UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:	
GRAND SOLEIL-NATCHEZ, LLC,	**CASE NO. 11-01632-NPO**
DEBTOR.	**CHAPTER 7**
GOOD HOPE CONSTRUCTION, INC. , ET AL.	**PLAINTIFFS**
VS.	**ADV. PROC. NO. 12-00013-NPO**
RJB FINANCING, LLC, ET AL.	**DEFENDANTS**

MEMORANDUM OPINION AND ORDER
ON THE CATO PARTIES' MOTION FOR **PARTIAL**
SUMMARY JUDGMENT AND RJB FINANCING, LLC AND
ROBERT J. BERARD'S JOINT MOTION FOR SUMMARY
JUDGMENT, OR ALTERNATIVELY, FOR PARTIAL SUMMARY JUDGMENT

There came on for consideration The Cato Parties' Motion for Partial Summary Judgment (the "Cato Motion") (Adv. Dkt. 410)[1] filed by Charles David Cato ("Charles Cato"), William Marvin Cato ("Marvin Cato"), Emerald Star Casino & Resorts, Inc. ("Emerald Star"), Emerald Star Properties, LLC ("ESP"), and ESC Holdings, LLC ("ESC") (collectively, the "Cato Parties"); the RJB Financing, LLC and Robert J. Berard's Joint Motion for Summary Judgment, or Alternatively, for Partial Summary Judgment (the "Berard Motion") (Adv. Dkt. 411) filed by RJB Financing, LLC ("RJB") and Robert J. Berard ("Berard") (collectively, the "Berard Parties"); the Joint Statement of Undisputed Material Facts in Support of RJB Financing, LLC and Robert J. Berard's Joint Motion for Summary Judgment, or Alternatively, for Partial

[1] Citations to the record are as follows: (1) citations to docket entries in this adversary proceeding, Adv. Proc. No. 12-00013-NPO, are cited as "(Adv. Dkt. ____)"; (2) citations to docket entries in the main bankruptcy case, Case No. 11-01632-NPO, are cited as "(Dkt. ____)"; and (3) citations to docket entries in other adversary proceedings are cited by the case number followed by the docket number.

Summary Judgment (the "Berard Statement") (Ex. D, Adv. Dkt. 411-3) filed by the Berard Parties; the Joint Memorandum in Support of RJB Financing, LLC and Robert J. Berard's Joint Motion for Summary Judgment, or Alternatively, for Partial Summary Judgment (the "Berard Brief") (Adv. Dkt. 412) filed by the Berard Parties; The Cato Parties' Response to Joint Motion for Summary Judgment or Alternatively, for Partial Summary Judgment Filed by RJB Financing, LLC and Robert J. Berard, Including Incorporated Memorandum of Law (the "Cato Response") (Adv. Dkt. 423) filed by the Cato Parties; the Joint Response of RJB Financing, LLC and Robert J. Berard to the Cato Parties' Motion for Partial Summary Judgment (the "Berard Response") (Adv. Dkt. 424) filed by the Berard Parties; the Joint Memorandum in Support of RJB Financing, LLC and Robert J. Berard's Joint Response to the Cato Parties' Motion for Partial Summary Judgment (the "Berard Response Brief") (Adv. Dkt. 425) filed by the Berard Parties; the Joint Reply of RJB Financing, LLC and Robert J. Berard to the Cato Parties' Response [AP Dkt. #423] to the Berard Parties' Joint Motion for Summary Judgment [AP Dkt. #411] and Supporting Joint Brief [AP Dkt. #412] (the "Berard Reply") (Adv. Dkt. 430) filed by the Berard Parties; the Joint Memorandum in Support of RJB Financing, LLC and Robert J. Berard's Joint Reply to the Cato Parties' Response [AP Dkt. #423] to the Berard Parties' Joint Motion for Summary Judgment [AP Dkt. #411] and Supporting Brief [AP Dkt. #412] (the "Berard Reply Brief") (Adv. Dkt. 431) filed by the Berard Parties; and The Cato Parties' Reply to Joint Response and Memorandum Filed by RJB Financing, LLC and Robert J. Berard (Dkt. 424, 425) and Incorporated Memorandum of Law (the "Cato Reply Brief") (Adv. Dkt. 433) filed by the Cato Parties in the above-referenced adversary proceeding (the "Adversary").

Before turning to the merits of the Cato Motion and the Berard Motion, the Court pauses here to address two procedural matters related to Local Rule 7056-1 of the Uniform Local Rules

of the United States Bankruptcy Court for the Northern and Southern Districts of Mississippi ("Local Rule 7056-1"). The Cato Parties did not file a separate brief in support of the Cato Motion. Instead, they filed a Notice of Incorporation of Memorandum Brief within Motion for Partial Summary Judgment in Compliance with Miss. Bankr. L.R. 7056-1 (the "Notice of Incorporation") (Adv. Dkt. 416) informing the Court that the "legal memorandum required by Rule 7056-1 was incorporated in the [Cato Motion]." Local Rule 7056-1(3)(A) provides that "[e]ach motion for summary judgment must be accompanied by a memorandum brief," yet the Cato Parties interpret it as not requiring a separate document. The Court has not found any authority that supports their interpretation of Local Rule 7056-1(3)(A) and, moreover, is unaware of any party who previously has challenged the separate-document requirement in Local Rule 7056-1(3)(A).

The Court has broad discretionary authority to enforce its local rules, which are implemented for the orderly and expeditious handling of cases. *See John v. Louisiana*, 757 F.2d 698, 709 (5th Cir. 1985). Although pages 14 and 19-21 of the Cato Motion do include some legal citations, the Court finds the argument of the Cato Parties regarding Local Rule 7056 to be untenable. Local Rule 7056-1 does mean what it says. The Cato Parties are instructed, for future reference, that there is a separate-document requirement in Local Rule 7056-1.

With regard to the second procedural matter related to Local Rule 7056-1, the Cato Parties submitted 6,023 pages of exhibits in support of the Cato Motion. These exhibits consist of deposition transcripts in their entirety, as opposed to deposition excerpts. (Adv. Dkts. 402-407 & 409). Also, many of the references to exhibits in the Cato Motion fail to include pinpoint citations. (*See, e.g.*, Cato Mot. at 11 n.35, 13 nn.45 & 50, 16 n.58, 18 n.67). It is well established that a litigant on summary judgment cannot shift the burden to the Court by

inundating the record with voluminous exhibits with the expectation that the Court will unearth evidence that will benefit the litigant's position. "Judges are not like pigs, hunting for truffles."[2] *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). For this reason, Local Rule 7056-1(A)(iii) expressly prohibits the attachment of entire depositions. The Court, nevertheless, declines the request of the Berard Parties to sanction the Cato Parties for their violation of Local Rule 7056.

Finally, it is worth noting that the parties filed their dispositive motions, with a combined total of 7,723 pages of exhibits,[3] despite the fast-approaching trial date[4] and the Court's prior admonition that the issues presented in the Adversary appeared to be fact intensive and not amenable to summary judgment. That both parties seek summary judgment on the same issues and claims, based on conflicting material facts, shows that the Court's original assessment was

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[2] *See infra* p. 65.

[3] The Berard Parties attached four (4) exhibits to the Berard Motion, which they identified as Exhibits A through D. Attached to Exhibit D (the Berard Statement) are seventeen (17) exhibits identified by Roman numeral, as Exhibits I through XVII. Attached to Exhibits I through XVII are even more exhibits. The Berard Parties identified these additional exhibits by letter of the alphabet except for those exhibits attached to Exhibit I (the "Hudson Affidavit") of Exhibit D (the Berard Statement), which they identified by number. All exhibits attached to the Berard Motion appear at docket entries 411-1 through 411-30. The Berard Parties attached to the Berard Response six (6) exhibits which they marked as Exhibits A through F. Exhibits A through F appear at docket entry 424. The Berard parties attached one (1) final exhibit to the Berard Reply, which appears at docket entry 430-1. The Court notes that Exhibit VII (Adv. Dkt. 411-10) to the Berard Statement consists of excerpts from the deposition of Marvin Cato, and the Court previously has entered an Order Granting Joint Motion to Disallow and Strike Changes to Errata Sheet from Deposition of William Marvin Cato (Adv. Dkt. 419). In support of the Cato Motion, the Cato Parties filed six (6) depositions in their entirety, including exhibits. These six (6) depositions appear at docket entries 402 through 407. The Cato Parties also attached one (1) exhibit to the Cato Response, which appears at docket entry 423-1. Citations to exhibits in the Opinion identify the letter or number of the exhibit, the original page number, and the docket number.

[4] The trial of the Adversary is set for the week of September 16, 2013.

correct. Disputed facts cannot support summary judgment as a matter of law in favor of parties who both claim a priority interest in the same funds. After considering the pleadings and the voluminous exhibits, the Court finds that the Cato Motion and the Berard Motion should be denied.

Jurisdiction

The Court has jurisdiction over the parties and the subject matter of this proceeding pursuant to 28 U.S.C. § 1334. This is a core proceeding under 28 U.S.C. § 157(b)(2)(K).[5] Notice of the Cato Motion and the Berard Motion was proper under the circumstances.

Facts

In making its determination of the facts, the Court must consider the Cato Motion and the Berard Motion independently and view the evidence and inferences in the light most favorable to the non-moving party. *Amerisure Ins. Co. v. Navigators Ins. Co.*, 611 F.3d 299, 304 (5th Cir. 2010). With that standard in mind, the Court finds that there are no genuine issues with respect to the following facts set forth in the Cato Motion and the Berard Statement.

[5] This finding of core jurisdiction is undisputed. The United States Supreme Court in *Stern v. Marshall*, 131 S. Ct. 2594 (2011), held that bankruptcy courts lack constitutional authority to enter a final judgment on a debtor's state-law, compulsory counterclaim that did not stem from the bankruptcy itself or that would not necessarily be resolved by the claims allowance process. *See Technical Automation Servs. Corp. v. Liberty Surplus Ins. Corp.*, 673 F.3d 399 (5th Cir. 2012) (suggesting a narrow interpretation of *Stern*). Recently, the Supreme Court granted a petition for writ of certiorari in *Executive Benefits Insurance Agency, Inc. v. Arkison (In re Bellingham Insurance Agency, Inc.)*, 702 F.3d 553 (9th Cir. 2012), in which the Ninth Circuit Court of Appeals held that bankruptcy courts lack constitutional authority under *Stern* to enter summary judgments in fraudulent conveyance claims against noncreditors. In the event that a higher court disagrees that the Adversary involves "core" matters and/or otherwise determines that the Court lacks constitutional authority to enter a final judgment, the Court recommends that this Opinion be regarded as its proposed findings of fact and conclusions of law and further recommends that the District Court enter this Opinion as its own after due consideration, in accordance with 28 U.S.C. § 157(c)(1).

1. Grand Soleil-Natchez, LLC ("Grand Soleil")[6] is a Mississippi limited liability company formed by Emerald Star on February 24, 2005, for the purpose of developing and operating a gaming casino in Natchez, Mississippi (the "Casino and Hotel Project") (C. Cato Dep. at 11, Adv. Dkt. 404-1; Bayba Dep. at 19-20, Adv. Dkt. 402-1). Emerald Star is a Wisconsin corporation solely owned by Charles Cato, and the idea for the Casino and Hotel Project originated with him. (C. Cato Dep. at 9, 11, Adv. Dkt. 404-1).

2. By mid-2008, Grand Soleil had acquired three parcels of real property in Natchez on which to locate the Casino and Hotel Project. They were known as: (1) the "Briars Property"; (2) the "Hotel"; and (3) the "Williams Tract." The Briars Property was an historic bed and breakfast located at 31 Irving Lane in Natchez. (Bayba Dep. at 274, Adv. Dkt. 402-1). Near the Briars Property was the Hotel and restaurant, located at 130 John R. Junkin Drive in Natchez. (Bayba Dep. at 274, Adv. Dkt. 402-1). The Hotel sits on a bluff overlooking the Mississippi River. Next to the Hotel is vacant land known as the Williams Tract, which abuts the Mississippi River. (Bayba Dep. at 70-71, Adv. Dkt. 402-1). Charles Cato planned to dock a riverboat casino[7] next to the Williams Tract, build a *porte-cochère* at the entrance to the casino, renovate the Hotel to provide casino patrons with a comfortable place to stay, and reward "high rollers" with deluxe accommodations at the Briars Property. (C. Cato Dep. at 266-70, Adv. Dkt. 404-2). When Charles Cato's vision of a gaming casino operation in Natchez failed to

[6] Grand Soleil was known as the Emerald Star Casino-Natchez, LLC until November 1, 2007, when it changed its name. (Ex. II, Adv. Dkt. 411-9; C. Cato Dep. at 11, Adv. Dkt. 404-1). To avoid confusion, the Court refers to Grand Soleil throughout the Opinion.

[7] Mississippi law initially limited the location of a gaming operating to a "cruise vessel." *See* MISS. CODE ANN. § 97-33-7(4)(a).

materialize, competing liens on these three properties gave rise to the Adversary. (C. Cato Dep. at 52, Adv. Dkt. 404-1).

Briars Property, Hotel, and Williams Tract

3. Grand Soleil acquired the Briars Property, the Hotel, and the Williams Tract from ESP, Big River Enterprises, LLC ("Big River"), and Charles Cato, respectively.

4. ESP, a Mississippi limited liability company formed by Charles Cato, purchased the Briars Property on November 1, 2005. (C. Cato Dep. at 13, Adv. Dkt. 404-1). Charles Cato, on behalf of ESP, signed a note (the "B&K Briars Note") and deed of trust (the "B&K Briars DOT") in favor of Britton & Koontz Bank N.A. ("B&K") in the amount of $1,550,000 (C. Cato Dep. at 9, Adv. Dkt. 404-1; Hudson Aff. ¶ 5, Adv. Dkt. 411-4; Ex. 1, Adv. Dkt. 411-5).

5. Big River is a Wisconsin limited liability company formed by William Bayba ("Bayba") on June 29, 2005, for the purpose of investing in Grand Soleil. (Bayba Dep. at 19-20, Adv. Dkt. 402-1). Berard, through Bayba, became a member of Big River shortly after its formation. (Bayba Dep. at 20-21, Adv. Dkt. 402-1). Big River acquired the Hotel in a foreclosure sale. (Bayba Dep. at 35, Adv. Dkt. 402-1). At that time, the Hotel had closed its doors and was in need of repairs. (Bayba Dep. at 52, Adv. Dkt. 402-2). Big River obtained a construction loan from B&K (the "B&K Hotel Note") and granted B&K a deed of trust encumbering the Hotel in the amount of $3,643,307 (the "B&K Hotel DOT"), dated December 4, 2006, and recorded on December 7, 2006. Big River then entered into a contract with Good Hope Construction Company ("Good Hope") to renovate the Hotel (Bayba Dep. at 62, 71-72, Adv. Dkt. 402-1; Ex. 3, Adv. Dkt. 403-4).

6. The Williams Tract was owned by Charles Cato (C. Cato Dep. at 13, Adv. Dkt. 404-1). In October, 2005, Charles Cato entered into a construction contract with W.G. Yates &

Sons Construction Company ("Yates Construction") to build the *porte-cochère*, stabilize the river bank, and perform other work to prepare the Williams Tract for the riverboat casino (Yates Dep. at 18-20, Adv. Dkt. 407-1; Ex. 2, Adv. Dkt. 407-3).

