

CALLING OFF AN M&A DEAL: LEGAL AND DAMAGE RAMIFICATIONS



MAY 27, 2009

Agenda

- Introduction
- Presentation
 - Jennifer Heil, Latham & Watkins LLP
 - Jeff Litvak, FTI Forensic and Litigation Consulting
 - Kenneth Mathieu, FTI Forensic and Litigation Consulting
- Questions and Answers — (*anonymous*)
- Slides — now available on front page of Securities Docket
 - > www.securitiesdocket.com
- Wrap-up



Webcast Series

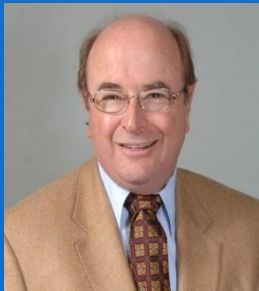
- Series of webcasts — every other week
- www.securitiesdocket.com/webcasts
- Next: June 11— **CDO Litigation Reaching Crucial Stage**
 - Jay Tambe, Jones Day
 - James Goldfarb, Jones Day
 - Jeff Nielsen, Navigant Consulting
 - Gene Deetz, Navigant Consulting



Panel



Jennifer Heil



Jeff Litvak



Ken Mathieu



Bruce Carton

Calling Off An M&A Deal: Legal And Damage Ramifications

Jennifer L. Heil
Senior Litigation Associate
Latham & Watkins LLP
(212) 906-1875

Overview

- Deal termination litigation case studies:
 - Fontainebleau Las Vegas
 - Landry's Restaurants
- Legal issues:
 - Breach of contract
 - Material adverse change clauses
 - Insolvency Test
 - In Balance Test
 - Breach of implied covenant of good faith and fair dealing
 - Intentional interference of contractual relations
 - Breach of fiduciary duties

The Fontainebleau Las Vegas Project

- The Fontainebleau Las Vegas is a new casino complex currently being built on the Las Vegas Strip
 - \$3.1 billion project
 - Scheduled to open in October 2009
 - Designed for 3,815 hotel and condo units
 - Includes a 63-story tower covering over 24 acres of the Strip
 - Construction is 70% complete

The Fontainebleau Las Vegas Financing

- The governing loan agreements provide for \$1.85 billion of bank financing
 - Two term loan facilities
 - Revolving loan facility
- As of April 2009, the financing banks had already provided over \$1 billion in funding

Leading Up To The Fontainebleau Las Vegas Lawsuit

- Fontainebleau says it attempted in March 2009 to draw \$670 million available under its revolving loan, along with another \$350 million available under a term loan.
- Bank of America and the other revolver banks refused and Fontainebleau resubmitted its request, this time arguing that the revolving funds, according to the loan agreement, should be made available once the term loan was fully drawn.
- Bank of America refused again and Fontainebleau eventually requested only the amount available under the term loan.

The Fontainebleau Las Vegas Lawsuit

- On April 23, 2009, Fontainebleau filed a \$3 billion lawsuit against 11 lenders who withheld \$770 million in funding because Fontainebleau breached its loan covenants.
- The lawsuit was filed after lenders served the project's developer with a notice of default.

Causes Of Action In The Original Fontainebleau Las Vegas Complaint

- The April 23, 2009 complaint included the following causes of action:
 - Breach of the Credit Agreement – Failure to Fund the Revolving Loans in March 2009
 - Breach of the Credit Agreement – Improper Termination of Commitments
 - Breach of the Credit Agreement – Failure to Fund the Revolving Loans in April 2009
 - Equitable Estoppel based on the banks allegedly acting as though they would continue with their commitments

Relief Requested In The Original Fontainebleau Las Vegas Complaint

- The original lawsuit requested:
 - Specific Performance by the banks of their obligations under the Credit Agreement
 - \$3 billion in damages
 - A declaration that no event of default had occurred under the Credit Agreement, the agreement was still in full force and effect, and the termination letter sent by the banks was a nullity.
 - Costs and attorneys' fees

The Fontainebleau Las Vegas Amended Complaint

- On May 12, 2009, Fontainebleau filed an amended complaint. The new complaint included the same allegations as the original complaint, but adding two new allegations against Deutsche Bank:
 - Breach of the implied covenant of good faith and fair dealing under the credit agreement
 - Intentional interference with contractual relations
- As an additional request, the amended complaint requests that the court enjoin Deutsche Bank from any further breaches of good faith and fair dealing and any further tortious interference.

The Basis For Fontainebleau's Additional Allegations

- Deutsche Bank controls \$80 million of the disputed \$770 million revolver.
- The amended complaint accuses Deutsche Bank of a conflict of interest because of the bank's ownership of the \$3.9 billion Cosmopolitan project, which is a similar project located a half mile south of the Fontainebleau project on Las Vegas Boulevard.

The Fontainebleau's Allegations Against Deutsche Bank

- The amended lawsuit accuses Deutsche Bank of "seeking to destroy the Fontainebleau in order to minimize competition" against the \$3.9 billion Cosmopolitan, which is owned by the bank and is scheduled to open the middle of 2010.
 - The Cosmopolitan will have 2,998 hotel-condominium units on 8.5 acres of Las Vegas Boulevard between MGM Mirage's City Center and Bellagio.
 - Both projects are designed with casinos, retail, restaurants and other amenities.
 - Deutsche Bank bought the Cosmopolitan in a foreclosure sale in August for \$1 billion after original developer Bruce Eichner defaulted on the project. The bank has been funding construction.
 - Deutsche Bank is rumored to have an agreement with Hilton Hotels Corp. to purchase the Cosmopolitan prior to its completion, although both sides have declined comment.

