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UNITED STATES
BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:
FORT DEFIANCE HOUSING
CORPORATION, INC.,

Debtor.

Case No: 2:05-bk-04534-RTB

BRENDA MOODY WHINERY, as
Chapter 11 Trustee of FORT DEFIANCE
HOUSING CORPORATION, INC.,

Plaintiff,

vs.

LODGEBUILDER, INC., et al.,

Defendants.

Adv. No.: 2:06-ap-00911-RTB

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Tried to the court were the claims by the Plaintiff, Brenda Moody Whinery, the Chapter 11 Trustee ("Trustee") for Fort Defiance Housing Corporation, Inc. ("FDHC"), against Lodgebuilder, Inc. ("Lodgebuilder"), William Aubrey ("Aubrey"), Brenda Todd ("Todd"), and Everett Ross ("Ross"), claiming, breach of contract, conversion, misrepresentation, negligence, breach of fiduciary duty, civil conspiracy/aiding and abetting, fraudulent conveyance, unjust enrichment, and for punitive damages.

FDHC is a not for profit Navajo corporation, incorporated for the sole purpose of building and leasing low income housing on the Navajo reservation. FDHC operations were funded by federal grants and federally supported loans. FDHC contracted with Lodgebuilder, which was owned by Aubrey and Todd, for the construction and some of the management of the housing units. In 2005, FDHC filed this chapter 11 case. The Trustee was appointed by the court and the trustee's plan of reorganization of FDHC has been

1 confirmed. The Trustee brought this action against these defendants to recover the funds
2 and assets the Trustee claims were wrongfully taken from FDHC.

3 FINDINGS OF FACT

4 BACKGROUND

5 1. FDHC was formed in the late 1960's as an Arizona non-profit
6 corporation to develop, construct, own, maintain, and operate low income housing projects
7 on the Navajo Nation, in northern Arizona and New Mexico.

8 2. In the mid-1990s, FDHC was re-formed as a Navajo corporation, for
9 primarily the same purposes - to develop, construct, own, maintain, and operate low income
10 housing projects on the Navajo Nation.

11 3. Ross was a member of the FDHC board of directors from 1973 to
12 March 2004. Ross served as President of the board of directors from 1978 to March 2004.
13 Ross also acted as the CEO of FDHC from March 2000 to March 2004.

14 4. Currently, FDHC owns and operates a total of 663 housing units,
15 located on fourteen housing projects, all on the Navajo Nation.

16 – FDHC owns a total of 76 single family homes in Shiprock, New
17 Mexico and NAPI, New Mexico, split into the Shiprock I and Shiprock II projects
18 ("Shiprock I" and "Shiprock II").

19 – FDHC owns a total of 75 apartments in Tsaile, Arizona, split into the
20 Tsaile I and the Tsaile II projects ("Tsaile I" and "Tsaile II").

21 – FDHC owns a total of 60 single family homes in Navajo, New Mexico,
22 known as the Red Lake Acres project ("Red Lake Acres").

23 – FDHC owns a total of 73 single family homes in Fort Defiance,
24 Arizona, known as the Rio Puerco project ("Rio Puerco").

25 – FDHC owns a total of 69 single family homes in Churchrock, New
26 Mexico, split into the Churchrock I and Churchrock II projects ("Churchrock I" and

1 "Churchrock II").

2 – FDHC owns a total of 221 single family homes in Kayenta, Arizona,
3 split into the Kayenta III, Kayenta IV, Kayenta V, Kayenta VI, and Kayenta VII projects
4 ("Kayenta III," Kayenta IV," "Kayenta V," "Kayenta VI," and "Kayenta VII," collectively
5 the "Kayenta Projects").

6 – FDHC owns a total of 70 single family homes and 10 duplexes (20
7 housing units) in Chilchinbeto, Arizona, which are currently unoccupied ("Chilchinbeto").

8 5. Beginning in 1996, FDHC associated with Lodgebuilder Management,
9 Inc. to develop and construct housing projects on the Navajo Nation.

10 6. Lodgebuilder Management, Inc. is a Montana corporation.
11 Lodgebuilder Management, Inc. is not named as a defendant in this adversary proceeding.
12 Lodgebuilder is the successor-in-interest to Lodgebuilder Management, Inc.

13 7. Congress has enacted the Native American Housing Assistance and
14 Self Determination Act ["NAHASDA"], 25 U.S.C. § 4101 et. seq. to, in part, "assist in the
15 development of private housing finance mechanisms on Indian lands to achieve the goals of
16 economic self sufficiency and self-determination for tribes and their members". See 25
17 U.S.C. § 4101(6).

18 8. Pursuant to NAHASDA regulations [24 C.F.R. 85], federal block grant
19 funds are disbursed to the Tribally Designated Housing Entity ("TDHE") for a particular
20 Native American tribe. The TDHE is then responsible to oversee the use of the NAHASDA
21 grant funds, to address the need for safe, sanitary and low-income housing on various Native
22 American Reservations, including the Navajo Nation. The TDHE is also called the
23 "Recipient."

24 9. The Navajo Nation designated the Navajo Housing Authority ("NHA")
25 as its TDHE, to oversee and disburse the NAHASDA block grant funds allocated for the
26 Navajo Nation.

1 10. NHA entered into a series of sub-recipient agreements with FDHC,
2 awarding FDHC grant funds to be utilized for developing, constructing and maintaining
3 housing projects on the Navajo Nation. FDHC and NHA entered into their first sub-recipient
4 agreement for the NAHASDA funds on October 9, 1998. FDHC was also known as a
5 "Sub-Recipient."

6 11. Pursuant to the NAHASDA Code and Regulations, the grants would
7 first be awarded to a "Recipient" such as the Navajo Housing Authority ("NHA") which
8 would then award subgrants to "Sub-recipients" such as FDHC.

9 12. NHA entered into Subgrant Agreements with FDHC for the fiscal years
10 1998 through 2003.

11 13. The Subgrant Agreements required FDHC to comply with all
12 NAHASDA standards and regulations, and provided that "the obligations and duties of the
13 FDHC under this Agreement shall not be assigned in whole or in part without prior written
14 approval of the NHA . . .".

15 14. Some of these Subgrant Agreements provided that FDHC would obtain
16 loans in addition to the federal grant funds it received. For example, the November 2001,
17 Amendment Number One (1) to FY 2001 Subgrant Agreement provided, in part:
18 "Subgrantee will cause to secure alternative funding in the amount of \$13,500,000.00 to
19 leverage the NAHASDA funding appropriated to the subgrantee to complete the above
20 projects".

21 15. Lodgebuilder is owned jointly by Aubrey and Todd, with Aubrey
22 holding an 80% ownership interest and Todd holding a 20% ownership interest. Aubrey and
23 Todd have maintained their respective ownership interests since Lodgebuilder's
24 incorporation.