Operating Agreement Between Emerald Star, Big River, and the Tribe

7. Emerald Star, as the sole member of Grand Soleil, entered into an operating agreement dated February 16, 2007, (the "Operating Agreement"), pursuant to which Big River and Lake of Torches Federal Development Corporation (the "Tribe")[8] became new owners of Grand Soleil, along with Emerald Star. (C. Cato Dep. at 17, Adv. Dkt. 404-1; Bayba Dep. at 40, Adv. Dkt. 402-1; Ex. 4, Adv. Dkts. 402-6 to 402-10).

8. The Operating Agreement required the members to make contributions to Grand Soleil in the form of cash and property. (C. Cato Dep. at 22, Adv. Dkt. 404-1; Bayba Dep. at 31, Adv. Dkt. 402-2).

9. On February 16, 2007, in connection with the Operating Agreement, Grand Soleil (as the purchaser) and Emerald Star, ESP, Charles Cato, Big River, Bayba, and the Tribe (as the sellers) entered into a Real Estate Purchase and Sale Agreement (the "Purchase and Sale Agreement") regarding the Briars Property, the Hotel, and the Williams Tract. (Ex. VI, Adv. Dkt. 411-9).

10. Under the auspices of the Operating Agreement and the Purchase and Sale Agreement, Grand Soleil acquired the Briars Property, the Hotel, and the Williams Tract through a series of conveyances. The Briars Property was conveyed to Grand Soleil by ESP by warranty

[8] Lake of Torches Federal Development Corporation is a tribal corporation owned by the Lac du Flambeau Band of Chippewa, a federally recognized Native American tribe. (C. Cato Dep. at 65, Dkt. 404-1).

deed (the "Briars Warranty Deed") on December 5, 2006.[9] (Ex. IV, Adv. Dkt. 411-9). The Hotel was conveyed to Grand Soleil by Big River on December 4, 2006.[10] (Ex. III, Adv. Dkt. 411-9). The Williams Tract was conveyed to Grand Soleil by Charles Cato on February 16, 2007 (Ex. V, Adv. Dkt. 411-9).

11. On September 26, 2007, Grand Soleil borrowed $1,700,000 from Concordia Bank & Trust Company ("Concordia"). Grand Soleil signed a note (the "Concordia Note") and granted Concordia a deed of trust encumbering the Briars Property (the "Concordia Briars DOT"), which was recorded on October 5, 2007. Most of the proceeds from the Concordia Note were used to refinance the B&K Briars Note and satisfy the B&K Briars DOT. (Hudson Aff. ¶ 10, Adv. Dkt. 411-4; Ex. 3, Adv. Dkt. 411-8).

12. Shortly thereafter, Grand Soleil borrowed $1,700,000 from First National Bank ("FNB") and granted FNB a deed of trust encumbering the Williams Tract (the "FNB Williams DOT") in the amount of $1,700,000, which was recorded on or about October 5, 2007. (Hudson Dep. at 69, Adv. Dkt. 406-1). FNB advanced additional funds under the terms of the FNB Williams DOT and through a series of modifications increased the principal amount of the loan to $4,654,000.

Global Settlement

13. Because of a downturn in the economy, among other reasons, Grand Soleil was unable to secure sufficient funding to complete the Casino and Hotel Project, which led to various disputes arising out of the Operating Agreement between the members of Grand Soleil.

[9] The Briars Warranty Deed does not refer to the B&K Briars DOT. (Ex. IV, Adv. Dkt. 411-9).

[10] As mentioned previously, the Hotel was subject to the B&K Hotel DOT, dated December 4, 2006, and recorded on December 7, 2006 (RJB POC #31) (Ex. 3, Adv. Dkt. 403-4).

These disputes spawned multiple lawsuits filed in Mississippi, Florida, and Louisiana. (Bayba Dep. at 241-43, Adv. Dkt. 402-1; Hudson Aff. ¶ 11, Adv. Dkt. 411-4). The financing problem apparently arose because lenders believed that Charles Cato would not be able to obtain a finding of "suitability"[11] from the Mississippi Gaming Commission and, consequently, that Grand Soleil would not be able to procure a gaming license. (Bayba Dep. at 43, Adv. Dkt. 402-1; C. Cato Dep. at 26-28, Adv. Dkt. 404-1; Hudson Dep. at 36, Adv. Dkt. 406-1).

14. In an attempt to resolve these disputes, Charles Cato formed ESC, and on January 16, 2008, assigned Emerald Star's interest in Grand Soleil to ESC (C. Cato Dep. at 30-31, Adv. Dkt. 404-1; Ex. 3, Adv. Dkt. 404-5; Bayba Dep. at 46-50, Adv. Dkt. 402-1; Ex. 5, Adv. Dkt. 402-11).

15. Ultimately, as a step toward obtaining a gaming license and additional funding, Grand Soleil, Big River, the Tribe, Bayba, and Richard R. Lindsley ("Lindsley") (on the one hand), and all of the Cato Parties, with the exception of Marvin Cato, (the "Charles Cato Affiliates") (on the other hand), entered into a global settlement agreement (the "Global Settlement") on June 18, 2008, in which Charles Cato sold his interest in Grand Soleil to Big River and the Tribe. (Bayba Dep. at 243, Adv. Dkt. 402-1; Ex. 60, Adv. Dkt. 402-89; C. Cato Dep. at 26-28, Adv. Dkt. 404-1; Ex. 5, Adv. Dkt. 404-7). At this point, both the Hotel and the Briars were open and doing business, although the Hotel "was limping along." (Bayba Dep. at

[11] A finding of suitability is required for a gaming license under the Mississippi Gaming Control Act, MISS. CODE ANN. §§ 75-76-1 to 75-76-325. "Any person who the commission determines is qualified to receive a license or be found suitable under the provisions of this chapter, . . . may be issued a state gaming license or found suitable." MISS. CODE ANN. § 75-76-67(1). "Except for persons associated with licensed corporations or limited partnerships and required to be licensed, each employee, agent, guardian, personal representative, lender or holder of indebtedness of a gaming licensee who, in the opinion of the commission, has the power to exercise a significant influence over the licensee's operation of a gaming establishment shall be required to apply for a license." MISS. CODE ANN. § 75-76-61(1).

243, Adv. Dkt. 402-1). Lindsley was the chief financial officer of the Tribe until early 2008 when he began working for Grand Soleil as a consultant, and then in early 2009, he became chief financial officer of Grand Soleil. (Lindsley Dep. at 9, 16, Adv. Dkt. 405-1). Marvin Cato, who is Charles Cato's father, held no position with Grand Soleil and owned no financial interest in Grand Soleil prior to the Global Settlement. (C. Cato Dep. at 9-10, Adv. Dkt. 404-1; M. Cato Dep. at 14-16, Adv. Dkt. 411-10).

16. As part of the Global Settlement, Grand Soleil agreed to purchase the interest of the Charles Cato Affiliates in Grand Soleil for a total of $16,500,000. (Hudson Aff. ¶ 12, Adv. Dkt. 411-4; Ex. 4, Adv. Dkt. 411-8). This amount was payable by Grand Soleil to the Cato Parties in the form of $2,000,000 in cash and a promissory note in the amount of $14,500,000 (the "Cato Note") (Bayba Dep. at 251, Adv. Dkt. 402-1). The Cato Note, dated July 14, 2008, was payable as follows:

> (a.) $3,000,000 in four (4) equal annual installments of $750,000 each, the first installment due on July 14, 2009, and continuing each year through July 14, 2012; and
>
> (b.) $11,500,000 in ten (10) equal annual installments of $1,150,000.00 each, the first installment due on July 14, 2013, and continuing each year through July 14, 2022.

(M. Cato Depo. at 46-47, Adv. Dkt. 411-10; C. Cato Depo. at 42-43, Adv. Dkt. 404-1; Ex. 5, Adv. Dkt. 404-7).

17. To secure repayment of the Cato Note, Grand Soleil granted Marvin Cato (but not the Charles Cato Affiliates) a deed of trust (the "Marvin Cato DOT") (Cato POC #23) in all real property of Grand Soleil, including the Briars Property, the Williams Tract, and the Hotel. (Bayba Dep. at 266-67, Adv. Dkt. 402-1; Ex. 61, Adv. Dkt. 402-90). The Marvin Cato DOT was signed on July 14, 2008, and recorded on July 29, 2008. (Hudson Aff. ¶ 13, Adv. Dkt. 411-4;

Ex. 5, Adv. Dkt. 411-8). As previously noted, Marvin Cato was not involved in the Casino and Hotel Project until the Global Settlement was signed. (C. Cato Dep. at 9-10, Adv. Dkt. 404-1). Charles Cato testified that he made Marvin Cato the sole beneficiary in the Marvin Cato DOT because Marvin Cato had a "suitability" finding from the Mississippi Gaming Commission whereas he did not. (C. Cato Dep. at 29, Adv. Dkt. 404-1).

18. The Global Settlement contained a provision acknowledging that Grand Soleil intended to secure a loan or series of loans not to exceed $70,000,000, for the purpose of completing and opening a casino and hotel in Natchez. Significantly, the Global Settlement also provided that "the security interest hereafter granted to the designated Cato Party on said real and personal property shall be deemed to be automatically subordinated thereto as hereinafter provided." (Hudson Aff. ¶ 12, Adv. Dkt. 411-4; Ex. 5, ¶ 5(D), Adv. Dkt. 404-7).

19. Similar to the subordination provision in the Global Settlement, the Marvin Cato DOT contained the following language:

SUBORDINATION OBLIGATION

> It is understood by all parties hereto that Debtor (Grand Soleil-Natchez, LLC) may hereafter secure an additional loan or series of loans in an aggregate amount not to exceed $70,000,000.00, and which loans shall be for the purpose of completing, opening and operating the Grand Soleil casino and hotel project currently under construction in Natchez, Mississippi. The Secured Party herein (William Marvin Cato), along with ESC, hereby represent and agree that this Deed of Trust shall be deemed to be junior in priority to such other additional loans to the extent such subsequent deeds of trust and security agreements to institutional or other lenders, as provided in the Settlement Agreement dated June 18, 2008 between the Cato Parties and the Natchez Parties ("the Settlement Agreement"), do not exceed the aggregate principal sum of $70,000,000.00. Additionally, any mortgage, deed of trust or security agreement executed by the Debtor for the above referenced purposes may include provisions permitting the lender(s) thereunder to advanced funds following the closing and recording of such security instruments and that any such advance or future advance shall maintain its priority over the secured interest hereby granted to Secured Party to the extent that the total principal balance on all such other loans and advances

> does not exceed the sum of $70,000,000.00. Except as set forth above, the Deed of Trust is intended to be a second priority Deed of Trust.
>
> It is further agreed that the security interest herein granted to the Secured Party shall be deemed to be automatically subordinated to all such other deeds of trust, mortgages or secured agreements to the extent that such do not exceed the aggregate principal sum of $70,000,000.00. It is further agreed that such institutional or other loans may be refinanced by the Debtor at any time and that this subordination obligation shall remain in effect as long as there is a security interest held by the Secured Party or his assignee.

Despite the fact that the Marvin Cato DOT named Marvin Cato as the sole beneficiary, the Charles Cato Affiliates assigned the Marvin Cato DOT to Marvin Cato on July 14, 2008 (the "Charles Cato Affiliates Assignment").[12] (C. Cato Dep. at 48-50, Adv. Dkt. 404-1).

UMB

20. Grand Soleil anticipated receiving a large investment from the Tribe in the fall of 2008. (Bayba Dep. at 268, Adv. Dkt. 402-1). When Grand Soleil realized that the funds would not be forthcoming, Grand Soleil borrowed $2,500,000 from United Mississippi Bank ("UMB") to complete the Hotel renovations (Bayba Dep. at 271-74, Adv. Dkt. 402-1). On October 31, 2008, Grand Soleil executed a promissory note (the "UMB 2008 Note") and a deed of trust encumbering both the Briars Property and the Hotel (the "UMB 2008 Briars/Hotel DOT") in favor of UMB (Bayba Dep. at 242-73, Adv. Dkt. 402-1; Ex. 64, Adv. Dkt. 402-93; Ex. 65, Adv. Dkt. 402-94; Hudson Aff. ¶ 16, Adv. Dkt. 411-4; Ellard Dep. at 18-19, Adv. Dkt. 403-1; Ex. 2, Adv. Dkt. 403-3). The UMB 2008 Note matured on February 25, 2009, which was approximately four (4) months after the UMB 2008 Note was signed. (Bayba Dep. at 272-74, Adv. Dkt. 402-1; Ex. 64, Adv. Dkt. 402-93). To further secure repayment of the UMB 2008

[12] For reasons discussed later in this Opinion, it is important to note that the Cato Note, the Marvin Cato DOT, and the Charles Cato Affiliates Assignment were all signed on the same day. *See infra* p. 35.

Note, Bayba, Berard, and other members of Big River signed personal guaranties. (Bayba Dep. at 275, Adv. Dkt. 402-1).

21. Prior to the loan, UMB obtained a title insurance commitment (the "UMB Briars Title Commitment") (Hudson Aff. ¶ 17, Adv. Dkt. 411-4; Ex. 7, Adv. Dkt. 411-8) issued by R. Kent Hudson ("Hudson") on behalf of First American Title Insurance Company. Hudson, a Mississippi licensed attorney, was then lead counsel for Grand Soleil and also a title agent of First American Title Insurance Company. Schedule B of the UMB Briars Title Commitment listed the Concordia Briars DOT but did not list the Marvin Cato DOT. (Hudson Aff. ¶ 17, Adv. Dkt. 411-4; Ex. 7, Adv. Dkt. 411-8; Hudson Dep. at 72, Adv. Dkt. 406-1).

22. Loan proceeds from the UMB 2008 Note refinanced the $1,700,000 Concordia Note and satisfied the Concordia Briars DOT on the Briars Property (Hudson Aff. ¶¶ 16, 18, Adv. Dkt. 411-4). Accordingly, a "Cancellation of Mississippi Deed of Trust" was recorded on November 10, 2008. Most of the remaining loan proceeds from the UMB 2008 Note were wired to Big River for completion of the pool area, walkways, landscaping, fencing, and a parking lot, all at the Hotel, for which UMB took a second lien position behind B&K. (Hudson Aff. ¶ 16, Adv. Dkt. 411-4; Lindsley Aff. ¶ 3, Adv. Dkt. 411-22; Bayba Dep. at 284, Adv. Dkt. 402-1).

23. Grand Soleil became delinquent in its payments to Yates Construction and to persuade Yates Construction to continue its work on the Williams Tract, Grand Soleil on November 19, 2008, signed a promissory note (the "Yates Note") in the principal amount of $2,976,423.89 in favor of Yates Construction (Yates Constr. Dep. at 16-18, Adv. Dkt. 407-1). To secure repayment of the Yates Note, Grand Soleil granted Yates Construction a deed of trust encumbering the Williams Tract (the "Yates Williams DOT") (Yates POC #11). In the Yates

Williams DOT, Yates Construction acknowledged that the FNB Williams DOT was senior in priority.

