DISTRICT COURT, COUNTY OF LARIMER, COLORADO 201 La Porte Ave., Suite 100 Ft. Collins, CO 80521	**EFILED Document** **CO Larimer County District Court 8th JD** **Filing Date: May 27 2011 3:09PM MDT** **Filing ID: 37847853** **Review Clerk: Stacy Pacheco**
Plaintiffs: MCWHINNEY HOLDING COMPANY, LLLP, a Colorado Limited Liability Limited Partnership; MCWHINNEY CENTERRA LIFESTYLE CENTER, LLC, a Colorado Limited Liability Company, derivatively on behalf of CENTERRA LIFESTYLE CENTER, LLC, a nominal defendant; CENTERRA PROPERTIES WEST, LLC, a Colorado Limited Liability Company; SMP4 INVESTMENTS, INC., a Colorado Corporation; CENTERRA RETAIL SALES FEE CORPORATION, a Colorado Nonprofit Corporation, v. **Defendants:** POAG & MCEWEN LIFESTYLE CENTERS-CENTERRA, LLC, a Delaware Limited Liability Company; POAG & MCEWEN LIFESTYLE CENTERS, LLC, a Delaware Limited Liability Company; POAG LIFESTYLE CENTERS, LLC, a Delaware Limited Liability Company; and DOES 1 through 50, inclusive, and **Nominal Defendant:** CENTERRA LIFESTYLE CENTER, LLC, a Delaware Limited Liability Company.	▲ **COURT USE ONLY** ▲
Attorneys for Plaintiffs: Names: Charles Norton, Esq., #10633 J. Michael Keane, Esq., #35858 Address: NORTON, SMITH & KEANE 1331 Seventeenth Street, Suite 500 Denver, CO 80202 Phone Number: 303.292.6400 FAX Number: 303.292.6401 E-mail: cnorton@nsk-law.com mkeane@nsk-law.com	Case Number:
VERIFIED COMPLAINT FOR: **1. BREACH OF CONTRACT REGARDING CENTERRA OPERATING**	

AGREEMENT

2. FRAUDULENT CONCEALMENT REGARDING "DOUBLE AGENDA"

3. BREACH OF FIDUCIARY DUTIES

4. INDEMNITY

5. INTENTIONAL INTERFERENCE WITH CONTRACTUAL OBLIGATIONS

6. INTENTIONAL INDUCEMENT FOR BREACH OF CONTRACT

7. FRAUD IN THE INDUCEMENT

8. FRAUDULENT CONCEALMENT REGARDING CENTERRA OPERATING AGREEMENT SECTION 6.2(M)

9. CIVIL CONSPIRACY

Plaintiffs McWhinney Holding Company, LLLP ("MCWHINNEY"), McWhinney Centerra Lifestyle Center, LLC ("MCLC"), Centerra Properties West, LLC ("CPW"), SMP4 INVESTMENTS, INC. ("SMP4") and Centerra Retail Sales Fee Corporation ("RSF CORP") (collectively, "PLAINTIFFS"), through their counsel, Norton, Smith & Keane, P.C., for themselves, and, in the case of MCLC, derivatively on behalf of nominal defendant Centerra Lifestyle Center, LLC, a Delaware Limited Liability Company ("CENTERRA LLC"), for causes of action against defendants Poag & McEwen Lifestyle Centers LLC ("PMLC"), Poag & McEwen Lifestyle Centers-Centerra, LLC ("P&M"), Poag Lifestyle Centers, LLC ("POAG") and DOES 1 through 50, inclusive, and each of them (collectively, "DEFENDANTS") allege as follows:

PARTIES

1. Plaintiff MCWHINNEY is a limited liability limited partnership in good standing. McWHINNEY was organized and exists under and by virtue of the laws of the State of Colorado. At all times herein mentioned, MCWHINNEY has done business, and continues to do business, as a real estate owner and developer in the State of Colorado, with its principal place of business in Larimer County. At all relevant times, MCWHINNEY has been, and continues to be, an "Affiliate" of CPW according to the definition of "Affiliate" in Section 1.1 of that certain a Centerra Master Financing and Intergovernmental Agreement ("MFA") described below.

2. On information and belief, PLAINTIFFS allege:

   a. Defendant PMLC is, or holds itself out to be, a Delaware limited liability company with its principal place of business in Memphis, Tennessee.

   b. Since 1987, PMLC has been in the business of developing, managing and leasing upscale outdoor retail malls known as lifestyle centers.

c. PMLC's business model is to work with local developers to identify the site of future lifestyle centers, then set up wholly owned PMLC subsidiaries to acquire and develop those sites in a joint venture with those local developers or their subsidiaries/assignees (typically, with the local developers or their subsidiaries/assignees contributing title to the identified site as a capital contribution to a new entity formed to pursue that particular business venture).

3. Nominal defendant CENTERRA LLC is a limited liability company organized and existing under and by virtue of the laws of the State of Delaware. At all times herein mentioned, CENTERRA LLC did business in the State of Colorado at its one and only place of business in Larimer County. CENTERRA LLC was formed in September 2004 by subsidiaries of McWHINNEY and PMLC – specifically, MCLC and P&M – for the purpose of carrying out the above-described business plan: *i.e.*, CENTERRA LLC was formed to carry out McWHINNEY and PMLC's planned cooperative development the then conceived, but then yet to be built, lifestyle center known as The Promenade Shops at Centerra (hereafter, "SHOPS AT CENTERRA").

4. On information and belief, PLAINTIFFS allege:

a. Defendant P&M is a limited liability company organized and existing under and by virtue of the laws of the State of Delaware.

b. PMLC created P&M for the purpose of carrying out the above-described business plan: *i.e.*, PMLC created P&M as PMLC's wholly owned subsidiary in anticipation of having P&M, on PMLC's behalf, acquire a 50% ownership stake in CENTERRA LLC and to serve as CENTERRA LLC's managing member.

c. At all relevant times, P&M has therefore been, and continues to be, a 50% member/owner and manager of CENTERRA LLC.

d. At all relevant times, P&M has also been, and continues to be, CENTERRA LLC's sole managing member with extensive, and in most instances exclusive, rights of management and control.

5. Plaintiff MCLC is a limited liability company in good standing. MCLC was organized and exists under and by virtue of the laws of the State of Colorado. At all times herein mentioned, MCLC has done business, and continues to do business, in the State of Colorado with its principal place of business in Larimer County. Prior to CENTERRA LLC's formation in September 2004, MCLC was formed to acquire the other 50% ownership interest in CENTERRA LLC. Accordingly, at all relevant times MCLC has been, and continues to be, a passive 50% member/owner in CENTERRA LLC with limited rights to approve or veto the actions of CENTERRA LLC's managing member, P&M.

6. On information and belief, PLAINTIFFS allege:

a. Defendant POAG is Delaware limited liability company.

b. POAG is another wholly-owned PMLC subsidiary.

c. POAG is presently under contract to manage the SHOPS AT CENTERRA.

7. On information and belief, PLAINTIFFS allege that at all relevant times P&M and POAG acted as alter egos, agents and/or co-conspirators of PMLC, and/or that PMLC is directly liable for acts or omissions attributable to P&M and/or POAG. As such, throughout this complaint, although P&M, POAG and PMLC may be referred to separately for purposes of explanation or clarity, such references are not meant to exclude, and in fact do not exclude, all such PMLC related entities for purposes of imposing liability on them jointly, severally and collectively as alter egos, agents, co-conspirators and/or for purposes of imposing direct liability. In that regard, on information and belief, PLAINTIFFS allege at all relevant times:

a. PMLC has owned, and continues to own, all or a substantial share of P&M;

b. PMLC has owned, and continues to own, all or a substantial share of POAG;

c. PMLC has, and continues to, financially support P&M;

d. PMLC has, and continues to, financially support POAG;

e. P&M was not been adequately capitalized to be viewed as a separate legal entity that had any independent significance from PMLC;

f. POAG was not been adequately capitalized to be viewed as a separate legal entity that had any independent significance from PMLC;

g. PMLC has interfered with P&M's operations in a way that surpasses the control exercised by a parent as an incident of ownership;

h. PMLC exercised exclusive dominion and control over P&M to the point that P&M no longer had a legal or independent significance of its own;

i. P&M acted as a mere shell, instrument or conduit for the business of PMLC;

j. POAG acted as a mere shell, instrument or conduit for the business of PMLC;

k. Substantially all of P&M's business has been on behalf of, or as an agent, representative or alter ego of PMLC;

l. Substantially all of POAG's business has been on behalf of, or as an agent, representative or alter ego of PMLC;

m. P&M's managers and/or management have taken direction from, and consistently acted at the behest of, PMLC;

n. POAG's managers and/or management have taken direction from, and consistently acted at the behest of, PMLC;

o. PMLC, P&M and POAG all share the same managers and/or management;

p. P&M acted within the scope of its authority or course of its employment (as applicable to PMLC or P&M employees) with respect to PMLC;

q. POAG acted within the scope of its authority or course of its employment (as applicable to PMLC or POAG employees) with respect to PMLC; and/or

r. P&M and POAG either acted as PMLC's agents under PMLC's complete dominion and control and/or, in the alternative, acted under and pursuant to PMLC's specific direction to cause the harm to PLAINTIFFS alleged herein.

