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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

FIRST-CITIZENS BANK & TRUST COMPANY, INC., North Carolina State-Chartered Commercial Bank,

Plaintiff,

v.

PERKINS, MANN & EVERETT, a California Professional Corporation; JAN T. PERKINS, an individual; JERRY H. MANN, an individual; REID H. EVERETT, an individual; LEE N. SMITH, an individual; CURTIS D. RINDLISBACHER, an individual; JEFFREY G. BOSWELL, an individual; and DOES 1 through 20, inclusive,

Defendants.

Case No. 18CECG01323

PLAINTIFF'S COMPLAINT AGAINST DEFENDANTS FOR PROFESSIONAL NEGLIGENCE (LEGAL MALPRACTICE)

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I. INTRODUCTION

1. This is a professional negligence action for bankruptcy malpractice by First-Citizens Bank & Trust Company, Inc. ("FCB" or "Plaintiff"), a national banking and financial institution, against FCB's former litigation and bankruptcy law firm, Perkins, Mann & Everett, Incorporated ("PME" or the "Corporate Defendant"), and PME's shareholder owners: Jan T. Perkins ("Perkins"), Jerry H. Mann ("Mann"), Reid Everett ("Everett"), Lee N. Smith ("Smith"), Curtis D. Rindlisbacher ("Rindlisbacher"), and Jeffrey G. Boswell ("Boswell") (collectively, the "Shareholder Defendants"). Effective since at least March 2018, PME and the Shareholder Defendants have announced on their company website (www.pmelaw.com) that they have disbanded PME as a Professional Law Corporation, and that PME's former shareholders and associate attorneys have joined other law firms. Prior to disbanding, and during all relevant times herein, PME was well-known as a commercial litigation and bankruptcy law firm in the greater Central Valley region of California, based in the City of Fresno. But PME's dissolution does not relieve it and its shareholders from their liability for PME's professional negligence, which severely damaged Plaintiff. When, as here, a lawyer and his law firm negligently advise a corporate creditor in a hotly-disputed bankruptcy case that their client may foreclose on the debtor's motel property, seize the debtor's business, and sell it to third parties without first seeking Bankruptcy Court approval and relief from the automatic stay provisions under 11 U.S.C. § 362 *et seq.*, and the creditor client faces disastrous financial consequences because it followed the law firm's erroneous advice, the client is entitled to redress for the substantial losses it has suffered. That is what this lawsuit is about.

2. The gist of this legal malpractice action is that Everett and PME incorrectly advised FCB that it did not need to seek relief from the automatic stay before noticing the default of FCB's borrower, debtor Oakhurst Lodge, Inc. ("OLI"), a hotel owner and management company, and before advising FCB to foreclose on the Oakhurst Lodge Motel (the "Motel"), formerly owned by OLI and located at 40302 Highway 41, Oakhurst, California, near Yosemite National Park. The Motel was the primary collateral securing over $2 million in loans made by FCB to OLI.

3. A series of state lawsuits and federal bankruptcy proceedings thereafter ensued which culminated in a series of findings and Memorandum Orders issued by the United States Bankruptcy Court for the Eastern District of California, the Honorable Frederick Clement presiding (the "Bankruptcy Court"). In its findings and Orders, the Bankruptcy Court determined that FCB had violated the automatic stay provisions under 11 U.S.C. § 362(a) by, among other acts approved and recommended by Everett and PME, noticing the default of OLI, and then foreclosing on and selling the Motel. As a result of those violations of the automatic stay, the Bankruptcy Court indicated that the foreclosure and subsequent sale of the Motel were void (not merely voidable). Because of its violations of the automatic stay, committed in reliance on Defendants' erroneous advice, FCB has been subjected to serious financial and contempt penalties, including but not limited to the unwinding of the sale of the Motel, the payment of substantial defense costs and attorneys' fees, as well as the payment of OLI's attorneys' fees and costs in the event FCB's attorney-sanctioned violation of the stay is determined to be unlawful and willful.

4. By this lawsuit, FCB seeks to recover its substantial losses which proximately resulted from the erroneous advice by Everett and PME (and the other Defendants) that FCB did not need to seek relief from automatic stay provisions of 11 U.S.C. § 362(a) before noticing the default of OLI, and then foreclosing on and selling the Motel, as well as Everett's and PME's other related acts and omissions, as more fully alleged below. Defendants Perkins, Mann, Smith, Rindlisbacher, and Boswell are liable for PME's and Everett's professional negligence (in addition to their culpability for their individual involvement, if any, in the erroneous advice at issue) as guarantors of PME's obligations and under standard vicarious liability and alter ego principles. (*See* Sections II.D. and II.E, below.)

II. PARTIES

A. THE PLAINTIFF

5. Plaintiff FCB is a North Carolina state-chartered commercial bank headquartered in Raleigh, North Carolina. Plaintiff FCB's principal place of business is located in Raleigh, Wake County, North Carolina 27611-7131. FCB is a national banking and financial institution.

B. THE DEFENDANTS

6. Plaintiff FCB is informed and believes, and on that basis alleges, that defendant PME is a professional law corporation formed and existing under the laws of the State of California. PME at all relevant times maintained its principal place of business in at 7815 N. Palm Avenue, Suite 200, in the City and County of Fresno, California 93711-5531. At all relevant times, PME, with Everett as the lead attorney, was counsel for FCB in this matter; and PME is both directly and vicariously liable for Everett's erroneous advice to FCB about the supposed inapplicability of the automatic stay provisions of 11 U.S.C. § 362(a) with respect to FCB's efforts to seize, foreclose upon, and monetize the Motel securing its loans to debtor OLI, and for Everett's other acts and omissions, as alleged below.

