



IN THE DISTRICT COURT IN AND FOR TULSA COUNTY
STATE OF OKLAHOMA

MARK PERKINS, ALBERT CARRILLO;
PERKINS REAL ESTATE GROUP, LLC;
MORGAN BROWN; and
ALLEN BROWN,

Plaintiffs,

v.

BLAKE EWING, an individual,
THE MAX RETROPUB, L.L.C.,
an Oklahoma limited liability company;
THE ENGINE ROOM LLC,
an Oklahoma limited liability company;
THE PHOENIX CAFE, LLC, an Oklahoma
limited liability company; FUR SHOP LLC,
an Oklahoma limited liability company; and
BLUE OX DINING GROUP, LLC,
an Oklahoma limited liability company

Defendants.

Case No. CJ-2016-3708

Judge Mary F. Fitzgerald

DISTRICT COURT
FILED

DEC 16 2016

SALLY HOWE SMITH, COURT CLERK
STATE OF OKLA. TULSA COUNTY

SALLY HOWE SMITH
COURT CLERK

SECOND AMENDED PETITION

Plaintiffs, Mark Perkins, Albert Carrillo, Perkins Real Estate Group, LLC, Morgan Brown,
and Allen Brown (collectively, "Plaintiffs"), for their claim for relief against Defendants, state as
follows.

1. Plaintiff, Mark Perkins ("Mr. Perkins"), is an Oklahoma resident who resides in Tulsa County.
2. Plaintiff, Albert Carrillo ("Mr. Carrillo"), is an Oklahoma resident who resides in Tulsa County.
3. Plaintiff, Perkins Real Estate Group, LLC ("Perkins Real Estate Group"), is a closely-held Oklahoma limited liability company, with its principal place of business in Tulsa County. It

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and Mr. Perkins are collectively referred to herein as “Perkins,” “Mr. Perkins,” or “the Perkins Group.”

4. Plaintiff, Morgan Brown (“Ms. Brown”), is a Texas resident who resides in Harris County.

5. Plaintiff, Allen Brown (“Mr. Brown”), is a Texas resident who resides in Harris County.

6. Defendant, Blake Ewing (“Ewing”), is an Oklahoma resident who resides in Tulsa County.

7. Defendant, The Max Retropub, L.L.C. (“The Max”), is an Oklahoma limited liability company, with its principal place of business in Tulsa County.

8. Defendant, The Engine Room LLC (“The Engine Room”), is an Oklahoma limited liability company, with its principal place of business in Tulsa County.

9. Defendant, The Phoenix Cafe, LLC (“The Phoenix Cafe”), is an Oklahoma limited liability company, with its principal place of business in Tulsa County.

10. Defendant, Fur Shop LLC (“Fur Shop”), is an Oklahoma limited liability company, with its principal place of business in Tulsa County.

11. Defendant, Blue Ox Dining Group, LLC (“Blue Ox”), is an Oklahoma limited liability company, with its principal place of business in Tulsa County.

12. All acts complained of herein occurred in Tulsa County, thus, jurisdiction and venue are appropriate in this matter.

COUNT 1: FRAUD

13. Ewing is a Tulsa businessman who manages and owns majority positions in several bars, restaurants, and other entities focused primarily in downtown Tulsa's Blue Dome District (the "Ewing Enterprises").

14. Recently, Ewing and certain Ewing Enterprises received adverse publicity when the *Tulsa World* and other news outlets reported that three of the Ewing Enterprises, The Max Retropub, the Fur Shop, and Legends Dance Hall & Saloon, had failed to pay state taxes to the Oklahoma Tax Commission, in the amount of \$80,262.38 plus \$16,400.35 in penalties, fees, and interest (hereafter, the "Tax Lien Disclosure").

15. This revelation revealed the tip of theretofore hidden massive acts of malfeasance and misappropriation by Ewing in his dealings with certain of the Ewing Enterprises. This Petition focuses on transactions involving The Max, and on certain acts perpetrated by Ewing personally and through his *alter egos* among the Ewing Enterprises.

16. The Max Retropub is an 80's themed arcade bar serving beer and cocktails in downtown Tulsa. It was formed as a limited liability company by Ewing through a filing made with the State of Oklahoma on January 27, 2010. The Max did not open for business, however until September 10, 2010. In the interim Ewing raised capital for The Max as partially disclosed hereafter.

17. Prior to The Max opening for business, certain Ewing Enterprises already existed in Tulsa, including at least the following:

- a. Joe Momma's Pizza, LLC ("Joe Momma's"), which was a pizza parlor.
- b. Boomtown Tees, LLC ("Boomtown"), which designs and sells t-shirts.
- c. The Engine Room, LLC ("Engine Room"), an entity whose primary function seemed to be providing services for other Ewing Enterprises.

d. Back Alley Blues & Barbeque, LLC ("Back Alley Blues"), which was a restaurant.

e. The Phoenix Cafe, which is a coffee house.

18. Beginning after January 27, 2010, Ewing, as promoter, owner, and manager, solicited potential investors in The Max ostensibly to raise initial capital for the creation, construction, and establishment of The Max at 114 S. Elgin Ave. in downtown Tulsa.

19. In time Ewing contacted Mr. Carrillo, who on April 7, 2010 invested a substantial sum in The Max, which amount became the first deposit in its checking account.

20. At the time of Mr. Carrillo's investment Ewing did not inform Mr. Carrillo of his then existing intent to use funds raised from Mr. Carrillo (and others) wrongfully to bolster and support one or more of the Ewing Enterprises, or to otherwise use Max funds for improper personal benefit. Ewing intended that Mr. Carrillo rely on this false state of affairs and he did so rely to his detriment.