Foreclosure and Forbearance

24. Grand Soleil did not pay the UMB 2008 Note when it became due on February 25, 2009. (Bayba Dep. at 37, Adv. Dkt. 402-2). As a result, UMB filed a state court action against Grand Soleil, Big River, Berard, and others seeking to foreclose the UMB 2008 Briars/Hotel DOT against the Briars Property and the Hotel. During the pendency of the foreclosure action, Grand Soleil and UMB entered into a series of forbearance agreements. (Exs. 17-24, Adv. Dkts. 402-29 to 402-36). Under the forbearance agreement dated April 19, 2010, UMB agreed to forebear from foreclosing on the UMB 2008 Briars/Hotel DOT and the B&K Hotel DOT for six (6) months on the condition that Berard purchase and pledge a certificate of deposit ("CD") in the amount of $1,250,000 as additional collateral for the UMB 2008 Note. (Bayba Dep. at 40, Adv. Dkt. 402-2; Ex. 20, Adv. Dkt. 402-32). Although Berard became a member of Big River shortly after it was formed, it was not until this juncture that his involvement in the Casino and Hotel Project began to escalate.

25. On April 19, 2010, Berard wired $1,600,000 to Hudson's trust account. From that amount, Hudson deposited $1,250,000 into a CD in Berard's name to be held by UMB as additional security for the 2008 UMB Note. (Bayba Dep. at 41, Adv. Dkt. 402-2; Ellard Dep. at 23, Adv. Dkt. 403-1). The remaining funds were used to pay property taxes and other items. (*See* Berard POC #27, Ex. 1 at 8).

26. On April 20, 2010, UMB acquired the B&K Note and the B&K Hotel DOT by assignment from B&K (RJB POC #31; Ellard Dep. at 20, Adv. Dkt. 403-1).

27. On August 11, 2010, the forbearance agreement dated April 19, 2010, was amended, and UMB agreed to loan Grand Soleil an additional $850,000 (the "UMB 2010 Note") (Bayba Dep. at 284, Adv. Dkt. 402-1; Ex. 67, Adv. Dkt. 402-96; Ellard Dep. at 20, Adv. Dkt. 403-1; Ex 4, Adv. Dkt. 403-5). This additional advance was secured by the UMB 2008 Briars/Hotel DOT and by an additional CD pledged by Berard in the amount of $650,000. (Bayba Dep. at 42, Adv. Dkt. 402-2; Ex. 21, Adv. Dkt. 402-33).

28. Berard wired $650,000 to UMB for the purpose of depositing $650,000 into a CD as security for the UMB 2010 Loan. (Ellard Dep. at 23, Adv. Dkt. 403-1; Ex. 6, Adv. Dkt. 403-6).

29. In summary, the collateral provided for the debts owed UMB under the 2008 UMB Note, the B&K Briars Note (acquired by UMB by assignment), and the UMB 2010 Note consisted of: (1) the $1,250,000 CD and the $650,000 CD, which totaled $1,900,000 (the "UMB CDs"); (2) the UMB 2008 Briars/Hotel DOT; and (3) the B&K Briars DOT.

30. In the series of forbearance agreements, UMB acknowledged that the UMB CDs were not property of Grand Soleil and that UMB had the right to liquidate the UMB CDs in the event that Grand Soleil commenced a bankruptcy case. (Exs. 17-24, Adv. Dkts. 402-29 to 402-36).

Bankruptcy Case

31. An involuntary petition for relief under chapter 7 (Dkt. 1) was filed against Grand Soleil on May 5, 2011, by Good Hope, Farmer Electrical Service Company, Inc., ("Farmer"), and Ketco, Inc. d/b/a Ketco Adv. & Spec. ("Ketco") in this Court.

32. An Agreed Order Granting Involuntary Petition and Converting Case to Chapter 11 (Dkt. 43) was entered by the Court on August 10, 2011, converting Grand Soleil's involuntary chapter 7 case to a voluntary chapter 11 case (the "Bankruptcy Case").[13] (Case 11-01632-NPO).

RJB

33. On September 8, 2011, Berard formed RJB, a Wisconsin limited liability company, for the purpose of providing post-petition financing to Grand Soleil. (Berard Aff. ¶ 10, Adv. Dkt. 411-24).

34. On October 6, 2011, RJB purchased the claims of FNB against Grand Soleil as to the Williams Tract and became the holder of the FNB Williams DOT. (RJB POC #30-1, 30-2, 30-3) (Berard Aff. ¶ 3, Adv. Dkt. 411-24).

35. RJB acquired by assignment the claims of UMB against Grand Soleil as to the Hotel and the Briars Property (the "UMB Assignment") and became the holder of the UMB 2008 Note, the UMB 2010 Note, the B&K Hotel Note, the B&K Hotel DOT, and the UMB 2008 Briars/Hotel DOT as of December 23, 2011. (RJB POC #31). RJB filed a Transfer of Claim Other Than for Security (Dkt. 225) on January 23, 2012.

36. The Court entered the Interim Order Granting Emergency Motion of Debtor for Preliminary Order [A] Authorizing Post-Petition "Additional Advance" Financing on Pre-Petition Debt on a Secured Basis Pursuant to 11 U.S.C. § 364(d)(1), and (B) Scheduling a Final Hearing Pursuant to Rule 4001(c)(2) [Dkt. #235] (the "Interim Financing Order") (Dkt. 261) and the Final Order Granting Emergency Motion of Debtor for Preliminary Order [A] Authorizing Post-Petition "Additional Advance" Financing on Pre-Petition Debt on a Secured Basis Pursuant

[13] Approximately one year later, the Bankruptcy Case was converted back to a chapter 7 case. (Dkt. 433).

to 11 U.S.C. § 364(d)(1), and (B) Scheduling a Final Hearing Pursuant to Rule 4001(c)(2) (the "Final Financing Order") (Dkt. 315) approving the Interim Financing Order and the Final Financing Order on February 14, 2012, and March 13, 2012, respectively. Pursuant to the Final Financing Order, RJB advanced $95,000 to Grand Soleil under the UMB 2008 Note. (Berard Aff. ¶ 10, Adv. Dkt. 411-24).

Sale of the Briars Property

37. Pursuant to 11 U.S.C. § 363, Grand Soleil filed the Motion to (I) Assume Lease and Executory Contract, and (II) Approve Sale of Certain Real and Personal Property Free and Clear of Liens, Claims and Interests (the "Briars Sale Motion") (Dkt. 137) on September 13, 2011. In the Briars Sale Motion, Grand Soleil sought approval from the Court to sell the Briars Property, including its contents, for $1,975,000.

38. Grand Soleil proposed to pay all net proceeds from the sale of the Briars Property to UMB in exchange for a release of the UMB 2008 Briars/Hotel DOT in the Briars Sale Motion.

39. A hearing on the Briars Sale Motion was held on November 1, 2011 (the "Briars Sale Hearing"). On November 15, 2011, the Court signed an order authorizing the sale of the Briars Property, including its contents, free and clear of all liens and encumbrances, in the amount of $1,975,000 ("Briars Sale Order") (Dkt. 213). The Court declined to make a ruling at that time regarding entitlement to the sale proceeds (the "Briars Proceeds") and ordered that the Briars Proceeds be placed in an escrow account.

Sale of the Hotel and the Williams Tract

40. On March 1, 2012, the Court entered the Order Granting Emergency Motion for Order (A) Approving: (i) Bidding Procedures; (ii) Bid Protections; and (iii) Auction Procedures; (B) Approving Notice Procedures for: (i) the Solicitation of Bids; and (ii) an Auction; (C)

Scheduling Hearings on Approval of a Sale or Sales of Substantially All of Debtors' Assets; and (D) Granting Related Relief [Dkt. #232] (the "Bid Procedures Order") (Dkt. 287). The Bid Procedures Order established bid procedures for the sale of the Hotel and the Williams Tract and set March 12, 2012, as the date of the auction. Included in the Bid Procedures Order was the requirement that credit bids submitted at the auction under 11 U.S.C. § 363(k) be supported by a letter of credit. "Any secured creditor, seeking to credit bid under Section 363(k) must post an irrevocable letter of credit based on the proof of claim amounts. Any junior lien creditor who may contest a reportedly senior lien creditor must post an irrevocable letter of credit in the amount of its credit bid and another letter of credit or cash amount to be held in escrow in the amount of that senior lien." (Bid Procedures Order at 6).

41. In preparation for the auction (the "Auction"), RJB obtained a letter of credit (the "RJB LOC") dated March 12, 2012. (Gerzmehle Aff., Adv. Dkt. 411-29; Ex. A, Adv. Dkt. 411-29).

42. Approximately two hours in advance of the Auction on March 12, 2012, there was a meeting at the office of Phelps Dunbar, LLP, the law firm representing Yates Construction.[14] (C. Cato Dep. at 188-89, 193, Adv. Dkt. 404-2). In attendance at the meeting were Charles Cato; Jeff D. Rawlings ("Rawlings"), counsel for Charles Cato; Samuel Andrew Newsom, Jr. ("Newsom");[15] Dodds Dehmer ("Dehmer"), in-house counsel for Yates

[14] As may be recalled, Yates Construction held the Yates Williams DOT dated November 19, 2008.

[15] According to Charles Cato, Newsom was there to represent the interests of a potential investor who wished to remain anonymous. (C. Cato Dep. at 110, 113-14, 117-18, 148-49, 221, Adv. Dkt. 404-2). Newsom, however, testified that he and Charles Cato formed MIS Gaming Holdings, LLC for the specific purpose of acquiring the Hotel and the Williams Tract at the auction. (Newsom Dep. at 26-27, 52-53, Adv. Dkt. 424-1).

Construction; and James W. O'Mara ("O'Mara"), outside counsel for Yates Construction. (*Id.*). At the conclusion of the meeting, a handwritten agreement prepared by O'Mara was signed by Charles Cato on behalf of the Cato Parties and by Dehmer on behalf of Yates Construction (the "Cato-Yates Agreement") (C. Cato Dep. 188-92, Adv. Dkt. 404-2; Ex. 32, Adv. Dkt. 404-41). The Cato-Yates Agreement provided:

> Cato Group & Yates Const.
> Re: GS auction
> --agree that
>
> > --if Cato buys Williams Tract, Cato will: (1) enter design-build construction contract, using industry-standard terms, with Yates for construction of new casino under a $23 million budget, and (2) pay Yates the principal amount of the Yates claim, approximately $3 million, without interest, with payment according to terms to be agreed starting after construction is completed within [blank] years
> >
> > ---with both obligations of Cato to be secured by first priority liens on the Williams Tract.
> >
> > --if Yates buys the Williams Tract, Yates will transfer it to Cato, and the above terms will apply, plus Cato paying the same purchase price as did Yates.

(C. Cato Dep. at 195, Adv. Dkt. 404-2; Ex. 32, Adv. Dkt. 404-41).

43. The Auction of the Hotel and the Williams Tract was conducted on March 12, 2012. (Auction Tr. at 4, Adv. Dkt. 409-1). In attendance at the Auction were Henry E. Waida, Jr. ("Waida"), who was the representative of Equity Partners, CRB, LLC ("Equity Partners"), the Court-approved broker; Dehmer; O'Mara; Bayba; John D. Moore, counsel for Grand Soleil; Lindsley; Charles Cato; Rawlings; Newsom; Jim F. Spencer, Jr., counsel for Good Hope; Cory Gerzmehle ("Gerzmehle"), representing RJB; and Kristina M. Johnson, counsel for RJB. (Auction Tr. at 2-3; Adv. Dkt. 409-1; Bayba Dep. at 211, Adv. Dkt. 402-1; Ex. 50, Adv. Dkt. 402-74; C. Cato Dep. at 183-84, Adv. Dkt. 404-2). The Cato-Yates Agreement was not

disclosed to RJB or to anyone else who was not affiliated with either Yates Construction or Charles Cato prior to or during the Auction.

44. The Auction began at approximately 2:00 p.m. on March 12, 2013, and lasted approximately four (4) hours. (Auction Tr. at 1, 80, Adv. Dkt. 409). During a break in the Auction, Charles Cato and Yates Construction reached a verbal agreement to subordinate the Marvin Cato DOT to the Yates Williams DOT. (C. Cato Dep. at 196-97, Adv. Dkt. 404-2). The subordination agreement was not disclosed to RJB or to anyone else not affiliated either with Yates Construction or Charles Cato during the Auction. At the close of the Auction, Yates Construction was declared the highest bidder at $5.9 million; and RJB was declared the alternate bidder. Charles Cato's final bid of $6 million was rejected after Waida determined that he had failed to qualify. (C. Cato Dep. at 256, Adv. Dkt. 404-2).

45. On March 14, 2012, several events occurred related to the sale of the Hotel and Williams Tract. To document the verbal agreement reached at the Auction, Marvin Cato signed a written subordination agreement (the "Cato-Yates Subordination Agreement") that purportedly subordinated the Marvin Cato DOT to the Yates Williams DOT. (C. Cato Dep. at 196-97, Adv. Dkt. 404-2; Ex. 33, Adv. Dkt. 404-42; Yates Constr. Dep. at 111-15, Adv. Dkt. 407-1; Ex. 25, Adv. Dkt. 407-28). Yates Construction signed an asset purchase agreement with Grand Soleil (the "Yates Asset Purchase Agreement"). (Bayba Dep. at 213, Adv. Dkt. 402-1; Ex. 52, Adv. Dkt. 402-76). Then, on the same day, the Court conducted a sale hearing (the "Sale Hearing") to confirm the Auction results. During his sworn testimony at the Sale Hearing, Dehmer disclosed the existence of the Cato-Yates Agreement but did not mention the Cato-Yates Subordination Agreement. (Sale Hr'g Tr. at 91, Dkt. 330). At the end of the Sale Hearing, the Court declined to issue a ruling as to whether Yates Construction qualified as a good faith purchaser until

counsel for Yates Construction produced a copy of the Cato-Yates Agreement. (Sale Hr'g Tr at 159-64, Dkt. 330). The Court recessed the Sale Hearing until March 20, 2012.

46. In the interim, Grand Soleil and Yates Construction engaged in settlement discussions. As soon as the Sale Hearing resumed on March 20, 2012, Grand Soleil announced that Yates Construction, who had been declared the highest bidder at the close of the Auction, had withdrawn its bid and that Grand Soleil had agreed to cancel the Yates Asset Purchase Agreement.[16] (Sale Hr'g Tr. at 5-6, Dkt. 351). The Court entered the Order Approving the Sale of Substantially All of the Debtors' Assets Fee and Clear of Liens, Claims and Interests [Dkt. #232] (the "Final Sale Order") (Dkt. 340) in which the Court approved the sale of the Hotel and the Williams Tract to the alternate bidder, RJB, whose bid is shown in the chart below.

Property	**Credit Bid**	**Cash Bid**	**Total Bid**
Hotel	$800,000 (Letter of Credit)		$800,000
Williams Tract	$3,900,000 $700,000 (Letter of Credit)	$275,000	$4,875,000
Total	$3,900,000 $1,500,000 (Letter of Credit)	$275,000	$5,675,000

(Dkt. 360).

47. The Final Sale Order provided that all liens in or to the Hotel and Williams Tract attached to the "sale proceeds and The Briars' Proceeds on deposit in the Escrow Account and as against the Letter of Credit posted by RJB in support of its credit bid, with the same validity and priority, and to the same extent as such Liens existed on the Asset(s) prior to closing." (Dkt. 340, at 9).

[16] Counsel for the Cato Parties complained at the Sale Hearing that Yates Construction's withdrawal of its bid came as a surprise. (Sale Hr'g Tr. at 10, Dkt. 351).