8. Plaintiff CPW is a limited liability company in good standing. CPW was organized and exists under and by virtue of the laws of the State of Colorado. At all times herein mentioned, CPW has done business, and continues to do business, in the State of Colorado with its principal place of business in Larimer County. As more particularly described below, at all relevant times CPW has been, and continues to be, a "Developer" of the SHOPS AT CENTERRA according to the definition of "Developer" in Section 1.33 of the MFA.

9. Plaintiff SMP4 is a corporation in good standing. SMP4 was organized and exists under and by virtue of the laws of the State of Colorado. At all times herein mentioned, SMP4 has done business, and continues to do business, in the State of Colorado, with its principal place of business in Larimer County.

10. Plaintiff RSF CORP is a nonprofit corporation in good standing. RSF CORP was organized and exists under and by virtue of the laws of the State of Colorado. At all times herein mentioned, RSF CORP has done business, and continues to do business, in the State of Colorado with its principal place of business in Larimer County.

11. The defendants named herein as DOES 1 through 50, inclusive, are unknown to PLAINTIFFS. PLAINTIFFS therefore sue these "DOE" defendants by such fictitious names. On information and belief, PLAINTIFFS allege that each fictitiously named "DOE" defendant is in some manner, means or degree responsible for the events and happenings alleged in this complaint. PLAINTIFFS will amend this complaint to assert the true names and capacities of the fictitiously designated "DOE" defendants pursuant to Colorado Rule of Civil Procedure 15 when their identities and roles have been ascertained.

JURISDICTION AND VENUE

12. This Court has jurisdiction in this matter as alleged in this complaint pursuant to C.R.S. section 13-1-124(1).

13. Venue is proper in this Court pursuant to C.R.C.P. Rule 98 because all, or a majority, of the actions alleged in this complaint occurred, were accomplished and/or had their purposeful effect in Larimer County, Colorado.

14. Certain of the claims and causes of action herein – specifically those relating to breaches of Article VII of that certain written Operating Agreement signed by representatives of PMLC, P&M, McWHINNEY and MCLC in connection with CENTERRA LLC's formation ("CENTERRA OPERATING AGREEMENT") – were previously the subject of an arbitration captioned *McWhinney Centerra Lifestyle Center, LLC v. Poag & McEwen Lifestyle Centers-Centerra, LLC and Centerra Lifestyle Center,*

LLC, American Arbitration Association, Case No. 77-115-Y-000433-09 JRJ ("ARBITRATION"). On or about November 3, 2010, the parties to that ARBITRATION – specifically, MCLC, P&M and CENTERRA LLC – stipulated to dismiss the ARBITRATION without prejudice and to waive the mandatory arbitration requirement in Article VII of the CENTERRA OPERATING AGREEMENT. As part of the same stipulation, the parties agreed that after a voluntarily mediation, the claims and counterclaims previously asserted in the ARBITRATION could be re-filed before this Court, and the statute of limitations pertaining thereto would be considered tolled from the date those claims and counterclaims were first asserted in the ARBITRATION up through and including the date the ARBITRATION was dismissed without prejudice. On or about November 10, 2010, the arbitrator, James M. Lyons, approved the stipulation and dismissed the ARBITRATION.

15. Correspondingly, on or about November 17, 2010, Centerra Metropolitan District No. 1 ("METRO DISTRICT"), P&M and CENTERRA LLC – parties to a related action then pending before this Court, specifically Case No. 2009 CV 1263 described *infra* ("LARIMER COUNTY ACTION") – stipulated to a stay of the LARIMER COUNTY ACTION so they could participate in the same mediation.

16. PLAINTIFFS and DEFENDANTS, together with duly authorized representatives of the METRO DISTRICT, thereafter participated in a voluntary mediation before the Hon. Steve Briggs, a retired justice of the Colorado Court of Appeals, on January 25, 2011, without success. Accordingly, the claims and causes of action previously asserted by MCLC in the ARBTRATION are asserted in this complaint.

DERIVATIVE ALLEGATIONS

17. PLAINTIFFS bring this action on their own behalf and, in the case of MCLC, additionally derivatively in the right and for the benefit of CENTERRA LLC, to redress injuries suffered and to be suffered by PLAINTIFFS and CENTERRA LLC as a result of PMLC/P&M's breaches of the CENTERRA OPERATING AGREEMENT, breaches of their fiduciary duties, fraudulent concealments and/or misrepresentations.

18. At all times relevant herein, MCLC was, and is, one of two 50/50 members of CENTERRA LLC. MCLC will adequately and fairly represent the interests of CENTERRA LLC in enforcing and prosecuting CENTERRA LLC's rights.

19. Because P&M is the managing member of CENTERRA, LLC, demand upon P&M to bring suite against itself or its affiliates would be futile.

ALLEGATIONS COMMON TO ALL CLAIMS FOR RELIEF

20. The claims and causes of action herein all arise from a failed real estate venture between MCWHINNEY and PMLC, and their respective subsidiaries, MCLC and P&M, to develop, build and manage the SHOPS AT CENTERRA. The SHOPS AT CENTERRA comprise approximately 85.588 usable acres of real property located near the northeast intersection of Interstate 25 and US Highway 34 in Loveland, Colorado.

The Public-Private Partnership

21. In early 2004, while this venture was still in the early planning stage, to facilitate the venture's fruition, MCWHINNEY by, through and in cooperation with certain of its agents and subsidiaries, including MCLC and CPW, facilitated the formation of a public-private partnership with various public entities including, but not limited to, the City of Loveland ("City"); Loveland Urban Renewal Authority ("LURA"); Centerra Metropolitan District Nos. I, II, III and IV; Centerra Public Improvement Collection Corporation ("PIC"); and Centerra Public Improvement Development Corporation ("PID"). The purpose of this public-private partnership – then and today – is to provide a mechanism to finance, build, operate and maintain large scale "Public Improvements" and "Regional Improvements" (as those terms are more particularly defined in the MFA) for the benefit of the then planned SHOPS AT CENTERRA and the surrounding Northern Colorado region.

22. As more particularly alleged below, the formation of this public-private partnership was concurrently negotiated along with negotiations then underway among McWHINNEY, PMLC and their respective subsidiaries with respect to their joint venture. The public-private partnership was formed by signing multiple written agreements (some, but not all, of which agreements are described below) and judicial approval as required by statute. At all relevant times, the public-private partnership concept was an integral part of McWHINNEY and PMLC's jointly conceived business plan. This is because, among other things, the business plan depended on the willingness and ability of the above-mentioned public agencies to approve those things necessary to enable the METRO DISTRICT's formation and timely sale of multiple bond offerings to raise funds (in excess of $85 million) to build, operate and maintain the specific Public Improvements described in, among other things, a written Centerra Lifestyle Center Contribution Agreement and Improvements Agreement between MCLC and CENTERRA LLC, as well as to enable the METRO DISTRICT to timely purchase certain on-site Public Improvements that the joint venture, or CENTERRA LLC, directly agreed to build in connection with the SHOPS AT CENTERRA.