21. For example, on May 4, 2010, three days before its grand opening, and *over four months before The Max was open for business*, Ewing caused a \$9,130.93 check to be written from The Max checking account to the order of Boomtown Tees.

22. On May 18, 2010, Ms. Brown invested a substantial sum in The Max.

23. At the time of Ms. Brown's investment, Ewing did not inform Ms. Brown of his then existing intent to use funds raised from Ms. Brown (and others) wrongfully to bolster and support one or more of the Ewing Enterprises, or to otherwise use Max funds for improper personal benefit. Ewing intended that Ms. Brown rely on this false state of affairs and she did so rely to her detriment.

24. Also on May 18, 2010, Mr. Brown invested a substantial sum in The Max.

25. At the time of Mr. Brown's investment, Ewing did not inform Mr. Brown of his then existing intent to use funds raised from Mr. Brown (and others) wrongfully to bolster and support

one or more of the Ewing Enterprises, or to otherwise use Max funds for improper personal benefit. Ewing intended that Mr. Brown rely on this false state of affairs and he did so rely to his detriment.

26. For example, on May 27, 2010, there was a \$7,500.00 transfer out of the checking account of The Max, which was stated to be for “Joe Momma’s . . . to cover credit card . . . problem. A. Blake Ewing.”

27. Like the other Plaintiffs, Mr. Perkins was solicited by Ewing to invest in The Max. Mr. Perkins invested by causing his closely-held Perkins Real Estate Group, LLC to invest substantial sums in The Max between August 12, 2010 and September 3, 2010.

28. Individually, Mr. Perkins, on September 3, 2010, also acquired an ownership interest in The Max Retropub.

29. Upon making his investments, Mr. Perkins was neither personally, nor as the manager of Perkins Real Estate Group, LLC, informed of Ewing’s then-existing intent to use capital raised for The Max for improper personal benefit, or wrongfully to support one or more of the Ewing Enterprises. Ewing intended that Mr. Perkins rely on this false state of affairs and he did so rely to his detriment.

30. For example, Mr. Perkins was not informed of the \$14,000.00 transfer out of The Max account on June 23, 2010 to “Cover Debt on Joe Momma’s,” nor of any of the prior misappropriations such as those alleged above. Nor did Ewing disclose his then present intent to make similar fraudulent transfers in the future for the benefit of himself or other Ewing Enterprises.

31. After Mr. Perkins’ investment, Ewing continued utilizing The Max’s checking account to spend his partners’ investment funds on unrelated Ewing Enterprises.

32. In addition, with the opening of The Max on September 10, 2010, Ewing commenced also to draw funds from the revenues of The Max for his own personal benefit and to benefit the

Ewing Enterprises, without making any disclosure to Plaintiffs, all as shown through the following, which is intended to be only a partial disclosure of facts expected to be more fully discovered through this lawsuit:

33. **The Engine Room:** This was a Ewing Enterprise, the purpose for which was never fully disclosed to the Plaintiffs, and with whom The Max had no written agreement.

34. It is Plaintiffs' good faith belief that The Engine Room was used by Ewing as a clearinghouse through which The Max funds were fraudulently redistributed to other Ewing Enterprises.

35. Ewing may suggest there was management provided by it to The Max, however, at the time of Mr. Perkins' investment, and shortly after the investments of Mr. Carrillo, Ms. Brown and Mr. Brown, each of the Plaintiffs were provided with a copy of and subscribed to the 1st Amended Operating Agreement of The Max (the "Operating Agreement"), dated September 3, 2010. Among other things, it provided:

In addition, for good consideration received by performing his duties as Manager, this Company shall issue and convey to Ewing One (1) Common Unit for every Preferred Unit issued and conveyed to any member.

By this provision, and by Ewing's representations to the investors, management of The Max was to be by Ewing and not by or through a Ewing Enterprise.

36. In fact, Ewing was given a full 50% ownership interest as sweat equity, in lieu of cash, for managing The Max. Despite this provision and for no disclosed reason, Ewing caused the following transfers of The Max's funds to the Engine Room:

(1) In 2010, at least \$21,015.00 of The Max's funds were transferred to The Engine Room.

(2) In 2011, at least \$89,999.99 of The Max's funds were transferred to The

Engine Room.

(3) In 2012, at least \$46,850.00 of The Max's funds were transferred to The Engine Room.

(4) In 2013, at least \$39,485.00 of The Max's funds were transferred to The Engine Room.

(5) In 2014, at least \$52,078.53 of The Max's funds were transferred to The Engine Room.

(6) In 2015, at least \$69,024.44 of The Max's funds were transferred were written to The Engine Room.

(7) Thus, from 2010 through 2015, The Engine Room received at least \$318,452.96 from The Max for no justified purpose.

37. **Joe Momma's:** In addition to the transfers of funds to Joe Momma's referred to above, Ewing caused additional transfers of The Max's funds to Joe Momma's, including \$4,953.10 on September 23, 2010, and \$2,947.08 on April 3, 2014.

38. On July 8, 2015, the interior of Joe Momma's was destroyed by a fire. It has remained closed since that date. Nevertheless, on August 12, 2015, Ewing caused a \$1,651.54 check to be written out of The Max account to Joe Momma's, and on February 12, 2016, another \$4,000.00 in Max funds was transferred to Joe Momma's, *which had been closed since it had been destroyed by a fire six months previously.*

39. In addition, on January 12, 2016, Ewing caused a \$16,746.99 check to be written out of Max funds to the order of Servpro, a Fire Damage and Restoration Company. On January 19, 2016, Servpro was paid another \$2,409.98 out of The Max account. Unlike Joe Momma's, The Max has not been damaged by a fire.

