00-30645

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE MATTER OF: LILJEBERG ENTERPRISES, INC. , Debtor.

LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee,
v.
LILJEBERG ENTERPRISES, INC.
Plaintiff/Appellee/Cross-Appellant.

LILJEBERG ENTERPRISES, INC.
Plaintiff/Appellee/Cross-Appellant,
v.
LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee.

LIFEMARK HOSPITALS, INC.
Defendant/Appellant/Cross-Appellee,
v.
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, LLC
Plaintiff/Appellee/Cross-Appellant.

LILJEBERG ENTERPRISES, INC.
ST. JUDE HOSPITAL OF KENNER, LOUISIANA, LLC
Plaintiffs/Appellees/Cross-Appellants,
v.
LIFEMARK HOSPITALS OF LOUISIANA, INC.; LIFEMARK HOSPITALS, INC.; AMERICAN MEDICAL INTERNATIONAL; TENET HEALTHCARE CORPORATION
Defendants/Appellants/Cross-Appellees.

On Appeal From The United States District Court For The Eastern District Of Louisiana

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BRIEF OF APPELLEES/CROSS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Local Rule 28.2.1, Appellees/Cross-Appellants Liljeberg Enterprises, Inc. and St. Jude Hospital of Kenner, Louisiana, LLC, certify that the following persons have an interest in the outcome of this lawsuit:

DEFENDANTS/APPELLANTS/CROSS-APPELLEES:

Lifemark Hospitals, Inc.
Lifemark Hospitals of Louisiana, Inc.
American Medical International
Tenet Healthcare Corporation

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Respectfully submitted,

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SIDNEY K. POWELL
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RECOMMENDATION ON ORAL ARGUMENT

Appellee requests oral argument. This is an appeal from four consolidated cases litigated over 10 years, and the record is found in 11 boxes. There are 41 volumes of record, 16 volumes of trial transcript, and 7 boxes containing hundreds of trial exhibits and volumes of depositions submitted at trial. The trial judge found that Lifemark/AMI/Tenet breached its fiduciary duties to St. Jude/LEI and engaged in deliberate collusion in forcing the judicial sale of and purchasing St. Jude Hospital. The court found Defendants did so for the purpose of usurping ownership of the hospital and terminating LEI's pharmacy contract, and the court ordered the hospital returned to St. Jude/LEI. The case also involves issues of Louisiana law and collateral mortgage. By cross-appeal, LEI seeks the additional monetary damages to which it is entitled.

This case is large and complex, and St. Jude/LEI believes that oral argument will assist the Court.

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2. Whether the trial court properly set aside the collusive sale and required Tenet to disgorge its wrongfully-attained profits?

3. Whether the trial court erred in requiring St. Jude/LEI to reimburse Tenet for money it paid in its collusion to purchase the hospital?

4. Whether the trial court properly allowed LEI to assume the CPMA in bankruptcy?

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I. STATEMENT OF THE CASE

A. Course Of Proceedings.

This case concerns four consolidated actions: (i) Lifemark/AMI/Tenet's ("Defendants") action against St. Jude to enforce a promissory note for debt incurred in the construction of St. Jude Hospital (Civil action 94-3993); (ii) Liljeberg Enterprise, Inc.'s ("LEI") motion to assume the Clinical Pharmacy Management Agreement ("CPMA") under Bankruptcy Code § 365 (Civil action 93-1794); (iii) LEI's action for Defendants' bad faith breaches of the CPMA (Civil action 93-4249); and (iv) LEI's injunction suit to prohibit Defendants from unlawfully dispensing legend drugs at the hospital (Civil action 95-4249).

The cases were tried to a district judge, who decided most issues favorable to St. Jude/LEI. In a 100-page opinion, the court made many fact-findings, including that Lifemark's negotiators deliberately obtained and breached the trust of St. Jude/LEI and engaged in tactics that "were both devious and underhanded" (RE8:8). Lifemark's expressed policy for dealing with St. Jude/LEI was

"RYLO" –"Rip Your Lips Off" (RE8:9). The court held that the articulated "corporate policy of AMI included the goals of: (a) causing financial harm to LEI; and (b) gaining complete control of the development" (RE8:10). The court held that Lifemark/AMI and its successor, Tenet, had deliberately acted in bad faith, breached fiduciary duties to St. Jude/LEI, and colluded to terminate St. Jude's ownership of the hospital, dissolve the lease and the pledge of basic rents, and cancel LEI's pharmacy agreement (RE8:10-13, 18, 21).

The court returned ownership of the hospital to St. Jude and reinstated the collateral mortgage, collateral mortgage note, and note in favor of LHI, deeming the mortgage note current at the time of transfer (RE6; 8:33). It also found that Defendants owed LEI over $11,000,000 in back fees and damages under the CPMA, and that LEI could assume the CPMA in bankruptcy (RE6). It awarded LEI prejudgment interest on its claims for reimbursement of costs under the CPMA (RE6; 8:104), but denied the requested injunction and ordered reimbursement of the $7,800,000 Lifemark/AMI paid to Travelers to purchase the hospital at the collusive sale (RE6). LHI/LHL/AMI/Tenet[1] timely appealed, and St. Jude/LEI timely cross-appealed (RE5).

B. Statement Of Facts.

1. The Liljeberg's Obtained A Certificate Of Need To Build A 300-Bed Hospital In New Orleans.

LEI is a small, family business owned by pharmacists-brothers. John and Robert Liljeberg worked extensively for many years to compile the requisite information, obtain community support,

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[1] Lifemark Hospitals, Inc. ("LHI") was a holding company for Lifemark's Hospitals in the southeast. Lifemark Hospitals of Louisiana ("LHL") was a shell entity that held Lifemark's Louisiana hospitals, including St. Jude (Ex770:13; Ex771:9-13; Ex772:19, 21, 22-27). All money and control rested with Lifemark/AMI/Tenet (Ex770:5, 13-19; Ex771:20, 22; Ex772:22-23, 25-27, 45).

find a site, negotiate for land, obtain zoning variances, and obtain a certificate of need (§1122 certificate)[2] from the U.S. Government to build a 300-bed hospital in New Orleans (R43:215-18).

Upon receiving the certificate in August 1981, LEI had one year to obtain a capital commitment and begin construction (R42:12; 43:218-19). It was inundated with calls from hospital companies (R43:221). Irv Gregory, a Lifemark executive, contacted the Liljebergs on behalf of Lifemark (R42:5-7; 43:222-23). Gregory arranged a meeting with Lifemark President, William Mackey, and others to discuss how Lifemark could participate (R42:8-9; 43:167-69, 223-25). Mackey instructed Gregory to make every effort to capitalize on his prior relationship with the Liljebergs, build the Liljeberg's trust, and secure the deal with the Liljebergs to build the hospital (R42:9, 20, 25; 43:173, 185-86).

Mackey asked the Liljebergs to sell the hospital, but they declined, expressing their intent to keep the hospital and pharmacy because many family members are licensed pharmacists (R42:6; 43:169-70, 227). Mackey agreed. The basic terms of their deal included: the Liljebergs would own St. Jude Hospital; Lifemark would lend the money to build it, and would lease the hospital for 25 years at payments equal to the debt service on the collateral mortgage; the Liljebergs would build a medical office building ("MOB") in which Lifemark would also lease space; the Liljebergs would keep the pharmacy; and, Lifemark and the Liljebergs would split the pharmacy profits 50/50 (R42:15, 74, 112; 43:170, 172-73, 227-28; 45:487-88). Mackey was warm and personable; he called the Liljebergs his partners, and he assured them this would be a great success (R43:232-33). He even

[2] The Certificate allows certain capital costs to be passed through to the government (R43:299).

told them that if they did this deal, he would give them other pharmacies to operate in the Lifemark system (R42:13). The Liljebergs and Lifemark committed to work exclusively with each other on the project (R43:230-31, 242; Ex728).

2. Lifemark Schemed To "Rip Your Lips Off"

Gregory admitted that Mackey "smelled blood" from the beginning. Mackey knew he had the upper hand in the contract negotiations and could capitalize on it (R42:12-13). Mackey bragged that he had the Liljebergs under time pressure, and Lifemark would draft the contracts to its advantage (R42:13; 43:179-81, 212-13; 45:500). Lifemark literally used the term "RYLO program" to describe how this deal was structured: "Rip Your Lips Off" (R45:482, 507).[3] Lifemark drafted provisions to make it difficult for the Liljebergs to comply and easy for Lifemark to terminate (R42:15; 43:310-12; 45:486, 509, 520, 523).

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[3] Former AMI executive Wendell Alford admitted to the "RYLO" scheme and testified that another AMI executive told him that if he "testified on behalf of the Liljebergs in any fashion, [he] would never be able to work in major hospital circles" again (R45:482, 486).

Lifemark originally drafted the CPMA as agreed, for a 50/50 split of gross revenues[4] with LEI bearing all expenses of running the pharmacy (R43:188-89, 239-40, 316-17). At the last minute, after everything had been negotiated, the documents were ready to sign, and it was too late for LEI to do anything else, Mackey took a phone call from his general counsel, then turned to the Liljebergs and informed them that new legislation prohibited the 50/50 split. Knowing this was untrue, Mackey put his arm around John Liljeberg and assured him they would work out a "fee for services contract" that would approximate the promised 50/50 split (R42:16-17, 33-34; 43:188-89, 191, 240-42, 246; 45:487-88; RE8). All the documents were initially drawn as a partnership. According to Lifemark's general counsel, those had to be destroyed and a corporation formed (R43:251).

From the inception, Defendants wanted LEI to default and schemed to make that happen (R42:106, 130, 140, 147-48, 155; 43:186, 208-09; 45:474, 486, 500; LEI-RE1). Several AMI/Tenet employees admitted the avowed corporate policy to eliminate LEI (R42:140, 148, 153-54; 43:186, 208; 45:474-75, 486, 500). Joe Vela of Lifemark/AMI, Wendell Alford, and others admitted that AMI's corporate policy was to harm the Liljebergs and gain control of the project (R42:119, 121, 130, 147-48; 43:208-09; 45:520, 523). AMI lured the Liljebergs into the MOB project, knowing that AMI would not renew the master lease, and it structured the CPMA to cause problems for LEI (R42:118-19, 140; 43:177; 45:520, 523).

[4] Lifemark ran numerous pharmacies for other hospitals on a percentage basis of 50-60% of gross revenues (R42:20; 45:472-73, 482).

AMI/Tenet's intentional deceit and bad faith were blatant at a meeting in Atlanta. AMI executives openly discussed the pharmacy contract with "the boys," that AMI never intended to honor it as written, that AMI would delay opening the hospital, and that AMI would do whatever it took to avoid the contract. Ashton Hecker repeatedly voiced intent to put as much financial pressure on the Liljebergs as possible to force them out of the hospital and pharmacy (Ex776:11-12, 14, 18; LEI-RE1).

3. Lifemark Drafted The Pharmacy Contract Ambiguously To Facilitate Terminating The Liljebergs.

Lifemark drafted the CPMA deliberately ambiguous, with the intent to "say whatever [they] wanted it to say" in the event "it became advantageous down the road to get into a shoving match" (R42:21-22). Corporate counsel bragged about his ability to draft documents loosely so they could later be interpreted however Lifemark wanted (R42:21-22, 56-57; 43:177). Indeed, Gregory, Lifemark's primary negotiator, admitted that the contract was loosely written so that if the Liljebergs got out of hand, Lifemark "could whack them with it" (R42:62). Meanwhile, Lifemark repeatedly assured the Liljebergs that the new "fee for services" contract would approximate a 50/50 split (R42:22, 28, 35, 38, 41-42, 45, 65). Pursuant to the new pharmacy contract, LEI was to have the exclusive right to furnish all legend drugs throughout the hospital (R42:18; 43:249).

4. AMI Controlled The Project, Over-Built The Hospital And MOB, Delayed The Project, And Financially Squeezed The Liljebergs.

Lifemark/AMI[5] took total control of the project. Mackey was determined to make St. Jude/LEI build an expensive MOB before the hospital even opened (R43:234-35; LEI-RE1). Lifemark arranged for financing from Travelers (R42:122; 43:177), then demanded a building several stories high and a second foundation for an additional MOB, merely to increase St. Jude/LEI's expenses–all commensurate with its plan to squeeze them out (R42:75, 121-22, 129-30, 152-55; 43:234-35). Lifemark fired the Liljeberg's architect and selected its own, required use of Lifemark's contractor–Spaw Glass (without bids),[6] and controlled the entire project, including the MOB (R42:14, 115-17, 129-30; 43:175-77, 183, 234-37, 238-39, 297, 304). Lifemark also controlled promotional costs for the start-up and rolled those into the project costs (R43:238).

LHI provided the financing for the hospital in return for a collateral mortgage (R43:296). Within a few months of ground-breaking, AMI bought Lifemark, "brushed off" the Liljebergs' inquiries about construction progress, and refused to give them monthly reports (R43:252-3).

Several former AMI employees testified that AMI deliberately increased costs and delay to apply financial pressure to the Liljebergs (R42:152-55; LEI-RE1). When construction was almost complete, AMI ordered the large maternity facilities to be redone and re-equipped (R42:96, 152-55).

5 AMI purchased Lifemark in 1984; AMI and NME later merged to become Tenet (R42:73, 128; 43:295; 44:446; Ex771:7-8).

6 The president of Spaw Glass was the brother-in-law of a partner in one of Lifemark's projects. The presidents of Spaw and Lifemark were on each others' boards (R42:14, 116).

This decision alone added $1 million in costs and delayed opening the hospital. AMI also ordered a nursing station torn out and re-equipped as a plastic surgery unit, and ordered several other areas redone as well (R42:94, 96-97, 137, 146, 152-55). Former AMI hospital administrator, Charles Woeppel, admitted that these renovations created enormous expense and burdened the Liljebergs with a greater mortgage (R42:97-98, 111-12, 137). In addition, he said that AMI chose the most expensive equipment he had ever placed in a hospital (R42:98). The Liljebergs' mortgage debt to LHI skyrocketed, while AMI recovered over $10,000,000 from the government in its initial capital cost pass-through request and approximately $4,000,000 each year (R42:99, 100, 110-12, 156; 55:1755). The hospital and MOB opened on August 26, 1985 (R43:264).

AMI held a master lease on the MOB for 80,000 square feet for five years with an option to renew (R43:263, 314). Lifemark had arranged for Travelers to finance the MOB for the Liljebergs (R43:296). The Liljebergs' monthly payments on the MOB were $275,000 (R43:263). AMI controlled the build-outs and restricted prospective lessees (R43:265). Meanwhile, AMI's payments for its lease of the hospital produced no cash—it was a purely paper transaction within AMI, which wholly owned LHI, the holding company which held the collateral mortgage on St. Jude (R43:312).

5. AMI/Tenet Deliberately Circumvented The Pharmacy Contract.

From early on, the pharmacy staff found cases of drugs hidden throughout the hospital—drugs which did not come from the pharmacy (R41:357-61; 43:257-58, 275; 45:576, 579-82; 47:723; 51:1156; Ex378; LEI-RE2). The pharmacy stopped getting calls for albumin, and the pharmacist learned that the hospital had begun buying it elsewhere (R43:258-60; 45:583-5). The hospital also used its materials management department to buy legend drugs that were contracted and legally permitted only through the pharmacy (R44:425, 432; 48:908; 51:1149-50, 1154; Ex595).[7] Former director of AMI's materials management department, Fred Matherne, testified it was part of his job to order legend drugs for the hospital (R48:908-09). When the Liljebergs brought these issues up with hospital directors, they were told "We'll look into it" (R43:259).[8]

Defendants also circumvented the agreement by using multiple-dose vials, for which they paid the pharmacy a single fee per-vial, instead of per-administered-dose as required by the contract (R44:362, 364; 54:1573; 55:1759). AMI/Tenet deliberately delayed correcting its accounting records to reflect price changes that would benefit the pharmacy, ignored information on prices

[7] An inspection by the Louisiana Department of Health and Hospitals found legend drugs being illegally ordered, stored, and dispensed from materials management (R44:425, 432; LEI-RE3). Even defense counsel conceded the hospital did not have the requisite permits to do this (R47:635). The state inspector testified that a paid expert for Lifemark/AMI tried to persuade him to "look the other way" and to ignore theses violations (R44:428, 437; LEI-RE3).