48. After entry of the Final Sale Order, Berard liquidated the UMB CDs on March 29, 2012, in the amount of $1,928,958.77. (Gerzmehle Aff. ¶ 6, Adv. Dkt. 411-29; Berard Aff. ¶ 11, Adv. Dkt. 411-24).

49. The sale of the Hotel and the Williams Tract to RJB was closed on May 14, 2012 (Bayba Dep. at 239, Adv. Dkt. 402-1; Ex. 59, Adv. Dkt. 402-83). There are no cash proceeds from the Auction held on March 12, 2012. The $275,000 in cash paid by RJB at the closing on the Hotel and the Williams Tract was subject to carve outs payable to estate professionals. (Dkt. 360-1).

50. On May 18, 2012, Grand Soleil filed an Amended Status Report (Dkt. 360), which included the closing statement from the sale of the Hotel and the Williams Tract to RJB on May 14, 2012.

51. On September 24, 2012, the Court entered an Order Granting United States Trustee's Motion to Convert (Dkt. 433) converting the Bankruptcy Case from a chapter 11 case back to a chapter 7 case. Stephen Smith was appointed the chapter 7 case trustee (the "Trustee") and presently has possession of the RJB LOC. (Gerzmehle Aff. ¶ 4, Adv. Dkt. 411-29).

Adversary

52. Prior to the sale of the Hotel and the Williams Tract, on February 15, 2012, Good Hope, Farmer, and Ketco (collectively, the "Good Hope Parties") initiated the Adversary by filing a complaint (the "Good Hope Complaint") against RJB, Berard, Paramount Farms, Inc. ("Paramount Farms"), Big River, and Grand Soleil. (Adv. Dkt. 1). On the same day, Good Hope and Farmer initiated a second adversary proceeding against the Cato Parties (Adv. Proc. No. 12-00014-NPO). In both adversary proceedings, an Order Consolidating Adversary Proceedings was entered consolidating the two adversary proceedings and designating the lead

matter as adversary proceeding 12-00013-NPO. (Adv. Proc. No. 12-00013-NPO, Adv. Dkt. 20; Adv. Proc. No. 12-00014-NPO, Adv. Dkt. 15).

53. In the Adversary, the Cato Parties filed cross-claims against the Berard Parties, Paramount Farms, and Big River (the "Cato Cross-Claims") (Adv. Dkt. 23). As part of the cross-claims, the Cato Parties adopted by reference the allegations in the Good Hope Complaint.

54. On May 29, 2012, Berard filed his Answer and Defenses of Robert J. Berard to Cross-Claims of Charles Cato, William Cato, Emerald Star Casino & Resorts, Inc., Emerald Star Properties, LLC, and ESC Holdings, LLC (Adv. Dkt. 29).

55. Also, on May 29, 2012, RJB filed RJB Financing, LLC's Answer and Affirmative Defenses to Cross-Claim of the Cato Group [Dkt. #23] (the "RJB Answer") (Adv. Dkt. 31) in which RJB asserted cross-claims against Yates Construction, the Cato Parties, and Grand Soleil.

56. On May 13, 2013, the Cato Parties filed a Stipulation for Voluntary Dismissal of Counts III, IV and VI of Cato Parties' Cross-Claim Against RJB Financing, LLC, Robert J. Berard, Paramount Farms, and Big River Enterprises, LLC (the "Cato Stipulation of Dismissal") (Adv. Dkt. 386): (1) dismissing all claims against Paramount Farms and Big River, (2) dismissing Counts I and II of the Good Hope Complaint (to the extent those counts had been incorporated by reference into the Cato Cross-Claims), and (3) amending Count V (paragraph 37) of the Cato Cross-Claims against the Berard Parties (Adv. Dkt. 23). The Cato Parties and the Berard Parties reserved all other claims and defenses.

57. The proofs of claims filed in the Bankruptcy Case that are relevant to the Adversary are as follows:

Cato Parties:
Proof of Claim #23-1 filed on December 7, 2011 ($14,500,00.00)

Berard:
Proof of Claim #27-1 filed on December 7, 2011 ($1,712,123.25)
Proof of Claim #28-1 filed on December 7, 2011 (Amount unknown)
Amended Proof of Claim #28-2 filed on January 31, 2013 (Amount unknown)

RJB as Assignee of FNB:
Proof of Claim #30-1 filed on December 7, 2011 ($4,746,013.92+)
Amended Proof of Claim #30-2 filed on February 16, 2012 ($4,908,456.97)
Amended Proof of Claim #30-3 filed on January 31, 2013 ($5,335,240.87)

RJB as Assignee of UMB:[17]
Amended Proof of Claim #31-2 filed on February 16, 2012 ($6,305,234.58)
Amended Proof of Claim #31-3 filed on January 31, 2013 ($6,168,557.98)

58. The cross-claims asserted in the Adversary by the Cato Parties against the Berard Parties are alleged in Cato Count I (lien priority), Cato Count II (merger), and Cato Count V (marshaling of assets), as follows:

[CATO] COUNT I

. . .
21. The Cato [Parties] at all relevant times, possessed a first duly perfected lien on the Briars [Property] and [are] entitled to all of the proceeds from the sale of the Briars [Property].

[CATO] COUNT II

. . .
23. [Grand Soleil] scheduled the value of the Hotel . . . at $6,000,000.00 and scheduled the value of the Williams [T]ract at $5,000,000.00.

24. RJB, acting on behalf of Big River and Berard, is in the process of obtaining tile of the Hotel . . . and the Williams [T]ract as the "successful bidder."

25. RJB, as successor in interest to [UMB] and [FNB], is bound by the same principals of equity as its predecessors in determining the amount of its claim, if any.

26. All of RJB's claims will be paid in full, merged and extinguished by the acquisition of title to the Hotel . . . and the Williams [T]ract. RJB is not entitled to recover anything further from [Grand Soleil's] Estate.

[17] Proof of Claim #31-1 ($3,681,659.45) was filed by UMB.

[CATO] COUNT V

. . .

37. The certificates of deposit "pledged" by Berard to secure the debt of [Grand Soleil] are property of the Debtor and the Estate and should be marshaled by this Court for the payment of legitimate claims in this proceeding.

(Adv. Dkt. 23).

59. The cross-claims asserted in the Adversary by the Berard Parties against the Cato Parties are alleged in RJB Count I (breach of contract) and RJB Count II (equitable subordination), as follows:

[RJB] COUNT I-BREACH OF CONTRACT AGAINST YATES CONSTRUCTION[18] AND THE CATO [PARTIES]

. . .

12. RJB, as successor in interest to the liens of FNB and UMB, is a third party beneficiary of the Cato [Parties]'s express subordination agreement with [Grand Soleil]. By asserting a lien position prior to RJB on the Williams [T]ract, the Hotel . . . and the Briars [Property] proceeds, the Cato [Parties have] breached [their] contractual agreement to subordinate any lien rights of the Cato [Parties] to UMB and FNB (and therefore to RJB as assignee of said rights, claims and liens).

. . .

14. Both the Cato [Parties] and Yates Construction have taken legal positions in [Grand Soleil's] case to challenge the priority of the lien rights of RJB obtained by assignments from UMB and FNB.

15. RJB has been damaged as a result of the breach of contract by Yates Construction and the Cato [Parties] for failure to honor their respective subordination agreements.

16. RJB is entitled to judgment against the Cato [Parties] and Yates Construction for damages in an amount to be proven at trial, but believe to be in excess of $200,000.00.

[18] RJB voluntarily dismissed Yates Construction after reaching a settlement. (Adv. Dkt. 422).

[RJB] COUNT II
EQUITABLE SUBORDINATION

. . .

18. During the sale hearings held in [Grand Soleil's] case on March 14 and 20, 2012, testimony was presented that revealed inequitable conduct by Yates Construction and the Cato [Parties]. Yates Construction was initially designated "successful bidder" at [Grand Soleil's] auction held on March 12, 2012. Testimony and evidence at the sale hearings revealed that Yates Construction and the Cato [Parties] had entered into a written agreement on the eve of the auction making various promises to each other upon the condition of either of them winning the bid at the auction. . . . Yates Construction ultimately withdrew its bid and RJB was designated "successful bidder."

19. The net effect of the agreement between Yates Construction and the Cato [Parties] was to lessen the amount of sales proceeds available to [Grand Soleil's] estate and to attempt to undermine the sale and claims processes. The agreement between Yates Construction and the Cato [Parties] was designed, among other things, to target and harm RJB as successor-in-interest to the rights of FNB and UMB.

20. Both Yates Construction and the Cato [Parties] took additional actions in challenging [Grand Soleil's] proposed bidding procedures and sale process which unnecessarily complicated RJB's ability to credit bid its assigned first lien positions and to participate in the sale process as first lien holder without undue burden and expense. The challenges by the Cato [Parties] and Yates Construction were without merit, in violation of contractual subordination agreements and/or intended to freeze out RJB's ability to exercise lien rights which had to-date not been challenged by said parties.

21. By engaging in inequitable conduct, Yates Construction and the Cato [Parties] sought to gain an unfair advantage and ultimately resulted in injury to [Grand Soleil's] estate as well as to RJB.

22. As a result, the claims of Yates Construction and the Cato [Parties] should be equitably subordinated under 11 U.S.C. § 510(c) to the rights of all creditors of the estate. Alternatively, and in the event this Court determines RJB's claims and lien rights do not otherwise prime Yates Construction and/or the Cato [Parties], any lien rights of Yates Construction and the Cato [Parties] should be equitably subordinated to the lien rights and/or claims of RJB.

23. Alternatively, any lien rights of Yates Construction and the Cato [Parties] should be transferred to the estate.

(Adv. Dkt. 31).

60. The Cato Motion was filed on June 28, 2013. On that same date, the Berard Motion, the Berard Statement, and the Berard Brief were filed. The Cato Response was filed on July 19, 2013. The Berard Response and the Berard Response Brief were filed on July 22, 2013. The Berard Reply and the Berard Reply Brief were filed on August 5, 2013. The Cato Reply Brief was filed on August 8, 2013.

61. In the meantime, RJB and Yates Construction resolved their claims, and on July 18, 2013, the Agreed Order Granting RJB Financing, LLC's *Ore Tenus* Motion for Dismissal of W.G. Yates & Sons Construction Company with Prejudice (Adv. Dkt. 422) was entered by the Court.

Discussion

In the Cato Motion, the Cato Parties seek partial summary judgment on Cato Count I and RJB Count II. Specifically, the Cato Parties assert: (1) Cato Count I (lien priority) that as to the Briars Property, the Marvin Cato DOT is senior in priority to the UMB 2008 Briars/Hotel DOT held by RJB; and (2) RJB Count II (equitable subordination) that no grounds exist upon which the claim of the Cato Parties may be equitably subordinated and that even if it is subject to equitable subordination, the extent of such subordination is limited to the actual damages suffered by RJB. The Cato Parties do not seek summary judgment on the cross-claims of the Cato Parties alleged in Cato Count II (merger) and Cato Count V (marshaling of assets).

In the Berard Motion, the Berard Parties seek partial summary judgment on Cato Count I, Cato Count II, Cato Count V, and on certain affirmative defenses asserted by the Berard Parties. Specifically, the Berard Parties assert: (1) Cato Count I (lien priority) that RJB is the first priority lien holder on the sale proceeds from the Briars Property; (2) Cato Count II (merger) that RJB is the first priority lien holder on the Hotel and Williams Tract auctioned on March 12,

2012, that the RJB LOC should be immediately released to RJB, and that RJB did not intend a merger of its liens into the fee simple titles of the Hotel and Williams Tracts but specifically reserved its lien rights; and (3) Cato Count V (marshaling of assets) that the UMB CDs were pledged by Berard to secure RJB's guaranty on all debt to UMB and were applied to the Auction sale and that the priority issue as to the UMB CD is now moot; and that the equitable remedy of marshaling does not apply. The Berard Parties do not seek summary judgment on the cross-claims of RJB against the Cato Parties alleged in RJB Count I (breach of contract) and RJB Count II (equitable subordination) (Berard Mot. at 13 n.14).

A. Summary Judgment Standard

Under Rule 56 of the Federal Rules of Civil Procedure ("Rule 56"), made applicable to adversary proceedings by Rule 7056 of the Federal Rule of Bankruptcy Procedure, summary judgment is appropriate when viewing the evidence in the light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, and admissions, together with affidavits, show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. FED. R. CIV. P. 56(a); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party has made its required showing, Rule 56(c)(1) provides, in relevant part:

> A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record . . . ; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(c)(1). "Summary judgment . . . serves, among other ways, to root out, narrow, and focus the issues, if not resolve them completely." *Calpetco 1981 v. Marshall Exploration, Inc.*, 989 F.2d 1408, 1415 (5th Cir. 1993).

By its express terms, Rule 56(a) provides for partial summary judgment. FED. R. CIV. P. 56(a). The effect of a partial summary judgment, if granted, is to lessen the length and complexity of trial on the remaining issues, "all to the advantage of the litigants, the courts, those waiting in line for trial, and the American public in general." *Calpetco 1981,* 989 F.2d at 1415. When, as here, both parties have filed motions for summary judgment, the Court must rule on each motion on an individual and separate basis. *Shaw Constructors v. ICF Kaiser Engineers, Inc.*, 395 F.3d 533, 538-39 n.8 (5th Cir. 2004). Ultimately, the role of this Court is "not . . . to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." *Anderson*, 477 U.S. at 249; *see Hamilton v. Segue Software Inc.*, 232 F.3d 473, 477 (5th Cir. 2000).

Having set forth the summary judgment standard, the Court turns to an issue raised by the Berard Parties regarding the authority of a court to deny summary judgment if the moving party has shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. (Berard Br. at 2-3). The Berard Parties maintain that an amendment to Rule 56(a) in 2010 removed any such discretion. According to the Berard Parties, prior to 2010, Rule 56(a) allowed a court to deny summary judgment if it believed it would be beneficial to allow parties to proceed to trial and develop a fuller record of the facts at trial. *See Kunin v. Feofanov*, 69 F.3d 59, 62 (5th Cir. 1995); *Black v. J.I. Case Co.*, 22 F.3d 568, 572 (5th Cir. 1994); *Veillon v. Exploration Servs., Inc.*, 876 F.2d 1197, 1200 (5th Cir. 1989).

As amended in 2010, Rule 56(a) now provides:

> A party may move for summary judgment, identifying each claim or defense -- or the part of each claim or defense -- on which summary judgment is sought. The court *shall* grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter

> of law. The court should state on the record the reasons for granting or denying the motion.

FED. R. CIV. P. 56(a) (emphasis added). The prior version of Rule 56(a), which was the result of an amendment in 2007, provided that the court "should" grant summary judgment when there is no genuine issue of material fact. According to the Berard Parties, the substitution of the word "shall" for "should" in the second sentence of Rule 56(a) removed a court's discretion.

As originally implemented in 1938, Rule 56 provided that summary judgment "shall be rendered forthwith" if the moving party satisfied its requirements. Rule 56 remained unchanged for seventy (70) years until 2007, when an amendment substituted the word "shall" for "should" in response to a style revision project (the "Style Project"). FED. R. CIV. P. 56 advisory committee notes; *see* Jeremy Counseller, *Rooting for the Restyled Rules (Even Though I Opposed Them),* 78 MISS. L.J. 519, 524-41 (2009) (discussing the history of the Style Project). The advisory committee's goal was to rewrite the Federal Rules of Civil Procedure using clear and more modern language without altering their substantive meaning. Under the drafting guidelines developed pursuant to the Style Project, the word "shall" was viewed as an inherently ambiguous term that should be eliminated altogether from the Federal Rules of Civil Procedure. Steven S. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. 1139, 1145 (2010). Instead, the guidelines suggested use of the words "must," "may," or "should." *Id.* at 1145-46.