40. **The Phoenix Cafe** is another Ewing Enterprise that has received an unknown amount of The Max's funds. As one example of the modus operandi of the Ewing Enterprises, on June 29, 2016, the Oklahoma Tax Commission shut down The Phoenix for the nonpayment of sales taxes. Shortly thereafter, The Phoenix was reopened, likely with the help of Ewing's \$6,000.00 transfer of Max funds to the Phoenix.

41. **Fur Shop** is another Ewing Enterprise that has received an unknown amount of The Max's funds. It is Plaintiffs' good faith belief that The Engine Room was used by Ewing as a clearinghouse through which Max funds were fraudulently redistributed to other Ewing Enterprises. For example, on May 21, 2015, Ewing caused a \$5,000.00 check to be written to The Engine Room out of Max funds. On that very same day, a \$5,000.00 deposit was made into the Fur Shop account by the Engine Room.

42. The Max owns no real estate. Despite this fact, Ewing, to benefit one or more of the Ewing Enterprises, caused checks to be paid out of the checking account of The Max to the Tulsa County Treasurer, including: \$5,635.50 on July 22, 2011, \$3,356.34 on December 20, 2012, and \$7,404.22 on August 26, 2016.

43. In addition to the above transfers, Plaintiffs, through examination of the checking account of The Max believe further significant funds were caused to be transferred by Ewing for the benefit of the Ewing Enterprises, the full extent of which can only be determined through discovery. Ewing intentionally concealed from Plaintiffs the misappropriation of Max funds to their detriment.

44. Further, Ewing caused expenditures by The Max for his own personal benefit. These are at least partially shown on the attached Exhibit A, which details charges at various restaurants, gas stations, furniture stores, baseball games, bars, hotels, airlines, veterinary clinics, musical instrument stores, bicycle shops, bookstores, consumer electronics stores, auto mechanics, flower

shops, fast food chains, movie theaters, yacht clubs, skate shops, and other businesses. It is believed that at least 41,235.77 in The Max funds were used by Ewing for improper personal benefit, in direct violation of the Oklahoma Limited Liability Act and common law.

45. Ewing concealed all of the above transfers and expenditures from the Plaintiffs and provided to them financial statements that were false and failed to fully disclose the fraudulent transfers of funds alleged herein. Ewing intended that Plaintiffs rely on this false state of affairs and they did so rely to their detriment.

46. In making their investments in The Max, Plaintiffs relied upon an offering circular provided by Ewing, a true copy of which is attached as Exhibit B. Ewing intended that this offering circular be relied upon, and Plaintiffs did so rely on the circular, to their detriment.

47. Among other things, the offering circular provided the following representations, each of which Ewing did not intend to be true, as shown by the actual facts that occurred as set forth hereafter following each representation.

a. "In all its operational processes, The Max Retropub will benefit from the direct, relevant experience of its owner/operator - award-winning businessman Blake Ewing, proprietor of Joe Momma's." The true facts were that Ewing never implemented nor followed the business plan.

b. "Check-signing authority for the general operating account will be the sole duty of the managing member." The true facts were that Ewing directed others to write one or more of the checks and transfers alleged above, including bestowing signature authority on Max accounts to individuals who were not Max employees.

c. "The managing member also will be responsible for the timely preparation of monthly financial statements, including monthly profit and loss and balance sheets." The true

facts were that Ewing rarely provided timely, and never provided accurate financial statements.

d. "A primary method for promoting The Max will be through "guerilla" or social marketing. Utilizing online social networks like Facebook and Twitter will allow The Max to get the word out about the pub and its events in relational ways. Well-planned promotions can easily "go viral" via social networking and "buzz" tools. And these value-filled tactics will very minimally impact the marketing budget." Although The Max was marketed through social media, Ewing fraudulently paid either himself or other of his Ewing Enterprises exorbitant sums to perform this extremely basic business task.

e. "Funding will be used to fulfill the projected capital budget requirements as explained in the Financial Projections section." The true facts are that Ewing never tried to fulfill the projected capital budget requirements, and diverted capital and revenue to himself and the Ewing Enterprises as alleged herein.

f. "Current financial projections indicate a return on investment in less than two years with an average annual return on investment of roughly 50 percent after taxes." The true facts were that while a return on investment did not occur within two years, the return on investment would have been sooner, and the annual returns larger, had the alleged defalcations not occurred.

48. Moreover, the opacity with which Ewing interacted with investors concerning company business, and the delay in investment returns caused by the fraudulent misappropriations, compelled Perkins to limit his exposure by selling nearly 10% shares in The Max to partner, Chris Matthes, on March 15, 2013. As a result, Perkins suffered additional damages at every distribution between March of 2014 through present day. The calculation of damages to Perkins Real Estate Group should be premised on the full interest it initially purchased.

49. Through the above-alleged acts, each of the Plaintiffs has been damaged in an amount in excess of \$75,000.00.

50. For the acts alleged, punitive damages should be assessed against Ewing.

51. Each of the above Defendants, *i.e.*, The Engine Room, The Phoenix Cafe, Fur Shop, and Blue Ox were controlled by Ewing and used by him to commit a fraud and a wrong. Moreover, their funds were commingled and they failed to observe corporate formalities because of Ewing. As such they are *alter egos* of Ewing, and, therefore, actual and punitive damages for fraud assessed against Ewing should also be assessed against each of the aforesaid.