25 16. Aubrey has constructed more than 4,000 housing units for Native
26 Americans in the western United States over the past 28 years. Todd has 15 years

1 experience in all phases of accounting and financial management, particularly related to
2 Native American housing programs.

3 17. Todd was very seriously injured in a car accident in May, 2003.

4 **THE FDHC/LODGBUILDER DEVELOPMENT CONTRACTS**

5 18. On July 30, 1996, FDHC and Lodgebuilder Management entered into a
6 Housing Development Contract for the housing project at Shiprock, New Mexico.

7 19. The July 30, 1996 Housing Development Contract provided that FDHC,
8 with the assistance of Lodgebuilder Management, would apply for grant or mortgage
9 funding:

10 that can be utilized for infrastructure and other development
11 of the sites and which will assist the homebuyers with lower
12 home mortgage payments. Any grant or mortgage funding
13 obtained by The Sponsor [FDHC] shall be made available
14 to the Housing Developer [Lodgebuilder Management] for
15 use in the development of the site improvements and any
16 other purpose that may apply.

17 20. On May 16, 1997, FDHC and Lodgebuilder Management entered into a
18 Housing Development Contract for the rehabilitation of the housing project at Red Lake
19 Acres.

20 21. The May 16, 1997 Housing Development Contract provided that
21 FDHC, with the assistance of Lodgebuilder Management, would apply for grant or mortgage
22 funding:

23 that can be utilized for refinance and renovation of the Red
24 Lake Acres project and which will enable residents of Red
25 Lake Acres to have an option for home ownership. Any
26 grant or mortgage funding obtained by The Sponsor
[FDHC] shall be made available to the Developer
[Lodgebuilder Management] for use in the renovation and
refinance and any other purpose related to housing
development.

27 22. The July 30, 1996 Housing Development Contract further provided
28 that:

1 The Housing Developer [Lodgebuilder Management] shall
2 comply with all laws, codes and regulations of the Navajo
3 Nation and specifically those of the Navajo Business
4 Regulatory Department pertaining to preferences in
5 employment and subcontracting.

6 23. On or about February 18, 1998, FDHC and Lodgebuilder entered into
7 an Amended Housing Development Contract which incorporated the May 16, 1997 contract.
8 The February 18, 1998 contract expanded the relationship with Lodgebuilder, to include
9 development of all projects identified in the One and Five-Year NAHASDA Housing Plan
10 dated August 14, 1997.

11 24. On or about March 31, 1999, Tsaile II Acres Limited Partnership,
12 acting through its general partner, FDHC, entered into a Development Services Agreement
13 with JL Gray Co., Inc., the developer, for the construction and operation of 32 housing units
14 at the Tsaile project. JL Gray was to over see all phases of the design, construction and
15 operation of the housing units plus obtain all financing for the project and, as expressly
16 provided in paragraph three of that agreement, was to be paid a fee of \$240,000.00

17 25. The Board of Directors of FDHC, on August 11, 1998, assigned the
18 rights and obligations of the May 16, 1997 and the February 18, 1998 Development
19 Agreements from Lodgebuilder Management, Inc. to Lodgebuilder, Inc. resolving that:

20 The Fort Defiance Housing Corporation hereby authorizes
21 and assigns the reimbursement of development costs to
22 Lodgebuilder, Inc. to be disbursed according to schedules
23 approved by the Fort Defiance Housing Corporation,
24 Navajo Housing Authority, the financial institutions, and the
25 construction inspectors.

26 26. On or about February 29, 2000, FDHC and Lodgebuilder entered into
an Amended Housing Development Contract which incorporated the May 16, 1997 contract
and the February 18, 1998 contract. The February 29, 2000 contract expanded the
relationship with Lodgebuilder, to include development of all projects identified in the fiscal

1 year 2000 One and Five-Year Plan.

2 27. The February 29, 2000 contract provided that Lodgebuilder:
3 shall be compensated for work performed according to
4 Schedules approved by the Sponsor [FDHC] and as shown
5 on the approved HUD Form 00-01, that in a [sic] cases shall
6 be equal to or less than the certified a [sic] appraisal amount
7 for each project as determined by HUD or FHA licensed
8 appraiser.

9 28. On or about June 15, 2002, FDHC published a legal advertisement,
10 seeking proposals from firms, seeking to enter into a development contract with FDHC. In
11 response, Lodgebuilder submitted its "Statement of Qualifications" to FDHC which stated:

12 Over the past seven years Lodgebuilder has constructed
13 nearly 400 new homes and renovated another 60 homes for
14 FDHC on the Navajo Nation. Every construction project
15 involving these homes was completed on time and within
16 the approved NAHASDA budget.

17 29. On or about October 10, 2002, FDHC and Lodgebuilder entered into a
18 Development/Consultant Agreement that set forth the duties that Lodgebuilder was to
19 provide to FDHC, including the planning, design, financing and construction for all FDHC
20 projects, for a period of five years, based on the 2003 NAHASDA Housing Plan.

21 30. The October 10, 2002 Agreement provides at section 4:

22 Lodgebuilder shall be compensated for all phases of
23 development work, from NAHASDA funds and other
24 financing arranged by Lodgebuilder. Said compensation
25 shall be in accordance with the line item amounts
26 established and approved by FDHC and Navajo Housing
Authority and in accordance with NAHASDA cost
guidelines. Payment requests shall be generally submitted
on a monthly basis for percentages or line item units of
work completed. All progress payments shall be subject to
inspection of work completed by FDHC and the Navajo
Housing Authority.

31. The October 10, 2002 Agreement provides at section 2:

At FDHC's discretion and approval, Lodgebuilder will

1 arrange for multi-family insured mortgage financing for
2 each project in amounts that ensure that monthly rental
3 payments will be affordable to the families who will lease
4 the homes. Proceeds from this financing will combine with
5 NAHASDA and other grant funds for the purpose of paying
6 new construction costs. FDHC will assign the proceeds of
7 all mortgage financing to Lodgebuilder in accordance with
8 budgets approved by FDHC, Lodgebuilder and the Navajo
9 Housing Authority.

10 32. The October 10, 2002 Agreement provides at Section 2(b):

11 Lodgebuilder shall prepare and submit full and final
12 construction plan drawings and specifications along with all
13 detailed site and structural engineering plans required for
14 the commencement of construction. All design work shall
15 be certified by Lodgebuilder to meet or exceed Navajo,
16 State, and Federal building codes and shall be subject to
17 review and approval by FDHC, the Navajo Housing
18 Authority, and any other funding agencies.

19 33. The October 10, 2002 Agreement provides at Section 2(b)(4):

20 Lodgebuilder shall provide full construction management
21 services from the initiation through the completion and
22 occupancy of each housing construction project authorized
23 under the One-Year and Five-year Plans. Agreement
24 services shall include:

25 ***

26 c) Contracting for and furnishing all equipment
required for proper and efficient construction activities for
all phases of construction.

d) Monitoring and enforcement for compliance with
approved construction plans and specifications as well as
quality of work and craftsmanship for all phases of
construction.

f) All payment activities for construction work related
to labor, subcontractors, materials, and consultants,
including applicable tax reporting and full accounting for
all receipts and expenditures.