[8] The Liljebergs filed suit in state court and prevailed on the circumvention claims, yet the hospital continued many of the same practices. *Liljeberg Enterprises, Inc. v. Lifemark Hospitals of Louisiana, Inc.*, 620 So.2d 1331 (La.App. 4th Cir. 1993), *writ denied*, 621 So.2d 818 (La. 1993) (A-1) (R43:260; 54:1579-80; 55:1765-66, 1768, 1770; LEI-RE5). Even the hospital's expert calculated that the hospital owed the pharmacy more than $3,500,000 for unreimbursed costs and $3,000,000 for circumvention (R55:1695-97; 56:1859).

given to it by the pharmacy, and paid the pharmacy only the cost of generic drugs at Tenet's bulk wholesale contract price —even though the pharmacy had filled the prescriptions with requested name-brand drugs purchased at higher cost (R53:1532-33; 54:1552, 1598-1604, 1614, 1628, 1630-31; LEI-2005; LEI-2006). *See generally* (LEI-RE4).

6. AMI/Tenet Calculated To Ruin The Liljebergs.

Without explanation, AMI cut its payments to the pharmacy by thousands of dollars each month (R46:541; 47:647-49, 781; 54:1558, 1567, 1580; LEI-RE5).[9] Meanwhile, the hospital was buying legend drugs itself through materials management, denying that business to LEI (R44:356-61; 47:653-54; 48:908-09; 51:1149-50; 54:1622-23). The hospital suddenly took the supply of contrast media from LEI and purchased it also through materials management (R47:632; 51:1155-66; 54:1606; RE8:39-40). Pharmacy revenues dropped dramatically (R46:607, 610, 626; Ex556; RE8:39-40).

At trial, Faucheaux unabashedly admitted not adding up the information on the disk LEI supplied to him daily, not resolving differences in quantities, not paying LEI for anything but contract-cost generics, not matching quantities or drug codes, and knowing there were large shortfalls monthly between what LEI billed and what he paid (R54:1599-1608, 1614-15, 1620, 1632; 55:1742). Faucheaux also admitted he never told Witchen, LEI's pharmacy director, to purchase and dispense only generics (R54:1632). *See generally* (LEI-RE4).

As soon as possible, AMI refused to renew its five-year master lease on the MOB (R42:74). John McDaniel told John Liljeberg that AMI was not renewing the lease to put financial pressure on LEI and to implement AMI's plan to ruin them (R42:77-79; 43:266, 291; 48:915; Ex37; LEI-RE1).

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[9] The hospital hired a pharmacist, Steve Faucheaux, to monitor LEI's billing. He admitted reducing payments to LEI each month, denying LEI reimbursement for the cost of the drugs it purchased and dispensed, for services and supplies, for additives to IVs, and for other expenses (R54:1546, 1552, 1554, 1566-69, 1600, 1622-23; LEI-RE5).

Doctors moved out, and the hospital census dropped after AMI refused to renew (R43:270). AMI ordered employees to destroy documents (R48:908, 912; Ex257). AMI employees even conducted a "funeral procession" through the hospital—removing John and Robert Liljeberg's portraits from the hallway (R48:911-12).

7. Travelers Foreclosed On The MOB And Hospital.

LHI/AMI's bad faith plan to cripple St. Jude/LEI achieved its purpose. Defendants' circumvention of the CPMA and refusal to renew the lease on the MOB caused St. Jude/LEI to experience significant shortfalls, foreclosing any possibility of paying the MOB note. In April 1993, Travelers recorded a judgment against St. Jude/LEI for nonpayment. Meanwhile, LHI/AMI did not reinscribe its collateral mortgage on the hospital, all of which facilitated Travelers' foreclosure and the judicial sale of the MOB and hospital (R43:323, 335, 341-42; Ex772:6).

Prior to Travelers' foreclosure, AMI held several meetings with Travelers to discuss how to proceed (Ex770:44, 47, 48, 68, 72; Ex773:70-71). AMI executives rejected the opportunity to pay Travelers and cancel the judicial sale (Ex770:50-51, 68). AMI executives held more than 30 meetings, some including NME/Tenet executives because of the pending merger, to decide how to structure the transaction for the maximum benefit to AMI/Tenet (Ex770:28-31, 33-37; Ex772:11-12, 18; Ex773:24, 44, 48-51, 70-71). One of the primary considerations in "structuring the transaction" was elimination of the CPMA and termination of the hospital lease (Ex770:73, 76, 77; Ex772:11, 18, 32, 35, 49; Ex773:24, 31-33, 41-51; Ex774:20, 22). AMI informed NME/Tenet that it could operate the pharmacy more economically without the Liljebergs (Ex772:47-48; Ex774:23). AMI also informed NME/Tenet that Travelers now held the priority lien, that a judicial sale could occur, and that the CPMA could be terminated as a result (Ex772:47-49, 55-56; Ex773:68-70). By paying

$26,000,000 through LHL instead of $7,800,000 through LHI, which held the mortgage, AMI would be able to terminate the CPMA (Ex772:55-56, 73, 76). It was common knowledge that the President of AMI wanted the contracts terminated as soon as possible (Ex773:44-45). The merger between AMI and NME/Tenet was contractually sealed before the 1994 judicial sale, but purposely made effective after the sale occurred (Ex775:43-44).

Appraisal for the judicial sale valued the hospital at $37,500,000 (R51:1182, 1188, 1202; Ex218). In its collusion to purchase the hospital, AMI/Tenet had LHI, which held the collateral mortgage, file a motion in federal court requesting to bid mortgage credits, giving notice that it would only have to pay $7,800,000 to purchase the hospital (RE8:21-22; Ex770:62). This effectively deterred other bidders, who would have to pay at least $26,000,000 cash (Ex770:65). Two days after its motion was granted, AMI/Tenet made the purchase through its shell company, LHL, which required AMI to pay $26,000,000 (R43:342-3).[10]

AMI/Tenet witnesses conceded that the transaction was structured so as to eliminate the Liljebergs and the pharmacy contract (Ex770:73, 76-77, 79; Ex773:44, 48-50; Ex774:19, 22, 31-32, 38, 40). It cost AMI considerably more to structure the purchase as it did, but everyone in AMI had wanted from the inception to eliminate St. Jude/LEI (R48:888; Ex770:82; Ex774:31-32).

SUMMARY OF THE ARGUMENT

[10] AMI wired the money without identifying who would make the purchase, although it already knew that LHL would–not LHI, who could bid credits (Ex770:59-62).

The evidence established that, *ab initio,* Defendants intended to "rip off" St. Jude/LEI and take from them the pharmacy and the hospital. To that end, Defendants colluded to force a judicial sale of the hospital and then canceled the lease and pharmacy contracts.

This Court should affirm the district court's decision restoring ownership of the hospital to St. Jude, awarding LEI more than $11,000,000 in damages for Defendants' circumvention of the pharmacy contract, and allowing LEI to assume the pharmacy contract in bankruptcy. This Court should reverse the district court's decision requiring St. Jude/LEI to reimburse Defendants for the money Defendants paid pursuant to their fraudulent scheme and award St. Jude/LEI reasonable attorneys' fees.

ARGUMENT

I. THE TRIAL COURT'S FINDINGS THAT DEFENDANTS BREACHED THE CPMA AND OWE LEI MORE THAN $11,000,000 ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Defendants contend the district court erred in awarding LEI more than $11,000,000 because of Defendants' breaches of the CPMA. Ignoring the numerous fact-findings and substantial evidence supporting this award, Defendants attempt to cast the error as one of contract construction. However, the trial court's findings that Defendants drafted the contract in bad faith, deliberately ambiguous to injure LEI, illuminate the contract and the creative ways Defendants manipulated and breached it to maximize financial damage and pressure on LEI. The contract, the Defendants' malevolent breaches, and the award to LEI are supported by the evidence and law. The court's judgment must be affirmed.

A. Standard Of Review.

When a judgment from a bench trial is appealed, this Court reviews factual findings for clear error and legal issues *de novo*. Where, as here, the credibility of the witnesses is a factor, the burden of showing clear error is much heavier. Due regard must be given to the fact-finder to assess the credibility of the witnesses. *Canal Barge Co., Inc. v. Torco Oil Company*, 220 F.3d 370, 375 (5th Cir. 2000). Only he can be aware of demeanor and tone of voice, which bear so heavily on his understanding of and belief in what is said. *Anderson v. City of Bessemer, City, N.C.,* 470 U.S. 564, 575 (1985). A trial judge's fact-findings, whether based on credibility determinations, physical evidence, or even inferences from other facts, should be respected. *Richmond Leasing Co. v. Capital Bank,* 762 F.2d 1303, 1307-08 (5th Cir. 1985) (citing *Anderson*, 470 U.S. at 574-75). If his account of the evidence is plausible in light of the entire record, this Court should not reverse even if it believes it might have weighed the evidence differently. *Anderson*, 470 U.S. at 573-74; *Michael X. St. Martin v. Mobil Exploration & Producing U.S., Inc.,* 224 F.3d 402, 410 (5th Cir. 2000).

The district court's determination of damages, which is the primary challenge by Defendants in this argument, is itself a fact-finding which can be set aside only if clearly erroneous. Damages in the form of lost profits need not be proved with specificity, but only to a reasonable certainty. *Canal Barge,* 220 F.3d at 379.

B. Defendants' Deliberate Bad Faith And Manipulation Of The CPMA Mandate The Relief Granted.

As its backdrop to assessing damages under the CPMA, the district court faced Defendants' deliberate, bad faith manipulation of the contract to squeeze LEI out of the pharmacy and hospital (LEI-RE1; 4; 6). Parsing the evidence, the court found that although Lifemark promised LEI an approximate 50/50 split, in reality it established a fee structure much less lucrative than it wrote for itself when it operated hospital pharmacies, making false representations to LEI and changing the deal when it was too late for LEI to do anything different (RE8:8). Lifemark's counsel admitted he "intentionally drafted the CPMA in an ambiguous manner," structured to say "whatever" LHL/AMI wanted it to say to underpay LEI and to terminate the CPMA at will (RE8:34,35). Indeed, the evidence showed that Lifemark entered the agreement with the intent to terminate it—never to abide by it or operate fairly (RE8:49; LEI-RE1).

Drafted by Defendants, the CPMA implemented Defendants' scheme to "Rip" LEI's "Lips Off" (RE8:9). When the hospital first opened, AMI management circulated a memo identifying plans for terminating the CPMA that was so inflammatory that one executive demanded all copies be returned to him after it was discussed (R42:77-80; Ex37). Even during construction, Lifemark/AMI executives were looking for a way out (R42:53-56; LEI-RE1).

The trial court found that once the hospital opened, "AMI . . . began a continuing bad faith pattern of deliberate CPMA circumvention, an unjustified refusal to pay LEI fees and reimbursable costs with the objective of starving LEI and St. Jude of the capital necessary for the hospital's development and operation, forcing the CPMA's termination and taking control of the development" (RE8:11). AMI instructed its employees to "find fault" with LEI when there was none (RE8:11; LEI-RE1).

Because Defendants drafted the CPMA, all ambiguities must to be construed against them. LA.CIV.CODE art. 2056; *Liljeberg*, 620 So.2d at 1331 (A-1). The contract itself, as well as the testimony of experts and fact witnesses—including AMI/Tenet employees—support the court's fact-findings, including its damage awards.[11]

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[11] Tenet does not appeal three awards: (1) $103,617 for "bad debt" wrongfully

deducted; (2) $54,055 for TPN/Chemo Fee underpayments; and (3) $57,085 for Nitroglycerin/Insulin underpayments.

LEI does not appeal the order to repay: (1) $616,400 for IV piggyback fee overcharges; or (2) $125,479 for Medicare reimbursement denials.

1. The Trial Court Appropriately Gave Preclusive Effect To A Prior Louisiana Appellate Court Determination That Defendants Circumvented The CPMA From 1989-1993 To The Tune Of $4,062,396.

In *Liljeberg*, 620 So.2d at 1331 (A-1), the Louisiana Fourth Circuit decided a declaratory judgment and damages action for Defendants' circumvention of the CPMA from August 31, 1989 to June 1, 1993 (RE8:44). The state court interpreted several of the same provisions at issue in the instant controversy, declaring that under § 4.1(a) and Exhibit B: (1) Defendants were required to reimburse LEI its actual acquisition cost and pay a "fee per procedure;" and, (2) Defendants were required to escalate LEI's minimum fees annually, beginning thirteen months after the hospital opened on August 25, 1985. *Id.* at 1335-40. The court then held that under the contract, LEI was entitled to $274,471 for Defendants' failure to escalate the minimum fees, $3,965,659 for Defendants' failure to compensate LEI's actual invoice cost plus the "fee per procedure," and additionally, $169,191 for Defendants' circumvention of the CPMA by purchasing Albumin elsewhere. *Id.* at 1340, 1352-53. The parties stipulated to a lower damage figure of $4,062,396 at this trial (R55:1696; RE8:44).

The district court properly applied doctrines of full faith and credit and issue preclusion to hold that it was bound by the state court's decision, and pursuant to the parties' stipulation, awarded LEI $4,062,396 (RE8:50-51). Defendants do not contest the court's determination of preclusion, but claim its award of $4,062,396 was too high. The parties' agreed during trial to "split the difference" between their experts' interpretations of the damages due under the state court judgment. It appears that Defendants' and LEI's experts originally did split at $4,062,396, but that Defendants' expert later tried to lower that figure (R31:9515; 50:1051; 55:1695-96). The district court did not clearly err in accepting the original $4,062,396 damage stipulation for LEI's damages from August 31, 1989 to June 1993. Moreover, the court was entitled to assess damages based on the evidence. *Canal Barge*, 220 F.3d at 379.

2. Tenet Wrongfully Disallowed Requested Payments For Actual Acquisition Costs After June 1993 And Owes LEI $2,023,571.

The court also found that AMI/Tenet refused to pay LEI's actual acquisition cost of pharmaceuticals–even after the Louisiana court ordered it to do so (R46:610, 626; 47:647-48; LEI-403; RE8:34,41; LEI-RE5; 7). Defendants arbitrarily chose prices advantageous to them regardless of the actual cost or the actual drug dispensed (RE8:41).

Section 2.4 required LEI to purchase drugs from "Lifemark Pharmacy" whenever Lifemark Pharmacy could provide them, and otherwise to obtain them from the least expensive supplier. However, there never was a Lifemark Pharmacy (R42:93; 43:288), and Lifemark Pharmacy never supplied pharmaceuticals to LEI, thus rendering this section meaningless (R46:568). The district court found that this provision was another example of Lifemark creating an ambiguity with which to hammer LEI (RE8:35-36).

