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Trustee of the STM Liquidating Trust

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF MONTANA**

In re SHOOT THE MOON, LLC, Debtor.	Case No. 15-60979-11 Adv. No. 17-000058
JEREMIAH FOSTER, as trustee of the STM Liquidating Trust, successor and assignee to the claim of Jeremiah Foster, as trustee for the Chapter 11 Estate of SHOOT THE MOON, LLC, Plaintiff, FIRST INTERSTATE BANK, a Montana banking corporation, and PRAIRIE MOUNTAIN BANK, a Montana banking corporation, Defendants.	COMPLAINT AND DEMAND FOR JURY TRIAL

COMES NOW, Jeremiah Foster, trustee of the STM Liquidating Trust (“STM”),
by and through his respective counsel, and for his Complaint against Defendants
(“Defendant”), states and alleges as follows:

JURISDICTION AND VENUE

1. This adversary proceeding arises out of the bankruptcy case of the above-named Debtor and is commenced pursuant to sections 541 through 550 of title 11 of the United States Code (the “Bankruptcy Code”) and Rules 3007 and 7001 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).

2. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157 and 1334.

3. This is either a “core” proceeding or a proceeding that is otherwise related to a case under title 11, pursuant to 28 U.S.C. § 157(b)(2). To the extent necessary, the Trustee consents to entry of a final order or judgment by this Court.

4. Venue is proper in this Court pursuant to 28 U.S.C. § 1409 in that the Debtor’s bankruptcy case is pending in this judicial district.

5. This adversary proceeding relates to the following Chapter 11 proceeding pending in the United States District Court for the District of Montana: In re Shoot the Moon, LLC, Case No. 15-60979-11.

PARTIES

6. Plaintiff, Jeremiah Foster, is the duly appointed trustee (“Trustee”) of the STM Liquidating Trust. The STM Liquidating Trust is the successor and assignee to the claim of Jeremiah Foster, as Trustee of the Chapter 11 estate of Shoot the Moon, LLC¹,

¹ On or about October 20, 2015, Articles of Merger were filed with Washington and Montana and Statements of Merger were filed with Idaho, which merged the following nineteen (19) entities: Shoot the Moon, LLC; Shoot the Moon X, LLC; Shoot the Moon X Realty, LLC; Shoot the Moon Realty, LLC; Shoot the Moon of Washington; Shoot the Moon of Nampa, LLC; Shoot the Moon of Montana, LLC; Shoot the Moon of Montana Realty, LLC; Shoot the

against Defendants.

7. Plaintiff represents the interest of Shoot the Moon, LLC.

8. Defendant First Interstate Bank, (“FIB”) was, at all times relevant to this Complaint, a Montana banking corporation, with its principal place of business located in Billings, Montana. FIB is a publicly traded corporation.

9. Defendant Prairie Mountain Bank, (“PMB”) was, at all times relevant to this Complaint, a Montana banking corporation, with its principal place of business located in Great Falls, Montana.

FACTUAL BACKGROUND

A. Overview of the Shoot the Moon and its Relationship with FIB and PMB.

10. Shoot the Moon was one of nineteen (19) separate entities created between 2006 to 2015 for the purpose of acquiring and operating restaurants in Montana, Washington, and Idaho. The restaurants included Chili’s Bar & Grills, On the Borders, and Sonic Drive-Ins, as well as several independent restaurants.

11. Shoot the Moon was managed by its managing member, Kenneth Hatzenbeller (“Hatzenbeller”). Along with Hatzenbeller, the members of Shoot the Moon were Dennis Conner (“Conner”), Dr. Gregory Tierney (“Tierney”) and Dr. John Bloemendaal (“Bloemendaal”). Conner remained a member of Shoot the Moon until

Moon of Idaho, LLC; Shoot the Moon of Billings, LLC; Shoot the Moon III, LLC; Shoot the Moon II, LLC; Shoot the Moon II Realty, LLC; Shoot the Moon II of Idaho, LLC; Shoot the Moon Grizzly, LLC; Shoot the Moon Enterprises, LLC; Shoot the Moon 5, LLC; Shoot the Moon 4, LLC; Shoot the Moon 22, LLC. For purposes of this Complaint, the term “Shoot the Moon” includes, but is not necessarily limited to, all of the nineteen (19) aforementioned Shoot the Moon entities.

January 1, 2014, when he executed a Redemption Agreement for the purchase of his membership interests in each of the Shoot the Moon entities.

12. Shoot the Moon initially enjoyed success and profitability with most of the restaurants. With their success, the members of Shoot the Moon undertook an aggressive expansion plan to add restaurants to their portfolio.

13. Shoot the Moon relied upon FIB, PMB, and other financial institutions to provide the necessary financing to maintain adequate operating capital, as well as the necessary capital to continue to grow and expand its business.

