Day's lawsuit with the FTC and their consent order and permanent injunction that prohibited them from making misrepresentations as to material facts about *any* product or services.

111. Moreover, the Lenders facilitated the breaches of fiduciary duty by rewarding the Today's Destiny sales staff and employees for referring borrowers to the Lenders. This practice

reflects the Lenders' true interest in these transactions: to sign up new borrowers without regard to the fairness of the underlying transactions.

112. Trustee is entitled to recover damages from Jared Day and each of the Lenders because they aided and abetted the breaches of fiduciary duty by Today's Destiny's officers and directors.

113. Additionally, Trustee is entitled to recover damages suffered by the creditors of Today's Destiny because of the aiding and abetting of breaches of fiduciary duty.

114. Defendants' acts to aid and abet the breaches of fiduciary duty to Today's Destiny and to its creditors were made knowingly and maliciously, and such conduct entitles Trustee to recover punitive damages.

115. On this cause of action, Trustee prays for an award of his actual damages, punitive damages, and pre- and postjudgment interest.

**Trustee's Claim for Defendants' Liability As Alter Egos or
for Sham to Perpetrate a Fraud**
**(Against Michael Day, Max K. Day, Max O. Day,
Medicus Marketing, IBD, and Joshua Smith)**

116. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

117. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the direct harm imposed by these Defendants on Today's Destiny as well as for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

118. Michael Day and Max K. Day were the sole shareholders of Today's Destiny. In published statements and advertisements and oral communications, they represented themselves to be the "owners" of Today's Destiny.

119. Alternatively, Michael Day owned title to all of the shares of Today's Destiny, and Max K. Day was one or more of the following: (i) a "beneficial owner" of some of the shares, (ii) an "affiliate" of Today's Destiny, or (iii) an "affiliate" of Michael Day as those terms are used and defined in the Texas Business Corporations Act, Vernon's Ann. Stat. Art. 2.21 and Art. 13.02.

120. Additionally, Max O. Day was one or more of the following: (i) a "beneficial owner" of some of the shares, (ii) an "affiliate" of Today's Destiny, (iii) an "affiliate" of Michael Day, or (iv) an affiliate of Max K. Day, as those terms are defined in the Texas Business Corporations Act, Vernon's Ann. Stat. Art. 2.21 and Art. 13.02.

121. As set forth above, Michael Day, Max K. Day, and Max O. Day caused Today's Destiny to be used for the purpose of perpetrating a fraud on the creditors of Today's Destiny.

122. Also as set forth above, Michael Day, Max K. Day, and Max O. Day perpetrated an actual fraud on the Customers of Today's Destiny primarily for their own direct benefit.

123. Michael Day, Max K. Day, and Max O. Day are therefore personally liable for all of the contractual obligations of Today's Destiny, and any matter relating to or arising from the obligations of Today's Destiny. Such liabilities include all allowed claims against this bankruptcy estate.

Trustee's Claim for Fraud and Fraudulent Inducement
**(Against Defendants Max K. Day, Michael Day, Max O. Day,
Chaz Robertson, Jared Day, Joshua Smith and Terry Vanderpool)**

124. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

125. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

126. As set forth above, Max K. Day, Max O. Day, Michael Day, Jared Day, Joshua Smith, Chaz Robertson and Terry Vanderpool made multiple representations to the Customers to induce them to enter into purchase contracts with Today's Destiny and into "leasing agreements" with the Lenders. These representations were both oral and written, as included in the contracts and marketing materials provided to the Customers.

127. All of these representations made by these Defendants related to the contracts that the Customers entered into with Today's Destiny, Medicus Marketing, and IBD for the purchase of the System/Program.

128. All of these representations were material representations, and they were false when made.

129. All of these representations made by these Defendants were made with knowledge of the falsity, or without knowledge of the truth, and were made as a positive assertion.

130. All of these representations were made with the intent that they be acted upon by the Customers who were being induced to buy the Program.

131. The Customers who bought the Program acted upon these representations and acted in reliance on the representations.

132. The Customers suffered damages as a result of these false representations.

133. Trustee, on behalf of the Customers, is entitled to an award of actual damages suffered by them.

134. For these Defendants' willful misrepresentations, Trustee is also entitled to exemplary damages.

135. Trustee is also entitled to pre- and postjudgment interest and costs of court.

Trustee's Claim for Conspiracy to Defraud and to Breach Fiduciary Duties
(Against Defendants Michael Day, Max O. Day, Max K. Day, Chaz Robertson,
Joshua Smith, Terry Vanderpool and the Lenders)

136. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

137. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the direct harm imposed by these Defendants on Today's Destiny as well as for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

138. Each of defendants Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith, Terry Vanderpool, and each Lender was a member of a combination of two or more persons. The object of the combination was to accomplish either (i) an unlawful purpose or (ii) a lawful purpose by unlawful means.