The advisory committee faced difficulty in eliminating "shall" from Rule 56 because of apparently conflicting *dicta* in the United States Supreme Court's decisions in *Anderson* and *Celotex Corp.* In *Anderson*, the Supreme Court held that "[n]either do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case where there is reason to believe that the better course

would be to proceed to a full trial." *Anderson,* 477 U.S. at 255 (citing *Kennedy v. Silas Mason Co.,* 334 U.S. 249, 256-57 (1948)). However, in *Celotex Corp.*, the Court held "[i]n our view, the plain language of Rule 56[] mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp.,* 477 U.S. at 322.

Faced with the task of finding another word for "shall," the advisory committee rejected the word "must" because it was too rigid (given the *dicta* in *Anderson*), and likewise rejected the word "may" because it was too weak (given the *dicta* in *Celotex*). *See* Gensler, *Must, Should, Shall,* 43 AKRON L. REV. at 1148. The advisory committee then concluded that the word "should" was the best choice because it suggested that courts retained the discretion to deny summary judgment even when the required showing was made, but adhered to the standard that had been and would continue to be to grant the motions when a required showing was made. *Id.* To emphasize this point, the advisory committee in its notes to the 2007 amendments stated that the switch to the word "'should' recognizes that courts will seldom exercise the discretion to deny summary judgment when there is no genuine issue as to any material fact." FED. R. CIV. P. 56 advisory committee notes.

In an effort to address variations between the text of Rule 56 and everyday summary judgment practice, the advisory committee again amended Rule 56 in 2010. The advisory committee restored "shall" to the second sentence in Rule 56(a) because "eliminating 'shall' created an unacceptable risk of changing the summary-judgment standard . . . . , [and] [r]estoring 'shall' avoids the unintended consequences of any other word." *Id.* The 2010 advisory committee commented that Rule 56 was revised in 2010 "to improve the procedures for

presenting and deciding summary-judgment motions and to make the procedures more consistent with those already used in many courts." *Id.* Additionally, the advisory committee stated that "the standard for granting summary judgment remains unchanged." *Id.* In short, the purpose of the change from "should" to "shall" was stylistic only, as made clear by the the history of the Style Project and the advisory committee notes. Gensler, *Must, Should, Shall*, 43 AKRON L. REV. at 1162. The 2007 change from "shall" to "should" did not increase the court's level of discretion, and the 2010 reversion to "shall" did not decrease the court's level of discretion. *Id.*

The sole authority cited by the Berard Parties for their argument that the 2010 reversion to "shall" is the well-known bankruptcy treatise, 10 COLLIER ON BANKRUPTCY ¶ 7056.03 (16th ed. 2013). Even that authority, however, concludes: "The better view . . . is that courts should still have the discretion to obtain the benefits of the presentation of the relevant evidence at trial in unusual cases when there is good reason to do so." 10 COLLIER ON BANKRUPTCY ¶ 7056.03. Moreover, decisions issued by the Fifth Circuit Court of Appeals and Mississippi federal courts have held that the standard for granting summary judgment remained unchanged after the 2010 amendments. *See, e.g., Firman v. Life Ins. Co. of N. Am.*, 684 F.3d 533, 538 n.42 (5th Cir. 2012); *see Brown v. Am. Home Mortg. Serv., Inc. (In re Brown)*, No. 10-01210-NPO, 2012 WL 3150320, at *4 n.10 (Bankr. N.D. Miss. July 6, 2012); *see also White v. McMillin*, No. 3:09cv120, 2011 WL 3555766, at *1 n.1 (S.D. Miss. Aug. 11, 2011). There is no authority supporting the position of the Berard Parties that the switch from "should" to "shall" in 2010 had any effect on a court's discretion under Rule 56 to deny the relief sought.

Given the large number of exhibits submitted by the parties and the complexity of the facts, the Court exercises its discretion under Rule 56 and denies both the Cato Motion and the Berard Motion to allow a fuller development of the record at trial. In the alternative, the Court

takes the circuitous route of addressing the merits of the summary judgment motions only to arrive at the same destination.

B. Standing

The Cato Parties, who include the Charles Cato Affiliates and Marvin Cato, filed the Cato Cross-Claims against RJB. Therefore, they have the burden of establishing standing. *See Automotive Fin. Corp. v. Ray Huffines Chevrolet, Inc. (In re Parkway Sales & Leasing, Inc.),* 411 B.R. 337, 342 (Bankr. E.D. Tex. 2009) (in adversary proceeding to determine validity, extent, and priority of liens, "party seeking to invoke federal jurisdiction has the burden of proving standing"). The Berard Parties challenge the standing of the Charles Cato Affiliates to assert any of their claims in the Adversary and also challenge the standing of Marvin Cato to pursue any claim he may have to the Briars Proceeds, to the extent the Briars Proceeds include proceeds from the sale of personal property.

1. Charles Cato Affiliates

The Berard Parties base their standing argument on the Marvin Cato DOT and the Charles Cato Affiliates Assignment. In the Marvin Cato DOT, Marvin Cato is the sole designated beneficiary. (Hudson Aff. ¶ 13, Adv. Dkt. 411-4; Ex 5, Adv. Dkt. 411-8). More to the point, not one of the Charles Cato Affiliates is listed as a beneficiary in the Marvin Cato DOT.[19] In the Charles Cato Affiliates Assignment, however, the Charles Cato Affiliates assigned the Marvin Cato DOT to Marvin Cato even though they apparently had no rights under

[19] The Berard Parties presume that Marvin Cato was designated as the beneficiary on behalf of undisclosed lienholders. Mississippi's Recording Act requires that the name of the beneficiary appear in the deed of trust unless the "deed of trust discloses the name of an agent or other representative designated as such of one or more holders of the secured indebtedness." MISS. CODE ANN. § 89-5-37. Otherwise, a failure to name the beneficiary in a deed of trust renders the deed unrecordable. *Id.*

the Marvin Cato DOT. The Berard Parties suppose that the intended legal effect of the Charles Cato Affiliates Assignment was to divest the Charles Cato Affiliates of their interest in the underlying Cato Note. Otherwise, the Charles Cato Affiliates Assignment would serve no purpose. They point to the provision in the Charles Cato Affiliates Assignment that assigned not only the Marvin Cato DOT but also "all rights in connection therewith." (Ex. 6 at 156-58, Adv. Dkt. 404-8). According to the Berard Parties, their interpretation is consistent with Charles Cato's deposition testimony. When questioned about the Charles Cato Affiliates Assignment, Charles Cato testified at his deposition, "[T]his completely removed me from everything. . . . From–from any part of the project . . . ownership of the debt. Basically, I was not involved [in] any shape, form, or fashion, even as a Creditor at that point." (C. Cato Dep. at 49, Adv. Dkt. 404-1). The Berard Parties, therefore, insist that the Charles Cato Affiliates have no standing to pursue the Cato Cross-Claims in the Adversary.

The Cato Parties contend that although Marvin Cato is the sole beneficiary under the Marvin Cato DOT, and notwithstanding the Charles Cato Affiliates Assignment, they remain obligees under the Cato Note. In other words, the Charles Cato Affiliates Assignment did not change the status of the Charles Cato Affiliates as creditors. Therefore, according to the Cato Parties, they all have a direct stake in the outcome of the Adversary and, accordingly, they have standing.

The Court finds that fact issues exist regarding the interests of the Charles Cato Affiliates that preclude summary judgment on the issue of standing. The Cato Note and the Charles Cato Assignment were contemporaneous documents related to the Global Settlement. These documents apparently were entered into with the same objective in mind, that is, to remove the Charles Cato Affiliates from the Casino and Hotel Project in order to satisfy the concerns of the

Mississippi Gaming Commission.[20] Whether the Charles Cato Affiliates Assignment divested the Charles Cato Affiliates of their right to payment under the Cato Note, as urged by the Berard Parties, requires the Court to consider the Global Settlement and the intent of the parties, which are matters for resolution at trial.

2. Marvin Cato

The standing argument of the Berard Parties as to Marvin Cato is unclear. The Berard Parties maintain that Marvin Cato does not have a properly perfected security interest in the Briars Proceeds attributable to the sale of the contents of the Briars Property, which, according to the Cato Parties' representations, constitute "several hundred thousand dollars' worth of antiques." (Dkt. 387, at 94). The Berard Parties do not explain why this fact deprives Marvin Cato of standing in the Adversary, and the Court can find none. The Court denies the Berard Parties summary judgment on the issue of Marvin Cato's standing.

C. Cato Count I-Briars Property

At the commencement of the Bankruptcy Case, the Briars Property was encumbered by the Marvin Cato DOT, and the UMB 2008 Briars/Hotel DOT, as follows:

Briars Property		
	Marvin Cato DOT	UMB 2008 Briars/Hotel DOT
Current Holder	Marvin Cato	RJB
Original Holder	Cato Parties	UMB
Date Recorded	July 29, 2008	November 5, 2008
Face Amount	$14,500,000	$2,500,000
Other Collateral	Hotel & Williams Tract	Hotel & UMB CDs

(Hudson Aff. ¶¶ 13, 16, Adv. Dkt. 411-4; Ellard Dep. at 25-26, Adv. Dkt. 403-1, Ex. 10, Adv. Dkt. 403-10). As shown in the above chart, the Marvin Cato DOT was recorded prior in time to

[20] *See supra* note 11.

the UMB 2008 Briars/Hotel DOT. Therefore, under Mississippi's Recording Act, MISS. CODE ANN. § 89-5-5, the Marvin Cato DOT would appear to have priority over the UMB 2008 Briars/Hotel DOT. *See G&B Invs., Inc. v. Henderson (In re Evans)*, No. 10-00040-NPO, 2011 WL 4712180, at *5 (Bankr. S.D. Miss. Oct. 7, 2011) ("The resulting rule is that the first recorded interest has priority over all subsequently recorded interests."). The issue addressed by both parties is whether the subordination provision in the Marvin Cato DOT alters this apparent result. (Berard Br. at 14-17; Cato Resp. at 3-10).

1. Contractual Subordination

The Marvin Cato DOT "automatically subordinated" the lien of the Marvin Cato DOT and rendered it junior to any loan incurred by Grand Soleil if two requirements were met: (1) the loan did not exceed $70,000,000 and (2) the loan was for the purpose of completing, opening, and operating the Casino and Hotel Project. Both parties maintain that there are no disputed facts and that this issue is amenable to summary judgment, although they reach opposite conclusions. (Berard Br. at 14; Cato Mot. at 14). They agree that the UMB 2008 Note and the UMB 2010 Note, secured by the Briars Property, were together less than $70,000,000 in amount. They disagree about whether the loan proceeds from the UMB 2008 Note and the UMB 2010 Note were used "for the purpose of completing, opening and operating the Grand Soleil casino and hotel project currently under construction in Natchez, Mississippi." (Ex. 5, Adv. Dkt. 411-8).

The Berard Parties insist that to the extent the UMB loan documents are not self-explanatory, the testimony of Ellard, Lindsley, and Hudson shows that the proceeds were used for these purposes. (Berard Br. at 16). Specifically, their testimony and Bayba's indicate that the loan proceeds were used to complete the pool area, walkways, landscaping, fencing, and a

parking lot, all at the Hotel. (Bayba Dep. at 284, Adv. Dkt. 402-1). The Berard Parties maintain that the subordination provision in the Marvin Cato DOT does not expressly limit its application to "take out" financing, as urged by the Cato Parties. Moreover, the Berard Parties oppose the Cato Parties' reliance on extrinsic evidence of the circumstances surrounding the execution of the Marvin Cato DOT to support their interpretation of the subordination provision because of Mississippi's parol evidence rule.[21]

The Cato Parties do not challenge the Berard Parties' description of how Grand Soleil spent the loan proceeds. They assert that the subordination provisions in both the Marvin Cato DOT and the Global Settlement were not intended to reach the UMB 2008 Briars/Hotel DOT, as demonstrated by the relatively low amount of the loan (only $2,500,000) and the very short term of maturity (only four (4) months). (Ellard Dep. at 147, Adv. Dkt. 403-1). According to the Cato Parties, the subordination language was inserted in the Global Settlement and in the Marvin Cato DOT because Grand Soleil expected an investment of $25,000,000 from the Tribe near the end of 2008.[22] (Bayba Dep. at 75-76, Adv. Dkt. 402-1). In early 2008, the Tribe had loaned Grand Soleil approximately $25,000,000. (Bayba Dep. at 64-65, Adv. Dkt. 402-1). The Tribe obtained these funds from the sale of bonds to Saybrook Capital, LLC (the "Saybrook Bonds")

[21] The Berard Parties contend that Mississippi's parol evidence rule applies to the Adversary because a federal court sitting in diversity must apply the law of the forum state. (Berard Br. at 15 n.42; Berard Resp. Br. at 6 n.14; Berard Reply Br. at 12 n.52; citing *Jack H. Brown & Co. v. Toys "R" Us, Inc.*, 906 F.2d 169, 173 (5th Cir. 1990)). The authority of the Court, however, is bankruptcy jurisdiction, not diversity jurisdiction. *See supra* n.5; *Crist v. Crist* (*In re Crist)*, 632 F.2d 1226, 1229 (5th Cir. 1980) (bankruptcy court must apply law considered most relevant to the pending controversy).

[22] The additional funding did not materialize because of a downturn in the economy. *See generally Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 658 F.3d 684 (7th Cir. 2011) (declaring trust indenture that governed the issuance of bonds that funded investment in Natchez casino void *ab initio* because the trust indenture constituted an unapproved management contract under federal law).

(*Id.*). The Cato Parties believed that a similar investment from the Tribe was forthcoming in an amount that would be sufficient to complete the Casino and Hotel Project and that Grand Soleil's gaming operations then would generate sufficient income to satisfy all debts of Grand Soleil, including the Cato Note. They contrast the Saybrook Bonds with the UMB 2008 Note, which was not expected to result in the completion, opening, and operation of the Casino and Hotel Project but which was intended to provide only short-term financing.

The Cato Parties assert that the Court may consider evidence regarding the Saybrook Bonds and other parol evidence showing the intent of the parties for two reasons. First, because the Berard Parties were not parties to the Marvin Cato DOT, they cannot invoke the rule. Second, because the Marvin Cato DOT expressly refers to the Global Settlement, the documents must be construed together. The Cato Parties rely on the sentence in the Marvin Cato DOT that provides, "this Deed of Trust shall be deemed to be junior in priority to such other additional loans to the extent such subsequent deeds of trust and security agreements to institutional or other lenders, *as provided in the [Global] Settlement, . . .* do not exceed the aggregate principal sum of $70,000,000.00." (Ex. 5, Adv. Dkt. 411-8) (emphasis added). This direct reference to the Global Settlement, according to the Cato Parties, means that the Global Settlement is not evidence that is extrinsic to the Marvin Cato DOT.