14. FIB provided significant financing to Shoot the Moon. The sizeable loans provided by FIB included the following:

- a. A May 3, 2006 loan of \$1,875,000.00 (Loan # 12050);
- b. A September 29, 2006 loan of \$300,000.00 (Loan # 12285);
- c. A March 27, 2007 loan of \$1,220,000.00 (Loan # 12665);
- d. A June 23, 2008 loan of \$6,812,500.00 (Loan # 13715);
- e. A July 30, 2008 loan of \$5,380,000.00 (Loan # 13780); and
- f. A February 8, 2010 loan of \$329,255.39. (Loan # 14465).

15. PMB similarly provided significant financing to Shoot the Moon. The loans provided by PMB included the following:

- a. A December 15, 2009 loan of \$235,467.25 (Loan # 4026188);
- b. A March 16, 2010, loan of \$1,200,000.00; (Loan # 4028281);
- c. A June 15, 2010, loan of \$300,013.00; (Loan # 4028384);
- d. A January 28, 2014, loan of \$96,406.87; (Loan # 4027414);

- e. A April 30, 2015 loan of \$460,044.30; (Loan # 4027742);
- f. A July 8, 2015, loan of \$505,000.00; and (Loan # 4027826); and
- g. A September 22, 2015, loan of \$454,500.00.

16. FIB and PMB had significant financial exposure with Shoot the Moon. As such, they held a considerable interest in Shoot the Moon's continued operation and the continued repayment of the outstanding loans.

B. Shoot the Moon's and Hatzenbeller's Fraudulent Check Kiting Scheme.

17. Shoot the Moon's success did not last. In approximately 2009, the financial condition of Shoot the Moon began to deteriorate as the result of the global economic recession. Shoot the Moon faced significant cashflow issues and struggled to meet its day-to-day obligations.

18. At the height of the recession, financial institutions were reluctant to extend credit to small businesses for working capital, especially restaurants.

19. As such, Shoot the Moon turned to its members to address its cashflow issues. Shoot the Moon required additional capital contributions from its members to offset the growing list of delinquent liabilities. Shoot the Moon's members liquidated their retirement accounts and took equity from their personal residences to raise the necessary capital to meet the business's obligations.

20. However, even with the capital contributions, Shoot the Moon still struggled to pay its current liabilities.

21. Without access to necessary capital and with Shoot the Moon's members having already exhausted their personal savings and access to cash, Shoot the Moon had limited options to obtain the financing necessary to meet its obligations.

22. In desperation and in effort to address Shoot the Moon's financial troubles, Hatzenbeller commenced a check kiting scheme. Hatzenbeller drafted checks of significant value from one account with one financial institution and then promptly drafted a check from another account from another financial institution to be deposited in the first account to cover the initial withdrawal.

23. Hatzenbeller repeated this practice over and over utilizing its accounts with FIB and PMB, without ever having actual funds to cover the checks being written. In effect, the scheme provided Shoot the Moon with substantial interest-free loans.

C. FIB's knowledge and active involvement in the Check Kiting Scheme.

24. FIB knew of the check kiting scheme as early as 2010. FIB had taken notice of the frequency of large checks being drawn on PMB, along with other financial institutions, to cover negative balances on accounts held at FIB.

25. On August 23, 2010, Bill Weber ("Weber"), President of FIB's Great Falls main branch, wrote to Hatzenbeller in relevant part:

Ken, as you are aware, a check you deposited in the amount of \$25,000 drawn on US Bank was returned NSF today. This is why our bank has been concerned with deposits you make with checks drawn on PMI Bank. We have discussed the issues that arise when you write checks between various financial institutions and deposit into your accounts with First Interstate Bank and as well as the reverse. Because of this we are now required to have guaranteed funds when depositing a check drawn on another financial institution from Shoot the Moon.

Exhibit “A”.

26. Despite this early warning, FIB continued to allow the check kiting scheme to continue for years without taking any action to stop it.

27. On May 10, 2012, Ted Lewis (“Lewis”), FIB’s Vice President of Commercial Lending for Great Falls, wrote to Hatzenbeller in relevant part:

While the ledger balances were a strong positive \$243K last night we would like to see the available balances remain positive as well. That may occur tomorrow looking at the memo available column below if the checks coming through today are light. Also if you are not going to be depositing large checks from Prairie Mountain Bank the float (difference between ledger and available balances) will reduce significantly.

Exhibit “B”.

28. On July 6, 2012, Lewis again raised his concerns with the members of Shoot the Moon, writing in part:

Last July when we met to modify many of Shoot the Moon’s loans I discussed the bank’s ongoing concerns regarding the companies’ working capital position. I mentioned that the checking accounts held at First Interstate Bank often times carried significant negative balances during the business day (referred to as daylight overdrafts) which are covered at the end of the business day with checks drawn on other financial institutions. The deposited checks take a day or so to collect through the Federal Reserve System which leaves the company’s accounts with negative collected balances on a regular basis.

Exhibit “C”.