LEI did purchase drugs under AMI's prime vendor contract, but when LEI was forced into bankruptcy, AMI's vendor stopped selling to it (R46:568-69; 47:651; 54:1625-26). LEI purchased the drugs at the lowest prices available to it—an undisputed 6% less than Tenet's bulk prices (R47:652, 777; RE8:36). Violating the Louisiana court's order, Tenet still refused to pay LEI's actual costs (R46:610; 47:646-48; LEI-RE 5; 7). At trial, Tenet pharmacist Faucheaux admitted that he did not match NDC numbers for drugs when he looked up prices to pay LEI, and that he arbitrarily chose the lowest possible price without regard to brand, strength, quantity, volume, or bioequivalency (R46:570-71; 54:1552, 1554, 1580, 1599-1608, 1614, 1620, 1632; 55:1742). Nothing in the contract authorized AMI/Tenet to lower prices this way or to pay LEI for generics when LEI was dispensing requested name-brand drugs, and Faucheaux never told LEI to dispense only generics (R54:1632).[12] As the Louisiana court and this trial court found, AMI/Tenet was required to pay LEI's actual acquisition costs for the drugs.

[12] Tenet routinely dispensed only generics, even when doctors ordered name-brands with no substitution (R54:1630). Tenet believed LEI should be paid only for generics at Tenet's lowest possible cost (R54:1603, 1628-32). Tenet's complaint that LEI dispensed doctor-requested brand-name drugs to increase its profits ignores that the hospital profited many times its payment to LEI (R46:611-17; Ex577; Ex808).

3. Breaching The Contract, Tenet Took The Provision Of Contrast Media From The Pharmacy And Owes LEI $700,000 In Lost Profits.

For several years, the hospital purchased contrast media from the pharmacy pursuant to the contract (R46:592-93; 47:632; Ex541; RE8:39-40). To avoid the contract, the hospital began purchasing it separately and claiming it was an "unidentifiable cost" in a single procedure by an ancillary department under § 2.6(a) (R47:632; 51:1155-56; Ex688; RE8:39-40). The court found that AMI changed its billing and purchasing practices solely for the purpose of circumventing the contract.

That the hospital refused to identify these charges separately on the patients' bills—a matter over which the hospital had exclusive control—only proves the depth of Defendants' fraud and bad faith. AMI employees, including Wendell Alford and hospital director Deborah Keel, testified that the charges were in-fact identifiable (R45:479-80, 504; 46:607; 51:1147-48; Ex653)—just as they had been in years past when the hospital identified them and compensated the pharmacy (R46:592-93; Ex541). Ample evidence supports the court's determination that the contrast media would have generated profits of $140,000 per year and that LEI was entitled to $700,000 for the hospital's circumvention breach since 1992 (R46:607, 610, 626;;

Ex556; RE8:39-40).[13] *Canal Barge*, 220 F.3d at 379 (lost profits need only be proved with reasonable certainty).

4. Tenet Owes LEI $150,275.60 For Minimum Fee Increases.

Like the Louisiana court, the district court found that Tenet owed LEI for failing to increase minimum fees under § 4.1(c) of the CPMA (RE8:43, 67). AMI/Tenet claims no fee increases were due because "pharmacy revenue per patient" day declined. Ignoring the Louisiana court, Defendants consistently refused to provide information for calculation of minimum fee increases and told LEI there would be no increases (R46:589-90; LEI-RE8).

[13] The court did not award this amount twice. Defendants circumvented the CPMA in many ways, and the court parsed them accordingly. *See* LEI-RE4. It separated high-dollar, specific underpayments, and then calculated a general award for the numerous other means of underpayment. That contrast media and insulin/nitroglycerin underpayments were grouped under LEI's circumvention claim does not mean Judge Porteous's separate handling of them constituted double-recovery. The damage figures reflect he did not (R46:614). He carefully itemized the drugs and breaches for which he awarded damages, listing last the $5,000,000 award for things too numerous to itemize, all of which resulted from Defendants' failure to pay LEI per-administered-doses and for other drugs Defendants purchased and dispensed behind LEI's back (RE6; 8).

Like the state court before it, the district court found that AMI/Tenet wrongfully withheld fee increases—$80,114.77 for 1995-96 and $70,160.83 for 1996-97—representing a 6.14% increase per the contract (RE8:43, 68). Aside from the "catch-22" created when pharmacy revenue declined largely because of AMI/Tenet's hospital mismanagement[14] and deliberate breaches of contract, the Louisiana court already decided that LEI was entitled to annual increases in minimum fees, and LEI's expert testimony and calculations confirmed when and how much (R48:847-48, 852,867-69, 888; 50:1054-60). Thirty-three percent of LEI's income derived from minimum fee compensation (R46:601; Ex556; Ex797; RE8:68).

The court properly found that the determination of whether a minimum fee increase is due is based upon a year by year comparison, as opposed to the last year versus the highest year, as asserted by Tenet. Section 4.1(c) specifies a formula that looks only to the currently ending year and the immediately preceding year. The section allows for increases to the minimum fees (but not for decreases to the minimum fees) based on percentage changes in the hospital market basket index and the departmental revenue per patient day, the latter of which is controlled solely by the hospital (LHL-49:§4.1(c)).

[14] The hospital census dropped dramatically after AMI refused to renew its lease on

the MOB, and doctors moved out (R43:184, 270).

CPA Waldo Moret calculated what was due under § 4.1(c) in two ways: (i) using an average of two years as a base, and (ii) using the lower year, both including calculations of the market basket index (R50:1052-1063; Ex785). Defendants' expert agreed that the market basket index showed a 6.14% increase for the same period (R55:1759, 1761, 1765). This was the figure the judge adopted. Thus, ample evidence supported the court's decision, regardless of whether it looked to the immediately preceding year or years, as Defendants contend. In any event, the trial court properly construed any ambiguity against Defendants and followed the binding state court decision to calculate annual minimum fee increases.

5. Tenet Owes LEI $281,906.32 For Pricing And Quantity Differences.

The district court found that AMI improperly entered cost data into its computer, "deleted administered doses dispensed by LEI without any known reason from [LEI's] daily and monthly disks," and generated inaccurate HPI reports which incorrectly reflected the drug prices and frequencies dispensed by LEI (R46:550-52, 554; 54:1580, 1588, 1600; Ex590; LEI-2005; RE8:44-45). Tenet also delayed correcting its records to reflect price changes and paid only the cost of generic drugs at its bulk, wholesale contract rate (R53:1532-34; 54:1552, 1598-04, 1614, 1628, 1630-31; LEI-2005; LEI-2006; LEI-RE4).

Defendants concede that AMI's HPI reports wrongly listed the price for many items as zero (Tenet's br. 84), and Faucheaux admitted ignoring LEI's information—provided daily and monthly on disks—as to price, frequency, and HPI prices that were listed as zero (R54:1579-80, 1599-1608, 1614-15, 1620, 1632, 1636; 55:1742). LEI did provide Tenet with information, contrary to Tenet's contention. The court found Tenet's HPI reports also failed to take into account floor stock (RE8:44), and Faucheaux admitted denying LEI fees for restocking carts. Faucheaux also conceded he regularly reduced LEI's cost-based reimbursements as well as fees for services and supplies (R54:1567-69, 1579, 1615-16, 1620, 1636; LEI-RE5). This evidence is sufficient to support the court's damage finding.

6. The Court's Judgment That Tenet Owes LEI $5,000,000 As Damages For Circumvention Rests On Ample Evidence And Must Be Affirmed.

Viewing the remaining damage issues, the district court agreed with the state court that while the CPMA was "ambiguous in many [ways]," it was intentionally drafted that way by Defendants (RE8:48-49). The court found "the intent to abrogate the contract, when coupled with the ambiguity designed to promote that goal, further militates in favor of interpreting the contract against [Defendants] in situations where the contract is susceptible of more than one interpretation" (RE8:49-50; LEI-RE4; 6).

On appeal, Defendants contend that the "fee per procedure" provision of § 4.1 is ambiguous and requires payment to the pharmacy only when the pharmacy dispensed the medication (Tenet's br. 62). However, the contract, the binding Louisiana state court decision, the intent of the parties, and the evidence of Defendants' deliberate misconduct more than justify the trial court's award of $5,000,000 in damages for failing to pay LEI for each procedure and for medications Defendants wrongfully obtained elsewhere (Ex595).

This CPMA was unusual. It required Tenet to pay LEI a "fee per procedure" (R42:18-19, 52, 64-65; RE8:44-47, 52-55). The Louisiana court held that this fee was in addition to the cost of the drug. *Liljeberg*, 620 So.2d at 1336-37 (A-1). Irv Gregory, who represented Lifemark/AMI in explaining the contract to LEI, testified that the contract was drafted this way to portray the represented 50/50 split of hospital revenue from the pharmacy (R42:9-11, 20, 22, 29; 43:172-72; LEI-RE6).

Wendell Alford explained that LEI was to run the pharmacy consistent with the hospital's practice—following a unit-dose system, pursuant to which drugs were administered to patients and billed *per dose* (R42:52, 64-65; 43:202-03; 45:476, 482-83, 509-17, 522; 46:550). LEI pharmacist Witchen complied with this policy (R46:550). Significantly, that is exactly how the hospital billed its patients—and at a much greater cost (R42:18-19; 43:245; 45:522; 46:532, 611-14; Ex577; Ex713).[15] The trial court correctly found that "per procedure" meant per dose or unit administered (R44:354-66; Ex801; Ex802; Ex807; RE8:54).

The district court also correctly found other types of circumvention. AMI/Tenet bought drugs through its material management department, and LEI found drugs hidden throughout the hospital that should have been obtained from the pharmacy (R41:357-61; 43:257-58, 275; 44:425, 432; 45:576, 579-82; 46:576-83, 586-87, 595; 47:723; 48:908-09; 51:1148-50, 1156; 54:1622-23; Ex378; RE8:46; LEI-RE2; 3). The judge did not err in finding that LEI was damaged by this conduct.

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[15] Defendants argue it is unreasonable for it to pay LEI for each dose of insulin administered from one vial, but that is exactly how the hospital bills its patients—and at a cost several times LEI's charge (R45:522; 46:566, 611-14; 54:1556-57, 1573, 1611). The Heparin flush kit is different. It involves only one procedure and contains only one legend drug, so LEI is entitled to one fee (RE8:54). There was no loss to the hospital from LEI's charges on Heparin flush kits because it billed the patients more than three times whatever LEI charged. *Weeks v. T.L. James & Co.*, 626 So.2d 420 (La.App. 3d Cir. 1993), *writ denied*, 630 So.2d 794 (La. 1994) (damages not awarded in absence of loss). Even after LEI reduced the price, the hospital continued to bill the patients at multiples of the *higher* cost (RE8:55).

Nor did the court misinterpret § 2.6(a). Section 2.6(a) states that LEI is not to provide[16] or be compensated for drugs used in procedures in ancillary departments "except those patient identifiable charges in which the cost of the drug is not included in a fee or charge for that procedure" (RE15:3). The trial judge did not find § 2.6(a) illegal. He read it in harmony with the applicable law and found that LEI—by contract, Tenet policy, and law—bore responsibility for prescription medications in the hospital (R44:416; RE8:38, 64). Steven Green, Tenet's hospital CEO, Wendell Alford, and Deborah Keel, all testified that by practice, law, and policy, the pharmacy was responsible for controlling all hospital medications (R44:453; 45:519-20; 51:1149-50).

At trial, defense counsel conceded the CPMA did not allow the hospital to use LEI's number or permit to buy drugs (R47:635; RE8:39; LEI-RE3). The court found the parties' intent was for LEI to have the exclusive right to furnish drugs to all hospital departments, except those specifically excluded, and that AMI purchased and dispensed drugs in contravention of that agreement (R43:249, 358-60; 45:480-81;

[16] LEI provided, but was not compensated for, items such as IV bags and chemotherapy kits (R46:563-64). LEI was entitled to compensation for those which the trial court awarded (RE8:62). LEI was also entitled to a handling fee and an additive fee for LVP's and for each additive to an IV piggyback on an LVP, and 90% of the IV piggybacks containing one or more additives (R46:563-66; 54:1593; RE8:42). Faucheaux admitted that each additive to an IV or "piggyback" required a separate procedure (R54:1593). The court considered these, and other items, in reaching the $5,000,000 award.

RE8:47). The hospital was neither legally nor contractually permitted to purchase the drugs, and it could not avoid this simply by failing to "identify" the drug charges. Changing its billing practices to camouflage drug charges within "procedures" did not render those charges "unidentifiable," but constituted calculated circumvention (R8:39).

The trial court properly found that the contract, the Defendants, and the law designated LEI as the "hospital pharmacy." Tenet policy required the pharmacy to be responsible for the storage, control, and distribution of all medications throughout the hospital (R45:519-20; 51:1149-50). This is also what the law requires. Only LEI had the state and federal permits to purchase legend and controlled drugs; AMI/Tenet did not but used LEI's without permission (R44:355-57, 360, 416; 46:576-79; 48:906-08; 51:1154; RE8:39).[17]

LEI received invoices from drug companies for items it did not carry or receive (R46:576-581). An investigator from the Louisiana Department of Health and Hospitals inspected the hospital and confirmed these violations. The hospital not only

[17] Defendants cite the Pharmacy Board's discretionary decision not to take action against Defendants. However, as the court expressly stated, that the Pharmacy Board opted to let the parties handle the matter civilly in the "exercise of its discretion cannot abrogate the black letter law" (RE8:63; LEI-RE3).

knew its conduct was wrongful, but tried to persuade the inspector to "bend the rules" and ignore the violations (R44:425, 427-28, 432, 437; LEI-RE3).

The district court's fact-findings of damages are neither clearly erroneous nor unsubstantiated on this huge record. *Canal Barge*, 220 F.3d at 379. Tenet ignores the voluminous evidence of damages attributable to its circumvention of the CPMA. LEI audited 1,000 patient charts—pulled from volumes selected by the Defendants, and compared the hospital records, the charts, and LEI's own records. LEI auditors conducted a "probability proportional to size sampling"[18] of the records to look for circumvention in three categories: narcotics, IVs and, insulin (R48:793-95; 49:931-32, 949, 961-62, 978, 987, 992, 1007, 1012-13, 1030, 1034-35; Ex648; Ex794; Ex903; LHL-270-T). LEI's fact and expert witnesses established damages of $12,800,000—*not including* IV handling fees (R47:723-29; 48:793-95; 49:932, 961-62, 978, 987, 992-94; Ex903). Expert Levine even did a verification sample of 3,000 charts, again not including insulin, and confirmed the damages (R49:1018-20). LEI offered invoices for items it did not furnish or receive, and the judge saw boxes and photographs of drugs found throughout the hospital in violation of the contract (R46:576-83; Ex567; Ex595). Even Defendants' witness conceded at least $3,000,000 in damages from circumvention (R56:1847, 1858-59, 1861). After

[18] The American Institute of CPAs recognizes this form of audit sampling (R49:932,

deducting from LEI's damage figure for actual acquisition costs of drugs with multiple administrations, the court arrived at $5,000,000 (RE8:47).

939).

Finally, Defendants' contention that they already paid LEI for some of their circumvention was considered by the trial court.[19] The trial court found that LEI's damages for circumvention were $5,000,000 in addition to the specific items on which it awarded damages. Tenet had ample opportunity to challenge[20] LEI's experts and present more persuasive evidence. It did not. This judge carefully calculated the damages from the mountains of information and documentation introduced in this lengthy trial (RE8). His opinion is entitled to deference. His fact-findings, which

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[19] LEI's expert did not initially divide damages by patient type because Tenet withheld this information, making it available only to its own expert (R49:940-48, 980, 985-87, 999, 1013, 1017). At trial, LEI's expert revised his opinion to incorporate patient types (R43:940-49, 958, 986-89, 999-1000). Defendants' expert, who was always privy to patient type, still could not render a believable opinion:(1) the court rejected his allegation that 40% of all patients received *no* drugs (RE8:47); and (2) the court found that, admittedly, neither he nor any of Defendants' experts factored in the NDC numbers, the brand, the strength, the bioavailability, or the bioequivalency of the drugs, and therefore their calculations were unreliable (R54:1599-1604; 55:1742,1746-47).