Legal Issues: Breach of Contract

- Potential breaches of loan agreement covenants by Fontainebleau:
 - Material adverse change clause
 - Insolvency test
 - In balance test

Material Adverse Change Clause

- The Fontainebleau Las Vegas dispute may involve a fight about the meaning of the material adverse change clause in the loan agreement.
- The clause allegedly gives lenders the right to terminate a loan before a project is completed for "*any event or circumstance which has a material adverse effect on the business, assets, properties, liabilities (actual or contingent), operations or condition (financial or otherwise) of the companies, taken as a whole,*" according to the Fontainebleau loan agreement.

MAC Clause Potential Carve-Outs

- Common carve-outs include:
 - changes in general political, economic or financial market conditions;
 - changes in industry conditions that do not disproportionately effect the target company;
 - changes resulting from the announcement of the transaction;
 - changes resulting from the parties' compliance with the terms of the agreement;
 - changes in generally accepted accounting principles;
 - changes in law;
 - acts of terrorism or war; or
 - the failure of the target company to meet its financial projections or a decline in the target's stock price.
- It will depend on the exact carve-outs in the Fontainebleau loan agreement whether the banks will be able to successfully claim that a material adverse change has occurred.
- There is very little case law interpreting MAC clauses, therefore, it is unclear how a court may interpret the clause and carve-outs in this case.

Breach of Contract: Insolvency Test

- The Fontainebleau Las Vegas Loan Agreement allegedly includes certain solvency requirements for Fontainebleau to be able to draw down on the revolver.
- Although no tests have been made public, it is rumored that Fontainebleau could not pass an **insolvency test**, which generally measures the fair market value of a project's expected earnings as compared with its debts.
- Bond rating agency Standard & Poor's said in February 2009 that Fontainebleau earnings after opening are expected to fall short of interest payments on the property's debt, in part based on lackluster demand for condos. Fontainebleau hoped to raise as much as \$800 million from the sale of more than 1,000 condo-hotel units.

Breach Of Contract: In Balance Test

- The Fontainebleau Las Vegas loan agreement purportedly provides for a monthly examination of whether a project has as much money going in the door as it does going out, called the **In Balance Test**. If Fontainebleau cannot meet the In Balance Test, the banks have the right to withhold financing.
- As of March 25, 2009, when Fontainebleau last drew money from a term loan, the project was “in balance.”
- However, as of mid-April 2009, when Fontainebleau notified lenders that the remaining costs to complete the project “appeared to exceed the available loan funds,” the project would not likely pass the In Balance Test as required under the loan agreement.

Legal Issues: Breach of the Implied Covenant of Good Faith and Fair Dealing

- To be able to show a breach of the implied covenant of good faith and fair dealing in its recently-added claim against Deutsche Bank, Fontainebleau will have to show:
 - That Fontainebleau and Deutsche Bank entered into a contract;
 - That Fontainebleau did all, or substantially all of the significant things that the contract required it to do;
 - That all conditions required for Deutsche Bank's performance had occurred;
 - That Deutsche Bank unfairly interfered with Fontainebleau's right to receive the benefits of the contract; and
 - That Fontainebleau was harmed by Deutsche Bank's conduct.

Legal Issues: Intentional Interference With Contractual Relations

- To be able to show that Deutsche Bank intentionally interfered with contractual relations between Fontainebleau and the other revolver banks, Fontainebleau will have to show:
 - The existence of a contractual relationship or beneficial business relationship between Fontainebleau and the revolver banks.
 - Knowledge of that relationship by Deutsche Bank.
 - Intent of Deutsche Bank to induce the revolver banks to breach the relationship.
 - Lack of any privilege on the part of Deutsche Bank to induce such a breach.
 - Damage to Fontainebleau.

The Future of Fontainebleau Las Vegas

- Bank of America, which arranged the \$800 million revolver loan among the banks, controls \$200 million of the loan.
- Bank of America officials have said they are in discussions with the developer regarding restructured financing for the Fontainebleau.

The Future of Fontainebleau Las Vegas

- Fontainebleau's request for money from the revolving line of credit may have been interpreted by the banks as a sign of trouble ahead, especially if Fontainebleau were to use the money to fund construction costs not anticipated in the original budget.
- Earnings at some major Las Vegas casinos have been cut in half, room rates at historic lows, and more than 10,000 additional hotel rooms are expected to cannibalize business from Strip properties.
- Fontainebleau lenders Bank of America, Barclays Bank, Deutsche Bank and Royal Bank of Scotland already have lent money to Las Vegas casino companies at risk in the recession. Fontainebleau was financed before the economic meltdown, when many Las Vegas casinos were generating record profits.
- Some analysts say that Fontainebleau presents a bigger financial risk than resorts built by other Las Vegas gaming giants, such as MGM Mirage's City Center and Boyd's Echelon, because it doesn't have as large a customer list to draw from.

The Landry's Going-Private Transaction

- Landry's Restaurants owns and operates several casual restaurant chains, including Rainforest Café, Chart House Restaurants, and Salt Grass Steakhouse, as well as the Golden Nugget casino complex in Las Vegas and Downtown Aquarium in Houston and Denver.
- In 2008, Tilman Fertitta, Landry's Chairman and CEO, and the original founder of the company, announced that he wanted to take the company private.

Landry's: The Initial Buyout Offer

- On January 27, 2008, Fertitta made an offer to acquire all shares of the common stock of the company for \$23.50 per share, a 41% premium over the price of Landry's stock on the last trading day before the offer.
- The Landry's Board of Directors formed a Special Committee of independent directors to consider the offer.
- After several months of negotiations amid a declining economy, on June 16, 2008 the Landry's Board entered into an agreement to sell the company to Fertitta for \$21.00 per share, which represented a 37% premium.