The Cato Parties cite numerous provisions of the Global Settlement which they believe support their interpretation of the Marvin Cato DOT:

> *The Institutional Loan*: It is understand and acknowledged by the parties that Natchez shall hereafter secure a loan or loans, in an aggregate amount that will not exceed Seventy Million and 00/100 Dollars ($70,000,000.00) for the purpose [of] completing and opening the Natchez casino and hotel project. The Natchez Parties warrant and represent that the lenders which may provide such loans (the "Institutional Lenders") shall at all times be granted and afforded a first priority mortgage/security interest on the real and personal property owned by

> Natchez in a total amount not to exceed $70,000,000 and that the security interest hereafter granted to the designated Cato Party on said real and personal property shall be deemed to be automatically subordinated thereto as hereinafter provided.
>
> That the Institutional Loan described [above] is being obtained for the purpose of completing and opening the Natchez casino and hotel project, and not for the purposes of (i) making distributions to any members of Natchez, or (ii) repaying loans or advances made to or for the benefit of Natchez by Big River or Bayba.
>
> *Institutional Loan Documents*: That at or before the closing of the Institutional Loan, Natchez shall deliver to the Cato Parties copies of the following Institutional Loan documents:
>
> 1) All Promissory Notes
> 2) All Closing Statements
> 3) All Deeds of Trust
> 4) All Security Agreements
> 5) All Financing Statements
>
> *As to Real and Personal Property*: A properly perfected second lien on all real and personal property and improvements owned by Natchez, said lien to be inferior in priority only to any mortgage or security interest granted to any Institutional or other lender in a total amount not to exceed $70,000,000. The Cato Parties hereby obligate themselves to, upon request, to [sic] execute and cause to be promptly recorded any and all subordination agreements as may be deemed necessary by Lenders' counsel to evidence such subordination. It is understood and agreed that the initial institutional loan or loans may be refinanced by Natchez at any time following the beginning of operations of the planned casino and hotel and that the obligation by the Cato Parties to subordinate shall remain in effect as long as there is a security interest held by the Cato Parties.

(Ex. 60, ¶¶ 5(D), 3.1(C), 5(E), 5(F)(2), Adv. Dkt. 402-89). According to the Cato Parties, construing the Marvin Cato DOT in conjunction with the Global Settlement eliminates any ambiguity and demonstrates that the parties clearly did not intend for the subordination provision to apply to the 2008 UMB Briars/Hotel DOT. The Cato Parties cite numerous events that took place during the period of time that the Marvin Cato DOT was signed in further support of their construction, such as, that Grand Soleil expected to fund the completion of the Casino and Hotel Project through the sale of the Saybrook Bonds in late 2008, that the Hotel and the Briars

Property were already open and operating when the 2008 UMB Note was signed, that the loan documents were not provided to the Cato Parties contemporaneously when the loan was made, that the proceeds from the UMB 2008 Note were used to pay the debts and operating expenses of the Hotel, and not the casino, that the linchpin of the success of the Casino and Hotel Project was the casino on the Williams Tract, and not the Hotel, that the loan proceeds from the UMB 2008 Note were not nearly enough to complete the casino, and, finally, that the UMB 2008 Briars/Hotel DOT was not secured by all of Grand Soleil's real and personal property (Bayba Dep. at 143-44, 243-48, 252-53, 260, 269, 272-73, Adv. Dkt. 402-1; Lindsley Dep. at 30-31, 133-35, Adv. Dkt. 405-1; Hudson Dep. at 46-48, Adv. Dkt. 406-1; Ellard Dep. at 153-54, Adv. Dkt. 403-1).

In general, the parol evidence rule preserves the integrity of an unambiguous, fully integrated, written agreement by prohibiting the admission of extrinsic or parol evidence to prove either the intent of the parties or the meaning of the terms used in the agreement. *In re Riedel*, No. 10-51106-KMS, 2011 WL 5025324, at *4 (Bankr. S.D. Miss. Oct. 21, 2011). In other words, "[p]rior or contemporaneous negotiations are merged into the completed contract." *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938, 946 (Miss. 1992). The parol evidence rule, however, does not apply when extrinsic evidence is offered merely to explain the written agreement. *See Keppner v. Gulf Shores, Inc.*, 462 So. 2d 719, 725 (Miss. 1985).

The Court finds that there are genuine issues regarding the priority of the UMB 2008 Briars/Hotel DOT that preclude summary judgment. The Cato Parties correctly note that in Mississippi the parol evidence rule applies only to disputes between the parties to the written agreement. *Sullivan v. Estate of Eason*, 558 So. 2d 830, 832 (Miss. 1990); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 347 n.12 (1971) (The "parol evidence rule is

usually understood to be operative only as to parties to a document."). The Berard Parties, however, are not signatories to the Marvin Cato DOT.[23] If the Berard Parties are strangers to the Marvin Cato DOT, then the Court may properly consider the evidence presented by the Cato Parties regarding the Saybrook Bonds and other evidence regarding the intent of the parties. There are facts in the summary judgment record indicating that Berard held an interest in Grand Soleil when the Marvin Cato DOT was signed. Whether this interest is sufficient to invoke the parol evidence rule is a triable issue.

Also, the Court finds that even assuming the Berard Parties may invoke the parol evidence rule, the Global Settlement clearly does not constitute inadmissible extrinsic evidence because it is specifically mentioned in the Marvin Cato DOT. *United Miss. Bank v. G.M.A.C. Mortg. Co.*, 615 So. 2d 1174, 1176 (Miss. 1993). Therefore, the Global Settlement and Marvin Cato DOT form part of the same transaction and must be construed together.

Finally, the Court finds that an ambiguity exists in the Marvin Cato DOT and the Global Settlement as to what the parties meant when they described the type of loans that would benefit from the automatic subordination provision. The Court is presented with directly conflicting interpretations. The Cato Parties view the subordination language in both documents as applying only to financing sufficient to complete both the Hotel and the casino on the Williams Tract. The Berard Parties, in contrast, view the subordination language in the Marvin Cato DOT as applying to any loans used to complete any component of the project. Each of the parties insists that their view is the only one that makes practical or business sense. These competing views render parol evidence admissible at trial. For these reason, the Court finds that the priority of the

[23] The Marvin Cato DOT was signed by Bayba on behalf of Grand Soleil, Charles Cato, on behalf of ESC, and Marvin Cato, individually. (Adv. Dkt. 402-90).

UMB 2008 Briars/Hotel DOT is a matter for resolution at trial based upon the facts surrounding the formation of the Marvin Cato DOT and other related matters.

2. Waiver and Judicial Estoppel

The Berard Parties allege waiver and judicial estoppel as affirmative defenses to the Cato Parties' assertion of a first lien position against the Briars Proceeds. The Berard Parties' assertion is based on the position taken by the Cato Parties in opposition to the Briars Sale Motion and the testimony of Charles Cato at the Briars Sale Hearing in opposition to the Briars Sale Motion.[24] The Briars Sale Motion included the allegation that "the first lienholder on the [Briars] Property is . . . UMB" and that Grand Soleil "will pay, at closing, all proceeds . . . to UMB." (Dkt. 137, at ¶¶ 10, 15). In response to the Briars Sale Motion, the Cato Parties filed the Objection to Motion to (I) Assume Lease and Executory Contract, and (II) Approve Sale of Certain Real and Personal Property Free and Clear of Liens, Claims and Interests (the "Cato Objection") (Dkt. 174), in which they asserted a marshaling claim. Specifically, they maintained that UMB should be required to recover its debt from assets other than the Briars Proceeds. Although the Cato Parties objected to the Briars Sale Motion, the Berard Parties point out that the Cato Parties did not interpose an objection on the ground that their rights to the Briars Proceeds were superior to UMB "in time, priority, or extent." (Berard Br. at 18). They also point out that at the Briars Sale Hearing, Charles Cato testified that he agreed that the Marvin Cato DOT was "subordinated to United Mississippi Bank." (Dkt. 387, at 16-17). For these reasons, the Berard Parties maintain that the Cato Parties have waived their right to assert a

[24] The Cato Parties assert a similar waiver defense against the Berard Parties as to their equitable subrogation claim.

priority lien position and/or should be judicially estopped from asserting a priority lien position in the Adversary. The Court addresses each contention in turn.

a. Waiver

Under Mississippi law, waiver "presupposes a full knowledge of a right existing, and an intentional surrender or relinquishment of that right . . . [and] contemplates something done designedly or knowingly, which modifies or changes existing rights, or varies or changes the terms and conditions of a contract." *Howard v. Gunnell,* 63 So. 3d 589, 594 (Miss. Ct. App. 2011). In the Fifth Circuit, the same standard applies. *United States v. Dodson*, 288 F.3d 153, 160 (5th Cir. 2002). The Court finds disputed facts in the record as to whether the Cato Parties intentionally waived their right to assert a claim to the Briar Proceeds. To reach this finding, the Court does not look any further than the Briars Sale Order, which states that "the rights, if any, of the Cato [Parties] . . . to make a claim against or to the proceeds of the sale are preserved." (Dkt. 213, at 5).

b. Judicial Estoppel

According to the Fifth Circuit, "[j]udicial estoppel is an equitable doctrine that 'prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same or some earlier proceeding." Hopkins v. Cornerstone Am., 545 F.3d 338, 347 (5th Cir. 2008); *accord Love v. Tyson Foods, Inc.*, 677 F.3d 258, 261 (5th Cir. 2012). The purpose of judicial estoppel is "to protect the integrity of the judicial process by prevent[ing] parties from playing fast and loose with the courts to suit the exigencies of self interest." *Browning Mfg. v. Mims* (*In re Coastal Plains, Inc.),* 179 F.3d 197, 205 (5th Cir. 1999) (citations omitted).

In a previous case, this Court has noted that three elements must be satisfied before judicial estoppel may be applied: (1) the party against whom judicial estoppel is asserted has taken a position that is clearly inconsistent with a prior position; (2) the court must have accepted the prior position; and (3) there must be an absence of inadvertence on the part of the party against whom estoppel is asserted. *See, e.g., Hancock Bank v. Bates (In re Bates)*, No. 09-05092-NPO, 2010 WL 2203634, at *13 (Bankr. S.D. Miss. May 27, 2010). The Fifth Circuit has defined "inadvertence" to mean that the party against whom estoppel is asserted "did not know of the inconsistent position or . . . had no motive to conceal it from the court." *Jethroe v. Omnova Solutions, Inc.*, 412 F.3d 598, 601 (5th Cir. 2005).

As to the first element, the Berard Parties allege that the Cato Parties took one position in the Bankruptcy Case (that UMB had the first lien on the Briars Property) but now take the opposite position in the Adversary (that Marvin Cato had the first lien on the Briars Property). The Court, however, finds that there are disputed facts in the summary judgment record as to whether the Cato Parties have taken inconsistent positions regarding the priority of the Marvin Cato DOT. In the Cato Objection, the Cato Parties asserted that there had not been "adequate disclosure of the nature of [UMB's] claim or its extent, validity or priority. As of October 4, 2011, [UMB] hasn't even filed a proof of claim." (Dkt. 174). This assertion raises a fact issue as to whether the Cato Parties were disputing UMB's status as the first lienholder on the Briars Proceeds.

As to the Briars Sale Hearing, Charles Cato's testimony regarding UMB's interest was inconsistent. When asked if the Marvin Cato DOT was "automatically subordinated to other deeds of trust up to $70 million," he answered, "I don't think that's what it says." (Dkt. 387, at 16). Charles Cato testified by affidavit that he either misunderstood the question relied upon by

the Berard Parties or that the transcript erroneously recorded his answer. (Ex. 1, Adv. Dkt. 423-1). Charles Cato's conflicting testimony may be evidence of an inadvertence on his part, which raises a fact issue under the third element.

Even if the facts were undisputed in establishing the first and third elements, the Court finds that factual issues exist as to the second element. The Berard Parties argue that the second element is satisfied as a matter of law because the Court considered the Cato Parties' arguments and Charles Cato's testimony before signing the Briars Sale Order. The Court, however, did not rule upon the priority of UMB's lien in the Briars Sale Order but expressly reserved that matter for determination in the Adversary. At the conclusion of the Briars Sale Hearing, the Court ruled:

> Now, obviously, there are disputes as to who's going to get this money, and we're not going to pay it out now until we have some additional hearing on whose money is this and whether Harrington Realty is entitled to a commission, whether this money should go to United Mississippi Bank, or whether the Cato Group has some interest in this money. We're not going to decide that today.

(Dkt. 387, at 108).

3. Equitable Subrogation and the Concordia Bank DOT

As an alternative to their contractual subordination argument, the Berard Parties invoke the doctrine of equitable subrogation for their contention that the interest acquired by RJB in the UMB 2008 Briars/Hotel DOT pursuant to the UMB Assignment is senior in priority to the Marvin Cato DOT. Mississippi law governs application of equitable subrogation as to real property in this state. *In re Shavers*, 418 B.R. 589, 605 (Bankr. S. D. Miss. 2009). Equitable subrogation under Mississippi law is described, as follows:

> Where a person acquires a lien upon property and with the money by which such lien is obtained pays prior incumbrances upon the property superior to that of the third person, such lienholder will be subrogated as against such third persons to

> the liens which had been discharged by the money paid out by such lienholder in procuring title to the property incumbered.

Wilkinson v. Wilson, 123 So. 847, 847 (Miss. 1929). Simply put, the doctrine of equitable subrogation allows the subrogee to "step into the shoes" of the subrogor. *See St. Paul Prop. & Liab. Ins. Co. v. Nance*, 577 So. 2d 1238, 1241 (Miss. 1991).

Here, the Berard Parties attempt to step into the "shoes" of UMB and the "overshoes" of Concordia. They trace their rights along the following path: Grand Soleil executed the Concordia Briars DOT encumbering the Briars Property on October 5, 2007. The Concordia Briars DOT secured the Concordia Note in the amount of $1,700,000. The UMB 2008 Briars/Hotel DOT was recorded on November 5, 2008. The UMB 2008 Briars/Hotel DOT secured the UMB 2008 Note in the amount of $2,500,000. From the proceeds of the UMB 2008 Note, UMB satisfied the $1,700,000 outstanding balance due on the Concordia Note. Concordia then cancelled the Concordia Briars DOT on November 10, 2008, and the UMB 2008 Briars/Hotel DOT moved up in priority. UMB then assigned its rights under the UMB 2008 Briars/Hotel DOT to RJB on December 23, 2011.

As noted previously in the discussion regarding Cato Count I, the Cato Parties argue that the Marvin Cato DOT has priority under Mississippi's Recording Act because it was recorded prior in time to the UMB 2008 Briars/Hotel DOT. MISS. CODE ANN. § 89-5-5. Similar to their argument regarding the contractual subordination provision, the Berard Parties contend that equitable subrogation pushes their interest ahead of the Cato Parties. Also, according to the Berard Parties, UMB's satisfaction of the Concordia Briars DOT placed UMB in Concordia's "shoes," and Concordia held a lien superior to the Marvin Cato DOT. According to the Berard

Parties, RJB's rights under the UMB Assignment gave RJB all the rights of UMB, including UMB's rights of equitable subrogation.

