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May 11, 2011

Via Hand Delivery
United States Bankruptcy Court (Clerk)
Homer J. Thornberry Federal Judicial Bldg.
903 San Jacinto Blvd., Suite 322
Austin, Texas 78701

Re: Adversary Matter No. 10-01111-cag; *In re Crescent Resources, LLC, et. al.; Chapter 11;* In the United States Bankruptcy Court for the Western District of Texas Austin Division.

Dear Sir or Madam:

On May 2, 2001, we filed Crescent Resources Litigation Trust's Redacted version of the First Amended Original Complaint and Objections to Claims with Exhibits in the above referenced matter.

Pursuant to the Court's Order of May 10, 2011, please find enclosed for refilling Crescent Resources Litigation Trust's Redacted version of the First Amended Original Complaint and Objections to Claims with Exhibits.

If you have any questions, please contact me at 495-1400.

Yours sincerely,

GEORGE & BROTHERS, L.L.P.

By
Gary L. Lewis

Enclosure

REDACTED

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

In re:	§	CHAPTER 11
CRESCENT RESOURCES, LLC et al.	§	
	§	Case No. 09-11507 (CAG)
Debtors,	§	(Jointly Administered)
	§	
CRESCENT RESOURCES LITIGATION TRUST, by and through Dan Bensimon, Trustee,	§	
Plaintiff	§	
v.	§	Adversary No. 10-01111-cag
DUKE ENERGY CORPORATION; DUKE VENTURES, LLC; SPECTRA ENERGY CAPITAL, LLC f/k/a DUKE CAPITAL, LLC; DUKE VENTURES, INC.; DUKE ENERGY CAROLINAS, LLC; DUKE ENERGY CAROLINAS; B. KEITH TRENT JIM W. MOGG; ARTHUR W. FIELDS; and R. WAYNE McGEE	§	
Defendants	§	

PLAINTIFF'S FIRST AMENDED ORIGINAL COMPLAINT AND OBJECTION TO CLAIMS

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Plaintiff Crescent Resources Litigation Trust (the "Trust" or the "Litigation Trust"), by and through Dan Bensimon, Trustee, files this First Amended Original Complaint against Duke Energy Corporation ("Duke Energy"); Duke Ventures, LLC ("Duke Ventures"); Spectra Energy Capital, LLC f/k/a Duke Capital, LLC ("Duke Capital") (Duke Energy, its wholly-owned subsidiary Duke Ventures, and its former wholly-owned subsidiary, Duke Capital, are sometimes referred to herein collectively as "Duke"); Duke Ventures, Inc.; Duke Energy Carolinas, LLC; Duke Energy Carolinas; Jim W. Mogg, Arthur W. Fields, and R. Wayne McGee (collectively "Crescent Board of Managers"); and B. Keith Trent ("Trent").

I. INTRODUCTION

1. In September 2006, Duke required Crescent Resources, LLC ("Crescent Resources"), at the time Duke's wholly owned subsidiary, to enter into a term loan of $1.225 billion from a consortium of banks and, immediately thereafter, to transfer $1.187 billion of these loan proceeds directly to Duke. However, only Crescent Resources (as the direct obligor), and its subsidiaries (as guarantors of the loan), were liable on the $1.225 billion dollar loan. That was so even though the loan transaction (and other related transactions) (collectively, the "2006 Duke Transaction" or the "Transaction") benefited Duke - not Crescent Resources - and Crescent Resources had no viable business plan upon which it could repay its lenders; no viable means of servicing this debt; and was in fact rendered insolvent as a result of the Transaction.

2. Crescent Resources predictably defaulted on the loan and, together with its parent, Crescent Holdings, LLC, and its subsidiaries, filed bankruptcy in this Court on June 10, 2009 (the "Crescent Bankruptcy"). Claims in the Crescent Bankruptcy totaling

more than $2.25 billion were brought by the more than 1000 innocent creditors who were the victims of Duke's conduct. Outstanding claims total approximately $1.6 billion. The Trust, by this action, seeks to recover funds for the creditors, as beneficiaries of the Litigation Trust.

3. On May 24, 2010, this Court confirmed a plan of reorganization in the Crescent Bankruptcy. Pursuant to that plan, the Litigation Trust was established to, among other things, collect (on behalf of the Debtors and their creditors) those damages resulting from the improper transfers of Crescent Resources' funds to Duke that are described herein. In this action, then, the Litigation Trust sues Duke, as well as the individuals who directed and/or substantially assisted the transactions at issue for, *inter alia,* the $1.187 billion wrongfully transferred to Duke, as well as for the damages occasioned by the other misconduct set forth herein.

II. THE PARTIES

4. Plaintiff Crescent Resources Litigation Trust was established by this Court's Order Confirming Debtors' Revised Second Amended Joint Plan of Reorganization. Dan Bensimon is the duly appointed Trustee of the Litigation Trust.

5. Defendant Duke Energy Corporation is a Delaware Corporation with its principal place of business in North Carolina. Duke Energy Corporation has been served with process and appeared in this action through its counsel of record.

6. Spectra Energy Capital LLC, f/k/a Duke Capital, LLC is a Delaware Limited Liability Company with its principal place of business in Houston, Texas. Spectra Energy Capital, LLC has been served with process and appeared in this action through its counsel of record.

7. Duke Ventures, LLC, is a Nevada Limited Liability Company with its principal place of business, on information and belief, in North Carolina. Duke Ventures, LLC has been served with process and appeared in this action through its counsel of record.

8. Duke Ventures, Inc., is a Delaware Corporation with its principal place of business, on information and belief, in North Carolina. Duke Ventures, Inc. has been served with process and appeared in this action through its counsel of record.

9. Duke Energy Carolinas, LLC is a North Carolina Limited Liability Company with its principal place of business, on information and belief, in North Carolina. Duke Energy Carolinas, LLC has been served with process and appeared in this action through its counsel of record.

10. Duke Energy Carolinas is an unknown type of business with its principal place of business, on information and belief, in North Carolina. Duke Energy Carolinas has been served with process and appeared in this action through its counsel of record.

11. Defendant B. Keith Trent is, upon information and belief, an individual resident of North Carolina. Defendant Trent has been served with process and appeared in this action through his counsel of record.

12. Defendant Jim W. Mogg is, upon information and belief, an individual resident of Colorado. Defendant Mogg has been served with process and appeared in this action through his counsel of record.

13. Defendant Arthur W. Fields is, upon information and belief, an individual resident of North Carolina. Defendant Fields has been served with process and appeared in this action through his counsel of record.

14. Defendant R. Wayne McGee is, upon information and belief, an individual resident of North Carolina. Defendant McGee has been served with process and appeared in this action through his counsel of record.

III. JURISDICTION AND VENUE

15. Bankruptcy Court Jurisdiction. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157(a) & (b) because this is a civil proceeding arising in or related to the Crescent Bankruptcy under Chapter 11 of Title 11 of the United States Code and because this is a core proceeding pursuant to 28 U.S.C. § 157(b). Pursuant to 28 U.S.C. § 157(b), this court also has jurisdiction over non-core claims that arise out of the subject bankruptcy. Pursuant to 28 U.S.C. §§ 1334(b) and 1367, the federal courts also have jurisdiction over pendant claims that arise out of the subject bankruptcy. Thus, this Court has jurisdiction over each of the claims asserted herein.

16. Jurisdiction over the Parties. This Court has jurisdiction over each of the Defendants because each is a citizen of the United States and each has conducted business within the Western District of Texas, including business that gives rise to the claims asserted herein. In addition, proofs of claims have been filed in the Crescent Bankruptcy by Defendants Duke Energy, Duke Ventures and/or Duke Ventures, Inc., Duke Energy Carolinas, Duke Energy Carolinas, LLC, and Fields, giving this Court jurisdiction over each of them. The filing of proofs of claims constitutes a voluntary submission to the equity jurisdiction of the bankruptcy court, especially where, as here, that jurisdiction is factually related to the claim.

17. Venue. Pursuant to 28 U.S.C. § 1409, venue is proper in the Western District of Texas, Austin Division, because that is the place of filing of the Crescent

Bankruptcy and because certain of the real estate assets that are the subject of the underlying bankruptcy are located within the Western District of Texas.

IV. FACTUAL BACKGROUND

A. The Litigation Trust

18. The Litigation Trust is the holder of the Debtors' claims arising from, among other things, the 2006 Duke Transaction. In its Order confirming Debtors' Chapter 11 plan of reorganization, this Court held that "the Litigation Trust Assets shall be transferred to the Litigation Trust in accordance with the provisions of the Plan." The Revised Second Amended Joint Plan provides that the 2006 Duke Transaction causes of action are specifically reserved by the Debtors and transferred, pursuant to the Plan, to the Litigation Trust. The Plan further provides that the causes of action transferred to the Litigation Trust include state law claims of fraudulent transfer and all other causes of action that could be brought under §§ 544, 547, 548, 549, 550 and 551 of the Bankruptcy Code. The Litigation Trustee is a properly appointed representative of the estate for the purposes of retaining and enforcing the claims and causes of action under § 1123(b)(3)(B) of the Bankruptcy Code.

B. The Debtors' Business

19. Prior to the 2006 Duke Transaction, Crescent Resources, LLC was a wholly owned indirect subsidiary of Duke Energy. On information and belief, Duke Energy wholly owned Duke Capital, which wholly owned Duke Ventures, which wholly owned Crescent Resources. Crescent Resources was, in effect, the Duke entity that held and developed Duke's real estate.

20. Duke Energy is a successor to energy companies that created numerous hydroelectric projects in the Catawba and Wateree river basins of North and South

Carolina. In the course of those projects, Duke obtained the rights to huge tracts of land which, after the installation of the dams, included substantial lake-front and timber holdings (the "Legacy Lands").

21. In approximately 1969, Duke created Crescent Resources' predecessor, Crescent Land and Timber Company, as a separate entity to hold the various real estate interests. On information and belief, Crescent Land and Timber was created as a separate entity so that the real estate assets would not be subject to a Federal Power Commission Order requiring power companies to provide recreational opportunities on lands surrounding their reservoirs.[1]

22. In 2000, Crescent Resources, LLC was formed and received title to the land holdings of its immediate predecessor, Crescent Resources of Georgia, Inc. Historically, Crescent Resources primarily developed master planned residential communities. Many of these communities were large lake-front properties located on the series of Catawba and Wateree river basin lakes created by Duke's hydroelectric projects.

23. Over the years, Crescent Resources branched out into additional geographic areas and acquired additional properties, primarily through I.R.C. § 1031 like-kind exchanges of the Legacy Lands. However, the core of its business model remained unchanged: Crescent Resources took large parcels of real estate, installed extensive infrastructure (such as roads and utilities), installed capital-intensive amenities (such as golf courses and community centers), and then sold lots to home-builders or individuals. This capital-intensive and long-term business plan was designed to maximize the return on these low or zero-basis properties. A key component of this business plan was to

[1] See, *Catawba Indian Tribe v. South Carolina*, 978 F.2d 1334 (4th Cir. 1992).

utilize a modest amount of project debt, usually less than 20% of the book value of the asset, and otherwise to avoid long-term debt.