1
2 34. The October 10, 2002 Agreement provides at Section 7:

3 Lodgebuilder and the Corporation both warrant that all
4 laws, rules, regulations, and guidelines established by
5 agencies with jurisdiction over development activities shall
6 be fully complied with. Those entities include: The Navajo
7 Nation and its Regulatory Departments; the Navajo Housing
8 Authority; The United States Department of Housing and
9 Urban Development; The Federal Home Loan Bank; The
10 Internal Revenue Service; and agencies of the States of
11 Arizona, New Mexico and Utah. The terms and conditions
12 of each annual NAHASDA Sub-Grant Agreement entered
13 into by and between the Fort Defiance Housing Corporation
14 and the Navajo Housing Authority shall be an Addendum to
15 this Agreement and shall be binding upon FDHC and
16 Lodgebuilder and their successors.

17 35. The October 10, 2002 Agreement provides at Section 1:

18 Lodgebuilder will draft and submit an annual One-Year and
19 Five-Year Housing Plan for approval by FDHC and for
20 submission to the Navajo Housing Authority for NHA's
21 ultimate approval. All budgeting detail for development
22 activities will be included along with schedules for
23 completion.

24 MANAGEMENT CONTRACTS

25 36. From approximately October 2000 until November, 2003, Lodgebuilder
26 served as the property management company for the operation of specific FDHC projects,
pursuant to written agreements.

37. On or about October 23, 2000, Lodgebuilder and FDHC entered into a
certain Management Agreement, whereby Lodgebuilder was to serve as property manager
for the units at Rio Puerco Acres, for a two-year term, and was to receive compensation for
its management services equal to five percent of project rents collected.

38. On or about February 8, 2001, FDHC entered into that certain
Management Agreement with Lodgebuilder, whereby Lodgebuilder was to serve as property
manager of 60 units in the Kayenta Projects, and was to receive compensation for its

1 management services of \$21 per unit, per month.

2 39. Pursuant to the February 8, 2001 Management Agreement,
3 Lodgebuilder agreed that:

4 Manager shall deposit all income collected in a special bank
5 account maintained by Manager for FDHC (the 'Bank
6 Account') and shall not co-mingle such amounts with
7 Manager's funds. Manager may withdraw from the Bank
8 Account all disbursements which under this Agreement are
9 to be made at FDHC's expense, including compensation of
10 Manager as set forth in Section 4. Manager shall provide to
11 FDHC a monthly statement showing all receipts,
12 disbursements and delinquent receipts of the prior month.
13 The statement shall be supported by cancelled checks (if
14 returned), vouchers, invoices and similar documentation
15 covering all receipts and expenses, which documentation
16 shall be kept in Manager's office. After deducting all
17 authorized fees and expenses from the funds collected,
18 Manager shall transfer to FDHC any excess funds in the
19 Bank Accounts. All books and records maintained by
20 Manager shall be the property of FDHC, and FDHC shall
21 have the right to review and audit the books and records at
22 any reasonable time, without prior notice to Manger.

23 40. On or about October 3, 2001, FDHC entered into that certain
24 Management Agreement with Lodgebuilder, whereby Lodgebuilder was to serve as manager
25 of 33 units in Tsaille, Arizona. In exchange for its management services, Lodgebuilder was
26 to be paid five percent of project rents collected.

 41. The Interim Management Assistance Agreement further provided that:

1. Lodgebuilder will maintain operating and management accounting and financial requirements until the end of the calendar year, 2002. Lodgebuilder will provide complete and accurate accounting records of all financial activities done on behalf of the Corporation by Lodgebuilder during 2002 to the Corporation's auditor. The Corporation's [FDHC] Board and staff will provide complete and accurate accounting records for financial transactions originating in the Corporation's Fort Defiance office during 2002. The Corporation's financial documentation shall include accounting and documentation for all Fort Defiance office and Board Member expenditures during 2002, tenant income certifications and verifications, tenants accounts receivable, and Section 8 operating

1 requisitions.

2 42. On or about February 20, 2002, FDHC entered into that certain
3 Management Agreement with Lodgebuilder, whereby Lodgebuilder was to serve as manager
4 of 56 units in Kayenta, Arizona. In exchange for its property management services,
5 Lodgebuilder was to be paid seven percent of project rents collected.

6 43. On or about September 10, 2002, FDHC entered into that certain
7 Management Agreement with Lodgebuilder, whereby Lodgebuilder was to serve as property
8 manager of 21 units in Kayenta, Arizona. In exchange for its property management services,
9 Lodgebuilder was to be paid \$31 per unit, per month.

10 44. On or about February 27, 2003, FDHC entered into that certain
11 Management Agreement with Lodgebuilder, whereby Lodgebuilder was to serve as property
12 manager of 49 units in Churchrock, New Mexico. In exchange for its management services,
13 Lodgebuilder was to be paid \$21.00 per unit, per month.

14 45. On August 22, 2003, Lodgebuilder provided notice to FDHC of its
15 intent to terminate its Interim Management Assistance Agreements.

16 46. On November 4, 2003, Aubrey gave Mesquite State Bank ("MSB")
17 written instructions to transfer \$1,274,979.64, which amount represented all of the then
18 accumulated rental income of FDHC to the Aubrey/Todd money market account. Aubrey
19 caused MSB to then wire transfer \$635,203.75 back to FDHC. Aubrey wrote to FDHC
20 stating the right to \$639,775.19 as owed to Lodgebuilder for "payroll & maint., managmt fee
21 and checks unclear" stating the amount for each such category for each project. Neither
22 Aubrey nor anyone else provided any other documentation or information regarding how the
23 amounts claimed owed were calculated.

24 47. Aubrey or Todd also transferred the following amounts on the dates
25 indicated from the FDHC property bank accounts for Redlake, Tsaile I and Tsaile II to the
26

1 Aubrey/Todd money market bank account:

2	2/4/02	\$32,419.82
3	2/4/02	592.79
4	4/23/02	92,806.60
5	5/7/02	20,000.00
6	5/7/02	20,000.00
7	5/7/02	200,000.00
8	6/26/03	75,015.00
9	2/27/04	1,138.14

10 Aubrey also transferred the following amounts from an FDHC property bank account for
11 Rio Puerco to the Aubrey bank account:

12	12/13/00	\$100,000.00
13	2/6/01	3,471.24

14 48. Lodgebuilder prepared the NAHASDA applications for FDHC and the
15 Annual Performance Reports for FDHC.