As a threshold matter, the Cato Parties contend that the Berard Parties are barred from asserting equitable subrogation because they failed to plead it as an affirmative defense in the RJB Answer.[25] Rule 8(c) of the Federal Rules of Civil Procedure[26] ("Rule 8(c)") requires that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense." FED. R. CIV. P. 8(c). According to the Cato Parties, equitable subrogation constitutes such an affirmative defense, and, yet, the Berard Parties alleged only that the UMB 2008 Briars/Hotel DOT has priority over the Marvin Cato DOT solely by virtue of the contractual subordination provisions. To demonstrate that the nature of the Berard Parties' equitable subrogation claim is "avoidance," the Cato Parties suggest that it is as if the Berard Parties have said, in response to their contention of priority, "yes, but equitable subrogation trumps record priority." (Cato Resp. at 14). The Cato Parties argue that they had no notice of this defense before now and that they would be prejudiced if the Berard Parties are allowed to raise equitable subrogation now or even later at trial.

The Berard Parties maintain that they have complied with the pleading standard for affirmative defenses set forth in Rule 8(c), which they describe as "fair notice" pleading. They reject the plausibility pleading standard articulated by the United States Supreme Court in *Bell*

[25] The Berard parties asserted a similar waiver-type defense against the Cato Parties as to their contractual subordination claim.

[26] In the Cato Response, the Cato Parties cite Rule 8(c) of the Mississippi Rules of Civil Procedure. Under Rule 7008(a) of the Federal Rules of Bankruptcy Procedure, however, Rule 8 of the Federal Rules of Civil Procedure applies in adversary proceedings. The Cato Parties' reliance on an inapplicable procedural rule is reason alone for the Court to deny them summary judgment. Nevertheless, the Court addresses their argument as if they had intended to invoke Rule 8 of the Federal Rules of Civil Procedure.

Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), because of the district court's decision in *E.E.O.C. v. LHC Group Inc.*, No. 1:11CV355, 2012 WL 3242168, at *2 (S.D. Miss. Aug. 7, 2012). There, the district court distinguished the pleading standards for claims and affirmative defenses under Rule 8: whereas Rule 8(a)(2) requires a "showing that the pleader is entitled to relief," Rule 8(c)(1) requires only that a defendant "affirmatively state any avoidance or affirmative defense." The district court then ruled that a defendant must only "plead an affirmative defense with enough specificity or factual particularity to give 'fair notice' of the defense that is being advanced." *LHC Group*, 2012 WL 3242168, at *3.

According to the Berard Parties, they have complied with the less rigorous pleading standard in Rule 8(c)(1) because there is "fair notice" of their equitable subrogation claim in the "Twelfth Defense" in the RJB Answer. The Twelfth Defense asserted "all other applicable equitable defenses including, but not limited to, . . . equitable lien." (RJB Answer at 3).

The Court finds that the Cato Parties had fair notice of the equitable subrogation claim in the Twelfth Defense in the RJB Answer and denies summary judgment. As demonstrated by the volume of exhibits submitted in support of the summary judgment pleadings, the parties engaged in the discovery process with vigor. The various liens placed by Grand Soleil on the Briars Property, including both the Concordia Note and the 2008 UMB Note were covered in the deposition testimony of Ellard and elsewhere. That the Berard Parties assert a first lien position based on an equitable remedy could not have surprised the Cato Parties.

Turning to the merits of the equitable subrogation claim, the Court also finds that issues of fact exist that preclude summary judgment. This Court previously has held that the doctrine of equitable subrogation in Mississippi applies "whenever any person other than a mere

volunteer pays a debt or demand which in equity and good conscience should have been satisfied by another, or where one person finds it necessary for his own protection to pay the debt for which another is primarily liable." *Shavers*, 418 B.R. at 605. Recognizing that their rights of equitable subrogation depend upon the "shoes" they step into, the Berard Parties argue that UMB could have invoked the remedy of equitable subrogation because: (1) UMB did not have actual knowledge of the Marvin Cato DOT; (2) UMB was not culpably negligent; and (3) applying equitable subrogation will not cause harm and will prevent unjust enrichment to the Cato Parties. The Court considers each of these factors in turn.

a. Knowledge

As to the first factor, the Berard Parties claim that UMB understood that it was obtaining a first lien position in the Briars Property when the UMB 2008 Briars/Hotel DOT was signed. Specifically, the Berard Parties allege that UMB did not know about the existence of the Marvin Cato DOT until the involuntary bankruptcy petition was filed against Grand Soleil. (Berard Br. at 26; Ellard Dep. at 145, Adv. Dkt. 403-1; Bayba Dep. 128-38, Adv. Dkt. 402-2; Ex. 17-24, Adv. Dkt. 402-29 to 402-36).

The Court finds that there is a genuine dispute as to UMB's actual knowledge that precludes summary judgment. Hudson, who prepared the UMB Briars Title Commitment, testified that the then president of UMB, now deceased, was aware of the Marvin Cato DOT. [27]

> I told -- Johnny Christian [UMB's president], regardless of what he later said, he was very much aware of the Cato documents. . . .[T]hey wanted it all cleaned up,

[27] The Berard Parties contend in the Berard Brief that Hudson testified "that there was no information provided to UMB prior to closing that would have disclosed the existence of the Marvin Cato Deed of Trust." (Berard Br. at 27). For this contention, they cite Hudson's affidavit. (Hudson Aff. ¶ 17, Adv. Dkt. 411-4). In his affidavit, however, Hudson does not mention any discussions he may have had with UMB. (*Compare* Hudson Aff., Adv. Dkt. 411-4, *with* Hudson Dep. at 69-72, Adv. Dkt. 406-1).

> too, before they even made this October loan. He was very much aware of what was going on.

(Hudson Dep. at 70, Adv. Dkt. 406-1). Also, the Berard parties contend that UMB became aware of the Marvin Cato DOT only after an involuntary bankruptcy petition was filed against Grand Soleil. The current Bankruptcy Case was filed in 2011, but a prior bankruptcy case was initiated in Florida against Grand Soleil in late 2009. (C. Cato Dep. at 77, Adv. Dkt. 404-1). Tying UMB's knowledge of the Marvin Cato DOT to the filing of Grand Soleil's bankruptcy case, without indicating which case, appears to have created some ambiguity in the testimony. (Ellard Dep. at 28-30, Adv. Dkt. 403-1). The UMB Assignment was effective on December 23, 2011, well after UMB may have had actual knowledge of the Marvin Cato DOT.

b. Negligence

As to the second factor, the Berard Parties maintain that UMB was not culpably negligent when it refinanced the Concordia Note. According to the Berard Parties, UMB's ignorance was clearly excusable in light of the commercially reasonable due diligence undertaken by UMB. They point out that the UMB Briars Title Commitment failed to disclose the existence of the Marvin Cato DOT. Again, however, Hudson testified that UMB knew about the Marvin Cato DOT, that the UMB Briars Title Commitment should have referred to the Marvin Cato DOT, and that he could not recall why he did not include the Marvin Cato DOT in the UMB Briars Title Commitment (Hudson Dep. at 69-74, Adv. Dkt. 406-1). The Court, therefore, finds that there are genuine issues as to UMB's culpable negligence that preclude summary judgment.

c. Harm or Prejudice

Finally, as to the third factor, the Berard Parties contend that the Charles Cato Affiliates will be unjustly enriched in the absence of equitable subrogation. In early 2007, Charles Cato

signed the Purchase and Sale Agreement as both the seller (on behalf of Emerald Star) and the buyer (on behalf of Grand Soleil). He did this without satisfying the B&K Briars DOT in 2007. The Berard Parties maintain that Grand Soleil was forced in 2007 to refinance the B&K Briars Note and satisfy the B&K Briars DOT through the Concordia Note, and was forced in 2008 to refinance the Concordia Note and satisfy the Concordia Briars DOT through the UMB 2008 Note. When UMB satisfied the Concordia Briars DOT, UMB paid the obligation in 2008 that Charles Cato should have satisfied as part of Emerald Star's initial contribution to Grand Soleil. Nevertheless, in the Global Settlement entered into in 2008, the Charles Cato Affiliates received $2,000,000 in cash and the Cato Note from Grand Soleil in the amount of $14,500,000 as a buyout of their interest. Because the Charles Cato Affiliates received $2,000,000 in cash from Grand Soleil without first satisfying the B&K Briars DOT, the Berard Parties insist that the Cato Parties will receive a windfall if they are awarded any part of the Briar Proceeds. Moreover, the Berard Parties assert that the Cato Parties will suffer no harm because they agreed to a junior lien position in the Marvin Cato DOT.

The Cato Parties point out that the Briars Property was conveyed to Grand Soleil by ESP on December 5, 2006, and that Grand Soleil released any claims it may have had against the Cato Parties when the Global Settlement was signed on June 18, 2008. The Cato Parties, therefore, contend that the Berard Parties cannot rely on facts that purportedly demonstrate a breach of the Purchase and Sale Agreement to show unjust enrichment.

The Court finds that disputed facts exist in the summary judgment record as to whether equitable subrogation in favor of the Berard Parties would prevent unjust enrichment and whether the Berard Parties suffered an injury as a result of the conduct surrounding the conveyance of the Briars Property to Grand Soleil. Also, the Court finds that disputed facts exist

as to whether a causal connection exists between the purported breach of the Purchase and Sale Agreement by the Charles Cato Affiliates and the alleged harm sustained by the Berard Parties. *See Mitchell Bros. Film Group v. Cinema Adult Theater*, 604 F.2d 852, 863 (5th Cir. 1979) (equitable doctrine applies only when alleged misconduct is directly related to the merits of the dispute between the parties).

D. Cato Count II- Merger

In Cato Count II, the Cato Parties allege that RJB is not entitled to assert a claim against the Briars Proceeds because RJB's claims against Grant Soleil were satisfied in full, by virtue of the common-law rule of "merger." The "merger" occurred, according to the Cato Parties, when RJB purchased the Hotel and the Williams Tract.

The Berard Parties contend that the doctrine of merger does not apply because the Bid Procedures Order, the Final Sale Order, and the amendments to RJB's proofs of claims, all demonstrate that RJB did not consent to its liens being extinguished. (Berard Br. at 8). The Bid Procedures Order provided that all cancelled liens would attach to the proceeds of the sale of the Hotel and Williams Tract. (Dkt. 287, at 11). Likewise, the Final Sale Order provided that all cancelled liens on the Hotel and the Williams Tract attached "with the same validity and priority, and to the same extent as such Liens existed on the Asset(s) prior to closing." (Dkt. 340, at 9). Finally, RJB's filing of amended proofs of claim to reflect the Auction result shows that RJB's did not intend to cancel its liens. (RJB POC #30-3).

The Berard Parties also contend that the Cato Parties cannot establish a *prima facie* case that RJB's claims against Grand Soleil were satisfied in full upon its acquisition of the Hotel and Williams Tract, evidence which they consider to be an essential element of the merger doctrine. (Berard Br. at 5). A comparison between Grand Soleil's scheduled value of the Williams Tract

($5,000,000) (Dkt. 115) and RJB's proof of claim (RJB POC #30-3) shows that the debt secured by the Williams Tract was $5,335,240.87 when it was assigned to RJB. A similar comparison of the scheduled value of the Hotel ($6,000,000) (Dkt. 115) and RJB's proof of claim (RJB POC #31-3) shows that the debt secured by the Hotel was $6,168,557.98 when it was assigned to RJB. The scheduled values, according to the Berard parties, show that RJB's claims exceed the value of those properties. The actual price paid after the Auction sale also shows that RJB will sustain a deficiency, say the Berard Parties. The Cato Parties do not address the merger doctrine in their briefs.

The Mississippi Supreme Court and federal courts interpreting Mississippi law have held that a lienholder's acquisition of real estate collateral merges the lien into the fee simple title when there is an expression of intent to that effect. *See Cade v. Toler,* 124 So. 793, 794 (Miss. 1929); *Genesis Air, LLC v. United States,* No. 1809-cv-308, 2012 WL 529885, at *2 (N.D. Miss. Feb. 17, 2012). The merger issue was aptly addressed by the Mississippi district court in *Mountaineer Investments, L.L.C. v. United States*, No. 3:08cv695, 2009 WL 3747205, at *2 (S.D. Miss. Nov. 4, 2009). There, the merger doctrine was raised in the context of the competing liens of a private lender and the Internal Revenue Service ("IRS"). The lender, who held the first lien, acquired fee simple title to the properties in a non-judicial foreclosure. At the time of the foreclosure, the properties were subject to several junior federal tax liens. The IRS maintained that the lender's senior lien merged with the fee simple title acquired by the lender in the foreclosure, and, as a result, the junior liens of the IRS were elevated to priority status.

The district court rejected the IRS's argument based upon the long-ago decision of the Mississippi Supreme Court in *Cade*. There, the Supreme Court held:

> The authorities appear to be quite unanimous in holding that the lien of a mortgage is not merged in the legal title acquired by the mortgagee, where it is his intention that it shall not so merge; and, in the absence of evidence, his intention will be presumed to accord with his interest, that there is no merger of the mortgage as against subsequent incumbrancers, when the mortgagor conveys the land to the mortgagee, where it would be inequitable, or where there is an express agreement of the parties that the lien of the mortgage shall remain alive; that there is no such merger when the interests and situation of the parties clearly indicate that there is no intention to let in junior liens ahead of the mortgage.

Cade, 124 So. at 794. Applying *Cade*, the district court in *Mountaineer* concluded "as a matter of law that [the lender] may rely on the equitable presumption against merger—assuming it needs to rely on the presumption—and that its liens take priority." *Mountaineer*, 2009 WL 3747205, at *5.

Although the Berard Parties' argument is persuasive, the Court declines to award summary judgment in their favor on the issue of merger at this time. Because of the voluminous summary judgment record, the Court is reluctant to find that no disputed fact exists regarding that issue, especially given that it requires the Court to determine the intent of RJB when it purchased the Hotel and Williams Tract and the relative lien priorities.

E. Cato Count V—Marshaling of Assets

The Cato Parties allege that the UMB CDs should be "marshaled . . . for the payment of legitimate claims in this proceeding." (Adv. Dkt. 23, ¶ 37). The Berard Parties contend that the doctrine of marshaling does not apply because of mootness and irrelevancy and because the Cato Parties cannot establish three of the four required elements of their marshaling claim. The Berard Parties also contend that the Cato Parties cannot invoke this equitable remedy because they come to Court with "unclean hands."

1. Mootness

The UMB CDs were titled in Berard's name and held by UMB as collateral for the UMB 2008 Note and the UMB 2010 Note. Berard apparently liquidated the UMB CDs after the execution of the UMB Assignment and after entry of the Final Sale Order. The Berard Parties allege that because the UMB CDs are no longer available for marshaling, the Cato Parties' request for marshaling is moot. The Berard Parties do not cite any legal authority in support of their mootness argument. (Berard Br. at 34). Because Cato Count V seeks relief against the Berard Parties, not the UMB CDs, and because the Court could provide the relief requested, the Court finds that the undisputed facts do not support summary judgment.

2. Relevancy

The Berard Parties challenge the relevancy of the marshaling request because they argue that RJB will sustain a deficiency regardless of the order in which the UMB CDs are applied. The Berard Parties provide the affidavit of Gerzmehle, who offers three scenarios for applying the UMB CDs: (1) the UMB CDs are applied on the entirety of the debt owed RJB under the UMB Assignment; (2) the UMB CDs are applied solely to the B&K Hotel DOT, which is superior to the Marvin Cato DOT; and (3) the UMB CDs are applied pro rata between the UMB 2008 Note and the UMB 2010 Note. (Gerzmehle Aff. ¶¶ 6-7, Adv. Dkt. 411-29). The Berard Parties refer to Gerzmehle's computation as the "Cato Marshaling Theory Mathematical Analysis." The Berard Parties insist that regardless of the order in which the UMB CDs are applied, RJB will sustain the same overall deficiency of $3,534,599.21 before the Briars Proceeds are applied. (Gerzmehle Aff. ¶¶ 6-7, Adv. Dkt. 411-29; Ex. B, Adv. Dkt. 411-29). Therefore, according to the Berard Parties, the Cato Parties will not receive "a dime" even if the Court orders the marshaling of assets. (Berard Br. at 36).