24. Using this business plan, Crescent Resources' property holdings expanded over the years, from the Catawba and Wateree lakes to other Carolina properties, eventually expanding to the greater Atlanta area; to the Hilton Head, South Carolina area; to Payson, Arizona; and to the Austin, Texas area. In addition, Crescent Resources branched out into the development of commercial and retail projects – primarily in the South.

25. In approximately 1999, Crescent Resources also expanded its operations to Florida by acquiring an 80% interest in LandMar Group, LLC, and its subsidiary entities (collectively "LandMar"). LandMar was an established Florida-based real estate development company whose principal was Ed Burr. On information and belief, Mr. Burr retained a significant interest in, and control of, the LandMar developments after Crescent Resources acquired its 80% interest. Mr. Burr also became Crescent Resources' Executive Vice President – Florida.

26. Customarily, Crescent Resources created single-purpose entities for each of its developments, although, from time to time, several entities would be created to own and operate a single project. As a result, in 2006, Crescent Resources operated, either as sole owner or as majority owner, or via LandMar, roughly 100 projects through roughly 120 entities.[2] As of December 31, 2005, the book value of Crescent Resources' majority and minority interests in these projects was approximately $1.2 billion.[3]

[2] Many of these entities are Debtors in these proceedings.
[3] Consolidated Financial Statements, 2004-2005, Crescent Resources, LLC, attached as Exhibit 1.

27. Crescent Resources' low-leverage model was critical to its long-term operating plan, because it allowed Crescent to invest the significant project expenses necessary to develop its raw land holdings and thereby generate income from finished lots. Even with the low-leverage business model, however, Crescent needed its Duke parent to provide two critical financial benefits. First, Duke was the source of substantial cash advances to Crescent during the frequent periods of limited cash flow. These advances often amounted to hundreds of millions of dollars annually and were essential to Crescent's ability to develop and market its residential communities in an orderly fashion. Access to the Duke treasury also meant that Crescent did not need to rely primarily upon the sale of its Legacy Lands in order to meet cash requirements, and could operate as an ongoing real estate development company.

28. The second financial benefit that Duke furnished was as guarantor of Crescent's development bonds and letters of credit. As is customarily the case with real estate development companies, substantial performance and payment bonds were required as a condition to approval of entitlements by government agencies. Crescent did not have the independent financial ability to obtain such bonds, and relied on Duke's credit in that regard.[4]

29. At the time of the 2006 Duke Transaction, due in substantial measure to its low levels of leverage and the financial backing of Duke, Crescent considered itself to be "one of the pre-eminent diversified, multi-product real estate development companies in

[4] As of the 2006 Duke Transaction, the cumulative value of such bonds approached onequarter of a billion dollars.

the United States." Its stated business plan going forward was to "continue portfolio diversification and to seek new acquisition and development opportunities."[5]

30. But the 2006 Duke Transaction destroyed Crescent's ability to operate as it had historically operated, and deprived Crescent of the resources necessary to continue in business. That Transaction immediately rendered Crescent's business model unsustainable, only invalidated the assumptions underlying its supposed solvency,[6] and assured Crescent's demise and the many other valuation errors contained therein.

C. Duke's Domination of the Debtors

31. From its inception through the closing of the 2006 Duke Transaction, Crescent Resources was operated as the real estate division of Duke Energy. Duke Ventures was the sole owner of Crescent Resources and the affairs of Crescent Resources were completely and totally controlled by Duke Energy and Duke Ventures. Moreover, the same individuals that made decisions for Duke also made decisions for Crescent Resources. Duke Energy employees often sat on Crescent Resources' Board of Managers and the Duke Transaction Review Committee was empowered to review and approve any significant transactions by Crescent Resources.

32. Duke Ventures, LLC was created in December of 2000. In 2006, its Managers included Defendants Fields and Mogg. Defendant McGee had previously served as its Treasurer. In 2006, its president was Defendant Trent, who also served, at various times, as President of Duke Energy's Commercial Business Group, its Chief Strategy, Policy, and Regulatory Officer and as its General Counsel, Litigation.

[5] Crescent Resources LLC, Senior Secured Credit Facilities, October 2006, Page 9, attached as Exhibit 2.

[6] For reasons addressed below, the 2006 Duke Transaction rendered Crescent immediately insolvent under the "balance sheet test," the "ability to pay debts as they become due" test, and the "inadequate capitalization" test.

33. Crescent Resources, was also created in December of 2000. At that time, three of Duke Ventures' Managers also comprised the majority of the Board of Managers of Crescent. By 2006, the Crescent Resources Managers included Defendants Fields, McGee, and Mogg. Defendant Fields also served as Crescent Resources' President and CEO. Defendant McGee served as its CFO. Also serving as a Manager of Crescent Resources was Defendant Mogg, who simultaneously served as Advisor to the Chairman of Duke Energy. Thus, at all times relevant to the 2006 Duke Transaction, the majority of Crescent Resources' Managers were on both sides of the transaction - ostensibly serving Crescent Resources but simultaneously serving Duke.

34. On information and belief, the Duke Transaction Review Committee (comprised of Duke Energy officials) approved the 2006 Duke Transaction for both Duke and Crescent Resources.

35. The Formation and Sale Agreement between Duke Ventures, Crescent Resources, and certain entities affiliated with Morgan Stanley[7] was executed, on behalf of Duke Ventures, by Defendant Trent, and on behalf of Crescent Resources, by Defendant Fields (who was also a Member of Duke Ventures).[8] The Credit Agreement was executed on behalf of Crescent Resources by Defendant McGee (who had previously been Treasurer of Duke Ventures).[9] The loan proceeds were paid first to Crescent Resources, and then to its new parent, Crescent Holdings, LLC. From there, they were passed through Duke Ventures and perhaps Duke Capital, to Duke Energy.

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[7] These entities are Morgan Stanley Real Estate Fund V U.S. L.P.; Morgan Stanley Real Estate Fund V Special U.S. L.P.; Morgan Stanley Real Estate Investors V U.S. L.P.; MSP Real Estate Fund V U.S. L.P.; and Morgan Stanley Strategic Investments, Inc.

[8] Formation and Sale Agreement Dated September 7, 2006, attached as Exhibit 3.

[9] Credit Agreement Dated as of September 7, 2006, attached as Exhibit 4.

36. Crescent Resources did not receive independent and conflict-free legal advice with respect to the Transaction. Though Robinson, Bradshaw & Hinson, P.A. ("RBH"), a North Carolina law firm, represented Crescent Resources in connection with the 2006 Duke Transaction, RBH also had long-standing ties to Duke Energy and its affiliates, and now claims to have represented *Duke* in the same transaction. Although RBH owed its loyalty to Crescent, Duke in fact controlled the activities of RBH before, during, and after the 2006 Duke Transaction. Indeed, Duke's domination of Crescent and its counsel is so complete that Duke now contends Crescent was unrepresented by counsel in connection with the 2006 Duke Transaction, a remarkable contention given the magnitude of the Transaction and the danger it posed to Crescent Resources and its subsidiaries.

37. The idea for the 2006 Duke Transaction was apparently developed jointly between Duke and its financial advisor, Morgan Stanley, during 2005. By mid-2005, senior Duke managers were aware of several facts: first, that Duke's balance sheet and cash position would be adversely affected by Duke's merger with Cinergy in a $9.1 billion transaction; second, that federal regulatory agencies would, or might, require divestiture of Duke's land holdings; third, that the Crescent Resources real estate holdings were becoming increasingly volatile and posing great business risk; fourth, that the national employment picture, and the overall real estate market, were beginning to soften rapidly; and fifth, that the softening of the market was especially pronounced in those areas – both in terms of geography (such as Florida) and market segments (such as condominiums) - upon which Crescent Resources was heavily dependant. Because of these facts, it was determined that the time was right for Duke to try to monetize its

investment in Crescent Resources. In mid-2005, Duke announced its plan to dispose of Crescent Resources.

38. As Duke Chairman and CEO James E. Rogers explained after the fact, in his 2006 Statement to Shareholders: "We reduced our earnings volatility and business risk by selling…our real estate development company, Crescent Resources."

D. The 2006 Duke Transaction

39. Rather than simply selling Crescent Resources on the open market, aggressively courting joint venture partners, or revising the business plan of Crescent Resources to favor a more aggressive selling strategy (each of which was expressly considered by Duke, in consultation with Morgan Stanley), Duke instead devised a plan that was intended to, and did, maximize the capital to be transferred from Crescent Resources to Duke. Unfortunately, that plan was devised with little or no regard to the financial risk that it posed for Crescent Resources, its subsidiaries, and their many creditors. Indeed, as the form of the transaction took shape, its structure guaranteed that Crescent Resources, and its subsidiaries, would be rendered insolvent by the Transaction.

40. The 2006 Duke Transaction (code-named "Galaxy") closed on September 7, 2006. In its final form, the Transaction consisted of the following elements: (a) Crescent borrowed nearly $1.6 billion against the newly-inflated value of the assets (including a Term Loan of $1.225 billion, a Revolver Loan of $200 million, a Letter of Credit Loan of $100 million, a Swingline Loan of $50 million, and closing costs in excess of $30 million) from Bank of America and Morgan Stanley; (b) Crescent, on paper, 'stepped-up' the 'value' of its assets by $544 million in order to justify, albeit falsely, a loan of this magnitude; (c) Crescent caused its Debtor subsidiaries to guarantee

the loans; (d) Crescent immediately transferred $1.187 billion of the term loan proceeds to its parent, Duke Ventures (which in turn went to Duke Energy's financial statement); (e) Duke created Crescent Holdings, LLC, a new holding company for all of the Crescent Debtors; (f) Duke sold a 49% interest in that holding company to certain Morgan Stanley real estate funds for $415 million; and (g) Crescent Holdings provided for the transfer of a 2% interest in the new holding company to Defendant Fields, then Crescent Resources' President, and CEO. The net effects of the 2006 Duke Transaction were: (i) to put $1.6 billion in cash into the pockets of Duke, (ii) to place $1.6 billion of debt on Crescent, and (iii) to simultaneously render the Crescent Debtors insolvent.