52. Following the Tax Lien Disclosure, the Plaintiffs, upon their demand, were first provided the bank statements for The Max for the years 2013, 2014, and 2015, on August 1, 2016, and for the years 2010, 2011, 2012 on August 18, 2016, at which point in time they were first put on notice of Ewing's fraud, thus this action is not time-barred under Okla. Stat. tit. 12 § 95(A)(3).

53. Subsequent to the Tax Lien Disclosure and after Mr. Perkins stepped forward to pay unpaid insurance of The Max, Ewing claimed to have infused \$100,000.00 into The Max. Any such payment was an admission of the fraud, misappropriation, and conversions Ewing had made or caused to be made of The Max's funds, was insufficient to make up for all of the defalcations alleged herein, and did not absolve Ewing of his liability for his wrongful and fraudulent acts.

54. Each of the above alleged misrepresentations and omissions were material.

COUNT 2 – BREACHES BY EWING OF HIS FIDUCIARY DUTY AND DUTY OF LOYALTY

55. Paragraphs 1-54, 60-63, and 72-90, above, are hereby incorporated by reference as if fully set forth herein.

56. Ewing, as promoter, Manager, and majority partner, owed a fiduciary duty to his

investors and partners. Ewing, including but not limited to his actions referenced herein, breached his fiduciary duties and duty of loyalty to Plaintiffs, thus causing each of the Plaintiffs damages in an amount in excess of \$75,000.00.

57. Moreover, on October 14, 2016, after the filing of Plaintiffs' petition, Ewing made public pronouncements that Plaintiffs would be permitted to review The Max's company books at any time upon request. Acting on the invitation, Plaintiffs made such a written request to the counsel for both Ewing and The Max. Contrary to public pronouncement, yet consistent with past performance, as of the date of this Second Amended Petition, Plaintiffs have not been provided with any access to The Max's company books. This ongoing failure to permit Plaintiffs to review the internal company books of The Max is a continuing breach of fiduciary duty, as well as a continuing breach of contract.

58. For the acts alleged, punitive damages should be assessed against Ewing.

59. Each of the above Defendants, *i.e.*, The Engine Room, The Phoenix Cafe, Fur Shop, and Blue Ox are *alter egos* of Ewing, and, therefore, actual and punitive damages assessed against Ewing should also be assessed against each of the aforesaid.

COUNT 3 – MALICIOUS WRONG

60. Paragraphs 1-59, above, are hereby incorporated by reference as if fully set forth herein.

61. Ewing, including but not limited to his actions referenced above, committed a malicious wrong against Plaintiffs in that his actions, were intentional and calculated in the ordinary course of events to damage, and which did, in fact, damage another person's property or trade, thus constituting a malicious wrong, under *Mangum Electric Co. v. Border*, 1923 OK 547 and *Fulton v. People Lease Corp.*, 2010 OK CIV APP 84.

62. Plaintiffs pray for actual damages in excess of \$75,000.00 each, and punitive damages against Ewing for his multiple wrongs alleged.

63. Each of the above Defendants, *i.e.*, The Engine Room, The Phoenix Cafe, Fur Shop, and Blue Ox are *alter egos* of Ewing, and, therefore, actual and punitive damages assessed against Ewing should also be assessed against each of the aforesaid.

COUNT 4 – ACCOUNTING

64. Paragraphs 1-63 are hereby incorporated by reference as if fully set forth herein.

65. As noted above, funds belonging to The Max have come into the possession of Ewing and his *alter egos*, for which he has not accounted. In such circumstances a trust relationship arises by operation of law, and Ewing is required to account for all funds of The Max. Moreover, in his capacity as Manager, Ewing owes a fiduciary duty to the Plaintiffs which further requires him to account to them. Plaintiffs pray that the Court enforce a full and complete accounting to be rendered by Ewing for his actions as Manager from inception of The Max to the present.

COUNT 5 – DECLARATORY JUDGMENT

66. Paragraphs 1-65 above are hereby incorporated by reference as if fully set forth herein.

67. A dispute exists between the Plaintiffs and Ewing concerning the rights and liabilities of Ewing under the Operating Agreement. Each of Plaintiffs ask the Court to determine that Ewing has no right to indemnity for any of his actions as alleged herein under § 7.04 of the Operating Agreement, and that he should be terminated as Manager of The Max. Indemnification for the acts alleged herein is also disallowed under 18 O.S. § 2017(B).

COUNT 6 – DERIVATIVE CLAIM – CONVERSION

68. Paragraphs 1-54 above are hereby incorporated by reference as if fully set forth herein.

69. Each of the transfers of funds out of The Max alleged above for the benefit of Ewing and the Ewing Enterprises constitute a conversion. No demand need be made on The Max to have it pursue claims against Ewing for such acts, because such demand would be futile. Ewing owns more than 50% of the units of The Max and controls it as the Manager, therefore, he lacks the requisite disinterestedness to determine fairly whether the corporate claim should be pursued, and, consequently, a demand of The Max to bring a claim is further excused. In the event judgment is not awarded against Ewing under Counts 1, 2, or 3 in the full amount of all damages, then the Plaintiffs, suing derivatively, demand judgment on behalf of The Max for all converted funds.

