

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF ONEIDA**

Jane Does #1-14 and John Does #15-64

Plaintiff,

v.

Bowlmor AMF Corp., Cerberus Capital  
Management, L.P., Tom Shannon, Brett Parker,  
Ethan Klemperer, Erik Wright, Robert Davenport,  
Jerry Comstack, John Young, Gerry Madigan, and  
Michael Elkins,

Defendants.

Index. No.

**COMPLAINT AND  
JURY DEMAND**

Plaintiffs, being Jane Does #1-14 and John Does #15-64 assert, by and through their attorneys, the following for their Complaint:

**THE PARTIES**

1. Plaintiffs are all former long-standing employees of the two largest bowling center chains in the United States, AMF and Brunswick, which were acquired by Defendant Bowlmor AMF in or about July, 2013 and October, 2014, respectively. Jane Does #11, #12, #51 and John Does #16, #17, #23, #25, #29, #33, #34, #38, #40, #50, #61 all reside in the New York State and John Doe #61 resides in the City of Utica, County of Oneida. All other Jane Does and John Does reside in 16 other states nationwide.
2. Defendant Bowlmor AMF Corp. is a Delaware corporation having its principal executive offices at 222 West 44<sup>th</sup> Street, New York, New York 10036 ("Bowlmor AMF").
3. Defendant Cerberus Capital Management, L.P., is a Delaware limited partnership, having its principal executive offices at 875 Third Avenue, New York, New York ("Cerberus"). Upon information and belief, Cerberus is the controlling shareholder of Bowlmor AMF owning

approximately 60-70% of the voting common stock in Bowlmor AMF. Cerberus also holds three of the eight director seats on the Bowlmor AMF board of directors. Together with Defendants Tom Shannon and Brett Parker, the two highest ranking officers of Bowlmor AMF, Cerberus has under its direct and indirect control, five of the eight director seats essentially giving Cerberus complete control over the ownership and board of directors of Bowlmor AMF.

4. Defendant Tom Shannon is the chief executive officer of Bowlmor AMF and a director.
5. Defendant Brett Parker is the chief financial officer of Bowlmor AMF and a director.
6. Defendant Ethan Klemperer is a director of Bowlmor AMF and is employed by Cerberus.
7. Defendant Robert Davenport is a director of Bowlmor AMF and is employed by Cerberus.
8. Defendant Erik Wright is a director of Bowlmor AMF and is employed by Cerberus.
9. Defendant Jerry Comstock is a director of Bowlmor AMF.
10. Defendant Gerry Madigan is a director of Bowlmor AMF.
11. Defendant John Young is a director of Bowlmor AMF.
12. At all relevant times, Defendant Michael Elkins was a director of Bowlmor AMF.

#### **JURISDICTION AND VENUE**

13. This Court has jurisdiction over all Defendants pursuant to CPLR §301 and 302.
14. Venue is proper pursuant to CPLR §503(a).

#### **THE FACTS**

15. The Defendant Bowlmor AMF has evolved from a string of bankruptcies all involving a pattern of excessive debt coupled with big sweeping business plans, all orchestrated by large financial shareholders and major lenders that reaped tremendous financial gains at the expense of

the corporation and its smaller unsecured creditors. Dowe Affirmation (hereinafter "Dowe Aff."), Pars. 15 to 30.

16. Upon acquiring AMF out of its 2nd bankruptcy, and then Brunswick, the owning entity (previously known as Strike Holdings LLC and doing business as "Bowlmor") became the largest operator of bowling centers in the United States operating as "Bowlmor AMF", the Defendant herein. Dowe Aff., Par. 31.

17. Each of the Plaintiffs, through the undersigned, have filed sealed Charges of Discrimination ("CODs") against Bowlmor AMF with the Equal Employment Opportunity Commission ("EEOC") for age discrimination under the Age Discrimination in Employment Act (ADEA) of 1967, as amended. ("Bowlmor EEOC Action"). Dowe Aff., Par. 4.

18. The Plaintiffs, a group of 64 individuals, have the following statistics relating to their employment with AMF and Brunswick, including the short duration they were employed by Bowlmor AMF:

Average Years of Employment – 17 years

Average Age at Termination – 53 years

Average Years to Retirement (62 yrs) – 9.5 years

Average Annual Compensation - \$81,119.00

Lost Wages Until Retirement - \$48,564,970.00 (not including pain & suffering, statutory quarterly compounding interest, costs and, upon proving willful conduct by Bowlmor AMF as is alleged by the Plaintiffs in the Bowlmor EEOC Action, the doubling of damages pursuant to federal labor laws.) Dowe Aff., Pars. 5-6.

19. Under New York Debtor and Creditor Law (McKinneys), s.270 Definition of Terms

states:

‘Creditor’ is a person having any claim, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent.

20. Under the United States Bankruptcy Code, 11 U.S. Code s.101 – Definitions:

(5) The term “claim” means –

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured.

21. Therefore, by definition, the Plaintiffs' CODs duly filed with the EEOC constitute "claims" and, thus, provide Plaintiffs with standing as "creditors" of Bowlmor AMF in this action.

22. On several occasions beginning in June, 2016 through May 2017, the undersigned placed the Defendants Bowlmor AMF and Cerberus on written notice of Plaintiffs' claims and demand to have its damages addressed. Dowe Aff., Pars. 57, 2-3.

23. To date, Plaintiffs have filed a total of 64 CODs with the EEOC for age discrimination under ADEA with more former employees of Bowlmor AMF seeking to join the Bowlmor EEOC Action. Dowe Aff., Par. 4.

