UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

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Bankruptcy Caption: In re Suncoast Towers South Associates

Bankruptcy No. 98-10537-BKC-AJC

Adversary Caption: James S. Feltman, AS Chapter 11 Trustee for the estate of Suncoast Towers South Associates

Adversary No. 98-1451-BKC-AJC-A

Date of Issuance: June 17, 1999

Judge: John H. Squires

Appearance of Counsel:

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UNITED STATES BANKRUPTCY COURT
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MEMORANDUM OPINION

This matter comes before the Court on the Complaint of James S. Feltman, as Chapter 11 Trustee (the "Trustee" or "Plaintiff") of the Debtor's bankruptcy estate seeking relief against Menada, Inc., a Florida corporation ("Menada") and one of its officers and directors, Homero F. Meruelo ("Meruelo") (collectively the "Defendants"). The dispute principally focuses on certain accounts receivable from tenants and tour operators, sold by the Trustee to Menada, in conjunction with the sale of the principal asset of the bankruptcy estate known as the Suncoast Towers South property. It also concerns the Trustee's claims for unpaid rent he alleges Meruelo owes for use and

occupancy of penthouse units in that property. The Defendants contend they are not liable for any of the relief sought. The genesis of the dispute lies in the underlying purchase agreement for the sale of the property and the conflicting interpretations of the parties concerning some of its terms. The resulting litigation certainly proves the point made long ago by Aristotle: "How many a dispute could have been deflated into a single paragraph if the disputants had dared define their terms." Unfortunately, the lack of such precise definition produced the following findings of fact and conclusions of law after trial on the merits.

I. JURISDICTION AND PROCEDURE

The Court has jurisdiction to entertain this matter pursuant to 28 U.S.C. § 1334 and Local Rule 87.2 of the United States District Court for the Southern District of Florida. This matter constitutes a core proceeding under 28 U.S.C. § 157(b)(2)(A), (E) and (O).

II. FACTS AND BACKGROUND

A. Agreed Findings of Facts

Pursuant to a Pretrial Order submitted on January 25, 1999, which limited the issues tried to the claims asserted by the Trustee against Menada and Meruelo and their defenses thereto, the following pertinent facts have been stipulated to by the parties:

On January 26, 1998 (the "Petition Date"), an involuntary Chapter 11 petition was filed against Suncoast Towers South Associates, a general partnership (the "Debtor"), by three of its five general partners: Seacoast Towers Limited Partnership ("Seacoast

Towers"), Suncoast South No. 2, Inc. ("Suncoast No. 2") and Suncoast South No. 7, Inc. ("Suncoast No. 7"). Thereafter, all five of the Debtor's general partners, Suncoast Towers, Suncoast No. 2, Suncoast No. 7, Suncoast Towers South No. 4, Inc. and Royal Suncoast Management South Associates consented to the granting of relief under Chapter 11. On February 2, 1998, the Court entered an order for relief.

The Debtor was in the business of owning and operating a residential and hotel rental property located at 5101 Collins Avenue, Miami Beach, Florida (the "Property"). The Property consisted of a sixteen story apartment building containing 239 residential units, various multi-purpose rooms and support facilities, 275 secured parking spaces, 14 dock slips, tennis courts and a heated swimming pool with private pool side cabanas located on approximately 2.53 acres of beachfront real estate. Approximately eighty of the residential units were hotel suites.

Prior to the Petition Date, the Property was managed by Royal Seacoast Management Associates. Thereafter, the Debtor, as debtor in possession, operated its business and managed the Property under 11 U.S.C. § 1107 and § 1108. Pursuant to a March 17, 1998 hearing and a subsequent order, on March 19, 1998, James S. Feltman was appointed Chapter 11 Trustee of the Debtor.

Pursuant to an order dated November 16, 1998, the amended joint Chapter 11 plan of reorganization, proposed by the Trustee and the Debtor, dated August 28, 1998, as modified by the modification dated November 6, 1998 relating thereto (collectively the "Plan"), was confirmed. The effective date (as that term is defined in the Plan) was December 11, 1998. Pursuant to the terms of the Plan, the Trustee is the liquidating agent

of the Debtor's estate.

On April 6, 1998, the Trustee filed a motion seeking authority to sell the estate's primary asset, the Property, to DBH Holdings, LLC ("DBH"), pursuant to a certain purchase and sale agreement between DBH and the Trustee, effective May 1, 1998, (the "DBH Contract"), subject to higher and better offers. See Plaintiff's Exhibit No. 10. By order dated May 19, 1998 (the "Procedures Order"), the Court granted the Trustee the authority to sell the Property, approved the DBH Contract, as modified by the terms of the Procedures Order, and approved certain notice and bidding procedures. Id. The Procedures Order required, among other things, that any prospective purchaser wishing to submit an offer to the Trustee to purchase the Property must submit the original offer to the Trustee with a copy to his counsel in the same form as the DBH Contract, as modified by the Procedures Order, on or before 5:00 p.m. on May 26, 1998.

On May 28, 1998, the Court conducted a hearing on a motion filed by Heritage Development Corporation, and joined in by Meruelo, which sought to extend the deadline for submission of contracts and deposits set forth in the Procedures Order. At the May 28, 1998 hearing and by Order dated May 29, 1998 (the "Extension Order"), the Court extended the deadlines contained in the Procedures Order for the benefit of, among others, Meruelo and ACP-JRL, as assignee of Heritage Development Corporation ("ACP"). See Plaintiff's Exhibit No. 13.

Prior to the final sale hearing held on June 2, 1998 ("Sale Hearing"), the following bidders submitted bids to the Trustee on the Property: DBH, Meruelo and ACP. Pursuant to the Procedures Order and Extension Order, Meruelo and ACP each submitted

a contract (the "Purchase and Sale Agreement" and the "ACP Agreement," respectively) to the Trustee that were identical to the DBH Contract in all material terms and each submitted deposits to the Trustee in the amount of $3,000,000. At the Sale Hearing, Meruelo modified the Purchase and Sale Agreement to increase the purchase price to $29,800,000; ACP modified the ACP Agreement to increase its purchase price to $29,700,000; and DBH chose not to increase its purchase price of $28,500,000.

By order dated June 10, 1998, the Court authorized the Trustee to sell the Property to Meruelo pursuant to the terms of the Purchase and Sale Agreement dated June 1, 1998, and Addendum thereto, (the "Purchase Agreement"), for a purchase price of $29,800,000. See Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9.

The closing was scheduled to occur on July 27, 1998, pursuant to the terms of the Purchase Agreement. The relevant portions of the Purchase Agreement include, but are not limited to, the following provisions:

> 1. Purchase and Sale. The Trustee agrees to sell to Purchase and Purchaser agrees to purchase from the Trustee that certain parcel of real property (the "Land") located in Dade County, Florida as more particularly described in Exhibit "A" attached to this Agreement together with all of the Trustee's right, title and interest in and to the following property and rights:
>
> > (a) all improvements, fixtures, equipment, furnishings and items of personal property located on the Land, including buildings, structures and other facilities (the "Improvements") (the Land and the Improvements are hereinafter collectively referred to as the "Realty");
> >
> > (b) all leases for space in the Realty (the "Leases");

> (c) all deposits, licenses, permits, authorizations, approvals and contract and general intangible rights pertaining to ownership and/or operation of the Realty. . . .
>
> . . .
>
> 9. Prorations. Real estate and personal property taxes, income and expenses, deposits, prepaid items, and all other proratable items,[1] shall be prorated as of the date of Closing. In the event the taxes for the year of Closing are unknown, the tax proration will be based upon the taxes for the prior year, based upon the maximum discounted amount . . . .
>
> . . .
>
> 19. Miscellaneous.
>
> (a) This Agreement shall be construed and governed in accordance with the laws of the State of Florida. All of the parties to this Agreement have participated fully in the negotiation and preparation hereof; and, accordingly, this Agreement shall not be more strictly construed against any one of the parties hereto.
>
> . . .

[1] The Trustee contends that this provision regarding proration was intended to provide that all income earned from the Property prior to the date of the closing, including accounts receivable, belonged to the estate, and that the estate was required to pay all expenses attributable to the period prior to the date of the closing. The Trustee, Jerrold A. Wish and Harold Lewis, so testified that the intent of the Purchase Agreement was that the seller would retain the earned and accrued pre-closing accounts receivable. Pursuant to this provision, Menada was entitled only to income, including accounts receivable, that was earned and accrued after the date of the closing. Prior to the closing, Menada did not contend that the pre-closing accounts receivable were included in the assets sold to it pursuant to the Purchase Agreement. Although Menada filed motions prior to the closing seeking clarification of certain provisions of the Purchase Agreement, (Plaintiff's Exhibit Nos. 12 and 15), Menada did not seek any clarification as to the term "general intangible rights." This term was not defined in the Purchase Agreement and is the point upon which the Defendants base their construction of the Purchase Agreement. It is the Defendants' contention that the disputed accounts receivable were sold to Menada under this term and provision of the Purchase Agreement and thus there was nothing to prorate concerning the subject accounts receivable with the Trustee at the time of closing.

> (c) In the event of any litigation between the parties under this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and court costs at all trial and appellate levels. The provisions of this subparagraph shall survive the Closing coextensively with other surviving provisions of this Agreement.

Id. (emphasis added)[2]

The relevant portions of the Addendum to the Purchase Agreement include, but are not limited to, the following provisions:

> 7. Prorations.
>
> . . .
>
> c. All base rents and other charges to tenants, including, without limitation, all "Additional Rent" consisting of contributions relative to real estate taxes, operating expenses, insurance premiums, common area maintenance charges and similar "pass-through" items paid by tenants, shall be prorated at Closing. At the Closing, no rents or other charges which are past due as of the Closing Date ("Delinquent Rents") shall be prorated in favor of the Trustee. For a period of thirty (30) days after the Closing, Purchaser shall use reasonable efforts to collect Delinquent Rents (which shall not include the filing of any lawsuits), and shall pay to Trustee such amounts it shall collect at any time which are attributable to a time prior to Closing, except that all Delinquent Rents collected by Purchaser shall be first applied to satisfy all current rents and additional rents and other payments due Purchaser. Trustee shall have the right both before and after Closing to sue any tenant for Delinquent Rents, and Trustee shall retain title to all Delinquent Rents, subject to the rights of Purchaser as set forth in the immediately preceding sentence. Trustee agrees to provide Purchaser no less than seven (7) days prior written notice of any Tenant which Trustee intends to sue. This paragraph shall survive the Closing.
>
> . . .
>
> 10. Closing. Paragraph 12 of the Agreement titled "Closing" is hereby deleted in its entirety and the following is substituted in lieu thereof.
>
> a. The closing ("Closing") of this transaction shall be held on

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[2] The term "general intangible rights" was undefined in the Purchase Agreement. From this lack of precise definition springs the instant litigation.

> a date and time specified by Purchaser, but not later than forty-five (45) days following the expiration of the Inspection Period (provided that Purchaser has elected to proceed) or forty-five (45) days following the date the Trustee has received an Order of the Bankruptcy Court approving the sale specifically to Purchaser pursuant to this Agreement at the Final Hearing (as defined in the Trustee's Motion to Approve Sale of Property Pursuant to Section 363 of the Bankruptcy Code and Approval of Bidding Procedures), whichever is later, at the offices of the attorneys for the Trustee, Greenberg Traurig Hoffman Lipoff Rosen & Quentel, P.A., at 1221 Brickell Avenue, Miami, Florida 33131.
>
> b. At Closing, the following documents shall be delivered by the Trustee:
>
> . . .
>
> (v) A Closing Statement.
>
> (vi) An Assignment of Contracts, Warranties, Licenses, Permits and Other Intangible Rights associated with the Property without warranty or recourse against the Trustee (it being understood, however, that Purchase shall have the right, in its discretion, to request that certain contracts not be assigned and/or rejected by the Bankruptcy Court as hereinafter provided). Said assignment shall not include cash but shall include pre-paid rent or other pre-paid expenses (which would be in the form of a credit to Purchaser on the Closing Statement). Insurance proceeds shall be included in the assignment to Purchaser for damage to the Property which occurs after April 6, 1998 (being the date of the Letter of Intent between the Trustee and Purchaser). As to any such damage, Trustee agrees to timely file a claim for all insurance amounts which may be payable, subject to prior notice to and approval of Purchaser.

Id.

On or about July 27, 1998, Meruelo assigned his interest in the Purchase Agreement to Menada, Inc. ("Menada"). On July 27, 1998, the Trustee and Menada, as assignee of Meruelo, closed on the sale of the Property (the "Closing"), and the Property was transferred to Menada.

At the Closing, a closing statement was executed by the parties (the "Closing

Statement"). At the Closing, the parties disputed whether the pre-Closing accounts receivable that had been earned and accrued by the Trustee up to the date of Closing (the "Accounts Receivable") belonged to the Trustee or to Menada. The Trustee believed that all Accounts Receivable earned and accrued up to the date of Closing would remain Property of the estate, and Menada would be entitled to all of the rents and Accounts Receivable accruing on the Property after the date of Closing. Menada argued it was entitled to the pre-Closing Accounts Receivable income because Accounts Receivable are general intangible rights by definition. Because the parties' interpretation of the contract was diametrically opposed regarding the Accounts Receivable, Menada and the Trustee discussed alternatives to the proration and delivery of the pre-Closing Accounts Receivable to the Trustee. Meruelo suggested the Trustee retain the rights to collect the pre-Closing Accounts Receivable directly from the Tour Operators. The Trustee agreed to this method of collecting the Accounts Receivable and the parties revised the Closing Statement to formalize their agreement. This agreement is memorialized in Footnote One of the Closing Statement. Footnote One summarized the parties' compromise and explained the agreed procedure for the collection of Accounts Receivable, specifically stating:

> Any amounts whatsoever collected by Buyer from any parties listed on Schedule 2 shall be first paid by Buyer to Seller until Seller has received the full amounts shown on Schedule 2 from each party shown thereon (less any amounts disputed by such party and not paid) regardless of the application intended or directed by such party. Buyer and Seller shall send to each party shown on Schedule 2 a joint letter prepared by Seller instructing each such party to send those amounts due as shown on Schedule 2 directly to Seller (and Seller may execute such letters on behalf of Buyer if Buyer fails to promptly sign such letters). Buyer shall

> provide Seller with monthly reports certifying all amounts whatsoever received by Buyer from such parties. Buyer shall not enter into any agreement or conduct with any of such parties that could cause any of such parties not to pay such amounts, and Buyer shall use best efforts to assist Seller in collecting and realizing upon such amounts, including opening up Buyer's records related thereto to Seller for inspection upon request. If all amounts are not paid to Seller, Seller may take any action (including the commencement of suit) to collect such amounts. Accordingly, no proration is being made hereon for such amounts.

See Plaintiff's Exhibit No. 7 and Defendants' Exhibit No. 28. The parties listed on Schedule 2 of the Closing Statement are hereinafter referred to as "Tour Operators."

