UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

IN RE:	)	CHAPTER 11
EQUIPMENT ACQUISITION RESOURCES, INC.	)	Case No. 09 B 39937
Debtor.	)	Hon. John H. Squires
EQUIPMENT ACQUISITION RESOURCES, INC.,	)	Adv. No. 11-00038
Plaintiff,	)	
v.	)	
REPUBLIC BANK OF CHICAGO	)	
Defendant.	)	

FIRST AMENDED COMPLAINT

Equipment Acquisition Resources, Inc. ("**EAR**" or "**Plaintiff**"), by its attorneys, Allan B. Diamond and J. Maxwell Beatty of Diamond McCarthy LLP, brings this adversary proceeding against Republic Bank of Chicago ("**Republic**" or "**Defendant**"). Plaintiff files this First Amended Complaint as a matter of course pursuant to Federal Rule of Civil Procedure 15(a)(1)(B).

INTRODUCTION

1. This suit seeks the recovery of approximately $5 million fraudulently transferred from EAR to Republic; a transfer that furthered Sheldon Player's ("**Player**") fraudulent scheme while simultaneously preventing its discovery. This suit also seeks declaratory relief to prevent Republic from continuing to hinder the administration of EAR's bankruptcy estate (the "**Estate**")

and the Plan of Liquidation dated July 15, 2010 (the "**Plan**") by, among other things, brandishing an invalid "blanket lien" on recoveries by the Estate. Finally, this suit seeks an injunction preventing Republic from pursuing general claims against EAR's former auditors that are property of the Estate under applicable bankruptcy law.

2. After EAR began to experience financial difficulties in late 2009, EAR employed turnaround specialists and restructuring counsel to assist the company. During the rehabilitation efforts, it became clear that EAR had been looted and artificially and detrimentally kept out of bankruptcy through fraudulent financial and accounting schemes relating to equipment leasing. As a result of the issues at EAR, William A. Brandt, Jr. ("**Brandt**") was appointed as Chief Restructuring Officer to replace the then current directors and officers. Brandt filed a voluntary bankruptcy petition on behalf of EAR on October 23, 2009.

3. Prior to EAR's bankruptcy filing, Republic, through an assignment, entered into five equipment leases with EAR. Republic maintained ownership interest of the equipment under the original lease agreements, but the original leases contained no security agreement. Despite the fact that bank statements from Republic show that EAR was current on its approximately $503,000 in monthly lease obligations, Republic seized or threatened to seize nearly $10 million of EAR funds held in bank accounts at Republic. In so doing so, Republic forced EAR to amend the Republic lease agreements in April 2009 to include more favorable treatment of Republic. Under the terms of the amended leases, EAR was required to: (a) prepay approximately $5 million of its original lease obligations to Republic; and (b) purportedly grant Republic a security interest.

4. Player, who perpetrated the fraudulent scheme that eventually brought down EAR, caused EAR to enter into the lease agreements and pre-pay its obligations despite the fact

that the transfers were unsupported by consideration. EAR was current on its lease obligations, and Republic failed to provide appropriate notice of default and acceleration of the amounts due under the terms of the original leases. Therefore, Republic had no legal right to seize or threaten to seize EAR's funds in early 2009. The $5 million transferred to Republic and lease amendments: (a) furthered Player's scheme; (b) served to hinder, delay, and defraud EAR's creditors by, among other things, prolonging Player's scheme for several critical months; and (c) allowed Republic to receive additional monies relative to other similarly situated creditors.

5. Post-petition, Republic has asserted that the security interest in the amended leases entitles it to all proceeds from various suits and settlements that rightfully belong to the Estate. Specifically, Republic argues that it is entitled to: (a) the proceeds of EAR's commercial tort claims against EAR's former auditor, and (b) recoveries from avoidance actions against entities including the Internal Revenue Service ("**IRS**"). Even absent avoidance of the amended leases and the additional security interests therein, Republic's position is mistaken and contrary to both the law and the plain language of the amended leases. Therefore, the Plaintiff requests a judgment declaring that Republic has no interest in these causes of action or proceeds derived there from.

6. Republic also filed two post-petition suits alleging claims for negligent misrepresentation associated with the audit of EAR's financial statements: the first against EAR's former auditor, VonLehman & Company, Inc. ("**VonLehman**") and the second against certain of VonLehman's principals. Both suits allege that Republic was injured by its reliance on EAR's audited financial statements. But as with Republic, EAR's other creditors relied on its audited financial statements in order to determine whether or not to enter into transactions with EAR. Because Republic's claims are based on the same injury suffered by most, if not all, of

EAR's creditors, those suits allege "general claims" that are property of the Estate under applicable bankruptcy law. Moreover, VonLehman's continued defense of these suits diminish the limited funds available under VonLehman's applicable insurance policy, and therefore, reduce assets available to pay a judgment in favor of the Estate that would benefit all of the injured creditors. As such, Plaintiff requests that this Court enjoin further prosecution of Republic's suits against VonLehman.