24. In the meantime, two significant transactions have come to Plaintiffs' attention that requires this Court's intervention to protect the rights of the Plaintiffs. One involved conflicted directors approving a transfer of \$175 million from Bowlmor AMF to defendant Cerberus that rendered Bowlmor AMF insolvent (“Cerberus Insider Deal”) which had a material adverse affect on Plaintiffs' ability to recover on its CODs, and the second transaction that is about to close that



will have compounding adverse consequences to the Plaintiffs.

25. For the fiscal year ended July 3, 2016, Bowlmor AMF reported total bank debt of \$430 million. Dowe Aff., Exhibit L, p.2.

26. In September 2016, Bowlmor AMF through its directors caused Bowlmor AMF to dramatically inflate its bank debt by taking on an additional \$200 million in new bank debt from its lender, Credit Suisse. Shortly thereafter, \$175 million was transferred to Bowlmor AMF's controlling shareholder, Cerberus, to purchase approximately 3,684,210 shares of stock owned by Cerberus (the "Cerberus Inside Deal"). Cerberus still holds approximately 64% of Bowlmor AMF's issued and outstanding common shares, thus maintaining full control over the ownership and board of directors of Bowlmor AMF. In addition, Bowlmor AMF has an on-going obligation to pay Cerberus lucrative management fees. Dowe Aff., Pars. 35-36, 54.

27. The conclusion of the Cerberus Insider Deal immediately resulted in Bowlmor AMF being plunged into a negative net worth of an astounding (\$161,708,000), with total debt of nearly \$700 million and continued operating losses year-over-year. Dowe Aff., Par. 39.

28. When considering the actual fair market value of Bowlmor AMF's Property versus the stated value on its last audited balance sheet for the fiscal period ending July 3, 2016 ("2016 Financial Statements") Bowlmor AMF's net worth is closer to (\$454,378,000). Dowe Aff., Par. 42.

29. By closing on the \$200 million leveraged loan after the fiscal period had ended on July 3, 2016, but prior to the publication of the 2016 Financial Statements, Bowlmor AMF did not have to reflect the \$200 million leveraged loan transaction in its July 3, 2016, balance sheet which still reflected the much lower bank loan balance of approximately \$430 million. Dowe Aff., Exhibit L, p. 2. Instead, the company was able to bury the additional \$200 million in new debt and the transfer to Cerberus, without even mentioning Cerberus' name, in a final "Subsequent Event"

footnote of an otherwise voluminous and very detailed auditors report. Dowe Aff., Par. 54.

30. The footnote reads as if the transaction is a simple refinance of existing debt when in reality Bowlmor AMF became indebted by another \$200 million (by nearly 50%) and defendant Cerberus received substantially all of the new cash while still holding its control position and further plummeting Bowlmor AMF into an insolvent state from both a Cash Flow and Balance Sheet test. Dowe Aff., Pars. 36, 46, 52-53.

31. Bowlmor AMF's financial statements for the nine months ending April 2, 2017 ("2017 Financial Statements"), show liabilities owing bank indebtedness (to Credit Suisse) of nearly \$600 million and shares of treasury stock of 3,845,210 where only 161,000 treasury shares were outstanding prior to the re-purchase of the Cerberus shares. Only Cerberus could have tendered 3,684,210 shares. Dowe Aff., Par. 53.

32. Nowhere in the 2016 Financial Statements, nor in any financials published since then, has Bowlmor AMF disclosed the Bowlmor EEOC Action, even though it had received copious written notifications of the claims prior to the close of the fiscal year on July 3, 2016 and subsequent correspondence. Dowe Aff., Par. 57

33. The Plaintiffs made it unequivocally clear in writing on several occasions that its group was growing in the number and Plaintiffs' damages were escalating. Dowe Aff., Par. 57. With a showing of \$48,564,970 for lost back and front pay to a normal retirement age if 62 years old, the Plaintiffs' claims are **very material** and must be disclosed in financial statements and with appropriate reserves as a contingent liability. Moreover, Bowlmor AMF has hired two large law firms to defend the Bowlmor EEOC Action, each of which knew, or should have known, that proof of willful conduct, as Plaintiffs have alleged, will result in a doubling of Plaintiffs' damages, which most certainly constitutes a material contingency of \$100 million that must be disclosed in the financials.

34. Cerberus is now seeking to sell its remaining equity interest in Bowlmor AMF to another large private equity fund, Atairos (the “Cerberus Cash Out”) Dowe Aff., Par. 54. This transaction is no more coincidental and is equally as suspect as the Bowlmor AMF's board decision to add debt to an already crippled balance sheet and its fraudulent conveyance of \$175 million to Cerberus all while Cerberus was shopping Bowlmor AMF for a buyer.

35. The pending sale adds further complexity with new legal entities, controlling ownership changes, and is expected to add another level of leverage on an already over-leveraged and declining business. Dowe Aff., Par. 55.

36. In September 2016, the Defendants had caused Bowlmor AMF to increase its senior first and second priority loan from \$400 million to \$600 million. The Atairos transaction contemplates replacing these loans with new senior first and second priority loans totaling \$695 million – adding another whopping \$95 million of debt over the current loans from Credit Suisse – further extending Bowlmor AMF's existing insolvency and burying the Plaintiffs' claims against the assets of Bowlmor AMF even deeper. Dowe Aff., Par. 55.

37. This new additional debt is wholly-adverse to the Plaintiffs' interests, and that of the ongoing state of the business itself with shrinking numbers of bowlers nationwide, more bowling center closings all but guaranteeing lower revenues and continued operating losses, as the past three years have shown. Dowe Aff., Par. 38.