The Landry's Agreement Termination Fees

- The Landry's merger agreement contained a two-way termination fee under which:
 - the Company would be required to pay Fertitta \$3 million if Landry's terminated the transaction during a 45 day "Go-Shop" period, and \$24 million upon termination after the end of the Go-Shop Period; and
 - Fertitta would be required to pay the Company a \$24 million reverse termination fee if it failed to close the deal.

The Landry's Agreement MAC Clause

- The merger agreement excused Fertitta of any obligation to pay the reverse termination fee if a MAC had occurred at the company since December 31, 2007. The relevant part of the MAC clause stated:
 - **“Material Adverse Effect” means any event, development, change or circumstance (any such item, an “Effect”) that, either individually or in the aggregate, has caused or would reasonably be expected to cause a material adverse effect on the condition (financial or otherwise), results of operations, assets, liabilities (contingent or otherwise), properties, solvency, business, management or material agreements of the Company and its subsidiaries taken as a whole, except in each case for any Effect resulting from, arising out of or relating to any of the following, either alone or in combination: ... (B) any change in interest rates or general economic conditions (i) in the industries or markets in which the Company or any of its subsidiaries operates, (ii) affecting the United States or foreign economies in general or (iii) in the United States or foreign financial, banking or securities markets, in each case which changes do not affect the Company and its subsidiaries to a materially disproportionate degree; (C) any natural disaster or act of God;....**

The Landry's Debt Commitment Letter

- The debt commitment letter between Fertitta and the lending banks, Jeffries and Wells Fargo Foothill, included an almost identical MAC clause, which contained identical exceptions for a “natural disaster or act of God” and for “any change in interest rates or general economic conditions in the industries or markets in which the Company or any of its subsidiaries operates....”

Landry's and Hurricane Ike

- On September 13, 2008, Hurricane Ike made landfall at Galveston, Texas, where several of Landry's restaurants and other properties are located, certain of which sustained damage and were temporarily closed as a result.
- A September 17, 2008 press release stated that as a result of the hurricane, restaurants in Houston, Kemah, and Galveston were closed, but stressed that they were all expected to reopen and that the majority of the damage sustained by the hurricane would be covered by insurance.

Landry's Deal Post-Hurricane Ike

- On September 18, 2008, Fertitta sent a letter to the Board's Special Committee stating that if the banks "withdrew their debt commitment letter because of a material adverse effect, Fertitta may have no choice but to exercise his right to terminate the original merger agreement."
- At the time, the financing banks had not initiated an investigation into the effects of the hurricane on the company.
- Also at the same time, Fertitta purchased 400,000 shares of Landry's stock on the open market at prices ranging from \$11.83 to \$14.11.

Landry's October 7, 2008 Press Release

- Although the banks had not indicated whether they would take action after the hurricane damaged many of Landry's properties, the company issued a press release on October 7, 2008 stating that the buyout of the company by Fertitta could be in "jeopardy" because of the banks' presumed unwillingness to provide the necessary financing to close the buyout deal.
- The same press release announced that all of its Houston area restaurants affected by the hurricane had reopened, and that all of the Kemah properties were to reopen by spring 2009.
- After this press release was issued, Landry's stock fell 35% to \$8.44 per share.

Landry's: Renegotiation of the Buyout

- During the weeks after Hurricane Ike, Fertitta pressed the Board to accept a lower takeover price.
- On October 18, 2008, Landry's issued a press release announcing that it had entered into an amended merger agreement with a reduced purchase price of \$13.50 per share.
- The amended merger agreement altered the terms of the Reverse Termination Fee, reducing the amount from \$24 million to \$15 million.

Landry's: Fertitta Continues To Purchase Stock

- Before the revised merger closed, between October 20, 2008 and December 2, 2008, Fertitta continued to purchase Landry's stock on the open market, eventually gaining majority control of the company after accumulating 56.7% of all outstanding stock.

Landry's: The SEC's Request for Information

- After the announcement of the revised merger, the SEC requested that Landry's disclose certain information regarding the amended debt commitment letter.
- Although the original debt commitment letter had been made available to the public in an SEC filing, the company did not disclose any information to the SEC about the amended debt commitment letter.

Landry's: Termination of the Buyout

- On January 11, 2009, the Landry's Board of Directors announced that the buyout transaction was terminated and that Fertitta would be released from his obligations under the merger agreement, including the obligation to pay the reverse termination fee.
- The explanation for the termination was that the lending banks were unwilling to make the amended debt commitment letter public.
- After the termination announcement, Landry's stock opened at \$7.70 per share.

Landry's Shareholder Class Action

- On February 5, 2009, a class of Landry's shareholders brought an action against Fertitta and the Landry's Board in Delaware Chancery Court. The class action complaint alleges:
 - Breach of fiduciary duty against Fertitta
 - Aiding and abetting breach of fiduciary duties against Fertitta's companies
 - Breach of fiduciary duty against Landry's directors
 - Alternative claim against the board for failure to seek the reverse termination fee

Landry's Case: Relief Requested

- The class action complaint requests that the court:
 - Find the defendants liable of the claims brought against them.
 - Order Fertitta to consummate the buyout at the original purchase price of \$21.00 per share or to pay to all class members damages representing the difference between \$21.00 per share and the price at which class members sold their share in the open market or the value of the stock on the date of the complaint.
 - Alternatively, order Fertitta to pay the original \$24 million reverse termination fee.
 - Award the class compensatory damages for the devaluation of Landry's shares.
 - Costs and attorneys' fees.