7. Plaintiff requests that this Court grant relief that will return the fraudulently transferred funds and put a stop to Republic's obstreperous and harmful behavior. Specifically, Plaintiff seeks: (a) the avoidance and recovery of nearly $5 million in fraudulent transfers; (b) avoidance of EAR's obligations and Republic's alleged security interest under the amended leases as fraudulent transfers; (c) a declaratory judgment stating that Republic's lien is invalid, or at a minimum, that the plain language of the amended leases does not provide Republic a security interest in EAR's assets; (d) a declaratory judgment stating that, even if the amended liens are valid and grant a security interest in EAR's assets, Republic has no right to the proceeds of certain settlements and suits as further described below; and (e) an injunction prohibiting Republic from maintaining its suits against VonLehman and its principals which assert general claims and waste property of the Estate.

PARTIES, JURISDICTION & VENUE

I. Nature of the Proceeding

8. This is an adversary proceeding, pursuant to Fed. R. Bankr. P. 7001, which relates to the Chapter 11 proceeding captioned *In re Equipment Acquisition Resources, Inc.*, Case No. 09-B-39937 (Bankr. N.D. Ill., Eastern Div.).

II. Plaintiff

9. On October 23, 2009, EAR filed a voluntary petition for relief under chapter 11 of the United States Bankruptcy Code in this Court (the "**Petition Date**"). This Court confirmed the Plan on July 15, 2010 [DE #322]. Pursuant to the terms of the Plan, EAR executed the Plan Administrator Agreement, appointing Brandt as Plan Administrator.

10. The Plan expressly retained the EAR's Litigation Claims, as defined in Plan ¶1.43. Under the terms of the Plan and the Plan Administrator Agreement, Brandt has the responsibility and right to pursue the Litigation Claims on behalf of the Estate, including EAR's claims against Republic.

III. Defendant

11. Defendant Republic Bank of Chicago is an Illinois banking corporation with its principal place of business at 2221 Camden Court Suite 200, Oak Brook, Illinois, 60523. Republic can be served with process by serving its registered agent, Robert M. Charal at 221 Camden Court Suite, Oak Brook, Illinois, 60523. Republic entered into various lease-financing transactions with EAR further described below.

IV. Jurisdiction and Venue

12. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1334(b) in that this action arises in, arises under, and/or relates to EAR's bankruptcy proceeding.

13. This action is, at least in part, a core proceeding under 28 U.S.C. §§ 157(b)(2)(A), (B), (C), (H) and/or (O). In the alternative, Plaintiff consents to entry of a final order or judgment by this Court.

14. This Court has venue over this proceeding pursuant to 28 U.S.C. § 1409(a).

FACTUAL BACKGROUND

I. EAR's Formation and Operations

15. EAR was incorporated in 1997 under the laws of Illinois. Under its business model, EAR was designed to operate as a refurbisher of special machinery, a manufacturer of high-end technology parts, and a process developer for the manufacturing of high-technology parts. The bulk of EAR's stated revenue was derived from the refurbishing and selling high-tech machinery. EAR was set up to purchase high-tech equipment near the end of its life-cycle at low prices relative to the cost of a new unit, and then refurbish the equipment for sale to end-users at substantial gross margins using a propriety process. Eventually, EAR's apparent success came to an end, and Player's systematic abuse of EAR and his other wrongful conduct was revealed. Investigations by Brandt uncovered that Player used EAR to support a Ponzi-like scheme that Player implemented for his personal enrichment.