29. While unwilling to take action to stop the fraudulent scheme, FIB did take steps to protect itself from the risk that the kiting scheme stopped while significant checks had been drawn on FIB accounts. Accordingly, FIB implemented a policy in which it

would only allow Shoot the Moon to deposit checks from other financial institutions into FIB accounts but would not allow Shoot the Moon to write checks on those accounts to any Shoot the Moon-affiliated company or other financial institution. FIB's self-serving policies served to protect itself from the potential harm of the check kiting scheme, while exposing other financial institutions and Shoot the Moon's creditors to further financial harm.

30. The policy was communicated in a July 13, 2012, email between Lewis and Hatzenbeller. Exhibit "D". The email provided in relevant part:

First Interstate Bank has agreed to your request to continue allowing checks drawn on Shoot the Moon and affiliated company accounts at other financial institutions to be deposited in First Interstate accounts provided that the companies permanently cease writing checks drawn on any First Interstate Bank accounts to Shoot the Moon and affiliated companies for deposit at other institutions.

Id.

31. Shoot the Moon essentially disregarded the policy put in place by FIB. Shoot the Moon continued the check kiting scheme, which raised the concerns of FIB's own Security Department. On August 15, 2013, Lewis wrote to Hatzenbeller and Jeff Mora ("Mora"), Shoot the Moon's general counsel, in relevant part:

[W]e received the attached analysis of checking account activity from our Security Department today and it appears that checks are once again being written on STM's FIB accounts and being deposited at Prairie Mountain Bank. Is our analysis incorrect, or have STM checks drawn on FIB again been deposited on STM accounts at Prairie Mountain? Please respond with an explanation and if the activity did occur, and if so please cease this activity immediately and resume compliance with our previous agreement.

Exhibit “E”.

32. In an attempt to further protect itself from the risk of loss from the collapse of the check kiting scheme, FIB implemented additional restrictions on Shoot the Moon’s use of their accounts located at FIB. The additional restrictions were implemented in a manner that only protected FIB’s financial interests, while leaving other financial institutions and creditors exposed to significant financial harm.

33. On October 2, 2013, Lewis wrote to Conner, as well as the other members, to communicate FIB’s continued concerns and the implementation of additional restrictions. The email provides in relevant part:

During a recent review of Shoot the Moon’s accounts it was noted that the deposit accounts are showing higher levels of uncollected funds and that checks are being written to owners for deposit at other financial institutions.

...

Also, because of our continued concerns with the high levels of uncollected funds in the companies’ deposit accounts we will begin placing holds on deposited items to the accounts that are drawn on related parties’ accounts at other financial institutions. The availability of funds on checks deposited may be delayed as permitted by law until we can verify that the checks have cleared the account on which they are drawn.

If we feel it necessary, we reserve the right to disallow withdrawals for a longer period of time on any particular item. We will notify you if we do this, and tell you when you will be able to withdraw the funds at the time of deposit.

Exhibit “F”.

34. The reasoning for restrictions implemented by FIB was explained in a February 13, 2013 email from Lewis to Hatzenbeller, stating in relevant part:

The intent is to stop the potential for checks related to STM that are drawn on FIB that could, in turn fund other bank's checks, that are then deposited back into FIB accounts.

Exhibit "G".

35. More than four years after first having knowledge of the check kiting scheme, FIB was still allowing the scheme to continue without taking any action to stop it.

36. On September 22, 2014, Lewis wrote to Hatzenbeller in relevant part:

The overdrafts are very high again at \$790k. This has to get fixed, any word on the check? I know that you are in Helena but please send me some confirmation or documentation that the funds are on the way so that I can justify paying the overdrafts again.

Exhibit "H".

37. In addition to having actual knowledge of Shoot the Moon's illegal activities, FIB actively participated in carrying out the fraudulent scheme.

38. When FIB's internal controls detected red flags of fraudulent activity, FIB's officers misled auditors with false assurances and provided instruction and guidance on how to avoid detection as evidenced in a February 9, 2012 email from Lewis to Hatzenbeller. The email provides in part:

I just finished my first round of examiner interrogations on Shoot the Moon. They noted the large daylight overdrafts and I said that Ken always covers them, and that you watch over the accounts balance late into the night. Not sure how my bs is working, we will see on Friday when they leave.

Thank you for keeping the payments within the 10 day grace period!!! It is huge for us with these boys breathing on the rampage.

Exhibit "I".

39. FIB's officers knew that Shoot the Moon's failure to deposit even a single check could cause the fraudulent scheme to unravel. To ensure that the check kiting scheme was not revealed, FIB's officers and employees would even send constant reminders to Hatzenbeller of the amount of the overdrafts that needed to be covered.

40. In a May 12, 2014 email to Hatzenbeller and Mora, Lewis sent a reminder on a day in which he was not working:

I am off today but need to get your overdrafts covered by 9:45 so items to Prairie Mountain won't get returned. I believe the amounts are \$43k in one account and \$64k in another after this mornings (sic) presentments. Please confirm these amounts and your plan to cover the items with Kevin Johnson[.]