Legal Issues: Breach of Fiduciary Duties

- To be able to prove a breach of fiduciary duty, the Landry's plaintiffs will have to prove:
 - The existence of a fiduciary duty between Fertitta and the company (or the directors and the company)
 - Breach of that duty
 - The breach of duty was the proximate cause of the Landry's plaintiff's damages

Legal Issues: The Landry's MAC Clause

- It is possible that if Fertitta and the director defendants can prove that a material adverse change occurred under the merger agreement and the debt commitment letter, they will not be found liable for a breach of fiduciary duties.
- This may be difficult because of the carve-outs for general economic conditions and natural disasters.

The Future of Landry's and Fontainebleau

- Case law is unclear on MAC and related claims, so going to trial would be a gamble for all parties
- Settlement during discovery or renegotiation of financing is likely



Calling Off an M&A Deal: Legal and Damage Ramifications

Jeff Litvak
Senior Managing Director
FTI Consulting
(312) 252-9323

Kenneth Mathieu
Managing Director
FTI Consulting
(312) 252-9383

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FTI®

Issues To Be Covered

- Damages Overview
- Measures of Damages
- Discounting and Evidentiary Challenges
- Calling Off an M&A Deal
- Case Study
 - Hypothetical Timetable
 - Fact Situation
 - Complaint – Allegations
 - Damages
 - Out of Pocket Damages
 - Lost Value of Equity
 - Diminution in Value of Other Holdings
 - Diminution in Value of Land
 - Summary of Economic Damages

Damages Overview

- “But For” Concept
- Types of Damages / Remedies:
 - Monetary Damages
 - Compensable
 - Consequential
 - Punitive

Damages Overview (cont'd)

- Legal Criteria in Proving Damages
 - Causation
 - Mitigation
 - Reasonable Certainty
 - Speculation
 - Foreseeability

Measures of Damages

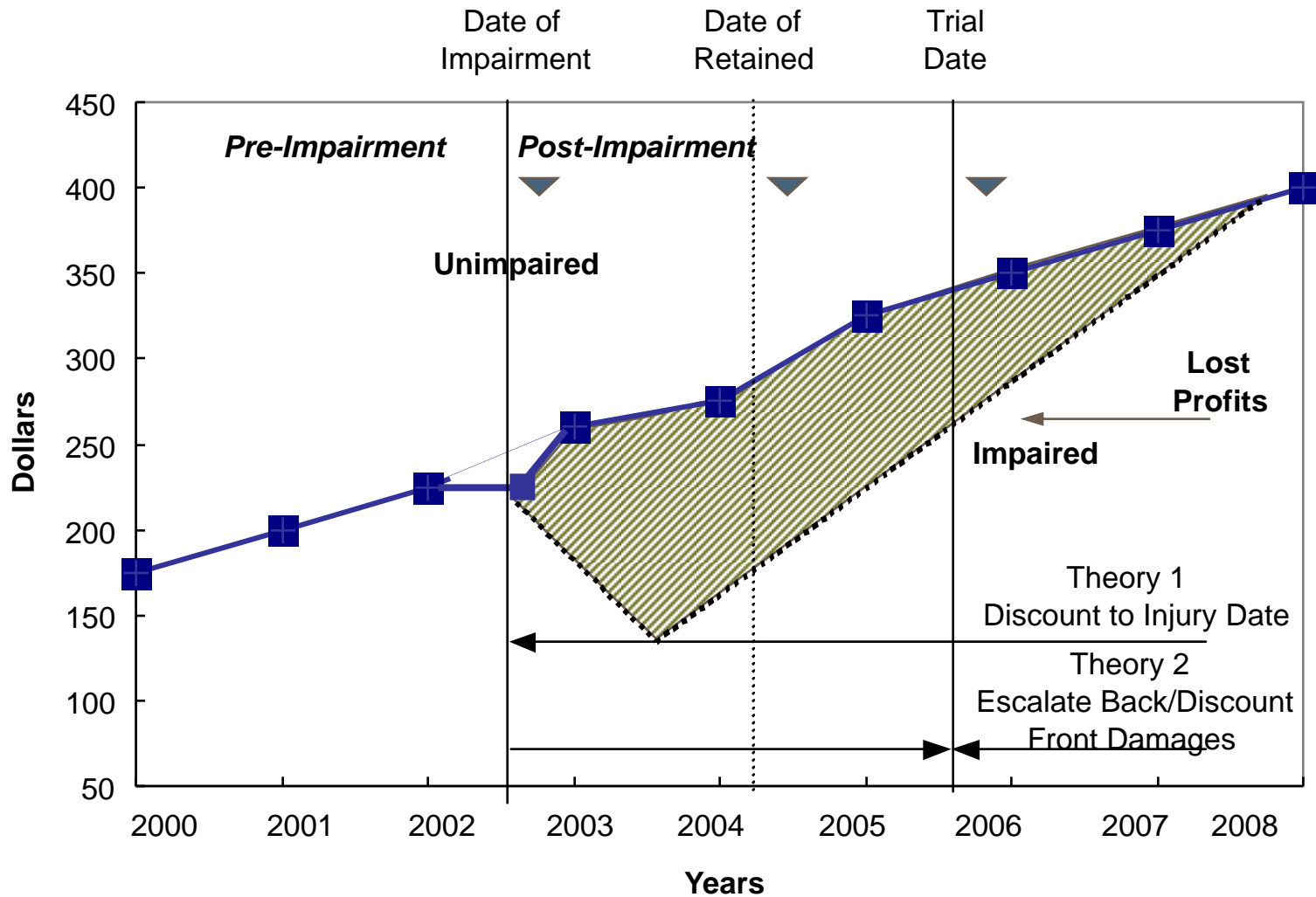
- Determinants of Measurement
 - Temporary vs. permanent impairment
- Measurements of Damages
 - Out-of-pocket Costs
 - Lost Profits
 - Destruction of Business Damages
 - Loss of Opportunity
 - Value of the opportunity
 - PV of future cash flow
 - What the parties thought the opportunity was worth
 - May be limited to OOP