7. Defendant Everett, an individual, is an attorney admitted to practice law in the State of California and is a named shareholder of defendant PME. Plaintiff FCB is informed and believes, and on that basis alleges, that Everett works and resides in the County of Fresno, California.

8. Defendant Perkins, an individual, is an attorney admitted to practice law in the State of California and is a named shareholder of defendant PME. Plaintiff FCB is informed and believes, and on that basis alleges, that Perkins works and resides in the County of Fresno, California.

9. Defendant Mann, an individual, is an attorney admitted to practice law in the State of California and is a named shareholder of defendant PME. Plaintiff FCB is informed and believes, and on that basis alleges, that Mann works and resides in the County of Fresno, California.

10. Defendant Smith, an individual, is an attorney admitted to practice law in the State of California and is a named shareholder of defendant PME. Plaintiff FCB is informed and believes, and on that basis alleges, that Smith works and resides in the County of Fresno, California.

11. Defendant Rindlisbacher, an individual, is an attorney admitted to practice law in the State of California and is a named shareholder of defendant PME. Plaintiff FCB is informed

and believes, and on that basis alleges, that Rindlisbacher works and resides in the County of Fresno, California.

12. Defendant Boswell, an individual, is an attorney admitted to practice law in the State of California and is a named shareholder of defendant PME. Plaintiff FCB is informed and believes, and on that basis alleges, that Boswell works and resides in the County of Fresno, California.

C. THE DOE DEFENDANTS

13. The true names or capacities, whether individual, corporate, associate, or otherwise, of defendants DOES 1 through 100, inclusive, are unknown to Plaintiff and therefore Plaintiff sues these DOE defendants by such fictitious names. Plaintiff will amend this Complaint to allege their true names and capacities when ascertained. Plaintiff is informed and believes and based thereon alleges that each of these fictitiously-named defendants is responsible in some manner for the occurrences herein alleged, and that Plaintiff's damages as herein alleged were proximately (legally) caused by their conduct. (PME, Perkins, Everett, Mann, Smith, Rindlisbacher, Boswell, and the DOE defendants hereafter sometimes are referred to collectively as the "Defendants.")

D. AGENCY AND PROFESSIONAL CORPORATION GUARANTOR ALLEGATIONS

14. Plaintiff is informed and believes and, upon such information and belief, alleges that each of the Defendants was and is in some manner responsible for the actions, acts and omissions herein alleged, and for the damage caused by the other Defendants, and is, therefore, jointly and severally liable to Plaintiff for its damages, as alleged herein. To that end, Plaintiff is informed and believes and thereon alleges that all Defendants were at all relevant times acting as actual agents, conspirators, ostensible agents, partners and/or joint venturers of all other Defendants, and that all acts alleged herein occurred within the course and scope of said agency, partnership, and joint venture, conspiracy or enterprise, and with the express and/or implied permission, knowledge, consent, authorization and ratification of all other Defendants; however, each of these allegations are deemed "alternative" theories wherever not doing so would result in a contradiction with other allegations.

15. As noted above, effective since at least March 2018, PME has publicly reported on its company website that it has disbanded, "closed its doors," and no longer operates as a law firm. On information and belief, at all relevant times PME was formed and operated as a California Professional Corporation. The California Legislature has authorized the formation of professional corporations for the purpose of practicing law if they are registered with the State Bar. (Cal. Bus. & Prof. Code, § 6160, 6161.) Business and Professions Code section 6167 provides: "A law corporation shall not do or fail to do any act the doing of which or the failure to do which would constitute a cause for discipline of a member of the State Bar, under any statute, rule or regulation now or hereafter in effect. In the conduct of its business, it shall observe and be bound by such statutes, rules and regulations to the same extent as if specifically designated therein as a member of the State Bar." The clear import of this section is that a professional corporation cannot be used to shield legal professionals from malfeasance through the corporate structure.

16. The Legislature has also mandated that the State Bar, as a condition of the registration process, require the corporation to "maintain security by insurance or otherwise for claims against it by its clients" for malpractice. (*Id.*, § 6171, subd. (b).) Accordingly, the State Bar requires "For law corporations that apply to the State Bar for a Certificate of Registration on or after October 27, 1971, security for claims against it by its clients for [malpractice] shall consist of an executed copy of a written agreement . . . by each of the shareholders, jointly and severally guaranteeing payment by the corporation of all claims established against it by its clients for [malpractice] arising out of the practice of law by the corporation . . .." (State Bar Law Corp. Rules, rule IV B(3), see 23 West's Ann. Cal. Codes, pt. 2 (1981 ed., 1993 cum. supp.) p. 787.) This written guarantee, which Plaintiff has not yet obtained, typically has certain financial limits per claim and may be offset by any available malpractice insurance under appropriate circumstances (which are inapplicable here). (*Ibid*.) Accordingly, to the extent that defendants Perkins, Mann, Smith, Rindlisbacher, and Boswell, as distinct from Everett, may not have provided legal services personally and individually to FCB regarding this matter (which discovery may or may not reveal during the course of this litigation), each of them nonetheless has joint and

several liability to PME's client, FCB, as individual guarantors of PME's financial responsibility to FCB for legal malpractice.

