

**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	§	
<hr/>	§	
	§	
JOSEPH M. HILL, TRUSTEE,	§	
	§	
Plaintiff	§	
	§	
v.	§	Adversary No. 06-3285
	§	
MICHAEL DAY ET AL.,	§	
	§	
Defendants	§	
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TRUSTEE'S THIRD AMENDED COMPLAINT

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

Parties

1. Plaintiff Joseph M. Hill, Trustee is the court-appointed chapter 7 trustee of Today's Destiny, Inc.
2. Certain Intervenors have appeared as set forth in the Court's Memorandum Opinion and Motions to Intervene and the related Order.
3. Defendant Michael Day has appeared.
4. Defendant Max K. Day (also known as Max Day, Sr.) has appeared.
5. Defendant Max O. Day (also known as Max Day, Jr.) has appeared.
6. Defendant Jared Day has appeared.

7. Defendant Medicus Marketing, Inc. failed to answer, and a default judgment has been entered against it.

8. Defendant Interactive Business Development, Inc. a/k/a IBD Marketing, Inc. (“IBD”) failed to answer, and a default judgment has been entered against it.

9. Defendant Straightway CA LLC d/b/a Straightway Chiropractic Affiliates (“Straightway”) failed to answer, and a default judgment has been entered against it.

10. Defendant Chaz Robertson failed to answer and a default judgment has been entered against him.

11. Defendant Terry Vanderpool is an individual who can be served with process at 1973 Old Ranch Road, China Springs, Texas 76633, and has appeared.

12. Defendant Joshua Smith failed to answer and a default judgment has been entered against him.

13. Defendant Advance Credit Leasing Corporation is a corporation that has appeared.

14. Defendant American Enterprise Leasing, Inc. a/k/a AEL Financial, is an Illinois corporation. American Enterprise Leasing, Inc. a/k/a AEL Financial has appeared.

15. Defendant Bankers Healthcare Group, Inc. is a Florida corporation that has appeared.

16. Defendant Bankers Leasing Company is an Iowa corporation that has appeared.

17. Defendant 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 that has appeared.

18. Defendant Citicorp Vendor Finance, Inc. is a foreign corporation that has appeared.
19. Defendant 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. Crest Capital has appeared.
20. Defendant Eastern Funding, LLC is a New York corporation that has appeared.
21. Defendant Financial Pacific Leasing, LLC is a Washington corporation that has appeared.
22. Defendant General Electric Capital Corporation a/k/a GE Capital is a corporation that has appeared.
23. Defendant Greater Bay Capital, Inc. is an Illinois corporation that has appeared.
24. Defendant Hewlett Packard Financial Services d/b/a HP Financial Services, Inc. and formerly known as Compaq Leasing is a corporation that has appeared.
25. Defendant HPSC, Inc. is a Massachusetts corporation that has appeared.
26. Defendant Irwin Commercial Finance is a Washington corporation that has appeared.
27. Defendant Leaf Financial Corp. is a corporation that has appeared.
28. Defendant Lyon Financial Services, Inc. d/b/a U.S. Bancorp Business Equipment Finance Group a/k/a US Bancorp is a corporation that has appeared.
29. Defendant Pioneer Capital Corporation is a Texas corporation that has appeared.
30. Defendant Puget Sound Leasing Company is a corporation that has appeared.
31. Defendant Sterling National Bank is a New York corporation. Sterling National Bank has appeared.

32. Defendant Susquehanna Patriot Commercial Leasing Company a/k/a Patriot Leasing Company a/k/a Patriot Leasing is a Pennsylvania corporation. Susquehanna Patriot Commercial Leasing Company has appeared.

33. Defendant Tiger Leasing LLC is a New York corporation. Tiger Leasing LLC has appeared.

34. Defendant U.S. Bank Portfolio Services is a corporation that has appeared.

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,

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.

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 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.” Additionally, in this complaint, actions attributed to “Today's Destiny” are actions that these Insiders orchestrated and participated in or for which they are ultimately responsible.

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 customers 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.

See **Exhibit C** (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. Attached hereto as **Exhibits I and J** are appendices containing first-hand details regarding the fraud perpetrated on the customers. **Exhibit I** is the same as the **Exhibit I** in Trustee's Second Amended Complaint, and **Exhibit J** contains supplemental details received between the filing of the Second Amended Complaint and this Third Complaint. **Exhibits I and J** are incorporated by reference as if fully set forth herein. As set forth more fully herein and as detailed in **Exhibits I and J**, 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 was 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 (through the Days themselves or the company's agents, all of whom were authorized to act by the principals) 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 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 some amount of the sales price 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. Today’s Destiny, its Insiders and employees acted as the Lenders’ agent and representative. 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 each Lender 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 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 about their role in this fraudulent scheme, participated in the scheme, and aided and assisted Today's Destiny as shown by the following:

- 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.
- i. The Lenders were knowingly financing the “Systems” or “Program” in jurisdictions where such automated telemarketing was illegal, such as California and Louisiana.

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. If the Customer insisted on reviewing the paperwork, Max Day, Jr. would talk to the Customer over the phone and threaten to charge the Customer for the installer's airfare, the equipment and other items in an effort to pressure the Customer into signing under duress without first reviewing the documents.

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 (Exhibits I and J) to this complaint, 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 to continue 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 with 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 made, 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 hundreds of additional accounts attached in Exhibits I and J 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.