Measurement of Damages (cont'd)

Measure of Recovery

- Lost Profits
Or
- Fair Market Value Before and After

Traditional Lost Profits Model



Destruction of a Business Measure of Damages

Fair Market Value (Going Concern) One Day Prior to the Impairment	\$XXX
Less: Value One Day After the Impairment	<u>(XXX)</u>
Economic Damages/Lost Opportunity	<u>\$XXX</u>

Date to Which Future Losses Should be Discontinued

(Jones & Laughlin Steel Company v. Pfelfer) The Supreme Court Stated:

"It is both easier and more precise to discount the entire lost stream of earnings back to the date of injury - the moment from which earning capacity was impaired."

Evidentiary Challenges

- Legal Standard of Admissibility of Expert Testimony
 - Federal Rule 702
- Federal Rule 702
 - Expert Must be Qualified
 - Relevant: Tied to the Facts of the Case
 - Reliable: Grounded in Technique / Principle
Validated by the Community

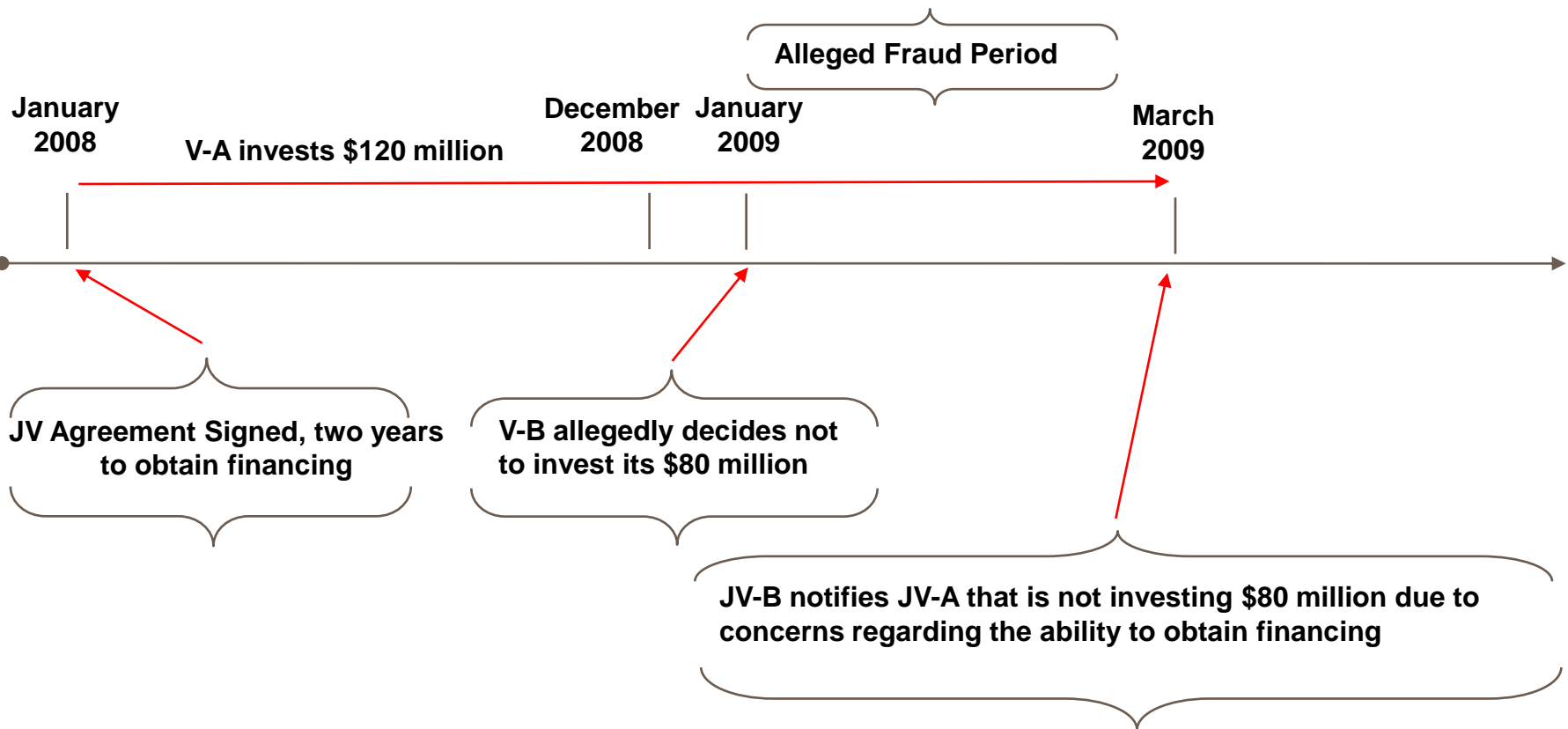
Overview

- In today's current economic state, transactions are becoming more fragile and subject to termination, driven by factors such as:
 - Declining revenues and profits
 - Tightening and disappearing credit
 - Material adverse changes
- The considerations of buyers, sellers, and creditors when making these decisions are driven by the economics of the transaction and the legal obligations of the parties

Recent Deals that were Terminated

- Fontainebleau Las Vegas filed a \$3 billion lawsuit against a group of bank lenders... **banks reneged on their commitments to provide funding...**
- The \$6.5 billion leveraged buyout of chemical company Huntsman Corp hit another speed bump... **two banks set to finance the deal are balking...**
- Samsung Electronics Co. withdrew its \$5.8 billion offer to acquire SanDisk Corp. ... **no longer believed SanDisk was worth the money it was offering...**