41. The first component of the 2006 Duke Transaction was to obtain a credit facility for Crescent Resources that would generate maximum funds for distribution to Duke, without regard for whether that loan could actually be repaid by Crescent Resources and/or its guarantor subsidiaries. But the repayment terms for that loan, in fact, bore no relation to the revenues Crescent Resources historically had generated, and no relation to what it could be expected to actually repay under its existing business plan. This was evident from the fact that the Term Loan component of the $1.225 billion loan had no principal payment for nine quarters and only one-quarter of 1% in quarterly principal repayment thereafter. Even more significantly, the loan matured in 2012, at which time Crescent Resources was to repay the outstanding principal balance in full. Prior to that time, Crescent Resources was to have paid down only 4% of the principal, as well as the interest expense on the loan. However, these were not small sums. The principal to be repaid between the funding of the loan and its maturity date was $64

million, and the interest for the first year of the term loan alone equaled approximately $87 million.

42. With respect to the second component--creating a 'value' of Crescent Resources far in excess of the $1.2 billion value then carried on Crescent Resources' books – that exercise had two parts. First, the transaction proponents arranged to have a "valuation" done by Morgan Stanley regarding the supposed 'fair market value' of Crescent Resources and its subsidiaries; second, they arranged to have an auditor (PricewaterhouseCoopers) perform a post-Transaction accounting "step-up" to conform the accounting records to the new "valuation."

43. But there were several problems with this re-valuation. First, the valuation was performed as of December 31, 2005 and the real estate market was in rapid decline between that date and the transaction closing in September of 2006. Second, the "valuation" itself was largely a regurgitation of Crescent Resources' management's (i.e. Duke's) own value projections and attributed significant value to potential future projects not yet even approved, much less underway. The valuation was also extremely aggressive and was, as admitted by the party who performed it, "at the upper end of the [value] range", and "comfortably exceeding the observed trading multiples of high quality land-rich public homebuilders". As Morgan Stanley also admitted, "the valuation on a per acre basis, the best statistic for meaningful comparison, is greater than that of comparable land companies." Thus the valuation overstated, and was known by Defendants to have overstated, the value of Crescent Resources and its subsidiaries at the time. Third, even though the transaction, as structured, effectively required the liquidation of Crescent, there was no liquidation analysis or similar valuation performed.

44. As noted, it was only after the closing that an audit firm – PricewaterhouseCoopers – was engaged by Crescent Resources to substantiate the valuation in a so-called "step up analysis." But this exercise was more an allocation of the original purchase price than a rigorous test of the fair market value of the assets. It too was predicated on cash flow and revenue assumptions furnished by Crescent Resources (*i.e.*, Duke) management – projections that were demonstrably wrong even by the closing date itself, much less by the first quarter of 2007, when the "step-up analysis" was actually performed.

45. The next step in the 2006 Duke Transaction was to create a holding company for Crescent Resources (*viz.*, a new Delaware Limited Liability Company named Crescent Holdings, LLC) and to find a buyer to purchase a portion of that company. To that end, Duke already had an insider ready, willing, and able to participate: Morgan Stanley, its investment advisor in connection with the 2006 transactions. In its own interest and capacity, Morgan Stanley had brought certain Morgan Stanley Real Estate Funds to the table in approximately May of 2006, and arranged to sell a 49% interest in Crescent Holdings, LLC to those funds.

46. The 2006 Duke Transaction was orchestrated by and under the domination of Duke and entirely for the benefit of Duke, in complicity with numerous senior executives of Duke and Crescent Resources, including the individual Defendants. Although the RBH law firm formally represented Crescent Resources in connection with the transaction, RBH gave no independent advice to the Crescent Resources Board.

47. Moreover, there was no legitimate business rationale for saddling Crescent Resources' ongoing operations with such enormous debt, save and except to enrich Duke

at the expense of Crescent Resources, its subsidiaries, and their creditors. In 2005, Crescent Resources' President and CEO, Defendant Fields, had heralded, as a key part of Crescent Resources' business, that its project debt levels were modest. Fields nevertheless, and in exchange for substantial personal financial benefit, expressly approved the previously unheard of level of debt in this transaction.

48. On information and belief, Crescent Resources was also required by Duke to pay in excess of $30 million in transaction costs in connection with the closing of the transaction. Included within these amounts were $5.5 million of loan proceeds wire transferred to Duke Ventures, $3.5 million of loan proceeds wire transferred to Morgan Stanley entities, (both being payments of "the good faith estimate of expenses incurred") and approximately $15 million in lender fees.

49. In anticipation of the subject financing, Crescent Resources does not appear to have altered or modified its business plan in any material respect that would allow it to support the new and high level of debt that Duke had imposed on it.

50. Interestingly, the 2006 Duke Transaction follows the pattern evident in a number of similarly opportunistic transactions, occurring in the same time frame, in which principals sought to liquidate their interests in ventures based on unsupportable and excessive valuations. The courts have soundly rejected such transactions where they have injured creditors – as in, for example, the *Yellowstone Club* and *ASARCO* transactions.

E. Key Market Conditions at the Time of the Transaction

51. As discussed above, the market conditions deteriorated significantly in Crescent's areas of development from the summer of 2005 until the closing in the fall of

2006. Sales dropped precipitously and new orders tied to home development dropped even harder. Despite these changing market conditions, the underlying inputs and assumptions in the valuations (including the Morgan Stanley Credit Model, the PriceWaterhouseCoopers step-up model, and the Crescent balance sheet) were not adjusted to take into consideration the changing market conditions. Consequently, the valuations did not properly reflect, among other factors, risk, timing, pricing, project viability, market absorption rates or costs of development.

52. Nor did the valuations take into consideration the high leverage that Crescent Resources was taking on in this market. After the Transaction, Crescent had significantly more leverage than other comparable real estate companies and required a significant adjustment of the discount rate for the higher risk profile.

53. In short, Duke attempted a very highly leveraged transaction in a deflationary market – the results of which were predictable and devastating to the innocent creditors swept along in its wake.

F. Financial Constraints Imposed by the Transaction

54. First and foremost, of course, the 2006 Duke Transaction saddled Crescent with $1.6 billion of debt. That alone turned Crescent's balance sheet upside down and, despite the revolving lines of credit, left the company without sufficient capital to implement its business plan. Many other features of the Transaction, too were inconsistent with Crescent's survival.

55. The Credit Facility provided for (i) a $200 million revolving line of credit, (ii) $100 million in availability for Letters of Credits, and (iii) a $50 million swing line commitment. [Credit Facility ¶2.01] However, this "availability" was subject to the

requirement that Crescent maintain $50 million in liquidity at all times [Credit Facility ¶8.12], and that Crescent assume responsibility going forward for obtaining and financing bonds and letters of credit previously obtained and financed by Duke (which at the time of the transaction was approximately $226 million) [Formation and Sale Agreement ¶6.8] Thus, the true availability of credit for Crescent under the Credit Facility was extremely modest, given Crescent's typical cash needs, and was well under the historical requirements of the business.

56. Moreover, the Credit Facility's negative covenants assured that Crescent would be unable to go to outside sources of capital to make up this shortfall. The agreement provided that Crescent was severely restricted in its ability to (i) incur new indebtedness [Credit Facility ¶ 8.3], (i) grant additional liens on its pledged assets [Credit Facility ¶ 8.1], or (iii) obtain outside investment [Credit Facility ¶ 8.2]

57. In addition, the debt burden created by the $1.225 billion Term Loan was unserviceable. The Term Loan had (i) annual interest payments of at least $87 million, (ii) with no principal payments for nine quarters and only one-quarter of 1% quarterly principal repayment thereafter, and (iii) a balloon payment of all outstanding principal in 2012. As things stood on September 7, 2006, then, Crescent had no present expectation that it would be able to repay the principal amount of the new debt, and every expectation that it would be required to divert cash flow from much needed operating capital just to make the annual interest payments.

58. Finally, the Credit Facility came with rigorous financial covenants. First, Crescent needed at all times to maintain a net worth of $500 million post-transaction. Second, Crescent needed to meet certain EBIDA targets in order to avoid a cash trap or

outright financial default. These financial covenants were such that, from the date of closing, Crescent's management knew that it would be in violation of one or more of the covenants set forth in section 8.12(c) of the Credit Agreement for each of the years 2007, 2008 and 2009.

G. Effect of the Transaction on the Business of Crescent

59. The Credit Agreement requirements had a devastating effect on Crescent. First, and most critically, development was constrained by the limited cash available for capital expenditures, by the lack of bonding capacity, and by the inability to obtain project-specific financing. Crescent, as a result, was unable to continue with its development operations, could no longer sustain its planned operations, and was immediately and fatally imperiled as a result of the Transaction.

60. In addition, the debt-service burden (as to interest alone) and the required EBIDA targets, meant that Crescent had to sell its Legacy Lands, at "fire sale" rates, in order to generate cash. Those fire sales of raw land were required just to meet quarterly financial requirements of the Credit Agreement.

61. Given these realities (the inability to develop properties according to plan, coupled with the urgency of selling Legacy Lands) Crescent was, effective upon consummation of the 2006 Duke Transaction, an unsustainable operation. In could not meet its development projections, could not operate as a self-sustaining real estate operation, and, as its asset base dwindled and revenues lagged, had no hope whatsoever of making the balloon payment in seven-years time.

H. The Parties' Roles in the Transaction

1. Duke Energy

62. The fact that Duke retained a 49% interest in Crescent is not an indicator that Crescent was solvent, or even that Duke believed Crescent was solvent, upon completion of the 2006 Duke Transaction.

63. Instead, the structure of the transaction actually reflects the opposite: First, the transaction was motivated by a corporate strategy of generating cash through a divestiture of non-core businesses such as Crescent, and Duke was advised that the maximum cash *for Duke* could be generated through what it euphemistically labeled as a 'leveraged recapitalization' of Crescent, i.e., by loading as much debt on Crescent as possible. Moreover, a sale or spin-off would have required a truly independent valuation, which this transaction did not.

64. Second, Duke was well aware of the deteriorating real estate market and was anxious to consummate the transaction because it knew that the inflated real estate values of 2005 and early 2006 were already in decline.

65. Third, Duke was fully aware that the transaction required liquidating Crescent. This fact was apparently not revealed to the investor and lender groups.

66. Finally, Duke's motivation in retaining an interest in Crescent, apart from the fact that it could do so while still sucking out most of the value of Crescent, was not due primarily to confidence in Crescent's solvency. It was due to what it styled the "political need" to give the investors in (and the regulators of) its utility business the perception that Duke remained in control of Legacy Lands that might be needed in connection with future power generation projects.

67. The transaction, as structured, allowed Duke to take as much or more cash out of Crescent than it would have received by selling the entire entity. The purpose of the Transaction was to allow Duke to cash out its interest in Crescent and shift the risks of Crescent's failing business onto creditors. In fact, Duke's credit rating improved once the transaction closed and Crescent's liabilities left Duke's balance sheet.

2. Morgan Stanley

68. Morgan Stanley's role as a supposed investor and lender does not suggest that it performed an arm's length independent valuation, much less a conclusive determination of solvency. Instead, Morgan Stanley's various roles in the transaction strongly suggest otherwise.