E. ALTER EGO ALLEGATIONS

17. The Shareholder Defendants (Perkins, Everett, Mann, Smith, Rindlisbacher, Boswell), together with the DOE defendants, are, and at all times herein mentioned were, owners of the stock of Corporate Defendant PME. The actual or potential liability and damages suffered by FCB as a proximate result of Everett's and PME's professional negligence in all likelihood will exceed the maximum principal amounts of any applicable malpractice insurance policies or other financial guarantees provided by the Defendant Shareholders to ostensibly back up PME's operations as a Professional Law Corporation under Cal. Bus. & Prof. Code, §§ 6160 *et seq.* As more fully alleged below, the malpractice insurance policy limits and any supposed caps on the individual Defendants' guarantees of PME's malpractice liability do not shield the individual defendants from the full extent of their direct and vicarious responsibility for PME's and Everett's bankruptcy malpractice under well-established alter ego principles.

18. In that regard, with respect to the Shareholder Defendants' alter ego liability, Plaintiff is informed and believes, and on that basis alleges, as follows:

a. Corporate Defendant PME was, a mere shell, instrumentality and conduit through which Defendant Shareholders carried on their business;

b. There existed a unity of interest between Defendant Shareholders and Corporate Defendant PME such that any individuality and separateness between the Defendant Shareholders and Corporate Defendant have ceased; and

c. Adherence to the fiction of separate existence of Corporate Defendant PME, as an entity distinct from Defendant Shareholders, would be inequitable, would permit abuse of the corporate privilege, and would sanction fraud.

19. Accordingly, Corporate Defendant PME's corporate veil should be pierced, its corporate existence separate and apart from the Shareholder Defendants should be disregarded, and the Shareholder Defendants should be held liable as PME's alter ego, for the following reasons:

a. The Shareholder Defendants, at all times herein mentioned, completely dominated, influenced and controlled the Corporate Defendant PME and the officers thereof as well as the business, property, and affairs of the Corporate Defendant;

b. Corporate Defendant PME is, and at all times herein mentioned was, a mere shell and sham with inadequate capital and assets, and was conceived, intended, and used by Defendant Shareholders as a device to avoid individual liability, inequitably, so as substitute a financially insolvent corporation in the place of Defendant Shareholders, without any reasonable regard for the true extent of PME's actual exposure to liability for professional negligence in the community where the Shareholder Defendants practiced law. To further that inequitable purpose, Corporate Defendant PME is, and at all times herein mentioned was, so inadequately capitalized that, compared with the business to be done by it and the risks of loss attendant thereto, its capitalization (and any malpractice insurance and related guarantees provided by the Defendant Shareholders) as a practical matter were illusory or trifling;

c. At no time after Corporate Defendant became incorporated was any stock authorized to be issued or issued nor has any permit for issuance of stock been applied for with the Commissioner of Corporations;

d. The activities and business of Corporate Defendant PME were carried out without the holding of properly-noticed Directors or Shareholders meetings, no records or minutes of any properly-noticed corporate proceedings were maintained, Defendant Shareholders entered into personal transactions with Corporate Defendant without due approval of other directors and shareholders, the Defendant Shareholders failed to file and maintain requisite corporate records with the California Secretary of State, and the Defendant Shareholders failed to follow other corporate formalities required for the operation of a valid California Professional Law Corporation;

e. Defendant Shareholders used assets of Corporate Defendant PME for their personal use, caused assets of Corporate Defendant to be transferred to them or appropriated

by them without adequate consideration, and withdrew funds from Corporate Defendant's bank accounts for personal use, such that the income, revenue and profits of Corporate Defendant PME was diverted by said Shareholders Defendants to themselves leaving the Corporate Defendant an empty shell;

f. Defendant Shareholders caused funds to be withdrawn from Corporate Defendant PME and distributed said funds without any consideration or adequate consideration to PME's actual and anticipated obligations and liabilities (including but not limited to its malpractice exposure), all for the purpose of avoiding and preventing attachment and execution by creditors, including Plaintiff, thereby rendering Corporate Defendant insolvent and unable to meet its obligations and liabilities incurred in the due course of its operations;

d. Defendant Shareholders represented to the public, implicitly or explicitly, that they would be responsible for corporate obligations, and the transactions complained of herein were entered into, under the belief that Defendant Shareholders were, in reality, the true parties obligated; and

e. Defendant Shareholders insured and guaranteed certain of Corporate Defendant PME's obligations, thereby enabling Corporate Defendant to engage in active business, without adequate financing, capitalization, or capital stock, which invited the public generally, and Plaintiff in particular, to deal with Corporate Defendant to Plaintiff's substantial loss, as herein pleaded.

III. JURISDICTION AND VENUE

20. This Court has jurisdiction over this action pursuant to California Code of Civil Procedure Section 410.10 and California Constitution Article VI, Section 5. The amount in controversy, exclusive of interest and costs, exceeds the jurisdictional threshold for this Court.

21. Venue is proper in this Court pursuant to California Code of Civil Procedure section 395(a) because Everett and PME at all relevant times maintained an office in this County; most, if not all, of the deficient legal services at issue were provided by Everett and PME in this

County; the Shareholder Defendants reside in this County, and the facts and circumstances giving rise to this lawsuit primarily occurred in this County.