[20] That the PDS generated daily by the pharmacy computers did not include late charges and other items for which the pharmacy should have been compensated does not undermine the survey. Rather, it supports an even greater award to LEI (R47:765; 54:1609; 56:1861). Albumin, for instance, did not show on the PDS because the pharmacy bought and supplied it by the case (R46:535; 47:776). Meanwhile, Defendants were circumventing the contract by buying albumin elsewhere (R46:583-85; Ex529; Ex595).

were based on credibility determinations, physical evidence, and inferences from other facts, should not be overturned. *See Richmond,* 762 F.2d at 1307-08.

7. The Trial Court Properly Refused To Award $2,585,138 For Alleged Overcharges.

For the same reasons, this Court should affirm the trial court's partial denial[21] of Defendants' overcharge claim. Defendants claim LEI submitted bills inconsistent with daily records provided to the hospital for patient billing and overcharged by claiming greater frequencies of drugs dispensed, by $3.05 "admixture fees," and by not charging by actual invoice cost. However, the record shows that each day, the pharmacy provided the hospital with a computer disk containing the pharmacy's records of dispensed drugs and the correct pricing (HPI rates) for drugs the hospital had ignored (R47:647-49; 54:1599-1608, 1614-15, 1632, 1636). Monthly, the pharmacy corrected the hospital's information on rates and frequencies when the hospital records showed lower numbers than the pharmacy records showed (R54:1567, 1580). The pharmacy gave information to the hospital daily, but the hospital alone input information into its database for patient billing (R46:536-43, 552, 554; 54:1588). Moreover, only the hospital knew from its charts and master records what its doctors and nurses actually administered (R46:558; 56:1858). LEI did not have this information (R46:558).

[21] *See supra* n. 11 (LEI does not appeal the court's award of $616,400 to Defendants).

AMI/Tenet was creative in its methods of circumventing the CPMA (LEI-RE1; 6). Large quantities of drugs not obtained through the pharmacy were found hidden throughout the hospital. LEI received invoices for drugs the hospital covertly ordered. In reviewing the hospital's reported frequencies, the court could reasonably assume the hospital dispensed these drugs in violation of the pharmacy agreement. The hospital did not question its frequencies when it billed its patients based on its HPI's (R53:1520-24, 1526-27; 54:1556). The $184,000 Defendants now claim as overcharge is based on frequencies the hospital alone handled, was responsible for, and more likely than not, would increase LEI's damages, not decrease them (R51:1157; 53:1518-19; 54:1549-52).

Ironically, Tenet also complains the court failed to award it $634,816 for overcharges for LEI's alleged incorrect submission of pricing information from September 1, 1989 through April 30, 1993, during which time it claims LEI's bills were based solely on HPI reports. Aside from being a wholly conclusory statement, the record shows that the hospital created the HPI reports on which LEI relied (R51:1157; 53:1518-19; 54:1549-52). In any event, Defendants admitted they did not rely on the pricing information from LEI's daily disks (R54:1588, 1614-15, 1636).

Finally, contrary to Tenet's assertion, Tenet's reimbursement pricing information did not come only from LEI's add/delete/change forms. Rather, the hospital changed the prices routinely—placing the lowest conceivable price on a drug—regardless of whether that price matched the brand, generic, strength, bioavailability, or bioequivalency of the drug the doctor ordered or the pharmacy dispensed (R54:1552, 1580, 1588, 1600, 1608, 1614-15). The only evidence reflects that AMI/Tenet owes LEI *more* damages for its longstanding failure to reimburse the actual acquisition costs of the drugs supplied according to the NDC numbers and frequencies actually administered.

II. DEFENDANTS' BAD FAITH, COLLUSION, AND INTENTIONAL BREACHES OF DUTY WARRANTED RESTORATION OF THE HOSPITAL TO ST. JUDE.

A. Standard Of Review.

The district court's fact-findings that Defendants committed bad faith, collusion, and breaches of duty are reviewed for clear error. *Seal v. Knorpp*, 957 F.2d 1230, 1234 & n. 1 (5th Cir. 1992). The district court's legal determinations of existence of duty, disgorgement, and rescission are reviewed *de novo*. *Gebreyesus v. F.C. Schaffer & Associates, Inc.*, 204 F.3d 639, 642 (5th Cir. 2000). Louisiana law controls. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78-79 (1938).

The district court did not err in restoring ownership of St. Jude Hospital to St. Jude. This case presents the strongest possible facts on which to order that remedy. The record shows that Defendants breached their legal duties as pledgee and colluded to stifle bidding at the judicial sale, structuring it to terminate their agreements with St. Jude/LEI (Ex770:76-77, 79; Ex772:47-49, 55-56, 73, 76; Ex773:44-45, 48-50, 68-70; Ex774:19, 22, 31-32, 38-40; LEI-RE1). Defendants agreed, beforehand, to suppress competition at the sale (Ex770:28-32, 33-37, 44, 47-48, 50-51, 68, 72-73, 77; Ex772:11-12, 18, 32, 35, 47-48, 55; Ex773:24, 31-33, 41-42, 68-71; Ex774:20, 22-23). They deliberately misled St. Jude/LEI and other bidders (R43:342-43; Ex770:59-65; RE8:21-22).

The district court properly restored ownership of the hospital to St. Jude based on two independent, equally-valid grounds: disgorgement for breach of duty and rescission for collusive bid-rigging (RE8:30-33). Restoration is the appropriate remedy here, moreover, because the parties required to disgorge are the parties who breached their duties in bad faith and collusively, and the parties aided are the property owners, who were owed the duties but were deliberately manipulated by Defendants.[22]

[22] Defendants believed, erroneously, that their pre-arranged purchasing structure would provide the ultimate possible economic and legal benefit to them all. By designating LHL the purchaser, Defendants aimed to: (1) avoid legal duties owed by LHI to St. Jude; (2) trigger "confusion" of the lease, thereby terminating it and the pledge of basic rents; (3) trigger a cross-default termination of the CPMA; (4) sue LEI/St. Jude for a deficiency judgment and, perhaps, seize and purchase even more surrounding LEI property; and (5) transfer all property to Tenet by way of a deferred merger. The district court astutely saw through this plan, holding that LHL, LHI, and AMI are a "single business entity" under the law (R8:12-14), and that Tenet is liable as their successor (R8:1, n.1, 17-18).

B. LHI Breached The Legal And Fiduciary Duties It Owed St. Jude, Justifying Disgorgement Of St. Jude Hospital.

The district court properly found that LHI breached its obligations as pledgee of the collateral mortgage note and right to basic rents. LHI had a duty to protect the mortgaged collateral, to preserve the priority of the pledged collateral mortgage note and underlying mortgage, and to protect the pledged assignment of basic rents and the lease to which they pertained (RE8:14-32). Defendants calculatedly breached these obligations to advance their own profit and control.

Defendants argue LHI owed no special duty as pledgee, and that it could take whatever actions were in its own best interests, regardless of the law and the cost to St. Jude/LEI. LHI's self-interest was to own St. Jude Hospital and to cancel the lease and pharmacy agreements (RE8:18-20, 28). See (Tenet's br. n. 16). The record shows Defendants served only these interests, despite their legal obligations and promises to LEI. Id. The district court properly relied on Defendants' bad faith, collusion, and self-dealing in contravention of their duties to require disgorgement of the hospital and all wrongfully-attained profits (RE8:30-32). See McDonald v. O'Meara, 473 F.2d 799, 804-05 (5th Cir.), cert. denied, 412 U.S. 906 (1973) (Civil Code article 3005 binds party who has breached fiduciary duty "to disgorge whatever he has received, is receiving, or will receive"); C&B Sales & Service, Inc. v. McDonald, 95 F.3d 1308, 1313-14 (5th Cir. 1996).

1. LHI Had A Duty To Protect And Preserve St. Jude's Pledged Collateral Mortgage And Basic Rents.

The legal relationship of pledgor/pledgee imposed a duty on LHI to preserve the priority of the collateral mortgage and the right to basic rents. Defendants cannot refute the pledgor/pledgee relationship or the duty. St. Jude executed a collateral mortgage note, secured by a mortgage on its property, and pledged that note to LHI to secure financing for the hospital project (RE8:14-15). To further secure its obligation, St. Jude pledged to LHI the right to receive basic rents under the lease between it and LHL (RE8:15-16).

Defendants' misunderstanding of collateral mortgage law explains why they have misconstrued the law and the district court's statements. In saying that "[a] collateral mortgage is NOT a mortgage. It is a pledge" (R8:27), the court merely distinguished between an ordinary mortgage, in which property is mortgaged to secure a specific debt, and a collateral mortgage, in which a collateral mortgage note, secured by a collateral mortgage, is pledged to secure a future or preexisting debt. See La.Civ.Code arts. 3100 et seq.; 3278 et seq.; La.Rev.Stat.Ann. §§9:5103 et seq.; §§ 9:5550 et seq. It did not mean collateral mortgage is only one, and not the other. Diamond Services Corp. v. Benoit, 780 So.2d 367, 370-72 (La. 2001).

In Louisiana, a collateral mortgage is a hybrid security interest possessing elements of both mortgage and pledge. See La.Rev.Stat.Ann. § 9:5550(1); Diamond, 780 So.2d at 372; Texas Bank of Beaumont v. Bozorg, 457 So.2d 667, 671 (La. 1984); First Guar. Bank v. Alford, 366 So.2d 1299, 1302 (La. 1978). The Louisiana Supreme Court recently reiterated: "the collateral mortgage does not directly secure a debt; instead, the collateral mortgage device 'is designed to create a mortgage note for a fictitious debt that can be pledged as collateral for a real debt.'" Diamond, 780 So.2d at 372. The typical Louisiana collateral mortgage consists of three parts: (1) an act of mortgage, (2) a collateral mortgage or "ne varietur" note, and (3) a pledge of the collateral mortgage note to secure indebtedness. See La.Civ.Code art. 3158; Alford, 366 So.2d at 1301-02; In re Charrier, 167 F.3d 229, 232 (5th Cir. 1999); Max Nathan and Anthony Dunbar, The Collateral Mortgage: Logic and Experience, 49 La.L.Rev. 39, 39-42 (Sept. 1988) ("Nathan and Dunbar"). The collateral mortgage package is delivered—in pledge—to the lender to secure one or more present or future debts, which are represented by separate hand notes. See Nathan and Dunbar at 40-42.

2. The Duties And Laws Of Pledge Controlled LHI's Conduct.

Pledge is an accessory contract governed by its own set of rules and standards. *See* LA.CIV.CODE. arts. 3133 *et seq*. Under the Civil Code, a pledgee is liable for "any loss or decay caused by its fault." LA.CIV.CODE art. 3167. This duty of reasonable care applies equally to the pledge of the collateral mortgage note and the pledge of the right to receive rents (RE8:28-29, n.3). *See also* LA.REV.STAT. § 9:4401 & §§ 9:5550 *et seq*.; § 10-9-207 (pledgee's duties under Chapter 9 same).

Louisiana law also imposes a fiduciary duty on a pledgee. The pledge relationship is "a trust relationship between the pledgor and pledgee with attendant duties to protect the debt or the obligation and the collateral. The pledgee is presumed to act for the pledgor's interest as well as for his own, although their interests are not identical." *Trans-Global Alloy, Ltd. v. First National Bank*, 583 So.2d 443, 452-53 (La. 1991).

This Court similarly has described the relationship as "fiduciary [in] character," stating there is a "trust relation between pledgor and pledgee with the consequent duty of the pledgee to protect the collateral." *Commercial National Bank v. Parsons*, 144 F.2d 231, 236 & n. 3 (5th Cir. 1944), *cert. denied,* 323 U.S. 796 (1945). It has made clear that a pledgee "has no right to use the thing pledged for his own pleasure or benefit . . . [or to] . . . have the enjoyment of it or receive any profit from it without the consent, express or tacit, of the pledgor." *Id.* at 236. Defendants' turning of the pledged collateral to their own use and advantage here was "violative of the spirit and nature of [their] contract. It [was] a breach of trust." HENRY DENIS, A TREATISE ON THE LAW OF THE CONTRACT OF PLEDGE, Chap. XX, § 205 at 19 (c. 1898); SLOVENKO, *Of Pledge*, 23 TUL.L.REV. 59, 119-22 (1958) (accord).

As a fiduciary, Defendants were required to place St. Jude's interests above their own. The fiduciary must "handle the matter as though it were his own affair," and "may not take even the slightest advantage, but must zealously, diligently and honestly guard and champion the rights of his principal against all other persons whomsoever, and is bound not to act in antagonism, opposition or conflict with the interest of the principal to even the slightest extent." *Noe v. Roussel*, 310 So.2d 806, 818 (La. 1975). As a "prudent administrator," the fiduciary must protect the interests of its pledgor and must not violate his trust. *See Trans-Global*, 583 So.2d at 453; SLOVENKO, *Of Pledge*, 33 Tul.L.Rev. 59 (1958). Defendants were required to be "loyal and faithful" to St. Jude, and "[could] not lawfully serve or acquire any private interest of [their] own in opposition to [St. Jude's]." *McDonald*, 473 F.2d at 804.

The scope of a pledgee's duty turns on the facts and circumstances, as well as the nature of the pledged collateral. *Omnitech Intern., Inc. v. Clorox Co.*, 11 F.3d 1316, 1330 (5th Cir.), *cert. denied*, 513 U.S. 815 (1994). The pledgee is responsible for ensuring the continued viability of the thing pledged. *See Trans-Global*, 583 So.2d at 454; *O'Kelley v. Ferguson*, 22 So.783, 787 (La. 1897). Failure to do so violates both the duty of reasonable care under article 3167 and the fiduciary duty inherent in the pledgee/pledgor relationship. *See Trans-Global,* 583 So.2d at 452-54 (FNBJ had a fiduciary duty both to ascertain the expiration date of a pledged letter of credit and to act to prevent its expiration).

3. LHI Breached Its Fiduciary Duty And Duty To Use Reasonable Care To Protect And Preserve St. Jude's Collateral.

The Supreme Court's holding in *Trans-Global* and this Court's holding in *Commercial Nat. Bank* affirm the district court's findings that LHI breached its duties as pledgee when it failed to reinscribe the collateral mortgage timely, resulting in a loss of rank, and then collusively arranged to purchase the collateralized hospital at the judicial sale, and to cancel the lease and pledged rent (RE8:28-29, n.3). *See* SLOVENKO, *Of Pledge*, 23 TUL.L.REV. 59, 119-122; *and* DENIS, A TREATISE ON THE LAW OF THE CONTRACT OF PLEDGE, Chap. XX, § 270 at 226 (pledgee has legal duty to reinscribe pledged mortgage timely to prevent loss of rank); *see also* (R32:10009; LEI-RE9) (opinion letter by Max Nathan finding "Lifemark failed to exercise reasonable care to protect the ranking of the collateral mortgage vis-a-vis the other encumbrances").[23]

[23] On appeal, Defendants challenge the court's denial of their motion to reopen to add evidence. LEI/St. Jude also challenge the court's denial of their motion to supplement the record with documents from the trial between Lifemark and Jones Walker. These documents clearly show that Defendants and their attorneys conspired to defraud St. Jude/LEI out the hospital, the lease, and the pharmacy (R32:9831-10255; LEI-RE6; 9). The Court reviews this for abuse of discretion. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 331-32 (1971).