Exhibit "J".

41. Similarly, on July 21, 2014, Lewis' concerns that a missed payment would lead to the collapse of the fraudulent scheme led him to write to Hazenbeller and Mora:

Just a heads up, Kevin Johnson is on vacation this week and I will be off until next Monday starting Tuesday afternoon. This may pose a problem processing overdrafts if they are not covered today as promised. Please let me know if there are any problems funding the last loans as soon as possible.

Exhibit "K".

42. Between 2010 and 2014, FIB held millions of dollars in outstanding loans with Shoot the Moon. As such, they had a significant interest in ensuring that Shoot the Moon's kiting scheme was not exposed and the business operation continued.

43. If FIB had exposed the check-kiting scheme at the time it was discovered, Shoot the Moon's business operations would have ceased, and FIB would not have

received any additional loan payments on amounts it was owed. Therefore, it was in FIB's financial interest to allow the check kiting scheme to continue.

44. FIB's efforts to conceal and facilitate the check kiting scheme allowed Shoot the Moon's business operations to continue for years longer than it otherwise would have. Shoot the Moon's continued operation allowed it to incur additional debts to its great detriment.

45. FIB's efforts to conceal the check kiting scheme continued throughout the Shoot the Moon Bankruptcy and continued despite FIB being one of three members of the Oversight Committee. Throughout this time, FIB as a secured creditor was actively involved in discussions involving assets and potential assets of Shoot the Moon. At no time did FIB disclose to Trustee, or Trustee's representative its knowledge of the check-kiting activity.

46. FIB further benefitted from the check-kiting scheme in that they collected substantial overdraft fees from Shoot the Moon.

D. PMB's knowledge and active involvement in the Check Kiting Scheme.

47. PMB similarly knew of the check kiting scheme as early as 2010. PMB had taken notice of the frequency of large checks being drawn on accounts at FIB, along with other financial institutions, to cover negative balances on accounts held at PMB.

48. From 2010 to 2015, Hatzenbeller consistently overdrew Shoot the Moon's accounts at PMB. Hatzenbeller utilized large checks drawn on accounts at FIB, along with other financial institutions, to cover negative balances on accounts held at PMB only to repeat this overdraft-cover cycle over and over.

49. PMB actively participated in facilitating the fraudulent check kiting scheme with Hatzenbeller.

50. On March 1, 2010, Laura Vukasin (“Vukasin”), President of PMB, wrote to Hatzenbeller in relevant part:

Thanks for your help on Friday. These next 3 to 4 days is where I’m going to need the help on the overdrafts due to the circumstances explained on Friday with this being a payroll week. Thanks again and let me know what I need to do.

Exhibit “L”.

51. On August 2, 2011, in response to concerns expressed by FIB, PMB entered into an agreement with FIB whereby PMB would guarantee up to \$200,000.00 in funds drawn on accounts held at PMB and deposited at FIB. Exhibit “M”. The purpose of PMB’s agreement was to ensure that the check kiting scheme continued, while appeasing FIB’s concerns.

52. Hatzenbeller was in frequent contact with PMB and Vukasin to ensure that PMB was honoring checks deposited and the check kiting scheme was not detected. For instance, in an August 4, 2010 email from Hatzenbeller to representatives of PMB, Hatzenbeller writes:

You may get a call from First Interstate on checks going thru the next couple days. There will be deposits to cover. Just giving you a heads up since I’m still out of town till Tuesday.

Exhibit “N”. A representative of PMB responded in relevant part:

Thanks for the heads up. I did get a call again yesterday and I told her all is fine.

Id.

53. PMB assisted Hatzenbeller avoid detection. As one example, in a November 7, 2012 email, Vukasin warned Hatzenbeller of the need for funds to cover deposits:

Attached are the deposit tickets & copy of returned check. I'm in trouble here, Ken – you have checks being presented for payment & I have called Billings to plead for leeway until noon.

I need money to cover the deposits FAST. Thanks!

Exhibit “O”.

54. Moreover, upon information and belief, Hatzenbeller and Vukasin conspired to mislead another financial institution as to the existence and availability of funds within Shoot the Moon's accounts. These false representations were made for the purpose ensuring that the check kiting scheme continued. See Exhibit “P”.

55. If PMB had exposed the check kiting scheme at the time it was discovered, Shoot the Moon's business operations would have ceased, and PMB would not have received any additional loan payments on amounts it was owed. Therefore, it was in PMB's financial interest to allow the check kiting scheme to continue.

56. PMB's efforts to conceal and facilitate the check kiting scheme allowed Shoot the Moon's business operations to continue for years longer than it otherwise would have. Shoot the Moon's continued operation allowed it to incur significant additional debt.

57. PMB further benefitted from the check kiting scheme in that they collected substantial overdraft fees, late payment fees, and other related fees (the “Overdraft Fees”) from Shoot the Moon.