IV. COMMON ALLEGATIONS

A. The Underlying Bankruptcy Court and State Court Cases Involving The Oakhurst Lodge Motel

22. FCB is or was a party or an interested person in the following legal proceedings involving the Motel and OLI regarding which Everett and PME (and the other Shareholder Defendants) provided legal advice to FCB, directly or indirectly:

a. *Oakhurst Lodge, Inc., etc., v. First-Citizens Bank & Trust Co., etc., et al.*, Superior Court, County of Madera, California, Case No. MCV063473 (the "Madera State Court Action"), and the prior unlawful detainer action and related foreclosure proceedings (collectively, the "Madera State Court Actions");

b. *In re Oakhurst Lodge, Inc., Debtor*, U.S. Bankruptcy Court, E.D. Cal., Case No. 10-19554, filed on 08/20/2010 (Chapter 11) (the "First OLI Bankruptcy Action");

c. *In re Oakhurst Lodge, Inc., Debtor*, U.S. Bankruptcy Court, E.D. Cal., Case No. 11-bk-17165, filed on 06/22/2011 (Chapter 7) (the "Second OLI Bankruptcy Action");

d. *In re Oakhurst Lodge, Inc., Debtor*, U.S. Bankruptcy Court, E.D. Cal., Case No. 12-bk-19553, filed on 11/15/2012 (Chapter 7) (the "Third OLI Bankruptcy Action"); and

e. *Oakhurst Lodge, Inc. v. First-Citizens Bank & Trust Co., et al.*, U.S. Bankruptcy Court, E.D. Cal., Case No. 15-ap-01017, filed on 02/11/2015 (the "OLI Adversary Proceeding"). (The Madera State Court Actions, the First OLI Bankruptcy Action, the Second OLI Bankruptcy Action, the Third OLI Bankruptcy Action, and the OLI Adversary Proceedings sometimes are referred to hereafter collectively as the "Oakhurst Lodge Matters.")

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B. The Bankruptcy Plan Of Reorganization Of Oakhurst Lodge, Inc., The Former Owner Of The Motel

23. In 2008, OLI borrowed over $2 million from Temecula Valley Bank and from FCB. The loans were secured by first and second deeds of trust, respectively, against the Motel, in favor of FCB.

24. In August of 2010, OLI sought the protections of Chapter 11 of the United States Bankruptcy Code.

25. In or about August of 2010, FCB retained Everett and PME to represent FCB in connection with FCB's loans to OLI, its security interests in the Motel, its interests under any Plan of Reorganization for OLI, and related issues, in light of the First OLI Bankruptcy .

26. In June of 2011, the Second OLI Bankruptcy Action commenced. On or about February 29, 2012, the Bankruptcy Court (the Hon. Frederick E. Clement, presiding) confirmed OLI's Plan. Everett and PME advised FCB in connection with the Plan. They provided comments on and revisions to, and consented to, the Plan on FCB's behalf.

27. The Plan provided for scheduled payments by OLI for the FCB promissory notes and first and second deeds of trust held by FCB with respect to the Motel. The Plan did not immediately re-vest property of the estate in the reorganized debtor. Instead, the Plan provided for discharge only after the debtor completed all payments under the Plan (which provided for 22 years of amortized payments) and moved for discharge.

28. The reorganized debtor, OLI, subsequently failed to make the payments to FCB (or other creditors) as required under the Plan. OLI was in default by June of 2012.

C. Defendants' Legal Advice To Plaintiff FCB That The Automatic Stay Provisions Of 11 U.S.C. § 362 Did Not Apply To FCB's Efforts To Foreclose On OLI's Motel And Its Other Efforts To Collect On Its Past Due Loans

29. Upon the filing of a bankruptcy, an automatic stay goes into effect under 11 U.S.C. § 362(a). The automatic stay provides a debtor immediate and automatic protection from the collection efforts of secured creditors like FCB. The automatic stay requires all collection efforts to cease immediately upon the filing of a voluntary or involuntary bankruptcy petition. All collection actions taken by a creditor in violation of the automatic stay are void. Moreover, a

creditor who wilfully violates the automatic stay may be subject to very serious penalties, including the forced unwinding of the transactions at issue, payment of the debtor's actual damages, including but not limited to attorneys' fees and costs, the imposition of contempt sanctions, and possibly even an award of punitive damages in appropriate cases. For these reasons, bankruptcy litigation counsel are required to exercise reasonable care when advising a corporate creditor that it may proceed with debt collection efforts against a debtor subject to a confirmed Plan of Reorganization in an ongoing bankruptcy proceeding. Unfortunately, Defendants failed to do so in this case.

30. Instead, by email on June 21, 2012, Everett (and by extension, PME) advised FCB, through Abel D. Tellez, FCB's Senior Vice President and Senior Commercial Resolution Officer, that the automatic stay provisions of 11 U.S.C. § 362(a) *et seq.* did not apply to FCB's effort to notice OLI's default on FCB's loans, and to foreclose on and sell the Motel that was the security for those loans:

> Abel,
>
> I have reviewed the debtor's chapter 11 plan, the order confirming the plan, and the applicable bankruptcy code and rules. There is no stay in effect that would require the Bank to go back to the bankruptcy court to get an order permitting it to take action to enforce the terms of the confirmed plan as it pertains to the Bank. I confirmed this with the debtor's attorney who agrees that there are no impediments to the Bank filing a new NOD. This means that the Bank can commence nonjudicial foreclosure proceedings anew. I recommend that the nonjudicial foreclosure proceedings be commenced to get the clock running.
>
> * * *
>
> Other considerations are whether or not to seek to put a receiver in place again and whether or not to pursue Chet Patel as a guarantor.
>
> Reid H. Everett

Perkins, Mann & Everett, Incorporated

(Emphasis added.)