At the Closing, the parties executed a General Assignment. See Plaintiff's Exhibit No. 8 and Defendants' Exhibit No. 30. The General Assignment provides, in pertinent part, that "Assignor is obligated to assign to Assignee any and all of Assignors right, title and interest in and to . . . intangible rights in any way related to the Realty, excluding . . . (g) accounts receivable as listed on Schedule 2 attached hereto and to the Closing Statement executed in connection herewith . . . ." Id. (emphasis supplied).

At the Closing, the parties executed an Agreement and Release (the "Release"). See Plaintiff's Exhibit No. 57.

Menada has collected Accounts Receivable and has placed Accounts Receivable into a segregated bank account.[3]

Paragraph 7(c) of the Addendum to the Purchase Agreement speaks to the rents from

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[3] The Trustee disputes whether Menada has placed all of the Accounts Receivable it has collected into such account, and whether Menada has spent some of the money in this account.

the Property that are past due as of the Closing date ("Delinquent Rents") and provides as follows:

> (c) All base rents and other charges to tenants, including, without limitation, all "Additional Rent" consisting of contributions relative to real estate taxes, operating expenses, insurance premiums, common area maintenance charges and similar "pass-through" items paid by tenants, shall be prorated at Closing. At the Closing, no rents or other charges which are past due as of the Closing Date ("Delinquent Rents") shall be prorated in favor of the Trustee. For a period of thirty (30) days after the Closing, Purchaser shall use reasonable efforts to collect Delinquent Rents (which shall not include the filing of any lawsuits), and shall pay to Trustee such amounts it shall collect at any time which are attributable to a time prior to Closing, except that all Delinquent Rents collected by Purchaser shall be first applied to satisfy all current rents and additional rents and other payments due Purchaser. Trustee shall have the right both before and after Closing to sue any tenant for Delinquent Rents, and Trustee shall retain title to all Delinquent Rents, subject to the rights of Purchaser as set forth in the immediately preceding sentence. Trustee agrees to provide Purchaser no less than seven (7) days prior written notice of any Tenant which Trustee intends to sue. This paragraph shall survive the Closing.

See Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9.

Menada has collected rents. Since the Closing, Menada has not paid any Delinquent Rents to the Trustee. Subsequent to the Closing, the Trustee has sent several demand letters to the tenants and Tour Operators, and has attempted to collect the Accounts Receivable and the Delinquent Rents.

The Trustee has not initiated any lawsuits against tenants or Tour Operators for amounts the Trustee claims are due for the period prior to July 27, 1998. Meruelo used a penthouse apartment at the Property (the "Penthouse") from approximately June 3, 1998 until Closing (July 27, 1998).

Meruelo provided a credit card imprint at the front desk of the Property at the time

he commenced his use of the Penthouse.

On July 24, 1998, the Trustee filed an emergency motion to approve sale of property to back-up bidder. See Plaintiff's Exhibit No. 50 and Defendants' Exhibit No. 19. On July 28, 1998, the Trustee filed a notice of withdrawal of the emergency motion. See Plaintiff's Exhibit No. 51.

The Court entered an order granting the motion of the Trustee, to compel discovery of Menada, dated October 15, 1998, which provides in part as follows:

> 4. Menada shall deliver to the Trustee on the 10th day of each month a monthly accounting of all of the checks, cash and other funds, and/or communication received by Menada from any of the tenants (collectively, the "Tenants") and any of the tour operators (collectively, the "Tour Operators") identified on the schedules attached to the Subpoenas as Schedules 1 and 2, respectively.
>
> 5. From and after September 16, 1998, Menada shall deliver and shall continue to deliver to the Trustee any checks, cash, funds and communication that it receives from any of the Tenants on account of rent owed through July 27, 1998, as provided by and pursuant to the Purchase and Sale Agreement, dated June 1, 1998.
>
> 6. From and after September 16, 1998, Menada shall deliver and shall continue to deliver to the Trustee any checks, cash, funds and communication that it receives from any of the Tour Operators on account of Accounts Receivable owed through July 27, 1998.

See Plaintiff's Exhibit No. 9.

B. Additional Findings of Fact Common to All Counts

On July 24, 1998, three days prior to the Closing, a draft of the Closing Statement was sent to Louis Zaretsky, real estate counsel for Menada in connection with Menada's purchase of the Property. See Plaintiff's Exhibit No. 21. As indicated by that draft, it was clearly contemplated that the Accounts Receivable were a proratable item that would not be

transferred to Menada without the corresponding prorated credit to the estate pursuant to the Trustee's view of the Purchase Agreement. The draft Closing Statement included a line for a "charge" to Menada for the amount of the Accounts Receivable. The line was left blank in the draft because the exact amount of the Accounts Receivable could not be determined until the date of the Closing. Zaretsky did not indicate any objection to this treatment of the Accounts Receivable on the drafts exchanged prior to the date of the Closing.

At the Closing, Menada's representatives for the first time argued that they believed they were entitled to the pre-Closing Accounts Receivable income. See Plaintiff's Exhibit No. 2, at ¶7; testimony of Linda G. Worton, Tr., at p. 586, line 8 through p. 593, line 14; testimony of Louis Zaretsky, at p. 343, lines 5-23.[4] Trustee's counsel took the position that the pre-Closing Accounts Receivable were to be retained by the estate, and that the estate would be entitled to a credit for the amount of such pre-Closing Accounts Receivable, based upon the income proration provision of paragraph 9 of the Purchase Agreement. See Plaintiff's Exhibit No. 6. After Menada consulted with its attorney, Menada changed its argument to one regarding the risk of collection of the Accounts Receivable. See Plaintiff's Exhibit No. 2, at ¶7; testimony of Linda G. Worton, Tr., at p. 586, line 8 through p. 593, line 14; testimony of Homero Meruelo, Sr. (father of Defendant, Meruelo), Tr., at p. 471, line 3 through p. 472, line 13.

Menada complained that it did not want to credit the Accounts Receivable to the Trustee at Closing because it did not want to assume the risk that these Accounts Receivable would not be paid. See Plaintiff's Exhibit No. 2, at ¶8; testimony of Linda G. Worton, Tr.,

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[4] References to the Trial Transcript are indicated as "Tr."

at p. 586, line 8 through p. 593, line 14; testimony of Homero Meruelo, Sr., Tr., at p. 471, line 3 through p. 472, line 13. The parties then discussed various mechanisms for proration and delivery of the Accounts Receivable to the Trustee. See Plaintiff's Exhibit No. 2, at ¶7. In order to resolve the dispute, Homero Meruelo, Sr. proposed a procedure whereby the Trustee would retain the right to collect the pre-Closing Accounts Receivable directly from the Tour Operators, such that the charge to Menada for the Accounts Receivable would be removed from the Closing Statement. (Testimony of Homero Meruelo, Sr., Tr., at p. 472, lines 10-13).

As an accommodation to Menada, and in order to ensure that the transaction closed, the Trustee agreed to the procedure proposed by Menada for the collection of pre-Closing Accounts Receivable by the Trustee. See Plaintiff's Exhibit No. 1, at ¶18; Plaintiff's Exhibit 2, at ¶8; testimony of Linda G. Worton, Tr., at p. 586, line 8 through p. 593, line 14. This compromise and agreement is contained in the Closing Statement. The Closing Statement identifies the prorations given at Closing and states that no proration is being made for Accounts Receivable solely for the reason stated in the Closing Statement. The Closing Statement contained the Accounts Receivable agreement in Footnote One, which has been previously quoted.

Menada agreed to the prorations and to the Accounts Receivable agreement at the Closing, and the Closing Statement was executed by Menada. See Plaintiff's Exhibit No. 1, at ¶19; Plaintiff's Exhibit No. 2, at ¶10; testimony of Linda G. Worton, Tr., at p. 586, line 8 through p. 593, line 14; testimony of Homero Meruelo, Sr., at p. 483, lines 21-22.

C. The Disputes Among the Parties

By way of his Complaint, the Trustee has asserted eight counts against Menada seeking to recover damages for Menada's conduct in collecting, and interfering with the Trustee's efforts to collect, approximately $125,000 in the subject Accounts Receivable and approximately $67,000 in Delinquent Rents, as follows: Count I (turnover of estate property under 11 U.S.C. § 542); Count II (willful violation of the automatic stay of 11 U.S.C. § 362(a)); Count III (avoidance and recovery of unauthorized post-petition transfers under 11 U.S.C. §§ 549 and 550); Count IV (breach of agreements); Count V (conversion); Count VI (tortious interference with business relationships); Count VII (fraud in the inducement); and Count VIII (unjust enrichment). See Defendants' Exhibit No. 39. In Count II, the Trustee seeks not only compensatory damages, but coercive sanctions and attorneys' fees as well. Id. He also seeks attorneys' fees under Count IV, and attorneys' fees and punitive damages under Counts V, VI, VII and VIII. Id. The Trustee has also asserted two counts against Meruelo, seeking to recover approximately $7,128 in rent from Meruelo for his use of the Penthouse from June 3, 1998 until July 27, 1998, as follows: Count IX (turnover of estate property) and Count X (breach of lease agreement). Id.

By way of its affirmative defenses, Menada contends that the Accounts Receivable agreement contained in Footnote One of the Closing Statement is unenforceable, because it lacked consideration, and because it was not approved by separate court order. Alternatively, Menada asserts that the Trustee and his representatives coerced Menada into signing the Closing Statement, by threatening forfeiture of Menada's $3,000,000 deposit. Menada alleges that its consent to the Closing Statement was obtained through duress. In addition, Menada contends that the Trustee agreed that the Accounts Receivable belonged to Menada

and that Menada would be entitled to the Accounts Receivable and could apply the Delinquent Rents as provided for in the Purchase Agreement. Thus, under the doctrines of waiver and estoppel, the Trustee may not assert any claim against Menada for Accounts Receivable or Delinquent Rents. Further, Menada argues that the Trustee fraudulently induced Menada into modifying the Purchase Agreement. Furthermore, Menada charges that Counts V, VI, and VII of the Complaint are barred by the economic loss rule because these actions are breach of contract claims and the Trustee cannot recover in tort for claims based on a contract. Moreover, Menada contends that the Trustee failed to state a claim of tortious interference because Menada purchased the business relationships at issue and thus cannot be held liable to interfering with relationships it purchased. Additionally, Menada asserts that all of the Trustee's claims in equity, including unjust enrichment and the request for an accounting, cannot be maintained because the Trustee has an adequate remedy at law, namely, a breach of contract claim. Menada also argues that the Trustee has failed to state causes of action for turnover under § 542, for violation of the automatic stay under § 362 and for avoidance of unauthorized post-petition transfer under § 549. Finally, Menada alleges that to the extent it is liable to the Trustee for any amount, such amount should be setoff and recouped against the money due by the Trustee to Menada.

Meruelo argues, by way of his affirmative defenses, that the Trustee agreed that he could use the Penthouse apartment for free and thus has waived any claim he may have against Meruelo for any alleged rents due. In addition, Meruelo contends that the Trustee is estopped from seeking any rents from Meruelo because the Trustee allegedly agreed to allow Meruelo to maintain an office and residence on the Property without requesting any rent from

him. Further, Meruelo alleges that any claims by the Trustee regarding rent to be paid by Meruelo are barred by fraudulent inducement. Finally, Meruelo contends that the Trustee cannot sustain a cause of action pursuant to § 542 because that section is confined to actions against parties holding property of the estate on the date of the filing of the petition. Meruelo argues that there is no property of the bankruptcy estate involved in this action, and even if the rent allegedly due from Meruelo is deemed to be property of the estate, it is post-petition property.

III. DISCUSSION

A. Count I - - Turnover of Estate Property

The Trustee alleges in this Count that the Accounts Receivable and the Delinquent Rents, as well as any proceeds of the Property that accrued prior to July 27, 1998, constitute property of the estate under 11 U.S.C. § 541. The Trustee asserts that Menada is in possession of the disputed Accounts Receivable and Delinquent Rents, and has asserted control over same. The Trustee requests that Menada be ordered to turn over the Accounts Receivable and Delinquent Rents pursuant to 11 U.S.C. § 542(a).

Menada argues, in its tenth affirmative defense, that the Trustee improperly seeks to employ turnover principles to recover the Accounts Receivable and Delinquent Rents because this property is the subject of a contract dispute. In short, Menada argues that the Trustee cannot utilize the turnover powers under § 542 to resolve the contract dispute with Menada.

The evidence presented by the Trustee at trial established that Menada is unlawfully in possession of the subject Accounts Receivable and Delinquent Rents which are property

of the estate, and that, despite repeated demands, Menada has failed to turn over the property. The Accounts Receivable and Delinquent Rents constitute property of the estate under § 541(a)(6), which specifically provides that property of the bankruptcy estate includes: "proceeds, product, offspring, rents, and or profits of or from property of the estate. . . ." 11 U.S.C. § 541(a)(6). Thus, the Accounts Receivable and Delinquent Rents constitute property of the estate under § 541(a)(6). Section 542 is applicable to actions against parties holding property of the estate on the dates of filing the petition, but also property of the estate which comes into being post-petition like the subject Accounts Receivable and Delinquent Rents. The Court notes that § 541(a)(6) expressly applies to rents from property of the estate which were generated from the subject Property, undisputedly the principal estate asset. The Court therefore grants judgment on Count I in favor of the Trustee and orders Menada to turnover the Accounts Receivable and Delinquent Rents in its possession. The Court denies Menada's tenth affirmative defense–failure to state a cause of action for turnover.

Under the Purchase Agreement and Addendum and Footnote One of the Closing Statement, the Accounts Receivable and the Delinquent Rents were not sold to Menada, and therefore are still property of the estate. See 11 U.S.C. § 541(a)(6). As such, the Trustee is authorized to seek their immediate turnover under § 542(a). The Trustee has clearly alleged that the Accounts Receivable constitute a matured debt which is owing. See Corzin v. Rawson (In re Rawson), 40 B.R. 167, 169 (Bankr. N.D. Ohio 1984) (trustee's complaint for breach of contract, unjust enrichment, turnover of property and fraudulent conveyance clearly alleged that defendant owed matured debt that was property of the estate; thus, mere fact that defendant denied allegations did not take trustee's action outside of scope of § 542).

The Bankruptcy Code statutory provision for turnover contained in 11 U.S.C. § 542(a) deals with property of the estate to be turned over to the case trustee. Turnover is not intended as a remedy to determine disputed rights of parties to property. Rather, it is intended as the remedy to obtain what is acknowledged to be property of the bankruptcy estate. Marlow v. Oakland Gin Co., Inc. (In re Julien Co.), 128 B. R. 987, 993 (Bankr. W.D. Tenn. 1991). Relief under § 542(a) is most frequently afforded to case trustees or debtors against creditors who are in actual or constructive possession of the subject collateral at the time of the bankruptcy petition is filed and who do not voluntarily surrender it. See Pileckas v. Marcucio, 156 B.R. 721 (N.D. N.Y. 1993). Thus, the burden is usually on the trustee or debtor seeking turnover, Groupe v. Hill (In re Hill), 156 B.R. 998, 1006 (Bankr. N.D. Ill. 1993), and the evidence must show that the asset in question is part of the bankruptcy estate. Mather v. Tailored Fabrics, Inc. (In re Himes), 179 B.R. 279, 282 (Bankr. E.D. Okla. 1995). Only property in which the debtor has an interest becomes part of the bankruptcy estate and can be made the subject of an order for turnover under § 542(a). Cates-Harman v. Stage (In re Stage), 85 B.R. 880, 881 (Bankr. M.D. Fla. 1988). It follows that if the debtor does not have the right to possess or use property at the commencement of a case, a turnover action cannot be a tool to acquire such rights. Creative Data Forms, Inc. v. Pennsylvania Minority Bus. Dev. Auth. (In re Creative Data Forms, Inc.), 41 B.R. 334, 336 (Bankr. E.D. Pa. 1984), aff'd 72 B.R. 619 (E.D. Pa. 1985), aff'd, 800 F.2d 1132 (3d Cir. 1986).