Hypothetical Scenario Timeline



Hypothetical Scenario

Facts

- Fact Situation

- An office park with five buildings and a conference center in Dubai is planned by a joint venture
- The JV agreement is signed January 1, 2008
- JV partner A owns other buildings and land near the development
- The JV obtained governmental concessions and obligations to complete the project
- The total project cost was projected to be approximately \$2 billion
- The JV-A has invested \$120 million in equity
- The JV agreement provided two years for the JV to obtain \$1.8 billion in financing

Hypothetical Scenario

Facts

- Fact Situation

- The JV agreement provided for another \$80 million to be invested by JV partner B.
- In March 2009, JV-B decided not to invest on the basis that obtaining financing in the current economic climate is not likely
- The JV agreement does not contain a provision to terminate the deal due to anticipated inability to obtain financing in the future
- The JV agreement contains a general MAC clause which allows partners to terminate
- The agreement specifically prohibits the ability to obtain consequential damages
- JV-A and JV-B are large multinational corporations

Complaint - Allegations

- JV-A files suit against JV-B alleging
 - JV-B attempting to renegotiate the economic terms of the agreement to its benefit through withholding the funds
 - JV-B acted fraudulently and misrepresented its commitment to the project as JV-B was aware it was going to terminate the JV on January 1 2009, but did not notify JV-A until March 2009
 - JV-A relied on JV-B representations and was damaged
 - JV-A will likely be held accountable for the obligations related to the government contracts

Damages Theories

Out of Pocket Costs

- Plaintiff

- JV-A incurred \$50 million in OOP on developing the site plans, direct and indirect salaries, overhead, etc.
- There is no salvage value to the plans to offset the expenditures
- The bases of the costs are invoices and expenses reported in the books and records of the JV

Damages Theories

Out of Pocket Costs

- Defendant
 - Pre-development costs will have value at some point in the future
 - The amounts included are overstated, included items unrelated to the project, and lack sufficient documentation
 - The allocation of overhead to the project is overstated because the amount of time and resource provided by the parent company of JV-A was overstated

Damages Theories

Out of Pocket Costs, millions

Plaintiff

	OOP	Salaries	Overhead	Total
January 2008 to December 2008	\$20,000	\$12,000	\$8,000	\$40,000
January 2009 to March 2009	\$5,000	\$3,000	\$2,000	\$10,000
Value of Assets				\$0
			Total Damage	\$50,000

Defendant

	OOP	Salaries	Overhead	Total
January 2008 to December 2008	\$10,000	\$5,000	\$2,000	\$17,000
January 2009 to March 2009	\$2,000	\$1,000	\$500	\$3,500
			Total	\$20,500
Value of Assets				(\$10,000)
			Total Damage	\$10,500

Damages Theories

Lost Value of JV Equity

- Plaintiff
 - JV-A has a 60 percent interest in the JV
 - Based on JV-B's analysis, the JV has an equity value of \$500 million
 - JV-A's share of the \$500 million is \$300 million
 - The current market value of the land owned by the JV is \$50 million
 - There is no salvage value to any other assets owned by the JV
 - JV-A was damaged by \$250 million

Damages Theories

Lost Value of JV Equity (millions)

JV- B Valuation Analysis assumes sale in 2014

JV-B Value in 2014		Undiscounted	Discounted Value in 1/2008
EBITDA	a	500,000	
Multiple (Rounded)	b	6	
Enterprise Value	c=a*b	3,005,679	
Debt	d	(2,000,000)	
Equity	e=c-d	1,005,679	
JV-B Interest	f=e*40%	402,271	200,000

Damages Theories

Lost Value of the JV Equity (millions)

JV- A Valuation Analysis based on JV-B Model

JV-B Value in 2014		Undiscounted	Discounted
			Value in 1/2008
EBITDA	a	\$500,000	
Multiple (Rounded)	b	6	
Enterprise Value	c=a*b	3,005,679	
Debt	d	(2,000,000)	
Equity	e=c-d	1,005,679	
JV-B Interest	f=e*60%	603,407	300,000
Less: Value of Land			(50,000)
Damage			<u>\$250,000</u>

Damages Theories

Lost Value of the JV Equity

- Defendant
 - The \$500 million valuation prepared by JV-B is overstated due to the change in the economic environment
 - The value of the land is significantly higher than \$50 million
 - The plans and other items have a future value estimated to be \$10 million
 - Other partners have expressed interest in the acquisition of the project which may increase the value of the JV holdings and mitigate JV-A's damages

Damages Theories

Lost Value of the JV Equity (millions)

JV- A Valuation Analysis based on JV-B Model

<u>JV-A Value in 2014</u>		Undiscounted	Discounted Value in 1/2008
EBITDA	a	\$400,000	
Multiple (Rounded)	b	6	
Enterprise Value	c=a*b	2,400,000	
Debt	d	(2,000,000)	
Equity	e=c-d	400,000	
JV-A Interest	f=e*60%	240,000	119,322
Less: Value of Land			(80,000)
Less: Value of other assets			(10,000)
Damage			\$29,322

Damages Theories

Diminution in Value of the other buildings

- Plaintiff

- JV-A owns building and land near the development site that would have directly benefited from the new buildings and conference area
- The buildings would have experienced a higher occupancy and increased rental rates
- The land would have increased in value due to its proximity to the conference center
- The value of the buildings and land without the development is \$100 million
- The value of the buildings and land with the development is \$200 million
- JV-A incurred \$100 million in damages related to the diminution in value of the other buildings and land