31. FCB reasonably relied on Everett's and PME's expertise and professional advice that he "ha[d] reviewed the debtor's chapter 11 plan, the order confirming the plan, and the applicable bankruptcy code and rules," that he had concluded "[t]here [was] no stay in effect that would require the Bank to go back to the bankruptcy court to get an order permitting it to take action to enforce the terms of the confirmed plan as it pertains to the Bank," that "there [were] no impediments to the Bank filing a new NOD [Notice of Default]" for the Bank to foreclose on the Motel, and that "[t]his mean[t] that the Bank [could] commence nonjudicial foreclosure proceedings anew" without violating the automatic stay provisions of 11 U.S.C. § 362 *et seq.* Accordingly, in reasonable reliance on Defendants' professional advice and expertise in those regards, FCB did not seek relief from the automatic stay against OLI or against the OLI's bankruptcy estate to foreclose on and sell the Motel (and to undertake its other collection OLI activities).

32. Article XIV of the Plan, entitled "Effect of Confirmation," provided in Section 15.01, in pertinent part, as follows:

> Revesting of Assets. Subject to the provisions of the Plan and the Confirmation Order, the property of the Estate shall not vest in the Reorganized Debtor until discharge is entered. As of the Discharge Date, all such property shall be free and clear of all Claims, Liens and Equity Interest, except as otherwise provided in the Plan or the Confirmation Order. From and after the Discharge Date, the Reorganized Debtor shall be free of any restriction imposed by the Bankruptcy Court, the Bankruptcy Code and Bankruptcy Rules, other than the obligations set forth in this Plan.

33. Accordingly, and critically for this case, under the Plan, re-vesting of the security for the FCB loans (*i.e.*, the Motel) in the reorganized debtor (*i.e.*, OLI) did not occur when the Plan was confirmed, or when the bankruptcy cases closed, but only after discharge of the OLI was granted, after all payments were made under the Plan, and after OLI moved the Bankruptcy Court

for an order of final discharge under the United States Bankruptcy Code. There was no provision in the Plan for any waiver or release of the statutory requirement for a creditor or other interested third party to move for relief from the automatic stay provisions under 11 U.S.C. § 362(a) prior to discharge.

34. OLI never sought, or received, a discharge under the Plan or otherwise.

35. Between July and December 2012, with the assistance of Total Lender Solutions, Inc. ("TLS") – which acted as the trustee under the deeds of trust -- FCB, represented by Everett and PME, prosecuted and completed foreclosure of the Motel in various Madera State Court Actions. In particular, among other actions, Everett and PME caused FCB to record a "Notice of Default" against the Motel on or about July 10, 2012. FCB (acting through and pursuant to the professional advice of Everett and PME) filed a "Notice of Unified Trustee's Sale" against the Motel in October 9, 2012. After foreclosure, title to the Motel was transferred to FCB on or about December 14, 2012.

36. In January 2013, on the motion of the United States Trustee, the Third OLI Bankruptcy Case was converted from Chapter 11 to Chapter 7, and Robert Hawkins was appointed the Chapter 7 trustee.

37. In March 2013, trustee Hawkins abandoned the Motel.

38. On or about June 1, 2013, the Third OLI Bankruptcy Case was dismissed and closed soon thereafter, on June 19, 2013.

39. On or about June 26, 2013, OLI commenced the Madera State Court Action alleging causes of action against FCB and TLS for quiet title, cancellation of instruments, injunctive relief, and constructive trust, all emanating from FCB's alleged violation of the automatic stay.

40. In June 2013, the Chapter 7 case in the Third OLI Bankruptcy Action was dismissed because the debtor failed to attend the meeting of creditors.

41. In June 2014, OLI recorded a notice of pendency of action against the property on which the Oakhurst Lodge Motel is located.

42. In August 2014, FCB sold the Oakhurst Lodge Motel to Oakhurst Lodge, LP ("OLL").

D. The OLI Bankruptcy Adversary Proceeding Against FCB And The Bankruptcy Court's Subsequent Findings And Orders That FCB Violated The Automatic Stay

43. On or about February 11, 2015, OLI filed a complaint in the OLI Adversary Proceeding to quiet title against FCB, TLS and OLL, and to recover the Motel and insurance proceeds arising from a post-confirmation fire.

44. In February and March of 2015, Judge Oakley in the Madera State Court Action ruled that the foreclosure and sale of the Oakhurst Lodge Motel by FCB were proper and did not violate the automatic stay provisions of 11 U.S.C. § 362(a).

45. In response to a motion to dismiss filed by FCB in the OLI Adversary Proceeding, the Bankruptcy Court issued an order on January 27, 2016 in which the Bankruptcy Court concluded, contrary to Judge Oakley's ruling, that FCB violated the automatic stay provisions in various respects, including but not limited by the following actions: (1) recordation of the Notice of Default-July 10, 2012; (2) recordation of the Notice of Sale-October 9, 2012; (3) conducting the trustee's sale and FCB's acquisition of title-December 14, 2012; (4) commencement and prosecution of an unlawful detainer action-starting January 4, 2013; and (5) retention of the Oakhurst Lodge Hotel between the trustee's sale on December 14, 2012 and the trustee's abandonment of it. The Bankruptcy Court also ruled that it alone, and not the California Superior Court, had jurisdiction to determine whether a stay violation had occurred and, if so, what damages and penalties should be assessed against the violator.

E. FCB Thereafter Engaged In Substantial Efforts To Mitigate Its Losses, Including But Not Limited To Engaging In Comprehensive Settlement Negotiations With OLI, But The Bankruptcy Court Ruled That The Parties' Conditional Settlement Was Ineffectual

46. Pursuant to direction by the Bankruptcy Court in its January 27, 2016 Order, the parties were instructed to conduct a settlement mediation on Wednesday, May 4, 2016. Those settlement discussions occurred and continued through May 26, 2016, when the parties reached a conditional resolution, which, if approved and enforced by the Bankruptcy Court, would resolve

all of the Oakhurst Lodge Matters in light of the Bankruptcy Court's automatic stay violation ruling. In exchange for mutual reciprocal releases (and other consideration), FCB agreed to pay $850,000 to resolve the case, conditioned on and subject to entry of an Order by the Bankruptcy Court authorizing and approving of the settlement.