16 **NAHASDA**

17 49. NHA, as the Tribally Designated Housing Entity ("TDHE") of the
18 Navajo Nation (the "Recipient"), awarded FDHC (the "Sub-Recipient") a series of
19 NAHASDA grants for fiscal years 1998- 2003 for the development of housing projects at
20 Kayenta, Arizona, Red Lake Acres (Navajo, New Mexico), Shiprock, New Mexico, Rio
21 Puerco Acres (Fort Defiance, Arizona), Churchrock, New Mexico, Tsaile, Arizona,
22 Chilchinbeto, Arizona, Springstead, New Mexico, Cottonwood, Arizona, and Mexican
23 Water, Arizona.

24 50. Before any grant money was disbursed, Lodgebuilder would prepare a
25 draw request and present it to FDHC for approval and for submission to NHA for approval.

26 51. After approval of a draw request, NHA would issue payment to FDHC,

1 which funds were immediately transferred to a Lodgebuilder account or an account in the
2 names of Aubrey and Todd, such funds were used for Lodgebuilder's business and by
3 Aubrey and Todd for their personal expenses.

4 **SHIPROCK**

5 52. In fiscal year 1996 , FDHC obtained two loans borrowing
6 \$2,954,159.00 and \$4,664,782.00 which loans were secured by mortgages on Shiprock
7 residences of FDHC. From the proceeds of these two loans, FDHC transferred to
8 Lodgebuilder \$4,664,782.00 and \$2,809,159.00 respectively.

9 53. In fiscal year 1997, FDHC obtained tax credit financing of
10 \$3,100,000.00 secured by the Shiprock residences and borrowed \$928,000.00 secured by the
11 Shiprock residences. From these proceeds, FDHC transferred to Lodgebuilder \$665,628.00.

12 54. In fiscal year 1998, NHA awarded FDHC a NAHASDA grant in the
13 amount of \$2,051,568 to retire mortgage debt for the 29 units in the Shiprock II Project.
14 This grant was made to reduce the mortgage debt by \$1,925,000.00. However,
15 Lodgebuilder caused only \$1,424,688.28 to be used to reduce such mortgage debt and
16 retained \$463,600.00 claiming the right to retain such funds contrary to the terms of the
17 grant of such funds. Lodgebuilder promptly transferred these funds to the Aubrey/Todd
18 bank account.

19 55. Almost all of the Shiprock grant funding received by FDHC was
20 transferred to Lodgebuilder.

21 **CHILCHINBETO**

22 56. On the Chilchinbeto Project, NHA awarded FDHC a grant from the
23 fiscal year 2002 Indian Housing Block Grant, in the amount of \$2,226,000.00.

24 57. Also for the Chilchinbeto Project, NHA awarded FDHC a grant from
25 the fiscal year 2003 Indian Housing Block Grant, in the amount of \$9,374,000,00 for the
26 construction of the 90 housing units at the Chilchinbeto Project.

1 58. Upon receipt of the Chilchinbeto NAHASDA funds from NHA, FDHC
2 transferred such amounts immediately and directly to Lodgebuilder.

3 59. All NAHASDA grant funds paid to FDHC, related to the Chilchinbeto
4 Project, as identified in Exhibits 44 and 45 were paid over to Lodgebuilder.

5 60. Lodgebuilder, in turn, transferred certain of such monies into the
6 Aubrey/Todd Money Market Account.

7 61. On the Chilchinbeto Project, Lodgebuilder hired subcontractors and
8 suppliers to perform various work and supply materials including, but not limited to,
9 electrical, stucco, flooring, roofing, insulation, doors, and lumber.

10 62. FDHC paid Lodgebuilder grant funds on the Chilchinbeto Project, out
11 of which it was to pay subcontractors and suppliers who had performed work or provided
12 materials. Specifically, monthly or periodic progress payments started on July 19, 2002 and
13 continued to June 17, 2004, which payments totaled \$11,382,100.00. Included with these
14 payments were the amounts budgeted for all of the construction work in this project.

15 63. Lodgebuilder hired subcontractors to dig a well at the Chilchinbeto
16 Project, which was done.

17 64. Lodgebuilder hired subcontractors to construct a sewage lagoon at the
18 Chilchinbeto Project.

19 65. By written agreement dated June 27, 2003 FDHC and Lodgebuilder
20 executed an AIA form construction contract for the project referred to as "Chilchinbeto 46
21 unit". That agreement inaccurately stated that: (1) the amount for that project was the
22 "stipulated sum" of \$1,000,000.00; (2) "This agreement and any amendments to this
23 Agreement shall not be in full force and effect until concurred with in writing by the Agency
24 State Director or the State Director's delegate. Such concurrence shall be evidenced by the
25 signature of such representative of the Agency in the space provided at the end of this
26 Agreement"; (3) the estimated cost for this project was \$5,499,300.00, which amount was

1 projected to be funded by NAHASDA, \$4,499,300.00 and Loan, \$1,000,000.00; (4) Aubrey
2 on behalf of Lodgebuilder, stated, in writing, that "Lodgebuilder will perform all the work
3 on this project with it' [sic] own forces. There will be no subcontractors used during
4 construction"; and (5) Aubrey on behalf of Lodgebuilder stated, in writing, to USDA Rural
5 Development that Lodgebuilder would provide the "interim construction financing" and that
6 it would "be reimbursed for this financing upon USDA's final mortgage closing" with
7 FDHC. This agreement was used to try and receive a USDA loan for \$1,000,000.00 on this
8 project. FDHC and Lodgebuilder did not obtain a loan on this project.

9 66. Lodgebuilder did not pay all of its subcontractors on the Chilchinbeto
10 Project. The amount of such unpaid subcontractors is between \$1,753,287.87 and
11 \$1,977,231.00.

12 67. Pursuant to its agreements with FDHC, Lodgebuilder was obligated to
13 construct a bentonite clay linear at the sewage lagoon at this project. Lodgebuilder, as a
14 result of the decision by Aubrey, did not construct the bentonite clay linear.

15 **KAYENTA**

16 68. From 1998 through 2002, NHA awarded FDHC a series of NAHASDA
17 grants to construct 254 housing units in Kayenta, Arizona.

18 69. As a result of the NAHASDA grants, Lodgebuilder constructed a total
19 of 229 housing units in Kayenta, Arizona. Lodgebuilder breached its construction contracts
20 with FDHC for Kayenta by building only 229 housing units and not the 254 units that the
21 written agreements stated would be built at Kayenta.

22 70. From the units constructed in Kayenta, Arizona, eight units were sold to
23 individuals, in exchange for additional monies paid through the Hopi Relocation Project.
24 Pursuant to the grant funds received by FDHC and transferred to Lodgebuilder
25 Lodgebuilder was fully paid for building these eight units. The sales price for these 8 units
26 was \$643,000.00, which amount was transferred to Lodgebuilder, which in turn transferred

1 such funds to Aubrey and Todd. Such funds were the property of FDHC and were not the
2 property of Lodgebuilder, Aubrey, or Todd.