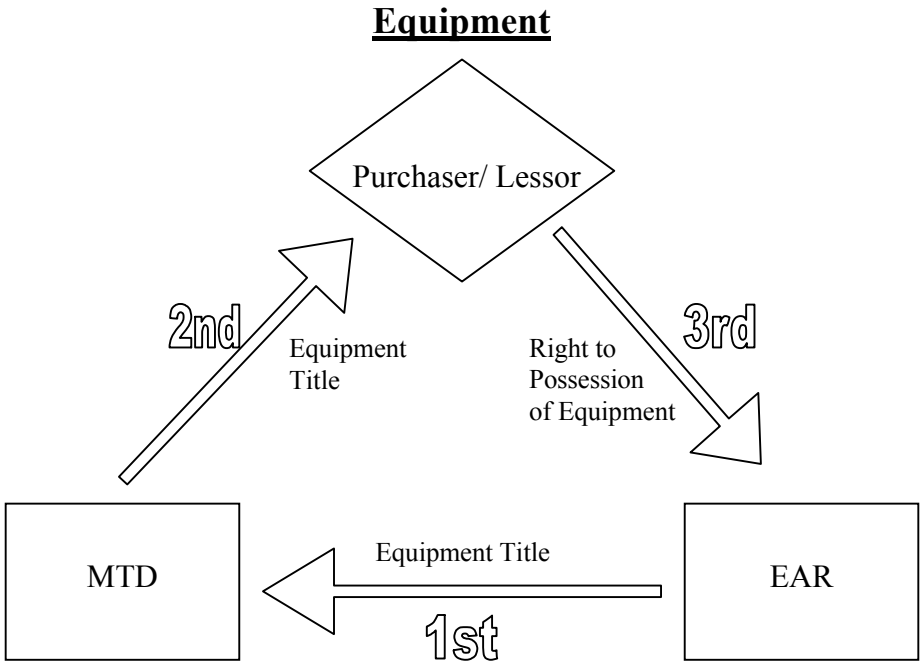
16. During the relevant period, Player did not own any of EAR's stock and was not an officer at EAR. Instead, Donna Malone ("**Malone**"), Player's wife, owned 90% of EAR's stock and Mark Anstett ("**Anstett**") owned the remaining 10% of EAR's stock. Both Malone and Anstett served as officers and directors of EAR. Player assumed an unofficial role at EAR, but had no official authority to conduct EAR's affairs.

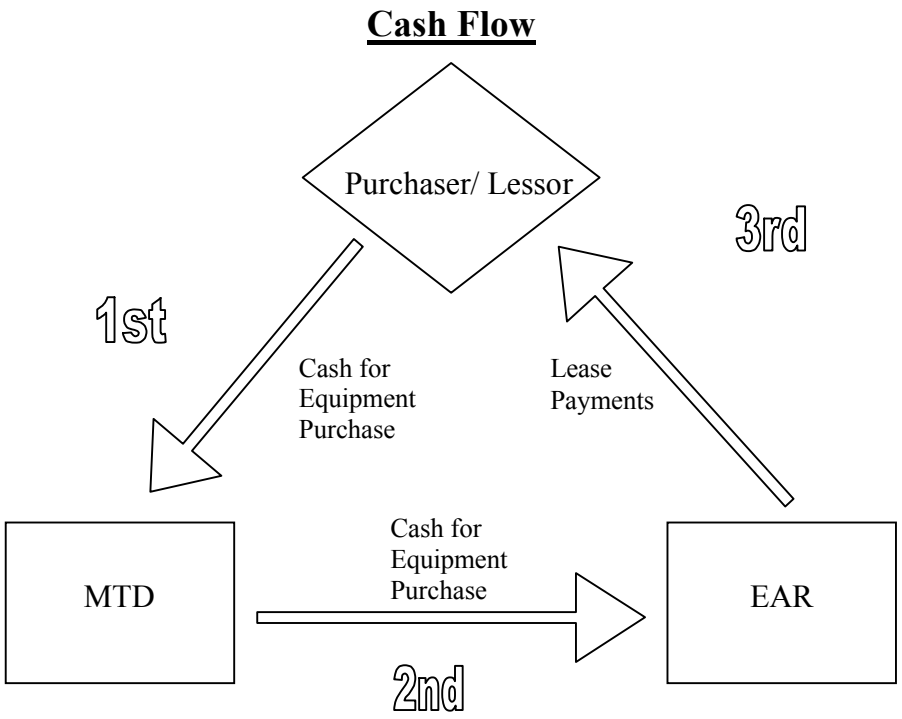
17. In 2009, EAR experienced financial trouble, and fell behind on payments to its creditors. After receiving numerous default letters, EAR sought the assistance of outside counsel and turn-around specialists in order to assist in the Company's rehabilitation. After some investigation, EAR's outside counsel and consultants discovered evidence of potential fraud in the sale/leasing activity.

II. Player's Wrongful Conduct at EAR

18. Player repeatedly caused EAR to enter into unnecessary and harmful lease agreements related to over-valued machinery. As part of his fraudulent scheme, Player caused EAR to enter into a financing-type lease agreement with a financial institution (the "**Lessor**") for a piece of equipment that was allegedly owned by Machine Tools Direct, Inc. ("**MTD**"). However, MTD was a mere straw-man in Player's scheme.

19. Many, if not all, of the sale invoices from MTD to the Lessors grossly overstated the value of the underlying equipment. Moreover, MTD "purchased" the underlying equipment from EAR mere days before MTD sold the equipment to the Lessor. In those instances, Player caused EAR to transfer title to the underlying equipment to MTD. MTD then sold that equipment to the Lessor at an inflated purchase price, passing a portion of the funds to EAR. As a result of this scheme, Player caused EAR to lease equipment at a cost far in excess of its actual value. The diagrams that follow track the actual flow of assets based on the full transaction:





20. As shown in the diagram above, the transactions on EAR's account were circular in nature. At first glance, the transaction might appear beneficial to EAR due to increased sales revenue. However, EAR could not and did not benefit from these circular transfers since EAR paid far more for the equipment lease than it ever received via the sale to MTD.