Damages Theories

Diminution in Value of the other buildings

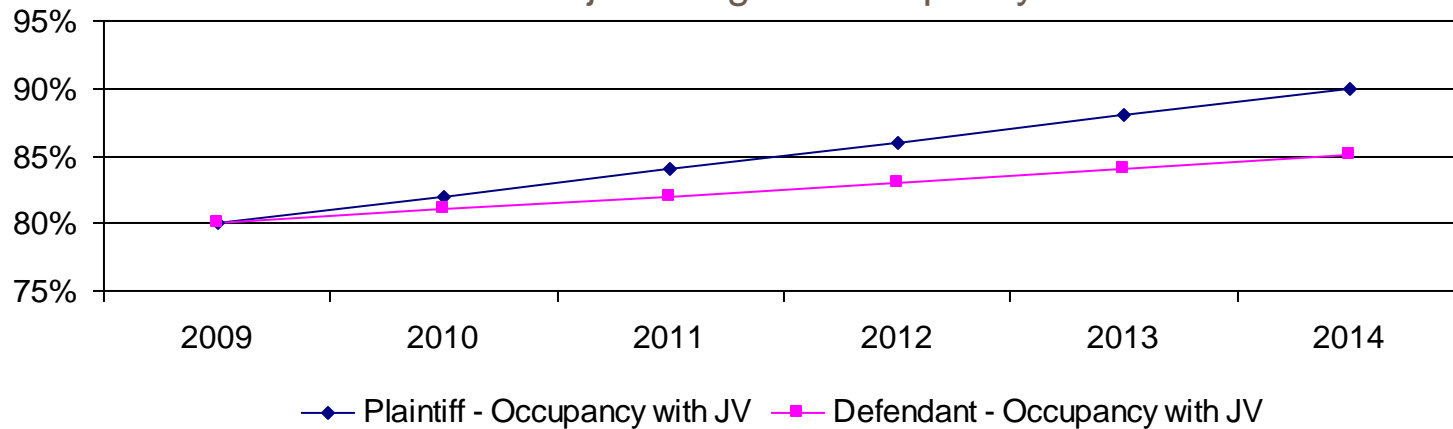
- Defendant

- These damages are consequential and expressly prohibited by the JV agreement
- The valuation methodologies and assumptions are flawed and overstated based on the occupancy and room rate assumptions in the scenario that contemplates new buildings and a conference center
- The valuation methodologies and assumptions are flawed and understated based on the occupancy and room rate assumptions in the scenario without the conference center and new buildings