COUNT 7 – DERIVATIVE CLAIM - FRAUDULENT TRANSFERS

70. Paragraphs 1-69 above are hereby incorporated by reference as if fully set forth herein.

71. The transfers alleged above to one or more of the Ewing Enterprises constitute fraudulent transfers. No demand need be made on The Max to have it pursue claims against Ewing for such acts, because such demand would be futile. Ewing owns more than 50% of the units of The Max and controls it as the Manager, therefore, he lacks the requisite disinterestedness to determine fairly whether the corporate claim should be pursued, and, consequently, a demand of The Max to bring a claim is further excused. In the event judgment is not awarded against Ewing under Counts 1, 2 or 3 for the amounts of all wrongfully-transferred funds, then the Plaintiffs, suing derivatively, demand judgment on behalf of The Max for all funds fraudulently transferred to each transferee

entity, resulting in The Max being unable to pay its debts to third parties and accruing penalties and interest thereon.

COUNT 8 – DERIVATIVE CLAIM - BREACH OF CONTRACT

72. Paragraphs 1-71, above are hereby incorporated by reference as if fully set forth herein.

73. On or about July 26, 2016, with the Tax Lien Disclosure, Plaintiffs unsuccessfully attempted to contact Ewing. Instead, Ewing sent Mr. Ron Durbin (“Mr. Durbin”) of The Durbin Law Firm to meet with Plaintiffs. Mr. Durbin purported to be acting on behalf of The Max as its attorney with the approval of Ewing. Mr. Durbin and Mr. Ewing failed to disclose to Plaintiffs his long history of working for Ewing individually and for several of the Ewing Enterprises against whom The Max has claims.

74. Mr. Durbin and Mr. Ewing also failed to disclose that he advised and assisted Ewing in selling his equity interests in Boomtown Tees, Back Alley, and Joe Momma’s, all Ewing Enterprises, which have been major recipients of misappropriated Max funds. Thus, not only did Durbin assist in Ewing’s unjust enrichment through the sale of his equity interest in businesses fraudulently supported by The Max, but as the purported general counsel of The Max he failed to secure for it the repayment of any misappropriated Max funds out of the proceeds of those sales.

75. Moreover, since Mr. Durbin registered as the agent for The Max on February 10, 2015, at least \$121,436.37 in Max funds have been transferred to other entities for which Ewing is the majority partner or Manager. The recipients of these fraudulent transfers include Ewing Enterprises for whom Durbin was counsel and agent *at the time they received misappropriated Max funds*. These recipients include the Fur Shop, Joe Momma’s, The Phoenix, and Blue Ox Dining Group.

76. In addition, Mr. Durbin has acted in other ways contrary to the best interests of The Max Retropub, in violation of his duties as the purported counsel to The Max. In a meeting with the Plaintiffs on July 29, 2016, Mr. Durbin informed Plaintiffs that The Max insurance had been allowed to lapse under Ewing's mismanagement. It is unknown how long The Max was permitted to remain open without insurance. Mr. Perkins suggested The Max close until insurance was reinstated, and agreed to provide the emergency funds for the reinstatement of the insurance. Mr. Durbin advised against closing The Max, despite it not having insurance coverage. The lapse of insurance was in itself a violation of Ewing's duties as manager of The Max.

77. At the same meeting, Plaintiff's asked for the resignation of Ewing as Manager of The Max. Mr. Durbin argued against the same, and has continued to either maintain that position or refused to offer an opinion on the matter when asked in writing by the entire board of directors to do so, despite knowing of virtually all facts disclosed in this Petition. Mr. Durbin has thus conducted himself in a manner that is disloyal to the best interests of The Max.

78. Given such actions, that Mr. Durbin is a *de facto* agent of Ewing, and that Ewing's bad acts have been the cause for Mr. Durbin's and his firm's actions that purport to be on behalf of The Max, all fees billed by Mr. Durbin or his law firm to The Max since July 26, 2016 should be the liability of Ewing.

79. Ewing during his term as manager of The Max allowed its rent to be in arrears under its lease which was a further breach of his duties as Manager of The Max.

80. The acts of Ewing alleged above constitute a breach of one or more of the following provisions of the Operating Agreement by Ewing.

81. "Section 4.07: **Loans**. Any Member may, at any time, make or cause a loan to be made to the Company in any amount and on those terms upon which the Board of Directors and the

Member agree, and in accordance with the terms of this Agreement. The Company may also, at any time, solicit a qualified financial institution and enter into a loan agreement in any amount and on those terms upon which the Board of Directors and lender agree, in accordance with the terms and conditions of this Agreement.

A. All loans exceeding \$10,000 just be approved by the unanimous consent of the Board of Directors.”

82. “Section 5.01. **Distribution of Cash Available for Distribution.** Commencing on the first anniversary of the operation of the restaurant(s), cash available for Distribution shall be made semi-annually, in accordance with the following:

... B. **During any period that is not a Preferred Unit Return Period.** During any period in which there are no outstanding Preferred Units, all distributions shall be made to all Members holding Common Units on a pro rata basis.”

83. “Section 6.01: The business and affairs of the Company shall be managed under the direction and control of the Manager. By this Agreement, the Members hereby designate Andrew Blake Ewing as the Manager.”

84. “Section 6.02(A): **Borrow Money.** Except as set forth in Exhibit “B,” borrow money in excess of \$10,000.00.”

85. “Section 6.02(D): Notwithstanding any other provision hereof, a Manager shall not have the authority to do the following acts without a unanimous vote of the Board of Directors: Acts in Contravention of Business. Do any act which would make it impossible to carry on the ordinary business of the Company.”

86. “Section 6.02(G): Notwithstanding any other provision hereof, a Manager shall not have the authority to do the following acts without a unanimous vote of the Board of Directors:

Cause Personal Liability. Knowingly perform any act that would subject a Member to personal liability.”