47. However, in the following months, OLI rejected the conditional settlement, claiming that it misunderstood the terms of the proposed resolution and that no meeting of the minds had occurred. In the meantime, the case remained unsettled and the litigation continued.

48. Due to OLI's rejection and disavowal of the proposed conditional settlement, FCB was compelled to file a motion with the Bankruptcy Court to authorize and affirm the proposed settlement and enforce its terms. But by its Memorandum Order dated March 28, 2018, entered in the OLI Bankruptcy Action, the Bankruptcy Court found that a proper settlement was never reached, that is was an unauthorized attempt to modify the existing Plan of Reorganization, and, therefore, it was ineffectual and inoperative, and did not bind the Debtor, its Estate, or the creditors of the Estate. In so holding, the Bankruptcy Court reiterated and expanded its prior ruling that FCB had violated the automatic stay when it foreclosed on the OLI Motel, sold it, and engaged in all other related collection activities as against OLI and its Motel.

F. Defendants' Legal Advice Was Erroneous And Constituted Professional Negligence

49. The Bankruptcy Court's January 27, 2016 Order and March 28, 2018 Memorandum Order together demonstrate irrefutably the negligence and error of Defendants' legal advice, summarized in Everett's June 21, 2012 email to Abel D. Tellez, FCB's Senior Vice President and Senior Commercial Resolution Officer, that the automatic stay provisions of 11 U.S.C. § 362(a) did not apply to FCB's effort to notice OLI's default on FCB's loans, and to foreclose on and sell the Motel that was the security for those loans. Without conceding the final validity of the Bankruptcy Court's findings and rulings (which still may be subject to reconsideration, review or appeal), Plaintiff summarizes the Bankruptcy Court's findings and rulings, in words or substance, as follows:

a. Debtor OLI owned the Motel which was encumbered by a first and second deed of trust in favor of FCB.

b. In June 2011, OLI sought the protections of Chapter 11 and confirmed the Plan of Reorganization.

c. The Plan (A) provided for the promissory notes and first and second deeds of trust held by FCB, (B) did not re-vest property of the estate in the reorganized debtor, OLI, and (C) provided for discharge only after the debtor completed all payments under the Plan and moved for discharge. Accordingly, under Section 15.01 and Section 15.02 of Article XIV of the Plan, the Motel would not re-vest in OLI for purposes of noticing a default and foreclosing on the Motel until after OLI had obtained a discharge order by the Bankruptcy Court.

d. In a Chapter 11 bankruptcy, the stay arises on the filing of a petition. 11 U.S.C. §§ 362(a), 103(a). The particular acts that are prohibited by the stay are described in 11 U.S.C. § 362(a), and include (a) the commencement or continuation of any lawsuits against the debtor that was or could have been commenced before the commencement of the bankruptcy case; (b) any act to obtain possession of or control over property of the debtor's estate; and (c) any acts to enforce or collect on any lien against property of the estate. 11 U.S.C. § 362(a).

e. No exception to the applicability of the automatic stay under 11 U.S.C. §§ 362(b), (e), (f) or (h) was applicable here. FCB did not move the Bankruptcy Court for relief from the automatic stay (based on Defendants' erroneous legal advice). Further, the Bankruptcy Court issued no order modifying the stay under 11 U.S.C. § 362(d) or permitting modification of the confirmed Plan of Reorganization.

f. Under 11 U.S.C. § 362(c)(1), as to the debtor, OLI, the stay arose on the petition date, June 22, 2011, and evaporated when the Chapter 7 case was dismissed on June 1, 2013. As to the Motel, which was property of the estate, *see* 11 U.S.C. § 541(a), the stay arose on the petition date, June 22, 2011, and evaporated no earlier than March 1, 2013, when trustee Hawkins abandoned it.

g. Under Ninth Circuit authority, acts taken in violation of the stay are void. "The Ninth Circuit follows the majority view in holding that acts in violation of the automatic stay are void (not merely voidable). *See In re Gruntz*, 202 F.3d 1074, 1081-1082 (9th Cir. 2000). "Void" acts have no force or effect and cannot be cured or ratified. As a result, the debtor/estate does not have to take any action to "undo" the act. *In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992).

h. At least five alleged acts, which FCB did in reliance on Defendants' erroneous advice, violated the automatic stay during the applicable periods in which the stay remained in effect: (1) recordation of the Notice of Default-July 10, 2012; (2) recordation of the Notice of Sale-October 9, 2012; (3) conducting the trustee's sale and FCB's acquisition of title-December 14, 2012; (4) commencement and prosecution of an unlawful detainer action-starting January 4, 2013; and (5) retention of the lodge between the trustee's sale on December 14, 2012, and, at least, the trustee's abandonment on March 1, 2013. The Bankruptcy Court noted that other stay violations may also exist.

i. Section 362(h) of the Bankruptcy Code provides that "an individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorney's fees and, in appropriate circumstances, may recover punitive damages."