58. PMB's efforts to conceal the check-kiting scheme continued throughout the Shoot the Moon Bankruptcy and continued despite PMB being one of three members of the Oversight Committee. Throughout this time, PMB as a secured creditor was actively involved in discussions involving assets and potential assets of Shoot the Moon. At no time did PMB disclose to Trustee, or Trustee's representative its knowledge of the check kiting activity.

E. Shoot the Moon's Bankruptcy and FIB's and PMB's Concealment of the Check Kiting Scheme from Trustee.

59. On October 21, 2015, Shoot the Moon filed a Voluntary Petition for Relief under Chapter 11 of the United States Bankruptcy Code in the United States Bankruptcy Court for the District of Montana (the "Bankruptcy Court").

60. On September 14, 2016, Trustee, PMB, FIB, and other secured creditors filed a *Stipulation and Settlement Motion for Approval of Sale of Substantially All of Debtor's Assets Free and Clear of Liens, Claims, Encumbrances, and Interests* (the "Settlement Agreement").

61. PMB and FIB entered into the Settlement Agreement with Trustee without disclosing their respective involvement and assistance in facilitating the check-kiting scheme.

62. As consideration for the Settlement Agreement and without knowledge of the check kiting scheme, Trustee granted PMB and FIB a release of all claims, liabilities, and causes of action (the "Release").

63. On November 29, 2017, the Bankruptcy Court entered an Order confirming a Plan of Liquidation (the “Plan”). The Plan called for the creation of the STM Liquidating Trust, which was subject to the STM Liquidating Trust Agreement.

64. The STM Liquidating Trust Agreement provides Trustee with the necessary powers to “investigate, file, compromise, settle, withdraw, or litigate in Bankruptcy Court or any other court of competent jurisdiction, any and all Claims, Trust Causes of Action, Avoidance Actions, or other causes of action belonging to the Trust Estate.”

65. The STM Liquidating Trust Agreement further provided for the creation of an Oversight Committee to oversee the Trustee’s implementation and administration of the Liquidating Trust, which would necessarily include the review and approval of all litigation pursued by the STM Liquidating Trust.

66. Pursuant to the terms of the STM Liquidating Trust Agreement, the Oversight Committee Members “shall include representatives of the three (3) general unsecured claimants holding the largest general unsecured allowed claims who are not the subject of Trust Causes of Action.”

67. As two of the three largest unsecured creditors, PMB and FIB were both appointed to the Oversight Committee, whose purpose was to oversee and assist Trustee with his pursuit of adversary actions.

68. At the time of appointment to the Oversight Committee, neither FIB nor PMB disclosed their knowledge or their respective involvement and assistance in facilitating the check kiting scheme.

69. The check kiting scheme itself was self-concealing. The activity took place in accounts that were not active operating accounts of Shoot the Moon at the time of the Bankruptcy. As such, Trustee who undertook the responsibility of managing the operation pending its sale, did not know, and reasonably could not have known that a check-kite occurred in Shoot the Moon's accounts at FIB and PMB.

70. During preparation work for a mediation to occur in Butte on a separate Shoot the Moon matter involving a director and officer claim, Trustee and his representatives identified large transactions involving Cashier's Checks which totaled \$22 Million. On August 22, 2019, while at the mediation, Trustee's counsel inquired of Hatzenbeller's counsel for an explanation of the transactions. No explanation was offered. After the mediation, Trustee's counsel followed up with PMB seeking bank records and documents. A partial production of bank records was provided on September 12, 2019, which revealed that the Cashier's Checks were issued to Shoot the Moon entities and were deposited into FIB.

71. On September 18, 2019, a meeting was held of the Oversight Committee, including representatives of Western Alliance Bank, FIB and PMB. A spreadsheet was circulated to the representatives of PMB and FIB showing the level of activity which had been discovered in 2014. Despite being presented with this evidence, representatives of PMB and FIB said nothing with respect to the existence of the kite.

72. Additional documentation was requested from PMB and FIB seeking bank record production. In October 2019, FIB responded to the Trustee confirming that a check

kite had occurred. On October 23, 2019, documentation supporting the existence of the check kite was provided by FIB to Trustee.

73. Trustee brought the evidence to FIB's and PMB's attention and asked that they voluntarily withdraw as members of the Oversight Committee, given the allegations of their respective involvement in the check-kiting scheme.

COUNT I
**DECLARATORY JUDGMENT—THE RELEASE IS NULL AND VOID AND
DOES NOT PRECLUDE THIS CLAIM**
(28 U.S.C. § 2201)

74. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

75. On September 14, 2016, Trustee, FIB, PMB, and other secured creditors entered into the Settlement Agreement.

76. FIB and PMB entered into the Settlement Agreement with Trustee without disclosing their respective involvement and assistance in facilitating the check-kiting scheme.