69. First, in its role as an investment banker performing a preliminary valuation upon which to price a transaction (a role Morgan Stanley withdrew from as MSREF became a potential investor), no appraisals, discounted cash flow analyses, or other rigorous valuation was performed to support the initial $2.1 billion valuation. Indeed, subsequent iterations of this informal valuation work arrived at values less than the $2.1 billion valuation required to make the deal for forward. Moreover, the valuation returned to $2.1 billion as of December 31, 2005, but it was never adjusted to reflect the deteriorating market conditions, or the corresponding deteriorating performance of Crescent, between that time and closing in September, 2006. Nonetheless the $2.1 billion valuation was required by Duke as a condition of the transaction, and the valuation work by MSREF, the preparation of the so-called 'credit model', was little more that an exercise to develop a 'plug figure' that would bring the value of Crescent back to the required valuation. As one Crescent participant noted three months before the

Transaction closed:

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70. Second, in its role as an "investor" in Crescent, MSREF was not an actual investor but rather a promoter seeking to place the funds of others. Once again, its compensation was determined not by the success of the investment, but rather by the fact that the transaction closed. (MSREF's fees in connection with the transaction are estimated to be in excess of $8 million.) Not surprisingly, MSREF has been sued by some of its institutional investors for failing to conduct adequate due diligence on its real estate investments. As Crescent observed at the time

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71. Third, in its role as lender, Morgan Stanley Senior Funding, Inc. did not actually retain any exposure on the loan, but instead syndicated 100% of its interest in the loans.

72. The 2006 Duke Transaction gave Morgan Stanley a way to raise $415 million from its investors, launch a major new fund, and earn roughly $8 million in additional asset management fees on top of the fees it was earning as a financial advisor and lending syndicate arranger. As recently documented in the report of the Financial Crisis Inquiry Commission, Wall Street greed and profit motives (both organization wide and individually through incentive packages) are ever-present and often lead even major

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[10] Notes entitled "Status Call 6/13/06",, attached as Exhibit 5.
[11] Notes entitled "Meeting with Keith Trent to Update Debt Financing 6/29/06", attached as Exhibit 6.

financial institutions to enter into transactions without sufficient due diligence or proper judgment.

73. Finally, MSREF did not do anything pre-closing to ensure that Crescent's 2006 performance was living up to the model's projections. There was no accounting "bring down" or "true up."[12] The transaction closed in September of 2006 based on a valuation prepared at the end of 2005 – a bizarre course of dealing for a $415 million investment.

74. In fact, Crescent's business declined rapidly through 2006 and the late-2005 model bore little resemblance to the reality as of the time the deal closed.

75. These facts do not suggest that Morgan Stanley determined Crescent's solvency, much less that it did so conclusively.

3. Bank of America

76. Bank of America's role does not suggest that an arm's length lending relationship supported a $2.1 billion valuation. First, Bank of America expressly relied on Morgan Stanley's flawed credit model. Second, the Bank, which had a financial relationship with Duke that reportedly dwarfed this transaction, was pressured by Duke to make the loan. Third, Bank of America syndicated the loan, i.e. reduced its exposure, after numerous problems with the Morgan Stanley credit model had become apparent. As with Morgan Stanley Senior Funding, Bank of America kept little of the loan exposure after syndication. As best as can be determined, Bank of America received

[12] In fact, Morgan Stanley, after initially lowering its valuations in late 2005 and early 2006, raised its later valuation to the amount required in the Duke term sheet in order to keep the value at its 2005 number despite numerous market reports and project-specific information that clearly demonstrated that its projections were far too optimistic.

more than $13 million in fees on the transaction, and held only $50 million of the loan after syndication.[13]

4. Arthur Fields

77. Crescent CEO Arthur Fields initially opposed the transaction and argued in favor of keeping Crescent under Duke ownership.[14] This was because, as Fields observed shortly after the closing, without Duke's credit the company lacked the working capital it needed to survive. Then Duke paid Mr. Fields $38 million in cash when the Transaction closed and, based on the transaction valuation, Fields's interest in Crescent Holdings was valued at an additional $16 million, for a total payout of some $55 million.[15] Mr. Fields then approved the Transaction.

78. These facts do not support any inference that Fields' approval of the Transaction is evidence of the solvency of Crescent.

I. Insolvency

79. In fact, the 2006 Duke Transaction rendered Crescent Holdings, Crescent Resources, and each of its Debtor Subsidiaries insolvent. Crescent Holdings and Crescent Resources were both liable on the debt created by the transaction, and the Crescent Debtor Subsidiaries were guarantors of the debt. The fact that those Crescent Resources subsidiaries who were not required to guarantee the debt did not join in the

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13 Bank of America Letter to Crescent Resources dated September 5, 2006. attached as Exhibit 7; E-mail from Charles Wilson to Brent Bowman, Henry Lomax, Kevin Lambert, Peter Harned, Stephen De May, Kevin Donnelly (February 20, 2007), attached as Exhibit 8.

14 See, Powerpoint slides entitled "Crescent Resources, Art Fields President and CEO, November 2005", attached as Exhibit 9.

15 Arthur Fields' proof of claim actually suggests that the "compensation" owed Fields was not based upon a compensation package based upon Crescent's income or earnings, but rather the fee/commission was calculated based upon the "stepped up" valuation used in the 2006 Transaction. Thus, Fields profited enormously through the speculative, highly leveraged transaction.

Bankruptcy filings underscores the fact that it was the crushing debt that Duke imposed on the Debtors that led to their bankruptcies.

80. Crescent Resources, Crescent Holdings, and the Debtor Subsidiaries were rendered 'insolvent' as a result of the 2006 Duke Transaction under a number of tests, each of which is independently sufficient to trigger avoidance of the transaction. First, they were left with unreasonably small capital to operate its business. Second, they were unable to pay their debts when they became due. Third, they were rendered insolvent because their post-transaction liabilities exceeded their post-transaction assets at a fair valuation.

81. Numerous creditors existed at the time of the 2006 Duke Transaction whose claims arose on or before the date of that transaction and remained unpaid at the time of the bankruptcy filing at both Crescent Resources and its Debtor Subsidiaries.[16] These claims derive from, among other things, (i) letters of credit, (ii) bonding obligations, (iii) swap agreements, (iv) unsecured notes, (v) guaranties, (vi) trade payables, (vii) development and completion agreements (viii) unfulfilled golf club obligations, (ix) executive compensation, long term bonus and retention plans, (x) tax claims (over three years old), (xi) land, tank, construction, building and timber fees and deposits, (xii) environmental claims for damages, and (xiii) breach of contract claims. In total, well over a thousand innocent creditors of Crescent Resources and its Debtor Subsidiaries filed claims for debts that were incurred prior to or within a reasonable time after the 2006 Duke Transaction. These creditors were the victims of Duke's greed and its improper, ill-conceived, and grossly over-leveraged distribution scheme.

[16] "Pre-Transaction Unsecured Claims," attached as Exhibit 10.

1. Balance Sheet Insolvency.

82. At the time of the 2006 Transaction, Crescent purported to have, on a balance sheet basis, \$2.35 billion in assets and a net worth of \$822 million.[17] In fact, as a result of the 2006 Duke Transaction, Crescent had an immediate negative net worth because (a) its assets were overstated; (b) its liabilities were understated or disregarded entirely; and (c) the market had deteriorated during the eight months between the date on which the assets were valued and the closing of the Transaction.

a. Overstatement of Assets.

83. Crescent's assets were overstated on a balance sheet basis in a number of ways, both in terms of improper valuation procedure, and improper values ascribed to particular assets.

84. With respect to the methodology employed by parties to the transaction:

- The step-up valuation was improper as a matter of accounting practice, and it falsely increased the book value of Crescent's assets by \$544 million. In the absence of the improper step-up, the maximum equity that could have been reported was \$273 million (i.e., reported net worth of \$817 million, less step-up adjustment of \$544 million), setting aside for the moment additional adjustments for the excessive valuation of LandMar and other properties and the many other valuation errors contained therein.

- In addition, the methodology employed under the step-up analysis did not properly take into consideration the market deterioration and the fundamental changes imposed upon the company by the 2006 Transaction and the resulting lack of sustainability of the business model. The analysis erred, as did the valuations, in the application of inputs and assumptions based upon such factors as market risk, timing, price, project viability, market absorption rates and cost of development.

- Moreover, as recognized by Crescent's management, the post-transaction entity was (i) more highly leveraged than other similar developers, (ii) valued at a significantly higher trading multiple than other similarly

[17] Consolidated Financial Statements, 2006, Crescent Resources, LLC, attached as Exhibit 11.

situated companies, and (iii) valued on a per acre basis at a significantly greater value than other similarly situated companies.

85. With respect to specific values ascribed to assets in the Morgan Stanley Credit Model and other valuations:

- The valuations attribute value to potential future projects not yet even approved, much less committed or underway at the time of the 2006 Transaction.

- The valuations used cash flow and revenue assumptions furnished by Crescent Resources (i.e. Duke) management – projections that were demonstrably wrong even by the closing date, much less by the first quarter of 2007, when the "step-up analysis" was actually performed, with the result that the subject asset values under its discounted cash flow models.

- The valuations failed to consider the actual results for Crescent Residential sales, which had fallen behind budgeted sales by at least $274 million by the time of the 2006 Transaction.

- Specific property valuations were knowingly overstated, and it was known by Defendants that the value of Crescent Resources and its subsidiaries had been overstated at the time.

- The valuations failed to take into consideration the fact that capital expenditures would be immediately cut by 40% and this reduction would have the immediate effect of delaying and reducing certain anticipated project revenues - while eliminating others altogether.

- The valuations failed to take into consideration that the terms of the loan made it impossible to maintain the capital requirements necessary to develop and market Crescent's projects in the manner anticipated in its financial models.

- The valuations failed to take into consideration the lack of available cash flow during the first three quarters of 2006 and the fact that this shortage of cash would foreclose Crescent's ability to make payments and fail to account for either (1) the substantial reduction in principal anticipated by the models in 2006; or (2) the consequences to future years of the interest burden on available cash flow otherwise attributed to development projects.

- The valuations were done as going concern values and never properly took into account the unsustainability of the operations triggered by the Transaction.

b. Understatement of Liabilities

86. The sensitivity analysis performed by Morgan Stanley in connection with its valuation work recognized that a loss of sales at a given percentage would cause a corresponding decrease of assets on Crescent's balance sheet. More specifically, Morgan Stanley determined that for every 2% decrease in residential sales the enterprise value would be reduced by $45 million. Applying that ratio to the actual facts, because actual residential sales were off plan by 19.49% for fiscal 2006 (and off of the original budget by even more), the decrease in assets due to the loss of sales between the time of Morgan Stanley's valuation and the time of closing was at least $438 million.