38. The Cerberus Insider Deal had no beneficial corporate purpose.

39. The Cerberus Insider Deal constitutes a total waste of assets.

40. The Cerberus Insider Deal constitutes absolute negligence and irresponsibility of Defendant directors, who have no conceivable basis of showing any possible defense under the business judgment rule for approving the transaction.

41. The Cerberus Insider Deal constitutes a fraudulent conveyance of a substantial portion of Bowlmor AMF's assets in the face of mounting creditor claims against those assets.
42. The Cerberus Insider Deal was not completed with 'capital surplus' as is required under the Business Corporate Law of New York State ("BCL"). The transaction, in and of itself, has substantially jeopardized the financial well-being of Bowlmor AMF and has directly caused materially adverse circumstances for the Plaintiffs whose rightful claims (64 separate CODs) against the assets of Bowlmor AMF are now pushed even further down from senior secured claims having first and second, priority liens over the assets of Bowlmor.
43. The Defendants attempted to conceal the Cerberus Insider Deal from its creditors as well as the existence of Plaintiffs' material claims filed with the EEOC.
44. The potential sale of Cerberus' remaining interest in Bowlmor to Atairos is not in the interest of Bowlmor AMF's creditors under statutory and common law, and is thus harmful to the Plaintiffs' right to pursue its claims against Bowlmor AMF. It is Plaintiffs' contention that this is simply another fraudulent conveyance against the interests of the Plaintiffs orchestrated by the same interested, conflicted and self-serving directors responsible for the Cerberus Insider Deal that was achieved in total disregard of their fiduciary duties, and should be stopped .

**FIRST CLAIM FOR RELIEF– UNLAWFUL REDEMPTION OF SHARES**

45. Plaintiffs repeat and reallege the foregoing paragraphs.
46. Section 513 of the BCL provides in pertinent part:
513. Purchase, redemption and certain other transactions by a corporation with respect to its own shares.
- (a) Notwithstanding any authority contained in the certificate of incorporation, the shares of a corporation may not be purchased by the corporation, or, if redeemable, convertible or exchangeable shares, may not be redeemed, converted or exchanged, in each case for into cash, other property, indebtedness or other securities of the corporation (other than shares of the corporation and rights to acquire such shares) **if the corporation is then insolvent or would thereby be**

**made insolvent.** Shares may be purchased or redeemed **only out of surplus.**  
(Emphasis added.)

47. Clearly the Cerberus Insider Deal transaction was not made out of surplus, as there was no surplus before, during or after the transaction and the transaction, thus rendering Bowlmor AMF insolvent using a Balance Sheet and Cash Flow analysis. Dowe Aff., Par. 46.

48. The Cerberus Insider Deal caused Bowlmor AMF to unnecessarily incur approximately \$200 million of additional debt, to push its total indebtedness to exceed \$699 million resulting in Bowlmor AMF having a stated negative net equity of (\$161,708,000) and a real negative net worth of (\$454,378,000) when placing a fair market value on the Property owned by Bowlmor AMF. Dowe Aff., Pars. 42, 44.

49. BCL § 513 was enacted to protect the well-being of a corporation, and thereby its creditors, by mandating that a corporation maintain a stated level of excess capital before it rewards its shareholders. It was enacted to ensure that corporations remain financially sound by using capital surplus from equity, or from current profits, to make payments to shareholders. The Cerberus Insider Deal flies in the face of the protections BCL § 513. Indeed, the massive multi-million dollar wealth transferring transactions like the Cerberus Insider Deal are precisely the types of transactions BCL § 513 was enacted to prevent.

50. Bowlmor AMF, Cerberus and the Defendant directors and officers by their actions caused Bowlmor AMF to violate the provisions of BCL § 513, thereby making all Defendants accountable to the Plaintiffs for their ultimate recovery against Bowlmor AMF.

51. The Plaintiffs' damages for lost wages already amount to \$48,564,970, not including pain and suffering, statutory quarterly compounding interest, costs and, upon proof of willful conduct as the Plaintiffs have alleged, Plaintiffs' total claims can easily exceed \$100 million, without considering the filing of additional CODs of new claimants.

**SECOND CLAIM FOR RELIEF – UNLAWFUL DISTRIBUTIONS OF CASH**

52. Plaintiffs repeat and reallege the foregoing paragraphs.

53. Section 510 of the BCL provides in pertinent part:

510. Dividends or other distributions in cash or property.

(a) A corporation may declare and pay dividends or make **other distributions** in cash or bonds or its property, including the shares of bonds of other corporations, on its outstanding shares, except when currently the corporation is insolvent or **would thereby be made insolvent**, or when the declaration, payment, or distribution would be contrary to any restrictions contained in the certificate of incorporation.

(b) Dividends may be declared or paid and **other distributions** may be made either (1) **out of surplus**, so that the net assets of the corporation remaining after such declaration, payment or distribution shall at least equal the amount of its stated capital, or (2) in the case there shall be no such surplus, out of the net profits for the fiscal year in which the dividend is declared and/or the preceding year. If the capital of the corporation shall have been diminished by the depreciation in the value of its property or by losses or otherwise to an amount less than the aggregate amount of the stated capital represented by the issued and outstanding shares of all classes having a preference upon the distribution of assets, the directors of such corporation shall not declare any pay out of such net profits any dividends upon any shares until the deficiency in the amount of stated capital represented by the issued and outstanding shares of all classes having a preference upon the distribution of assets shall have been repaired. [Emphasis Added]

54. To the extent Cerberus Insider Deal may be characterized as a distribution of cash, the board of directors and Cerberus, as the controlling shareholder of Bowlmor AMF, caused the directors to execute the Cerberus Insider Deal not out of surplus, as there was no surplus before, during or after the transaction, but out of debt. By their very own actions, they rendered

Bowlmor AMF insolvent under both a Balance Sheet and Cash Flow analysis. Dowe Aff., Par.