77. As consideration for the Settlement Agreement and without knowledge of the check-kiting scheme, Trustee granted FIB and PMB the Release.

78. Trustee's consent in entering into the Settlement Agreement was obtained through fraud or constructive fraud, where FIB and PMB concealed their respective involvement and assistance in facilitating the check-kiting scheme.

79. Pursuant to 28 U.S.C. § 2201, Trustee seeks declaratory judgment in which the Court conclusively rules that FIB and PMB are prohibited from asserting the

protections of the Release within the Settlement Agreement, where Trustee's consent to the Settlement Agreement and Release was obtained through fraud.

COUNT II
**DECLARATORY JUDGMENT—THE STATUTE OF LIMITATIONS WAS
TOLLED UNTIL DISCOVERY OF THE CHECK-KITING SCHEME
(28 U.S.C. § 2201)**

80. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

81. FIB and PMB actively participated in and facilitated the fraudulent check-kiting scheme.

82. The check-kiting scheme itself was self-concealing. The activity took place in accounts that were not active operating accounts of Shoot the Moon at the time of the Bankruptcy. As such, Trustee who undertook the responsibility of managing the business operation pending its sale, did not know, and reasonably could not have known that a check-kite occurred in Shoot the Moon's accounts at FIB and PMB

83. FIB and PMB actively concealed their knowledge and participation in the check-kiting scheme to evade discovery by Trustee and others.

84. As a result of FIB's and PMB's concealment, Trustee did not have knowledge, and reasonably should not have had knowledge, of the fraudulent check-kiting scheme until mid-September 2019.

85. The concealment was for the purpose of preventing Trustee and others from discovering potential claims that may exist against FIB and PMB.

86. Pursuant to 28 U.S.C. § 2201, Foster seeks declaratory judgment in which the Court conclusively rules that, because of FIB and PMB's known concealment of the check-kiting scheme, the statute of limitations on Trustee's causes of action did not begin to run until September 12, 2019, at the earliest, when PMB provided Trustee with documentation of Cashier's Checks issued to Shoot the Moon entities and deposited into FIB.

COUNT III
CIVIL CONSPIRACY

87. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

88. At all times relevant, FIB and PMB had actual knowledge of Hatzenbeller's check-kiting scheme.

89. FIB and PMB owed a duty to Shoot the Moon not to cause reasonably foreseeable damages as a result of the check-kiting scheme that occurred between 2010 and 2015.

90. Notwithstanding, FIB and PMB conspired with Hatzenbeller to the detriment of Shoot the Moon by agreeing to perform activities in concert with or on behalf of them to ensure that the check-kiting scheme continued indefinitely.

91. FIB and PMB knowingly, willfully, and maliciously engaged in the following activities in concert for or on behalf of Hatzenbeller and reaped the significant benefits as a result thereof:

- a. Continuously extending substantial credit to Shoot the Moon in the form of overdraft protection so that they could cover shortfalls. Had FIB and PMB followed their customary policies and procedures associated with substantial overdrafts, it is clear that Hatzenbeller's check-kiting scheme would have collapsed much earlier and Shoot the Moon would have accumulated far less debt and would have had assets to liquidate to pay creditors.
- b. Ignoring and disregarding its own internal policies, procedures, practices, and protocols in order to accommodate Hatzenbeller, who was funneling millions of dollars through the Shoot the Moon accounts, FIB and PMB covered significant overdrafts.
- c. Assisting, enabling, and permitting Hatzenbeller to make substantial recurring transfers between Shoot the Moon business accounts without regard to the source of funds or to their stated purpose.
- d. Advising, assisting, and coaching Hatzenbeller on how to avoid actions that would trigger the filing of federally mandated suspicious activity, check-kiting, and related reports designed to identify check-kiting and other criminal activities by giving Hatzenbeller advance notification and opportunity to avoid detection.
- e. Improperly overriding internal risk, compliance, and fraud prevention concerns for the purpose of preserving the banking relationship with Shoot the Moon and ensuring that Shoot the Moon continued to make payments on existing loans with both FIB and PMB.

92. Notwithstanding their actual knowledge of Hatzenbeller's fraudulent actions and the consequences of such actions as set forth hereinabove, FIB and PMB consciously rendered substantial assistance to the fraudulent check-kiting scheme.

93. FIB and PMB willfully chose to subordinate or otherwise disregard their legal obligations to timely detect and prevent the criminal conduct of Hatzenbeller to their own business interests in generating substantial sums in interest, fees, and other charges in

connection with the overdrafts and ensuring the continued receipt of loan payments from Shoot the Moon.

94. FIB's and PMB's (i) complete disregard for their own internal policies, procedures, practices, protocols, and regulations; (ii) failure to fulfill their common law, statutory and regulatory duties; and (iii) violations of other prudent and sound banking practices and procedures, caused significant damages to Shoot the Moon.

95. As a direct and proximate result of FIB's and PMB's civil conspiracy, Shoot the Moon incurred significant damages to be proven at the time of trial.