87. In addition, there was no recognition of the following liabilities: (a) the bad debt arising from the $200 million LandMar note receivable to Crescent; (b) the significant deductions of value caused by the immediate 40% reduction in cap-ex available for operations; (c) the failure to recognize the $226 million of various project bonds and letters of credit that Crescent Resources was obligated to take-over from Duke under the Formation and Sale Agreement; (d) the eve-of-transaction decision not to include $79 million of indebtedness in the Shipyard project as a liability; and (f) the non-recognition of project development contractual obligations that Crescent was no longer going to be able to perform (such as community development contractual obligations).

88. Other specific liabilities not accounted for, include:

- Based upon the valuation, it was anticipated that by the time of the transaction approximately $306 million in positive cash flow should have been available to pay down the principal amount of the Term Loan. The failure to have produced this positive cash flow and to have made the anticipated interest payment has a present value (reduction in asset value) of approximately $190 million.

- Due to the cash constraints imposed by the 2006 Transaction, numerous major projects were never completed or stopped. These projects had an equity value attributed to them in excess of $100 million.
- LandMar had a negative net worth by the 2006 Transaction date. Consequently, the asset values of Crescent were overstated by both (i) the purported equity value of $237 million and (ii) the intercompany obligation of LandMar to Crescent (in a face amount of $200 million).
- The financial model failed to account for significant cost overruns that were incurred prior to closing of the Transaction.

c. Date of Valuation

89. The projections upon which the "step up valuations" were done were based upon a value rooted in late 2005. Moreover, neither Crescent management's internal numbers supporting the initial equity value, nor the discount factor or risk assessments associated with such valuation, were updated or revised as the company and the markets in which it operated suffered setbacks in the months leading up to the September, 2006 closing.

90. After closing, the 2006 year-end valuation of Crescent Resources' assets was far in excess of the actual value of those assets, given the actual market conditions existing at the time of closing. By the time of the closing of the 2006 Duke Transaction, the parties were aware that market conditions had soured. Thus, even if the Morgan Stanley valuation had been accurate as of the end of 2005 – which it was not – adjustments to reflect market deterioration were required prior to closing. Duke and Crescent Resources were both aware of this deterioration, as evidenced by, among other things, the following:

- In March 2006, six months before the 2006 transaction closed, a three-year budget was prepared by Crescent Resources. That budget projected a decline in real estate profits from $259 million in 2006, to $196 million in 2007, and to $169 million in 2008.[18]

- That same March, 2006 Crescent Resources budget projected a cash trap scenario for all three years of that budget under then-existing market conditions and loan covenants. In particular, that budget noted that the LandMar and condominium markets had softened dramatically from the original credit model.

- In August 2006, a month before the 2006 Duke Transaction closed, Crescent Resources' management publicly observed that the key Gulf Coast Market had slowed.

- In the fall of 2006, Crescent Resources' management publicly observed a national slowdown in home sales, and continued softness in the residential sector, primarily in Florida.

- The 2006 Duke 10-K, issued in March 2007, noted a $274 million decrease in Crescent Resources revenue due, in part, to "softening in the residential real estate market."

- In the third quarter of 2005, a $16 million impairment charge was taken against the Oldfield project, one of Crescent Resources' properties.

91. Just prior to the closing of the Transaction, both Duke and Crescent managers expressed their understanding that the market had deteriorated significantly since the valuation was initially determined.

92. Together, the failure to properly adjust the valuation models, and the overstatement of assets and the understatement of liabilities discussed above, demonstrate that Crescent Resources and its subsidiaries were immediately rendered insolvent on a "balance sheet" basis at the time of the Transaction, with its liabilities far exceeding its assets at a fair valuation.

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[18] Crescent Resources LLC, 2006 Budget, attached as Exhibit 12.

2. **<u>"Unreasonably Small Capital"</u>**

93. The "unreasonably small capital" test is an independent test upon which a determination of insolvency may be based. The test is met by showing that the remaining assets of the Debtors were unreasonably small in relation to its business. Such a showing is easily made because, among other things, Crescent experienced an immediate "cash trap" under the Credit Facility, had insufficient funds for the capital expenditures necessary to meet its business plans, and was forced immediately into an unsustainable mode of operation.

94. Prior to the 2006 Duke Transaction, Crescent Resources had a long-history of borrowing cash from Duke to meet its liquidity needs. With the 2006 Duke Transaction, Crescent Resources was cut off from this potential source of funds. Moreover, the revolver and swingline loans provided insufficient capitalization for Crescent to meet its cash needs, especially given the requirement that $50 million in cash be kept on-hand. In addition, as stated above, the terms of the loan made it impossible to maintain or obtain the capital historically needed to develop and market Crescent Resources' properties.

95. After the Transaction, the company attempted, unsuccessfully, to alleviate this condition by immediately cutting its capital expenditure budget by 40%. This had the effect of 'boosting' its immediate cash and balance sheet positions, but also made it unable to continue to develop and sell real estate, thus forestalling, but further assuring, Crescent Resources' demise.

96. The $350 million of loan proceeds retained by Crescent did not make Crescent solvent. The $350 million was the only operating capital that was actually for

Crescent's use. It was, as recognized by Crescent management, woefully inadequate capitalization to support its ongoing activities and developments, as Crescent's sales projections simply could not be generated without substantially greater capital expenditures. Because of this inadequate capitalization too, Crescent was insolvent from the moment of the 2006 Transaction. This inadequate capitalization manifests itself in many ways, among them, again, in the immediate cut-back of approximately 40% in capital expenditures, imposed even before the end of 2006; and in the breach of numerous of the Crescent Debtors' obligations to install infrastructure.

3. <u>"Inability To Pay Its Debts As They Come Due".</u>

97. The "inability to pay its debts as they came due" test is another independent test upon which a determination of insolvency may be based. This test is met by demonstrating that the transaction left the company with insufficient liquidity to fund its existing projects and left it unable to pay its debts or honor its obligations under various contracts and project development agreements.

98. Crescent simply could not meet its obligations under the terms of the 2006 Credit Facility for numerous reasons. First, the loan had precious little amortization during its term, and a balloon in seven years, and no business plan ever developed by Crescent contemplated raising sufficient cash to pay off the loan over such a term. More immediately, the terms of the 2006 loan were not performable because Crescent could not maintain the required liquidity of $50 million, and meet the fixed charge or EBIDA requirements necessary to avoid cash trap and financial covenant defaults, and still meet those debts as well as its other obligations.

99. The reality of Crescent Resources' insolvency is further demonstrated by its inability to perform under the loan covenants. Among other things, the loan documents required that Crescent maintain a ratio of EBIDA to certain fixed charges (such as interest, debt payments and lease obligations) of 1.75 (the "Fixed Charge Coverage"), and, further, that if the coverage fell to less than 2.00, it would trigger a cash trap requirement (a "Cash Trap Period").

100. By December 2006, less than 90 days after closing and before syndication of the loan was even completed, Crescent's new owners had reduced their cash flow projections. By January of 2007, Crescent management was projecting a Cash Trap Period to occur that quarter. In April of 2007 Crescent sought an amendment to the covenant definitions in order to postpone being in a Cash Trap Period. By the second quarter of 2007, Crescent formally entered a Cash Trap Period. As a result, Crescent Debtor Subsidiaries pledged, at the bank's request, all Deposit Accounts, effective August 24, 2007.

101. By the end of the third quarter of 2007, Crescent was also in breach of the Fixed Charge Coverage covenant. As a result, in June of 2008, the Crescent Debtor Subsidiaries were required to grant liens on all of the real properties.

102. By the second quarter of 2008, Crescent's auditor had advised it that a further Event of Default would occur due to the failure to meet the Adjusted EBIDA requirements. As a result Crescent and its owners began actively exploring bankruptcy as a solution to the continuing default.

103. At that same time – during the second quarter of 2008 – Crescent's limited liquidity was bolstered by the sale of $50.5 million of property to Duke Energy. The

express purpose of the transaction, known to both Duke and Crescent, was to avoid a monetary default on the loan in the second quarter of 2008. As one participant noted: if we "pull this off by the end of Q2"…"we have averted this crisis."[19] This transaction was not only intended to forestall the inevitable default, but also to postpone bankruptcy, and the resulting scrutiny of the 2006 Duke Transaction.

104. The 2006 Transaction left the company in an unsustainable mode of operation with insufficient liquidity to fund obligations for which the Debtors were already liable. As reflected on Exhibit 10, "the Pre-Transaction Based Unsecured Proof of Claim Chart," the liquidity problem prevented Crescent Resources and its subsidiaries from paying their existing debts and fulfilling their existing obligations. The problem became even more pronounced in the fourth quarter of 2006 and throughout 2007. The Debtors failed to meet their development obligations under such projects as the Shipyards, the Parks at Meadowview, the Austin condo project, Tussahaw (a/k/a Watermark), Beachscape, Payson, Sanctuary on Haw River and the Sheep Island (a/k/a Parks at Berkely) and left numerous landowners, builders, contractors and tradesmen unpaid and unsatisfied.

4. Insolvency – Conclusion

105. In summary, Duke (in concert with Mr. Trent and the Crescent Board of Managers) compelled Crescent Resources and the Debtor Subsidiaries to enter into a transaction that had no benefit to Crescent Resources, and that immediately rendered it insolvent. Indeed, the sole purpose of the transaction was to benefit Duke at the expense of Crescent Resources and its many innocent creditors.

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[19] E-mail from Kevin Lambert to Charles Wilson (March 19, 2008), attached as Exhibit 13.

J. Facts Specific to Allegations of Actual Intent Fraud

106. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

107. Defendants, and each of them, acted with the actual intent to damage Crescent and to hinder, delay, or defraud its then-existing and future creditors. It is undisputed that Crescent did not receive any consideration for the transfer of $1.187 billion to Duke, much less "reasonably equivalent value". Under these circumstances, fraudulent intent may be presumed. Moreover, there is ample evidence, both direct and circumstantial, of Defendants' actual fraudulent intent, including, without limitation, the following:

1. Improper Motivation for the Transaction

108. In late June of 2005, Morgan Stanley noted several factors prompting the Transaction. First, that from a regulatory standpoint, Duke might be required to divest all or a portion of Crescent; second, that Crescent would be facing depleting Legacy Land cash flows; and third, that "the current [inflated] real estate market may prompt near-term actions", i.e. that a sale or other disposition should take advantage of the then-existing real estate bubble.[20] A preliminary (and non-rigorous) valuation of $2.125 billion was placed on Crescent by Morgan Stanley at this time.