139. Specifically, the object of the combination included (i) perpetrating a fraud on the Customers, (ii) promoting the breach of fiduciary duties owed to Today's Destiny and to the Customers by those Defendants who owed such duties, and (iii) obtaining the execution of contracts in favor of Today's Destiny and the Lenders through misrepresentations and fraud.

140. Each of these Defendants had a meeting of the minds on the object or their course of action.

141. At least one of these Defendants committed an unlawful, overt act to further the object or course of action.

142. Consequently, the Customers all suffered injury as a proximate result of the wrongful acts.

143. These Defendants' conspiracy to defraud the Customers and to promote breaches of fiduciary duty was entered into willingly and maliciously in a way that entitles Trustee to exemplary damages.

144. Trustee is also entitled to pre- and postjudgment interest and costs of court.

Trustee's Claim for Denuding the Corporation and Conspiracy to Denude the Corporation
(Against Defendants Michael Day, Max K. Day, and Max O. Day)

145. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

146. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the direct harm imposed by these Defendants on Today's Destiny as well as for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

147. Defendants Michael Day and Max K. Day own all or most of the shares of Today's Destiny. They served as Chief Executive Officer and Chief Operating Officer, respectively, of Today's Destiny. They, together with vice president Max O. Day, were primarily responsible for the operations of Today's Destiny.

148. Using their powers as officer and/or owners of Today's Destiny, Michael Day, Max K. Day, and Max O. Day orchestrated the transfer of significant assets out of Today's Destiny for the benefit of their family, their friends, and themselves. From 2003 through the filing of the bankruptcy case on October 13, 2005, Today's Destiny had gross revenues of almost \$13.7 million (according to the Statement of Financial Affairs signed under penalty of perjury by Michael Day). Yet, on the petition date, Today's Destiny had cash on hand of only \$2,492. It

owed its lender, Wells Fargo Bank, \$500,000 (also according to schedules signed by Michael Day).

149. The company's schedules reflect no real assets.

150. Michael Day, Max K. Day, and Max O. Day oversaw, authorized and permitted the systematic denuding of Today's Destiny to the detriment of the substantial creditors of the company. They divested Today's Destiny of any source from which the creditors of the company and Trustee could collect their claims.

151. Defendants Michael Day, Max K. Day, and Max O. Day have denuded and conspired to denude Today's Destiny or its assets by leaving the creditors of Today's Destiny claims against Today's Destiny and no recourse for payment.

152. Today's Destiny's creditors and its estate have suffered injuries as a proximate cause of these Defendants' conspiratorial acts and corporate denuding actions.

153. As a consequence of these actions, Michael Day, Max K. Day, and Max O. Day are liable for the debts of Today's Destiny.

Trustee's Claim for Legal Malpractice and Breach of Fiduciary Duty
(Against Defendant Terry Vanderpool)

154. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

155. Trustee brings this claim as a direct claim owned by the Today's Destiny bankruptcy estate

156. Defendant Vanderpool was general counsel to Today's Destiny. As such, he owed a duty of care and loyalty to Today's Destiny.

157. Vanderpool drafted the contracts that Today's Destiny presented to the Customers for execution. Vanderpool also reviewed and approved the Master Agreements that Today's

Destiny entered into with the Lenders concerning the referral of Customers as prospective borrowers. Vanderpool also consulted with Michael Day, Max K. Day, Michael O. Day, Chaz Robertson and other representatives of Today's Destiny concerning the "usage requirements" of the contracts and Today's Destiny's refusal to honor its many obligations to the Customers, including the obligations to provide technical support, refunds, and rebates.

158. Vanderpool's duties were to Today's Destiny; nevertheless, he conspired in and aided and abetted the actionable wrongful conduct of Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith and other representatives of Today's Destiny to the detriment of Today's Destiny and its creditors.

159. Vanderpool breached his duty of care to Today's Destiny, and such breaches were the result of gross negligence or wanton and willful misconduct.

160. Vanderpool's breaches proximately caused damage to Today's Destiny.

161. Trustee is entitled to recover his actual damages and exemplary damages for Vanderpool's conduct, along with pre- and postjudgment interest and costs of court.