3 71. NHA awarded the following grant amounts in the fiscal years stated to
4 FDHC and FDHC, in turn, paid such grant amounts to Lodgebuilder, all payments relating to
5 construction projects at Kayenta:

6	Year	Grant Amount
7	1998	\$176,295.00
8	1998	\$2,319,140.00
9	1999	\$3,756,860.00
10	2000	\$200,000.00
11	2000	\$5,625,000.00
12	2000	\$485,100.00
13	2001	\$8,040,000.00
14	2001	\$2,400,000.00
15	2002	\$2,400,000.00
16	2002	\$3,268,000.00

17 72. In connection with the Kayenta projects, FDHC under the direction of
18 Lodgebuilder obtained the following loans, in the years stated, and from the loan proceeds
19 paid the amounts listed below immediately to Lodgebuilder:

20	Year	Loan Amount	Lodgebuilder Amount
21	2001	\$2,600,000.00	\$1,902,910.00
22	2001	\$2,600,000.00	\$519,958.90
23	2002	\$1,456,000.00	\$1,345,275.35
24	2002	\$640,000.00	\$640,000.00
25	2002	\$874,000.00	\$836,282.43
26	2003	\$644,000.00	\$552,567.67

1 2003 \$1,000,000.00 \$345,275.35

2 **SPRINGSTEAD**

3 73. NHA awarded FDHC a NAHASDA grant in the amount of \$1 million
4 from the fiscal year 2002 Indian Housing Block Grant, for planning a 500 unit housing
5 project in Springstead, New Mexico.

6 74. NHA distributed \$752,148.38 pursuant to this grant including
7 \$44,548.38 for closing costs and \$70,000.00 for site improvements. As monies were paid to
8 FDHC, they were immediately transferred to Lodgebuilder.

9 75. NHA awarded FDHC a NAHASDA grant in the amount of
10 \$2,570,000.00 from the fiscal year 2003 Indian Housing Block Grant.

11 76. NHA distributed \$584,000.00 pursuant to this grant, including
12 \$286,000.00 for non-dwelling construction. As monies were paid to FDHC, they were
13 immediately transferred to Lodgebuilder.

14 77. In fiscal year 2003, NHA awarded FDHC a NAHASDA grant in the
15 amount of \$9,413,971.00 for the construction of 82 housing units at the Springstead Project.
16 From these grant proceeds, FDHC transferred to Lodgebuilder \$673,600.00.

17 78. Lodgebuilder did not perform any construction work on this project for
18 FDHC.

19 **TSAILE II**

20 79. In fiscal year 2001, NHA awarded FDHC a NAHASDA grant in the
21 amount of \$1,500,000.00 for the construction of 34 housing units at the Tsaile II Project.

22 80. In fiscal year 2002, FDHC borrowed \$1,570,000.00 from USDA which
23 loan was secured by the Tsaile II housing units.

24 81. FDHC transferred \$1,904,425.59 to Lodgebuilder from the above
25 funding regarding Tsaile II.

26

1 **CHURCHROCK I and II**

2 82. In fiscal year 2001, NHA awarded FDHC NAHASDA grants in the
3 amounts of \$2,871,425.00 for the construction of 25 housing units and \$360,000.00 for
4 planning costs on this project. From the grant for planning, FDHC paid Lodgebuilder
5 \$360,000.00 for administration, developer fees, engineering fees and consultant fees.

6 83. In fiscal year 2002, NHA awarded FDHC NAHASDA grants in the
7 amounts of \$5,280,000.00 for the construction of 44 housing units and \$676,000.00 for
8 demolition. Also in that year, FDHC obtained a permanent loan from USDA for
9 \$800,000.00 secured by the Churchrock housing units and another loan for \$900,000.00
10 secured by the Churchrock housing units.

11 84. From the collective loan proceeds, FDHC transferred \$1,667,395.33 to
12 Lodgebuilder.

13 **RED LAKE ACRES**

14 85. In fiscal year 1998, NHA awarded FDHC a NAHASDA grant in the
15 amount of \$1,188,000.00 for the renovation of 60 housing units at Red Lake Acres.

16 86. In fiscal year 2001, NHA awarded FDHC a NAHASDA grant in the
17 amount of \$2,100,000.00 for the renovation of 60 housing units at Red Lake Acres.

18 **FEDERAL HOME LOAN BANK SUBSIDY**

19 87. In 1998, FDHC was awarded a grant from the Federal Home Loan
20 Bank ("FHLB"), through Mesquite State Bank, as the Sponsor Bank, in the amount of
21 \$328,350.00. The grant was issued as an unsecured loan, which would be forgiven if the
22 recipient used the funds for construction of low income housing at Rio Puerco Acres.

23 88. Pursuant to draw requests prepared, signed and submitted by Aubrey,
24 FHLB distributed all of the grant funds in the amount of \$328,350.00 to FDHC. In turn, all
25 such funds were transferred from FDHC to Lodgebuilder.

26

1 89. FHLB performed an inquiry to verify the appropriate use of the FHLB
2 grant funds in construction of the Rio Puerco Project.

3 **RIO PUERCO ACRES**

4 90. In fiscal year 1998, NHA awarded FDHC a NAHASDA grant in the
5 amount of \$1,349,160.00 for the construction of 16 housing units at Rio Puerco Acres.
6 Also in that year, FDHC obtained the Federal Home Loan Bank grant in the amount of
7 \$328,350.00. The FHLB grant required such funds to used in the construction of the Rio
8 Puerco project and that FHLB was entitled to an accounting verifying that the grant funds
9 were used in that project. Such grant was funded by Mesquite State Bank, now known as
10 Bank of Nevada. These grant funds were transferred by FDHC to Lodgebuilder, which then
11 transferred these funds to Aubrey and Todd. Despite repeated requests, Lodgebuilder,
12 Aubrey and Todd have never adequately accounted for the use of such funds in the Rio
13 Puerco project. Bank of Nevada has filed a proof of claim in the FDHC case in the amount
14 of \$741,549.00. Some of the grant funds were used by Lodgebuilder to pay amounts
15 claimed by Lodgebuilder for projects other than Rio Puerco.

16 91. In fiscal year 1999, NHA awarded FDHC a NAHASDA grant in the
17 amount of \$6,377,410.00 for the construction of 50 housing units at Rio Puerco Acres.

18 92. In fiscal year 2000, NHA awarded FDHC a NAHASDA grant in the
19 amount of \$864,900.00 for the construction of 8 housing units. Also in that year, FDHC
20 obtained a permanent financing loan from Allied Mortgage for \$3,845,000.00.

21 93. From the loan proceeds, FDHC transferred \$3,515,254.25 to
22 Lodgebuilder.

23 **MEXICAN WATER**

24 94. In fiscal year 2002, NHA awarded FDHC a NAHASDA grant in the
25 amount of \$440,000.00 for planning of 50 units at the Mexican Water Project.

26 95. From those grant proceeds, FDHC transferred to Lodgebuilder

1 \$410,000.00. Lodgebuilder did not perform any construction work at this project.