The Court finds that disputed facts preclude summary judgment regarding the method used by Gerzmehle to compute the amount of RJB's purported deficiency. At this juncture of the Adversary, the "Cato Marshaling Theory Mathematical Analysis" provided by Gerzmehle is based on disputed amounts and disputed lien priorities.

3. Elements Required for Marshaling of Assets

The doctrine of marshaling has long been recognized in Mississippi. *Dilworth v. Fed. Reserve Bank of St. Louis*, 154 So. 535 (Miss. 1934). The bankruptcy court in *Coors of North Mississippi, Inc. v. Bank of Longview (In re Coors of North Mississippi, Inc.)*, 66 B.R. 845, 866-70 (Bankr. N.D. Miss. 1986), tracing the roots of the doctrine of marshaling to 1682, defined its elements, as follows:

> (1) two persons that are creditors of a common or the same debtor;
> (2) that common debtor owns or is in control of at least two funds;
> (3) one creditor has the right to resort to at least two of the funds while the other creditor has the right to resort to only one of the funds; and
> (4) both funds must be within the jurisdiction and control of the court.

Id. at 866. To prevail under the doctrine of marshaling, "an extremely potent equitable remedy, all of the requisite elements must be established." *Id.* at 870. In that regard, the party asserting marshaling has the burden of proof. *In re San Jacinto Glass Indus., Inc.*, 93 B.R. 934, 942 (Bankr. S.D. Tex. 1988).

The Berard Parties contend that the Cato Parties cannot satisfy the first, second, and fourth elements because: (1) the Charles Cato Affiliates are not secured creditors of Grand Soleil; (2) the UMB CDs were owned by Berard, not by Grand Soleil; and (3) the UMB CDs were not property of the bankruptcy estate and, thus, are not under the jurisdiction and control of the Court. *Evans*, 2011 WL 4712180, at *7 (only secured creditors have authority to invoke marshaling). In support of their contention that Grand Soleil owned or was in control of only

one fund (the Briars Property) and not two funds (the Briars Property and the UMB CDs), the Berard Parties rely on evidence: (1) that Grand Soleil's bankruptcy schedules did not list the UMB CDs as an asset (Dkt. 115); (2) that the forbearance agreements refer to the UMB CDs as the "Berard" CDs and allowed UMB to apply them in the event Grand Soleil filed bankruptcy; and (3) that the funds used to establish the UMB CDs were wired in such a way as to prevent Grand Soleil from having any control over them.

Finally, the Berard Parties assert that the application of the doctrine of marshaling will create inequity and injustice to Berard since application of the UMB CDs will not satisfy Berard's claims. Berard will suffer prejudice, say the Berard Parties, because his liability under his personal guaranty will increase. Also, because the forbearance agreements signed by UMB show that UMB intended to apply the UMB CDs only if real property collateral was unavailable, it would be unjust, according to the Berard Parties, to force a different order of liquidation.

As to the first, third, and fourth elements, the Cato Parties maintain that the two secured creditors are Marvin Cato and Berard and that the two funds are the Briars Proceeds and the UMB CDs. As to the second element, the Cato Parties assert that Grand Soleil owned the Briars Property (and the Briars Proceeds) and controlled the UMB CDs. They acknowledge that Berard, and not Grand Soleil, owned the UMB CDs, but point out that Berard had guaranteed the UMB 2008 Note and the UMB 2010 Note, that Berard was a 35 percent owner of Big River, and that Big River was the owner of the vast majority of Grand Soleil's membership interests. Berard provided the UMB CDs to secure the debts owed by Grand Soleil, and Grand Soleil controlled the UMB CDs to the extent that UMB would not release them absent payment by Grand Soleil of the UMB 2008 Note and the UMB 2010 Note. Finally, as to the fairness factor,

the Cato Parties assert that issues of fact exist that render their marshaling claim not subject to summary judgment.

The Court finds that disputed issues exist that preclude summary judgment, such as whether Grand Soleil controlled the UMB CDs for purposes of establishing the second element of the marshaling doctrine. Moreover, there are numerous exceptions to the traditional doctrine of marshaling related to the common-debtor rule, which courts have applied when mandated by equity. *Coors*, 66 B.R. at 867. For example, an exception to the common-debtor rule may apply if the UMB CDs constituted contributions to the capital of Grand Soleil. This inquiry would require the Court to determine the intent of the parties. More important, until the priority issues are resolved, a determination as to the marshaling of assets is premature. For these reasons, the Court finds that summary judgment is inappropriate at this time.

4. Equity

The Berard Parties contend that the Cato Parties may not obtain equitable relief because of two separate but related ancient maxims of equity: the doctrine of "unclean hands" and the related principle that no party should "take an advantage which has his own wrong as a foundation for that advantage." *Thigpen v. Kennedy*, 238 So. 2d 744, 746-47 (Miss. 1970).

The doctrine of "unclean hands" is aptly described by the statement that "[H]e who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." *Ellzey v. James*, 970 So. 2d 193, 195-96 (Miss. Ct. App. 2007) (citation omitted). The doctrine of unclean hands requires that one who seeks equitable relief must come to court with "clean hands":

> The meaning of this maxim is to declare that no person as a complaining party can have the aid of a court of equity when his conduct with respect to the transaction in question has been characterized by wilful inequity.

Tatum v. Tatum, 105 So. 3d 1141, 1145 (Miss. Ct. App. 2012) (quoting *Chapman v. Ward*, 3 So. 3d 790, 799 (Miss. Ct. App. 2008)).

The district court in *Mountaineer Investments* addressed both maxims and observed that a party may have "unclean hands" even if the conduct is not punishable as a crime or does not justify any legal proceeding. *Mountaineer*, 2009 WL 3747205, at *3. On the other hand, there must be evidence of willful misconduct for either maxim to apply. *Id.*

The Berard Parties assert that the Charles Cato Affiliates engaged in willful misconduct by conveying the Briars Property to Grand Soleil without first satisfying the B&K Briars/Hotel DOT when the Global Settlement obligated them to convey the Briar Property free and clear of liens. The Berard Parties also assert that the Charles Cato Affiliates used Marvin Cato as a "straw" man to create the false impression that the Charles Cato Affiliates had removed themselves from any involvement in the Casino and Hotel Project for the purpose of allaying the "suitability" concerns of the Mississippi Gaming Commission. The Charles Cato Affiliates, however, did not hesitate to pursue their claims against Grand Soleil in the Bankruptcy Case although previously they had hidden their involvement in front of the Mississippi Gaming Commission, according to the Berard Parties. As to Marvin Cato, the Berard Parties suppose that he may not have had actual knowledge of what transpired, but argue that his acceptance of the legal positions taken by the Charles Cato Affiliates renders his hands just as "unclean" as Charles Cato's. Moreover, the Berard Parties contend that given his deposition testimony, Marvin Cato did not know he was suing for the Briars Proceeds or that the Briars Proceeds even existed, and, thus, will not be prejudiced by denying him the equity he does not know he is seeking.

The Court finds that disputed facts exist as to the alleged inequitable conduct of the Cato Parties. As to the conveyance of the Briars Property, there is some evidence that UMB was aware of the B&K Briars DOT before it agreed to loan any funds to Grand Soleil. Also, the UMB 2008 Note was entered into after the Global Settlement, and there are fact questions as to whether all claims against the Cato Parties may have been released. Finally, Hudson's deposition testimony places a different gloss on Charles Cato's legal strategy before the Mississippi Gaming Commission. All of these disputes require resolution at trial.

F. RJB Count II-Equitable Subordination-Collusion

The Cato Parties seek summary judgment on the equitable subordination claim in RJB Count II on the ground that the Berard Parties lack standing and that no evidence in the record supports a finding of collusion. In RJB Count II, the Berard Parties contend that the net effect of the Cato-Yates Agreement was to reduce the amount of sales proceeds available to the bankruptcy estate. The Berard Parties further contend that the Cato-Yates Agreement "was designed . . . to target and harm RJB as successor-in-interest to the rights of FNB and UMB." (Adv. Dkt. 31). As a remedy, the Berard Parties ask the Court to subordinate the claims of the Cato Parties[28] under 11 U.S.C. § 510(c) to the rights of all creditors of the estate or, alternatively, to the rights of RJB. (Adv. Dkt. 31). Section 510(c) provides, in relevant part:

> [A]fter notice and a hearing, the Court may---
>
> > (1) under principles of equitable subordination, subordinate for purpose of distribution all or part of an allowed claim to all or part of another allowed claim or all or part of an allowed interest to all or part of another allowed interest; or

[28] As noted previously, RJB settled its cross-claim against Yates Construction. (Adv. Dkt. 422).

> (2) order that any lien securing such a subordinated claim be transferred to the estate.

11 U.S.C. § 510(c). Equitable subordination is an extraordinary remedy and requires the satisfaction of the following three-part test:

> 1. that the claimant engaged in inequitable conduct;
> 2. that the misconduct caused injury to the creditors or conferred an unfair advantage on the claimant; and
> 3. that bestowing the remedy of equitable subordination is not inconsistent with bankruptcy law.

Benjamin v. Diamond (In re Mobile Steel Co.), 563 F.2d 692, 700 (5th Cir. 1977). Equitable subordination allows a court to move the priority of a claim down in the order of payment if it determines that the claimant is guilty of misconduct that injures other creditors or confers an unfair advantage on the claimant. *In re Lifschultz Fast Freight*, 132 F.3d 339, 344 (7th Cir. 1997); *In re Kreisler*, 546 F.3d 863, 866 (7th Cir. 2008).

As a preliminary matter, the Cato Parties maintain that the Berard Parties lack standing to complain on behalf of the estate as to the outcome of the Auction because only the trustee may seek relief for allegedly collusive activity under 11 U.S.C. § 363(n). Section 363(n) provides:

> The trustee may avoid a sale under this section if the sale price was controlled by an agreement among potential bidders at such sale, or may recover from a party to such agreement any amount by which the value of the property sold exceeds the price at which such sale was consummated, and may recover any costs, attorneys' fees, or expenses incurred in avoiding such sale or recovering such amount. In addition to any recovery under the preceding sentence, the court may grant judgment for punitive damages in favor of the estate and against any such party that entered into such an agreement in willful disregard of this subsection.

11 U.S.C. § 363(n).

The Court rejects this standing argument because it misstates the nature of RJB Count II, which is based on 11 U.S.C. § 510, not 11 U.S.C. § 363(n). RJB Count II does not cite 11 U.S.C. § 363(n) and does not seek to avoid the Auction sale to RJB under 11 U.S.C. § 363(n).

As to the merits, the Cato Parties maintain that there are no facts in the record that suggest that the Cato-Yates Agreement was negotiated or entered into for an "unsavory" purpose. (Cato Mot. at 19). The Cato Parties also maintain that under 11 U.S.C. § 363(n)[29] the alleged collusive activity must control, not merely effect, the sale price. *Lone Star Indus., Inc. v. Compania Naviera Perez Companc* (*In re New York Trap Rock Corp.)*, 42 F.3d 747 (2d Cir. 1994).

> It is most unlikely Congress would have intended to prohibit all agreements that *affect* a sale price. Such a prohibition would cover a vast range of innocent agreements among potential bidders; it would furthermore be very difficult for the parties to an agreement to recognize that their agreement was unlawful. They would need to make an imaginative exploration of the potential consequences of their agreement to determine whether it had a potential to affect the price of the auction sale.

Id. at 752. Finally, the Cato Parties contend that even if Charles Cato and Yates Construction had intended to control the sale price, 11 U.S.C. § 363(n) does not apply absent a showing that the Cato-Yates Agreement actually deprived the estate of the fair value of the assets sold at the Auction.

The arguments on the merits made by the Cato Parties, like their standing argument, confuse 11 U.S.C. § 510(c) with 11 U.S.C. § 363(n). Although the Berard Parties rely on allegations of collusive activity to support the relief they seek under 11 U.S.C. § 510(c), they are not limited by the elements of a cause of action under 11 U.S.C. § 363(n) in establishing a claim for equitable subordination. In the Cato Reply Brief, the Cato Parties do not raise this argument again and instead assert that the Berard Parties have failed to show any specific economic harm, a matter to which the Court now turns.

[29] The Cato Parties cite 11 U.S.C. § 363(k) for this proposition but apparently intended to cite 11 U.S.C. § 363(n).

Clearly, Charles Cato and Yates reached an agreement to work together at the Auction and kept that agreement a secret. (Bayba Dep. at 206-07, Adv. Dkt. 402-1). In that regard, the Cato-Yates Agreement was not disclosed until the Sale Hearing on March 14, 2012; the Cato-Yates Subordination Agreement was not revealed until it was produced by Yates Construction in discovery in February, 2013. Notwithstanding this backdrop of secrecy, the Cato Parties assert that there are no disputed facts showing that the Cato-Yates Agreement had any impact whatsoever on the Auction because Charles Cato was disqualified from bidding, and Yates was declared the highest bidder.

The transcript from the Auction shows that Charles Cato made numerous bids and that the broker rejected each of his bids because Charles Cato had failed to provide a cash deposit, letter of credit, or sufficient proof of his financial ability to close the transaction. Instead, he provided a one-page bank statement that indicated a balance of $7,514,006.93 but the name of the owner of the account was redacted. (Newsom Dep. at 169-76, Adv. Dkt. 424-1; C. Cato Dep. at 221-22, 227, Adv. Dkt. 404-2; Equity Dep. at 147-52, Adv. Dkt. 424-3). Charles Cato testified at his deposition that he did not know the identity of the "anonymous" investor. (C. Cato Dep. at 221-22, Adv. Dkt. 404-2). He also testified that if Yates Construction had won the bid, he intended to purchase both the Hotel and the Williams Tract, not just the Williams Tract as contemplated in the Cato-Yates Agreement. (C. Cato Dep. at 248, Adv. Dkt. 404-2).

These events give rise to a number of questions. For example, what did Charles Cato and Yates Construction intend to accomplish by entering into the Cato-Yates Agreement and the Cato-Yates Subordination Agreement? Were the Cato-Yates Agreement and the Cato-Yates Subordination Agreement the result of a collaboration or collusion? In that regard, the Court

notes that equitable subordination is rarely amenable to resolution by summary judgment. *In re Mid-Am. Waste Sys., Inc.*, 274 B.R. 111, 125 (Bankr. D. Del. 2001).

Conclusion

The Court has rooted around like a pig in a pile of voluminous exhibits and has not found truffles.[30] For the reasons stated above, the Court concludes that the Cato Motion and the Berard Motion are not well taken and should be denied on the ground that the record would be developed more fully at trial or, in the alternative, on the ground that there are genuine issues of disputed fact and the parties have failed to show that they are entitled to judgment as a matter of law.

IT IS, THEREFORE, ORDERED that the Cato Motion hereby is denied.

IT IS FURTHER ORDERED that the Berard Motion hereby is denied.

SO ORDERED.

Neil P. Olack
United States Bankruptcy Judge
Dated: August 13, 2013

[30] *See supra* p. 4.