Assessing duty, the court properly looked to the nature of the collateral and the circumstances of LHI/St. Jude's relationship: LHI's status as pledgee; LHI's superior knowledge and its awareness that St. Jude was acting in reliance; LHI's repeated assurances to St. Jude; LHI's initial recordation of the collateral mortgage; LHI's control of LHL and its lease of the hospital; LHI's duty to collect rent; and LHI's total control over the hospital project (RE8:14-33). Based on these circumstances and the collusive action of Defendants at the judicial sale, the district court properly found that LHI breached its duties by failing to reinscribe the collateral mortgage timely, conspiring to manipulate the judicial sale, colluding to minimize the price offered at the sale, and scheming to terminate the lease and St. Jude's right to collect rents from LHL (RE8:22-33, 28-29, n.3).[24]

As pledgee, LHI had a duty to preserve the collateral, including the right to receive rents and the priority of the collateral mortgage. In *Trans-Global*, the pledgee bank held in pledge the plaintiff's letter of credit from another bank. The jury found the bank breached either a contractual or a fiduciary duty to the plaintiff by allowing the pledged letter of credit to expire. *Id*. Affirming, the Supreme Court focused on

[24] Defendants *admit* that they took these actions in their own interest to secure ownership of the hospital and cancel the lease and pharmacy agreements (RE8:18-20, 29). (Tenet's br. n. 16.)

the bank's intimate knowledge of the transaction, assurances made to plaintiff on numerous occasions, control over the terms of the pledged letter of credit, understanding that it would act as pledgee, and previous actions taken in accordance with its position as pledgee. *Trans-Global*, 583 So.2d at 452-54.

The same considerations govern here. Admittedly, LHI made false assurances and acted in its own self-interest, based on information and control it alone held. *See supra* nn. 3, 9-10, 14, 22, 24; (LEI-RE1; 6). LHI should not benefit from its wrongdoing. *Trans-Global* controls,[25] and this Court should uphold the court's findings and order of disgorgement (RE8:14-33). *McDonald, supra.*

4. Defendants' "No Duty" Arguments Ignore The Facts And The Law.

Defendants' excuses for their breaches of duty fail. *First*, Defendants claim that LHI had a contractual right to release the collateral, and that this obviated any legal duty to protect and preserve it. The language relied on by Defendants merely clarifies St. Jude's personal obligation on the note. It does not absolve LHI of its legal duties while holding the collateral, and certainly does not grant LHI the right to release it to anyone other than the pledgor, St. Jude. *See Tapp v. Guar. Finance Co.*, 158 So.2d

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[25] LA. REV. STAT. ANN. § 6:1124 does not supercede *Trans-Global* here because LHI does not qualify as a "financial institution" under that statute.

228, 234-35 (La.App. 1st Cir. 1963), *writ ref'd*, 160 So.2d 228 (1964) (party cannot evade mandatory laws or ratify illegal behavior). The authority cited by Defendants likewise fails because there, unlike here, there were no allegations or evidence of fraud, collusion, or bad faith. *Cf. Commercial Nat. Bank v. Audubon Meadow Partnership*, 566 So.2d 1136, 140-41 (La.App. 2d Cir. 1990).

Finally, LHI did *not* release this collateral and never intended to do so. To the contrary, Defendants long coveted this collateral. LHI did not reinscribe the collateral mortgage for this purpose—*not* to *release* the collateral: (1) LHI accepted the sale proceeds in its capacity as secured creditor; (2) LHI filed a motion to bid credits at the sale; and (3) LHI reinscribed the collateral mortgage shortly after recordation of the Travelers judgment but before the judicial sale (R8:17-23).

Second, Defendants argue the court erred in imposing a duty on LHI to act contrary to its own interests. Defendants ignore that LHI freely and voluntarily entered into this pledge agreement, structuring the transaction and drafting all the documents. It was deemed to know and accept the laws governing pledge—including those that subordinated its interests.

Defendants really say that it was not in LHI's interest to reinscribe the collateral mortgage, so it did not, despite St. Jude's interests and Louisiana law. This is precisely what the legal duties of pledge aim to prevent. It *should* be in a creditor's interest to preserve its security, and a creditor may *not* concoct a scheme whereby it benefits greater by allowing its security to lapse. The latter is what LHI did: it schemed to obtain ownership of the hospital, cancel the lease and pharmacy contracts, and sue for deficiency (LEI-RE1). LHI decided it was not in its best interest to reinscribe the mortgage or mitigate damages by paying the Travelers judgment—only because that would have dashed Defendants' hopes of taking over the hospital and forcing LEI out, while simultaneously escaping legal obligations.[26] Defendants' argument contravenes the law and does not absolve them of their legal duties or excuse their bad faith, collusive breaches.

Finally, Defendants argue that LHI was only required to prevent physical destruction of the note and return it to St. Jude once paid. This restrictive

[26] This reality also dashes Defendants' unsupported argument that they could have accelerated and foreclosed on their own. Had they chosen to do so, they would not have been able to manipulate the judicial sale. *Compare Dynamic Marine Consortium, S.A. v. M/V Latini,* 1999 WL 123808 (E.D.La. 1999) (A-3). In any event, Defendants' argument is pure speculation on whether they had a valid, untainted basis for accelerating or foreclosing. All alleged breaches emanated from the bad faith and collusive machinations of Defendants. *See* LA.CIV.CODE art. 2003 (bad faith obligee may not recover when his own bad faith caused obligor's failure to perform or when he concealed facts he knew would cause such failure).

characterization is flawed. At a bare minimum LHI had a duty to protect the note, but its duty required preserving the value of the underlying security (RE8:28-29, n.3). Defendants' simplistic view stems from their basic misunderstanding of collateral mortgage law. In a typical pledge, the thing given is a tangible object. *See* LA.CIV.CODE arts. 3134-35. The pledgee's duty to protect it from "loss and decay" is understandable. LA.CIV.CODE art. 3167; LA.REV.STAT.ANN. § 9:4401 & §§ 9:5550 *et seq*.

In the pledge of a collateral mortgage note, "loss and decay" occur in more sophisticated ways. The thing pledged—the collateral mortgage note—is an intangible, incorporeal object which itself is secured by a collateral mortgage on property. The duties attendant to this sort of pledge are more complex. Dangers other than pure physical destruction threaten value.

Loss of priority over the collateralized property is certainly a danger, and is a circumstance against which the pledgee must protect by timely reinscribing the mortgage. *Cf. Trans-Global*, 583 So.2d at 454. Although the collateral mortgage note may be enforced *in personam* against the borrower,[27] the principle point of the

[27] Defendants' argument that pledge by the mortgagor versus pledge by a third party differentiates the pledgee's duty is without basis. The pledgee's duties do not change: the only difference relates to the extent of the pledgor's *in personam* liability. *Compare Naquin v. American Bank of Luling*, 347 So.2d 332, 334 (La.App. 4th Cir. 1977) (if pledge of own note to secure own debt, personal liability is complete); *and Diamond,* 780 So.2d at 380-82 (if pledge of own note to secure third-party debt, personal liability is limited to value of

collateral mortgage is to provide collateral. Priority over the collateral is valuable and can only be protected against third parties by timely recordation. Here, LHI's failure to timely reinscribe the collateral mortgage was a breach of duty, and one which did not merely result in the loss of priority over the underlying security. Rather than mitigate its breach by paying the Travelers judgment, Defendants aggravated it and conspired to control the hospital and contracts (RE8:28-29, n3; LEI-RE1). Ultimately, AMI *did* pay the Travelers judgment (R8:23).

In sum, LHI/AMI committed numerous breaches of its duties as pledgee: (i) it failed to timely reinscribe the collateral mortgage securing the note; (ii) costing loss of its priority; (iii) it engaged in collusion and self-dealing; (iv) it refused to pay off the Travelers judgment, allowing it to impact its security; (v) it forced the building and hospital into foreclosure and judicial sale; (vi) it filed a pleading in federal court to chill bidding to enable its purchase at a rock-bottom price; (vii) it structured the transaction, at greater economic cost to itself, to achieve its longtime plan to terminate the hospital lease and the pharmacy contract; and (viii) it ceased to collect rent from LHL.

LHI willfully breached its fiduciary duties to act as a prudent administrator and to protect and preserve the collateral hospital and rents against loss and decay. The

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property); NATHAN AND DUNBAR at 43-44.

district court's findings and order of disgorgement must be affirmed under the law and facts of this case. LA.CIV.CODE art. 3167; LA.REV.STAT.ANN. § 9:4401 & §§ 9:5550 *et seq.; Trans-Global, supra.*

C. Defendants' Bad Faith And Collusion Required Rescission Of The Tainted Sale As A Matter Of Louisiana Law.

Defendants' collusive bid-rigging provides a second basis for restoring ownership of the hospital to St. Jude. Under Louisiana law, collusion to stifle competitive bidding at a judicial sale renders that sale an absolute nullity warranting rescission. The party harmed may assert a separate, direct action against the purchaser to annul the judicial sale. *See* LA.REV.STAT.ANN. §9:3169; *Reid v. Federal Land Bank of New Orleans*, 192 So. 688 (La. 1939). Nullity of the sale for fraud or ill practices may also be used as a defense to a deficiency suit. *See First Guar. Bank, Hammond v. Baton Rouge Petroleum Center, Inc.,* 515 So.2d 802 (La. 1987). LEI/St. Jude appropriately sought annulment of this judicial sale both as an affirmative counterclaim *and* as a defense to Defendants' deficiency claim.

1. Defendants Colluded To Chill Bidding At The Sale.

On this record, the district court correctly annulled the judicial sale and correctly refused to grant a deficiency judgment (RE8:21-23, 32-33). *See* LA.REV.STAT.ANN. § 9:3169 (judicial sale may be set aside for nullity); LA.CIV.CODE art. 2004 (judgments may be annulled for fraud or ill practices). The Louisiana Supreme Court has long recognized annulment as a remedy for conduct that tends to stifle bidding at a judicial sale. *See Acadian Production Corp. of La. v. Savanna Corp.*, 63 So.2d 141, 142-43 (La. 1953); *Pearlstine v. Mattes*, 67 So.2d 582, 586 n.3 (La. 1953); *Pease v. Gatti,* 12 So.2d 684 (La. 1942); *Konen v. Konen*, 115 So. 490, 491 (La. 1928); *First Nat. Bank of Abbeville v. Hebert*, 111 So. 66, 69 (La. 1926)*;* *Swain v. Kirkpatrick Lumber Co.,* 78 So. 140, 142 (La. 1918).

Evidence of "stifling" need not be overwhelming. The party seeking annulment need only show by a preponderance of the evidence that a request or statement was made that was likely to prevent competitive bidding, was made for that purpose, and had that effect. *Konen*, 115 So. at 491. Contrary to Defendants' argument, LEI/St. Jude need not offer concrete proof that someone else would have bid higher. The United States Supreme Court has rejected this, stating that where there is an allegation of collusive bidding, the evidentiary focus is on the "tendency and character of the agreement made between the parties . . . [t]he vice is in the very nature of the contract, and it is condemned as belonging to a class which the law will not tolerate." *McMullen v. Hoffman*, 174 U.S. 639, 647-48 (1899). "[T]he inference [is] natural" that there would have been other bidders. *Id.*

This record amply shows Defendants' bad faith and collusion, factually amounting to fraud. LHI's public announcement and filing in federal court just prior to the sale that it planned to bid credits (R8:21-23) had its intended effect: LHL was the sole bidder at the sale. *Compare Swain*, 78 So. at 140 (no one bid at the sale except colluders). To cement misperception of truth, LHL appeared and bid through officials who appeared to represent LHI, the entity that had moved to bid credits (R8:21-23). In *Dynamic Marine*, 1999 WL 123808 (A-2), the court found collusion to chill bidding and rescinded a judicial sale under similar circumstances: (1) prior to the sale, the mortgagor announced its intent to bid credits to chill competition; (2) at the sale, counsel for the mortgagor appeared to bid, but did so as representative of the cohort and bid only for cohort; and (3) the purchasing cohort presented the sole bid at the sale. Here, as in *Dynamic Marine,* "the inference [is] natural" that collusion impacted the sale. *See* McMullen, 174 U.S. at 647-48. Here, as in *Dynamic Marine*, rescission of the tainted sale is warranted.

2. Defendants Ignore Their Own Bad Faith and Collusion.

That LHL "paid" the minimum price allowed by law has no bearing on the rescission. First, as a practical matter, Defendants admit they paid only $7,800,000 for the property (Tenet's br. 37),[28] a trifling sum compared to the property's appraised

[28] *See infra* n. 37 (though $18,200,000 was credited toward the collateral mortgage,

value of $37,500,000. Second, LHL's minimum bid carries no weight because it was paid pursuant to a collusive scheme designed to quell competitive bidding. Defendants argue that their payment of the minimum price satisfies the law—despite their collusion, however, the very fact of collusion and bid-rigging voids the sale and justifies rescission. The price paid is irrelevant because the bidding process was tainted by fraud.

That LHI could bid credits was part of the fraud. In view of LHI's illicit agreement with Defendants, the deterrent effect of its public statement and federal filing on prospective bidders, and the surrounding circumstances of this case, LHI's actions *support* the district court's decision to restore ownership to St. Jude. No court can sanction collusive conduct. The Louisiana Supreme Court has opined: "Neither the law nor the courts [should ever] be used as instruments to work an injustice." *Swain*, 78 So. at 142.

Finally, Defendants' argument that each of their actions, taken alone, were "legal," and therefore their collusive scheme was permissible, falls flat. *See Dynamic Marine,* 1999 WL 123808 (A-2) (rejecting argument that steps in collusive scheme were independent and legal business decisions). The law prohibits bid-chilling at judicial sales, not to mention collusive, fraudulent conduct. *Konen,* 115 So. at 491

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this would have been paid anyway under the net-net lease/mortgage arrangement).

(either "concealment or misrepresentation of facts, amounting to fraud" or statements and actions taken to "prevent[] competition" is "sufficient to annul the sale"); *Swain*, 78 So. at 142 (rescission is justified where Defendant "act[ed] . . . [to] deter[] [others] from bidding").

While conduct tainting a judicial sale need not rise to the level of outright fraud, the instant facts and the court's findings establish it. *Ab initio,* Defendants planned from the beginning to strip St. Jude/LEI of the hospital and pharmacy by squeezing them financially, then setting the legal dominoes in motion. Defendants' plan culminated with the judicial sale provoked by the Travelers lien, which held superior ranking *only* because Defendants did not reinscribe their collateral mortgage and did not mitigate their damage by paying the judgment. Defendants manipulated the sale proceedings so that LHL would pay the minimum price necessary to own the property, thereby allegedly triggering termination of the lease by confusion and the CPMA by cross-default. *See supra* n. 22. Defendants' conduct was neither legal nor conscionable.

"Auctions should not be empty exercises." *First Nat. Bank of Jefferson v. M/V Lightning Power*, 776 F.2d 1258,1261 (5th Cir. 1985) (Rubin, J.). Public confidence in judicial sales demands that they be conducted fairly. The laws against fraud, collusion, and bid-rigging instill public confidence and ensure that the property owner receives the highest possible price and is left with the lowest possible deficiency. *Coen v. Toups*, 168 So.2d 893, 896 (La. App. 2d Cir. 1964). When bid-chilling occurs, the primary object of the sale—to come as close as possible to full property value—cannot be achieved. *See Konen,* 115 So. at 491. There cannot be any confidence that the debtor was treated fairly and received a fair price for the property.[29]

Defendants stripped St. Jude of its statutory rights as a debtor under Louisiana law. The district court appropriately rescinded the judicial sale and restored St. Jude Hospital to its rightful owner (RE8:14-33).