23. In this regard, McWHINNEY, its agents and subsidiaries materially participated in the negotiation, approval and signing of those multiple agreements and documents necessary for the establishment and on-going governance of Centerra Metropolitan District Nos. I, II, III and IV, the PIC, the PID and this public-private partnership generally including, but not limited to, the above-referenced MFA, the Centerra Lifestyle Center Contribution Agreement, the Improvements Agreement and the Improvements Acquisition Agreement.

The METRO DISTRICT

24. The METRO DISTRICT, along with Centerra Metropolitan District Nos. II, III and IV, is a quasi-municipal corporation and political subdivision of the State of Colorado organized and existing under and pursuant to Title 32 of the Colorado Revised Statutes (the "Special District Act"). As contemplated in the MFA (see further explanation below), the METRO DISTRICT was established, among other things, to facilitate the contemplated construction of major public infrastructure and regional transportation improvements – including streets, traffic safety controls, landscaping, water, sanitary sewer, storm drainage, television relay, transportation and park and recreation facilities – and to provide ongoing governmental structure for the operation and maintenance of such improvements for the benefit of the entire CENTERRA COMMUNITY including, but not limited to, the then planned SHOPS AT CENTERRA. The basic concept of the METRO DISTRICT was to provide a vehicle to issue and service public improvement bonds, and use the proceeds from those bonds, to the extent possible or then approved by the METRO DISTRICT, for the purposes stated in the parties' various written agreements.

The MFA

25. In early 2004, prior to the CENTERRA LLC's actual formation, the City, CPW, the LURA, the METRO DISTRICT, the PIC and the PID all signed the MFA.

26. Section 1.68 of the MFA defines "Party" or the "Parties" therein as "the City, the LURA, the Developer [CPW], the [METRO DISTRICT], the PIC, the PID, and their respective successors and, to the extent permitted by this Agreement, assigns."

a. Although not officially a "Party," on or about August 19, 2004, P&M – in its capacity as manager of the yet-to-be-formed CENTERRA LLC – signed the MFA for the purpose of acknowledging CENTERRA LLC's consent and agreement to Section 12.2 of the MFA.

b. MFA Section 12.2 allows the City and CPW, as "Developer," to defer payment of all City capital expansion fees and utility system impact fees due to construction of the SHOPS AT CENTERRA, and made the PIC and CENTERRA LLC jointly and severally liable for payment of such deferred fees.

27. On January 20, 2004, the City approved the MFA (per City Resolution # R-6-2004). In so doing, and in thereafter approving periodic amendments to the MFA, the City Council found such agreements to be in the best interests of the public and intended to advance the City's economic goals as established in the City's economic development plan.

28. The MFA specifies, among other things, how property tax revenues, ownership tax revenues, public improvement fees are imposed, collected and incrementally distributed by and among the participating public and private signatories thereto. Among other things, the MFA provides the METRO DISTRICT the means of funding its operations, and those of Centerra Metropolitan District Nos. II, III and IV, by issuing and servicing

tax-exempt bonds. It also allows the METRO DISTRICT the means of repaying private loans: *e.g.*, loans made to fund a shortfall in the METRO DISTRICT'S operating budgets by McWHINNEY or its subsidiaries.

29. Also on January 20, 2004 (per City Resolution # R-7-2004), the City approved a Consolidated Service Plan for the METRO DISTRICT, thereby vesting the METRO DISTRICT with authority to construct, maintain and operate public infrastructure within the CENTERRA COMMUNITY.

30. To facilitate the development of the SHOPS AT CENTERRA and the surrounding off-site infrastructure, the MFA and related agreements negotiated by the respective parties contemplated three "buckets" of funding:

a. The biggest "bucket" goes to the METRO DISTRICT. Essentially, the METRO DISTRICT's funding comes from property taxes.

b. The next "bucket" goes to the PIC. Essentially, the PIC's funding comes from a 1.25% Public Improvements Fee ("PIF") imposed on sales at the SHOPS AT CENTERRA.

c. Finally, a third "bucket" goes to RSF CORP The RSF CORP's funding comes from a 1.0% "Retail Sales Fee" imposed on sales that occur within the Centerra development, excluding sales within the SHOPS AT CENTERRA.

This complicated funding mechanism is relevant to an understanding of the harm DEFENDANTS inflicted on PLAINTIFFS, and is therefore explained below in greater detail.

The METRO DISTRICT's "Buckets of Funding" Under the MFA

31. As stated above, the METRO DISTRICT secures the bulk of its operating income, and thus is able to operate, as the result of an irrevocable assignment of certain incremental ad valorem (property) tax revenues. In that regard, per the MFA:

a. All such taxes are collected by the County Assessor. Ad valorem taxes produced by the "Total Mill Levy" less "Base Property Taxes within the approximate 3,000-acre development generally known as "Centerra" (which development includes and encompasses the SHOPS AT CENTERRA) are then, by reason of their irrevocable assignment to the METRO DISTRICT, paid into the Centerra Special Fund. MFA §§ 1.115, 3.1.1. Total Mill Levy consists of two components: a base and excess Metro District levy. Base Property Taxes are ad valorem taxes collected according to January 20, 2004 levels (while Centerra was still zoned for agricultural use). Hence, the concept was and is that the METRO DISTRICT gets the benefit of ad valorem taxes collected in excess of January 20, 2004 levels resulting from Centerra's improved condition to offset the cost of certain aspects of those improvements: *i.e.*, the above-described major public infrastructure and regional transportation improvements.

b. All Centerra Special Fund monies (with the exception of a "LURA Administrative Fee" and a "School Increment") were similarly "irrevocably pledge[d]" by the LURA to the METRO DISTRICT to pay the URA Obligation, *i.e.*, "principal, interest, premiums, and Bond Trustee's fees" incurred in whole or in part pay for construction of certain "URA Improvements," *i.e.*, infrastructure improvements. MFA §§ 1.105, 1.118, 1.120, 4.4.

32. Mechanically, when the METRO DISTRICT receives net TIF proceeds from the LURA, by contractual assignment the proceeds are remitted to a "Bond Trustee," who in turn disburses the same to service outstanding bonds and pay the METRO DISTRICT's other obligations. *See, e.g.*, MFA §§ 1.10, 1.36, 2.10.

The METRO DISTRICT Has Financed In Excess Of $64.5 Million In Public Improvements

33. To date, the METRO DISTRICT has financed approximately $64.5 million worth of infrastructure and regional transportation. These improvements benefit the CENTERRA COMMUNITY, including the SHOPS AT CENTERRA, along with much of Northern Colorado. The METRO DISTRICT secured this financing through a combination of bonds and private loans. To service the bonds, as stated above, the METRO DISTRICT depends on, among other things, the continued receipt of assigned TIF, or property tax revenue collected by Larimer County.

a. For these reasons, among others, the METRO DISTRICT and the public/private partnership it serves are intended third-party beneficiaries of Section 6.2(m) of the CENTERRA OPERATING AGREEMENT.

   i. The CENTERRA OPERATING AGREEMENT, described below in greater detail, is the principal agreement documenting the joint venture among McWHINNEY, PMLC and their respective agents and subsidiaries.

   ii. Section 6.2(m) of the CENTERRA OPERATING AGREEMENT limits P&M's right, as PMLC's agent and CENTERRA LLC's managing member, to file and prosecute any tax appeal seeking to reduce the assessed value of the SHOPS AT CENTERRA below $190.00 per square foot.