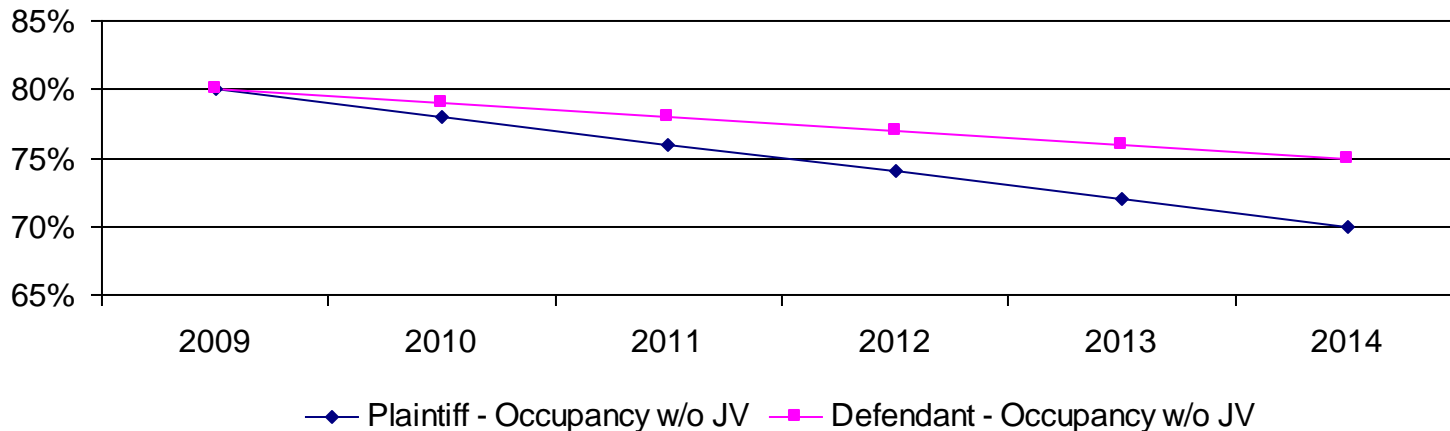
Damages Theories

Occupancy Rate Assumptions

Plaintiff Projects Higher Occupancy with JV



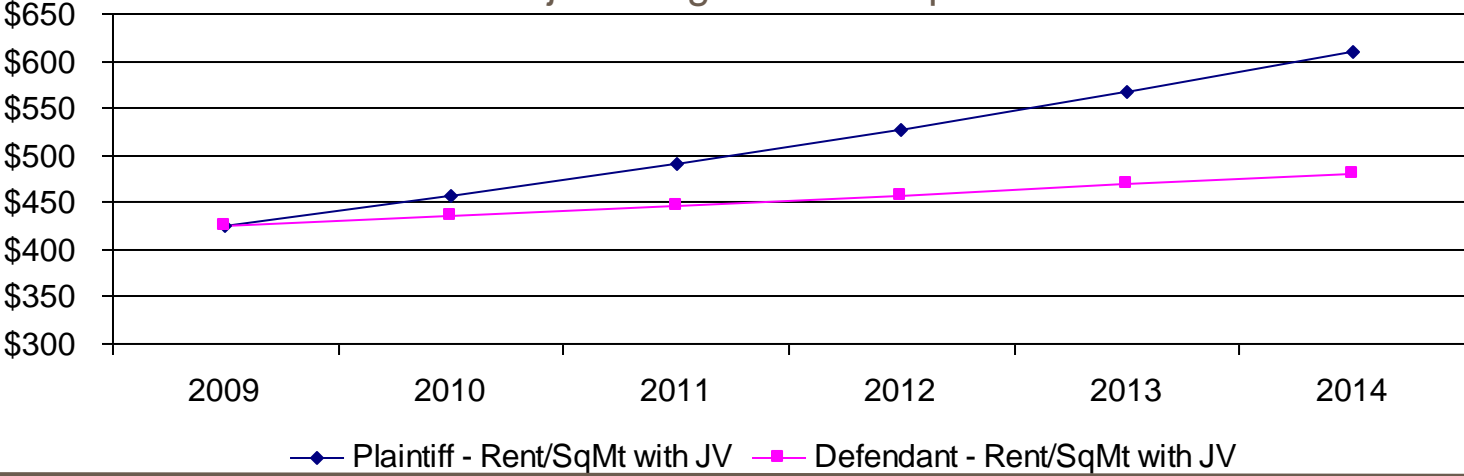
Plaintiff Projects Lower Occupancy without JV



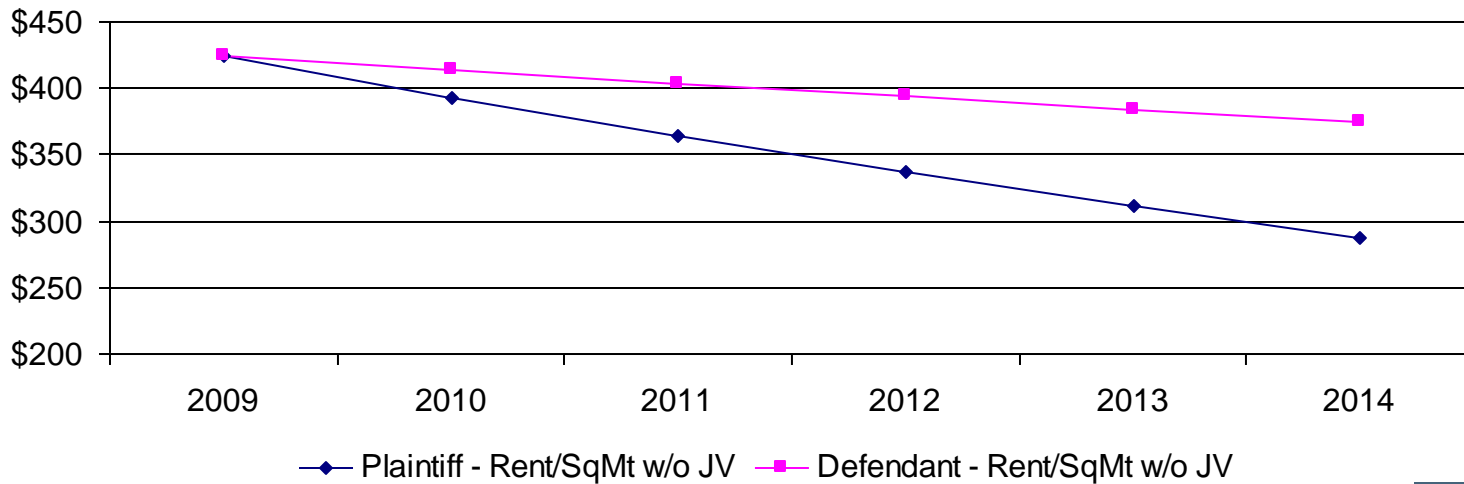
Damages Theories

Rental Rate Assumptions

Plaintiff Projects Higher Rent/SqMt with JV



Plaintiff Projects Lower Rent/SqMt without JV



Damages Theories

Diminution in Value of the land

- Plaintiff

- JV-A owns land near the development site that would have benefited from the new buildings and conference area
- The land would have experienced an increase in value due to its proximity to the conference center
- The value of the land without the development is \$20 million
- The value of the land with the development is \$40 million
- JV-A incurred \$20 million in damages related to the diminution in value of the land

Damages Theories

Diminution in Value of the land

- Defendant

- These damages are consequential and prohibited by the JV agreement
- The valuation methodologies and assumptions are flawed and overstated in the scenario that contemplates new buildings and a conference center
- The valuation methodologies and assumptions are flawed and understated conference center and new buildings

Damages Theories

Diminution in Value

Plaintiff

Description	Impaired Value	Unimpaired Value	Damage
Loss of Value			
Development and Convention	\$50,000	\$300,000	\$250,000
Existing Buildings	\$100,000	\$200,000	\$100,000
Land	\$20,000	\$40,000	\$20,000
Total			\$370,000

Defendant

Description	Impaired Value	Unimpaired Value	Damage
Loss of Value			
Development and Convention	\$90,000	\$119,000	\$29,000
Existing Buildings	\$0	\$0	\$0
Land	\$0	\$0	\$0
Total			\$29,000

Damages Theories Summary

Description	Plaintiff	Defendant
OOP	\$50,000	\$10,500
Diminution in Value of Other Assets	\$370,000	\$0
Total Damages	<u>\$420,000</u>	<u>\$10,500</u>

OR

Description	Plaintiff	Defendant
Lost Equity Value	\$250,000	\$29,000
Diminution in Value of Other Assets	\$370,000	\$0
Total Damages	<u>\$620,000</u>	<u>\$29,000</u>

Questions?



Thank You

Thank you for attending this webcast.