3. The Defendants/Bad-Faith Adjudicatees Still Hold The Property.

St. Jude Hospital remains in the hands of the bad faith adjudicatees whose misconduct tainted and nullified the judicial sale. The district court correctly deemed LHI, LHL, and AMI to be a single business entity, a finding which Defendants have not appealed, *see* (Tenet's br. n. 25), and Tenet to be liable as a successor, both under Louisiana law[30] and by participation in Defendants' scheme (R8:1, n.1, 12-14).[31]

[29] And, as explained *infra* § III, nor can any deficiency amount be relied upon as an amount fairly and appropriately due.

[30] This Court held in *Hollowell v. Orleans Regional Hospital, LLC*, 217 F.3d 379, 390-91 (5th Cir. 1990), that a fact-finder does not clearly err in imposing successor liability under Louisiana law when the new company continues the business of the old. Here, Tenet does not dispute it is AMI's "successor," *see* (Tenet's br. n. 25); Tenet's legal counsel,

Donna Erb, admitted only the name has changed; and, Tenet's trial counsel likewise acknowledged Tenet is a party to this proceeding (Ex775:5, 37-41, 43, 45, 52). Tenet was also tried by consent, as demonstrated by its heavy and active involvement at trial. *See e.g.,* (R43:206-10, 245; 44:416, 444, 446, 456-57; 46:537, 541, 604; 51:1126, 1130-31, 1159).

[31] Tenet participated in Defendants' prearranged scheme to purchase the hospital collusively, and then to terminate the lease and the CPMA. The Tenet merger was contractually sealed before the sale, but its effective date was purposely postponed until after it (Ex775:43-44). Despite NME/Tenet's desire to own St. Jude Hospital along with numerous other acute care facilities in the area, it did not bid at the judicial sale because it accepted AMI's collusive plan (Ex771:49-52; Ex772:11-12, 16). Indeed, for months prior to the sale, AMI held meetings with Travelers and NME/Tenet to discuss the implications of a foreclosure and sale by Travelers (Ex770:28, 31, 33, 37, 44, 47-48, 50-51, 68, 72-73; Ex771:46-50, 52; Ex772:11-15, 18; Ex773:24, 44, 48-51, 70-71; RE8:17-18). *Compare Meyer v. Farmer*, 36 La.Ann. 785, 1884 WL 7895 (La. 1884) (A-3) (affirming rescission of judicial sale even though property was in hands of supposed "third party" purchaser: purchaser had prior knowledge about the original purchaser's scheme to chill bidding, chose not to bid at the sale, and purchased the property later pursuant to the parties' plan).

Defendants all believed, erroneously, that their pre-arranged purchasing structure, executed pre-merger, would provide the ultimate possible economic and legal benefit to them all. There can be no barrier to annulment here, where the guilty parties still have possession of the property.[32] *See Reed v. Meaux*, 292 So.2d 557, 562-63 (La. 1973); *Acadian Production Corp.*, 63 So.2d at 142-43; *Viley v. Wall*, 97 So. 409, 412 (La. 1923); *Pease,* 12 So.2d at 686-87; *Boyd v. Farmers-Merchant Bank & Trust Co.*, 433 So.2d 339, 341 (La.App. 3d Cir. 1983), *writ denied*, 496 So.2d 1047 (La. 1983).

4. Prior Confirmation Did Not Preclude The Court From Annulling The Sale Based On Defendants' Bad Faith And Collusion.

Finally, neither confirmation of the judicial sale in the Travelers litigation nor this Court's dismissal of that appeal as moot precludes annulment of the judicial sale here. Even confirmed judicial sales may be vacated and rescinded for fraud or ill practices. See supra § II.C; Schlater v. Brusle, 22 So. 925 (La. 1897); Slidell Bldg. Supply, Inc. v. I.D.S. Mortg. Corp., 273 So.2d 343 (La.App. 1st Cir. 1972), writ denied, 274 So.2d 708 (La. 1973).

[32] Defendants have not argued that Tenet is an uninvolved, innocent third party from whom ownership may not be rescinded. *See* (Tenet's br. 85). They have waived this and any similar argument on appeal.

Evidence of Defendants' collusion and bad faith was not before the Court in Travelers, nor were the same parties. See Travelers Ins. Co. v. St. Jude Hospital of Kenner, Louisiana, Inc., No. 94-30636 (5th Cir., May 24, 1995) (unpublished). This case does not fit the legal parameters for res judicata or collateral estoppel. Identity of parties, which is required for both, is not present. *See Travelers Ins. Co. v. St. Jude Hospital of Kenner, Louisiana, Inc.,* 37 F.3d 193 (5th Cir. 1994). Nor are the two cases based on the same "cause" or theories of the case. *See St. Paul Mercury Ins. Co. v. Williamson*, 224 F.3d 425, 436-39 (5th Cir. 2000); *Hicks v. Quaker Oats Co.,*662 F.2d 1158, 1163-68 (5th Cir. 1981).[33]

[33] For similar reasons, the parties' 1990 settlement agreement in no way precludes LEI/St. Jude from suing Defendants for bad faith and collusion. That settlement was not a waiver of the claims presented here, and LEI/St. Jude's claims of bad faith and collusion do not turn on the loan document.

LEI/St. Jude's claims proceeded to trial on the merits of the issues of bad faith, collusion, and breach. The district court, in detailed and substantiated factual findings, found the Defendants/adjudicatees guilty of bad faith, collusion, and breach of duty which tainted and annulled the judicial sale. Neither these claims, nor the district court's resolution of them, are predetermined or moot on appeal.[34]

III. THE DISTRICT COURT PROPERLY DENIED DEFENDANTS' REQUEST FOR A DEFICIENCY JUDGMENT.

Defendants seek a deficiency judgment of $20,600,060.91 based on the "debt left" after distribution of their collusive bid. The same bad faith and collusive conduct that taints a judicial sales also bars any claim for deficiency. *Bank of Lafayette v. Bailey*, 531 So.2d 294, 297 (La.App. 3d Cir. 1988), *rev'd in part on other grounds,*

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[34] Defendants' authorities do not state that confirmed judicial sales can never be overturned. None of them even involved judicial sales premised on bad faith, collusion, or breach of duty. Louisiana courts have repeatedly distinguished those cases. *Compare First Guar. Bank*, 529 So.2d at 840-41; *Frisard v. Autin*, 747 So.2d 813, 819-20 (La.App. 1st Cir. 1999), *writ denied,* 756 So.2d 1145 (La. 2000); *Peyriffitte v. Harvey*, 312 So.2d 159, 162 (La.App. 1st Cir. 1975), *writ refused,* 314 So.2d 736 (La. 1975), *with Defendants' cites*, *Wetherbee v. Lodwick Lumber Co.*, 193 So. 671, 679 (La. 1940) (third-party possession); *Washburn v. Green*, 13 La.Ann. 332, 333 (La. 1858) (purchaser must comply with terms of sale); *accord Frierson v. New York Life Ins. Co.*, 142 So. 256, 258 (La. 1932).

533 So.2d 5 (La. 1988); *Hebert v. First Guar. Bank*, 493 So.2d 150, 155-57 (La.App. 1st Cir. 1986); *see First Acadiana Bank v. Bieber*, 582 So.2d 1293, 1296 (La. 1991) (creditor must prove property was sold in accordance with law and proceeds were insufficient); *Tapp v. Guar. Finance Co.*, 158 So.2d 228 (La.App. 1st Cir. 1963) (if executory procedure was invalid, then any alleged deficiency is also invalid); *Bank of Commerce and Trust Co. v. Landry*, 610 So.2d 927 (La.App. 1st Cir.), *writ denied*, 612 So.2d 82 (La. 1993) (purpose of Deficiency Judgment Act is to protect debtors from creditors selling property at low price and pursuing debtor for the balance).

In annulling the sale, the court effectively placed the parties in their presale positions, employing the normal pass-through payment to deem any rent due by LHL to St. Jude paid, and any mortgage payment due by St. Jude to LHI paid (RE6:2; 8:30-33).[35] The court found there was no default or acceleration because St. Jude was current on its mortgage payments.

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[35] Pursuant to this order and as explained in St. Jude/LEI's post-trial brief

(R31:9522), Defendants actually owe St. Jude more back rent and interest, which the district court mistakenly left out and which it should assess as additional damages when it takes up that issue following resolution of this Rule 54(b) appeal. *See* (RE6). Restoring the hospital *did not* create a dollar for dollar offset of rent against mortgage payments. From the time Defendants received possession of the hospital until the time Defendants finally return possession to St. Jude, rent and interest continue to accrue. This Court should order the district court to take up these additional damage issues under action 94-3993 when the court assesses the continuing damages being done under action 93-4249. The ramifications are substantial, as St. Jude's mortgage debt may be satisfied, and additional damages may be due to St. Jude/LEI. *See* (R31:9522); *infra* n. 37.

Finally, the alleged defaults and acceleration were caused by the bad faith and collusive wrongdoing of Defendants, who alone are legally responsible. Defendants always planned to defraud St. Jude/LEI out of the hospital and pharmacy (LEI-RE1). They cannot turn "breaches" they orchestrated to their advantage. On this ground, also, the district court properly denied deficiency judgment. *See* LA.CIV.CODE art. 2003 (party who performs obligation in bad faith forfeits right to reciprocal performance).[36]

IV. DEFENDANTS' BAD FAITH AND COLLUSIVE CONDUCT PRECLUDE THEIR RECOVERY OF THE PURCHASE PRICE.

[36] Defendants' reliance on covenants 4 and 5 similarly is misplaced because any alleged violation was caused by Defendants' own bad faith, collusion, and deliberate scheme to harm LEI and gain control of the hospital and contracts. *See infra* § V.C.3.(i)(b).

Restoration of St. Jude Hospital is an appropriate remedy for Defendants' bad faith, collusion, and breaches of duty. However, the district court erred in awarding Defendants reimbursement for the money they paid to Travelers. Legally, Defendants engaged in highly offensive, illegal conduct prohibited by law and public policy. In such cases, Louisiana law deems the guilty party to have purchased the property at its own risk and peril, and to have forfeited any right to reimbursement of the purchase price. The district court here should not have conditioned restoration of hospital ownership on St. Jude/LEI repaying any of the money Defendants spent to purchase it pursuant to their collusive scheme.[37] As a matter of law, this Court should reverse and hold that St. Jude/LEI owe nothing to Defendants based on their offensive and illegal conduct.

The district court understandably took a business approach in annulling this absolutely void transaction, *i.e.,* it put the parties in their pre-collusive sale positions. However, the Louisiana Supreme Court has long held that in this setting, restoration of the status quo is not enough. *Meyer v. Farmer*, 36 La. Ann. 785, 1884 WL 7895 (La. 1884) (A-3). *Meyer* is remarkably similar, and has not been overturned by the Louisiana Supreme Court or Legislature. Instead, it has been followed by the

[37] Defendants stipulated that $7,800,000 of the purchase price paid off the Travelers judgment, and the rest went back to AMI/LHI in satisfaction of the collateral mortgage. *See* (R30:9207, 9217; Ex722(17)).

Supreme Court. *See e.g., Dean v. Martin*, 24 La.Ann. 103 (La. 1872); *Copley v. Berry*, 12 Rob. 79 (La. 1845); *New Orleans & C.R. Co. v. Jourdain*, 34 La.Ann. 648, 1882 WL 8656, *3 (La. 1882); *Aronstein v. Irvine*, 22 So. 405, 408 (La. 1897).

In *Meyer,* the Louisiana Supreme Court held that upon nullification of a collusive judicial sale, the guilty purchaser is not entitled to recover its purchase price. *Meyer* also involved collusion to stifle bidding. According to *Meyer*, the collusive buyer is deemed to have purchased at his own risk and peril, with full awareness of the danger of eviction and rescission. *Id.* at *2. *Compare* LA.CIV.CODE art. 2033, cmt. (c) (if performance is rendered with knowledge that contract is illegal and null, performance may not be recovered).

The buyer who participates in this scheme is deemed to understand the legal consequences of his illegal actions. *Id.* at *3. The bad faith buyer who colluded to chill bidding at a judicial auction may not recover damages or return of the purchase price following rescission under the law of *Meyer*. *Accord Dean, Copley, Jourdain, and Aronstein, cited supra*; s*ee also* SLOVENKO, *Of Pledge*, 23 Tul.L.Rev. at 122; *compare* LA.CIV.CODE art. 1894 & cmts. ("wrongdoers . . . who have acted in bad faith are not allowed to set up plea of compensation"); *Tolbird v. Cooper*, 143 So.2d 80, 83-85 (La. 1962); *Hitt v. Herndon*, 117 So. 568, 569-72 (La. 1927); *Aldredge v.*

Moses, 595 So.2d 379, 381 (La.App. 3d Cir. 1992); *Neff v. Ford Motor Co.*, 347 So.2d 1228, 1232 (La.App. 1st Cir. 1977) (all applying article 1894).

Based on these fundamental principles, this Court should deny Defendants the return of any portion of the price they paid to buy St. Jude Hospital at the collusive judicial sale. By their wrongful conduct, Defendants assumed this risk. This Court should affirm the district court's restitution to St. Jude, but modify the court's judgment to state that the guilty 1-43parties have forfeited any right to reimbursement.[38]

V. LEI QUALIFIED TO ASSUME THE CPMA UNDER BANKRUPTCY LAW.

The district court correctly held that LEI could assume the CPMA as an executory contract under § 365 of the Bankruptcy Code (RE8). Whether LEI's assumption of the CPMA satisfied the business judgment rule and whether LEI provided the assurances required under § 365 are both factual findings reviewed for clear error. *Richmond,* 762 F.2d at 1307-08.[39] Here, the district court found: "[i]t would be incomprehensible . . . to imagine a scenario where anything other than assumption would be in the best interest of LEI" (RE8:78).

[38] Defendants paid $7,834,516.26 pursuant to their collusive scheme.

[39] In *Richmond*, 762 F.2d at 1309-10, this Court expressly rejected the contention that "business judgment" is a mixed question of law and fact.

A. Section 365 Of The Bankruptcy Code Permits Assumption.

Under § 365, a debtor in possession may assume an executory contract provided the debtor cures or shows it will promptly cure any default in the contract, compensates or shows it will promptly compensate for any actual pecuniary loss caused by the default, and provides adequate assurance of future performance under the contract. 11 U.S.C. § 365(a)&(b)(1).

A contract is executory if at the time of filing, "performance remains due to some extent on both sides." 11 U.S.C. § 365, Revision Notes and Legislative Reports, 1978 Acts., subsection (a); *Matter of Murexco Petroleum, Inc.,* 15 F.3d 60, 62-63 (5th Cir. 1994).

Once a contract is deemed executory, the "business judgment" rule governs assumption. *Richmond,* 762 F.2d at 1309. Assumption will be granted if "maintenance of the contract is more beneficial to the estate than doing without the other party's services." *In re National Gypsum Co.,* 208 F.3d at 498, 505 (5th Cir.), *cert denied,* 121 S.Ct. 172 (2000).

The underlying purpose of § 365 is to relieve the debtor of burdensome obligations, while allowing the debtor the means to continue beneficial contracts, thereby facilitating rehabilitation. *Richmond,* 762 F.2d at 1309.

