

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION**

FIFTH THIRD BANK, an Ohio banking  
corporation, successor by merger with Fifth  
Third Bank, a Michigan banking corporation,

Plaintiff,

v.

DONNA L. MALONE and  
MARK W. ANSTETT,

Defendants.

Case No.

**COMPLAINT**

Plaintiff, Fifth Third Bank (“Bank”), by its attorneys, Dykema Gossett PLLC, for its Complaint against Defendants, Donna L. Malone (“Malone”) and Mark W. Anstett (“Anstett”) states as follows:

**PARTIES**

1. The Bank is an Ohio banking corporation with its principal place of business in Cincinnati, Ohio.
2. Defendant Malone is an individual residing at 3401 N. Carriageway Drive, Arlington Heights, Illinois 60004. Malone is a shareholder of Equipment Acquisition Resources, Inc. (“EAR”).
3. Defendant Anstett is an individual residing at 1111 Estate Lane, Lake Forest, Illinois 60045. Anstett is a shareholder of EAR.

**JURISDICTION AND VENUE**

4. Jurisdiction is proper in this Court pursuant to 28 U.S.C. § 1332(a)(1) and (c)(1), as the parties are citizens of different States and the amount in controversy exceeds \$75,000.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(a)(1) and (2) as both of the Defendants reside in this District and a substantial part of the events giving rise to the claims alleged in this Complaint occurred within this District.

#### **FACTS COMMON TO ALL COUNTS**

6. On or about September 15, 2008, EAR executed and delivered to the Bank a Promissory Note (“September Note”) in the original principal sum of \$4,459,905.00, which was to mature on September 15, 2012, a copy of the September Note is attached hereto and made a part hereof as **Exhibit 1**.

7. In connection with and as an inducement to make the loan represented by the September Note, on or about September 15, 2008, Malone executed and delivered to the Bank a Guaranty, wherein she unconditionally, absolutely and irrevocably guaranteed the full and prompt payment and performance of EAR’s indebtedness to the Bank (“Malone Guaranty”). A copy of the Malone Guaranty is attached hereto and made a part hereof as **Exhibit 2**.

8. In connection with and as an inducement to make the loan represented by the September Note, on or about September 15, 2008, Anstett executed and delivered to the Bank a Guaranty, wherein he unconditionally, absolutely and irrevocably guaranteed the full and prompt payment and performance of EAR’s indebtedness to the Bank. (“Anstett Guaranty”). A copy of the Anstett Guaranty is attached hereto and made a part hereof as **Exhibit 3**.

9. On or about December 19, 2008, EAR executed and delivered to the Bank a Promissory Note, in the original principal sum of \$3,280,000.00, which was to mature on December 15, 2012 (“December Note”), a copy of which is attached hereto and made a part hereof as **Exhibit 4**.

10. In connection with and as an inducement to make the loan represented by the December Note, on or about December 15, 2008, Malone delivered to the Bank a Continuing Guaranty (“Malone Continuing Guaranty”), whereby she unconditionally, absolutely and irrevocably guaranteed the full and prompt payment and performance of all indebtedness of EAR to the Bank. A copy of the Malone Continuing Guaranty is attached as **Exhibit 5**.

11. On or about December 15, 2008, in connection with and as inducement to make the loan represented by the December Note, Anstett executed and delivered to the Bank a Continuing Guaranty (“Anstett Continuing Guaranty”) which he unconditionally, absolutely and irrevocably guaranteed the full and prompt payment and performance of all indebtedness of EAR to the Bank. A copy of the Anstett Continuing Guaranty is attached as **Exhibit 6**.

12. On July 15, 2009 EAR failed to make payment to the Bank of the scheduled principal and interest due under the terms of the September Note.

13. On July 15, 2009, EAR failed to make payment to the Bank of the scheduled principal and interest due under the terms of the December Note.

14. Accordingly, on August 5, 2009, the Bank sent written notice to EAR, Malone and Anstett that EAR was in default under the terms of the September Note and December Note. The Bank accelerated the entire debt and demanded payment. A copy of the demands are attached hereto and made a part hereof as **Exhibits 7 and 8**.

15. Defendants have refused and continue to refuse to pay the indebtedness due to the Bank.

16. As of October 13, 2009, there is due and owing on the Loans the following amounts:

September Note:	Principal:	\$3,744,310.95
	Interest:	79,108.61
	Late Fees:	14,938.84
	Other Fees:	<u>1,100.00</u>
	TOTAL	\$3,839,458.40
with interest accruing at 6.24%	Per Diem:	<u>\$ 649.36</u>
December Note:	Principal:	\$3,280,000.00
	Interest:	67,879.96
	Late Fees:	12,835.59
	Other Fees:	<u>1,100.00</u>
	TOTAL	\$2,951,722.85
with interest accruing at 6.99%	Per Diem:	<u>\$ 557.51</u>

17. In connection with the Loans, EAR entered into certain interest rate swap agreements with the Bank to hedge against increases in the variable interest rates EAR agreed to under the terms of the September Promissory Note and the December Promissory Note.