109. On July 19, 2005 Morgan Stanley reversed course and recognized that Duke might not need divestiture from a regulatory standpoint after all, but noted again that "current market conditions suggest near-term action."[21] Another preliminary valuation, this time of $2.05 billion, was placed on Crescent. Thus, from inception, a

[20] Morgan Stanley "Discussion Materials" (June 29-30, 2005), attached as Exhibit 14.
[21] Morgan Stanley "Discussion Materials" (July 19, 2005), attached as Exhibit 15.

primary motivation for the timing of the Transaction was for Duke to take advantage of what it knew to be a speculative real estate bubble.

110. Duke management also contemplated disposition of Crescent as a part of an overall Duke restructuring. In early April, 2006, management announced the "New Duke" that would focus on core utility operations and spin off its gas transmission business, its Crescent (real estate) operations, and other non-core business units.[22] In addition, Duke sought to restore its cash position in light of the merger with Cinergy. Duke needed cash in order to execute on its overall corporate plan and thus sought to maximize the cash that could be realized from the Crescent transaction, regardless of the true value of Crescent or the effect such a transaction would have on its creditors.

111. As a result, the term sheet between Crescent and MSREF required that Crescent have a valuation of not less than $2.1 billion in order for the Transaction to close, irrespective of the actual value of Crescent, as of the closing date.

112. Defendants' motive was to maximize the cash infusion to Duke, maximize the debt burden on Crescent (and its Creditors) and provide nothing by way of reasonably equivalent value to Crescent. To accomplish these goals, Defendants helped to create, and then exploited, a much-flawed valuation, which was, among other things, never adjusted to reflect the rapid deterioration of the real estate markets. Armed with this knowledge, yet nonetheless approving the 2006 Duke Transaction, and the transfer of $1.187 billion from Crescent to Duke, the Defendants committed actual intent fraud on Crescent and its Creditors.

[22] Power point presentation "The 'New' Duke Energy" (April 3, 2006), attached as Exhibit 16.

2. Valuation Irregularities

113. As the transaction began to take more definite shape, Crescent executives were increasingly concerned with delays given the deteriorating market. By mid-December of 2005, the Morgan Stanley valuation had also declined – to $1.8 billion.[23] Even this lower valuation, however, did not take into account the overstated assets and understated liabilities identified above.

114. As the Morgan Stanley credit model evolved, it first had numbers that were, according to Duke and Crescent, "too light" and thus were "updated."[24] Duke then pressured both Bank of America and Morgan Stanley to move forward with the Transaction, even though, as of mid-July, the Morgan Stanley credit model has still not been completed.

115. In fact, as set forth above, Defendants knew of the overstatement of assets, the understatement of liabilities, and the flaws in the timing of the valuation. Given their actual knowledge that the Morgan Stanley Credit Model was fatally flawed, they nonetheless approved the 2006 Duke Transaction, and approved the transfer of $1.187 billion from Crescent to Duke. In so doing, the Defendants committed actual intent fraud on Crescent and its Creditors.

3. Knowledge of the Deteriorating Market

116. As the transaction proceeded forward in the summer of 2006, Defendants knew that the real estate market continued to deteriorate.[25]

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[23] Morgan Stanley "Updated Valuation Package" (December 16, 2005), attached as Exhibit 17.
[24] E-mail from Kevin Lambert to Charles Wilson (September 1, 2006), attached as Exhibit 18.
[25] June 13, 2006 Project Galaxy discussion materials and attached performance charts regarding real estate and homebuilding companies, attached as Exhibit 19.

117. The less than rosy outlook in the business plan had been articulated in the 2007 plan in which Crescent management noted deteriorating market conditions and "continued softness in the residential sector."[26]

118. As stated at length above, Crescent and Duke knew of substantial softening of markets, in Florida, Raleigh, and throughout Crescent's operations. Indeed, Crescent management, after the closing, downplayed any supposed surprise about the declining real estate market: As one executive wrote: "how could they NOT see it coming!"[27]

119. Defendants' actual knowledge of the deteriorating market conditions, and their approval and participation of the Transaction in spite of such knowledge, constitutes actual intent fraud on Crescent and its Creditors.

4. Knowledge of Insufficient Capital and Lack of Bonding Capacity

120. Well prior to closing, senior Crescent managers noted that the capital commitment portion of the loan would be insufficient for operating purposes. For example, on May 22, 2006 Crescent Senior Vice-President of the Commercial Division, Daniel Kohlhepp, issued a memo in which he questioned whether the [then] $400 million capital commitment was enough.[28] On June 5, 2006, in an e-mail exchange between Mr. Kohlhepp and Defendants Fields and McGee (Crescent's CEO and CFO respectively), Mr. Kohlhepp stated:

> Attached is a current active deal capital outlay of $500 million in 2006-2008: One of my biggest concerns is how do we bring 'new money' into Project Galaxy…[we have a] long list of capital requirements…[and] the

[26] Crescent Resources, LLC 2007 Business Plan Summary of Assumptions, attached as Exhibit 20.
[27] E-mail from James Mozley to James Page, John Yelverton, James Short, Thomas Glenn, Henry Webb, William Peacher (February 14, 2007), attached as Exhibit 21.
[28] E-mail from Daniel Kohlhepp to Arthur Fields and Robert McGee (May 22, 2006), attached as Exhibit 22.

> proposed debt structure looks like it will eat up available cash flow for awhile....There should probably be a portfolio or fund-like credit facility.

Defendant McGee responded that "I agree with you this is a big concern."[29]

121. Thus, Crescent's (and Duke's) most senior executives recognized that the 2006 Transaction would leave Crescent with capital that was inadequate to its needs and insufficient to execute its business plan.

122. Also, by July 27, 2006, Crescent acknowledged the Transaction would likely leave Crescent without the bonding capacity necessary to complete its projects. This impediment to continuing development was never addressed and, even after closing, on September 20, 2006 it was recognized that Crescent's primary bonding company would require additional outside collateral to continue to bond Crescent.

123. Immediately after closing, it was again recognized that there was insufficient operating capital for Crescent. Immediately after closing, Crescent management recognized that the existing capital provided by the Credit Agreement was insufficient.

124. Management dealt with this concern by presuming that MSREF, or perhaps Duke, would bring additional funds to the table. But there was no requirement they do so, and, in fact, when it later became necessary to have additional capital infused in order to avoid a default, both parties steadfastly refused to put their own funds in the failed venture.

125. Defendants' actual knowledge of inadequate capital and lack of bonding capacity, and their approval and participation of the Transaction in spite of such knowledge, constitutes actual intent fraud on Crescent and its Creditors.

[29] E-mail from Robert McGee to Daniel Kohlhepp, Arthur Fields, and Edward Burr (June 5, 2006), attached as Exhibit 23.

5. Knowledge of Unsustainable Operations

126. By late 2005, Crescent and Duke management and concluded that Crescent's earnings would be insufficient to establish a self-sustaining, and solvent, operation going forward once the term-loan debt of $1.2 billion had been imposed on it. This conclusion was not shared by Duke or Crescent with Morgan Stanley or Bank of America. Neither the "Bank Book" circulated to participating lenders, nor any MSREF materials of which the Trust is aware, have ever described the 2006 Crescent business plan as a liquidating plan.

127. Several communications prior to the Transaction closing, however, demonstrate Defendants' knowledge that the Transaction was not supportable. For example, notes of a June 13, 2006 meeting reveal

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."[31] And on September 5, 2006,

128. In addition, on June 1, 2006, Crescent's Vice-President of Capital Markets, Henry Lomax, wrote to Fields and McGee: "does MS envision bringing other

[30] Exhibit 5.
[31] Notes entitled "Galaxy Status – 8/28 2pm, attached as Exhibit 24.
[32] E-mail from Shawn Lese to Katherine Ettridge, et al (September 5, 2006), attached as Exhibit25.

funds to the table to make this a longer term proposition?"[33] Duke and Crescent management thus recognized that Crescent would not be able to operate as a self-sustaining, going concern.

129. As a result, and armed with the knowledge that the Transaction would require liquidation, within days of the closing Crescent, radically trimmed back its capital expenditures, including expenditures it had already committed to incur.[34]

130. Soon after the closing, Crescent managers understood what by then was obvious – that the cutback in capital expenditures meant Crescent was being liquidated absent a massive new infusion of capital. By April 2, 2007, Crescent was already discussing the need (barred by the existing Credit Facility) to raise an additional $700-800 million just to continue in business.

131. Defendants' actual knowledge of the fact that the Transaction would put Crescent out of business, and their approval and participation of the Transaction in spite of such knowledge, constitutes actual intent fraud on Crescent and its Creditors.

6. Knowledge of Loan Covenant Breach

132. Within a month after closing, Crescent and Duke determined that the same "step-up" accounting treatment required to create a sufficient net worth, would also cause problems under its loan covenants – specifically those requiring coverage tied to net worth. Crescent management recognized it would be necessary to renegotiate covenant levels." And by December 2006 those renegotiations were in full-swing.

133. Also, at the same time (and before the loan had even been syndicated), the Crescent 2007 Business Plan Summary of Assumptions was for sales to be down 14%

[33] E-mail from Henry Lomax to Arthur Fields, Robert McGee (June 1, 2006), attached as Exhibit 26.
[34] E.g., Answer to Amended Complaint and Counterclaims of the Parks at Meadowview, LLC (January 7, 2010)

and capital expenditures to be down 40%. In fact, the numbers were so bad that Crescent management delayed giving accurate information to the banks, perhaps because the syndication had not yet closed. At the same time, Crescent management recognized that a required accounting change would result in a cash trap and would take Crescent out of loan covenant compliance.

134. On February 20, 2007, the initial loan syndication closed. Morgan Stanley kept none of the term loan debt, and Bank of America kept only $50 million, and both institutions were looking to reduce their exposure by selling down their revolver positions.[35] Within six weeks, on April 13, Crescent submitted yet another loan modification request. Crescent's controller then noted that there is "more downside than upside to our current plan; and the current plan projects cash trap scenario for all three years (2007-09)."[36] This was followed by the observation that "we are projected to be in cash trap under fixed charge covenant all three years [2007-2009]." Indeed, the failure of Crescent to be able to comply with covenant levels was so clear that a senior Duke manager noted: "Given [Crescent] projections, I don't know how we can argue against increasing covenant levels...it was our choice to develop projections based on the most optimistic pricing outcome (which I remember arguing against)."[37] Further, on April 24, Crescent persuaded its auditors to "delay issuance of financials while we work on proposed amendments with lenders."[38]

[35]See, Exhibit 8.

[36] E-mail from Kevin Lambert to Peter Harned, Charles Wilson, Gregg Dawley, Robert McGee, Henry Lomax (March 13, 2007), attached as Exhibit 27.

[37] E-mail from Charles Wilson to Kevin Lambert, Gregg Dawley, and Peter Harned (March 12, 2007), attached as Exhibit 28.

[38] E-mail from Kevin Lambert to Keith Trent, Gregg Dawley, Robert McGee, Shawn Stine, Ryan Wheatley, Michael Zagora (April 24, 2007), attached as Exhibit 29.