46.

55. The Cerberus Insider Deal caused Bowlmor AMF to unnecessarily incur approximately \$200 million of additional debt, to push its total indebtedness to exceed \$699 million resulting in Bowlmor AMF having a stated negative net equity of (\$161,708,000) and a real negative net

worth of (\$454,378,000) when placing a fair market value on the Property owned by Bowlmor AMF. Dowe Aff., Pars. 42, 44.

56. BCL § 510 was enacted to protect the well-being of a corporation, and thereby its creditors, by mandating that a corporation maintain a stated level of excess capital before it rewards its shareholders. It was enacted to ensure that corporations remain financially sound by using capital surplus from equity, or from current profits, to make payments to shareholders. The Cerberus Insider Deal flies in the face of the protections BCL § 510. Indeed, the massive multi-million dollar wealth transferring transactions like the Cerberus Insider Deal are precisely the types of transactions BCL § 510 was enacted to prevent.

57. Bowlmor AMF, Cerberus and the Defendant directors and officers by their actions caused Bowlmor AMF to violate the provisions of BCL § 510, thereby making all Defendants accountable to the Plaintiffs for their ultimate recovery against Bowlmor AMF.

58. The Plaintiffs' damages for lost wages already amount to \$48,564,970, not including pain and suffering, statutory quarterly compounding interest, costs and, upon proof of willful conduct as the Plaintiffs have alleged, Plaintiffs' total claims can easily exceed \$100 million, without considering the filing of additional CODs of new claimants.

### **THIRD CLAIM FOR RELIEF – UNLAWFUL TRANSFERS**

59. Plaintiffs repeat and reallege the foregoing paragraphs.

60. Section 629 of the BCL provides in pertinent part:

Section 629. Certain transfers or assignments by shareholders or subscribers; effect.

Any transfer or assignment by a shareholder of his shares, or by a subscriber for shares of his interest in the corporation, shall not relieve him of liability as a shareholder or subscriber if at the time of such transfer or assignment the **aggregate of the corporations property**, exclusive of any property which it may have conveyed, transferred, concealed, removed, or permitted to be concealed or

removed, with intent to defraud, hinder or delay its creditors is not at a fair valuation sufficient in amount to pay its debts, or if such condition is imminent.

61. The total assets of \$537 million as reflected in the 2017 Financial Statements, when faced with total liabilities exceeding \$699 million, are not sufficient to pay the Company's existing creditors. The situation becomes more grim when taking into consideration (i) the \$292,670,000 decrease in value of Property & Equipment based upon the more accurate fair market value calculation of Property & Equipment and (ii) a reserve that should be made for Plaintiffs' claims of \$100 million. Dowe Aff., Pars. 6, 12.

62. Furthermore the Cerberus Insider Deal was intentionally timed to avoid a more conspicuous public disclosure of the transfer of a massive amount of cash to a controlling shareholder in the face of an active, dynamic and growing lawsuit commenced by the Plaintiffs of which Defendants had ample notice. Dowe Aff., Par. 57.

63. Cerberus abused its control over Bowlmor AMF by placing its own financial interest above the corporation and its creditors. The sale of Cerberus shares in Bowlmor AMF back to the company is in direct contravention of BCL § 629 for which Cerberus must bear full responsibility to the Plaintiffs for recovery of their claims against Bowlmor AMF.

64. The Plaintiffs damages for lost wages already amounts to \$48,564,970, not including pain and suffering, statutory quarterly compounding interest, cost and upon proof of willful conduct as the Plaintiffs have alleged, the Plaintiffs total claim can easily exceed \$100 million, even before considering new CODs being filed.



**FOURTH CLAIM FOR RELIEF – RESCISSION OF CERBERUS STOCK PURCHASE**

65. Plaintiffs repeat and reallege the foregoing paragraphs.

66. Section 514 of the BCL provides in pertinent part:

Section 514. Agreements for Purchase by a Corporation of its Own Shares.

(a) An agreement for the purchase by a corporation of its own shares shall be enforceable by the shareholder and the corporation to the extent such purchase is permitted at the time of purchase by Section 513 (Purchase of redemption by a corporation of its own shares).

67. BCL § 514 makes it clear that an agreement for the purchase by a corporation of its own shares is only enforceable if such transaction would be permitted under BCL § 513.

68. As alleged above, the Cerberus Insider Deal violated the provisions of BCL § 513 and thus the provisions of BCL § 514, as well, and must be rescinded.

69. The Plaintiffs damages for lost wages already amounts to \$48,564,970, not including pain and suffering, statutory quarterly compounding interest, cost and upon proof of willful conduct as the Plaintiffs have alleged, the Plaintiffs total claim can easily exceed \$100 million, even before considering new CODs being filed.

70. The Defendants' actions allowing for the Cerberus Insider Deal was a showing of irresponsibility and negligence that deprives the Plaintiffs of any trust and confidence that the return of the funds to Bowlmor AMF will be properly managed for the benefit of creditors, including the Plaintiffs.