18. To effectuate the interest rate swaps, EAR and the Bank entered into a International Swap Dealers Association Master Agreement dated as of September 11, 2008, including a Schedule (“Master Swap Agreement”). A copy of the Master Swap Agreement and Schedule is attached as **Exhibit 9**.

19. Effective September 22, 2008, EAR purchased an interest rate swap (“September Swap”) pursuant to the terms and conditions of the Master Swap Agreement. A copy of a Swap Confirmation Letter, dated September 19, 2009 (“September 19 Confirmation”), is attached as **Exhibit 10**.

20. Effective December 18, 2009, EAR purchased an interest rate swap (“December Swap”) pursuant to the terms and conditions of the Master Swap Agreement. A copy of a Swap Confirmation letter, dated December 18, 2009 (“December 18 Confirmation”), is attached as **Exhibit 11**.

21. Under the terms of the September 19 Confirmation and the December 18 Confirmation, EAR was required to make monthly settlement payments on the 15<sup>th</sup> day of each month. EAR failed make the required payments on July 15, 2009 and thereafter.

22. Paragraph 5(a)(i) of the Master Swap Agreement, as amended by the Schedule provides that the failure by EAR to make any payment when due, if such failure is not remedied on or before the first business day after notice of such failure is given, shall constitute an Event of Default.

23. By letter dated September 22, 2009, the Bank demanded the overdue payments EAR failed to make any payment following such demand.

24. Effective October 2, 2009, the Bank terminated the September Swap and December Swap, and provided notice to Malone and Anstett of same. The termination of the Swaps caused the Bank to incur unwinding costs of \$164,200 for the September Swap and \$59,400 for the December Swap. These amounts, along with the unpaid monthly payments, are now due.

25. The Master Agreement provides that interest accrues on unpaid amounts at 5%, (1% plus the Bank's 4% cost of funding).

**COUNT I**  
**Breach of Guaranty**  
**Against Defendant Donna L. Malone**

26. The Bank restates the allegations contained in Paragraphs 1-25 of the Complaint as if fully stated herein.

27. The Bank has declared the unpaid principal and accrued interest on the September Note, December Note and the Master Swap Agreement to be immediately due and payable.

28. Pursuant to the terms of the Malone Guaranties, the Bank is entitled to reimbursement for all reasonable costs, attorneys' fees and legal expenses incurred in exercising its rights and remedies under each of the Guaranties.

WHEREFORE, Plaintiff, Fifth Third Bank, prays for judgment against Defendant, Malone as follows:

- (a) As to the September Note in the amount of \$3,839,458.80, plus interest accruing at the per diem rate of \$649.36;
- (b) As to the December Note in the amount of \$2,951,722.85, plus interest accruing at the per diem rate of \$557.51;
- (c) As to the Swaps, \$263,223.77, plus interest accruing at 5% per annum;
- (d) Plus attorney's fees and costs through the date of judgment; and
- (e) Such other and further relief as the Court deems just and proper.

**COUNT II**  
**Breach of Guaranty**  
**Against Defendant Mark W. Anstett**

29. The Bank restates the allegations contained in Paragraphs 1-25 of the Complaint as if fully stated herein.

30. The Bank has declared the unpaid principal and accrued interest on the September Note, December Note and Master Swap Agreement to be immediately due and payable.

31. Pursuant to the terms of the Anstett Guaranties, the Bank is entitled to reimbursement for all reasonable costs, attorneys' fees and legal expenses incurred in exercising its rights and remedies under the September Note and December Note and the Guaranties.

WHEREFORE, Plaintiff, Fifth Third Bank, prays for judgment against Defendant, Anstett as follows:

- (a) As to the September Note in the amount of \$3,839,458.40, plus interest accruing at the per diem rate of \$649.36;
- (b) As to the December Note in the amount of \$2,951,722.85, plus interest accruing at the per diem rate of \$557.51;
- (c) As to the Swaps, \$263,223.77, plus interest accruing at 5% per annum;
- (d) Plus attorney's fees and costs through the date of judgment; and
- (e) Such other and further relief as the Court deems just and proper.

Dated: October 19, 2009

Respectfully submitted,

FIFTH THIRD BANK, an Ohio Banking Corporation, successor by merger to Fifth Third Bank, a Michigan Banking Corporation

By: /s/Patrick T. Stanton

One of its Attorneys

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