B. The CPMA Was An Assumable Executory Contract Under § 365.

The district court properly found the CPMA executory and assumable. The CPMA "clearly contemplates an ongoing relationship with continuing obligations" on the part of both LHL and LEI (RE8:78). When LEI filed for Chapter 11 relief on January 27, 1993, the contract was extant, no defaults existed, and failure to perform by either party still constituted a material breach. *See In re Murexco*, 15 F.3d at 62-63.

Defendants wrongly focus not on the date of the petition, but instead on the time of trial to argue that the CPMA was "no longer executory," and thus could not be assumed. However, the test for whether a contract is executory applies at the time of the bankruptcy filing. *In re Murexco Petroleum, Inc.*, 15 F.3d at 62-63. To fall outside § 365, the contract must have terminated validly, completely, and without possibility of reversal, under its terms or applicable law,[40] prior to the bankruptcy filing.[41] *Moody v. Amoco Oil Co.,* 734 F.2d 1200, 1212-13 (7th Cir.), *cert. denied,*

[40] State law governs whether and when a contract has been validly terminated. *Matter of Topco, Inc.*, 894 F.2d 727, 739 n. 17 (5th Cir. 1990).

[41] As a general rule, default-based termination is relevant only if it occurs prepetition. While there are some exceptions, if the contract was executory at the time of filing, the debtor may still assume the contract provided he cures any later default. *See In re Ontario Entertainment Corp.,* 237 B.R. 460 (Bankr.N.D.Ill. 1999). This is different from termination of a contract prepetition, because postpetition the contract becomes property of the estate under 11 U.S.C. § 501 and subject to an automatic stay against enforcement or cancellation under 11 U.S.C. § 362(a). *See Matter of Varisco*, 16 B.R. 634, 637-38 (Bankr.M.D.Fla. 1981); 11 U.S.C. § 362(a)(3) (stay prohibits any act to obtain possession or control over property of the estate). Here, the CPMA was executory and extant at the time of LEI's

469 U.S. 982 (1984); *In re Pyramid Operating Authority, Inc.,* 144 B.R. 795, 808 (Bankr.W.D.Tenn. 1992); *In re Lonepine Corp.*, 184 B.R. 370, 376-77 (Bank.D.Co. 1994).

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petition and thus subject to § 362's stay.

Defendants cannot show that as of LEI's bankruptcy filing, the CPMA had been legally terminated.[42] Defendants did not even give notice of breach before that time, as required under the CPMA (R43:283; LHL-49:§8.2, §15).[43]

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[42] Defendants' reliance on *In re Trigg*, 630 F.2d 1370 (10th Cir. 1980), is misplaced. *Trigg* was decided under the Bankruptcy Act of 1898, which had no provision for cure of default. *Varisco*, 16 B.R. at 637. Moreover, even *Trigg* recognized that the default-based termination must have occurred automatically, without *any* action on the part of the nondebtor. *See* 11 U.S.C. § 362(a)(3). That is not what occurred here, where Defendants not only participated in, but intentionally precipitated the alleged defaults they now claim "terminated" the CPMA. *See also infra* n. 43 (under CPMA and Louisiana law, Defendants had to act to terminate the CPMA); *compare In re Kansas Personal Communication Services, Ltd.*, 252 B.R. 179, 186, 189 (Bankr.D.Kan. 2000) (automatic stay precluded postpetition termination because nondebtor had to move to cancel licenses).

[43] The district court explained why under Louisiana law, neither the lease nor the

CPMA could have terminated prior to LEI's bankruptcy in 1993: (1) at the time of the filing, LEI was in possession and has remained in possession of the pharmacy; (2) under Louisiana law and the circumstances of this case, LHL was required to obtain judicial dissolution of the CPMA prior to LEI's bankruptcy, and LHL did not do this; (3) based on the record evidence and the many disputes these parties had over the construction of the CPMA, it is not clear that LEI even breached the CPMA to justify dissolution; and (4) as a good faith party, LEI would have been given an opportunity to remedy any problems found, under Louisiana law (RE8:80-82) and the CPMA (LHL-49:§8.2). *Compare In re Lonepine*, 184 B.R. at 372-75 (under terms of lease and governing state law, executory contract was not terminated prior to bankruptcy).

Nor can Defendants prove the CPMA legally terminated prior to court approval because (i) the CPMA was then property of the estate subject to the automatic stay and LEI's right to cure, *supra* nn. 41-43, and (ii) no cure was even necessary because LEI did not breach §5.1(e). LHL always leased and/or operated the hospital[44] (RE8:88-90). This contract was never validly and irrevocably terminated. *See In re Pyramid,* 144 B.R. at 808 (termination "must be complete and not subject to reversal, either under the terms of the contract or under state law"). The district court saw through Defendants' collusive scheme, restoring St. Jude's ownership and LHL's lease retroactively, as if the sale had never occurred. LA.CIV.CODE art. 2033 ("[a]n absolutely null contract . . . is deemed never to have existed"). No breach ever occurred and, even if one had, it was cured by the district court's order.

Defendants ignore their bad faith and collusion and the district court's order, claiming LHL ceased to lease the hospital and this alone was enough to trigger §5.1(e). Defendants' argument fails because the district court, construing the contract against its drafters, properly rejected their interpretation.

[44] Even today, it continues to operate and lease it under the name AMI/Tenet.

The court found the CPMA was severable[45] from the other agreements based on numerous facts (RE8:88-89).[46] Then, viewing the CPMA, the other documents, the various transactions, and the parties' intent, the court determined that § 5.1(e)

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[45] Even if the documents were not severable, the CPMA cross-default provisions are legally invalid. They impermissibly hinged on LEI's financial condition and ability to pay under the other contracts. *Compare In re Sambo's Restaurants, Inc.,* 24 B.R. 755, 757 (Bankr.C.D.Cal. 1982); *In re Plitt Amusement Co. of Washington, Inc.*, 233 B.R. 837, 842-45 (Bankr.C.D.Ca. 1999). Principles of estoppel and waiver also bar Defendants' challenge to assumption because LEI would not be in bankruptcy were it not for Defendants' actions. *In re Braniff, Inc.*, 118 B.R. 819, 845 (Bankr.M.D.Fla. 1990) (Defendants' conduct may waive or estop challenge to assumption).

[46] Neither the Loan nor the Lease mentioned the CPMA, both the Loan and the Lease related only to St. Jude, not LEI, and while the Loan and Lease were executed together, the CPMA was executed one month earlier, before the Loan and Lease were through negotiations and before their provisions were known (RE8:88-89). *Compare In re Pyramid*, 144 B.R. at 814 (execution at different times and failure to incorporate related contracts); *In re Plitt,* 233 B.R. at 842-45 (provisions of instruments and structure of overall transactions suggested severability). If the parties had intended to make these documents dependent on one another, they would have said so.

triggered only if LHL ceased its association with the hospital—lease or operation. *See* LA.CIV.CODE art. 2045 (interpretation of contact turns on parties' intent).

Section 5.1(e) was designed this way to allow the Liljebergs to negotiate a new pharmacy agreement with any new hospital operator. This is consistent with § 5.1(b), which protects the Liljebergs in the event LHL ceases to run the hospital and a third-party takes over. *See infra* § V.C.3.(ii); LA.CIV.CODE arts. 2049-50 (provisions of contract must be interpreted together to give each one meaning in light of the whole).

These parties always intended LEI would operate the pharmacy and this was critical to their deal (R42:6; 43:169-70, 227). However, because the lease granted LHL a first-right of refusal over the hospital (Ex240-B(20), § 5.1(e) contemplated LHL's potential ownership. The district court did not clearly err in its findings here, and in any event, it properly interpreted any ambiguity against Defendants, who drafted the document deliberately ambiguous so it would "say whatever [they] wanted it to say" (R42:21-22; LEI-RE6). LA.CIV.CODE arts. 2056-57 (in case of doubt, provision must be interpreted against drafter and against obligee).

C. The District Court Correctly Found That LEI Qualified To Assume The CPMA.

Following its bankruptcy, LEI timely moved to assume the CPMA. The CPMA is a valuable asset which generates positive income, and it was a good business decision for LEI to assume it. LEI has performed its obligations in good faith and will continue to do so. The district court correctly found LEI qualified to assume this contract (R43:282-83; RE8:71-99).

Defendants have been found guilty of bad faith and collusion, yet complain that LEI should not be allowed to assume the CPMA largely because the parties' relationship has become "acrimonious"—a situation which Defendants created, and because of alleged incurable defaults—which either do not exist or were orchestrated by Defendants. Defendants may not use their own wrongdoing to prevent LEI's assumption of this beneficial contract. *See* LA.CIV.CODE art. 2003.

1. The Only Reassurance Of Future Performance Missing Is That Of Defendants.

Defendants twist the facts and ignore the court's findings when they argue "acrimony" in the parties' relationship precludes LEI from assuming it. If any party should be held accountable for relationship difficulties, it should be Defendants, not LEI. If any party should be required to reassure the court of its good faith future performance, it should be Defendants, as the district court noted (RE8:100).

LEI is a good faith debtor seeking to assume its original contract as part of its plan of rehabilitation. LEI has satisfied the "business judgment" rule and adequately assured the court (RE8:71-100). This case is not like *In re Texas Health Enterprises, Inc.*, 246 B.R. 832 (Bankr.E.D.Tex. 2000). Indeed, it the reverse: there, the debtor operated in bad faith and disregarded its obligations under the contract, *id.* at 836;

here, the debtor is in good faith and has made every attempt to operate fairly under the contract. LEI has assured the court that it will continue to do so, promising to incorporate a new computer system and to provide MARs for fair compensation (RE6:4; 8:69-70, 77). LEI's assurance of future performance was adequate under § 365.

2. LEI Has Cured Or Agreed To Cure Any Operational Defaults.

Most of the "incurable" breaches alleged by Defendants did not occur. Of the few breaches that occurred, the district court found adequate assurance of cures by LEI. Defendants have not shown that the district court clearly erred in making these factual findings. *Richmond,* 762 F.2d at 1309-10.

The district court found that LEI did not commit breaches in relation to patient care or hospital operations. LEI has never been sued for malpractice (RE8:75), and has never been cited by the Board of Pharmacy for ineffective service (R43:283; 47:780; RE8:75). The Pharmacy and Therapeutics Committee of the Hospital has never written LEI regarding the Pharmacy's performance (R43:283; 47:780). LEI conformed to the standards of the Joint Commission for Accreditation of Health Care Organizations ("JCAHO") and all other agencies who exercised authority over the pharmacy during the 1997 JCAHO survey of St. Jude Hospital (RE8:75). Prior to LEI's bankruptcy, LEI never received any notice of breach of the CPMA (R43:283), and Hospital CEO Steve Green testified he never received any complaints about LEI (R44:450; LEI-RE1).

For the first 11 years, Defendants never conducted the quality assurance survey allowed by § 8.2. Nonetheless, LEI passed the first survey and resurvey in 1993 with a score of more than 90% (R53:1442-8 , 1459, 1469, 1482-83, 1497, 1499; RE8:74, 94).

In 1997, Defendants improperly "designed and scored [a survey] with the sole purpose of having LEI fail." Defendants manipulated the scoring and held LEI responsible for acts and omissions outside the pharmacy's control (RE8:74-75, 98-99). Defendants' bad faith and intentional manipulation were obvious to the court, which found: "[t]he record is abundantly clear that LHL and its various parent companies over the years relished the thought of actually terminating the CPMA, starting even before it was signed" (RE8:96). Nonetheless, LEI scored 86.7% on the 1997 survey—despite Defendants' scheme to formulate and score it so as to insure breach (R53:1442-8, 1459, 1469, 1482-83, 1497, 1499; RE8:90-99).

On the resurvey, the pharmacy scored above 90% in all but one category (R53:1462-65). Kalman, Tenet's witness who conducted the survey, conceded, and the trial court found, that if the survey had been scored correctly, as it was in 1993, LEI's score would have exceeded 90% (R53:1469, 1482, 1499, 1507, 1509, RE8:90-

99); *see also* (R51:1132, 1137-39, 1142, 1143, 1152-53, 1160; 53:1469). The almost contemporaneous audit by the JCAHO gave the Hospital a 94% and found *no* deficiencies or remedial actions necessary by LEI (RE8:99).

LHL also approved the organizational chart of authority governing its relationship with the LEI Pharmacy Director (RE8:77). Under the CPMA and Civil Code, LEI was an independent contractor responsible for results, not means (LHL-49:§14; RE8:90-93). The court found, "LEI discharged its duties consistent with the intention of the CPMA, and . . . was not in breach of the contract on the basis of LHL's assertion that LEI failed to submit to LHL's control and authority" (RE8:90-93).

Notably, Tenet policy did not require its other hospitals to have a 24-hour pharmacy (R51:1158-60; LEI-RE1), yet LEI provided one at all times except for one three-hour period during which its night pharmacist was ill (RE8:75-76). Tenet policy allowed for 20 drug dispensing errors per month (R51:1158-60), but LEI never came close to this amount (RE8:75). Other than incidents with one pharmacist, which LEI cured by firing the pharmacist,[47] LEI's record was a good one (R51:1160-62, 1268,

[47] The Pharmacy fired one pharmacist due to his poor performance (R47:703-04, 711-12, 780). Defendants moved to terminate the pharmacy contract, claiming the pharmacist had committed a "sentinel event." However, Defendants' witness on this point, Deborah Keel, conceded at trial that the pharmacist's errors did not meet the definition of a "sentinel event" (R51:1132, 1137-39, 1142, 1143, 1152-53, 1160; 53:1469), and documentary evidence from the hospital confirmed this (LEI-2001)

1274, 1276, 1277, 1278-79; 52:1423-24; LEI-RE1; RE8:100). LHL's claims of breach based on strengths or dosages of medication are meritless because, as the district court found, these decisions rested in the Pharmacy Director's discretion, and he did not abuse his discretion (RE8:99).

LEI's personnel took part in Hospital committee meetings, even though Tenet had no policy on how many meetings an employee or department must attend. The meetings LEI missed were due to failures of notice by the Hospital or decisions to protest the items addressed (RE8:76). The district court specifically found LEI fulfilled its legal obligations under the CPMA in relation to meeting attendance (RE8:76).[48]

The district court found that LEI only breached two payment provisions under the CPMA (RE6:3), but that LEI could adequately cure those breaches by paying the money due to LHL (RE8:77). No incurable breaches existed to preclude LEI's assumption of the CPMA.

3. LEI Did Not Commit Any Transactional Breaches.

Nor did LEI commit any transactional breaches (RE8:71-73, 82-90). The "breaches" alleged by Defendants all emanated from Defendants' bad faith and

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[48] Tenet employees admitted missing hospital meetings regularly. *See* (R51:1132, 1137-39 , 1142, 1143, 1152-53, 1160; 53:1469).

collusive conduct and only reached the CPMA through a cross-default provision which is inapplicable and unenforceable. Defendants make purely speculative arguments based on invalid and tainted legal bases for terminating the parties' contracts. The district court found no breaches (RE8:83-87).

(i) St. Jude Did Not Breach Either The Lease Or The Mortgage Agreements.

As a threshold matter, the CPMA cross-default provision could not have triggered because St. Jude did not breach the Lease or Mortgage.[49] As the district court found, the mortgage, when viewed in tandem with the recorded lease, was "incapable of default" because the obligations owed by LHL under the lease automatically satisfied the mortgage obligation owed by St. Jude to LHI (RE8:72, 84).[50] The lease, which was recorded even before the collateral mortgage (RE8:72), remained effective against any later-recorded property right. *See* LA.REV.STAT.ANN. §§ 9:2721 *et seq*.

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[49] Additionally, even assuming a breach by St. Jude, that does not translate into a breach of the CPMA by LEI. *Infra* § V.C.3.(ii).