COUNT IV
NEGLIGENCE

96. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

97. FIB and PMB owed a duty of care to Shoot the Moon to correctly, cautiously, and prudently process the checks subject to commercially reasonable security procedures.

98. FIB and PMB breached their duty of care to Shoot the Moon by violating banking regulations and other prudent and sound banking practices and procedures as more fully identified above and/or lacking good faith in processing and/or effectuating the deposited checks based upon their actual and/or constructive knowledge of suspicious activities relating to Shoot the Moon's accounts.

99. In honoring the checks, FIB and PMB ignored ongoing suspicious activities within Shoot the Moon's accounts, and other material red flags that clearly should have required that the funds remain at FIB and PMB pending, among other things, full notification and disclosure to the authorities.

100. FIB and PMB knew about the suspicious activities and other material red flags prior to their decision to process the checks, which thereby caused funds to be transferred to other Shoot the Moon accounts for an improper purpose, whereby they were thereafter dissipated and further converted.

101. As a direct and proximate result of FIB and PMB's negligence, Shoot the Moon incurred significant damages to be proven at the time of trial.

COUNT V
FRAUD

102. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

103. FIB's and PMB's representations with respect to Shoot the Moon's accounts containing available funds were false.

104. The representations made by FIB and PMB were material to Shoot the Moon's creditors' beliefs that Shoot the Moon was financially viable. Without such representations, Shoot the Moon's creditors would not have extended credit to Shoot the Moon, and Shoot the Moon would have accumulated far less debt.

105. At the time of making the representations, FIB and PMB had knowledge of the falsity of the representations.

106. FIB and PMB intended that the representations be relied upon by Shoot the Moon.

107. At the time of hearing the representations, Shoot the Moon was ignorant of the falsity of such representations.

108. Shoot the Moon justifiably relied upon the representations made by FIB and PMB, and had a right to rely on such representations.

109. As a direct consequence of such representations, Shoot the Moon was injured in an amount, which will be established at the time of trial.

110. Such injury was caused by a reliance on the representations made.

COUNT VI
AIDING AND ABETTING FRAUD

111. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

112. Hatzenbeller perpetrated fraud through a check-kiting scheme as set forth at length herein.

113. FIB and PMB had actual knowledge of Hatzenbeller's fraud through: (a) its communications with Hatzenbeller and (b) its actions, inactions, and observations pertaining to Shoot the Moon's various bank accounts.

114. FIB and PMB acted in concert and pursuant to a common design with Hatzenbeller in carrying out the fraudulent scheme.

115. FIB and PMB knew that Hatzenbeller's conduct constituted a breach of duty to Shoot the Moon and, despite such knowledge, proceeded to give Hatzenbeller substantial assistance in facilitating the check-kiting scheme.

116. FIB and PMB provided substantial assistance to Hatzenbeller in accomplishing a tortious result and their own conduct, separately considered, constitutes a breach of duty to Shoot the Moon.

117. FIB and PMB owed a duty to Shoot the Moon not to cause reasonably foreseeable damages to such parties as a result of the check-kiting scheme.

118. Notwithstanding their actual knowledge of Hatzenbeller's intent to defraud Shoot the Moon and their duty to known third parties as set forth hereinabove, FIB and PMB consciously rendered substantial assistance to, and aided and abetted their fraud, and by concealing it thereafter.

119. FIB and PMB are therefore liable for all damages actually and proximately caused as a result of Hatzenbeller's fraud. All such damages shall be proven at the time of trial.

COUNT VII
UNJUST ENRICHMENT

120. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

121. Shoot the Moon conferred a benefit upon FIB and PMB by paying Overdraft Fees and loan payments that they would not have otherwise been able to make without the check-kiting scheme.

122. FIB and PMB knowingly and voluntarily accepted and retained the benefit conferred by Shoot the Moon.

123. The circumstances are such that it would be inequitable and unjust for FIB and PMB to retain the benefit conferred by Shoot the Moon without paying the STM Liquidating Trust the value thereof.

124. As a result of the foregoing, FIB and PMB has been unjustly enriched at the expense of the STM Liquidating Trust.

125. Trustee is entitled to the return of those amounts by which FIB and PMB were unjustly enriched through disgorgement or any other appropriate remedy.

COUNT VIII
CONVERSION

126. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

127. Shoot the Moon owned the Overdraft Fees that were paid to FIB and PMB.

128. Shoot the Moon had a right to possess the Overdraft Fees that would have been otherwise been retained by Shoot the Moon.

129. FIB and PMB exercised unauthorized control over Shoot the Moon's Overdraft Fees by fraudulently depriving Shoot the Moon of those Overdraft Fees.

130. Shoot the Moon has been damaged by FIB's and PMB's unauthorized control over Shoot the Moon's Overdraft Fees.

COUNT IX
AVOIDANCE AND RECOVERY OF FRAUDULENT TRANSFERS
(11 U.S.C. §§ 548 and 550)

131. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

132. Shoot the Moon paid Overdraft Fees allegedly arising under FIB's and PMB's loans for insufficient consideration (the "Transfers").