      1. More particularly, Section 6.2(m) requires any such tax appeal to be unanimously approved by both of CENTERRA LLC's members, such that any attack on the METRO DISTRICT's primary source of funding had to be unanimously approved by both MCLC and P&M.

   iii. McWHINNEY insisted upon, and PMLC accepted, the inclusion of Section 6.2(m) in the CENTERRA OPERATING AGREEMENT so McWHINNEY's subsidiary, MCLC, might veto any attempt to reduce the SHOPS AT CENTERRA's assessed value for tax purposes where MCLC deemed such action necessary to safeguard the integrity of the financial model on which the entire public-private partnership is based.

b. For similar reasons, RSF CORP, MCWHINNEY and its affiliated entities (including CPW and SMP4) are also intended third-party beneficiaries of Section 6.2(m).

i. In negotiating the original deal that led to the formation of the METRO DISTRICT, Centerra Metropolitan District Nos. II, III and IV, the PIC and the PID (hereinafter, the "PUBLIC-PRIVATE PARTNERSHIP") and concurrent formation of P&M, MCLC and CENTERRA LLC (hereinafter, "PLAINTIFFS AND DEFENDANTS' JOINT VENTURE"), the parties contemplated MCWHINNEY and/or its affiliates would make short-term loans to the then-to-be formed METRO DISTRICT to ensure timely construction of certain key infrastructure: *e.g.*, the entrance drive off US Highway 34, now known as Centerra Parkway.

1. The timely construction of such public infrastructure was mutually understood to be crucial to the timely construction of the SHOPS AT CENTERRA as called for in, among other things, in the CENTERRA OPERATING AGREEMENT.

ii. McWHINNEY thus insisted upon, and PMLC again accepted, the inclusion of Section 6.2(m) as a means of ensuring the METRO DISTRICT had the financial means to timely repay such short-term loans with the proceeds of future bond issuances.

iii. But for the inclusion of such bargained-for protection for the METRO DISTRICT's income and concomitant ability to issue, sell and service bonds via the METRO DISTRICT's pledge or hypothecation of such income as a condition to the bond issuances, McWHINNEY and its subsidiaries would never have agreed to make short-term loans to the METRO DISTRICT.

1. Indeed, but for the inclusion of such bargained-for protection for the financial model on which the entire PUBLIC-PRIVATE PARTNERSHIP was based, McWHINNEY and its subsidiaries would never have entered into PLAINTIFFS AND DEFENDANTS' JOINT VENTURE in the first place.

c. In reliance on this bargained for protection of the METRO DISTRICT's future income and associated credit, RSF CORP and MCWHINNEY affiliated entities CPW and SMP4 made what they intended and reasonably expected would be short-term loans to the METRO DISTRICT. Specifically:

i. Between 2006 and 2010, the METRO DISTRICT issued two promissory notes to SMP4: Note 1 for $10,800,000.00; and Note 2 for $50,000.00. Pursuant to those promissory notes, SMP4 loaned the METRO DISTRICT approximately $5,031,953.51 on Note 1, and approximately $58,193.01 on note 2, for a total of approximately $5,090,146.52. Of those amounts, to date, open balances of approximately $1,471,938.25 on Note 1 and $62,434.92 on Note 2 remain due and owing from the METRO DISTRICT to SMP4 for total of approximately $1,534,373.17.

ii. Between 2007 and 2010, the METRO DISTRICT issued two promissory notes to CPW: Note 1 for $9,260,000.00; and Note 2 for $715,000.00. Pursuant to those promissory notes, CPW loaned the METRO DISTRICT approximately $8,109,084.99 on Note 1, and approximately $475,605.19 on Note 2, for a total of approximately $8,584,690.18. Of those amounts, to date, open balances of approximately $3,827,808.76 on Note 1 and $513,631.23 on Note 2 remain due and owing from the METRO DISTRICT to CPW for total of approximately $4,341,439.99.

1. To date, approximately $5.875 million still remains due and owing on the above-described "short-term" SMP4 and CPW loans.

iii. In addition, during the same time period MCWHINNEY affiliated entities loaned RSF CORP approximately $6 million. RSF CORP, in turn, loaned the METRO DISTRICT approximately $6 million. Because the METRO DISTRICT could not timely repay the $6 million to RSF CORP, RSF CORP could not timely repay the $6 million loaned to it by the MCWHINNEY affiliated entities.

iv. Collectively, the unpaid portion of the above-described loans made by CPW, SMP4 and RSF CORP is hereinafter referred to as the "UNPAID $12 MM LOAN."

v. For the reasons stated below, the UNPAID $12 MM LOAN has yet to be repaid.

The PIC/PIF Bucket of Funding Under the MFA

34. As an additional inducement for CENTERRA LLC's development of the SHOPS AT CENTERRA, pursuant to the MFA the City concurrently agreed to provide a "Sales Tax Credit" of 1.25% of its future 3% sales tax revenue in exchange for the CPW's (the "Developer," as defined in the MFA) promise to impose a 1.25% Public Improvement Fee ("PIF") to finance operations of the PIC. MFA §§ 1.33, 1.75, 7.1, 7.2, 9. In other words, as of January 20, 2004, the City effectively waived 1.25% of its sales tax so that, in exchange, an equivalent 1.25% PIF could be imposed on all sales transactions at the SHOPS AT CENTERRA.

35. Akin to the flow of TIF monies, the City collects and accounts for this "PIF" on behalf of the PIC; the PIC, pursuant to the MFA, has irrevocably pledged the PIF revenues as additional security for repayment of the METRO DISTRICT's bonds. MFA §§ 1.71, 1.75, 2.1.

a. As such, the MFA states the PIC was established "for the sole and exclusive purpose of collecting, holding and disbursing the PIF...." MFA § 1.71.

b. Along with representatives of the land owner, the City's Manager perpetually sits on the PIC's Board of Directors.

c. Although the PIC is not a party to this complaint, to the extent it has any claims arising hereunder, it has assigned such claims to PLAINTIFFS.

36. Because of the above-described credit (bank) assignment, in actuality the "PIF" is remitted to the independent bond trustee who, in accordance with the "waterfall" called for in Section 7.3 of the MFA, disburses these supplemental funds as needed to service the METRO DISTRICT's bonds and to pay other obligations. In this regard, Section 7.3 provides:

> 7.3 Disbursement of PIF. The PIF shall be paid and disbursed by the PIC in the following order and for the following purposes:
>
> > 7.3.1 Administrative Expenses. The PIC shall pay the Reasonable administrative costs and expenses necessarily incurred by the PIC in the collection of, disbursement of, and accounting for, the PIF.
> >
> > 7.3.2 [METRO DISTRICT] Debt. After payment of the amount set forth in §7.3.1, the PIC shall pay and disburse to the [METRO DISTRICT] such amounts as may be necessary or required by the [METRO DISTRICT] to pay all amounts due on the [METRO DISTRICT] Debt to the extent that such amounts are not paid by the [METRO DISTRICT] from the TIF received by the [METRO DISTRICT], the [METRO DISTRICT] Tax, and/or the Residential Contribution.
> >
> > 7.3.3 Debt Service Reserve. After payment of the amounts set forth in §§ 7.3.1 and 7.3.2, the PIC shall pay and disburse to the [METRO DISTRICT] such amounts as may be necessary, or in the opinion of the [METRO DISTRICT], reasonably required to establish, maintain and/or replenish a supplemental debt service reserve fund for the payment of amounts due on the [METRO DISTRICT] Debt to the extent such supplemental debt service reserve fund is not established, maintained or replenished from the TIF received by the [METRO DISTRICT], the [METRO DISTRICT] Tax, and/or the Residential Contribution.
> >
> > 7.3.4 Payment to Constructors and/or Payment of Development Fees. After payment of the amounts set forth in §§ 7.3.1 through 7.3.3 inclusive, the PIC shall have the authority to reimburse the Constructors for the Reasonable costs and expenses necessarily incurred by the Constructors in connection with the Construction of Public Improvements that qualify as Local and/or Regional Improvements. The PIC may also pay, or reimburse any Person for the payment of, Development Fees, but only to the extent such Development Fees were incurred for, in connection with, or as a result of, the Construction of Private Improvements within the Commercial Area. The PIF may not be used to purchase any water rights necessary to satisfy the raw water requirements of the City or of any other Governmental Authority in connection with, or as a

result of, the Construction of Private Improvements within the Commercial Area.

7.3.5 Payment of SID Debt. After payments of the amounts set forth in §§7.3.1 through 7.3.4 inclusive, the PIC may pay SID Debt, provided however that the PIC shall not pay or reimburse any SID Debt incurred for any tax years prior to and including 2003. [The MFA defined "SID Debt" as certain "principal, interest, premiums in trustee's fees due" for "any and all bonds of the City of Loveland Special Improvement District No. 1 for Centerra issued and outstanding as of the Effective Date." MFA § 1.107.]