87. “Section 6.03: Company Funds: The funds of the Company shall be deposited in an account or accounts maintained with a nationally insured bank located in Tulsa, Oklahoma as may be designated by the Members *and shall not be commingled with any other funds.*” (Emphasis added.)

88. “Section 6.06: The Manager shall be solely responsible for the management of this Company’s business.”

89. “Section 7.02: **Rights of Member Relating to the Company.** In addition to other rights provided by this Agreement or by applicable law, a Member shall have the right upon demand and at such Member’s own expense:

A. To obtain any and all information regarding the status of the business and financial condition of the Company;

B. Promptly after becoming available, to obtain a copy of the Company’s federal, state and local income tax returns for each year;

...

F. To inspect and copy any of the Company’s books and records and obtain such other information regarding the affairs of the Company.”

90. No demand need be made on The Max to have it pursue claims against Ewing for such acts, because such demand would be futile. Ewing owns more than 50% of the units of The Max and controls it as the Manager, therefore, he lacks the requisite disinterestedness to determine fairly whether the corporate claim should be pursued, and, consequently, a demand of The Max to bring a claim is further excused. In the event judgment is not awarded against Ewing under Counts

1, 2 or 3 for the amounts of all funds lost through Ewing's breaches, then the Plaintiffs, suing derivatively, demand judgment on behalf of The Max for each act constituting breach.

COUNT 9 – DERIVATIVE CLAIM - NEGLIGENCE

91. Paragraphs 1-54 and 72-90, above are hereby incorporated by reference as if fully set forth herein.

92. Ewing's acts as alleged above constitute negligence damaging each of the Plaintiffs in an amount in excess of \$10,000.00.

93. In addition to the Tax Lien Disclosure, and the previous revelations regarding lapsed insurance and unpaid rent, on October 14, 2016 Mr. Perkins received via email a Notice of Cancellation of The Max's insurance, and a call from The Max's insurance agent advising him that The Max's insurance policy was again scheduled to lapse by the end of the day. Despite a previous Notice of Cancellation having been sent to Ewing on October 4, 2015, The Max's insurance had not been paid since Mr. Perkins paid for it on The Max's behalf on July 29, 2016.

94. Plaintiffs fear the ongoing negligence of Ewing in failing to perform his duties as Manager, put The Max and its partners, including Plaintiffs, at risk. Consequently, Plaintiffs ask the Court to determine, in conjunction with Count 5 above, that Ewing be terminated as Manager of The Max.

95. No demand need be made on The Max to have it pursue claims against Ewing for such acts, because such demand would be futile. Ewing owns more than 50% of the units of The Max and controls it as the Manager, therefore, he lacks the requisite disinterestedness to determine fairly whether the corporate claim should be pursued, and, consequently, a demand of The Max to bring a claim is further excused. In the event judgment is not awarded against Ewing under Counts

1, 2 or 3 for the amounts of all funds lost through Ewing's breaches, then the Plaintiffs, suing derivatively, demand judgment on behalf of The Max for each act constituting breach.

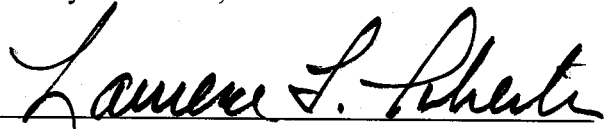
PRAYER FOR RELIEF

WHEREFORE, premises considered, each of the Plaintiffs hereby prays for judgment in their favor and against Ewing as follows:

- a. Actual damages on Counts 1-3 in excess of \$75,000.00, and punitive damages against Ewing for his alleged acts in Counts 1 and 2;
- b. An accounting under Count 4;
- c. A declaratory judgment on Count 5 that Ewing has no right to indemnification, and that he should be terminated;
- d. Attorney fees, costs, and other just and appropriate relief.

FURTHER, Plaintiffs pray for judgment in favor of The Max for its damages as alleged in Counts 6-9, punitive damages under Counts 6 and 7, and that the Plaintiffs be awarded their attorney fees, costs, and other just and appropriate relief for bringing such claims.

Respectfully submitted,



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918-796-5717 – fax
brian@brandesandyancy.com

Attorneys for Plaintiffs

DECLARATION OF MARK PERKINS

On this date Mark Perkins declares the following:

1. My name is Mark Perkins. I am over the age of twenty-one years, of sound mind, and fully competent to testify to the matters set forth herein. I have personal knowledge of the statements contained herein, and they are true and correct.
2. I am a Unit holder, and was a Unit holder and Member of The Max Retropub, L.L.C. ("The Max") at all times addressed in the Second Amended Petition. I am also a Member of the Board of Directors of The Max, and have been since its inception along with Albert Carrillo and Chris Matthes (hereinafter collectively referred to as the "Board of Directors").
3. I am a Plaintiff in that case styled *Mark Perkins, et al., v. Blake Ewing, et al.*, Case No. CJ-2016-3708 in the District Court in and for Tulsa County, State of Oklahoma (the "Lawsuit"). In that capacity, I have reviewed in detail the allegations of the Amended Petition filed on October 27, 2016, and the Second Amended Petition to which this Declaration is attached, and they are true and correct to the best of my knowledge, except I do not so declare insofar as the allegations relate specifically to the knowledge of, or statement to, one or more of the other Plaintiffs.
4. Mr. Blake Ewing ("Ewing") is a Unit holder in The Max and has been its Manager during all periods addressed in the Second Amended Petition. The Second Amended Petition concerns activities of Ewing as Manager and a Member of The Max. Matters sufficient to show the existence of derivative claims, as more fully asserted in the Second Amended Petition, were addressed by myself and the other Members of the Board of Directors with Ewing and his agent, the alleged attorney for The Max, Mr. Ron Durbin ("Durbin"), in person and through dozens of correspondences between July 29, 2016 through October 13, 2016.