21. On information and belief, Player designed and executed the transactions at issue in order to benefit himself at EAR's expense. Player used EAR's funds to enrich himself by using those funds to purchase real or personal property for his own benefit and through cash distributions from EAR. Player's scheme provided no benefit to EAR because it caused EAR to take on insurmountable debt while his defalcations simultaneously prevented EAR from having the funds necessary to pay its creditors.

22. In 2009, after receiving numerous notices of default from its creditors, EAR sought the assistance of outside counsel and turn-around specialists in order to help in the

company's rehabilitation. After some investigation, EAR's outside counsel and consultants discovered evidence of potential fraud in the sale/leasing activity.

23. After it became apparent that Player had engaged in suspicious and potentially fraudulent activity, Malone and Anstett resigned from their positions at EAR on October 8, 2009. With the resignation of the former officers and directors, Player too lost any power to influence or control EAR's operations. Brandt was elected as sole member of the board of directors and as the Chief Restructuring Officer ("**CRO**") subsequent to the departure of Malone, Anstett, and Player.

24. The CRO was vested with the power to assume full control of all operations of EAR and all the powers and duties of the President, Chief Executive, and Treasurer of EAR. Pursuant to these powers, the CRO filed EAR's voluntary Chapter 11 bankruptcy petition to manage EAR's assets for the benefit of all creditors. Pursuant to the Plan, Brandt was appointed as the Plan Administrator for EAR.

III. Republic's Pre-Bankruptcy Conduct

25. Commencing in mid-2008, EAR entered into five equipment leases (the "**Original Equipment Leases**") with Alliance Commercial Capital, Inc. ("**Alliance**") as lessor. Alliance shortly thereafter assigned its interests in the Original Equipment Leases to Republic. Under the terms of the Original Equipment Leases and the subsequent assignment agreements, Republic had an ownership interest in the underlying equipment. EAR was required to make monthly payments on the five leases with an aggregate total of approximately $503,000. Alliance filed UCC financing statements with the Secretary of State of Illinois that evidenced the Original Equipment Leases and the assignments to Republic. Four of the five related financing statements reported that Republic had a security interest in all of EAR's assets. However, the

Original Equipment Leases show that Republic's interest was limited to ownership of the equipment underlying each lease.

26. In the spring of 2009, Republic notified EAR that it intended to seize the entirety of EAR's cash held in deposit accounts at Republic (the "**Deposit Accounts**") based upon EAR's alleged non-payment under the terms of the Original Equipment Leases. At that time, the funds in the Deposit Accounts totaled nearly $10 million (the "**Deposited Funds**"). Republic made allegations of non-payment despite the fact that EAR's bank statements show full payment on all five leases in both March and April of 2009. Additionally, many of the bank statements indicate that the lease payments were automatically drafted from the Deposit Accounts.

27. The Original Equipment Leases provided that, upon an event of default, Republic could "declare all unpaid rentals under this lease to be immediately due and payable; the amount to be due to be computed as hereinafter set forth. . . ." Upon information and belief, Republic failed to provide EAR with appropriate notice that Republic was accelerating the amounts due under the Original Equipment Leases due to alleged events of default.

28. On April 29, 2009, EAR and Republic entered into amended equipment leases (the "**Amended Leases**"). On information and belief, the Amended Leases were drafted by Republic or its counsel. The Amended Leases contained the following language:

> The Lease Agreement is hereby modified to provide that the Lessee [EAR] hereby grants to Assignee [Republic] as additional security for amounts due under the Lease Agreement a security interest in and lien upon all of ***Assignee's*** [Republic's] now or hereafter existing or acquired assets . . . .

This plain and unambiguous language does not provide Republic with a security interest in EAR's assets.

29. Without the funds contained in the Deposit Accounts, EAR simply could not continue its business operations, and Player, likewise, could not continue his scheme. To the

extent that the Amended Leases could be interpreted to provide Republic with a security interest in EAR's assets, Republic forced EAR to "agree" to give Republic a lien on EAR's assets (the "**Amended Lien**"). As part of the agreement, EAR was also compelled to pay $4,656,002.69 of the aggregate amount outstanding under the Original Equipment Leases from funds in the Deposit Accounts (the "**4/29 Transfer**"). This nearly $5 million payment was applied to future indebtedness not yet due under the terms of the Original Equipment Leases.