7.3.6 PIC Reserve Fund. After payment of the amounts set forth in §§7.3.1 through 7.3.5 inclusive, the PIC may retain such amount, not to exceed One Million Dollars ($1,000,000), as may be Reasonably determined by the PIC Board to be necessary or Reasonably required to reimburse the Constructors for the costs and expenses Reasonably anticipated to be incurred by the Constructors in the future in connection with the Construction of Public Improvements and/or payment of Development Fees.

7.3.7. Payment to [METRO DISTRICT]. Any and all PIF collected by the PIC which is not paid and disbursed by the PIC pursuant to the terms of §§7.3.1 through 7.3.6 inclusive, shall be paid and disbursed to the [METRO DISTRICT] Annually.

37. In sum, because the waterfall of PIF disbursements contemplates, among other things, disbursements for PIC Administrative Expenses, METRO DISTRICT debt and Debt Service Reserve, and Payment to Constructors and/or of Development Fees, the MFA evidences the clear intent of all signatories to the MFA to benefit not only the METRO DISTRICT, but also the PIC, CPW and its Affiliates. That is, the MFA expressly seeks to ensure distributions of PIF to each of those entities. In that regard:

a. The MFA defines a "Constructor" to mean and refer to "the PID, the Developer [CPW] and/or its Affiliates to the extent such Persons Construct Public Improvements." MFA § 1.25.

b. The MFA defines an "Affiliate" as: (1) "any Person" directly or indirectly controlling, controlled by, or under common control with the Developer"; (2) "any Person that is a member, partner, shareholder or principal of the Developer; (3) "any Person owning or controlling five percent (5%) or more of the outstanding voting interests of any [of the foregoing] Person[s]; or (4) the successors of any Person." MFA § 1.1. Furthermore, for purposes of the Affiliate definition, the terms "controls," "is controlled by," or "is under common control with," meant "the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities or otherwise." *Id.*

c. Although MCWHINNEY and SMP4 are not officially parties to the MFA, as Affiliates of CPW (as defined in the MFA), they constitute intended third-party beneficiaries of these express waterfall/funding provisions. On information and belief, RSF CORP also constitutes an intended third-party beneficiary of these express waterfall/funding provisions.

The RSF Bucket of Funding

38. The 1.0% Retail Sales Fee that funds RSF CORP is charged on sales that occur within the Centerra development, excluding sales within the SHOPS AT CENTERRA.

The CENTERRA OPERATING AGREEMENT

39. On or about September 1, 2004, MCLC and P&M entered into the CENTERRA OPERATING AGREEMENT. McWHINNEY and PMLC additionally signed the CENTERRA OPERATING AGREEMENT. In so doing, McWHINNEY and PMLC agreed, *inter alia*, to guarantee certain obligations of their respective subsidiaries, and to "not sell, assign, transfer or otherwise dispose of [their respective] ownership interest[s] in MCLC and P&M" as "long as MCLC and P&M are Members of [CENTERRA LLC]."

40. The CENTERRA OPERATING AGREEMENT and its exhibits, as amended, set forth the primary terms and conditions of PLAINTIFFS AND DEFENDANTS' JOINT VENTURE. More particularly, collectively these documents describe how both real estate development firms, through their respective subsidiaries, agreed to acquire, finance, develop, lease, maintain, own, operate and manage the SHOPS AT CENTERRA.

41. The following provisions of the CENTERRA OPERATING AGREEMENT, as amended, have particular relevance to the claims herein:

a. **[CENTERRA LLC] Members**. Article 1, or the Definitions section of the CENTERRA OPERATING AGREEMENT, defines MCLC and P&M as CENTERRA LLC's sole two 50/50 "Members."

b. **MCWHINNEY**. Article 1 defines McWhinney Holding Company, LLLC (*i.e.*, MCWHINNEY) as "the parent of MCLC."

c. **PMLC**. Article 1 defines Poag & McEwen Lifestyle Centers, LLC, a Delaware limited liability company (*i.e.*, PMLC) as "the parent of P&M."

d. **Section 2.3, captioned "Purpose and Character of Business, and Powers,"** states CENTERRA LLC's purpose with respect to the creation of the SHOPS AT CENTERRA (a/k/a the "Property"):

> Purpose and Character of Business, and Powers. [CENTERRA LLC] is formed and organized under the Act for the purpose of (a) acquiring, financing, developing, leasing, maintaining, owning, operating, managing, enhancing and selling the Property, which

Property is more fully described in Exhibit C hereto, (b) borrowing funds for the Construction Loan and refinancing of such indebtedness (the "Permanent Loan"), and making and issuing notes, obligations and evidences of indebtedness consistent therewith, (c) doing any and all things necessary or incidental to any of the foregoing, and (d) engaging in any other lawful business that may be engaged in by a limited liability company organized under the Act, as such business activities may be determined by the Members from time to time.

e. **Section 2.10, captioned "Manager,"** vests P&M with responsibility for the overall management and control of CENTERRA LLC's business in P&M's capacity as CENTERRA LLC's sole managing member, stating, P&M "shall be the Manager [of CENTERRA LLC] with all of the rights, duties and obligations of the Manager as expressly set forth herein."

f. **Section 3.2, captioned "Mandatory Capital Contributions,"** required MCLC to contribute fully entitled real property to CENTERRA LLC as MCLC's principal equity investment. In that regard, Section 3.2(a) states, "MCLC shall contribute to [CENTERRA LLC] pursuant to a Contribution Agreement substantially in the form attached hereto as Exhibit B, upon the Closing Date set forth therein, the Property, free and clear of all liens, claims and encumbrances not permitted under the terms of the Contribution Agreement...."

g. **Section 6.1, captioned "Management of Company,"** acknowledges P&M's role as sole managing member of CENTERRA LLC, stating:

> Management of Company. The overall management and control of the business and affairs of CENTERRA and the Property shall be vested in the Manager; provided, however, that the decisions described in Section 6.2 shall require the consent of all Members. The Manager will owe a duty in carrying out its duties and responsibilities under this Agreement of good faith, loyalty and fair dealing to CENTERRA.

h. **Section 6.2, captioned "Unanimous Decisions,"** states a set of decisions that require the approval of both Company members, *i.e.*, including MCLC, stating in pertinent part:

> Except with respect to a Member who is adjudged bankrupt or against whom an involuntary petition in bankruptcy has been filed where such petition is not vacated or dismissed within thirty (30) days after the filing thereof, *the following matters must be unanimously approved by the Members:*
>
> ...
>
> *(m) causing [CENTERRA LLC] to contest or seek to lower the assessed value of the improved real property owned by*

[CENTERRA LLC] to a value less than One Hundred Ninety Dollars ($190.00) per square foot ....

(Emphasis added).

i. **Section 6.6, captioned "Liabilities and Indemnification of Members,"** states in pertinent part at subsection (a):

> In carrying out its powers and duties hereunder, each Member, as well as the Manager, shall exercise its best efforts, shall owe a duty of good faith and fair dealing to [CENTERRA LLC] and to each Member and shall not be liable to [CENTERRA LLC] or to any other Member for any actions taken on behalf of [CENTERRA LLC] in good faith or omitted to be taken on behalf of [CENTERRA LLC] in good faith and reasonably believed to be in the best interest of [CENTERRA LLC] or for errors of judgment made in good faith; *provided, however, that a Member shall be liable to, and shall indemnify, defend and hold harmless [CENTERRA LLC] and the other Members for actions or omissions involving actual fraud, gross negligence or willful misconduct or from which such Member derived improper personal benefit.*
>
> (Emphasis added).

j. **Section 6.8, captioned "Services; Compensation of Members,"** states in pertinent part at subsection (b):

> [P&M], or its respective Affiliate, shall receive a management fee as provided for in the Management Agreement, and development fees and leasing fees as provided for in the PMLC Development Agreement, and such further amounts as provided for in the Construction Budget or Operating Budget or as agreed to by all of the Members.

k. **Sections 7.2 and 7.3** set forth PMLC/P&M's obligations with respect to CENTERRA LLC's Construction Loan and Permanent Loan, vesting P&M with the sole right (and corollary responsibility) to competently and in good faith negotiate the terms of both credit facilities.