Trustee's Claim for Contribution
(Against the Lenders)

162. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

163. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the direct harm imposed by these Defendants on Today's Destiny as well as for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

164. As of the date of this complaint, Customers of Today's Destiny have filed more than 280 proofs of claim against the Today's Destiny bankruptcy estate, and such claims total

almost \$11 million.⁴ Trustee anticipates that additional claims will be filed. The claims arise out of the Customer's purchase of the Program/System and – in most cases – out of the claimants' liability for financing those purchases through the Lenders.

165. Today's Destiny and each of the Lenders were, together, joint tortfeasors in defrauding the Customers into purchasing the System/Program and financing their purchase through the Lenders.

166. Trustee, on behalf of Today's Destiny, asserts a right of contribution from the Lenders pursuant to Texas Civil Practice & Remedies Code § 33.015.

Trustee's Claim for Rescission
(Against the Lenders)

167. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

168. Trustee brings these claims for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

169. The majority of Today's Destiny's Customers financed their purchases of the Program/System through loans obtained from the Lenders.

170. The Customers are entitled to rescission of the leases, guaranties and other contracts with the Lenders because they were fraudulently induced to enter into those agreements due to the false and fraudulent actions of Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith, and the Lenders themselves, as set forth above.

⁴ Pursuant to Federal Rule of Evidence 201, Trustee requests that the Court take judicial notice of these claims, which are maintained in the Court's records.

**Trustee's Claims for
Violations of the Texas Deceptive Trade Practices - Consumer Protection Act
(Against the Lenders)**

171. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

172. Trustee brings these claims for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

173. The Customers are "consumers," as that term is defined in Tex. Bus. And Com. Code Ann. §17.41 *et seq.*, the Texas Deceptive Trade Practices-Consumer Protection Act ("DTPA"), and as such, have a cause of action against the Lenders for their conduct in violation of the DTPA. None of those plaintiffs had, at the time they contracted with the Lenders (nor do they currently have), assets in excess of \$25 million. In agreeing to finance their purchase of goods and services, each of the Customers was guided by the advice and representations of the Lenders (or the Lenders' agents, who were representatives of Today's Destiny). These representations constituted violations of the DTPA.

174. Each of the Lenders, either independently or in conjunction with Today's Destiny or Medicus, engaged in the following false and deceptive practices identified under Tex. Bus. & Com. Code Ann., § 17.46 with respect to one or more of the Customers:

- (1) the Lenders represented that their equipment lease agreements conferred or involved rights, remedies or obligations which they did not have or involve, or which were prohibited by law: for instance, as set forth herein, the lease agreements contained unenforceable penalty clauses;
- (2) the Lenders engaged in unconscionable conduct under and in violation of the DTPA by grossly overcharging the lessees for the equipment under the leases, or, in the case of Bankers Healthcare, secured promissory notes
- (3) the Lenders caused confusion or misunderstanding as to the source, sponsorship, approval or certification of goods or services by, for instance, representing themselves to be the "financing arm" of Today's Destiny or permitting Today's Destiny to act as their agent

- (4) the Lenders caused confusion or misunderstanding as to affiliation, connection or association with, or certification by, another by, for instance, representing themselves to be the “financing arm” of Today’s Destiny or permitting Today’s Destiny to act as their agent
- (5) the Lenders represented that certain goods leased to the Customers were original or new, when they knew that such goods and services contained parts that were reconditioned, reclaimed, used or second hand products; and
- (6) the Lenders failed to disclose information concerning goods or services which was known to them at the time of the transaction and such failure was intended to induce the Customers to enter into the leases: for instance, the Lenders knew of other Customers’ complaints and that Today’s Destiny and Medicus were not performing their obligations under agreements that the Lenders were financing.

179. In support of Trustee’s DTPA claims as set forth above, Trustee alleges that the Lenders, through Today's Destiny and/or Medicus, presented the leases to the Customers together with the marketing agreements as single integrated transactions. The leases and marketing agreements are contradictory in terms of ability to cancel prior to the expiration of the primary terms of those contracts, and they have contradictory forum selection clauses for different forums. This conduct violates the DTPA provisions identified above.

180. Each of the Lenders violated Section 17.50(a) of the DTPA by employing these false, misleading and deceptive practices covered under Section 17.46(b) of the DTPA, and through such false and misleading statements and omissions of material fact each Lender engaged in an unconscionable act or course of conduct.

181. Each of these acts and violations of the DTPA was a producing cause of substantial and actual economic damages to the Customers. The Lenders committed these violations knowingly, and these violations constituted willful and deceitful conduct.