71. For this reason, the Cerberus Insider Deal must be rescinded and all cash paid to Cerberus must be returned to Bowlmor AMF, except that the sum of \$100 million should be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

**FIFTH CLAIM FOR RELIEF – DIRECTORS LIABILITY**

72. Plaintiffs repeat and reallege the foregoing paragraphs.

73. Section 719 of the BCL provides in pertinent part:

Section 719. Liability of directors in certain cases.

**(a) Directors of a corporation who vote for or concur in any of the following corporate actions shall be jointly and severally liable to the corporation for the benefit of its creditors or shareholders, to the extent of any injury suffered by such persons, respectively, as a result of such action:**

(1) The declaration of any dividend or **other distribution** to the extent that it is contrary to the provisions of paragraph (a) and (b) of Section 510 (Dividends or other distributions in cash or property).

(2) **The purchase of the shares of the corporation to the extent that is contrary to the provisions of Section 513** (Purchase or redemption by a corporation of its own shares).

(b) A director who is present at a meeting of the board, or any committee thereof, when action is specified in paragraph (a) is taken shall be presumed to have concurred in the action unless his dissent thereto shall be entered into the minutes of the meeting, or unless he shall submit his written dissent to the person acting as the secretary of the meeting before the adjournment thereof, or shall deliver or send by registered mail such dissent to the secretary of the corporation promptly after the adjournment of the meeting. Such right to dissent shall not apply to a director who voted in favor of such action.

(d) Directors against who a claim is successfully asserted under this section shall be entitled, to the extent of the amounts paid by them to the corporation as a result of such claims:

(1) Upon payment to the corporation of any amount of an improper dividend or distribution, to be subrogated to the rights of the corporation against shareholders who received such dividend or distribution with knowledge of facts indicating that it was not authorized by Section 510, in proportion to the amounts received by them respectively.

(2) **Upon payment to the corporation of any amount of the purchase price of an improper purchase of shares, to have the corporation rescind such purchase of shares and recover of their benefit, but at their expense, the amount of such purchase price from any seller who sold such shares with knowledge of facts indicating that such purchase of shares by the corporation was not authorized by Section 513. [Emphasis Added.]**

74. Bowlmor AMF directors Tom Shannon, Brett Parker, Ethan Klemperer, Erik Wright, Robert Davenport, Jerry Comstack, John Young, Gerry Madigan, Michael Elkins, all acting as

directors of Bowlmor AMF at the time of the Cerberus Insider Deal were and are directly responsible for the decisions and actions that led Bowlmor AMF to purchase its own shares from Cerberus for no beneficial corporate reason and against the interests of creditors, namely the Plaintiffs, in direct contravention of BCL §§ 510 and 513, and accordingly, BCL § 719.

75. The Cerberus Insider Deal caused Bowlmor AMF to unnecessarily incur approximately \$200 million of additional debt, to push its total indebtedness to exceed \$699 million resulting in Bowlmor AMF having a stated negative net equity of (\$161,708,000) and a real negative net worth of (\$454,378,000) when placing a fair market value on the Property owned by Bowlmor AMF.

76. A corporation and its directors have a duty to creditors under law whenever a corporation's solvency is in question. By authorizing the Cerberus Insider Deal, the directors caused Bowlmor AMF to become insolvent under both a Balance Sheet and Cash Flow test.

77. Accordingly, the Cerberus Insider Deal must be rescinded pursuant to BCL § 719(d)(2), and all cash paid to Cerberus must be returned to Bowlmor AMF, except that the sum of \$100 million should be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

Alternatively, the directors of Bowlmor AMF, jointly and severally, should be required to post the aggregate sum of \$100 million to be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals, and seek subrogation from the company pursuant to BCL § 719.

#### **SIXTH CLAIM FOR RELIEF – DIRECTORS BREACH OF DUTY LIABILITY**

78. Plaintiffs repeat and reallege the foregoing paragraphs.

79. Section 717 of the BCL clearly states:

Section 717. Duty of Directors.

(a) A Director shall perform his duties as a director, including his duties as a member of any committee of the board upon which he may serve, **in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.**

(b) In taking action, including, without limitation, action which **may involve or relate to a change or potential change in the control of the corporation**, a director shall be entitled to consider, without limitation, (1) both the long-term and the short-term interests of the corporation and its shareholders and (2) the effects that the corporations actions may have in the short-term or in the long-term upon any of the following:

(i) the prospects for potential growth, development, productivity and profitability of the corporation;

(ii) the corporations current employees:

(iii) the corporations retired employees and other beneficiaries receiving or entitled to receive retirement, welfare or similar benefits from, or pursuant to any plan sponsored, or agreement entered into, by the corporation:

(iv) **the corporation's customers and creditors;** and

(v) the ability of the corporation to provide, **as a going concern**, goods, services, employment opportunities and employment benefits and otherwise to contribute to the communities in which is does business. [Emphasis Added]

80. Bowlmor AMF directors Tom Shannon, Brett Parker, Ethan Klemperer, Erik Wright, Robert Davenport, Jerry Comstack, John Young, Gerry Madigan, Michael Elkins, all acting as directors of Bowlmor AMF were directly responsible for the decisions that resulted in Bowlmor AMF's increased its level of debt from \$400 million to \$600 million and the subsequent purchase of its shares from, and/or distribution of cash to, Cerberus in the amount of \$175 million.