30. It was only by economic duress that Republic was able to compel EAR to sign the Amended Leases that underlie the Amended Lien.[1] EAR simply could not operate without the cash in the Deposit Accounts. By wrongfully seizing or threatening to seize the Deposited Funds, Republic created an economic emergency that overcame EAR's free will. EAR's assent to the Amended Leases and 4/29 Transfer was therefore brought about by duress. By the same token, the Amended Leases are not supported by consideration. Republic had no legal right to seize the Deposited Funds, and therefore, could not exchange those legal rights for the Amended Lien and 4/29 Transfer.

31. Upon information and belief, Player caused EAR to agree to the Amended Leases and the 4/29 Transfer because doing so furthered his fraudulent scheme. If Player had not agreed to cause EAR to transfer approximately $5 million to Republic and/or caused EAR to sign the Amended Leases, his scheme would have crumbled much earlier. Moreover, the 4/29 Transfer postponed the discovery of Player's wrongful scheme. Thus, the Amended Leases and the 4/29 Transfers were made with the actual intent to hinder, delay, and defraud EAR's remaining creditors.

[1] To the extent that the Amended Leases purport to release Republic from any claims brought in this suit, such releases are invalid as obtained under duress or unsupported by consideration for the reasons set forth in this complaint.

IV. Republic's Post-bankruptcy Conduct

32. Since EAR's bankruptcy filing on October 23, 2009, Republic has brandished the Amended Lien to the detriment of the Estate. Republic has claimed that the Amended Lien entitles it to virtually all of the funds generated by the Plan Administrator. For instance, Republic claims that this interest extends to funds recovered from avoidance actions in which Republic could never have a pre-petition interest, and funds recovered from commercial tort actions in which Republic had no security interest. Republic has also filed individual suits against VonLehman and its principals asserting, wholly for its own benefit, general claims that belong to the Estate. These suits are currently wasting Estate property, namely insurance proceeds that could have inured to the benefit of all of EAR's creditors.

A. Republic Claims a Right to Funds Recovered From Avoidance Actions

33. Plaintiff has thus far instituted several avoidance actions: one against the IRS (the "**IRS Suit**") seeking to avoid transfers made by EAR to the IRS to pay the tax obligations of the individual owners and officers of EAR, and others against various Las Vegas casinos (the "**Casino Suits**") seeking the avoidance of transfers from EAR to these casinos to pay off the gambling debts of Player and others. Republic has asserted to Brandt (and the Court in the case of the IRS Suit) that any amounts recovered in these actions are covered by the Amended Lien.

34. Republic claims an interest in the settlement from the IRS suit on the theory that the IRS suit constitutes a suit for a tax refund. Republic is mistaken—the IRS Suit only contains two causes of action, both seeking avoidance and recovery of funds paid to the IRS under fraudulent transfer law.

35. Republic has no claim to the proceeds of the IRS Suit, the Casino Suits, or any other avoidance action because, even if the Amended Lien was valid and extended to EAR's

assets, it would not extend to avoidance actions. Avoidance actions exist, and thus become property of the Estate, only after the commencement of the bankruptcy. Section § 552(a) of the Bankruptcy Code specifically provides that "property acquired by the estate after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." Both the IRS Suit and the Casino Suits assert only fraudulent transfer claims. As such, these avoidance actions and any recoveries from these actions would be protected by § 522(a) even if the Amended Lien were valid and covered EAR's assets.

B. Republic Claims a Right to Funds Recovered from Commercial Torts

36. During 2010, EAR commenced an adversary against VonLehman, EAR's pre-petition auditor, and Brian Malthouse ("**Malthouse**"), the VonLehman partner in charge of the EAR assignment (collectively, the "**VonLehman Parties**"). Republic has asserted that the Amended Lien entitles it to all proceeds from the EAR's litigation with the VonLehman Parties. Indeed, that is the position taken by Republic before this Court in its response to the Plaintiff's 9019 motion [DE # 351] (the "**Republic Settlement Objection**").

37. Putting aside the question of whether the Amended Lien is valid and extends to EAR's assets, Republic's position ignores that any recovery from the VonLehman litigation arises out of a commercial tort claim, and therefore any security interest that Republic may have does not extend to such recoveries under the requirements of 810 ILCS 5/9-108.

38. There is no dispute that Republic's ostensible interest in the commercial tort claim against VonLehman is not described anywhere with the requisite particularity. For instance, the language regarding commercial tort claims in the UCC financing statements recording

Republic's lien describes only "ALL OF GRANTOR'S EXISTING COMMERCIAL TORT CLAIMS." Such language falls woefully short of the requirements of 810 ILCS 5/9-108.

39. Republic has previously conceded that EAR's previous settlement with VonLehman was pursuant to a commercial tort claim. "The claim by EAR against VonLehman is a commercial tort claim pursuant to the definition provided in the Uniform Commercial Code, and therefore this claim is subject to the Blanket Lien of [Republic]." Republic Settlement Objection, ¶ 24.