50. For these reasons, among others, Everett's and PME's advice to FCB that it did not need to seek relief from the automatic stay under the terms of the OLI Plan of Reorganization fell below the applicable standard of care for bankruptcy attorneys and commercial litigation lawyers, and therefore constituted culpable professional negligence. Everett's and PME's erroneous legal advice was not the product of a reasoned judgment that reflected a considered choice among other possible courses of action or the exercise of informed judgment with respect to an unsettled state of the law. It would not have been made non-negligently by other reputable attorneys in the community under the same or substantially similar circumstances. It was not a viable choice between competing considerations leading to alternative tactical or strategic options. It was a negligent error, pure and simple. Simply put, Defendants got it dead wrong, and their mistake devastated FCB.

G. Plaintiff FCB Has Suffered Substantial Damages As A Direct And Proximate Result Of Defendants' Professional Negligence

51. In its March 28, 2018 Memorandum Order, the Bankruptcy Court stated that, as of the date of the hearing on FCB's motion to approve and enforce the OLI conditional settlement, the amount due under the Plan was approximately $1,481,878. The Bankruptcy Court calculated this amount to include the following: (1) professional fees of $12,000; (2) the Collier Partnership's claim of $407,241 ($324,000 principal + $83,241 interest at 5.5%); (3) the Olsen Trust's claim of $501,867 ($392,000 principal + $109,867 interest at 6%); (4) On Deck Capital's claim of $66,464 ($56,000 principal + $10,464 interest at 4%); (5) TimePayment Corp.'s claim of $26,111 ($22,000 principal + $4,111 interest at 4%); (6) the County of Madera's claim of $154,195 ($125,000 principal + $29,195 interest at 5%); (7) priority unsecured tax claims of $202,000; and (8) non-insider unsecured claims of $112,000. (See Bankruptcy Court Memorandum Order dated March 28, 2018, at page 25, footnote 12.) The figure of $1,481,878 did not include: (1) amounts due First-Citizens Bank on its first and second trust deeds (as provided in the proposed settlement agreement); (2) "statutorily required" interest on priority tax claims; or (3) U.S. Trustee's fees (which together were substantial, constituting many tens of thousands of dollars). (*Ibid.*)

52. Nor did these amounts include attorneys' fees, costs, damages, penalties, and sanctions that may be or could be imposed on FCB as a result of its violation of the automatic stay, due to Defendants' erroneous advice.

53. Finally, these amounts did not include the hundreds of thousands of dollars in attorneys' fees and costs incurred by FCB as a result of Defendants' professional negligence.

V. ALL APPLICABLE STATUTES OF LIMITATIONS AND REPOSE HAVE BEEN TOLLED DUE TO DEFENDANTS' CONTINUOUS REPRESENTATION OF FCBT AND SUBSEQUENT TOLLING AGREEMENTS

54. Until at least June 10, 2016, when FCB, on the one hand, and Everett and PME, on the other hand, entered into a written Tolling Agreement stopping the running of any statutes of limitation or repose with respect to FCB's professional negligence claim (and any other related claims) against Defendants, all such claims by FCB against Defendants were tolled under the "continuing representation" tolling provision set forth in Cal. Code Civ. Proc., § 340.6, subsection (a)(2) and applicable case law.

55. At all relevant times, up though and including June 10, 2016, PME and Everett maintained an ongoing attorney-client relationship with FCB and engaged in activities in furtherance of the relationship. A plaintiff who is aware of, and has been actually injured by, attorney malpractice in a matter need not file suit for malpractice while that attorney is still representing him on the same specific subject matter, in this case, the various Oakhurst Lodge matters. Everett's and PME's ongoing relationship with FCB was not merely "tangentially related" to the Oakhurst Lodge Matters that were finally resolved by settlement on May 26, 2016. Instead, PME's and Everett's ongoing mutual attorney-client relationship with FCB and activities in furtherance of the relationship included the following:

a. Everett and PME were counsel of record, and remain counsel of record, in the Madera State Court Action;

b. The Madera State Court Action remains pending, albeit subject to the automatic bankruptcy stay at least through June, 2016;

c. While the Sheppard Mullin firm later came into the Madera State Court Action, sometime in 2013, as lead counsel, Everett and PME remained in the case as co-counsel providing input to Sheppard Mullin in connection with FCB's injunctive relief and demurrer proceedings in that case (through 2013, 2014, and 2015);

d. Everett and PME never substituted out of the Madera State Court Action or withdrew as counsel from that case, nor did Everett give notice of the termination of his engagement or his attorney-client relationship with FCB;

e. FCB never terminated its attorney-client engagement with Everett and PME in that regard either;

f. Everett and PME remained counsel of record in the OLI Bankruptcy Action, although the Sheppard firm was lead counsel since at least mid-2013;

g. Everett never substituted out of the OLI Bankruptcy Action or withdrew as counsel from that case, nor did Everett give notice of the termination of his engagement or his attorney-client relationship with FCB;

h. FCB never terminated its attorney-client engagement with Everett and PME in that regard either;

i. Everett's and PME's representation of FCB was not fulfilled and all agreed tasks for which Everett and PME were retained were not completed, because the efficacy of the FCB's foreclosure and sale of the Oakhurst Lodge Hotel in light of Oakhurst

Lodge, Inc.'s automatic stay challenge under 11 U.S.C. § 362(a) remained pending and unresolved;

j. Everett and PME provided input and legal advice to FCB in connection with the OLI Bankruptcy Actions and the OLI Adversary Proceeding, and the related Madera State Court Action, including through May of 2016, which all involve substantively the "same subject matter" – the sale of the Oakhurst Lodge and whether that sale violated the automatic stay provisions under 11 U.S.C. § 362(a);

k. Because the automatic stay issue had not been resolved, the matters remained open and contested, and the engagement with Everett never formally terminated, FCB never understood or reasonably should have understood that no further services would be rendered by Everett and PME; and

l. Notwithstanding the failure of Everett and PME to seek relief from the automatic stay before initiating and consummate foreclosure proceedings on the Oakhurst Lodge Motel, FCB continued to maintain an attorney-client relationship with Everett and PME in the hope that Everett and PME could remedy the problem and mitigate any resulting damages.