81. Each of directors knew or should have known the following information:

i) the prior two bankruptcies at AMF. Dowe Aff., Pars. 17-30;

ii) Bowlmor AMF's continued closing of bowling centers, lower revenues and lack of

profits in its past three annual fiscal periods and, given those operating results, there was no rational basis to believe that Bowlmor AMF would ever be able to pay back this level of debt. Dowe Aff., Pars. 38-39, 44-46;

- iii) the adverse impact that overleveraging the bowling business with excessive debt would lead to failure;
- iv) the corporation became insolvent because of the Cerberus Insider Deal. Dowe Aff., Par. 48;
- v) public opinions of regulators chastising boards of directors and companies (specifically Bowlmor AMF) for making such leveraged loans a routine practice;
- vi) the fact that the Cerberus Insider Deal lacked any rational business purpose for loading Bowlmor AMF down with an additional \$200 million of new debt to reach an astounding \$699 million in total debt;
- vii) the fact that the company's transfer of substantially all of the funds provided by the new debt to a controlling shareholder at an excessive valuation while still allowing that shareholder to maintain control over the ownership and board of directors after being paid \$175 million is a wealth transferring transaction which screams conflict;
- viii) the increasing number of Plaintiffs CODs, with notice that more CODs were likely to be filed, thereby adding to the existing damages claims in the Bowlmor EEOC Action and that upon proof of willful conduct by Bowlmor AMF, Bowlmor AMF could be facing a judgment in the amount of \$100 million, or more; and
- ix) the fact that by approving the Cerberus Insider deal, the directors were precluding any possibility that Plaintiffs might have of recovering payment of their claims from the assets of Bowlmor AMF.

82. Any person having the knowledge set forth in paragraph 81 (i) to (ix), and acting in good faith with that degree of care which an *ordinarily prudent person in like position would use under similar circumstances*, could not conclude that the Cerberus Insider Deal was proper and lawful and in the best interest of the corporation.

83. Section 717(b) (iii) and (iv) and (v) makes it unequivocally clear that in transactions where a change of control is contemplated, as is the case involving the Cerberus Sell Out transaction, the directors of Bowlmor AMF **shall be entitled to consider**, among other things, the corporation's **creditors**; the ability of the corporation to provide, as a going concern, goods, services, employment opportunities and **employment benefits** and otherwise to contribute to the communities in which it does business.

84. The Cerberus Sell Out transaction is to a buyer seeking to add another \$95 million of bank debt on top of Bowlmor AMF's current bank indebtedness of approximately \$600 million, which will cause Bowlmor AMF to have a negative net worth of (\$256,708,000) and more realistically a negative net worth of (\$549,378,000) if the Property value of Bowlmor AMF is stated at its fair market value versus its carried value. Dowe Aff., Par. 55.

85. Given the past three years of operating results at Bowlmor AMF, the additional debt and other complications involved in the Cerberus Sell Out transaction will certainly impact Bowlmor AMF's ability to operate as a going concern and satisfy the claims of its creditors.

86. Accordingly, (i) the defendant directors by their negligent conduct and violation of their duties under BCL § 717 authorized the Cerberus Sell Out and should be required by the Court to post, jointly and severally, no less than \$100 million into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals, or, in the alternative, (ii) Cerberus should be restrained from selling its controlling interest in Bowlmor AMF until sufficient findings of fact can be made known to this court and

Plaintiffs that adequate protections are in place to protect the ultimate potential payment of damages awarded to Plaintiffs, to wit, the posting by Cerberus of no less than \$100 million into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

**SEVENTH CLAIM FOR RELIEF – OFFICERS DUTIES**

87. Plaintiffs repeat and reallege the foregoing paragraphs.

88. Section 715 of the BCL clearly states:

Section 715. Officers.

(h) An officer shall perform his duties as an officer in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances.

89. Bowlmor AMF officer Tom Shannon and Brett Parker were directly and responsible for the decisions that resulted in Bowlmor AMF's purchase of its shares from Cerberus in direct contravention of BCL §§ 510 and 513.

90. Each of these officers knew or should have known the following information:

- i) the prior two bankruptcies at AMF; Dowe Aff., Pars. 17-30.
- ii) Bowlmor AMF's continued closing of bowling centers, lower revenues and lack of profits in its past three annual fiscal periods and, given those operating results, there was no rational basis to believe that Bowlmor AMF would ever be able to pay back this level of debt. Dowe Aff., Pars.38-39, 44-46.
- iii) the adverse impact that overleveraging the bowling business with excessive debt would lead to failure;
- iv) the corporation became insolvent because of the Cerberus Insider Deal;
- v) public opinions of regulators chastising boards of directors and companies (specifically Bowlmor AMF) for making such leveraged loans a routine practice;

- vi) the fact that the Cerberus Insider Deal lacked any rational business purpose for loading Bowlmor AMF down with an additional \$200 million of new debt to reach an astounding \$699,595,000 in total debt;
- vii) the fact that the company's transfer of substantially all of the funds provided by the new debt to a controlling shareholder at an excessive valuation while still allowing that shareholder to maintain control over the ownership and board of directors after being paid \$175 million is a wealth transferring transaction which screams conflict;
- viii) the increasing number of Plaintiffs CODs, with notice that more CODs were likely to be filed, thereby adding to the existing damages claims in the Bowlmor EEOC Action and that upon proof of willful conduct by Bowlmor AMF, Bowlmor AMF could be facing a judgment in the amount of \$100 million, or more; and
- ix) the fact that by approving the Cerberus Insider deal, the directors were precluding any possibility that Plaintiffs might have of recovering payment of their claims from the assets of Bowlmor AMF.

91. Any person having the knowledge set forth in paragraph 90 (i) to (ix), and acting in good faith with that degree of care which an *ordinarily prudent person in like position would use under similar circumstances*, could not conclude that the Cerberus Insider Deal was proper and lawful and in the best interest of the corporation.