l. **Section 7.2, captioned Construction Loan,** states pertinent part at subsection (a):

> The Manager [P&M] shall seek a commitment for a Construction Loan sufficient, together with MCLC's Capital Contributions of the Property and the Financing Equity (if any), to fund the Total Net Project Cost. The Manager shall keep the other Member informed as to the status of the negotiations for the Construction Loan and shall promptly send to the other Member a copy of any commitment that is obtained. Provided that the terms of the commitment for the Construction Loan fall within, or are more

favorable to [CENTERRA LLC] in the aggregate, than the ranges specified in Exhibit G hereto, which shall include the anticipated maximum amount of the equity contribution required of MCLC (the "Parameters"), the Manager shall be authorized, without the consent of the other Member, to enter into the commitment on behalf of [CENTERRA LLC] and to close the Construction Loan pursuant to the commitment. If the terms of the commitment obtained by the Manager do not fall within, or are not in the aggregate more favorable than, the Parameters, the Manager shall not be authorized to enter into the commitment on behalf of [CENTERRA LLC] without the prior approval of the other Member.

m. **Section 7.3, captioned Permanent Loan,** states in pertinent part at subsection (a):

Prior to the Maturity Date of the Construction Loan, the Manager [P&M] shall submit to the other Member [MCLC] in writing the terms proposed for the Permanent Loan, including the maximum loan amount, Maturity Date, interest rate, fees to the lender, repayment terms and other material terms (the "Permanent Loan Notice"). If the other Member does not object to the terms contained in the Permanent Loan Notice by written notice to the Manager within fifteen (15) days of receipt of the Permanent Loan Notice, the Manager may proceed to close the Permanent Loan in accordance with such proposed terms. If, within such fifteen (15) day period, the other Member objects to the terms contained in the Permanent Loan Notice by written notice to the Manager of such other Member's specific objections, the Manager shall consult in good faith with the other Member and with the proposed lender of the Permanent Loan in an effort to agree upon terms acceptable to all parties. If the Manager determines, in its good faith discretion, at any time after the tenth (10) day following the date on which the Manager receives notice of the other Member's specific objections, that terms acceptable to all parties cannot be agreed upon, the Manager shall notify the other Member in writing either (i) that the Manager will seek to obtain another Permanent Loan, in which case the Manager may at any time recommence the procedure set forth in this Section 7.3 by sending written notice of new proposed terms to the other Member, or (ii) that an impasse exists (a "Permanent Loan Impasse"), which the Manager intends to resolve by closing the Permanent Loan on terms not less favorable than those contained in the Permanent Loan Notice (the written notice of the Permanent Loan Impasse shall be referred to as the "Permanent Loan Impasse Notice" and shall be accompanied by a written disclosure of all material liabilities and potential liabilities of [CENTERRA LLC] known to the Manager which are not reflected on its most recent financial statements).

(Emphasis added).

n. **Section 7.3(b), [regarding Permanent Loan Impasse],** states:

> Within fifteen (15) business days of receipt of the Permanent Loan Impasse Notice (together with a written disclosure of all material liabilities and potential liabilities of [CENTERRA LLC] known to the Manager which are not reflected on its most recent financial statements), the other Member shall be entitled to invoke the reciprocal purchase provisions of Section 7.4 by giving written notice to the Manager setting forth the Specified Value (as defined therein) for the Property (the "Buy-Sell Notice").

o. **Section 7.4, captioned Permanent Loan Impasse; Reciprocal Purchase Rights,** states in pertinent part at subsection (a):

> At any time for any reason following the Stabilization Date, or upon a Permanent Loan Impasse pursuant to Section 7.3, any Member (other than a Noncontributing Member or a Member in default hereunder) may deliver a Buy-Sell Notice (the Member giving such notice being sometimes hereinafter referred to as "A") to the other Member (the Member receiving such written notice being sometimes hereinafter referred to as "B") stating that A wishes to apply the provisions of Section 7.4 to purchase the entire right, title and interest of B in the Company and setting forth (i) a dollar figure selected by A (such figure being hereinafter referred to as the "Specified Value") to be the total value of the Property before deduction of any liabilities, and (ii) the amount A is willing to pay for B's interest in the Company....

p. **Section 7.4(i)** states: "McWhinney Holding [*i.e.*, MCWHINNEY] agrees to guarantee the obligations of MCLC under this Section 7.4 and PMLC agrees to guarantee the obligations of PMLC under this Section 7.4."

q. **Section 8.3, captioned "Restrictions on Transfer of Parent Interests,"** states:

> As long as MCLC and PMLC are Members of the Company, each of McWhinney Holding and PMLC, respectively, agrees that it will not sell, assign, transfer or otherwise dispose of its ownership interest in MCLC and PMLC, respectively, except to an Affiliate of MCLC or PMLC, respectively; provided, however, that McWhinney Holding and PMLC may pledge its ownership interest in MCLC and PMLC, respectively, to a third party financial institution for any purpose.

r. **Section 10.1, captioned "Governing Law,"** states: "This agreement and [CENTERRA LLC] shall be governed by and construed in accordance with the laws of the State of Delaware."

s. **Section 10.2, captioned "Amendments,"** states, in relevant part:

[A]mendments or modifications may be made to this Agreement only by setting forth such amendments or modifications in a document approved by all Members. *Any alleged amendment or modification herein which is not so documented shall not be effective as to any Member.*

(Emphasis added).

ALLEGATIONS GENERALLY DESCRIBING PMLC/P&M'S BREACHES OF THE CENTERRA OPERATING AGREEMENT AND RELATED BREACHES OF THEIR FIDUCIARY DUTIES

42. As required by Section 3.2 of the CENTERRA OPERATING AGREEMENT, in September 2004, MCLC made a capital contribution to CENTERRA LLC of the approximately 85.588 usable acres of real property that now constitute the SHOPS AT CENTERRA.

43. As contemplated in Section 7.2 of the CENTERRA OPERATING AGREEMENT, on or about October 22, 2004, CENTERRA LLC secured a Construction Loan ("Construction Loan") of approximately $116 million. The Construction Loan was made by a consortium of eight domestic and foreign banks ("BANK GROUP"). Thereafter, the Construction Loan was amended three times: *i.e.*, on January 31, 2005, October 23, 2007 and October 23, 2008. As a result of each amendment, the term of the Construction Loan was extended (among other changes). The final maturity date of the Construction Loan, as successively amended, thus became January 23, 2009.

44. Prior to January 23, 2009, MCLC repeatedly encouraged PMLC and P&M (whose agents and representatives are the same) to comply with P&M's contractual and fiduciary duty as CENTERRA LLC's sole managing member to timely arrange and "submit ... the terms proposed for the Permanent Loan, including the maximum loan amount, maturity date, interest rate, fees to the lender, repayment terms and other material terms...."

a. For example, on August 1, 2005, and again on March 20, 2006, MCLC's Chief Executive Officer, Chad McWhinney, inquired, via e-mails to P&M Chief Financial Officer and Executive Vice President Josh Poag, as to the status of PMLC/P&M's efforts to locate new financing to replace the Construction Loan. On both occasions, Mr. Poag informed Mr. McWhinney of PMLC/P&M's intention to wait to seek new financing until CENTERRA LLC was in a position to "leverage" additional funds out of the refinancing. In other words, Mr. Poag, then and on other occasions, stated it was PMLC/P&M's desire to wait until market conditions were right to not only refinance the Construction Loan as called for in the CENTERRA OPERATING AGREEMENT, but to place additional mortgage debt on the SHOPS AT CENTERRA so that this money could be distributed to CENTERRA LLC's members. At the same time, Mr. Poag assured Mr. McWhinney that CENTERRA LLC's interests were protected because it was "still hedged in case things go to hell. We have found that we will be able to stretch dollars a lot farther with a little patience."

i. PLAINTIFFS are advised and believe, and thereon allege, that Mr. Poag's assurance that CENTERRA LLC's interests were protected was at all times false and reckless.

ii. PLAINTIFFS are further advised and believe, and thereon allege, that at all relevant times Mr. Poag, on behalf of PMLC and P&M, knew, or through the exercise of reasonable diligence should have known, such assurances were at all times false and reckless.

b. PLAINTIFFS never consented to PMLC/P&M's risky plan to leverage excess funds out of the refinancing of the Construction Loan, or to deviate from the express terms and requirements of the CENTERRA OPERATING AGREEMENT by gambling on uncertain future market conditions. Rather, PLAINTIFFS continued to urge PMLC/P&M to live up to their express contractual obligations to timely refinance the Construction Loan.