5. Subsequent to the "Tax Lien Disclosure", all Members of the Board of Directors attempted contacting Ewing to discuss the problems facing our Company. Our phone calls and emails were not returned by Ewing.

6. On July 29th, 2016, I and the other Directors met with Durbin in person to discuss the problems facing the Company. At that meeting, the Board of Directors unanimously requested that Ewing resign as Manager of the Company. Durbin advocated against Ewing's removal.

7. On August 14th, 2016, I personally sent an email to Durbin, on behalf of the Board of Directors, calling for Ewing's termination as Manager of the Company because of the matters more fully asserted in the Second Amended Complaint:

On behalf of the large minority partners, as counsel of The Max we ask that you do whatever is required to fulfill this request. If you think it is in the best interest of the company to continue forward with a Manager who has, without question, misappropriated company funds and created a situation where the tax commission is filing liens and garnishments against our business (a business that should be able to pay its bills), a bar that finds itself without general liability insurance, and a tenant that doesn't pay it's rent, please advise us as to why it is in The Max's best interest to continue with the same manager.

8. On August 16th, 2016, I again requested in writing, on behalf of the entire Board of Directors, that Durbin, as the alleged attorney of the Company, do whatever is required to pursue the removal of Ewing as Manager of the Company or, in the alternative, advise us as to his reasoning for refusing to do so. Durbin did not reply to that email.

9. On August 19th, 2016, I sent an email to Durbin detailing items unanimously approved by the Board of Directors as necessary for resolving the claims more fully asserted in the Second Amended Petition. The proposals, made directly to the alleged attorney of the Company, included the removal of Ewing as Manager, the recovery of misappropriated Company funds, the reimbursement of misused Company funds, and the reimbursement to the Company of

interest and penalties incurred as the result of Ewing's management. In a responsive email dated August 24th, 2016, Durbin responded:

Because we represent the LLC, we do not believe we should be involved in discussions related to the removal of Mr. Ewing as the Manager of The Max Retropub, LLC. Additionally, we do not believe we should be involved in any settlement discussions between the individual members of the LLC. This would specifically include the proposals contained in Mr. Perkins August 19th, 2016, email to me.

10. Nevertheless, one week later, Durbin did attend a settlement meeting. Matters sufficient to show the existence of derivative claims, as more fully asserted in the Second Amended Petition, were addressed with Ewing and Durbin, in person, in the meeting at my office on August 31, 2016.

11. In that meeting it became clear that Ewing, Durbin, and The Max would oppose any claims that were brought by the Unit holders. In addition, the issues following the meeting were further considered in an email exchange with Durbin with copies to Ewing on September 8, 2016. In a responsive email on September 8, 2016, Durbin concluded with the following:

After you have a chance to review the above, please contact me to discuss. If Mr. Perkins elects to file suit, please be advised that, on behalf of The Max Retropub, LLC, we will seek to dismiss your Petition and seek recovery of attorney fees incurred in defense.

These exchanges and Durbin's email response made it clear that any further demand upon the Manager of The Max, or the counsel hired by him, to assert claims would be futile, particularly when Ewing was both the Manager and holder of over 50% of the Units of The Max. See ¶ 69 of the Second Amended Petition.

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

Date

11/30/16

Mark Perkins

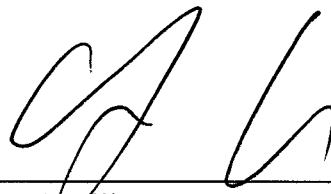
DECLARATION OF ALBERT CARRILLO

On this date Albert Carrillo declares the following:

1. My name is Albert Carrillo. I am over the age of twenty-one years, of sound mind, and fully competent to testify to the matters set forth herein. I have personal knowledge of the statements contained herein, and they are true and correct.
2. I am a Unit holder, and was a Unit holder and Member of The Max Retropub, L.L.C. ("The Max") at all times addressed in the Second Amended Petition. I am also a Member of the Board of Directors of The Max, and have been since its inception along with Mark Perkins and Chris Matthes.
3. I am a Plaintiff in that case styled *Mark Perkins, et al., v. Blake Ewing, et al.*, Case No. CJ-2016-3708 in the District Court in and for Tulsa County, State of Oklahoma (the "Lawsuit"). In that capacity, I have reviewed in detail the allegations of the Amended Petition filed on October 27, 2016, and the Second Amended Petition to which this Declaration is attached, and they are true and correct to the best of my knowledge and belief, except I do not so declare insofar as the allegations relate specifically to the knowledge of, or statement to, one or more of the other Plaintiffs.
4. Mr. Blake Ewing ("Ewing") is a Unit holder in The Max and has been its Manager during all periods addressed in the Second Amended Petition. The Second Amended Petition concerns activities of Ewing as Manager and a Member of The Max. Matters sufficient to show the existence of derivative claims, as more fully asserted in the Second Amended Petition, were addressed by myself and the other Members of the Board of Directors with Ewing and his agent, the alleged attorney for The Max, Mr. Ron Durbin ("Durbin"), in dozens of correspondences from July 29, 2016 through October 13, 2016.