After the Closing, Menada refused to comply with the Accounts Receivable Agreement and the provisions of the Purchase Agreement regarding the Accounts Receivable and Delinquent Rents. Footnote One of the Closing Statement provided that the Trustee and

Menada would send a joint letter to the Accounts Receivable debtors, directing payment of all amounts due to the Trustee. See Trustee's Exhibit No. 7. The testimony and evidence presented showed that the Trustee sent the required letter to Menada for execution (Plaintiff's Exhibit No. 27), and Menada, simply ignoring the Accounts Receivable agreement, delivery of the letters, and numerous follow-up calls, refused to sign the joint letter. See Plaintiff's Exhibit No. 1, at ¶21 and Plaintiff's Exhibit No.3, at ¶7, 8.

Further, rather than cooperate and assist the Trustee with collection of the Accounts Receivable as agreed, Menada refused to provide the Trustee with any assistance or cooperation and interfered with the Trustee's efforts by, among other things: (i) contacting several of the Tour Operators and instructing them to send the checks to Menada rather than the Trustee (Plaintiff's Exhibit No. 1, at ¶23; Plaintiff's Exhibit No. 5; testimony of Elena Artamendi, Tr., at p. 53, line 8 through p. 56, line 23; testimony of Meruelo, Tr., at p. 292, line 10 through p. 295, line 16); (ii) keeping Accounts Receivable payments received from the Tour Operators (Plaintiff's Exhibit No. 1, at ¶23, 31; Defendants' Exhibit No. 57, at ¶19); (iii) directing Tour Operators not to pay the Trustee at all (Plaintiff's Exhibit No. 1, at ¶23; Plaintiff's Exhibit No. 5; testimony of Elena Artamendi, Tr., at p. 53, line 8 through p. 56, line 23; testimony of Homero Meruelo, Jr., Tr., at p. 292, line 10 through p. 295, line 16); (iv) refusing to provide the Trustee with information regarding the Accounts Receivable, until required to do so by Court Order (Plaintiff's Exhibit No. 1, at ¶26; Plaintiff's Exhibit No. 9); and (v) using the Accounts Receivable and proceeds thereof for its own purposes. See Plaintiff's Exhibit No. 1, at ¶23; Defendants' Exhibit No. 57, at ¶19; Plaintiff's Exhibits Nos. 31 and 32.

The evidence established that, in direct contravention of Footnote One of the Closing Statement, Menada contacted the Tour Operators and directed them to pay the Accounts Receivable to Menada, instead of paying such funds to the Trustee. Menada even went so far as to falsely represent to the Tour Operators that the Trustee granted Menada authority to negotiate and settle the Accounts Receivable debt, and, in some instances has even made settlements on the "Trustee's behalf." See Plaintiff's Exhibit No. 1, at ¶23-25; Plaintiff's Exhibit No. 5.

Having taken such affirmative steps to divert and keep the Accounts Receivable, Menada then refused to turn over to the Trustee any of the Accounts Receivable collected and ignored all of the many letters and telephone calls from the Trustee demanding turnover of the Accounts Receivable. See Plaintiff's Exhibit No. 1, at ¶25.

Menada's intent not to comply with its obligation to turn over the Accounts Receivable was further evidenced by its retention of such funds in a segregated account at Ocean Bank. See Plaintiff's Exhibit No. 30 and Defendants' Exhibit No. 43. The evidence showed that Menada used and applied some of the funds in the segregated account for its own use, including the purchase of furniture. See Trustee's Exhibit Nos. 31 and 32.

Further, despite Menada's agreement that the Trustee could inspect Menada's books and records relating to the Accounts Receivable upon request, Menada refused all of the Trustee's efforts to inspect any of Menada's records, and even refused to speak with the Trustee regarding the Accounts Receivable. See Plaintiff's Exhibit No. 1, at ¶26. Menada also refused to provide the monthly accounting it agreed to provide under the Footnote One of the Closing Statement despite requests for same, until ordered to do so by Court Order

pursuant to formal discovery requests. See Plaintiff's Exhibit No. 9.

The Trustee sent numerous requests by letter to Menada to gain access to the information that was and still is needed to collect the Accounts Receivable. In one such instance, the Trustee advised Menada by letter dated August 20, 1998 (Plaintiff's Exhibit No. 35), that his representative would be visiting the Property in accordance with Footnote One to inspect the books and records. However, when the Trustee's assistant arrived at the Property, Menada first refused to permit access to the Property, then denied that any such records were even present. Then, when the Trustee's representative pointed out that the books and records were on a nearby desk, Menada's accountant grabbed the books and records and fled the Property. See Plaintiff's Exhibit No. 1, at ¶27; Plaintiff's Exhibit No. 3, at ¶11-19.

The Trustee testified that for the four months prior to the Closing, he collected approximately 84% of the monthly rent from the tenants. See Plaintiff's Exhibit No. 1, at ¶29. With respect to the specific tenants that owed Delinquent Rents at the time of the Closing, the Trustee collected approximately 72% from such tenants on a monthly basis prior to the Closing. Id. As a direct result of Menada's interference with the Trustee's collection efforts, the Trustee has been able to collect only $1,968.42 of the $66,958.03 in the claimed Delinquent Rents that were outstanding on the date of the Closing, which represents approximately 3% of the total Delinquent Rents. Id.

With respect to Accounts Receivable, Menada has improperly collected and retained at least $83,185.04 in Accounts Receivable (although Menada claims to have collected $72,860), all of which constitutes property of the estate. The Trustee has been able to collect

only $28,437.25 of the $125,741.58 in Accounts Receivable that were outstanding on the day of the Closing, which represents only 23% of the Accounts Receivable. See Plaintiff's Exhibit No. 1, at ¶28.

Menada contends that the Trustee is abusing his powers to command the return of the Accounts Receivable and Delinquent Rents, and that the Trustee cannot use turnover proceedings to liquidate disputed contract claims. To support its position, Menada cites In re Charter Co., 913 F.2d 1575 (11th Cir. 1990). In Charter, the Eleventh Circuit refused to apply turnover principles where a contract dispute existed between the parties. The Charter court explained the purpose of § 542 stating:

> Clearly, Congress envisioned the turnover provision of § 542 of the Code, 11 U.S.C. § 542 (1988), to apply to tangible property and money due to the debtor without dispute which are fully matured and payable on demand . . . Congress intended to ease reorganization by allowing the debtor to obtain funds immediately necessary for survival — not all funds, only those not in dispute.

Charter, 913 F.2d at 1579 (citations omitted).

However, that rationale does not apply in this case because the parties resolved their contract dispute during the Closing when they negotiated Footnote One in the Closing Statement. Footnote One specified the exact manner in which the Accounts Receivable must be paid to the Trustee. The problem is not merely a contract dispute over funds allegedly owed to Trustee; the issue at hand is Menada's failure to forward to the Trustee property of the bankruptcy estate which came into its possession, despite its agreement to do so, as memorialized by the execution of the Closing Statement containing Footnote One. The evidence presented at trial established that certain funds remain in Menada's bank account in

spite of the Trustee's repeated demands to turn over this property and the Court's October 15, 1998 order compelling Menada to do just that. See Plaintiff's Exhibit No. 9.

Menada further relies on Ven-Mar of Indian River, Inc. v. Hancock (In re Ven-Mar Intern., Inc.), 166 B.R. 191 (Bankr. S.D. Fla 1994) (§ 542 is not available to trustees and debtors-in-possession to recover property subject to a contract dispute). The Court respectfully declines to apply Ven-Mar to these facts. In Ven-Mar, there was a dispute whether funds were even owed by the subject account debtor. However, in the instant case, any pre-Closing dispute or dispute at the Closing effectively ended when the terms of the Closing Statement were negotiated and Footnote One was inserted into the Closing Statement. It is untimely for Menada to argue that those funds it agreed to account for, and was ordered by the October 15, 1998 Order to provide to the Trustee, do not constitute property of the estate.

As part of its affirmative defenses, Menada asserts that the Trustee failed to state a cause of action for turnover because (1) the Accounts Receivable and Delinquent Rents are not property of the estate, and (2) turnover only applied against parties holding property at the time the petition is filed. As discussed previously, these arguments are incorrect and rejected as a matter of law. First as explained above, the Accounts Receivable and the Delinquent Rents belong to the estate pursuant to § 541(a)(6). Second, Menada is relying upon In re 31-33 Corp., 100 B.R. 744 (Bankr. E.D. Pa. 1989), to argue that the Trustee may not maintain an action against Menada under § 542(a) because Menada did not hold the property at issue at the time of the filing of the bankruptcy petition. 31-33 Corp., 100 B.R. at 747. The 31-33 Corp. case, however, arose under § 541(a)(1), not under §541(a)(6). To

the extent 31-33 Corp. holds otherwise, this Court declines to follow that ruling.

Section 542 contains no requirement that it be applied only in cases where property was in possession of a third party at the time of the filing. Section 542(a) states, in pertinent part, that "an entity . . . in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 . . . shall deliver to the trustee, and account for, such property or the value of such property . . . ." 11 U.S.C. § 542(a). This Court should interpret this section in accordance with its plain meaning. See United States v. Ron Pair Enters., Inc., 489 U.S. 235, 240-42 (1989). Under the plain meaning of the statute, Menada is holding property of the estate, i.e., the Accounts Receivable and Delinquent Rents, during the case, which the Trustee may use pursuant to the terms of the confirmed plan of reorganization. Accordingly, it should be compelled to turnover the Accounts Receivable and the Delinquent Rents. See also In re EZ Feed Cube Co., Ltd., 123 B.R. 69, 72 (Bankr. D. Or. 1991) (noting that the 31-33 Corp. court failed to take into account conflicting legislative history of § 542). Further, 31-33 Corp., as a Pennsylvania bankruptcy case, is not binding on this Court. As previously ordered pursuant to the October 15, 1998 Order, Menada must continue to account and provide to the Trustee all information relating to the pre-Closing, Accounts Receivable and Delinquent Rents. The Trustee has demonstrated to the Court that these funds constitute a matured debt which was due and owing at the time of the Closing.

For all these reasons, the Court enters judgment in the Trustee's favor on Count I of the Complaint, and orders Menada to turn over the pre-Closing Accounts Receivable and Delinquent Rents in its possession to the Trustee in the sums of $88,286.88 and $12.820.00,

respectively as discussed in further detail below with respect to Count IV. Menada is further ordered to update the Trustee with additional funds if and as they are received. The Court denies Menada's tenth affirmative defense.

B. **Count II - - Violation of the Automatic Stay**

In Count II of the Complaint, the Trustee seeks a determination that Menada has violated the automatic stay provisions of 11 U.S.C. § 362(a) by contacting third-party payors and instructing them to send money to the Property rather than the Trustee; in keeping revenues received from these third parties and converting such revenue for its own use; and intentionally interfering with the Trustee's ability to collect the Accounts Receivable and Delinquent Rents, for which the Trustee seeks compensatory damages, sanctions and attorneys' fees.

Menada has improperly exercised control over estate property in violation of the automatic stay by, among other things, contacting Tour Operators and residential tenants of the Property to instruct them to send payments to Menada rather than the Trustee; keeping Accounts Receivable and Delinquent Rents received from Tour Operators and residential tenants; and directing Tour Operators and residential tenants not to pay the Trustee. Further, the evidence proved that Menada has knowingly and intentionally misrepresented to both Tour Operators and residential tenants that it has the authority to negotiate the Accounts Receivable debt on behalf of the Trustee, and has negotiated such "settlements" on the Trustee's behalf. See Plaintiff's Exhibit No. 5. For these reasons, Menada's eleventh affirmative defense (failure to a state a cause of action for violation of the automatic stay) fails as a matter of law.

Menada also asserted as an affirmative defense that the Trustee may not recover damages for its violation of the automatic stay under 11 U.S.C. §§ 362(h) or 105(a) because the Trustee represents a corporate debtor and the Trustee has not alleged bad faith on the part of Menada.

Section 362(h) of the Bankruptcy Code provides:

> An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

11 U.S.C. § 362(h) (emphasis added). The Eleventh Circuit in Jove Engineering, Inc. v. IRS, 92 F.3d 1539 (11th Cir. 1996) has held that the term "individual" does not include corporations or other artificial entities. Specifically, the Jove court found that a corporate debtor is not entitled to relief under § 362(h) "because the term 'individual' is limited to natural persons and does not include corporations or other artificial entities." Id. at 1552-53. The Jove decision did not address whether a bankruptcy trustee constitutes an "individual" for purposes of § 362(h).

The Court finds that even though the Trustee at bar is a human being, he is not prosecuting this adversary proceeding on his own behalf nor has he proven any injury to himself personally. The relief under § 362(h) does not afford him a cause of action as the representative of the estate. See Martino v. First Nat. Bank in Harvey (In re Garofalo's Finer Foods, Inc.), 164 B.R. 955, 972-73 (Bankr. N.D. Ill. 1994), aff'd in part and rev'd in part, 186 B.R. 414 (N.D. Ill. 1995). Accord In re Pace, 56 F.3d 1170, 1175-76 (9th Cir. 1995). Consequently, the uninjured Trustee is not entitled to compensatory damages, including attorneys' fees, under § 362(h). The estate will be made whole by the award of proven actual

damages made hereinafter under other Counts and the taxation and assessment of allowed attorneys fees and costs under the Purchase Agreement.

Section 105(a) of the Bankruptcy Code provides:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

The Jove court has stated that "§ 105(a) grants courts independent statutory powers to award monetary and other forms of relief for automatic stay violations to the extent such awards are 'necessary or appropriate' to carry out the provisions of the Bankruptcy Code." 92 F.3d at 1554. Thus, the Court disagrees with Menada's contention that § 105(a) is unavailable to the Trustee. However, the Court will not exercise its discretion under § 105(a) and award damages under that section to the Trustee because such relief is not "necessary or appropriate" to carry out the provisions of the Bankruptcy Code when the damages incurred by the estate are recoverable in the awards made in favor of the Trustee under other Counts. Consequently, the Court enters judgment in favor of Menada on Count II of the Complaint.