45. In response to PLAINTIFFS' continued urging that PMLC/P&M live up to their refinancing duties under the CENTERRA OPERATING AGREEMENT, on more than one occasion PMLC/P&M representatives reminded PLAINTIFFS that P&M was CENTERRA LLC's sole managing member. As such, PMLC/P&M's representatives stated that PLAINTIFFS' so-called "interference" with PMLC/P&M's business decision-making authority (*i.e.*, PLAINTIFFS' urging of PMLC/P&M to do that which the CENTERRA OPERATING AGREEMENT required) was unacceptable, and would be regarded by PMLC/P&M as an actionable breach of the CENTERRA OPERATING AGREEMENT.

a. In view of PMLC/P&M's implicit threat to sue PLAINTIFFS for "interference" with PMLC/P&M's decision-making authority, MCLC reluctantly assented to PMLC/P&M's successive, unilaterally negotiated agreements with the BANK GROUP to postpone the maturity date of the Construction Loan.

b. On the other hand, PLAINTIFFS generally, and MCLC in particular, never agreed to waive PMLC/P&M's express duties under the CENTERRA OPERATING AGREEMENT.

i. In particular, PLAINTIFFS generally, and MCLC in particular, never agreed to waive PMLC/P&M's duty under above-quoted Section 7.3 "*[p]rior to the maturity date of the Construction Loan* [to] submit to [MCLC] in writing the terms proposed for the Permanent Loan, including the maximum loan amount, maturity date, interest rate, fees to the lender, repayment terms and other material terms (the 'Permanent Loan Notice')." (Italics added)

ii. Similarly, PLAINTIFFS generally, and MCLC in particular, never agreed to amend, modify or waive those expressly prescribed refinancing duties, and no such purported amendment, modification or waiver was ever documented as would have been required by Section 10.2 of the CENTERRA OPERATING AGREEMENT.

46. At no time before the final maturity date of the Construction Loan (following multiple extensions arranged by PMLC/P&M) did P&M present MCLC with a "Permanent Loan Notice" as required under Section 7.3 of the CENTERRA OPERATING AGREEMENT.

47. As a result of PMLC/P&M's failure to timely seek refinancing, failure to timely perform their refinancing duties under the CENTERRA OPERATING AGREEMENT and failure to timely present MCLC with a Permanent Loan Notice, CENTERRA LLC was ultimately left with no viable prospects or options to replace or pay-off the Construction Loan after the downturn in the economy that occurred in approximately mid-2008. Furthermore, as a result of the same misconduct, CENTERRA LLC was at that point left without adequate funding to avoid a default under the "balloon" pay-off terms of the Construction Loan.

48. As a result of the foregoing, in or about January 2009, JP Morgan Chase Bank, N.A., in its capacity as agent for the BANK GROUP, declared the Construction Loan in default.

49. At or about the time of the January 2009 default, the balance of unpaid principal on the Construction Loan was approximately $112 million. By contrast, on information PLAINTIFFS believe the fair market value of the SHOPS AT CENTERRA at that time was approximately $75 million. Thus, PMLC/P&M allowed the Construction Loan to go into default at a time when: (1) the market value of CENTERRA LLC's sole asset, the SHOPS AT CENTERRA, declined to approximately $37 million less than CENTERRA LLC's then outstanding secured debt; and (2) the availability of permanent or long-term financing was generally scarce in the marketplace.

a. In other words, PMLC/P&M's gamble that the value of the SHOPS AT CENTERRA would increase over time – thereby permitting PMLC/P&M to leverage the SHOPS AT CENTERRA with additional debt via the refinancing to generate excess funds to distribute to CENTERRA LLC's members – backfired, and backfired miserably. Instead of increasing, with the nationwide collapse of the real estate "bubble," the value of the SHOPS AT CENTERRA declined significantly.

50. At various times before and after the BANK GROUP's declaration of default, PMLC/P&M represented, and PLAINTIFFS believed, that the Construction Loan was non-recourse as to both of CENTERRA LLC's members. Thus, PLAINTIFFS did not object when PMLC/P&M continued to act as CENTERRA LLC's sole negotiating agent with the BANK GROUP in pursuing a purported post-default restructuring of the Construction Loan and/or forbearance agreement to avoid foreclosure.

a. Indeed, given the Construction Loan's presumed non-recourse status, MCLC understood PMLC/P&M would use the SHOPS AT CENTERRA's "underwater" status to negotiate a market-rate reduction in the principal of the Construction Loan, and/or to secure alternative market-rate financing to avoid foreclosure.

b. In other words, MCLC assumed PMLC/P&M would act in the best interest of CENTERRA LLC in mitigating the harm caused by its above-described misconduct. This, however, did not occur.

51. Rather, after the Construction Loan went into default, PMLC/P&M continued to secretly breach their contractual and fiduciary duties as CENTERRA LLC's sole managing member. They did so by, among other things:

a. Fraudulently concealing their conflict of interest stemming from a $40 Mezzanine Loan ("$40 MM MEZZ LOAN").

i. In this regard, PLAINTIFFS are informed and believe, and thereon allege, in a series of complex transactions PMLC arranged the $40 MM MEZZ LOAN for two purposes: *i.e.*, (i) to fund PMLC's separate and unrelated joint venture with another real estate owner/developer in Southern California, and (ii) to buy-out or redeem the interests of one of PMLC's former principal/owners, Terry W. McEwen.

ii. Specifically, PLAINTIFFS are informed and believe, and thereon allege, PMLC – at the time acting as P&M's sole member and manager – transferred its entire membership interest in P&M to a new entity called Centerra & Dos Lagos Venture, LLC (the "DOS LAGOS BORROWER"). PLAINTIFFS are informed and believe, and thereon allege, PMLC capitalized the DOS LAGOS BORROWER with not only PMLC's then 100% ownership interest in P&M, but also PMLC's planned or then existing 100% ownership interest in Poag & McEwen Lifestyle Centers – Corona, LLC ("P&M CORONA"). PLAINTIFFS are further informed and believe, and thereon allege, PMLC did the foregoing to facilitate its ability to borrow approximately $40 million via the $40 MM MEZZ LOAN through the newly conceived DOS LAGOS BORROWER – an entity whose sole member, in turn, was PMLC.

iii. PLAINTIFFS are informed and believe, and thereon allege, the lender who made this $40 MM MEZZ LOAN was I&G Promenade Shops Lender, LLC ("DOS LAGOS LENDER"). PLAINTIFFS are further informed and believe, and thereon allege, the DOS LAGOS LENDER was and/or is affiliated or economically tied to JP Morgan Chase Bank, N.A. ("JP Morgan") and/or one of JP Morgan's subsidiaries or operating divisions.

iv. PLAINTIFFS are informed and believe, and thereon allege, to obtain the $40 MM MEZZ LOAN:

1. P&M pledged, among other things, all its limited liability company membership interests, capital stock and/or other equity interests (the "P&M DOS LAGOS PLEDGE").

2. P&M CORONA pledged, among other things, all of its limited liability company membership interests, capital stock and/or other equity interests (the "P&M CORONA DOS LAGOS PLEDGE").