95. Trustee attaches the Declaration of Eric Scott Fleenor as **Exhibit A**, and incorporates it by reference as if fully set forth herein. Mr. Fleenor is a former employee of Today's Destiny/TNG and confirms many of the allegations set forth herein. Mr. Fleenor also states that he was instructed to put together dummy computers to turn over to the bankruptcy court, instead of the actual computers used by Today's Destiny/TNG.

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)**

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

97. 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.

98. 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.

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

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

101. Defendants breached their fiduciary duties to Today's Destiny and to its creditors, resulting in a benefit to Defendants or injury to Today's Destiny and its creditors.

102. 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.

103. Trustee is entitled to recover damages suffered by 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 the Lenders aided and abetted the breaches of fiduciary duty of Michael Day, Max K. Day, Max O. Day, Chaz Robertson, Joshua Smith and Terry Vanderpool. They knowingly assisted and participated in the breaches of fiduciary duty. 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, Defendant 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 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

³ In the event that any of the other defendants alleged to owe fiduciary duties are held not to owe fiduciary duties to Today's Destiny, Trustee includes them in this Cause of Action for Aiding and Abetting Breaches of Fiduciary Duties.

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 expressly incorporates the Customer accounts set forth in the Appendix (Exhibits I and J) with regard to the Lenders' and Jared Day's involvement in aiding and abetting the breaches of fiduciary duty.

113. 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.

114. 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.

115. 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.

116. 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)**

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

118. 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.

119. 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.

120. 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.

121. 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.

122. 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.

123. 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. 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 Denuding the Corporation and Conspiracy to Denude the Corporation (Against Defendants Michael Day, Max K. Day, and Max O. Day)

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 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.

126. 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.

127. Using their powers as officers 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).

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

129. 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 could collect their claims.

130. 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 with claims against Today's Destiny and no apparent recourse for payment.

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

132. 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)

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

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

135. Defendant Vanderpool was general counsel to Today's Destiny. As such, he owed the same duty of care that would be exercised by a reasonably prudent attorney.

Vanderpool owed fiduciary duties of care and loyalty to Today's Destiny.

136. 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.

137. 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.

138. Vanderpool breached his duties of care to Today's Destiny.

139. Vanderpool's breaches additionally rose to the level of gross negligence or wanton and willful misconduct.

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

141. 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)

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

143. 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.

144. As of the date of this complaint, Customers of Today's Destiny have filed more than 300 proofs of claim or amended proofs of claim against the Today's Destiny bankruptcy estate, and such claims total approximately \$22 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.

145. Trustee respectfully requests that the Court take judicial notice of the proofs of claim filed in the bankruptcy case pursuant to Federal Rule of Evidence 201.

146. 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, and for the other wrongful acts and omissions as described herein, in the claims of the Intervenors, and in the proofs of claims and information contained in **Exhibits I** and **J**, all of which are incorporated by reference as if fully set forth herein.

147. Trustee, on behalf of Today's Destiny, asserts a right of contribution from the Lenders pursuant to the Texas Proportionate Responsibility Statute, Chapter 33 of the Texas Civil Practice & Remedies Code.

148. Trustee does not seek contribution from any Defendant that qualifies as a "settling person" as that term is defined pursuant to Texas Civil Practice & Remedies Code § 33.011(5).

149. At this time, Trustee has the settlement documentation between the following Lenders and Customers, which shows that the Lender qualifies as a "settling person" under Texas Civil Practice & Remedies Code § 33.011(5): Anthony Vicheto (Lender: Citicorp Vendor Finance, Inc.); William Nolan (Spine Time Family Chiropractic) (Lender: AEL Financial, LLC);

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.

and Gregory Scheer and Joshua Biberdorf (Black Hills) (Lender: AEL Financial, LLC). While many other settlements have been announced, the actual settlement documentation has not been produced to determine whether the Lender is a “settling person.”

150. Other Lenders have provided statements of settlement, but documentation sufficient to show that the Lenders qualify as “settling persons” has not been produced.

Trustee’s Claim for Indemnity
(Against the Lenders)

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

152. Today’s Destiny and the Lenders entered into written and/or oral contracts by which the System/Program was sold to the Customers.

153. Upon information and belief, indemnity agreements exist between Today’s Destiny and the Lenders. Because discovery has not yet commenced, Trustee does not know at this time the extent of the indemnification agreements. Trustee reserves the right to assert claims under such contracts as the terms of those agreements are made available to Trustee.

154. Today’s Destiny asserts its contractual and common law rights of indemnity against the Lenders for losses incurred as a result of the parties’ relationship in selling and financing the System/Program.

Trustee’s Additional Claims Against Sterling National Bank

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

157. 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.

158. 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.

159. 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.

160. 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. Notwithstanding this knowledge, Sterling Bank continued to lend money to new Customers.

161. 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."

162. 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.

163. 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.

164. 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.

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

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

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

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

Trustee's Claim for Conspiracy
(Against all Defendants)

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

170. The above facts and causes of action show that Defendants' object was to accomplish an unlawful purpose or a lawful purpose by unlawful means. Defendants had a meeting of the minds on the object or course of action. One or more of the Defendants committed an unlawful, overt act to further the object or course of action, and the Today's Destiny estate has suffered injury as a proximate result of the wrongful act.

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

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

Conditions Precedent

172. All conditions precedent to Trustee's prosecution of this case have been performed or have occurred.

Alternative Pleadings

173. The foregoing facts and theories are pled cumulatively and alternatively, with no election or waiver of rights or remedies.

PRAYER

174. 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

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this Amended Complaint was served on May 27, 2008, electronically on those persons who receive electronic notification from the court, and on May 28, 2008 by U.S. Certified Mail, return receipt requested on all others, as indicated below:

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