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

12-15-16
Date



Albert Carrillo

DECLARATION OF ALLEN BROWN

On this date Allen Brown declares the following:

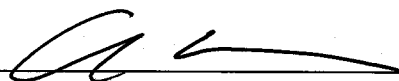
1. My name is Allen Brown. I am over the age of twenty-one years, of sound mind, and fully competent to testify to the matters set forth herein. I have personal knowledge of the statements contained herein, and they are true and correct.

2. I am a Unit holder, and was a Unit holder and Member of The Max Retropub, L.L.C. ("The Max") at all times addressed in the Second Amended Petition.

3. I am a Plaintiff in that case styled *Mark Perkins, et al., v. Blake Ewing, et al.*, Case No. CJ-2016-3708 in the District Court in and for Tulsa County, State of Oklahoma (the "Lawsuit"). In that capacity, I have reviewed in detail the allegations of the Amended Petition filed on October 27, 2016, and the Second Amended Petition to which this Declaration is attached, and they are true and correct to the best of my knowledge or belief, except I do not so declare insofar as the allegations relate specifically to the knowledge of, or statement to, one or more of the other Plaintiffs.

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

11-30-16
Date


Allen Brown

DECLARATION OF MORGAN BROWN

On this date Morgan Brown declares the following:

1. My name is Morgan Brown. I am over the age of twenty-one years, of sound mind, and fully competent to testify to the matters set forth herein. I have personal knowledge of the statements contained herein, and they are true and correct.

2. I am a Unit holder, and was a Unit holder and Member of The Max Retro Pub, L.L.C. ("The Max") at all times addressed in the Second Amended Petition.

3. I am a Plaintiff in that case styled *Mark Perkins, et al., v. Blake Ewing, et al.*, Case No. CJ-2016-3708 in the District Court in and for Tulsa County, State of Oklahoma (the "Lawsuit"). In that capacity, I have reviewed in detail the allegations of the Amended Petition filed on October 27, 2016, and the Second Amended Petition to which this Declaration is attached, and they are true and correct to the best of my knowledge or belief, except I do not so declare insofar as the allegations relate specifically to the knowledge of, or statement to, one or more of the other Plaintiffs.

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

11/30/2016

Date


Morgan Brown

DECLARATION OF MARK PERKINS

On this date Mark Perkins declares the following:

1. My name is Mark Perkins. I am over the age of twenty-one years, of sound mind, and fully competent to testify to the matters set forth herein. I have personal knowledge of the statements contained herein, and they are true and correct.

2. I am a Unit holder, and was a Unit holder and Member of The Max Retropub, L.L.C. ("The Max") at all times addressed in the Second Amended Petition. I am also a Member of the Board of Directors of The Max, and have been since its inception along with Albert Carrillo and Chris Matthes.

3. I am a Plaintiff in that case styled *Mark Perkins, et al., v. Blake Ewing, et al.*, Case No. CJ-2016-3708 in the District Court in and for Tulsa County, State of Oklahoma (the "Lawsuit"). In that capacity, I have reviewed in detail the allegations of the Amended Petition filed on October 27, 2016, and the Second Amended Petition to which this Declaration is attached, and they are true and correct to the best of my knowledge, except I do not so declare insofar as the allegations relate specifically to the knowledge of, or statement to, one or more of the other Plaintiffs.

4. Mr. Blake Ewing ("Ewing") is a Unit holder in The Max and has been its Manager during all periods addressed in the Second Amended Petition. The Second Amended Petition concerns activities of Ewing as Manager and a Member of The Max. Matters sufficient to show the existence of derivative claims, as more fully asserted in the Second Amended Petition, were addressed by myself and the other Members of the Board of Directors with Ewing and his agent, the alleged attorney for The Max, Mr. Ron Durbin ("Durbin"), in dozens of correspondences from July 29, 2016 through October 13, 2016.

5. Matters sufficient to show the existence of derivative claims, as more fully asserted in the Second Amended Petition, were also addressed with Ewing and Durbin, in person,, in a meeting at my office on August 31, 2016.

6. In that meeting it became clear that Ewing and The Max would oppose any claims that were brought by the Unit holders. Further, the issues following the meeting were further considered in an email exchange with Durbin with copies to Ewing on September 8, 2016. In a responsive email on September 8, 2016, Durbin concluded with the following:


After you have a chance to review the above, please contact me to discuss. If Mr. Perkins elects to file suit, please be advised that, on behalf of The Max Retropub, LLC, we will seek to dismiss your Petition and seek recovery of attorney fees incurred in defense.

These exchanges and Durbin's email response made it clear that any further demand upon the Manager of The Max to assert claims would be futile, particularly when Ewing was both the Manager and holder of over 50% of the Units of The Max. See ¶ 69 of the Second Amended Petition.

I state under penalty of perjury under the laws of Oklahoma that the foregoing is true and correct.

PERKINS REAL ESTATE GROUP, LLC

11/30/16
Date


By: Mark Perkins

CERTIFICATE OF SERVICE

I, Laurence L. Pinkerton, do hereby certify that on the 16th day of December, 2016, I caused to be mailed a true and correct copy of the above and foregoing *Second Amended Petition*, with proper postage thereon fully prepaid, to:

Ronald E. Durbin, II, Esq.
John E. Rooney, Jr., Esq.
DURBIN LAW FIRM, PLLC
1502 S. Denver Ave.
Tulsa, Oklahoma 74119

Ashley R. Webb, Esq.
RIGGS ABNEY NEAL TURPIN
ORBISON & LEWIS
502 W. 6th St.
Tulsa, Oklahoma 74119-1016