C. Count III - - Avoidance

The Trustee alleged and has proven by a preponderance of the credible evidence that Menada's unauthorized transfer of the Accounts Receivable and the Delinquent Rents constituted unauthorized and unlawful post-petition transfers. Hence, judgment is therefore granted in the Trustee's favor as to Count III to avoid these transfers under 11 U.S.C. § 549

and to recover same under 11 U.S.C. § 550

Section 549(a) provides:

> (a) Except as provided in subsection (b) or (c) of this section, the trustee may avoid a transfer of property of the estate--
> (1) that occurs after the commencement of the case; and
> (2)(A) that is authorized only under section 303(f) or 542(c) of this title; or
> (B) that is not authorized under this title or by the court.

11 U.S.C. § 549(a).

Section 550(a) provides in relevant part:

> (a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section . . . 549 . . . of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from --
> (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or
> (2) any immediate or mediate transferee of such initial transferee.

11 U.S.C. § 550(a).

There is no dispute that pre-Closing, the Trustee was in actual control and possession of the Property and actively in the process of collecting the unpaid Accounts Receivable and Delinquent Rents owed by the tenants and Tour Operators. They leased the various units in the Property and generated the unpaid amount of pre-Closing funds which are the disputed Accounts Receivable uncollected by the Trustee, some of which have been collected and retained by Menada.

The central issue in determining whether a transfer of property is avoidable under § 549 is establishing whether there has been a transfer of an interest of the debtor in property.

Tavormina v. Capital Factors, Inc. (In re Jarax Int'l, Inc.), 164 B.R. 180, 186 (Bankr. S.D. Fla. 1993) (citing In re Russell, 927 F.2d 413, 417-18 (8th Cir. 1991)).

There are four elements to a § 549 claim: (i) the transfer must take place after the bankruptcy case begins; (ii) the property transferred must be property of the estate; (iii) the debtor must transfer the property; and (iv) the transfer must not be authorized by any court or statute. Russell, 927 F.2d at 417-18. Any entity asserting the validity of a transfer under § 549 shall have the burden of proof. See Fed. R. Bankr. P. 6001.

Here, all four elements are present and have been proved by a preponderance of the evidence. Menada's unlawful retention, collection and failure to transfer to the Trustee the prorated pre-Closing Accounts Receivable and Delinquent Rents are avoidable transfers that Menada subsequently collected pursuant to § 549(a), which are recoverable under § 550. As to the first element, Menada admitted that the transfers took place post-petition. With regard to the second element, the Court has previously noted that the subject Accounts Receivable and Delinquent Rents constitute property of the estate under § 541(a)(6). The property interest at issue here was clearly determined to be owned by the Trustee as evidenced by both the October 15, 1998 Order and Footnote One of the Closing Statement. See Plaintiff's Exhibit Nos. 7 and 9.

With respect to the third element, the Court finds the property at issue was transferred as a result of Menada's improper actions. The Bankruptcy Code defines "transfer" as "every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with property or with an interest in property. . . ." 11 U.S.C. § 101(54). Under this broad definition, the involuntary taking and retention of the estate's property by Menada

without remitting the prorated portion of the pre-Closing Accounts Receivable as well as the Delinquent Rents, clearly constitutes a transfer. Menada's twelfth affirmative defense (failure to state a cause of action for avoidance of unauthorized post-petition transfer) incorrectly asserts that the Trustee fails to state a cause of action for turnover because the property in dispute was held by third parties who allegedly transferred the property, and because Menada did not transfer the property in dispute, the Trustee did not allege that an unauthorized post-petition transfer occurred. This argument fails because it ignores the above-cited broad definition of transfer under the Bankruptcy Code. Menada's concerted efforts to obtain funds belonging to the estate from third parties is a "transfer" under § 101(54), and is an avoidable post-petition transfer pursuant to § 549(a). The Trustee is entitled to recover such amounts from Menada, as the "original transferee" under § 550.

Finally, as to the fourth element, this transfer and retention of the Accounts Receivable and Delinquent Rents by Menada has not be authorized by the Court. The parties have stipulated that Menada received certain Accounts Receivable and Delinquent Rents and the Court is aware of Menada's flagrant disregard of its October 15, 1998 Order. See Plaintiff's Exhibit No. 9. Accordingly, the Court concludes all four elements of § 549 are present and proven. The Court will therefore enter judgment in the Trustee's favor as to Count III, and avoid the post-petition transfers of the Accounts Receivable and Delinquent Rents. The Court hereby denies Menada's twelfth affirmative defense.

D. Count IV - - Breach of Contract

The Trustee alleges in Count IV that Menada violated the terms of the Purchase Agreement and Addendum and Footnote One of the Closing Statement with respect to its

collection and retention of the Accounts Receivable and Delinquent Rents. Menada argues that the evidence adduced at trial demonstrated that all the Delinquent Rents collected by it were applied in accordance with Paragraph 7(c) of the Addendum. Menada contends that the Trustee failed to demonstrate that it collected the Delinquent Rents and applied them to any charge other than "current rents, additional rents or other payments due [Menada]." For these reasons, Menada states that the Trustee's breach of contract claim must fail. Further, Menada asserts that the Accounts Receivable Agreement is not enforceable because (1) it lacked consideration and (2) it was a product of coercion and threats asserted upon Menada by the Trustee prior to the Closing.

In order to recover on a claim for breach of contract in Florida, the Trustee must establish: (1) the existence of a contract; (2) breach thereof; and (3) damages flowing from the breach. Boim v. National Data Prods., Inc., 932 F. Supp. 1402, 1405 (M.D. Fla. 1996) (citing Knowles v. C. I. T. Corp., 346 So.2d 1042 (1st Dist. Ct. App. 1977)). The Court holds that the Trustee has established all three elements.

The Court finds that the Accounts Receivable agreement contained within Footnote One of the Closing Statement constitutes a valid and enforceable agreement for at least three reasons: (1) there was valid consideration for the Accounts Receivable agreement; (2) the real estate doctrine of merger provides that the Closing documents control and govern the relationship between the parties; and (3) Menada has failed to satisfy its burden of proving economic duress.

1. There Was Valid Consideration for the Accounts Receivable Agreement Contained at Footnote One of the Closing Statement

Under Florida law, "the settlement of a disputed claim may constitute a valid consideration for an accord and satisfaction, a compromise agreement or a new contract." Bryan, Keefe & Co. v. Howell,109 So. 593, 596 (Fla. 1926); 11 Fla. Jur. 2d Contracts, § 91 (1998) ("The settlement of a disputed claim may form a valid consideration for a new or substituted contract between the parties, at least where the claim is well-founded."). This is particularly so because "[t]he law favors settlement of disputes and the avoidance of litigation." IMHOF v. Nationwide Mutual Ins. Co., 643 So.2d 617, 618 (Fla. 1994) (citation omitted). All of the witnesses who testified regarding the events at the Closing, including James S. Feltman, Jerrold A. Wish, Linda G. Worton, Homero Meruelo, Sr., Belinda Meruelo and Louis Zaretsky, affirmed that the parties ultimately agreed to a different treatment of the Accounts Receivable than either party had anticipated prior to the Closing. The Accounts Receivable agreement memorialized the settlement terms as to ownership of the pre-Closing Accounts Receivable, the assumption of the risk of collection, and the collection efforts to be undertaken after the Closing from the tenants and Tour Operators who owed the unpaid Accounts Receivable.

At the Closing, the Trustee took the position that pre-Closing Accounts Receivable were to be retained by the estate, and that the estate would be entitled to a credit for the amount of such pre-Closing Accounts Receivable, based upon the income proration provision of paragraph 9 of the Purchase Agreement. See Trustee's Exhibit Nos. 6 and 1, at ¶11. Menada's original position was that the term "general intangible rights," as used in paragraph 1(c) of the Purchase Agreement, transferred to Menada any rights in pre-Closing Accounts

Receivable as part of the sale. After extensive debate and consultation with counsel, Menada changed its position. Menada claimed it should not be required to assume the risk of collecting the Accounts Receivable, and that therefore it should not be required to pay for them at closing with a charge to Menada on the Closing Statement. See Trustee's Exhibit No. 1, at ¶18. It is clear that both parties believed they were entitled to keep the Accounts Receivable, accrued, but unpaid, as of the Closing.

Because both parties compromised their positions to resolve the dispute and finalize the Sale, the compromise embodied in the Closing Statement and General Assignment constitutes adequate consideration. In Uwanawich v. Gaudini, 334 So.2d 116, 118 (Fla. 3d Dist. Ct. App. 1976), the Court referred to "the well-established rule that where a party has a bona fide belief that he has a legal right, a forbearance to enforce that right may be consideration for a new agreement." Id. (citation omitted). Footnote One of the Closing Statement contains a compromise and the final agreement of the parties. This conclusion is supported by the trial testimony of Homero Meruelo, Sr.: "I had a big argument with [the Trustee] until we both agreed on the same terminology." See testimony of Homero Meruelo, Sr., Tr., at p. 483, lines 21-22. This agreement regarding the pre-Closing Accounts Receivable was also memorialized in the General Assignment. See Plaintiff's Exhibit No. 8 and Defendants' Exhibit No. 30.

Thus, the principal issues that were argued and discussed by the parties at this trial -- i.e., whether Accounts Receivable constitute an item of income that was to be prorated as of the Closing date, or whether Accounts Receivable constituted a general intangible which was to be transferred without provocation to Menada -- were thoroughly discussed and

resolved by the parties at the Closing. Such settlement and resolution of those disputed claims regarding the disposition of the Accounts Receivable constitutes valid consideration under Florida law, and constitutes an accord and satisfaction. The Court concludes that trial testimony and the several drafts of the Closing Statement that were prepared on the day of the Closing. (Plaintiff's Exhibit No. 22), demonstrate that the Accounts Receivable agreement embodied in the Closing Statement was clearly the product of compromise and negotiation between the parties, with each side making concessions. Accordingly, the Court finds the provision dealing with the subject Accounts Receivable contained in Footnote One of the Closing Statement is a valid and enforceable agreement between the parties supported by valid consideration. Hence, Menada's second affirmative defense regarding a lack of consideration is overruled.

2. The Real Estate Doctrine of Merger Provides That the Closing Documents Control and Govern the Relationship Between the Parties

The issue of whether the Closing documents control and govern the relationship between the parties requires the application of the common law doctrine of merger. Under the real estate doctrine of merger, applicable to real estate transactions in Florida, preliminary agreements and understandings relative to the sale of the property merge into the deed by which the original contract becomes executed. 19 Fla. Jur. 2d Deeds § 145 (1980). In that context, merger means that "'all preliminary agreements and understandings leading up to the sale of real estate merge in the deed.'" Whitehurst v. Camp, 699 So.2d 679, 683 (Fla. 1997) (quoting Southpointe Dev., Inc. v. Cruikshank, 484 So.2d 1361, 1362 (Fla. 2d Dist. Ct. App. 1986)). The Florida Supreme Court explained the concept of merger as it relates to real estate transactions:

> [P]roperty transactions are inherently a "two-act" play in which the two acts are separated by a lengthy "intermission"; that the parties may during the intermission actually or impliedly change their initial agreement ("Act I"); and that whether or not they did in fact evoke a change, the second act (the closing) is deemed to carry out and fulfill the first act (the contract), so that the first act has been "swallowed up" and is of no further legal effect.

Whitehurst, 699 So. 2d at 683 (citations omitted). Therefore, as with the separate and discrete component parts of real estate transactions, pertaining to the sale of the Property to Menada, the preliminary agreements and understanding set forth in the Purchase Agreement, other than those that explicitly provide that they survive the Closing, were merged into the Closing Statement and other Closing documents such that they no longer have any force or effect. Sun First Nat. Bank of Orlando v. Grinnell, 416 So.2d 829, 834 (Fla. 5th Dist. Ct. App. 1982) (after closing, original sale contract was "fulfilled and exhausted" such that it "ceased to be a contract" and "has historical, but no legal, significance"). Florida case law supports the Trustee's position. In Uwanawich, 334 So.2d 116, the court held that the closing of a real estate deal merges all of the prior agreements concerning the sale into the new contract between the parties. Id. at 118. See also St. Clair v. City Bank & Trust of St. Petersburg, 175 So.2d 791, 792 (Fla. 2d Dist. Ct. App. 1965) (it is the general rule that preliminary agreements and understanding concerning the sale of realty merge in the deed).

Menada attempts to argue that the merger rule under Florida law does not apply in this particular case because (1) it only applies to residential real estate sales, not commercial real estate sales; (2) the merger rule only applies to deeds, and not to other closing documents, such as closing statements or general assignments; and (3) the provisions of paragraph 10 of the Addendum to the Purchase Agreement. (Plaintiff's Exhibit No. 6)

regarding an assignment, upon which Menada relies, was not intended to be performed by the Closing documents, including the General Assignment. See Plaintiff's Exhibit No. 8.

None of the Menada's arguments have merit. First, under Fraser v. Schoenfeld, 364 So.2d 533 (Fla. 3d Dist. Ct. App. 1978), the doctrine of merger does apply to commercial real estate transactions, as well as residential real estate transactions. The sale transaction in Fraser, like the sale transaction in this case, was the sale of an apartment building in Miami Beach. In that case, the purchaser of the business sued the seller for defects in the building, based upon a covenant in the original contract for sale which provided that there were no code violations. As in the present case, the purchaser claimed that seller threatened a lawsuit if the purchaser failed to close. The court held:

> [W]here, as here, the purchaser has knowledge of claimed violations and, thereafter, closes the deal, he is precluded by the doctrine of merger from a subsequent suit on a covenant contained in the contract of sale.

Id. at 534 (citations omitted). The facts are similar here. Menada representatives consulted with counsel, decided to close the deal, negotiated a compromise at the Closing, and executed appropriate Closing documents, including the Closing Statement and General Assignment, to effectuate the Sale. Accordingly, Menada is bound by the doctrine of merger from relying upon the latent ambiguity in the Purchase Agreement and is held to the provisions of the Closing Statement which are consistent and valid. Florida law states that the merger doctrine applies to all closing documents, not just deeds. See Uwanawich, 334 So.2d at 118. ("[I]t is held that a closing of a real estate deal merges all of the prior agreements concerning the sale into the new contact between the parties.").

3. Menada Has Not Suffered Economic Duress

Menada has failed to persuade the Court that it suffered economic duress and that it should therefore be relieved of the compromise it agreed to in the Accounts Receivable agreement. Under the doctrine of economic duress, the Court permits an aggrieved party to rescind an agreement which was entered into under financial anxiety or undue pressure. Economic duress does not appear to be applicable to the facts of this case, under the test set forth in Chouinard v. Chouinard, 568 F.2d 430 (5th Cir. 1978). In the Chouinard case, the plaintiff brought an action to set aside two promissory notes they had executed to the defendants. The court held that where financial distress in which the plaintiffs found themselves and their company was of their own making, the settlement agreement entered into was not voidable on the grounds of economic duress, absent a wrongful act by the opposing party to create and take advantage of an untenable situation. Specifically, the court stated:

> A contract is voidable where undue or unjust advantage has been taken of a person's economic necessity or distress to coerce him into making the agreement. However, a duress claim of this nature must be based on the acts or conduct of the opposite party and not merely on the necessities of the purported victim. Thus, the mere fact that a person enters into a contract as a result of the pressure of business circumstances, financial embarrassment, or economic

> necessity is not sufficient. Unless wrongful or unlawful pressure is applied, there is no business compulsion or economic duress, and such a claim cannot be predicated on a demand which is lawful or on the insistence of a legal right.