135. Crescent also recognized, on June 17, 2007, that the lender participants, when they initially purchased the term loan, did not understand Crescent's business plan but instead "lenders bought based on rating and 300 point spread without knowledge of business plan."[39]

136. By August 21, 2007 Crescent was discussing its impending default on the loan with the Duke and Morgan Stanley members,[40] and projecting that default would occur at the end of the third quarter.[41]

137. Defendants' actual knowledge of the fact that the Transaction would result in immediate failure to meet the financial covenants of the Credit Agreement (which it did from the first quarter after closing), and their approval and participation of the Transaction in spite of such knowledge, constitutes actual fraud on Crescent and its Creditors.

7. The Aftermath

138. By the summer of 2007, not even three full quarters after closing on a loan that required no amortization during the period, bankruptcy was a certainty. The only question was when that bankruptcy would occur. It could be forestalled for a period by "attempting to offset residential shortfall by accelerating Legacy Land sales"[42] but, of course, as Duke officials noted: such "'fire sales are counterproductive since debt is not amortizing."[43]

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[39] E-mail from Kevin Lambert to Charles Wilson (June 17, 2007), attached as Exhibit 30.
[40] E-mail from Kevin Lambert to Charles Wilson (August 21, 2007), attached as Exhibit 31.
[41] Id
[42] E-mail from Levin Lambert to Lisa Bellucci (October 25, 2007), attached as Exhibit 32.
[43] E-mail from Charles Wilson to Shawn Stine, David Hauser, Marc Manly, Thomas O'Connor, Arthur Fields, Robert McGee, Kevin Lambert, Ryan Wheately, Stephen De May (November 20, 2007), attached as Exhibit 33.

139. As 2007 wound to a close, Crescent managers knew that all available credit had been tapped and the debt was being serviced by fire sales of Legacy Lands. The only remaining question was not whether Crescent was solvent, but rather how soon bankruptcy would need to filed.

140. The inevitable filing was forestalled for a period by continuing the Legacy Land fire sales, and by selling properties to Duke in an effort to prop up Crescent's financials, yet Crescent officers acknowledged the obvious: that "Project Galaxy" was really "Project Death Star"[44], and that Crescent's demise was caused by taking on too much debt.

8. Circumstantial Evidence of Actual Fraudulent Intent – "Badges of Fraud"

141. In addition to direct proof of actual fraudulent intent, Plaintiff may make such proof by circumstantial evidence: the so-called "Badges of Fraud." Numerous of these badges are present:

142. First, the transfer was made for little or no consideration (or not reasonably equivalent consideration) when both transferor and transferee knew of the claims of creditors, and knew, or should have known, that the transaction would leave Crescent unable to pay those creditors. Second, as a result of the transaction, the Debtor was insolvent or became insolvent. Third, the transfer was to an insider. Fourth, the Transferee retained control of the Debtor after the transfer. Fifth, the Debtor and Transferee concealed facts known to them, including, without limitation, that the

[44] Email from Todd Farrell to Kevin Lambert (February 12, 2009), attached as Exhibit 34.

valuation was flawed, and that Crescent would be placed in liquidation mode as a result of the Transaction.[45]

V. CAUSES OF ACTION, CLAIMS AND COUNTERCLAIMS

143. The Litigation Trust brings this action, and asserts the following causes of action, in both its capacity as a direct owner of claims belonging to the Debtors, and in its capacity as the owner of derivative claims that may be brought on behalf of the Debtors and their creditors. The Litigation Trust brings these claims as the properly appointed representative of the estate for the purposes of retaining and enforcing the claims and causes of action pursuant to the Plan and under § 1123(b)(3)(B) of the Bankruptcy Code.

144. The claims asserted herein are asserted on behalf of Crescent Holdings, Crescent Resources, and each Debtor.

145. The claims herein are asserted both collectively and in the alternative.

Count 1 - State Law Fraudulent Transfer – Constructive Fraud (Applicable through 11 U.S.C. § 544(b)(1)) As to Duke Energy, Duke Ventures and Duke Capital

146. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

147. Duke Energy's, Duke Venture's, and Duke Capital's receipt of the $1.187 million in connection with the 2006 Duke Transaction constituted a fraudulent transfer.

[45] This Court, in *In re SMTC Mfg. Of Texas*, 421 B.R. 251, 261 (Bkrtcy.W.D.Tex. 2009) identified the following Badges of Fraud, many of which are present here: Transfers made to insiders or obligations to insiders incurred; The debtor retained possession or control of the property transferred after the transfer; The transfer or obligation was concealed; Before the transfer was made or obligation was incurred, the debtor had been threatened with suit; The transfer was of substantially all the debtor's assets; The debtor absconded; The debtor removed or concealed assets; The value of the consideration received by the debtor was not reasonably equivalent to the value of the assets transferred or the amount of the obligation incurred; The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred; The transfer occurred or the obligation was incurred shortly before or shortly after a substantial debt was incurred; and The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

The Litigation Trust therefore asserts state law claims of constructive fraudulent transfer, made applicable through 11 U.S.C. § 544(b)(1),[46] against each of those Defendants.

148. Under applicable state law, a transfer, such as that at issue here, is fraudulent as to creditors whose claim arose before or after the transaction where, as here, the debtor does not receive reasonably equivalent value, or fair consideration for the transfer, where the debtor, as here, was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to that business or transaction, or where the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

149. Transfers are also fraudulent as to creditors whose claims arose before the transfer was made or the obligation was incurred and the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

150. These elements are satisfied by the facts set forth herein. The Litigation Trust is thus entitled to recover the sum of $1.187 billion that was fraudulently transferred to Duke Energy, Duke Ventures, and/or Duke Capital, or alternatively, to impose a constructive trust on the $1.187 billion that was fraudulently transferred.

[46] Including, but not limited to, claims brought under 6 Del. Code § 1304; Tex. Bus. & Comm. Code 24.005; Ga. Code Ann., § 18-2-74 and § 18-2-75; and N.C. GEN. STAT. §§ 39-23.4 and 39-23.5.

Count 2 – State Law Fraudulent Transfer – Actual
(Applicable through 11 U.S.C. § 544(b)(1))
As to Duke Energy, Duke Ventures, and Duke Capital

151. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

152. Duke Energy's, Duke Venture's, and Duke Capital's receipt of the $1.187 billion in connection with the 2006 Duke Transaction constituted a fraudulent transfer. The Litigation Trust therefore asserts under state law claims of actual fraudulent transfer, made applicable in this proceeding through 11 U.S.C. § 544(b)(1),[47] against each of those Defendants.

153. Under applicable state law, a transfer is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor.

154. Many of the factors considered as probative of fraudulent transaction under these statutes are present in this case. For example: (a) the transfer was to an insider; (b) the transfer was made for little or no consideration when the transferor and the transferee both knew of the claims of creditors, and knew, or should have known, that the transaction would leave Crescent unable to pay those creditors; (c) there was an unconscionable discrepancy between the value of the property transferred and the consideration received for the transfer; (d) there was a concealment of facts known to Duke, among other things, regarding the softening real estate market; (e) Duke purchased from Crescent certain of the subject property; and (f) the transfer was approved by

[47] Including, but not limited to, claims brought under 6 Del. Code § 1304; Tex. Bus. & Comm. Code §§ 24. 005(a)(1) & 24.010(a)(1); Ga. Code Ann., § 18-2-74; and N.C. GEN. STAT. §§ 39-23.4 and 39-23.5.

Crescent Resources' Managers and its President and CEO, who were affiliated with Duke Energy.

155. The elements of 'actual intent' are satisfied by the facts set forth herein. As such, the Litigation Trust is able: (a) to demonstrate the voidability of the transfers under state law; (b) to avoid the transfers under 11 U.S.C. § 544(b); and (c) entitled to recover under 11 U.S.C. § 550 the sum of $1.187 billion that was fraudulently transferred to Duke Energy, Duke Ventures, and/or Duke Capital, or, alternatively, to impose a constructive trust on the $1.87 billion fraudulently transferred.

Count 3 - State Law Fraudulent Transfer – Constructive Fraud (Applicable through 11 U.S.C. § 544(b)(1)) Avoidance of Obligations Incurred for the Benefit of Duke Energy, Duke Ventures and Duke Capital

156. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

157. Crescent's incurrence of obligations under the Term Loan and the Debtor Subsidiaries' guaranties of such debt constituted fraudulent transfers.

158. Under applicable state law, a transfer or incurrence of an obligation, such as the transfers and obligations at issue here, is fraudulent as to creditors whose claim arose before or after the transaction where, as here, the debtor does not receive reasonably equivalent value, or fair consideration for the transfer or obligation, where the debtor, as here, was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to that business or transaction, or where the debtor intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

159. Transfers are also fraudulent as to creditors whose claims arose before the transfer was made or the obligation was incurred and the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

160. Thus, the obligations incurred are (i) voidable under applicable state law, (ii) subject to avoidance under § 544 of the Bankruptcy Code and (iii) recoverable to the extent of the obligations incurred from the entity for whose benefit such transfer was made under § 550(a)(1). As Duke Energy, Duke Ventures and/or Duke Capital were clearly the parties for whose benefit the notes and guarantees were made, and the obligations incurred, the Trust is entitled to recover against these Defendants the value of such obligations.

Count 4 – State Law Fraudulent Transfer – Actual
(Applicable through 11 U.S.C. § 544(b)(1))
Avoidance of Obligations Incurred for the Benefit of Duke Energy, Duke Ventures and Duke Capital

161. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

162. Crescent's incurrence of obligations under the Term Loan and the Debtor Subsidiaries' guarantee of such debt constituted fraudulent transfers.

163. Under applicable state law, a transfer or incurrence of an obligation is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay or defraud any creditor of the debtor.

164. Many of the factors considered as probative of fraudulent transaction under these statutes are present in this case. For example: (a) the obligation was incurred for the benefit of an insider; (b) the obligation was incurred for little or no consideration when the transferor and the transferee both knew of the claims of creditors, and knew, or should have known, that the transaction would leave Crescent and its subsidiaries unable to pay those creditors; (c) there was an unconscionable discrepancy between the amount of the obligations incurred and the consideration received for the incurrence of that obligation; (d) there was a concealment of facts known to Duke, among other things regarding the softening real estate market; (e) Duke reserved the right to purchase from Crescent certain of the subject property; and (f) the transfer was approved by Crescent Resources' Managers and its President and CEO, who were affiliated with Duke Energy.

165. The elements of 'actual intent' are satisfied by the facts set forth herein. As such, the Litigation Trust is able to: (a) demonstrate the voidability of the obligations under state law; (b) avoid the obligations under 11 U.S.C. § 544(b); and (c) recover under 11 U.S.C. § 550(a)(1) against Duke Energy, Duke Ventures and/or Duke Capital as the entities for whom the obligations were incurred in the amount of such obligations.