2 **COTTONWOOD**

3 96. In fiscal year 2002, NHA awarded FDHC a NAHASDA grant in the
4 amount of \$128,000.00 for the planning of the Cottonwood project. Later that fiscal year,
5 NHA awarded FDHC a NAHASDA grant in the amount of \$1,236,000.00 for the
6 construction of 16 housing units.

7 97. On July 2, 2004, NHA terminated all grant agreements with FDHC.

8 98. The construction industry standard for reasonable overhead and profit
9 for a general contractor/developer for work in remote areas, such as those remote areas
10 involved in this case, is 12% or less.

11 99. Lodgebuilder, Aubrey and Todd maintained and controlled the
12 numerous FDHC bank accounts. Such control included their signing authority on those
13 bank accounts, their actions of making numerous transfers of funds to and from those
14 accounts, their maintaining the accounting for those bank accounts, and by causing the
15 monthly statements for those accounts to be mailed to them. Essentially Aubrey and Todd
16 had sole control over virtually all of the federal grants and federal supported loans made to
17 FDHC.

18 100. Aubrey and Todd, through Lodgebuilder, controlled the development
19 and funding for the above referenced projects of FDHC. FDHC and its agents and
20 representatives (other than Lodgebuilder, Aubrey and Todd) had a minimal role in the
21 development and funding for the above referenced projects of FDHC. Aubrey and Todd
22 maintained and controlled the books and records of FDHC. FDHC did not maintain or
23 control any of its books and records. FDHC and its board of directors did not act or function
24 independently from Lodgebuilder, rather FDHC allowed Lodgebuilder, through Aubrey and
25 Todd, to make decisions and act on its behalf regarding the above referenced FDHC
26 projects. Aubrey and Todd caused the grant and loan funds received by FDHC to be

1 transferred to their various bank accounts, primarily the Aubrey/Todd money market
2 account. Aubrey and Todd spent the FDHC funds in their accounts in their sole discretion
3 including, but not limited to, significant personal expenses. Aubrey and Todd claimed that
4 they had the "right" to so spend the FDHC funds.

5 101. At all relevant times, FDHC was insolvent.

6 102. For the period from January 2, 1999 through September 13, 2005,
7 Aubrey and Todd collectively transferred, primarily by numerous checks, a total of
8 \$16,494,020.00 to various Las Vegas casinos. Todd signed various checks to Las Vegas
9 casinos for the following amounts on the following dates:

10	Date	Amount
11	1/2/99	\$ 5,000.00
12	1/2/99	5,000.00
13	1/2/99	5,000.00
14	1/22/99	5,000.00
15	3/12/99	5,000.00
16	7/21/00	200,000.00
17	9/8/00	3,000.00
18	9/10/00	3,000.00
19	9/10/00	3,000.00
20	9/15/00	3,000.00
21	2/26/01	10,000.00
22	2/26/01	10,000.00
23	2/26/01	10,000.00
24	2/26/01	10,000.00
25	3/4/01	5,000.00
26	3/4/01	5,000.00

1	3/30/01	5,000.00
2	3/30/01	5,000.00
3	3/31/01	5,000.00
4	4/16/01	10,000.00
5	4/25/01	4,000.00
6	5/1/01	5,000.00
7	5/1/01	5,000.00
8	5/9/01	5,000.00
9	5/11/01	5,000.00
10	5/25/01	10,000.00
11	5/25/01	40,000.00
12	5/26/01	20,000.00
13	5/26/01	20,000.00
14	5/26/01	10,000.00
15	5/26/01	10,000.00
16	5/26/01	10,000.00
17	5/28/01	10,000.00
18	5/30/01	20,000.00
19	5/30/01	10,000.00
20	5/30/01	10,000.00
21	5/30/01	10,000.00
22	6/18/01	20,000.00
23	6/18/01	20,000.00
24	6/18/01	20,000.00
25	6/20/01	5,000.00
26	6/20/01	5,000.00

1	6/20/01	5,000.00
2	7/14/01	50,000.00
3	7/25/01	20,000.00
4	7/25/01	20,000.00
5	7/25/01	5,000.00
6	7/25/01	5,000.00
7	7/25/01	5,000.00
8	7/25/01	5,000.00
9	8/4/01	10,000.00
10	8/4/01	20,000.00
11	8/4/01	20,000.00
12	9/14/01	5,000.00
13	9/14/01	5,000.00
14	9/14/01	5,000.00
15	9/21/01	5,000.00
16	9/22/01	5,000.00
17	9/22/01	100,000.00
18	9/24/01	5,000.00
19	9/27/01	20,000.00
20	10/5/01	5,000.00
21	10/5/01	5,000.00
22	11/21/01	5,000.00
23	11/23/01	5,000.00
24	11/30/01	40,000.00
25	12/1/01	3,000.00
26	12/1/01	100,000.00

1	12/7/01	5,000.00
2	12/7/01	5,000.00
3	12/15/01	200,000.00
4	12/15/01	100,000.00
5	2/20/02	20,000.00
6	2/22/02	20,000.00
7	3/8/02	30,000.00
8	3/8/02	30,000.00
9	3/8/02	20,000.00
10	3/8/02	20,000.00
11	3/8/02	20,000.00
12	3/8/02	20,000.00
13	3/8/02	50,000.00
14	3/8/02	50,000.00

15 Todd transferred a total of \$1,659,000.00 to the casinos during this period. The balance of
 16 the \$16,494,020.00 was transferred to casinos by Aubrey.

17 103. NHA transferred total grant funds to FDHC of \$69,029.606.00. Virtually all of
 18 the grant funds FDHC received from NHA were immediately transferred by FDHC to either
 19 Lodgebuilder, Aubrey or Todd.

20 104. In addition to all of the grant funding, FDHC received additional funding
 21 totaling \$21,425,638.42, in loan and equity financing regarding the above referenced
 22 projects. Virtually all of the loan and equity financing funds received by FDHC were
 23 immediately transferred by FDHC to either Lodgebuilder, Aubrey or Todd.

24 105. Lodgebuilder, Aubrey and Todd presented no credible evidence to prove the
 25 actual costs incurred in building the housing units and related construction work on the
 26 above referenced projects.