Id. at 434 (emphasis supplied) (footnotes and citations omitted). In order to prevail under the affirmative defense of economic duress, Florida courts generally look to three basic elements in determining whether a contracting party is entitled to avoid the otherwise binding effect of its agreement. Specifically, the Court must determine if there was (1) a wrongful act which (2) overcomes the will of a person (3) who has no adequate legal remedy to protect his interests. In re Frenz Enters., 89 B.R. 220, 222 (Bankr. M.D. Fla. 1988) (citation omitted).

It is abundantly clear to the Court that both sides to this dispute were experienced and knowledgeable in commercial real estate transactions and were represented by experienced counsel both before and after the Closing on the Property. No novices or untried rookies were involved in this deal and its Closing. Menada's representatives, including Homero F. Meruelo, Sr., Belinda Meruelo and Louis Zaretsky, admitted at trial that neither the Trustee nor his agents made any threats to Menada at the Closing to pressure Menada into signing the Purchase Agreement. Menada has failed to establish that the Trustee wrongfully coerced the Menada representatives into signing the Closing Statement and the General Assignment. Menada's representatives acknowledged that neither the Trustee nor his representatives threatened Menada with default or forfeiture of its deposit at the Closing. The parties negotiated the terms of the Closing Statement, and reached the agreement that appears as Footnote One of the Closing Statement. Menada was represented by qualified counsel at the Closing, and actually consulted with three attorneys on the day of the Closing. Menada had

ample opportunity to discuss and consider the issues at Closing with its attorneys, and never requested to contact the Court for relief or postpone the Closing in order to address the issue regarding Accounts Receivable. Each of Menada's representatives admitted that neither the Trustee nor his representatives ever threatened at the Closing to seek a default against Menada. Menada's representatives also admitted that neither the Trustee nor his representatives ever threatened forfeiture of Menada's deposit at the Closing. Homero Meruelo, Sr. testified that he proposed the Accounts Receivable agreement at the Closing. (Testimony of Homero Meruelo, Sr., Tr., at p. 472, lines 12-13). This statement is consistent with the testimony of the Trustee's counsel, Linda G. Worton. (Testimony of Linda G. Worton, Tr., at p. 586-94). Hard bargaining does not constitute duress. Chouinard, 568 F.2d at 434. ("Mere hard bargaining positions, if lawful, and the press of financial circumstances, not caused by the [party against whom the contract is sought to be voided], will not be deemed duress."). The Trustee made concessions to Menada at the Closing and relinquished his original position that he would be entitled to a credit at the Closing for the outstanding pre-Closing Accounts Receivable. See Plaintiff's Exhibit No. 1, at ¶18, Plaintiff's Exhibit No. 2, at ¶6-10; Plaintiff's Exhibit No. 22. The Court finds that the Trustee did not commit a wrongful act.

Menada alleged that a "threat" took place three days prior to the Closing. According to the testimony of Louis Zaretsky, the alleged "threat" made by Linda Worton on July 24, 1998, was that the Trustee would not allow Homero Meruelo, Sr. to assign the Purchase Agreement to Menada, and would attempt to hold the Meruelos in default if they attempted an assignment. The Trustee, however, did allow the assignment to Menada without objection

and closed with Menada on July 27, 1998. (Testimony of Linda G. Worton, Tr., at p. 584, lines 11-23). The Court does not find that this action overcame the will of Menada's representatives at the Closing. Similarly, the Court does not deem the Trustee's filing of an emergency motion to approve sale to property backup bidder (Plaintiff's Exhibit No. 50) to constitute an unlawful act by the Trustee. As indicated by the Trustee (testimony of James S. Feltman, Tr., at p. 164, line 20 through p. 165, line 17) and Linda G. Worton (Tr., at p. 580, line 13 through p. 581, line 12) at trial, the Trustee's emergency motion was filed in response to certain actions taken by Menada which caused the Trustee and his counsel to become concerned that Menada would not attend the Closing or close on the Property at all, so the motion was filed to expedite closing and sale to the next highest bidder on the Property, a not uncommon prophylactic device employed in bankruptcy sales. Nevertheless, the Trustee did not request a hearing on the emergency motion until after the scheduled Closing date, and requested such relief only "in the event Meruelo fails to close on July 27, 1998." See Plaintiff's Exhibit No. 50, at p. 6. The motion was in fact withdrawn the date after Closing. See Plaintiff's Exhibit No. 51.

The Court is somewhat surprised that the Trustee bothered to file this motion when the order approving the Sale had already given the Trustee authority to retain Menada's $3,000,000 deposit and to sell the Property to the backup bidder in the event the Meruelo's defaulted under the Purchase Agreement. See Plaintiff's Exhibit No. 10, at ¶9(g). Nevertheless, the Court is not convinced that the Trustee acted unlawfully or somehow improperly coerced Menada to close on the Property.

As indicated by the testimony at trial, Menada's representatives–Homero Meruelo,

Sr. and Belinda Meruelo -- are sophisticated real estate investors who have been involved in the ownership and operation of commercial real estate since at least 1971. See Defendants' Exhibit No. 57, at ¶3, and Defendants' Exhibit No. 58, at ¶2. They testified that they are good negotiators and that they are not easily manipulated. That fact was evidenced by their demeanor and testimony on the stand. In addition, Menada's real estate counsel, Louis Zaretsky, attended the Closing, participated in the negotiations and reviewed the form of agreement that appears as Footnote One to the Closing Statement. In Frenz, 89 B.R. 220, the court denied a duress defense where defendant was "an experienced businessman who, before signing the release, sought the advise of independent counsel". Id. at 222. Here, Menada was represented by capable business people and had the assistance of three experienced attorneys. Accordingly, the Court concludes that the facts clearly indicate that the Trustee's conduct did not overcome Menada's representatives. The Court overrules Menada's sixth affirmative defense.

4. Menada Had a Legal Remedy to Protect its Interests

If Menada truly believed that it was being forced to do something that it was not legally obligated to do, there were numerous legal remedies to which it could have resorted. Menada could have declared the Trustee in default and could have sought the remedies available to it under paragraph 8 of the Purchase Agreement. See Plaintiff's Exhibit No. 6. Moreover, Menada could have requested emergency relief from the Court prior to or on the day of Closing. Menada could have requested to continue the Closing until the Accounts Receivable issue could be addressed by the Court. However, Menada did not select any of these alternatives. Both the original Sale Order (Plaintiff's Exhibit No. 10, at ¶9(g)) and the

Order approving the sale to Menada (Plaintiff's Exhibit No. 14, at ¶ 10) make clear that Menada would be in default and lose its deposit only if it failed to close "in accordance with the relevant contract" or "pursuant to the terms of the Meruelo Contract." If Menada truly believed that it was entitled to all the pre-Closing Accounts Receivable, and had refused to close on this basis, then it would not have been in default, and would not lose its deposit. It is clear to the Court that the economic leverage of the deal shifted at the time of the Closing. Prior thereto, the Trustee had possession of both the deposit and the Property and was in the process of collecting rents therefrom. After the Closing, Menada had title to and possession of the Property and began to collect the rents therefrom. The deposit was no longer at risk because Menada had received a credit therefor against the purchase price balance paid at Closing. The unpaid pre-Closing Accounts Receivable thereafter were collected by Menada, but the prorated portions, accrued but unpaid up to July 27, 1998, were not remitted back to the Trustee per the terms of the Closing Statement and General Assignment. The tenants and Tour Operators were dealing with their new landlord, Menada, and no longer with their former landlord, the Trustee. Thus, post-Closing, the economic leverage shifted from the Trustee to Menada.

It is undisputed that nothing in the original Purchase Agreement expressly provides that "accounts receivable" will be transferred to the purchaser. See Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9. In fact, the term "accounts receivable" does not appear anywhere in the Purchase Agreement. The evidence also indicates that DBH, the original "stalking horse" bidder and one of the bidders at the final Sale Hearing, did not interpret the Purchase Agreement to provide for a transfer of the Accounts Receivable, and did not bid at

the auction with the understanding that Accounts Receivable were included in the sale. See Plaintiff's Exhibit No. 4, at ¶5-7. At no time prior to the Closing did Menada assert that the Purchase Agreement or the Addendum was ambiguous, nor did Menada seek clarification from the Court that Accounts Receivable were included within the sale.

In light of its construction of the Purchase Agreement terms, to the extent that Menada believed that any ambiguity existed as to the Accounts Receivable, it was Menada's obligation, not the Trustee's, to seek clarification in this regard prior to the Sale Hearing. See In re Silver Bros. Co., 179 B.R. 986, 1007 (Bankr. D.N.H. 1995); In re Dartmouth Audio, Inc., 42 B.R. 871, 875 (Bankr. D.N.H. 1984). Menada filed a motion in June, 1998, shortly after the Sale Hearing (Plaintiff's Exhibit No. 15), seeking clarification of the Purchase Agreement (Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9) and the Sale Order (Plaintiff's Exhibit No. 14) with respect to certain lease and improvement issues. Menada, however, failed to seek any clarification as to the term "general intangible rights" to include the subject Accounts Receivable.

The Court concludes that the estate retained the rights to the pre-Closing Accounts Receivable. The Purchase Agreement contains a specific provision regard "Prorations." See Plaintiff's Exhibit No. 6, at ¶9 and Defendants' Exhibit No. 9. The treatment of Delinquent Rents in the Purchase Agreement also supports the Trustee's contention that he retained the right to the Accounts Receivable. Menada admits that Delinquent Rents are "the item most akin to accounts receivable." See Menada's Closing Argument, at p. 7. Pursuant to paragraph 7(c) of the Addendum (Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9), the Trustee maintained the right to all Delinquent Rents that were earned and accrued (but

not paid) prior to the Closing date. ("Trustee shall retain title to all Delinquent Rents"). Pursuant to the procedures set forth in paragraph 7(c) of the Addendum, Menada was to use "reasonable efforts" to collect Delinquent Rents after the Closing, and was required to "pay to Trustee such amounts it shall collect at any time which are attributable to a time prior to Closing . . . ." Id. Because Menada was to collect and turn over to the Trustee the Delinquent Rents it received from tenants, paragraph 7(c) states that there would be no proration, i.e. credit, in favor of the Trustee for Delinquent Rents at the Closing. The fair inference that arises from this provision is that there would have been a proration in favor of the Trustee for Delinquent Rents at Closing (the item most similar to the Accounts Receivable), but for the alternative procedure set forth in paragraph 7(c) of the Addendum, which was designed to assure that the Trustee would receive the value of the earned and accrued pre-Closing Delinquent Rents through post-Closing collections.

Menada argues that the plain meaning of the Purchase Agreement's terms include the Accounts Receivable as part of the property being purchased. In particular, Menada relies upon section 1(c) of the Purchase Agreement, which provides that: "The Trustee agrees to sell to Purchaser and Purchaser agrees to purchase from the Trustee . . . all of the Trustee's right, title and interest in and to the following property and rights. . . . (c) all deposits, licenses, permits, authorizations, approvals and contract and general intangible rights pertaining to ownership and/or operation of the Realty. . . ." See Plaintiff's Exhibit No. 6, at ¶1(c) and Defendants' Exhibit No. 9.

As defined by the Uniform Commercial Code, a "general intangible" means "any personal property, including things in action, other than goods, accounts, chattel paper, documents, instruments and money." See Fla. Stat. § 679.106 (emphasis supplied). "Account," in turn, is defined under the UCC as "any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper regardless of whether it has been earned by performance." Id. Thus, the term "general intangible," under this most common and well-understood statutory definition excludes accounts. Black's Law Dictionary also defines "general intangibles" as follows: "Any personal property (including things in action) other than goods, accounts, contract rights, chattel paper, documents, instruments, and money." Black's Law Dictionary, at 684 (6th ed. 1990) (emphasis supplied). See, e.g., Flannigan's Enters, Inc. v. Barnett Bank of Naples, 614 So.2d 1198, 1201 (Fla. 5th Dist. Ct. App. 1993); First New England Fin. Corp. v. Woffard, 421 So.2d 590, 594 n.8 (Fla. 5th Dist. Ct. App. 1982); Citizens Nat. Bank of Orlando v. Bornstein, 374 So.2d 6, 11 (Fla. 1979); In re Dillard Ford, Inc., 940 F.2d 1507, 1510 (11th Cir. 1991); Atlantic States Constr., Inc. v. Hand, Arendall, Bedsole, Greaves & Johnston, 892 F.2d 1530, 1536 n.14 (11th Cir. 1990); In re ESM Gov't Sec., Inc., 812 F.2d 1374, 1377 (11th Cir. 1987); NCNB Nat. Bank of Fla. v. Fogarty (In re Fogarty), 114 B.R. 788, 792 (Bankr. S.D. Fla. 1990).

In interpreting a contract, a court must give words their ordinary and well understood meaning. See Hussman Corp. v. UPS Truck Leasing, Inc., 549 So.2d 215, 217 (Fla. 5th Dist. Ct. App. 1989); Royal Inv. & Dev. Corp. v. Monty's Air-Conditioning Serv., Inc., 511 So.2d 419, 421 (Fla. 4th Dist. Ct. App. 1987); Gamble v. Mills, 483 So.2d 826, 829

(Fla. 4th Dist. Ct. App. 1986); Eastern Ins. Co. v. Austin, 396 So.2d 823, 825 (Fla. 4th Dist. Ct. App. 1981); Taylor v. Florida Power & Light Co., 407 So.2d 293, 294 (Fla..2d Dist. Ct. App. 1981). Here, under Florida law, the ordinary and well understood meaning of the term of art "general intangible" undeniably excludes accounts receivable.

Menada also argues that "general intangibles" should be interpreted as provided by Fla. Stat. §199.023. Menada's reliance upon Section 199.023 is misplaced. Section 199.023 defines certain property that is taxable under Florida law, and has nothing to do with "general intangibles" in connection with a real estate transaction. Moreover, that section does not define "general intangibles" or "intangible rights", but instead defines "intangible personal property."

Menada also argued at trial that the Accounts Receivable were sold pursuant to paragraph 10(b)(vi) of the Addendum. See Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9. That section provides that the Trustee will deliver to Menada at Closing "[a]n assignment of Contracts, Warranties, Licenses, Permits and Other intangible rights associated with the Property. . . ." Id. This argument fails for several reasons. First, Accounts Receivable are governed by the proration section of the Purchase Agreement. Second, the rule of ejusdem generis requires that "intangible rights" be interpreted similarly to "contracts, warranties, licenses, and permits," which would exclude "accounts receivable." Third, this provision specifies that the assignment will exclude "cash," making it nonsensical to interpret this section to exclude cash, but not the right to receive cash to be paid in the future, i.e., the Accounts Receivable.