182. Each of the Lenders was actually aware and became increasingly aware of the falsity, deceptiveness and unfairness of the conduct about which the Customers complain. Additionally, the DTPA violations and all acts of unconscionable conduct on the part of the

Lenders were committed knowingly, willfully and without conscious regard to the welfare of the Customers.

183. As a result, Trustee, on behalf of the Customers, is entitled to recover from the Lenders additional damages equal to two times their actual proven damages as provided by DTPA, for a total of three times the actual proven damages sustained, together with reasonable attorney fees and costs.

Trustee's Additional Claims Against Sterling National Bank

184. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

185. Trustee brings these claims as direct claims owned by the Today's Destiny bankruptcy estate for the direct harm imposed by Sterling on Today's Destiny as well as for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

186. Sterling National Bank was deeply involved in the scheme of Today's Destiny, Medicus, and IBD to sell the System/Program to the Customers and to induce them to enter into "equipment leases" to finance their purchase. Sterling began its alliance with Today's Destiny and continued its "leasing" arrangements with Medicus after Today's Destiny moved the business into these new entities. With each of the companies, Sterling was on notice of the fraud being perpetrated on the Customers, and it actively participated in it.

187. Such participation included the acts committed by Darren Base, a salesman with Sterling who worked in "vendor relationships." Base made sales calls on Michael Day, Max K. Day, and Joshua Smith and arranged with them to provide financing to their companies' Customers. At Base's urging, Sterling paid commissions back to Today's Destiny

representatives as an incentive to steer Customers to Sterling (rather than other Lenders) for financing.

188. Base never saw any equipment that Sterling financed. He had no knowledge of the value of the equipment or even exactly what Today's Destiny and Medicus were selling. He and Sterling did know, however, that the Customers of Today's Destiny and Medicus were complaining about the failure of the Program/System and the failure of Today's Destiny and Medicus to honor the guarantees that were made to induce the Customers to purchase the TNG Program/System.

189. Base contacted Today's Destiny Customers to determine if they had received the equipment before he could authorize the release of funds to Today's Destiny or Medicus. During these conversations, various Customers inquired of Base about the Program/System and his knowledge of how the product performed. Typically, these conversations took place on the day of the equipment installation, when the Today's Destiny or Medicus installer was on site and insisted on execution of the Sterling "equipment leases."

190. Notwithstanding his awareness of the many Customer complaints about the System/Program – including complaints that Today's Destiny and Medicus were failing to provide guaranteed services and to pay guaranteed rebates and refunds – Base informed the Customers that the product was great and that he had heard no complaints about it. The same is true of Sterling vice-president Steve Ornstein, who as late as October 2005 (just days before the commencement of this bankruptcy case) denied to a Customer that Sterling had received any complaints about the Medicus Program/System. Base also denied any problems when asked later by the same Customer.

191. Base made these misrepresentations and failed to provide truthful information to the Customers in the scope of his employment as a Sterling salesman. Base's acts and omissions were all made within the scope of Sterling's general authority, in furtherance of Sterling's business, and for the accomplishment of the object for which Base was hired: obtaining borrowers for Sterling.

192. Sterling – through Base – aided and abetted the breach of fiduciary duties owed by Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Terry Vanderpool, and Joshua Smith to Today's Destiny and/or Medicus.

193. Additionally, Sterling – through Base – defrauded the Customers who financed their purchases of TNG products and services through Sterling.

194. Today's Destiny, Medicus and the Customers who financed their purchases through Sterling were damaged by Base's acts and omissions.

195. Base and Sterling made these acts and omissions knowingly and maliciously, thereby entitling Trustee to recovery of exemplary damages.

196. Trustee is entitled to recover his actual and punitive damages.

Trustee's Request for Declaratory Judgment
(Against the Lenders)

197. Trustee repeats and asserts each of the preceding paragraphs as if fully set forth verbatim.

198. Trustee brings these claims as claims for the generalized harm inflicted upon the creditors of the Today's Destiny estate.

199. Pursuant to 18 U.S.C. § 2201 and Federal Rule of Civil Procedure 57, Trustee seeks a declaratory judgment as to various issues arising out of the Lenders' transactions with the Customers, which affect this bankruptcy estate.

200. The “leases” associated with the Lenders contain “rental acceleration” clauses (except, to the extent that Trustee has been able to review them, the Sterling leases. Further, the Bankers Healthcare documents reviewed by Trustee do not contain such clauses). These rental acceleration clauses are an unenforceable penalty because they may be invoked under the most minor default.