[50] LHI's pledge of basic rents allowed all payments to be handled as mere bookkeeping. LHL did not even have a bank account. The lease payments skipped St. Jude and went directly to LHI/AMI. All costs associated with LHL's rental (taxes, utilities, maintenance, insurance) also passed through to AMI (RE8:84-85). Meanwhile, all outgoing payments to the LEI pharmacy and hospital employees were made by AMI/Tenet (RE8:72-73).

To maintain prime priority of the collateral mortgage, LHI had to reinscribe it prior to March 1993, which it did not do. Thereafter, when Travelers recorded its judgment against St. Jude/LEI in April 1993, it primed the collateral mortgage, but it could not prime the prerecorded lease. The judgment remained inferior to LHL's right of peaceable possession. No breach of the lease or the mortgage occurred (RE8:84-88).

(a) No Breach Of The Lease Occurred.

LHL never lost possession of the leased premises. Defendants drafted the lease so that St. Jude relinquished complete power over the lease rent and property to Defendants. *Supra* n. 50. St. Jude was only obligated to provide those basic things owed by a lessor under Louisiana law, one of which is "peaceable possession" (RE8:85). LA.CIV.CODE art. 2692. Under the law and the lease, St. Jude owed nothing further—even the default provision shows that all rights and powers lay with LHL/LHI, and thus all default grounds related only to LHL as tenant, not St. Jude as lessor (LHL-240.B:XV; RE8:85).

The court properly found that the Travelers lien did not breach § 11.1 of the lease because LHL remained in possession. Section 11.1 is a warranty of peaceable possession and relates to the Lessor's obligations, not the land (RE8:84-85):[51]

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[51] In Louisiana, a lease is a personal obligation and does not create an interest in the

11.1 Warranty of Peaceable Possession and Title.

> . . . . During the Lease Term, LESSOR represents and covenants that it will not create nor allow to exist any liens, encumbrances or charges *relating to obligations of the LESSOR affecting the Leased Premises* except liens, such as paving, water and sewerage liens, . . . and any other mortgage instruments now or hereafter executed to secure the [LHI] loan . . . or otherwise agreed to in writing by [LHI].

(LHL-240.B) (emphasis added). It addresses only those liens affecting the Lessor's ability to uphold its obligation to provide peaceable possession, as the provision states and Louisiana law requires (LEI-RE3). LA.CIV.CODE art. 2692.

The lease provision uses a term of art and is clear. LA.CIV.CODE arts. 2046 (when contract is clear, no further interpretation may be made); 2047 (words, including technical terms, must be given their prevailing meaning). The district court correctly determined that the provision relates to "peaceable possession," as it says, and did not disregard the lease language or insert a provision, as Defendants suggest.

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land. *Prados v. South Central Bell Telephone Co.*, 329 So.2d 744 (La. 1975). This lease appropriately addresses the parties' reciprocal lease obligations; it does not regulate real rights in relation to the property. *Id.*

The district court also correctly held that LHL was not deprived of possession. Under Louisiana law, the prior-recorded lease primed any later-recorded lien (RE8:85). *See* LA.REV.STAT.ANN. §§ 9:2721 *et seq.* The lease confirmed this, specifically providing that it would remain superior, even to the parties' later-executed loan and security agreements (LHL-240.B:§20.10).

Moreover, seizure of property does not cause a lease breach if possession remains intact. *Union Bank v. Cottonport Ins. Exchange*, 630 So.2d 975, 977 (La.App. 3d Cir.), *writ denied,* 637 So.2d 1049 (La. 1994). Nor does sale of the property, because the prerecorded lease protects peaceable possession. LA.REV.STAT.ANN. §§ 9:2721 *et seq.*

The district court properly held that St. Jude did not breach § 11.1 (RE8:84-87). Under the prior-recorded lease, "LHL could have sat on its hands" and not been dispossessed. LHL (and Defendants) thought they could force a breach of the lease, and through it a breach of the CPMA. Their plan was to allow Travelers to foreclose by failing to reinscribe the collateral mortgage, refusing to mitigate by paying the judgment, and then violating their obligations as mortgagee and lessee by attempting to acquire the property collusively (RE8:87). Ironically, even if Defendants' scheme had not been fraudulent, LHL still would have maintained peaceable possession pursuant to its lease. St. Jude never deprived LHL of possession.

(b) No Breach Of The Mortgage Occurred.

Defendants' claim of a collateral mortgage breach also fails because Defendants' own bad faith, collusion, and deliberate scheming caused the domino effect which Defendants designed to tip the parties' contracts. Travelers was able to obtain a superior lien and foreclose only because Defendants failed to reinscribe their superior mortgage, refused to mitigate the damage by paying the Travelers judgment, and breached their legal duties to St. Jude.

The collateral mortgage contains the standard *pact de non alienado*, which aimed to protect LHI's prime security interest by prohibiting St. Jude from conveying or creating a superior mortgage or lien (LEI-722(7):3). *See* LA.CIV.CODE arts. 2047, 2053 (words of art, technical terms, and contracts of like nature should be given their normally prevailing meaning). St. Jude did nothing to create a superior mortgage or lien. The Travelers lien attained superior status only because Defendants failed to reinscribe the mortgage (RE8:87-88).

Defendants may not complain about alleged harm they have not shown to exist and they themselves caused. They designed their own bad faith defaults to "create" defaults by St. Jude when St. Jude committed none. LA.CIV.CODE art. 2003. LEI is a good faith debtor in rehabilitation, and should not be precluded from assuming the CPMA because of Defendants' fraudulent scheme.

(ii) The CPMA Was Not Terminated By Cross-Default.

St. Jude committed no breach of the lease or mortgage. Even if St. Jude had committed a breach, this would not constitute breach of the CPMA by LEI. Section 5.1(b) provides for termination if:

> Either party shall remain in breach of this Agreement for a continuous, unabated 30-day period after receipt of written notice of such breach from the other party. Should OPERATOR; or any of LIFEMARK's corporate affiliates, be in default of any other contractual agreement with LIFEMARK or any of LIFEMARK's corporate affiliates, including, but not limited to, the lease relating to the Hospital, then OPERATOR shall be in breach of this Agreement.

The district court read this provision literally, determining "OPERATOR" means LEI and "LIFEMARK" means LHL, as the contract expressly defines (LHL-49:1). Defendants claim "any of LIFEMARK's corporate affiliates" should say "any of OPERATOR's corporate affiliates," but they failed to offer sufficient proof.[52]

The district court found Defendants' suggested reading is only one among many, and it appropriately chose to follow the wording of the provision, rather than to speculate about some other, unarticulated meaning (RE8:84). *Compare Drachenberg*

[52] Contrary to Defendants' claim, John Liljeberg did not admit the Travelers lien would trigger default of the CPMA. As the district court quickly recognized, the Travelers lien did not become a problem until after Defendants allowed it to become a first lien (R44:408).

v. Parish of Jefferson, 563 So.2d 523, 526 (La.App. 5th Cir. 1990) (refusing to reform contract because there was insufficient evidence of mutual error or mistake). The provision could be correct as written (RE8:84), allowing LEI to terminate the CPMA if a new operator takes over the hospital (RE8:84). This reading is consistent with § 5.1(e), which requires LHL to cease association with the hospital before § 5.1(e) triggers termination. *See supra* § V.B.

Section 5.1(b) must be construed literally and against Defendants. LA.CIV.CODE art. 2056 (contact must be interpreted against party who furnished text). If Defendants had wanted the provision to mean "any of OPERATOR's corporate affiliates," they should have drafted that text. LEI does not agree that there is a mistake. *See Drachenberg*, 563 So.2d at 526 (reformation requires mutual mistake). LEI is only bound by the final draft, which "constitutes the entire agreement between the parties" and "supercedes all previous negotiations, commitments, and writings" (LHL-49:9; LEI-RE6). Defendants failed to meet their burden of proving mutual error by clear and convincing evidence. *Drachenberg,* 563 at 526; *Hollier v. Galthier*, 430 So.2d 376, 379 (La.App. 3d Cir. 1983).[53]

[53] Defendants-drafters also improperly seek to impose a substantial new obligation on the LEI, one which was not intended and one which they argue is fatal. LA.CIV.CODE art. 2027 (in case of doubt, a contract must be interpreted against the obligee in favor of the obligor). The CPMA was executed before the other agreements were fully negotiated, and LEI had no way of knowing what obligations would bind St. Jude. This militates against finding LEI agreed to hinge continuation of the CPMA on contractual obligations yet-to-be

VI. LEI AND ST. JUDE ARE ENTITLED TO ATTORNEYS' FEES.

The district court failed to address or analyze attorneys' fees in dealing with the many issues presented in these cases (RE6; 8). LEI and St. Jude are entitled to attorneys' fees contractually under the parties' agreement and legally under Civil Code articles 1997 and 1958. This Court should amend the court's judgment and award attorneys' fees to St. Jude/LEI for both the district and appellate court proceedings.[54] On remand, the district court may calculate a reasonable attorneys' fee award.

A. LEI and St. Jude Are Entitled To Attorneys' Fees Under The Governing Contract.

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undertaken by St. Jude. LA.CIV.CODE arts. 2046, 2053, 2055 (contract must be interpreted equitably, not in a way that produces absurd results).

[54] Defendants' post-judgment behavior underscores why an award of attorneys' fees is appropriate. Post-judgment, pending appeal, St. Jude/LEI had to file an Emergency Motion asking the court to enjoin Defendants from disobeying the court's judgment, continuing to operate in bad faith, and manipulating and withholding official documents relevant to continuing damages (Supp.Rec.000008). The court found merit in the motion (Supp.Rec.000043).

The parties' Lease agreement provides for attorneys' fees (LHL-240.B). St. Jude was forced to move in court to "enforce th[e] Lease Agreement," to "collect[] . . . rents," and to "recover[] . . . possession of the Leased Premises," which had been taken from it by Defendants' collusion and bad faith. (LHL-240.B:317.1) The district court restored possession of the premises and enforced LHL's obligations under the lease. Under § 17.1, St. Jude is entitled to recover all reasonable attorneys' fees and expenses incurred in connection with this action. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975); *Quealy v. Paine, Webber, Jackson & Curtis, Inc.*, 475 So.2d 756 (La. 1985); *see also Hollenbach v. Holden*, 728 So.2d 544, 550 (La.App. 3d Cir. 1999).

B. LEI And St. Jude Are Entitled To Attorneys' Fees Based On Defendants' Bad Faith And Collusion.

LEI and St. Jude are also entitled to recover attorneys' fees under Civil Code articles 1997 and 1958 because Defendants committed bad faith and collusion amounting to fraud.

1. Defendants' Bad Faith Conduct Supports An Award Of Attorneys' Fees.

The "American Rule" provides that a party may recover attorneys' fees if authorized by contract or statute. *Alyeska , supra.* In Louisiana, attorneys' fees are also recoverable for cases involving bad faith. Civil Code article 1997 states:

> An obligor in bad faith is liable for *all* the damages, foreseeable or not, that are a direct consequence of his failure to perform.

LA.CIV.CODE art. 1997 (emphasis added). Attorneys' fees are part of the damages incurred as a direct result of an obligor's bad faith failure to perform. Where bad faith or fraud has occurred, damages "which in spite of being an immediate and direct consequence of the nonperformance, could not have been foreseen" are nonetheless included in the measure of damages. S. LITVINOFF, THE LAW OF OBLIGATIONS IN THE LOUISIANA JURISPRUDENCE, § 192 at 359 (1994).

"But for" Defendants' bad faith conduct, LEI and St. Jude would not have been forced to hire attorneys to sue them to rescind the tainted sale and to recover the damages they suffered as a result of Defendants' breaches and other wrongful conduct. *Compare Newport Ltd. v. Sears, Roebuck & Co.*, 1995 WL 688799 (E.D.La. 1995) (attorneys' fees awarded based on bad faith); *Layrisson v. H.S.S. Vending Distributors,* 1998 WL 355461 (E.D.La. 1998) (same).

The rule allowing attorneys' fees in cases of bad faith was recognized long ago by the Louisiana Supreme Court. *See Eatman v. New Orleans Pac. Ry. Co.*, 35

La.Ann. 1018 (La. 1883) (fees recoverable when act complained of is tainted by fraud or malice, which includes bad faith); *Hernandez v. Harson*, 111 So.2d 320, 327 (La. 1958) (accepting bad faith rule without question). It has remained the law through the 1984 amendments to the Code articles on Obligations. *See* LA.CIV.CODE art. 1997, cmt. (a) (new article 1997 reproduces substance of old article 1934 and does not change the law).

In sum, in Louisiana, attorneys' fees are recoverable "if there is fraud or bad faith on the part of the contracting party against whom relief is sought." *Airline Constr., Inc. v. Ted Hicks & Associates, Inc.*, 506 So.2d 554, 557 (La.App. 1st Cir.), *writ denied*, 511 So.2d 1157 (La. 1987); *see Eatman, supra; Williams Engineering, Inc. v. Goodyear,* 480 So.2d 772, 781 (La.App. 5th Cir. 1985), *aff'd*, 496 So.2d 1012 (La. 1986).

2. Defendants' Collusion Entitles LEI And St. Jude To Fees.

LEI and St. Jude are also entitled to recover attorneys' fees under Civil Code articles 1953 *et seq.* because the district court found collusion tantamount to fraud and rescinded the judicial sale on that basis. Article 1953 condemns as fraud any:

> [M]isrepresentation or . . . suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other.

LA.CIV.CODE art. 1953.

Article 1958 specifies the remedy for fraud necessitating rescission:

> The party against whom rescission is granted because of fraud is liable for damages and attorney fees.

LA.CIV.CODE art. 1958.

Here, Defendants actively misrepresented material facts, rescission was ordered based on their collusion, and the district court's findings substantiate fraud under the legal definition. Even Defendants' own counsel realized his clients' fraud, questioning their executives about whether they or their companies had defrauded the Liljebergs, St. Jude, or LEI (R43:206-08).

An award of attorneys' fees based on Defendants' bad faith and fraudulent collusion is warranted. LA.CIV.CODE art. 1953. The governing contracts, the law, and the equities provide ample basis for an award of attorneys' fees to St. Jude/LEI.

CONCLUSION

For these reasons, and those stated in the district court's opinion, the judgment setting aside the judicial sale, awarding LEI over $11,000,000 in damages under the CPMA, and allowing it to assume CPMA, should be affirmed. All relief requested by Defendants should be denied. In addition, LEI should be relieved of that portion of the judgment requiring it to reimburse Tenet for money paid to Travelers in the collusive bidding, and LEI should be awarded its reasonable attorneys' fees and expenses incurred because of AMI/Tenet's breach of the lease, bad faith, and collusion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of Appellee's Record excerpts was served via Federal Express upon all counsel of record on the 9th day of May, 2001 as shown below:

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CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.3, undersigned counsel certifies this appellate brief complies with the type-volume limitations of 5th Cir. R. 32.3.

1. EXCLUSIVE OF THE EXEMPTED PORTIONS OF FED.R.APP.P. 32(a)(7)(B)(iii), THE BRIEF CONTAINS 20,407WORDS.

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING WORD PERFECT 8.0 FOR WINDOWS IN TIMES NEW ROMAN TYPEFACE AND 14 POINT FONT SIZE.

3. UNDERSIGNED COUNSEL IS ALSO PROVIDING AN ELECTRONIC VERSION OF THE BRIEF TO THE COURT AND OPPOSING COUNSEL.

4. UNDERSIGNED COUNSEL UNDERSTANDS THAT A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN FED.R.APP.P. 32(a)(7)(B)(iii), MAY RESULT IN THE COURT'S STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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