Menada further argued that evolution of the General Assignment demonstrated that Menada purchased the Accounts Receivable. However, as established by the Trustee at trial, Menada excluded several important facts which render this argument without merit. First, Menada fails to point out that the Accounts Receivable were not included in the General Assignment (Trustee's Exhibit No. 8) because the proration provision (paragraph 9) of the Purchase Agreement provided that the estate would retain the right to collect all pre-Closing Accounts Receivable.

Prior to the date of the Closing, Menada was repeatedly and continuously trying to improve the terms of the deal for which it had agreed to purchase the Property. As indicated by Plaintiff's Exhibit Nos. 15, 16, 17 and 59, Menada filed a motion for rehearing and for clarification of the sale order, claiming that the Trustee was required to invest an additional $1,000,000 into the Property to correct certain real property code violations, notwithstanding the "as is, where is" language of the Purchase Agreement. As indicated by the Order that appears as Plaintiff's Exhibit No. 59, this request was denied by the Court. In the weeks prior to the Closing, Menada's counsel again made demands upon the Trustee to invest significant additional funds into the Property prior to the date of the Closing, as indicated by the testimony of the Trustee and Linda G. Worton, and as evidenced by Plaintiff's Exhibit Nos. 18 and 19.

In the weeks prior to the Closing, Menada was also aware of, and participated in, the Trustee's efforts to prorate income (including Accounts Receivable) and expenses as of the Closing date. During that period of time, Andrew Jordan, an assistant of the Trustee, was actively engaged in closing out the books and records relating to the Property, so that

appropriate prorations could be made with respect to income and expenses. See Plaintiff's Exhibit No. 3 at ¶4). The representatives of Menada were aware of this activity and did not object to the Trustee receiving the hotel guest income that was earned and accrued up to the date of the Closing. Id.

In the weeks prior to the Closing, Jordan also worked with David Blakely in prorating advance tenant deposits and pre-paid hotel guests as of the Closing date, another task that would have been unnecessary if income was not going to be prorated as of the Closing date. Id. The Meruelo family was aware of the activity and made corrections to Blakely's prorations. Id.

In the weeks prior to the Closing, Blakely provided regular daily accounting to the Trustee regarding the amount of Accounts Receivable owed by the Tour Operators. Id. at ¶6. It was in fact Blakely who generated Schedule 2 to the Closing Statement on the day of Closing, and sent it to the Trustee. Id. The only reason this information was provided by Blakely is so that the parties to the Purchase Agreement would know the appropriate amount of the prorations to be made with respect to the Accounts Receivable at the Closing. See Plaintiff's Exhibit No. 3, at ¶4.

At the Closing itself, Menada, for the first time, took the position that it had purchased all of the earned and accrued pre-Closing Accounts Receivable. Though Menada (through its representative, Homero Meruelo, Sr.) and its counsel (Louis Zaretsky) received and reviewed draft Closing statements prior to the Closing date that indicated a charge to Menada for the pre-Closing Accounts Receivable (Plaintiff's Exhibit No. 21), Menada did not indicate any objection to this treatment of the Accounts Receivable prior to the Closing.

As indicated by the testimony of Linda Worton (testimony of Linda G. Worton, Tr., at p. 608, line 2 through p. 612, line 14), Menada did not advise the Trustee or his counsel that it believed it was coerced or that it owned all of the Accounts Receivable until this litigation was commenced, over two months after the Closing. Instead, Menada provided a variety of different rationales to the Trustee to support its receipt and retention of pre-Closing Accounts Receivable from the Tour Operators, in violation of the Accounts Receivable agreement. First, Menada explained that it was retaining the pre-Closing Accounts Receivable because it wanted to purchase them from the Trustee, an offer that was ultimately rejected by the Trustee. See Plaintiff's Exhibit No. 36. Subsequently, Menada took the position that it received and retained the pre-Closing Accounts Receivable in order to set such amounts off against certain pre-Closing vendor bills that Menada claimed should be paid by the Trustee. See Plaintiff's Exhibit No. 37.

The Accounts Receivable agreement, as contained in the Closing Statement, is valid and enforceable, and the Court will award the Trustee the full amount of his proven damages, sufficient to put the Trustee in as advantageous position as he would have been had there been no breach by Menada. Popwell v. Abel, 226 So.2d 418, 422 (Fla. 4th Dist. Ct. App. 1969). This measure of damages would include the $83,185.04 in pre-Closing Accounts Receivable collected and retain by Menada (Plaintiff's Exhibit No. 49),[5] together with the

[5] Although Menada claims to have collected only $72,860.59 in pre-Closing Accounts Receivable (Defendants' Exhibit No. 48), Menada's financial representative, Belinda Meruelo, admitted at trial that this calculation was not performed in accordance with the requirements of the Accounts Receivable agreement (Plaintiff's Exhibit No. 7), which requires that any amounts collected from the Tour Operators be first paid to the Trustee in satisfaction of pre-Closing Account Receivable, and that the dollar figure for the pre-Closing Accounts Receivable collected by Menada would be higher if the formula prescribed by the Accounts

$5,101.94 which the Trustee would have received from Mazza Tours, but for the interference by Menada, (Plaintiff's Exhibit No. 1, at ¶28 and 31, and Plaintiff's Exhibit No. 5),[6] for a total of $88,286.98.

Paragraph 7(c) of the Addendum to the Purchase Agreement governs the Delinquent Rents issue.[7] See Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9. That section provides that "[f]or a period of thirty (30) days after the Closing, Purchaser shall use reasonable efforts to collect Delinquent Rents (which shall not include the filing of any lawsuits), and shall pay to Trustee such amounts it shall collect at any time which are attributable to a time prior to Closing, except that all Delinquent Rents collected by Purchaser shall be first applied to satisfy all current rents and additional rents and other payments due Purchaser." Id. However, the testimony of Belinda Meruelo indicates that Menada has interpreted this provision as allowing it to apply Delinquent Rents to rent that has not yet even come due. The evidence at trial established that Menada collected at least $12,820 in Delinquent Rents (with respect to apartments 10R, 15C, 15D, 15E, 15L and 15S).[8]

Receivable agreement were followed. In contrast, the Trustee's calculation is performed in accordance with the formula set forth in the Accounts Receivable agreement. See Plaintiff's Exhibit No. 49.

[6] The fourth paragraph on page two of the affidavit indicates that, post-Closing, Menada, through David Blakely, negotiated and "settled " the debt of Mazza Tours to the Trustee for pre-Closing receivables by granting Mazza Tours a credit towards such debt in the amount of $5,000. Since that time, the Trustee has been unable to collect that debt from Mazza Tours.

[7] The last sentence of paragraph 7(c) states: "This paragraph shall survive the Closing."

[8] The delinquent status of the rents for apartments 10R, 15C, 15D, 15E, 15L and 15S, is established by Defendants' Exhibit No. 27, as well as Trustee's Exhibit No. 7 (Schedule 1), Trustee's Exhibit No. 40 and Trustee's Exhibit No. 49, all of which indicate that the Trustee

(Defendants' Exhibit No 46 - Daily Income From Apartments), and applied such amounts to "future rent."

The testimony was clear that Menada applied the extra payments of Delinquent Rents it received in August, 1998 from the tenants in apartments 10R, 15C, 15D, 15E, 15L and 15S to future rents that came due from such tenants in September, 1998, instead of turning such amounts over to the Trustee. (Testimony of Belinda Meruelo, Tr., at p. 532, line 5 through p. 537, line 16). Thus, the Delinquent Rents were not applied to "current rents," because, as Belinda Meruelo testified, the tenants did not owe September rent until September 1, 1998. (Testimony of Belinda Meruelo, Tr., at p. 537, lines 6-16). The Delinquent Rents were also not applied to "Additional Rents" because that is a defined term in paragraph 7(c) that refers only to "real estate taxes, operating expenses, insurance premiums, common area maintenance charges and similar 'pass-through' items paid by tenants...." See Plaintiff's Exhibit No. 6, at ¶7(c) and Defendants' Exhibit No. 9. If the Delinquent Rents were applied to future base rents, then they were not applied to any items of "Additional Rent" that may have been due in August, 1998.

Lastly, the provision allowing Menada to apply Delinquent Rents to "other payments due Purchaser" cannot be interpreted to allow Menada to hold extra payments of Delinquent Rents received from tenants who pay double rent in one month and apply such funds to future rents that would come due to Menada in future months. Under this interpretation, which Menada has given to paragraph 7(c), Menada would never be required to turn over any

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did not receive July rent with respect to these apartments (among others) prior to the date of the Closing.

Delinquent Rents to the Trustee because it could always apply such rents to amounts that would come due in the future, thus rendering the entire provision meaningless. See Premier Ins. Co. v. Adams, 632 So.2d 1054, 1057 (Fla. 5th Dist. Ct. App. 1994) ("an interpretation which gives a reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable").

All Delinquent Rents collected by Menada thus far have been applied in this manner, and the estate has yet to receive any Delinquent Rents from Menada. See Pretrial Order, at ¶1(u) and ¶1(v); Plaintiff's Exhibit No. 1, at ¶29. Further, the Trustee presented evidence indicating that Menada interfered with the Trustee's efforts to collect the Delinquent Rents from tenants, a fact that was not disputed by Menada. See Plaintiff's Exhibit No.1, at ¶23-25. In the case of Mazza Tours,[9] Menada caused Mazza Tours to put a "stop payment" on a check in the amount of $7,200 delivered by Mazza Tours to the Trustee with respect to pre-Closing Delinquent Rents. See Plaintiff's Exhibit Nos.5 and 34; testimony of Daniel Sauer, Tr., at p. 247, line 25 through p. 248, line 14.

With respect to the specific tenant accounts that owed Delinquent Rents at the time of the Closing, the Trustee collected approximately 72% from such tenants on a monthly basis prior to the Closing. See Plaintiff's Exhibit No. 1 at ¶29. The Trustee maintained records regarding pre-Closing Delinquent Rents, which the Trustee has calculated in the amount of $64,989.61 as of the Closing date. See Plaintiff's Exhibit No. 49, p. 3 and 4. As a result of Menada's interferences, the Trustee has been able to collect from tenants only $1,968.42 of

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[9] As indicated by Plaintiff's Exhibit No. 49, Mazza Tours was both a Tour Operator (that owed in such capacity $5,101.94 as of the Closing date) and a tenant that rented certain rooms on a monthly basis (that owed in such capacity $7,200 as of the Closing date).

the $64,989.61 in Delinquent Rents that were outstanding on the date of Closing, which represents only 3% of the total outstanding Delinquent Rents (Plaintiff's Exhibit No. 1, at ¶29), despite repeated efforts to collect the full amount of Delinquent Rents. See Pretrial Order, at ¶1(w); Plaintiff's Exhibit No. 29. Menada will be required to comply with the terms of paragraph 7(c) and turn over the $12,820 in Delinquent Rents identified through Menada's documents and Belinda Meruelo's testimony at trial, which Menada has collected and applied to "future rents" post-Closing.

The evidence presented at the trial in this matter clearly showed that the Trustee is entitled to judgment in his favor as to Count IV. Both the Purchase Agreement and the Accounts Receivable agreement contained in Footnote One of the Closing Statement clearly provides that the Accounts Receivable, as pre-Closing income, remained property of the estate, and were not sold to Menada.[10]

As its first affirmative defense, Menada contends that the Accounts Receivable agreement was a modification of the Purchase Agreement that required approval by the

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[10] This Court has reviewed the language of the Closing Statement, and has already ordered in the October 15, 1998 Order, that Menada turn over to the Trustee any funds it receives on account of pre-Closing Delinquent Rents or Accounts Receivable, as follows:

> From and after September 16, 1998, Menada shall deliver and shall continue to deliver to the Trustee any checks, cash, funds and communication that it receives from any of the Tenants on account of rent owed through July 17, 1998, as provided by and pursuant to the Purchase and Sale Agreement, dated June 2, 1998.
>
> From and after September 16, 1998, Menada shall deliver and shall continue to deliver to the Trustee any checks, cash, funds and communication that it receives from any of the Tour Operators on account of Accounts Receivable owed through July 27, 1998.

bankruptcy court under 11 U.S.C. § 363. Menada fails to cite any case authority for the proposition that a trustee must obtain separate court approval for the terms of the closing documents exchanged by the parties at the closing. Menada never requested that the Trustee obtain additional Court approval for the Closing documents, either before, during or after the Closing. The purpose of § 363 is to provide creditors, who have an interest in the maximum realization from the assets of the estate, an opportunity to review the terms of the proposed sale, in order to protect their interests. See In re Sapolin Paints, Inc., 11 B.R. 930, 936 (Bankr. E.D. N.Y. 1981). Thus, the purpose of § 363 is to protect the estate, not the entity purchasing estate assets, such as Menada.

The June 10, 1998 Order that was entered authorizing the Sale (Defendants' Exhibit No. 11) to Meruelo (who assigned his interest to Menada) for the gross purchase price of $29,800,000, was subject to the terms and conditions of the Sale under the Purchase Agreement. Section 363 does not require that a supplemental order be obtained for each and every line item debit or credit dispute as to amount on the proposed final closing statement before the approved sale can be closed.

In the context of the overall transaction involving almost $30,000,000, the subject disputed items of intangible personal property incidental to the Sale, total less than $100,000 or less than .003 of the total consideration and purchase price of the deal. The dispute here, in the context of the overall transaction, was relatively minor and did not involve a major term or essential element of the Sale. If it had, either one or both of the parties would likely have immediately sought relief from the Court prior to or during the Closing. Instead, they negotiated the terms and language of the Closing Statement and General Assignment, and

closed to later fight over this relatively minuscule part of the Sale. Thus, the Court overrules Menada's first affirmative defense.

The Court finds that Menada forfeits its waiver, estoppel, fraudulent inducement, setoff and recoupment affirmative defenses. Menada has failed to cite any case authority to support these defenses. Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are deemed to be waived. See NLRB v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 (11th Cir. 1998).

The Purchase Agreement contained an attorneys' fee clause, and the Trustee is entitled to collect his reasonable attorney's fees and court costs from Menada. The Trustee is entitled to attorney's fees and costs against Menada in accordance with ¶19(c) of the Purchase Agreement. See Plaintiff's Exhibit No. 6 and Defendants' Exhibit No. 9. That paragraph provides that "[i]n the event of any litigation between the parties under this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and court costs at all trial and appellate levels. The provisions of this subparagraph shall survive the Closing coextensively and other surviving provisions of this Agreement." Id. at ¶19(c). Where a contract provides attorney's fees for a prevailing party, the Court is without discretion to decline to enforce the provision. Hutchinson v. Hutchinson, 687 So.2d 912, 913 (Fla. 4th Dist. Ct. App. 1997) (citation omitted). The test for determining the prevailing party under such a provision is to determine which party prevailed on significant issues tried before the Court. See Moritz v. Hoyt Enters., Inc., 604 So.2d 807, 810 (Fla. 1992); Hutchinson, 687 So.2d at 913. Here, the Trustee is the prevailing party as to all significant issues, and the Court hereby awards reasonable attorneys' fees and costs incurred by the estate against

Menada, in an amount to be determined upon further notice, application and hearing in accordance with 11 U.S.C. § 331 and the applicable local and federal bankruptcy rules..