40. Republic has since tried to argue that its right to the proceeds of the prior settlement with VonLehman arises not out of EAR's commercial tort claims, but instead out of Republic's interest in EAR's "general intangibles." Republic claims that recoveries from the VonLehman parties arise out of a "chose in action" for breach of contract, and as such is a general intangible subject to Republic's lien. However, in addition to contradicting its earlier admissions to the Court, this position fails to take into account that claims against professionals such as auditors and attorneys sound in tort rather than contract. Because the claims against the VonLehman Parties are commercial tort claims, Republic has no right to the proceeds from the VonLehman litigation.

C. Republic has Pursued General Claims Owned by the Estate

41. On June 10, 2010, Republic filed an Ohio state court suit against VonLehman alleging damages arising out of VonLehman's accounting malpractice and misrepresentations in connection with EAR. *Republic Bank of Chicago v. Von Lehman & Co. Inc.*, No. A-1005504 in Hamilton County, Ohio. On October 22, 2010, Republic filed a second, similar suit against the individual principals of VonLehman alleging their personal liability for the same acts. *Republic*

Bank of Chicago v. Andrew J. VonLehman, et al., No. A-1009751 in Hamilton County, Ohio (collectively, the "**Ohio Suits**"). One of the principals named in this second suit is Malthouse.

42. The Ohio Suits are based on general claims that belong to the Estate, and which the Estate has the authority to pursue on behalf of the creditors as a whole. EAR's audited financial statements that Republic relied upon were distributed to many (if not all) of EAR's creditors. EAR's creditors, including Republic, suffered damages because of Player's wrongful conduct as facilitated by VonLehman's negligence and malpractice regarding EAR's financial condition. Republic's injury is no different than that of these other creditors, and as such, any claims against VonLehman based on negligent performance of the EAR audits are general claims that belong to the Estate. This Court should enjoin Republic from prosecuting the Ohio Suits, and impairing Estate property to the detriment of EAR's other creditors.

43. Moreover, the cost of defense of the Ohio Suits is being paid out of VonLehman's insurance policy. This "wasting" policy is the only asset that can provide any significant recovery against VonLehman. By squandering the proceeds available under VonLehman's insurance policy, the Ohio Suits are destroying the value of Estate property, namely EAR's commercial tort claims against VonLehman.

CLAIMS FOR RELIEF

COUNT I – ACTUAL FRAUDULENT CONVEYANCE UNDER 11 U.S.C. § 548(a)(1)(A)

44. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 43 as if fully set forth herein.

45. The $4,656,002.69 Republic received from EAR on or about April 29, 2010 constituted a transfer of an interest of EAR in property, and the Amended Leases entered into on

or about April 29, 2010 constituted obligations incurred by the debtor, EAR (collectively the "**Amended Lease Transfers**").

46. The Amended Lease Transfers were made within two years of the Petition Date.

47. The Amended Lease Transfers were made with the actual intent to hinder, delay, or defraud entities to which EAR was or became indebted to on or after the date of the transfer.

48. Pursuant to 11 U.S.C. § 548(a)(1)(A), the plaintiff is entitled to judgment avoiding the 4/29 Transfers.

COUNT II – ACTUAL FRAUDULENT CONVEYANCE UNDER 11 U.S.C. § 544(b)(1)

49. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 43 as if fully set forth herein.

50. The $4,656,002.69 Republic received from EAR on or about April 29, 2010 constituted a transfer of an interest of EAR in property, and the Amended Leases entered into on or about April 29, 2010 constituted obligations incurred by the debtor, EAR.

51. The Amended Lease Transfers were made within four years of the Petition Date.

52. The Amended Lease Transfers were made with the actual intent to hinder, delay, or defraud entities to which EAR was or became indebted to on or after the date of the transfer.

53. Pursuant to 11 U.S.C. § 544(b)(1) and 740 ILCS 160/5(a)(1), the plaintiff is entitled to judgment avoiding the Amended Lease Transfers.

COUNT III – RECOVERY OF THE VALUE OF THE AVOIDED TRANSFER UNDER 11 U.S.C. § 550

54. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 53 as if fully set forth herein.

55. For the reasons set forth above, Plaintiff is entitled to avoid the Amended Lease Transfers.

56. Republic was the initial transferee of the Amended Lease Transfers.

57. Pursuant to 11 U.S.C. § 550, Plaintiff is entitled to recover the value of the Amended Lease Transfers from Republic.

COUNT IV – DECLARATORY JUDGMENT THAT REPUBLIC HAS NO LIEN ON EAR'S ASSETS

58. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 57 as if fully set forth herein.