133. Shoot the Moon received less than reasonably equivalent value in exchange for incurring, granting and/or making the Transfers.

134. At the time the transfers were incurred, granted, and/or made or as a result of the Transfers having been incurred, granted, and/or made, Shoot the Moon was insolvent, became insolvent, or intended or believed it would incur obligations beyond its ability to pay as such obligations matured; or at the time the transfers were incurred, granted, and/or made, Shoot the Moon was engaged in a business or a transaction, or was about to engage in business or a transaction, for which the property remaining in its hands was an unreasonably small capital.

135. The Transfers were incurred, granted and/or made by Shoot the Moon within two years of the date Shoot the Moon filed its Voluntary Petition for Relief under Chapter 11 of the United States Bankruptcy Code on October 21, 2015 (the “Petition Date”).

136. Based on the foregoing, Trustee is entitled to avoid the Transfers pursuant to 11 U.S.C. § 548.

137. FIB and PMB are the initial transferees of the Transfers, the entity or person for whose benefit the Transfers were made, or the immediate or mediate transferees of the initial transferee receiving the Transfers.

138. Based on the foregoing, Trustee is entitled to recover the value of the Transfers from FIB and PMB pursuant to 11 U.S.C. § 550.

COUNT X
AVOIDANCE AND RECOVERY OF FRAUDULENT TRANSFER
(M.C.A. § 31-2-333(1)(b))

139. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

140. Pursuant to M.C.A. § 31-2-333(1)(b), “A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

(b) without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor:

- (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
- (ii) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor’s ability to pay as they became due.

141. The Transfers were incurred, granted or made by Shoot the Moon within four years of the Petition Date.

142. Pursuant to 11 U.S.C. § 544 and 550, Trustee is entitled to recover, for the benefit of the STM Liquidating Trust, the value of the property from FIB and PMB for which they are responsible for the reimbursement.

COUNT XI
TRANSFER FRAUDULENT AS TO CREDITORS
(M.C.A. § 31-2-334(1))

143. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

144. Pursuant to M.C.A. 31-2-333(1), “A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation

without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.”

145. The Transfers were incurred, granted or made by Shoot the Moon within four years of the Petition Date.

146. Pursuant to 11 U.S.C. § 544 and 550, Trustee is entitled to recover, for the benefit of the STM Liquidating Trust, the value of the property from FIB and PMB for which they are responsible for the reimbursement

147.

COUNT XII
DISALLOWANCE AND EQUITABLE SUBORDINATION OF CLAIMS
(11 U.S.C. §§ 502 and 510)

148. Plaintiff alleges each of the other allegations of this Complaint as if fully set forth herein.

149. FIB filed Proof of Claim Nos. 348, 350, 351, 357, 358, and 359 in the underlying Bankruptcy proceeding. The cumulative of FIB’s Proof of Claims exceeds \$13,200,000.00.

150. PMB filed Proof of Claim Nos. 190, 192, and 193 in the underlying Bankruptcy proceeding. The cumulative total of PMB’s Proof of Claims exceeds \$1,300,000.00.

151. FIB's and PMB's claims against the Shoot the Moon Estate should be disallowed and expunged to the extent the obligation that forms the basis for the claims is void as a fraudulent transfer, if any.

152. The remaining amount of FIB's and PMB's claims should be subordinated for purposes of distribution to the allowed claims of other creditors in the underlying Bankruptcy proceeding.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiff request the following relief:

1. For a declaratory judgment declaring the Release set forth in the September 14, 2016 Settlement Agreement does not prohibit these claims.
2. For a declaratory judgment declaring the statute of limitations did not commence until no earlier than September 2019.
3. Damages, in an amount exceeding \$10 Million to be proven at trial, against FIB and PMB, jointly and severally;
4. For punitive damages against FIB and PMB.
5. For Pre- and post-judgment interest;
6. For Attorney's fees and costs as permitted by applicable law.
7. With respect to Count XII for a judgment disallowing FIB's and PMB's Proof of Claims to the extent the obligation that forms the basis for the claims is void as a fraudulent transfer, if any, and equitably subordinating the remaining amount of FIB's and PMB's Proof of Claims for purposes of distribution to the allowed claims of other creditors.

8. For such other relief as this Court determines is just and proper.

DATED this 3rd day of August 2021.

COTNER LAW, PLLC

By: /s/ David B. Cotner

David B. Cotner

Kyle C. Ryan

Attorneys for Plaintiff

JURY DEMAND

The Plaintiff in this action demands a jury trial on all issues so triable.

DATED this 3rd day of August 2021.

COTNER LAW, PLLC

By: /s/ David B. Cotner

David B. Cotner

Kyle C. Ryan

Attorneys for Plaintiffs