92. Moreover the Defendants Shannon and Parker as the two highest ranking officers of Bowlmor AMF have full knowledge of the Plaintiffs COD and are the two most culpable parties that knowingly and willfully conducted themselves, and encouraged and directed other employees of Bowlmor AMF to conduct themselves, in an unlawful manner that gave rise to numerous breaches of the ADEA and the filing of Plaintiffs' 64 CODs.



93. Defendants Shannon and Parker were in willful violation of the duty of care owed by officers under BCL § 715 by (i) taking direct action and fostering a corporate environment that resulted in the filing of 64 CODs, and many other unlawful terminations, and (ii) directing, approving and executing the Cerberus Insider Deal on behalf of Bowlmor AMF.

94. By their conduct, officers Shannon and Parker are personally accountable to the Plaintiffs for the full amount of any award granted to the Plaintiffs in this action and the Bowlmor EEOC Action.

95. Accordingly, officers Shannon and Parker, jointly and severally, should post the sum of \$100 million to be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

**EIGHTH CLAIM FOR RELIEF – INTERESTED DIRECTORS**

96. Plaintiffs repeat and reallege the foregoing paragraphs.

97. Section 713 of the BCL provides in pertinent part:

Section 713. Interested Directors.

(a) No contract or other transaction between a corporation and one or more of its directors, or between a corporation and any other corporation, firm, association, or other entity in which one or more of its directors are directors or officers, or have a substantial financial interest, shall be either void or voidable for this reason alone or by reason alone that such director or directors are present at the meeting of the board, or of a committee thereof, which approves such contract or transaction, or that his or their votes are counted for such purpose:

(1) If the material facts as to such directors interest in such contract or transaction and as to any such common directorship, officership or financial interest are disclosed in good faith or known to the board or committee approves such contract or transaction by a vote sufficient for such purpose without counting the votes of such interested director or, if the votes of such interested director or, if the votes of the disinterested directors are insufficient to constitute an act of the board as defined in Section 708 (action of the board), by unanimous vote of the disinterested directors; or

(2) If the material facts as to such directors interest in such contract or transaction and as to any such common directorship, officership of financial interest are disclosed in good faith or known to the shareholders entitled to vote thereon, and such contract or transaction is approved by vote of such shareholders.

(b) If a contract or other transaction between a corporation and one or more directors, or between a corporation and any other corporation, firm, association or other entity in which one or more of its directors are directors or officers, or have a substantial financial interest, is not approved in accordance with paragraph (a), **the corporation may avoid the contract or transaction unless the party or parties thereto shall establish affirmatively that the contract or transaction was fair and reasonable as to the corporation at the time it was approved by the board, a committee or the shareholders. [Emphasis added].**

98. The board was totally conflicted with a majority of the eight then acting directors being directly or indirectly employed or under the control of Cerberus as majority shareholder and the direct beneficiary of the transaction in question.

99. Even if the Defendants can establish by a showing of written proof that the deliberations and voting for the Cerberus Insider Deal was unanimously approved by the disinterested directors, no director of Bowlmor AMF can, in good conscience, show that the Cerberus Insider Deal was fair and reasonable *as to the corporation*.

100. Bowlmor AMF lacked any business or financial basis to conclude the Cerberus Insider Deal; the funds used were not derived from capital surplus; and most importantly the transaction rendered the corporation insolvent for the benefit of Cerberus and at the expense of the company and its creditors.

101. By their conduct all the Defendant directors are personally liable to the Plaintiffs for the full amount of any award granted to the Plaintiffs in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

102. Accordingly, the directors of Bowlmor AMF, jointly and severally, should post the sum of \$100 million is to be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals, or, in the alternative, Bowlmor AMF and Cerberus should be ordered to rescind the Cerberus Insider Deal with Cerberus posting the sum of \$100 million into a court-monitored escrow fund until the

Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

**NINTH CLAIM FOR RELIEF – TRUST FUND DOCTRINE**

103. Plaintiffs repeat and reallege the foregoing paragraphs:

104. Pursuant to New York's trust fund doctrine, officers and directors of an insolvent corporation owe a fiduciary duty to preserve the assets of the corporation for the benefit of creditors.

105. By authorizing the company to borrow an additional \$200 million in September 2016, and subsequently using \$175 million of the newly-borrowed funds to purchase shares of stock owned by a controlling shareholder, the officers and directors of Bowlmor AMF sanctioned the very transaction which caused the company to become insolvent.

106. The Cerberus Insider Deal caused Bowlmor AMF to have a negative net worth of at least (\$161,708,000) but more accurately (\$461,708,000) with total bank debt of nearly \$700 million and continued operating losses year-over-year.

107. Their misconduct is exacerbated by the fact that the funds were not used for any legitimate corporate purpose but to line the pockets of its controlling shareholder, Cerberus.

108. Not only did Bowlmor's officers and directors fail to hold the assets in trust but they caused the insolvency and then wasted the assets constituting a blatant breach of the duty owed to the Bowlmor AMF creditors.

109. Accordingly, the directors of Bowlmor AMF, jointly and severally, should post the sum of \$100 million is to be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

**TENTH CLAIM FOR RELIEF – FRAUDULENT CONVEYANCE**

110. Plaintiffs repeat and reallege the foregoing paragraphs:

111. Under the New York Debtor Creditor Law § 272(a) debtors are prohibited from engaging in transactions that harm the interests of creditors. The law provides that a transfer made or an obligation incurred may be avoided as a constructive fraudulent conveyance where:

- (1) The transferor was insolvent or rendered insolvent as a result of the transfer; and
- (2) The transferor did not receive “fair consideration” in exchange for the transfer.