201. The Lenders sent demand letters and/or acceleration notices that stated that otherwise unaccrued future rentals were presently due and owing under the leases. The Lenders (other than Bankers Healthcare) violated the DTPA by representing that these leases conferred rights or remedies that are prohibited by law.

202. Trustee also seeks a declaratory judgment that the “leases” with Greater Bay Capital, Irwin Business Finance Corporation, General Electric Capital Corporation, Tiger Leasing, Sterling National Bank, and those parties asserting rights under leases originated by DVI Financial Services, Inc. are actually secured transactions because those leases provided the lessees with the option of purchase the equipment for nominal consideration.

203. The leases with Advance Credit Leasing Corp. are actually secured transactions because that lease *requires* the lessee to purchase the equipment for the nominal additional consideration of \$1.00.

204. All of the leases are also secured transactions because the primary terms of those leases exceeded the remaining economic life of the equipment when the leases were entered into.

205. The leases did not state interest rates, other than for late charges and default interest. The promissory notes and security agreements with Bankers Healthcare likewise do not state an interest rate, other than for late charges and default interest. Upon information and belief, Lenders sent demand letters and/or acceleration notices which charged and made demand

for usurious interest. Trustee is entitled to and seeks determination and declaration as to what interest rate was contracted for or charged under these transactions, whether or not such rates exceeded that applicable rate, and what damages or forfeiture resulted from such conduct.

206. Trustee seeks and is entitled to the Court's declaration as to these issues and to reasonable attorney's fees and costs in connection with his requests for declaratory judgment.

The Discovery Rule and Law of Adverse Domination as to All Claims

207. Trustee pleads the discovery rule and the law of adverse domination as to all claims asserted herein.

Conditions Precedent

208. All conditions precedent to Trustee's prosecution of this case have occurred.

PRAYER

209. Trustee prays that each Defendant be required to appear and answer herein and that he recover:

- Actual damages, both general and special;
- Such punitive and exemplary damages as are awarded by the Court;
- Just and reasonable attorney's fees;
- Expert witness fees and other fees and costs associated with this litigation;
- Pre- and postjudgment interest;
- Costs of suit; and
- Such other relief at law and equity to which Trustee may be justly entitled.

Respectfully submitted,

/s/ Ernest W. Boyd

Ernest W. Boyd
500 Dallas, Suite 1200
Houston, Texas 77002
Phone: (713) 655-1200
Fax: (713) 655-0222

ATTORNEYS FOR
JOSEPH M. HILL, TRUSTEE

OF COUNSEL:

MEHAFFY WEBER, P.C.
Susan Hardie Jacks
State Bar No. 08957600
S.D. Texas I.D. No. 4192
Jeremy R. Stone
State Bar No. 24013577
S.D. Texas I.D. No. 27060

and

JOSEPH F. ARCHER, P.C.

Joseph F. Archer
500 Dallas, Suite 3400
Houston, Texas 77002
(713) 654-7799
(713) 654-7814

CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Amended Complaint was served on January 31, 2007, electronically on those persons who receive electronic notification from the court, and on February 1, 2007 by U.S. Certified Mail, return receipt requested on all others, as indicated below:

Mr. Joe W. Meyer (electronic)
Meyer Knight & Williams
8100 Washington Avenue, Suite 1000
Houston, Texas 77007

Mr. Craig J. Cowgill (electronic)
2211 Norfolk Street, #1190
Houston, TX 77098-4054

Mr. John Akard, Jr. (electronic)
Mason, Coplen & Banks, PC
7500 San Felipe, Suite 700
Houston, Texas 77063-1709

Mr. Donald Scott Mackenzie (electronic)
9603 White Rock Trail, Suite 324
Dallas, Texas 75238

Mr. A. Elliott Barrow, Jr.
Barrow Law Firm
1051 Chuck Dawley Boulevard
Mt. Pleasant, SC 29464-4181

Mr. Frank J. Schmidt (electronic)
The Schmidt Law Firm, P.C.
8000 Maryland Avenue, Suite 930
Clayton, MO 63105

Mr. Paul Gumina (electronic)
The Law Offices of Paul L. Gumina, PC
1735 N. First Street, Suite 300
San Jose, CA 95112

Mr. Joshua King
330 North Main Street
Kaysville, UT 84037

Mr. John J. O'Brien, III
257 Lancaster Avenue, Suite 201
Wynnewood, PA 19096

Mr. Michael Sharp (electronic)
1100B S. Friendswood Drive
Friendswood, TX 77546

Dr. Grant Douglas Lewis
1156 Kenny Centre Mall
Columbus, OH 43220

/s/ Jeremy R. Stone
Jeremy R. Stone