1
2 106. Lodgebuilder's tax returns for the tax years 2000 through 2005 state the
3 following for its gross revenue [line 1a], net income [line 28], cost of goods sold ("CGS")
4 [line 2], and total deductions ("TD")[line 27]:

5

6 Year	Gross Revenue	CGS	TD	Net Income
7 2000	11,323,440	5,792,281	5,115,142	493,484
8 2001	17,061,498	12,503,970	3,487,509	1,110,615
9 2002	19,779,449	15,048,544	4,688,039	140,912
10 2003	14,287,718	11,597,527	2,284,113	432,673
11 2004	4,416,900	3,771,904	1,301,832	(614,670)
12 2005	5,523,866	3,577,769	1,687,253	258,844

13 107. Aubrey's tax returns for the tax years 2000 through 2005 state the following for
14 his adjusted gross income("AGI") [line 33], income from Lodgebuilders ("LBI") listed
15 either as wages [line 7 or on schedule C], gambling winnings ("GW") [line 21], and
16 gambling losses ("GL") [line 27]:

17

18 Year	AGI	LBI	GW	GL
19 2000	891,677	150,000	692,150	692,150
20 2001	731,951	143,821	563,150	563,150
21 2002	400,213	149,224	255,552	255,552
22 2003	452,962	169,012	360,785	360,785
23 2004	355,149	242,641	279,775	279,775
24 2005	394,907	168,728	218,750	218,750

25 108. Todd's tax returns for the tax years 2000 through 2003 state the following for
26 her adjusted gross income, income from Lodgebuilders, gambling winnings and gambling
losses:

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Year	AGI	LBI	GW	GL
2000	759,276	80,000	611,075	611,075
2001	346,434	82,500	212,153	212,153
2002	262,100	110,388	138,962	138,962
2003	221,135	140,000	31,495	31,495

109. Aubrey, Todd, and Lodgebuilder, and each of them, by the totality of their intentional actions regarding FDHC: (1) each knew that such actions would cause severe harm and damage to FDHC, its creditors, its finances and its ability to effectively provide low income housing on the Navajo Reservation, (2) each knew such actions were reprehensible because of their extensive experience in the Native American housing program and that the funds wrongfully taken by them were Congressionally appropriated and/or federally guaranteed to provide low income housing on the Navajo reservation, (3) each were fully aware that their actions caused severe harm to FDHC and its creditors and with such knowledge continued their actions for years, (4) each knew that such conduct would cause unjustified and significant damage to FDHC and its creditors, and (5) each intentionally concealed their wrongful conduct through their complete control of the financial actions, books, records and source documents of FDHC. The actions of these defendants warrants the assessing of punitive damages for their intentionally wrongfully conducts.

CONCLUSIONS OF LAW

1. Lodgebuilder breached the various management agreements with FDHC when it transferred the \$1,274,979.64 into the Aubrey/Todd bank account, by not adequately accounting to FDHC as the agreements required for the moneys retained by Lodgebuilder/Aubrey/Todd, and by commingling the FDHC funds.

1 2. FDHC has been damaged in the net amount of the funds wrongfully transferred
2 and retained by Aubrey and Todd in their account in the amount of \$487,345.00.

3 3. FDHC has been damaged by the additional wrongful commingling and transfers
4 from the FDHC property bank accounts to Aubrey and Todd in the amount of \$441,972.35.

5 4. FDHC has been damaged by the additional wrongful commingling and transfers
6 from the FDHC property bank accounts to the Aubrey account in the amount of
7 \$103,471.24.

8 5. The long established rule of law is that the expenditure of public/appropriated
9 funds is authorized and proper only when allowed by Congress, not that public funds may be
10 expended unless prohibited by Congress. See United States v. MacCollom, 96 S. Ct. 2086
11 (1976); Illinois E.P.A. v. U.S.E.P.A., 947 F.2d 283 (7th Cir. 1991); Greene County Planning
12 Bd. v. Federal Power Comm., 559 F.2d 1227 (2nd Cir. 1976); F.D.I.C. v. Hurwitz 384
13 F.Supp.2d 1039 (S.D.Tex 2005). See 31 U.S.C. § 1301.

14 6. Title 24 Housing and Urban Development Part 85 titled Administrative
15 Requirements For Grants and Cooperative Agreements to State, Local and Federally
16 Recognized Indian Tribal Governments provides, in pertinent part:

17 Sec. 85.36 Procurement

18 (a) Other grantees and subgrantees will follow paragraphs (b) through (I) in this
19 section.

20 (f) Contract cost and price. (1) Grantees and subgrantees must perform a cost or price
21 analysis in connection with every procurement action including contract modifications. The
22 method and decree of analysis is dependent on the facts surrounding the particular
23 procurement situation, but as a starting point, grantees must make independent estimates
24 before receiving bids or proposals. A cost analysis must be performed when the offeror is
25 required to submit the element of his estimated costs, e.g., under professional , consulting,
26 and architectural engineering services contracts. A cost analysis will be necessary when

1 adequate price competition is lacking, and for sole source procurements, including contract
2 modifications or change orders, unless price reasonableness can be established on the basis
3 of a catalog or market price of a commercial product sold in substantial quantities to the
4 general public or based on prices set by law or regulation. A price analysis will be used in
5 all other instances to determine the reasonableness of the proposed contract price.

6 (2) Grantee and subgrantees will negotiate profit as a separate element of the price for
7 each contract in which there is no price competition and in all cases where cost analysis is
8 performed. To establish a fair and reasonable profit, consideration will be given to the
9 complexity of the work to be performed, the risk borne by the contractor, the contractor's
10 investment, the amount of subcontracting, the quality of its record of past performance, and
11 the industry profit rates in the surrounding geographical area for similar work.

12

13 (I) Contract provisions. A grantee's and subgrantee's contracts must contain
14 provisions in paragraph (I) of this section. Federal agencies are permitted to require
15 changes, remedies, changed conditions, access and records retention, suspension or work,
16 and other clauses approved by the Office of Federal Procurement Policy.

17 (1) Administrative, contractual, or legal remedies in instances where
18 contractors violate or breach contract terms, and provide for such sanctions
19 and penalties as may be appropriate.

20

21 (10) Access by the grantee, the subgrantee, the Federal grantor agency, the
22 Comptroller General of the United States, or any of their duly authorized
23 representatives to any books, documents, papers, and records of the contractor
24 which are directly pertinent to that specific contract for the purpose of making
25 audit, examination, excerpts, and transcriptions.

26 (11) Retention of all required records for three years after grantees or

1 subgrantees make final payments and all other pending matters are closed.

2 7. Lodgebuilder and FDHC breached the above quoted statutory and regulatory
3 requirements for the expense of federally appropriated funds by not separately negotiating
4 the profit element of each contract. Based upon their many years of experience in the Native
5 American housing program, Aubrey and Todd, as the principals of Lodgebuilder, knew or
6 should have known that the profit element in these agreements had to be separately
7 negotiated and agreed upon by the parties. In so doing, Lodgebuilder Aubrey and Todd
8 received Congressionally appropriated funds in violation of the statutory and regulatory
9 requirements and, therefore, their receipt of such funds was neither Congressionally
10 authorized or proper.

11 8. Lodgebuilder breached its contract for the Chilchinbeto Project with FDHC by (1)
12 not paying the subcontractors and suppliers on that job and (2) not doing all the work
13 required on that job.

14 9. Lodgebuilder breached its contract with FDHC by not adequately accounting for
15 the Federal Home Loan Bank loan proceeds it received and agreed to use in the Rio Puerco
16 Project.