59. Republic has sought to assert the Amended Lien over all of the funds recovered by Plaintiff in the VonLehman Settlement, the IRS Suit, and the Casino Suits. Republic has made this assertion despite facts that contradict Republic's claims. Based on the above facts, Republic has no security interest or exclusive right to the proceeds of the VonLehman Settlement, the IRS Suit, or the Casino Suits.

60. First, the plain language contained in the Amended Leases does not provide Republic with a lien over EAR's assets. Upon information and belief, Republic or its counsel drafted the Amended Leases. According to the Amended Leases, the "additional security" granted was "a security interest in and a lien upon all of **Assignee's** now or hereafter existing or acquired assets. . . ." Pursuant to the terms of the Amended Leases, "Republic Bank of Chicago" was defined as the "Assignee." Therefore, the Amended Leases do not provide Republic with a security interest in EAR's assets.

61. Second, the Amended Lease Transfers, including the security agreement in the Amended Leases, are avoidable fraudulent transfers, as discussed in Counts I-III.

62. Third, the security agreement in the Amended Leases, to the extent it is applicable to EAR's assets, was obtained through economic duress, and is therefore voidable. Republic induced EAR to enter into the Amended Leases by wrongfully seizing or threatening to seize the funds contained in the Deposit Accounts. At the time the Amended Leases were executed, Republic was essentially holding hostage $10 million dollars that EAR needed for the continued operation of its business. The circumstances surrounding the Amended Leases show that EAR's free will was overborne by Republic's economic threat and the resulting duress, and it would not have granted the Amended Lien otherwise.

63. Fourth, the Amended Leases are void and unenforceable due to want of consideration. On information and belief, Republic released its purported right to approximately half of the funds in the Deposit Accounts in exchange for EAR entering into the Amended Leases. However, as described above, Republic did not have the right to seize the Deposited Funds because: (a) EAR was current on the payment obligations under the Original Equipment Leases; and (b) Republic failed to properly accelerate amounts due under the Original Leases. Because Republic did not have the legal right to seize the approximately $10 million contained in the Deposit Accounts, release of those funds cannot constitute consideration for the Amended Leases.

64. Accordingly, Plaintiff seeks a declaration that the Amended Lien is invalid, and that Republic has no interest in the funds recovered from the VonLehman Settlement, the IRS Suit, or the Casino Suits, except for its interest as a general creditor in the EAR bankruptcy.

COUNT V – DECLARATORY JUDGMENT THAT REPUBLIC HAS NO LIEN ON THE IRS SUIT OR ANY RELATED RECOVERIES

65. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 43 as if fully set forth herein.

66. Even if the Court finds that the Amended Leases, are not avoidable, were not obtained through duress, were entered into for valid and sufficient consideration and apply to EAR's assets, Republic's liens do not extend to the IRS Suit or any related recoveries. The Amended Lien, if valid and applicable to EAR's assets, does not extend to the IRS Suit because it is an avoidance action. Section §552(a) of the Bankruptcy Code provides that "property acquired by the estate after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." The causes of action asserted in the IRS Suit is property acquired by the Estate after the commencement of the case. Therefore, under 11 U.S.C. § 552(a), any pre-petition lien held by Republic would not extend to the IRS Suit or any related recoveries.

67. Accordingly, Plaintiff seeks a declaration that Republic has no interest in the IRS Suit or any related recoveries, except for its interest as a general creditor in the EAR bankruptcy.

COUNT VI – DECLARATORY JUDGMENT THAT REPUBLIC HAS NO LIEN ON THE CASINO SUITS OR ANY RELATED RECOVERIES

68. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 43 as if fully set forth herein.

69. Even if the Court finds that the Amended Leases, are not avoidable, were not obtained through duress, were entered into for valid and sufficient consideration and apply to EAR's assets, Republic's liens do not extend to the Casino Suits or any related recoveries. The Amended Lien, if valid and applicable to EAR's assets, does not extend to the Casino Suits because they are avoidance actions. Section §552(a) of the Bankruptcy Code provides that "property acquired by the estate after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." The causes of action asserted in the Casino Suits are property acquired by the Estate

after the commencement of the case. Therefore, under 11 U.S.C. § 552(a), any pre-petition lien held by Republic would not extend to the Casino Suits or any related recoveries.

70. Accordingly, Plaintiff seeks a declaration that Republic has no interest in the Casino Suits or any related recoveries, except for its interest as a general creditor in the EAR bankruptcy.

COUNT VII – DECLARATORY JUDGMENT THAT REPUBLIC HAS NO LIEN ON THE SUIT AGAINST THE VONLEHMAN PARTIES OR ANY RELATED RECOVERIES

71. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 43 as if fully set forth herein.