112. The Cerberus Insider Deal resulted in Defendant debtor, Bowlmor AMF, being rendered balance sheet and cash flow insolvent. Bowlmor AMF received virtually nothing in return for a payment of \$175 million of preciously-needed cash from its bank account. All it received were stock certificates now sitting in its treasury, while the same shareholder, Cerberus, still controlling Bowlmor AMF, directing that the company be sold to yet another buyer seeking to add even more debt to the company and reaping continued "management fees". There was no benefit to Bowlmor AMF--there was no "fair consideration."

113. Accordingly, Bowlmor AMF, Cerberus and the officers and directors of Bowlmor AMF effected a transfer of assets that constituted a fraudulent conveyance of assets under Section 272 of the New York Debtor Creditor Law thereby making all Defendants accountable to the Plaintiffs for their ultimate recovery against Bowlmor AMF.

114. Accordingly, Bowlmor AMF, Cerberus, the officers and directors of Bowlmor AMF, jointly and severally, should post the sum of \$100 million to be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

**ELEVENTH CLAIM FOR RELIEF – COMMON LAW NEGLIGENCE**

115. Plaintiffs repeat and reallege the foregoing paragraphs:

116. The Defendant directors and officers of Bowlmor AMF owe a duty to the corporation to protect the assets and the business for the benefit of shareholder and creditors having a direct claim arising from negligence against the assets of the corporation.

117. By authorizing the Cerberus Insider Deal the directors and officers by their negligence caused Bowlmor AMF to become balance sheet and cash flow insolvent and caused the Plaintiffs claims to be further jeopardized by the addition of \$200 million in having first and second liens against the assets of Bowlmor AMF and total liabilities nearing \$700 million.

118. The Defendant directors at all times during the planning and execution of the Cerberus Insider Deal, knew of the Plaintiffs claims and damages, that the Bowling EEOC Action matter was growing in scale as measured by new COD's being filed adding even higher levels of damages.

119. Given Bowlmor AMF's operating performance over the past three years, there is no rational basis for Bowlmor AMF to pay back this level of debt. Dowe Aff., Par. 45.

120. By closing on the Cerberus Insider Deal, the Defendant directors breached their duty and in doing so caused the Plaintiffs immediate damage by further impairing the assets of Bowlmor AMF and causing it to be insolvent both on a Balance Sheet and Cash Flow basis.

121. Accordingly, the directors of Bowlmor AMF, jointly and severally, should post the sum of \$100 million is to be paid into a court-monitored escrow fund until the Plaintiffs' claims in this action and the Bowlmor EEOC Action are finally adjudicated, including any appeals.

**WHEREFORE**, Plaintiff respectfully seeks judgment as follows:

- (a) on Plaintiffs' FIRST, SECOND, FOURTH and TENTH CLAIMS FOR RELIEF, judgment in Plaintiffs' favor, rescission of the Cerberus Insider Deal and an order directing Bowlmor AMF, Cerberus, and/or the Defendant directors, jointly and severally, to pay no less than \$100 million into a court-monitored escrow account until this action and the Plaintiffs related CODs are adjudicated and final, including appeals;
- (b) on Plaintiffs' THIRD CLAIM FOR RELIEF, judgment in Plaintiffs' favor, rescission of the Cerberus Insider Deal and an order directing Cerberus to pay no less than \$100 million into a court-monitored escrow account until this action and the Plaintiffs related CODs are adjudicated and final, including appeals;
- (c) on Plaintiffs' FIFTH, SIXTH, and EIGHTH CLAIMS FOR RELIEF, judgment in Plaintiffs' favor, rescission of the Cerberus Insider Deal and an order directing the Defendant directors, jointly and severally, to pay no less than \$100 million.00 into a court-monitored escrow account until this action and the Plaintiffs related CODs are adjudicated and final, including appeals;
- (d) on Plaintiffs' SEVENTH CLAIM FOR RELIEF, judgment in Plaintiffs' favor, and an order directing that Officers Shannon and Parker pay damages to the Plaintiffs for the full extent of any judgment it shall receive in the disposition of its COD at the EEOC or federal court, including costs, fees, interest and including the doubling thereof upon Plaintiffs prevailing upon its claims that the Defendants actions were willful;
- (e) on Plaintiffs' NINTH and ELEVENTH CLAIMS FOR RELIEF, judgment in Plaintiffs' favor, rescission of the Cerberus Insider Deal and an order directing the Defendant officers and directors, jointly and severally, to pay no less than \$100

million into a court-monitored escrow account until this action and the Plaintiffs related CODs are adjudicated and final, including appeals;

- (f) postpone the sale of Cerberus' remaining ownership interest in Bowlmor AMF until such time as adequate legal and financial protections are in place to safeguard the payment of future claims owned to the Plaintiffs;
- (g) a judgment awarding Plaintiffs' attorneys' fees and costs of this action; and
- (h) a judgment awarding Plaintiffs such other and further relief as the Court seems just and proper.

**DEMAND FOR JURY TRIAL**

Plaintiffs demand trial by jury in this action of all issues so triable.

Dated:           Bronxville, New York  
                  July 11, 2017

DOWE PARTNERS LLC

By: 

Daniel W. Dowe  
Attorneys for Plaintiffs  
42 Forest Lane  
Bronxville, New York 10708  
(914) 441-3591