17 10. Aubrey and Todd, through Lodgebuilder, acquired and maintained essentially
18 complete control over FDHC, particularly over (1) the Congressionally appropriated funds
19 and housing related loan proceeds received by FDHC which funds were ultimately
20 transferred to accounts of Aubrey and/or Todd, (2) the procedure for applying for such
21 funds, and (3) the construction projects. FDHC and its principals entrusted Aubrey and
22 Todd, through Lodgebuilder, to look out for and protect the interests of FDHC. FDHC
23 relied upon Aubrey and Todd by entrusting to them all of the funds for these construction
24 projects. As a result of such complete control and trust, Lodgebuilder, Aubrey and Todd
25 each owed fiduciary duties to FDHC.

26

1 11. Lodgebuilder, Aubrey and Todd each breached their fiduciary duty to FDHC by
2 (1) using the Congressionally appropriated funds for purposes other than authorized by
3 Congress, (2) using the various project grant and loan proceeds for their personal benefit and
4 not for the projects, and (3) by failing to protect the rights and interests of FDHC, its
5 creditors and lenders.

6 12. At the time of all transfers of FDHC funds to Lodgebuilder and which funds
7 were then immediately transferred to Aubrey and/or Todd, Aubrey and Todd caused such
8 transfers to be made with the actual intent to hinder, delay and/or defraud FDHC and its
9 creditors.

10 13. At the time of all transfers of FDHC funds to Lodgebuilder and then to Aubrey
11 and/or Todd, FDHC received less than reasonably equivalent value in exchange for such
12 transfers.

13 14. At the time of all transfers of FDHC funds to Lodgebuilder and then immediately
14 to Aubrey and/or Todd, FDHC was insolvent, was engaged in business for which any of its
15 remaining property was an unreasonably small capital, and Lodgebuilder, Aubrey and/or
16 Todd caused FDHC to incur debts that would be beyond its ability to pay such debts as such
17 debts matured.

18 15. Aubrey and Todd are liable for the fraudulent conveyances of FDHC assets
19 through Lodgebuilder because they are both the mediate transferees and are the persons for
20 whose benefit the transfers were made. See 11 U.S.C. § 550.

21 16. Lodgebuilder wrongfully converted property/funds of FDHC and breached its
22 fiduciary duty to FDHC.

23 17. Aubrey and Todd participated in and knew that Lodgebuilder was wrongfully
24 converting property/funds of FDHC and that Lodgebuilder was breaching its fiduciary duty
25 to FDHC.

26

1 18. Aubrey and Todd substantially assisted, aided and encouraged Lodgebuilder in
2 converting the property/funds of FDHC and in breaching its fiduciary duty to FDHC.

3 19. Due to Aubrey's and Todd's aiding and abetting Lodgebuilder in its tortious
4 conduct to FDHC they are liable to FDHC for the damages it suffered. Wells Fargo Bank v.
5 Arizona Laborers, 201 Ariz. 474, 38 P.3d 12 (Ariz. 2002); Gomez v. Hensley, 145 Ariz.
6 176, 700 P.2d 874 (Ariz. App. 1984); Restatement (Second) of Torts 876(b)(1977).

7 20. Lodgebuilder breached its implied covenant of good faith and fair dealing under
8 its contracts with FDHC. Aubrey and Todd caused Lodgebuilder to breach this implied
9 covenant.

10 21. Lodgebuilder, Aubrey and Todd, and each of them damaged FDHC and
11 are each liable to FDHC as follows:

12	A. Kayenta	\$3,285,625.00
13	B. Chilchinbeto	\$1,977,231.00
14	C. Shiprock	\$463,600.00
15	D. Rio Puerco	\$741,549.00
16	E. Rents wrongfully taken	\$487,435.00
17		\$441,972.35
18		\$103,471.24
19	F. Excessive profits and other funds wrongfully taken and/or	
20	fraudulently transferred	\$10,000,000.00
21	G. Punitive damages	\$1,000,000.00

22 **SUMMARY AND CONCLUSION**

23 The case is unusual for several reasons including but not limited to the fact that the
24 housing units and other construction work were, with a few small exceptions, apparently
25 well constructed. Thus the Trustee acknowledges that in determining the damages suffered
26 by FDHC, Lodgebuilder is entitled to credit for a reasonable, but not excessive, profit factor.

1 This has been a difficult case to resolve for several reasons. The liability of
2 Lodgebuilder, Aubrey and Todd, as more specifically set forth above, was not a difficult
3 decision. Establishing the amount of damages was a difficult decision. It was difficult
4 because the defendants provided no credible evidence of the actual costs incurred to
5 construct the various building projects. These three defendants received a total of
6 \$90,455,244.00 in federal grants and federal loan type financing from or on behalf of
7 FDHC. Lodgebuilder's tax returns state total costs and expenses of \$65,620,861.00 for tax
8 years 2000 through 2004. Recognizing that (1) some of the work done and funds received
9 by Lodgebuilder from FDHC occurred prior to 2000, (2) that FDHC was terminated by
10 NHA in July 2004, and (3) the court does not totally credit the information contained in the
11 tax returns, thus making the comparison of total receipts and expenses imprecise, at best.
12 Another indication of the magnitude of the damages of FDHC is illustrated by the
13 \$16,494,020.00 paid to various casinos by Aubrey and Todd from 1999 through September
14 2005. Although not an absolutely fair methodology, applying the maximum 12% profit
15 factor to all of the funds advanced to FDHC/Lodgebuilder of \$90,455,244.00 results in at
16 best maximum profit of \$10,854,629.28. Considering the \$16,494,020.00 paid to the
17 casinos, no credible evidence was presented to indicate that the defendants earned almost
18 \$6,000,000.00 from any source other than FDHC. The only fair inference is that such
19 difference must represent funds obtained from FDHC. In the final analysis, the court
20 concludes that the exact amount of funds wrongfully taken by Aubrey and Todd, through
21 their conduit-Lodgebuilder, can not be calculated to a mathematical certainty.

22 The decision as to Ross was likewise a difficult and close decision. There is some
23 credible evidence that Ross received hundreds of thousands of dollars from Lodgebuilder
24 and/or FDHC. That sole fact makes it appear that Ross was more of a participant than a
25 victim of the wrongful conduct that occurred here. However, damages alone do not prove a
26 case. Ultimately, the court concludes as to Ross that there was not sufficient credible

1 evidence for the court to conclude that the plaintiff/Trustee proved her claims as to Ross.
2 Accordingly, all claims against Ross are denied.

3 Finally, although not a claim before the court, the court is compelled to note the
4 systemic failure of this Congressionally funded program, involving in excess of
5 \$65,000,000.00 in Federal grants and more than \$90,000,000.00 when the federally supported
6 loans are included, to be adequately monitored by the numerous agencies involved in
7 overseeing this program and allowing such funds to be disbursed in a manner fundamentally
8 contrary to the regulations governing the program.

9 Counsel for the Plaintiff/Trustee shall serve and lodge an appropriate form of
10 judgment.

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15 Copy of the foregoing
mailed this 11th day of
February, 2009 to:

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