E. Count V--Conversion

Next, the Trustee alleges that Menada has intentionally and willfully converted the Accounts Receivable and Delinquent Rents for its own use and refuse to return same to the Trustee. Under Florida law, conversion is "'an act of dominion wrongfully asserted over another's property inconsistent with his ownership of it.'" Advanced Surgical Techs., Inc. v. Automated Instruments, Inc., 777 F.2d 1504, 1507 (11th Cir. 1985) (per curiam) (quoting Belford Trucking Co. v. Zagar, 243 So.2d 646, 648 (Fla. 4th Dist. Ct. App. 1970)). See also Rosenthal Toyota, Inc. v. Thorpe, 824 F.2d 897, 902 (11th Cir. 1987).

Neither an obligation to pay money nor a breach of contract gives rise to a claim of conversion. Kee v. National Reserve Life Ins. Co., 918 F.2d 1538, 1541 (11th Cir. 1990) (citation omitted). (plaintiff did not state a count for conversion by merely asserting that it was entitled to money under a contract). Money may be the subject of a conversion only where "it consists of specific money capable of identification." Belford, 243 So.2d at 648 (citation omitted). The Florida Supreme Court held in Florida Power & Light Co. v. Westinghouse Elec. Corp., 510 So.2d 899 (Fla. 1987), that a party cannot recover in tort for economic losses incurred pursuant to the terms of a written contract. The court reasoned that "contract principles are more appropriate than tort principles for resolving economic loss without an accompanying physical injury or property damage." Id. at 902. "[T]he economic loss doctrine bars tort recovery for contract claims which involve no injury to person or property . . . ." Hoseline, Inc. v. U.S.A. Diversified Prods., Inc., 40 F.3d 1198, 1200 (11th

Cir. 1994. The Court finds that doctrine applicable on the evidence to bar recovery on this Count by the Trustee against Menada.

The Trustee has argued in favor of his conversion count by citing to Belford, 243 So.2d 646, however, that case undermines the Trustee's argument. In Belford, a truck driver entered into an agreement with a company to drive a truck-tractor and receive a percentage of the freight charges as compensation. The company received all the proceeds from the truck's operation charged to plaintiff's account advances and expenditures for items chargeable to him under the agreement. The agreement was terminated when the company showed that the driver had overdrawn his account by receiving more advances and incurring more expenses than the share of the profits he was entitled to receive. The driver sued the company for conversion claiming that he was entitled to commissions and that the company was using the commissions that rightfully belonged to him. The appellate court reversed the jury's verdict in favor of the driver. The appellate court reiterated that a mere obligation to pay money may not be enforced by a conversion action. "[A]n action in tort is inappropriate where the basis of the suit is a contract, either expressed or implied." Id. at 648 (citation omitted).

The only obligation undertaken here by Menada, if the Trustee's argument is to be accepted, was to collect and pay the Accounts Receivable to the Trustee in accordance with the terms and conditions of a contract. The Trustee's allegations of breach of contract do not, ipso facto, state a Florida tort claim for conversion. In fact, as the Belford court stated, for conversion, the money at issue must be "capable of identification where it is delivered at one time, by one act and in one mass, or where the deposit is special and the identical money

is to be kept for the party making the deposit, or where wrongful possession of such property is obtained . . . . Therefore, where the parties have an open account, and the defendant is not required to pay the plaintiff identical monies which he collected, there can be no action in tort for conversion." Id. at 648 (citations omitted).

The Court declines to find that Menada's position is so wholly frivolous or specious given the lack of precision and definition in the Purchase Agreement, which led to the subsequent negotiated terms of the Closing Statement and General Assignment. The Court declines to conclude that Menada's actions arise to the level of an independent tort. The Trustee cannot establish a conversion claim by merely asserting that Menada retained funds to which the Trustee is entitled under the Accounts Receivable agreement; the breach of contract claim and the bankruptcy turnover and avoidance theories are the proper avenues for the Trustee to recover the funds. Even if the Court was persuaded by the Trustee's argument in Count V, his claim for conversion appears barred by Florida's economic loss doctrine because the real dispute arises from a contract based claim, not tortious injury to person or property. The Court holds that the Trustee's claim for conversion is barred under Florida law. Hence, judgment is entered in favor of Menada on Count V and its seventh affirmative defense is hereby sustained.

F. Count VI - - Tortious Interference With Contractual Relationship

In Count VI of the Complaint, the Trustee asserts Menada tortiously interfered with the estate's contractual relationship with parties obligated to pay the Accounts Receivable and Delinquent Rents. Menada argues this Count of the complaint is contradicted by the terms of the Purchase Agreement. If the Trustee had a business relationship with the payors of the

Accounts Receivable and Delinquent Rents, Menada argues that it has purchased and has been assigned those relationships. Thus, it is impossible for the Trustee to establish the breach of a relationship that has been consensually assigned to Menada.

The elements necessary under Florida law to establish tortious interference with a contractual relationship are the following: (1) the existence of a business relationship; (2) knowledge of the relationship on the part of the defendant; (3) intentional and unjustified interference with the relationship by the defendant; and (4) damage to the plaintiff as a result of the breach of the relationship. Ethan Allen, Inc. v. Georgetown Manor, Inc., 647 So.2d 812, 814 (Fla. 1995) (quoting Tamiami Trail Tours, Inc. v. Cotton, 463, So.2d 1126, 1127 (Fla. 1985)). Under Florida law, a cause of action for tortious interference does not exist against one who is a party to the business relationship allegedly interfered with. Genet Co. v. Annheuser-Busch, Inc., 498 So.2d 683, 684 (Fla. 3rd Dist. Ct. App. 1986) (citation omitted).

The Court finds that the intent of the deal was to sell the Property to Menada with the tenants and Tour Operators and in place. Menada, in turn, would succeed to the post-Closing business with the tenants and Tour Operators, not the Trustee continuing to deal with them. The position of the Trustee as an effective landlord was at all times intended by both parties to be transferred to Menada after the Closing. The Trustee never intended to continue as a landlord post-Closing vis a vis the tenants and Tour Operators.

Pursuant to the Purchase Agreement, the Trustee assigned his relationship with the tenants and the Tour Operators, who are the parties obligated to pay the Accounts Receivable. Thus, because Menada is now and was always contemplated to be the successor

party landlord to the business relationships allegedly interfered with, the Trustee cannot properly claim that Menada tortiously interfered with those relationships. The evidence does not prove tortious interference by Menada. Accordingly, the Trustee is not entitled to judgment against Menada on Count VI of the Complaint and Menada's eight affirmative defense is sustained.

G. Count VII -- Fraud in the Inducement

The Trustee alleges that Menada fraudulently induced the Trustee into entering into the Accounts Receivable agreement established in Footnote One of the Closing Statement, suggesting that Menada knew it would not perform in accordance with the terms. Menada claims that the economic loss rule precludes the Trustee from asserting a damages claim in the event the Trustee prevails on this count.

"'Fraud in the inducement presents a special situation where parties to a contract appear to negotiate freely -- which normally would constitute grounds for invoking the economic loss doctrine -- but where in fact the ability of one party to negotiate fair terms and make an informed decision is undermined by the other party's fraudulent behavior.'" Nautica Int'l, Inc. v. Intermarine USA, L.P., 5 F. Supp.2d 1333, 1346 (S.D. Fla. 1998) (quoting HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So.2d 1238, 1240 (Fla. 1996)). "'More specifically, the interest protected by fraud is a plaintiff's right to justifiably rely on the truth of a defendant's factual representation in a situation where an intentional lie would result in loss to the plaintiff.'" Id.

The Florida Supreme Court has stated that "[f]raudulent inducement is an independent tort in that it requires proof of facts separate and distinct from the breach of contract." HTP,

685 So.2d at 1239. It normally "'occurs prior to the contract and the standard of truthful representation placed upon the defendant is not derived from the contract.'" Id. (quotation omitted). "'[F]raudulent inducement claims may coexist with breach of contract claim, safe from the economic loss rule because 'the interest protected by fraud is society's need for true factual statements in important human relationships, primarily commercial or business relationships.'" Id. at 1240 (quotation omitted).

Under the terms of the Accounts Receivable agreement, Menada was required, among other things, to pay the Accounts Receivable to the Trustee, no matter how the payment was designated by the Tour Operator, until full satisfaction of the Accounts Receivable. Menada was also required to send Tour Operators a letter directing them to send the Accounts Receivable, prior to July 27, 1998, directly to the Trustee. Under Footnote One, Menada agreed to use its best efforts to assist the Trustee in collecting the Accounts Receivable, and to provide a monthly report to the Trustee certifying all amounts whatsoever received by Menada from the Tour Operators. Menada agreed to refrain from any conduct that would cause Tour Operators not to pay the Accounts Receivable to the Trustee. Finally, Menada agreed to make its books and records available to the Trustee for inspection.

In Florida, fraud in the inducement only survives the economic loss rule if it is independent of the contractual breach. HTP, 685 So.2d at 1239. The fraudulent inducement claims which are barred are those inseparably embodied in the parties' subsequent agreement. Hotels of Key Largo, Inc. v. RHI Hotels, Inc., 694 So.2d 74, 77 (Fla. 3rd Dist. Ct. App. 1997). "[W]here the only alleged misrepresentation concerns the heart of the parties' agreement, simply applying the label of 'fraudulent inducement' to a cause of action will not

suffice to subvert the sound policy rationales underlying the economic loss doctrine." Id.

The Trustee's fraudulent inducement claim is based upon the identical allegations which form his breach of contract claim, namely, that Menada breached the terms of the Purchase Agreement by keeping all of the Accounts Receivable and Delinquent Rents. The Court is convinced that both parties -- the Trustee and Menada -- knew exactly what they were doing when they closed the sale and negotiated the terms of the Closing Statement and related documents. The modifications in the Closing Statement and related documents were exactly what the Trustee bargained for and received as a result of the parties' negotiations. Menada's subsequent breach does not equate to fraudulent inducement of the Trustee to enter into the original deal to begin with or the modified terms embodied in the Closing documents. This fraudulent inducement count is so "inseparably embodied in the parties' subsequent agreement" that the Trustee himself could not separate them -- he incorporated each and every allegation of the breach of contract count into the fraudulent inducement count. Thus, Count VII is barred by the Florida economic loss rule. In a case previously relied upon by the Trustee, Williams v. Peak Resorts Int'l, Inc., 676 So.2d 513 (Fla. 5th Dist. Ct. App. 1996), the court stated that, "[i]t is well settled that a party may not recover damages for both breach of contract and fraud unless the party first establishes that the damages arising from the fraud are separate or distinguishable from the damages arising from the breach of contract." Id. at 516 (citations omitted). Here, the actual damages to the bankruptcy estate sought by the Trustee are virtually identical under the contract and tort theories of recovery. Thus, the fraudulent inducement claim is barred and relief thereunder is denied. The Court hereby sustains Menada's affirmative defense and enters judgment in favor of Menada pursuant to

this count.

H. **Count VIII - - Unjust Enrichment**

Next, the Trustee alleges that Menada has been unjustly enriched by its retention of the Accounts Receivable and the Delinquent Rents. The Court holds that an adequate remedy at law exists for the Trustee. Consequently, the Court sustains Menada's ninth affirmative defense and enters judgment pursuant to this Count in favor of Menada.

The elements of a claim of unjust enrichment are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) acceptance and retention of such benefit by the defendant under such circumstances that it would be inequitable for him to retain it without paying the value thereof. Nautica, 5 F. Supp.2d at 1341-42 (quotation omitted).

"'[T]he theory of unjust enrichment is equitable in nature and is, therefore, not available where there is an adequate legal remedy.'" Id. at 1342 (quotations omitted). The Court finds that the Trustee's claim for unjust enrichment cannot stand because the Trustee has an adequate remedy at law under Counts I, III and IV, all based on the terms of the Purchase Agreement, as modified by the Addendum, Closing Statement and Assignment and the Trustee's statutory remedies under the Bankruptcy Code, which he has properly invoked. See also Hall v. Burger King Corp., 912 F. Supp. 1509, 1529-30 (S.D. Fla. 1995) (citing McNorton v. Pan American Bank of Orlando, N.A., 387 So.2d 393, 399 (Fla. 5th Dist. Ct. App. 1980))(Florida courts recognize the general rule that where a complaint shows on its face that there exists an adequate remedy at law, there is no jurisdiction in equity). If the plaintiff fails to allege that an adequate remedy at law does not exist, and the court is not

convinced that it is clear from the complaint, the count for unjust enrichment must fail. Martinez v. Weyerhaeuser Mortg. Co., 959 F.Supp. 1511, 1518-19 (S.D. Fla. 1996).

I. Counts IX and X - -Turnover of Estate Property and Breach of Lease Agreement

In Count IX, the Trustee seeks that Meruelo turn over estate property in the amount of $7,128.00 as rent allegedly owed pursuant to an oral lease agreement entered into between the Trustee and Meruelo for the Penthouse. The Trustee alleges that the parties had an oral agreement whereby Meruelo agreed to lease the Penthouse from the Trustee from June 3, 1998 through July 28, 1998 for a monthly rental amount of $3,600.00. Meruelo asserts in defense to the Trustee's claim that there was no agreement or understanding between the Trustee and Meruelo on the material terms of an oral lease, such as rent, occupancy and duration.

The Trustee advances under Count X an action for breach of the oral lease agreement between the Trustee and Meruelo. In this Count, the Trustee alleges that Meruelo breached his oral agreement with the Trustee by failing to pay the agreed upon monthly rent from June 3, 1998 until the date of Closing, July 27, 1998. In this Count, the Trustee seeks total past due rents of $7,128.00.

Meruelo alleges by way of affirmative defenses that (1) the Trustee has waived any claim he may have against Meruelo for any rents due; (2) based upon representations made by the Trustee, Meruelo moved his office and residence to the Property and the Trustee should be estopped from seeking any rents from Meruelo; (3) all claims by the Trustee regarding rent to be paid by Meruelo are barred by fraudulent inducement; and (4) the Trustee cannot sustain a cause of action under § 542 because the rent allegedly owed by Meruelo

would not be considered property of the estate.

There is no question that there was an agreement or understanding between the parties that Meruelo could occupy the Penthouse for the period from June 3, 1998 until the Closing (July 27, 1998). See Pretrial Order at ¶1(y). Although he took possession and occupancy for such period, Meruelo claims there was no agreement or understanding between the Trustee and Meruelo on the material terms of an oral lease, such as rent, occupancy and duration. The Trustee credibly testified that he directed David Blakely, the property manager, to charge Meruelo $3,600 a month for the Penthouse. (Testimony of James S. Feltman, Tr., at p. 125, lines 10-23). Blakely testified that this understanding regarding payment of rent was communicated to Meruelo. (Testimony of David Blakely, Tr., at p. 376, line 23 through p. 377, line 25). The credit card authorization given by Meruelo, evidencing a transaction whereby Meruelo would pay something for the Penthouse he undisputedly occupied for that period(Plaintiff's Exhibit No. 39), supports the Trustee's allegation that a contract, albeit oral or implied, existed. The only contrary evidence is Meruelo's self-serving and less than credible testimony that the Trustee personally told him that he could use the Penthouse for free (testimony of Homero Meruelo, Tr., at p. 296, line 3 through p. 298, line 14). This directly contradicts the Trustee's more credible testimony and is contrary to the Trustee's statutory responsibilities to the estate. (Testimony of James S. Feltman, Tr., at p. 122, line 10 through p. 125, line 23).