72. Even if the Court finds that the Amended Leases, are not avoidable, were not obtained through duress, were entered into for valid and sufficient consideration, and the liens apply to EAR's assets, Republic's liens do not extend to the IRS Suit or any related recoveries. The suit against the VonLehman Parties is based on professional negligence claims that sound in tort. Because the Amended Leases do not comply with the requirements of 810 ILCS 5/9-108, Republic does not have a lien on any amounts the Estate recovers from the VonLehman Parties. The law requires that a security interest in a commercial tort claim must be described in the security agreement in greater detail than by just a general reference to "commercial tort claims." Republic's purported security agreement contains no such further description.

73. Accordingly, Plaintiff seeks a declaration that Republic has no interest in the suit against the VonLehman Parties or any related recoveries, except for its interest as a general creditor in the EAR bankruptcy.

COUNT VIII – INJUNCTION AGAINST
REPUBLIC FROM PURSUING THE OHIO SUITS

74. The Plaintiff re-alleges and fully incorporates the allegations pleaded in paragraphs 1 through 43 as if fully set forth herein.

75. Plaintiff seeks a a preliminary injunction, and ultimately a permanent injunction, prohibiting Defendant from pursuing the Ohio Suits.

76. Plaintiff seeks injunctive relief under Fed. R. Civ. P. 65, Fed. R. Bankr. P. 7065, 11 U.S.C. § 105(a), and general principals of equity.

77. First, Plaintiff is entitled to injunctive relief because Republic is pursuing general claims belonging to the Estate. Plaintiff has demonstrated a substantial likelihood of success on the merits of its claims, as indicated by the settlement agreement previously reached between the Plaintiff and the VonLehman Parties. The financial statements audited by VonLehman were widely distributed to EAR's creditors. EAR's creditors all suffered the same injury in relying on the financial statements and VonLehman's assurances that they were properly audited. Thus any claims against VonLehman for negligent misrepresentation or accounting malpractice in connection with the auditing of EAR's financial statements constitute "general claims" held only by the Estate and not any creditor individually.

78. Second, Plaintiff is entitled to injunctive relief under 11 U.S.C. § 105(a) because the Ohio Suits affect the amount of property available for distribution or the allocation amongst creditors. As stated above, Plaintiff has demonstrated a substantial likelihood of success on the merits of its claims. Plaintiff will suffer immediate and irreparable injury, for which there is no adequate remedy at law, if Defendant is not prohibited from continuing its suits. The Ohio Suits are related to the administration of the Estate because their resolution will affect the amount of property of the Estate, or the allocation of property among creditors. Without injunctive relief,

the Ohio Suits will continue to cause VonLehman's insurance policy to dissipate. This policy represents the Estate's only realistic chance of recovery for VonLehman's professional negligence. Therefore, the Bankruptcy Codes' core goals of pro rata distributions and orderly administration of bankrupt estates make injunctive relief imperative and in the public's interest at this juncture.

79. Granting injunctive relief to Plaintiff would benefit, and not adversely affect, public policy and the public interest. EAR's recovery against VonLehman will be shared pro-rata with all the creditors of the Estate pursuant to the already-approved Plan. Such equitable distribution is precisely the policy undergirding the whole of bankruptcy law. Enjoining Republic's continued effort to siphon money away from the Estate for its own benefit and at the expense of EAR's other creditors furthers that purpose.

80. Accordingly, Plaintiff seeks an injunction that will block Republic's efforts to prosecute the Ohio Suits on the basis that: (a) Republic is pursuing general claims belonging to the estate; or (b) the Ohio Suits are sufficiently related to the property of the estate that their pursuit should be stayed pursuant to 11 U.S.C. § 105 until the resolution of the Debtor's claims against the VonLehman Parties.

PRAYER

Wherefore, Plaintiff respectfully requests that the Court enter judgment and grant it the following relief against the Defendant:

1. Entering an order of judgment avoiding the Amended Leases and the transfer of 4,656,002.69 transferred to Republic;
2. Entering an order of judgment in the amount of $4,656,002.69 in favor of the Plaintiff and against the Republic;
3. Declaring that the Amended Lien is invalid and of no effect, and that Republic has no interest in any proceeds from the suit against the VonLehman Parties, IRS Suit, or Casino suits apart from its status as a general creditor in the EAR bankruptcy;

4. Declaring that the Amended Lien does not provide Republic with a security interest in EAR's assets;

5. Enjoining Republic from any further action in prosecution of *Republic Bank of Chicago v. Von Lehman & Co. Inc.*, No. A-1005504 in Hamilton County, Ohio, and *Republic Bank of Chicago v. Andrew J. VonLehman,* et al., No. A-1009751 in Hamilton County, Ohio;

6. Attorneys' fees incurred in the prosecution of this action as allowed by law;

7. Prejudgment and post-judgment interest as allowed by law; and

8. All other relief to which it is entitled.

Dated: February 28, 2011

Respectfully submitted,

/s/ J. Maxwell Beatty
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