56. As noted above, on June 10, 2016, the parties entered into a Tolling Agreement that tolled Plaintiff's professional negligence (and related) claims against Defendants up through and including August 9, 2016. The parties, through their respective counsel, thereafter entered into a series of written Addendums to their Tolling Agreement that extended its time period through April 18, 2018.

57. For the foregoing reasons, as a result of Everett's and PME's continuous representation of FCB in the various Oakhurst Lodge Matters, together with the subsequent Tolling Agreement and related Addendums thereto, the statute of limitations and repose under Cal.

Code Civ. Proc., § 340.6, and all other time-based defenses (if any), were tolled up to and including April 18, 2018. The professional negligence claims and related vicarious liability and guarantor claims also are tolled as to Perkins, Everett, Smith, Rindlisbacher, Boswell, and the DOE defendants for the same reasons and by virtue of their status as the alter ego of PME, as alleged in Section II.D., above.

VI. CAUSE OF ACTION: FOR PROFESSIONAL NEGLIGENCE (LEGAL MALPRACTICE) AGAINST ALL DEFENDANTS

58. Plaintiff FCB re-alleges and incorporates Paragraphs 1 through 57, above, as though fully set forth herein.

59. Commencing in or about August of 2010, when the First OLI Bankruptcy Action was filed, and continuing through at least June 10, 2016, when FCB entered into its Tolling Agreement with the Defendants, Everett and FCB were in a continuous attorney-client relationship in which Everett and FCB were bankruptcy and commercial litigation counsel to FCB in connection with the Oakhurst Lodge Matters.

60. As FCB's counsel in connection with the Oakhurst Lodge Matters, Everett and PME (and the other Shareholder Defendants) owed a duty of care and professional responsibility to FCB, requiring them to exercise the knowledge, skill and ability ordinarily exercised by other similarly situated lawyers in the community. Further, as a purported specialist in complex bankruptcy and creditor cases, the professional services rendered by Everett (and by extension, PME and the other Shareholder Defendants) should have been comparable to other complex litigation and bankruptcy specialists, imposing upon Defendants a more stringent, specialist standard of care.

61. In breach of their duty of care, and in violation of their professional responsibilities, Everett and PME negligently advised FCB that it did not need to seek relief from the automatic stay provisions under 11 U.S.C. § 362(a) in connection with the Oakhurst Lodge Matters. Defendants also were professionally negligent in not advising FCB of the serious consequences it would face if it (1) recorded the Notice of Default on July 10, 2012; (2) recorded the Notice of Sale on October 9, 2012; (3) conducted the trustee's sale and acquired title to the Motel on

December 14, 2012; (4) commenced and prosecuted an unlawful detainer action against OLI starting in January 4, 2013; and (5) retained the Motel between the trustee's sale on December 14, 2012, and, at least, the trustee's abandonment of the Motel on March 1, 2013, all in violation of the automatic stay.

62. Defendants' negligent acts and omissions were below the standard of care for comparable attorneys who practice in this community, especially attorneys who specialize in handling bankruptcy and creditor claims. Defendants were negligent in not recognizing that the OLI Plan of Reorganization did not waive or release the requirement to seek relief from the automatic stay before proceeding against the Motel as collateral for the FCB's loans to OLI prior to final discharge of OLI in accordance with the terms of the Plan. Everett and PME prosecuted the unlawful detainer action, the foreclosure action, and the related default, trustee sale, and transfer proceedings negligently, because all such actions were not simply voidable, but were void *ab initio* for violating the automatic stay provisions of 11 U.S.C. § 362(a). OLI's insolvency does not undermine the core collectability of the underlying claim because FCB was proceeding as a secured creditor liquidating "hard" real property assets, *i.e.*, the Motel and related fixtures.

63. Defendants' professional's negligence was a substantial factor, indeed, the critical factor in FCB's violation of the automatic stay by proceeding with all of its various efforts to secure and monetize the Motel, by foreclosing on it and selling it, as the primary collateral securing FCB's loans to OLI. But for Everett's and PME's erroneous advice about the supposed inapplicability of the automatic stay, on which FCB reasonably relied, FCB would not have proceeded against OLI and the Motel without first seeking relief from the automatic stay. But for Everett's and PME's erroneous advice, years of litigation would have been avoided, including substantial defense attorneys' fees and costs, the risk of adverse attorneys' fees and cost awards, and other actual damages, as well as possible contempt sanctions, under section 362(h) of the Bankruptcy Code and applicable case law. In summary, as a direct and proximate result of Defendants' professional negligence, FCB has suffered several millions of dollars in compensatory damages, in an amount to be proven at trial.

PRAYER FOR RELIEF

Wherefore, Plaintiff FCB prays that this Court enter Judgment against Defendants, and each of them, as follows:

A. For compensatory damages for the acts and omissions complained of herein, in an amount to be proven at trial;

B. For such pre- and post-judgment interest as permitted by law; and

C. For such other and further relief as the Court deems just and proper.

DATED: April 17, 2018

Respectfully submitted,

MARK ANCHOR ALBERT & ASSOCIATES

By: _____

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