Under Florida law, contracts may be either express or implied in fact. Bromer v. Florida Power & Light Co., 45 So.2d 658, 660 (Fla. 1949). It is not necessary under Florida law to reduce an agreement to writing to bind the parties, as long as the parties intend to be

bound at the time of the oral agreement. Eastern Air Lines, Inc. v. Mobil Oil Corp., 564 F. Supp. 1131, 1145 (S.D. Fla. 1983), aff'd, 735 F.2d 1379 (Em. App. 1984).

Meruelo unpersuasively argues that the Trustee "comped" him and allowed him to use the Penthouse as an accommodation (or complimentary and for use without charge) because it would benefit the estate by allowing Meruelo to familiarize himself with the Property. There is absolutely no credible evidence in the record to support this assertion. The Court did not find Meruelo to be a credible witness for three reasons. First, the above facts in the case and the furnishing of Meruelo's credit card authorization tend to support the Trustee's version of events. Second, Meruelo's testimony is self-serving and not credible on this point. Third, Meruelo admitted under cross-examination that he has a federal criminal record and has been convicted for several crimes involving dishonesty within the past ten years. (Testimony of Homero Meruelo, Tr., at p. 298, line 24, through p. 306, line 10). Finally, it stretches credibility past the breaking point for the Court to believe that a bankruptcy Trustee acting as liquidating agent under a confirmed plan of reorganization selling revenue-producing property would give an "accommodation" to Meruelo in contradiction of his duties as a Trustee, under 11 U.S.C. §§ 1106 and 704, which require him to reduce the property of the estate to cash and use business judgment that affords the best possible result to the estate and its creditors.

There is no dispute in this case that the Trustee conferred a benefit upon Meruelo by permitting him to use the Penthouse from approximately June 3, 1998 until the Closing date. As indicated by his testimony at trial, Meruelo voluntarily accepted this benefit and retained the benefit conferred by utilizing the Penthouse space to allow him to live in the building and

become acquainted with the building's operations between the date of the Purchase Agreement and the date of the Closing. (Testimony of Homero Meruelo, Tr., at p. 287, lines 7-17). Lastly, the surrounding circumstances are such that it would be inequitable for Meruelo to retain that benefit without paying rent to the estate for it, in the amount of $3,600.00 per month. Indeed, David Blakely admitted at trial that the only reason a written lease was not prepared was because Blakely obtained a credit card authorization from Meruelo for the rent. See Trustee's Exhibit No. 39; testimony of David Blakely, Tr., at p. 377, lines 14-25.

After weighing the credibility of the parties and considering all of the evidence and testimony, the Court concludes that the Trustee is entitled to collect rent from Meruelo for his use of the Penthouse, at a rate of $3,600.00 per month for a (prorated) total of $6,038.70. See Plaintiff's Exhibit No. 1 at ¶ 30. It would be an inequitable result to the estate and its creditors to allow Meruelo free occupancy of the Penthouse while other tenants and occupants of the Property were liable and expected to pay as their express contracts or leases required for their use and occupancy. Accordingly, the Court enters judgment in favor of the Trustee and against Meruelo on Count X of the Complaint. The Court overrules Meruelo's affirmative defenses of waiver and estoppel. In addition, the Court finds that Meruelo forfeits his fraudulent inducement defense. Meruelo has failed to cite any case authority to support this defense. Issues raised in a perfunctory manner, without supporting arguments and citation to authorities, are deemed to be waived. See NLRB v. McClain of Georgia, Inc., 138 F.3d 1418, 1422 (11th Cir. 1998).

The Court finds that the Trustee has not satisfied the burden of proof for the turnover

claim set forth in Count IX of the Complaint. The Court sustains Meruelo's affirmative defense that the Trustee has not stated a cause of action for turnover. This is because Meruelo has apparently at all times disputed he owes any rent, in contrast to the tenants and Tour Operators, and has disputed the rights of the Trustee to collect from him at all. Thus, under the previously cited case law, relief under § 542 is inapposite. Because the Trustee already has and is receiving an adequate remedy at law under Count X, it would be unnecessary to provide a duplicate remedy on the same disputed rent. Consequently, the Court enters judgment in favor of Meruelo under Count IX of the Complaint. The Court overrules Meruelo's affirmative defenses.

J. Motions For Directed Verdict

At the conclusion of the Trustee's case in chief, both Menada and Meruelo presented motions for partial findings. The Court reserved ruling on the motions under Federal Rule of Bankruptcy Procedure 7052(c) until the close of all of the evidence. The defense motions for partial findings are granted with respect to Counts II, V, VI, VII, VIII, and IX and denied with respect to Counts I, III, IV, and X in light of the above findings and discussions with respect to those Counts.

K. Motion to Amend The Complaint

At the conclusion of all the evidence, and after Menada and Meruelo argued their motions for partial findings, the Trustee moved under Federal Rule of Bankruptcy Procedure 7015 and Federal Rule of Civil Procedure Rule 15(b) to amend the Complaint to include a count of unjust enrichment, Count XI, against Meruelo for his use of the Penthouse. Meruelo objected because there was no express or implied consent by Meruelo for the Trustee to try

an additional theory of recovery against him; the Trustee's case in chief was already closed; and the defendants' motions for partial findings had been made, argued and taken under advisement by the Court. When Meruelo presented the motion for partial findings, he argued that the Trustee's Complaint did not contained a claim of unjust enrichment against Meruelo as Count VIII did against Menada, and the facts did not support any of the theories pled against Meruelo.

The Court notes that the parties already stipulated in the Pretrial Order to commence trial only on the enumerated factual issues. See Pretrial Order at ¶ 9, p. 31. The only theory of recovery based on unjust enrichment was advanced against Menada (in Count VIII), not against Meruelo. The two theories pleaded against Meruelo were advanced in Count IX (concerning the turnover of estate property) and Count X (Meruelo's alleged breach of lease agreement for his use of the Penthouse). Neither involved the elements of unjust enrichment. Moreover, Meruelo's attorney argued that because he had prepared defenses only to Counts IX and X of the Complaint, it would be unfair prejudice for Meruelo to have to defend on a new theory, not expressly or impliedly tried by agreement. The Court agrees.

When relief is based on a theory of recovery not raised in the pleadings, the requirements of Federal Rule of Civil Procedure 15(b) and its bankruptcy analogue Federal Rule of Bankruptcy Procedure 7015 come into play. Rule 15(b) provides:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial

> on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice the party in maintaining the party's action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

Fed. R. Civ. P. 15(b).

Rule 15(b) requires that unpleaded issues which are tried with the express or implied consent of the parties are to be treated as if they were raised in the pleadings. A "judgment may be based on an unpleaded issue as long as consent to trial of the issue is evident." Cioffe v. Morris, 676 F.2d 539, 541 (11th Cir. 1982). The corollary is that "a judgment may not be based on issues not presented in the pleadings and not tried with the express or implied consent of the parties." Id. (citations omitted). The primary consideration in determining whether leave to amend under Rule 15(b) should be granted is whether unfair prejudice results to the opposing party. Id. at 542. The test for prejudice when relief is sought that was not raised in the pleadings is whether the opposing party was denied a fair opportunity to defend and to offer additional evidence on that different theory. Id. (citations omitted).

Meruelo did not give his express or implied consent, and has objected to the Trustee's motion to amend the Complaint, which was made after the close of all the evidence and after the defense motions for directed findings under Federal Rule of Civil Procedure 52(c). The Court reserved ruling on the motion to amend. The Court finds that Meruelo was denied a fair opportunity to defend and to offer additional evidence on the theory of unjust enrichment. To grant the Trustee's motion would eviscerate the stipulations of the parties embodied in the Pretrial Order. The Court has no reason to doubt the arguments made by Meruelo's counsel

that he was surprised by the instant motion to amend to add this new theory of recovery. Therefore, the Trustee's motion to amend the Complaint is denied.

L. Requests for Punitive Damages

The Trustee seeks punitive damages against Menada under Counts II, V, VII, and VIII of the Complaint. Under Florida law, it is well settled that generally, punitive damages are not available for breach of contract. Griffith v. Shamrock Village, Inc., 94 So.2d 854, 858 (Fla. 1957); Southern Bell Tel. & Tel. v. Hanft, 436 So.2d 40, 42 (Fla. 1983). However, when the acts constituting a breach of contract also amount to a cause of action in tort, there may be a recovery of exemplary damages upon proper allegations and proof. Griffith, 94 So.2d at 858. In order to permit a recovery of punitive damages, the breach must be attended by some intentional wrong, insult, abuse or gross negligence which amounts to an independent tort. Id. (citation omitted); Lewis v. Guthartz, 428 So.2d 222, 224 (Fla. 1982). ("The fact that the trial court found that the Landlord acted intentionally, wilfully, and outrageously as to the breach of contract does not by itself, create a tort where a tort otherwise does not exist."); Nicholas v. Miami Burglar Alarm Co., 339 So.2d 175, 178 (Fla. 1976). That allowance of punitive damages is dependent on a showing of malice, moral turpitude, wantonness or outrageousness of tort. Id. (citations omitted).

After considering all of the evidence, the Court finds that Menada's actions constituting a breach of the Purchase Agreement and Addendum, as modified by the Closing Statement and General Assignment, and do not also rise to the level of or amount to an independent cause of action sounding in tort. Accordingly, the award of punitive damages is improper and the Court declines to award same.

M. Trustee's Request For an Accounting

Pursuant to Counts I, II, III, IV, V, VI, VII and VIII of the Complaint, the Trustee requests that the Court order an accounting of all Delinquent Rents and Accounts Receivable that Menada has received. Under Florida law, a party seeking an accounting must show the existence of a fiduciary relationship or a complex transaction and must demonstrate that the remedy at law is inadequate. Kee v. National Reserve Life Ins. Co., 918 F.2d 1538, 1540 (11th Cir. 1990) (citations omitted). Because the Trustee has failed to establish all of the required elements, he is not entitled to an accounting.

The Court will not exercise its discretion and order the requested accounting. The additional unknown cost would likely be high and further dilute the net recovery to pre-petition creditors under the confirmed plan. If the documentary evidence admitted at trial is the best available and discoverable to date, the Court doubts that an examiner could do better. The Trustee has not alleged, let alone proven, a fiduciary relationship between himself and Menada or Meruelo or a complex transaction. The parties were in the non-fiduciary relationship of buyer and seller and landlord and assignee, respectively. The transaction was a complicated sale of commercial real estate and related personal property, both tangible and intangible, but nothing so complex as to necessitate the additional expertise and expense of an additional professional person to serve as an examiner either under relevant Florida law or 11 U.S.C. § 327. Moreover, the Trustee has not alleged or shown that his remedies at law are inadequate. Accordingly, the Trustee's request for an accounting is hereby denied.

N. Interest

1. Prejudgment Interest

Under Florida law, a party may recover prejudgment interest on damages for breach of contract as an element of the damages. Department of Transp. v. Hawkins Bridge Co., 457 So.2d 525, 528 (Fla. 1st Dist. Ct. App. 1984). Like other elements of damages, the interest must be ascertained and assessed by the trier of fact. Id. (citations omitted).

Prejudgment interest is merely another element of pecuniary damages. For a plaintiff to be fully compensated, the award must include damages suffered from the loss of the use of the money because "the loss itself is a wrongful deprivation by the defendant of the plaintiff's property." Argonaut Ins. Co. v. May Plumbing Co., 474 So.2d 212, 215 (Fla. 1985). In Florida, once damages are liquidated, prejudgment interest is considered an element of those damages as a matter of law, and the plaintiff is to be made whole from the date of the loss. Kissimmee Utility Auth. v. Better Plastics, Inc., 526 So.2d 46, 47 (Fla. 1988).

The Court awards the Trustee prejudgment interest in accordance with Section 55.03(1), Florida Statutes (1995),[11] accruing from the date of August 27, 1998, when the Trustee first demanded turnover of the prorated pre-Closing Accounts Receivable and Delinquent Rents as shown by Trustee's Exhibit No. 39, to the date of this Opinion.

2. Post-judgment Interest

Post-judgment interest is hereby awarded hereafter pursuant to 28 U.S.C. § 1961.

IV. CONCLUSION

For the foregoing reasons, the Court grants judgment in favor of the Trustee on Counts I, III, IV and X and grants judgment in favor of Menada on Counts II, V, VI, VII and VIII, and grants judgment in favor of Meruelo on Count IX.

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[11] Pursuant to Section 55.03(1), Florida Statutes (1995), as of January 1st of each year, the comptroller of the State of Florida sets the rate of interest payable on judgments and decrees. Thus, this statute shall govern the prejudgment interest rate.

This Opinion constitutes the Court's findings of fact and conclusions of law in accordance with Federal Rule of Bankruptcy Procedure 7052. A separate order shall be entered pursuant to Federal Rule of Bankruptcy Procedure 9021.

ENTERED:

Date: _____ _____

John H. Squires
United Bankruptcy Judge

cc: See attached Service List

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

IN RE: SUNCOAST TOWERS SOUTH ASSOCIATES, Debtor.	)	Chapter 11 Bankruptcy No. 98-10537-BKC-AJC Judge John H. Squires
JAMES S. FELTMAN, as Chapter 11 Trustee for the estate of Suncoast Towers South Associates, Plaintiff, v. MENADA, INC., a Florida corporation, and HOMERO F. MERUELO, Defendants.	)	Adversary No. 98-1451-BKC-AJC-A

O R D E R

For the reasons set forth in a Memorandum Opinion dated the 17th day of June, 1999, the Court hereby grants judgment in favor of James S. Feltman on Counts I, III, IV and X of the Complaint and grants judgment in favor of Menada, Inc. on Counts II, V, VI, VII and VIII of the Complaint and grants judgment in favor of Homero F. Meruelo on Count IX of the Complaint. The Defendants' motions under Federal Rule of Bankruptcy Procedure 7052(c) for partial findings are granted with respect to Counts II, V, VI, VII, VIII, and IX of the Complaint and denied with respect to Counts I, III, IV, and X of the Complaint. In addition, the Court denies James S. Feltman's motion to amend the Complaint under Federal Rule of Bankruptcy Procedure 7015 to include a count of unjust enrichment, Count XI, against Homero F. Meruelo. Further, the Court declines to impose punitive damages against

Menada, Inc. and in favor of James S. Feltman under Counts II, V, VII, and VIII of the Complaint. Moreover, the Court denies James S. Feltman's request for an accounting. Finally, the Court awards James S. Feltman prejudgment interest accruing from the date of August 27, 1998 to the date of this Opinion. The Court also awards post-judgment interest.

ENTERED:

Date: _____ _____

John H. Squires
United Bankruptcy Judge

cc: See attached Service List