3. The DOS LAGOS BORROWER pledged all its limited liability company membership interests, capital stock and/or other equity interests (the "DOS LAGOS BORROWER PLEDGE").

v. In so doing, PLAINTIFFS are informed and believe, and thereon allege, PMLC pledged as collateral for the $40 MM MEZZ LOAN not only all of its direct and indirect ownership interest in CENTERRA LLC (and, thus, indirectly the SHOPS AT CENTERRA), but also all of its "membership interests, capital stock and/or other equity interests" in all PMLC's other subsidiaries and properties. PLAINTIFFS are informed and believe, and thereon allege, this included PMLC's direct and indirect ownership interest in the Southern California "Dos Lagos" joint venture. In short, PLAINTIFFS are informed and believe, and thereon allege, the $40 MM MEZZ LOAN was cross-collateralized with multiple LLC membership interests, capital stock and/or other equity.

vi. As a part of the written $40 MM MEZZ LOAN agreement, in particular, Section 8.1(k) thereof, the DOS LAGOS BORROWER, and correspondingly, PMLC and P&M, stipulated that a default in, among other things, CENTERRA LLC's ability to repay the CENTERRA LLC Construction Loan – defined in the $40 MM MEZZ LOAN agreement as a "Senior Loan Document[]" – would trigger a default on the $40 MM MEZZ LOAN, thereby triggering the DOS LAGOS LENDER's right to foreclosure on all PMLC, P&M, the DOS LAGOS BORROWER and P&M CORONA's pledged collateral. Those Senior Loan Documents included, not only the CENTERRA LLC Construction loan, but also an unrelated Dos Lagos Senior Loan of $88.1 million from JP Morgan/BANK GROUP to Dos Lagos Lifestyle Center, LLC – another credit facility wholly unrelated to the SHOPS AT CENTERRA or CENTERRA LLC.

vii. Notably, the mezzanine lender for the CENTERRA LLC Construction Loan was also JP Morgan affiliate. JP Morgan was the original negotiating agent for the BANK GROUP with whom PMLC/P&M was purportedly negotiating on CENTERRA LLC's behalf for a market-rate reduction/restructuring of the Construction Loan.

viii. By concealing the fact that a default on the Construction Loan put PMLC at risk of losing its interests in its other affiliates/subsidiaries and properties via a foreclosure by the same lender who was responsible, in whole or in part, for deciding whether to restructure the Construction Loan, PMLC/P&M fraudulently led PLAINTIFFS to believe that the principals of PMLC/P&M (who were one-in-the-same) were in a position to aggressively negotiate a market-rate restructuring of the Construction Loan without concern for adverse economic repercussions to PMLC/P&M's other interests. In other words, by concealing the simple fact that PMLC/P&M's principals could not threaten to have CENTERRA LLC "walk away" from its ownership in the SHOPS AT CENTERRA without putting PMLC/P&M's other assets at risk, PMLC/P&M misled

PLAINTIFFS into believing PMLC/P&M could be trusted to act in CENTERRA LLC's best interests.

b. Fraudulently misrepresenting their true goals and intentions in their on-going negotiations with the BANK GROUP.

   i. Specifically, PMLC/P&M concealed the fact that instead of just trying to negotiate a market-rate restructuring of the Construction Loan, PMLC/P&M were secretly trying to negotiate – with new money PMLC/P&M thereafter insisted that CENTERRA LLC's members contribute via additional capital contributions – a way of avoiding foreclosure on PMLCC/P&M's other pledged subsidiary interests and assets.

c. Repeatedly and expressly denying that PMLC had any exposure or liability as a result of CENTERRA LLC's default on the Construction Loan.

d. Improperly refusing to recuse themselves from their on-going role as CENTERRA LLC's principal negotiating agents in dealing with the BANK GROUP, even after MCLC raised concern about PMLC/P&M's possible conflict of interest.

e. Failing to diligently and timely marshal and disclose all available facts and information to the BANK GROUP concerning the SHOPS AT CENTERRA's true value, apparently to "prop up" or artificially overstate the SHOPS AT CENTERRA's value to further serve PMLC/P&M's self-interest.

f. Failing to diligently and timely marshal and disclose information requested by PLAINTIFFS related to the merits of the high-cost, short-term further extension of the Construction Loan favored by PMLC/P&M.

g. Failing to diligently and timely answer PLAINTIFFS' questions about PMLC/P&M's perceived possible conflict of interest.

h. Claiming falsely, and in bad faith, that a high-cost, short-term further extension of the Construction Loan amounted to a "Permanent Loan" as called for in the CENTERRA OPERATING AGREEMENT.

52. In the latter regard, on or about February 9, 2009, PMLC/P&M served MCLC with a letter (the "FIRST PURPORTED PERMANENT LOAN NOTICE") purporting to give notice of PMLC/P&M's belated performance of its duties under Article VII of the CENTERRA OPERATING AGREEMENT to arrange and "submit ... the terms proposed for the Permanent Loan, including the maximum loan amount, maturity date, interest rate, fees to the lender, repayment terms and other material terms...." In fact, however, the FIRST PURPORTED PERMANENT LOAN NOTICE did not describe proposed terms for a permanent loan as contemplated and required by the CENTERRA OPERATING AGREEMENT. Rather, the FIRST PURPORTED PERMANENT LOAN NOTICE belatedly described incomplete terms for a high-cost, short-term further extension or modification of the Construction Loan then in default.

53. As such, on or about February 20, 2009, MCLC rejected the FIRST PURPORTED PERMANENT LOAN NOTICE as untimely and non-compliant with the terms of the CENTERRA OPERATING AGREEMENT.

54. On information and belief, PLAINTIFFS allege that PMLC/P&M's untimely, incomplete and unacceptable proposal for a high-cost, short-term further extension of the Construction Loan, presented in the guise of compliance with Article VII of the CENTERRA OPERATING AGREEMENT, was not the result of good faith attempts to negotiate the terms for refinancing the Construction Loan or a commercially reasonable, market-rate extension of said loan (in the absence of any conflict of interest). Nor was this proposal the result of an inability to obtain permanent financing prior to 2008 collapse of the real estate "bubble." Indeed, PLAINTIFFS know the latter to be untrue as MCWHINNEY affiliated entities were independently able to secure permanent financing for other projects and properties during this same pre-collapse time period (a fact repeatedly brought to PMLC/P&M's attention).

55. On information, PLAINTIFFS believe, in retrospect, PMLC/P&M's FIRST PURPORTED PERMANENT LOAN NOTICE was the result of the BANK GROUP's superior bargaining leverage over PMLC/P&M (and thereby CENTERRA LLC) resulting from: (1) the default status of the Construction Loan (caused by the above-described overlapping breaches of contractual and fiduciary duties), and (2) the BANK GROUP's initially concealed leverage over PMLC/P&M related to the above-described $40 MM MEZZ LOAN.

56. Following MCLC's rejection of the FIRST PURPORTED PERMANENT LOAN NOTICE, on or about March 13, 2009, PMLC/P&M served MCLC with a second letter (the "SECOND PURPORTED PERMANENT LOAN NOTICE"). This SECOND PURPORTED PERMANENT LOAN NOTICE again purported to give MCLC notice of PMLC/P&M's belated performance of their duties under Article VII of the CENTERRA OPERATING AGREEMENT to arrange and "submit ... the terms proposed for the Permanent Loan, including the maximum loan amount, maturity date, interest rate, fees to the lender, repayment terms and other material terms ...." However, like the FIRST PURPORTED PERMANENT LOAN NOTICE, the SECOND PURPORTED PERMANENT LOAN NOTICE did not set forth the terms for a permanent loan in the manner required by the CENTERRA OPERATING AGREEMENT. Rather, the SECOND PURPORTED PERMANENT LOAN NOTICE described terms, in slightly more detail than the FIRST PURPORTED PERMANENT LOAN NOTICE, for the same sort of high-cost, short-term extension of the Construction Loan.

57. On or about March 25, 2009, MCLC rejected the SECOND PURPORTED PERMANENT LOAN NOTICE. MCLC did so on a number of grounds including, but not limited to, the fact that the SECOND PURPORTED PERMANENT LOAN NOTICE did not call for replacing the Construction Loan with a Permanent Loan. Instead, MCLC's March 25, 2009 letter observed the SECOND PURPORTED PERMANENT LOAN NOTICE merely "proposed a one-year extension" of the Construction Loan "with the potential for another one-year extension." MCLC further expressed concern that "[w]e believe [PMLC/P&M] have an inability to negotiate in the sole interest of [CENTERRA LLC] because of your inherent conflict of interest regarding the mezzanine loan. As the lead arranger and participant in the [Construction] Loan, J.P. Morgan has