Count 5 – Wrongful Distribution
As to Duke Energy, Duke Ventures, and Duke Capital, and the Crescent Board of Manager Defendants

166. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

167. The transfer of $1.187 billion from Crescent Resources and/or Crescent Holdings to Duke Energy, Duke Ventures, and/or Duke Capital in connection with the 2006 Duke Transaction was characterized by Crescent as a "cash distribution to Duke

Ventures" for accounting purposes. Under applicable state law, a distribution made which renders a limited liability company, such as Crescent Resources, unable to pay its debts when they come due in the usual course of business, or leaves it with total assets less than the sum of its total liabilities, is a wrongful distribution. The Defendants named in this count possessed actual knowledge that the 2006 Duke transaction would render Crescent insolvent. As such, Duke Energy's, Duke Ventures', and/or Duke Capital's orchestration and receipt of the $1.187 billion constitutes receipt of a wrongful distribution. The Crescent Board of Managers' payment of the $1.187 billion constitutes the knowing payment of a wrongful distribution.

168. The Litigation Trust accordingly sues Duke Energy, Duke Ventures, and Duke Capital, and the Crescent Board of Managers, pursuant to state law,[48] for wrongful distribution.

169. The Litigation Trust is thus entitled to recover the sum of $1.187 billion improperly distributed to Duke Energy, Duke Ventures, and/or Duke Capital by Jim W. Mogg, James M. Short, Jr., Arthur W. Fields, and R. Wayne McGee, or alternatively, to impose a constructive trust on the $1.187 billion wrongfully distributed.

Count 6 – Unjust Enrichment
As to Duke Energy, Duke Ventures, and Duke Capital

170. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

171. Duke Energy, Duke Ventures, and/or Duke Capital, in connection with the 2006 Transaction, obtained a benefit (in the form of the receipt from Crescent Resources of $1.187 billion) by fraud, duress, or the taking of an undue advantage of Crescent

[48] Including, but not limited to, claims brought under 18 Del. Code § 607; Tex. Bus. Org. Code §101.206; Ga. Code Ann., § 14-11-407, 408; and N.C. GEN. STAT. 57C-4-06.

Resources and its co-Debtors. Accordingly, those Defendants are equitably obliged to return such benefit to Crescent Resources to compensate it for the loss of that benefit.

172. The Litigation Trust sues Duke Energy, Duke Ventures, and Duke Capital for state law claims of unjust enrichment.

173. The Litigation Trust is thus equitably entitled to recover the sum of $1.187 billion from Duke Energy, Duke Ventures, and/or Duke Capital, or alternatively to impose a constructive trust on the $1.187 billion.

Count 7 – Breach of Fiduciary and Other Duties As to Duke Energy, Duke Ventures, and Duke Capital, and the Crescent Board of Manager Defendants

174. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

175. Each of the Crescent Board of Manager Defendants, Jim W. Mogg, James M. Short, Jr., Arthur W. Fields, and R. Wayne McGee owed Crescent Resources, LLC fiduciary duties, e.g., a duty of loyalty; a duty not to engage in intentional misconduct; and a duty not to engage in an act or omission performed fraudulently, or constituting gross negligence. Duke, as the dominant or controlling shareholder of Crescent, also owed a fiduciary duty to Crescent. Such duties were owed to Crescent Resources both during the time the company was a wholly owned indirect subsidiary of Duke Energy, and as of that time when the company was no longer a wholly owned subsidiary. Such duties existed both before and after the company became insolvent, and with respect to any transactions causing the company's insolvency. Those duties extend to the creditors of the company after insolvency and/or after the company entered the zone of insolvency.

176. The Litigation Trust sues the Defendants identified below for state law claims of breaches of their fiduciary and other duties they owed to Crescent Resources and its creditors under applicable state law.

1. As to the Crescent Board of Manager Defendants.

177. The Litigation Trust sues the Crescent Board of Manager Defendants, Jim W. Mogg, James M. Short, Jr., Arthur W. Fields, and R. Wayne McGee for breach of fiduciary and other duties with respect to the 2006 Duke Transaction.

2. As to the Duke Energy, Duke Ventures, Duke Capital, and B. Keith Trent.

178. The Litigation Trust sues Duke Energy, Duke Ventures, Duke Capital, and B. Keith Trent for breach of fiduciary and other duties with respect to the 2006 Duke Transaction.

3. Inducing and/or Aiding and Abetting Breach of Fiduciary Duty – As to Duke Energy, Duke Ventures, Duke Capital, and B. Keith Trent.

179. The Litigation Trust sues Duke Energy, Duke Ventures, Duke Capital, and B. Keith Trent for inducing and/or aiding and abetting the breaches of fiduciary duty and other duties as set forth in this Count 7 committed by the Crescent Board of Manager Defendants with respect to the 2006 Duke Transaction.

Count 8 – Civil Conspiracy
As to Duke Energy, Duke Ventures, Duke Capital, B. Keith Trent and the Crescent Board of Manager Defendants

180. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

181. The Litigation Trust sues Duke Energy, Duke Ventures, Duke Capital, B. Keith Trent, and the Crescent Board of Manager Defendants for state law claims for civil conspiracy with respect to the 2006 Duke Transaction.

182. Such defendants conspired to cause the wrongful payment of distributions previously described and to aid or cause the breaches of fiduciary and other duties by the Crescent Board of Manager Defendants with respect to the 2006 Duke Transaction, and thus engaged in a confederation or combination of two or more persons; performed at least one unlawful act in furtherance of the conspiracy; acted pursuant to a common scheme; and caused actual damage to Crescent.

Count 9 – Equitable Subordination of Claims

183. Plaintiff re-alleges each and every allegation contained in the preceding paragraphs.

184. As a result of the conduct of Duke Energy and its direct and indirect subsidiaries, Plaintiff requests that Claim Nos. 172, 1053, 1054, 1065, 1066, 1860, 1861, 1862, 1032 (as amended by 1829), and 1245 (as amended by 1843), as well as all claims listed on Exhibit 51 hereto, be equitably subordinated to all other claims asserted against Crescent Resources and its Debtor Subsidiaries.

VI. OMNIBUS CLAIMS OBJECTION

185. Objection to Claim No. 172 – Plaintiff objects to the allowance and payment of Claim No. 172 filed by Duke Energy Carolinas LLC, pursuant to Rule 3001(f), because the claimant has failed to provide adequate information or transparent calculations of the claim's amounts. Plaintiff reserves the right to further amend this objection.

186. Objection to Claim No. 1053 – Plaintiff objects to the allowance and payment of Claim No. 1053 filed by Duke Energy Carolinas LLC (i) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is

contingent, and (ii) pursuant to Rule 3001(f), because the claimant has failed to provide adequate information or transparent calculations of the claim's amount. Plaintiff reserves the right to further amend this objection.

187. Objection to Claim No. 1054 – Plaintiff objects to the allowance and payment of Claim No. 1054 filed by Duke Energy Carolinas LLC (i) because the claim is partially or fully duplicative of Claim No. 1053, (ii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, and (iii) pursuant to Rule 3001(f), because the claimant has failed to provide adequate information or transparent calculations of the claim's amount. Plaintiff reserves the right to further amend this objection.

188. Objection to Claim No. 1065. Plaintiff objects to the allowance and payment of Claim No. 1065 filed by Duke Energy Carolinas LLC (i) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, and (ii) pursuant to Rule 3001(f), because the claimant has failed to provide adequate information or transparent calculations of the claim's amount. Plaintiff reserves the right to further amend this objection.

189. Objection to Claim No. 1066. Plaintiff objects to the allowance and payment of Claim No. 1066 filed by Duke Energy Carolinas LLC (i) because the claim is partially or fully duplicative of Claim No. 1065, (ii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, and (iii) pursuant to Rule 3001(f), because the claimant has failed to provide adequate information or transparent calculations of the claim's amount. Plaintiff reserves the right to further amend the objection.

190. Objection to Claim No. 1860. Plaintiff objects to the allowance and payment of Claim No. 1860 made by Duke Ventures, Inc. "for or on account of Duke Energy, LLC" (i) because the claim is duplicative and/or seeks the same claim, in whole or in part, as Claim Nos. 1861 and 1862, (ii) pursuant to § 502(d), because claimant is the recipient of property or a transfer which may be avoided, as more fully set forth *supra*, and is therefore not entitled to a claim until such time as claimant has paid over such amount, or turned over such property, (iii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, (iv) pursuant to Rule 3001(f), because claimant has failed to provide adequate information or transparent calculations of the claim's amount, and (v) because Plaintiff possesses claims against the claimant in amounts substantially in excess of those claimed by claimant as more fully set forth *supra*, and because claimant is therefore not entitled to payment of a claim until such time as all such matters have been resolved and a determination made as to the amounts Plaintiff is entitled to recover from claimant. Plaintiff reserves the right to further amend this objection.

191. Objection to Claim No. 1861. Plaintiff objects to the allowance and payment of Claim No. 1861 made by Duke Ventures, Inc. "for or on account of Duke Energy, LLC" (i) because the claim is duplicative and/or seeks the same claim, in whole or in part, as Claim No 1860 and is completely duplicative of Claim No. 1862, (ii) pursuant to § 502(d), because claimant is the recipient of property or a transfer which may be avoided, as more fully set forth *supra*, and is therefore not entitled to a claim until such time as claimant has paid over such amount, or turned over such property, (iii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or

contribution that is contingent, (iv) pursuant to Rule 3001(f), because claimant has failed to provide adequate information or transparent calculations of the claim's amount, and (v) because Plaintiff possesses claims against the claimant in amounts substantially in excess of those claimed by claimant as more fully set forth *supra*, and because claimant is therefore not entitled to payment of a claim until such time as all such matters have been resolved and a determination made as to the amounts Plaintiff is entitled to recover from claimant. Plaintiff reserves the right to further amend this objection.

192. Objection to Claim No. 1862. Plaintiff objects to the allowance and payment of Claim No. 1862 made by Duke Ventures, Inc. "for or on account of Duke Energy, LLC" (i) because the claim is duplicative and/or seeks the same claim, in whole or in part, as Claim No 1860 and is completely duplicative of Claim No. 1861, (ii) pursuant to § 502(d), because claimant is the recipient of property or a transfer which may be avoided, as more fully set forth *supra*, and is therefore not entitled to a claim until such time as claimant has paid over such amount, or turned over such property, (iii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, (iv) pursuant to Rule 3001(f), because claimant has failed to provide adequate information or transparent calculations of the claim's amount, and (v) because Plaintiff possesses claims against the claimant in amounts substantially in excess of those claimed by claimant as more fully set forth *supra*, and because claimant is therefore not entitled to payment of a claim until such time as all such matters have been resolved and a determination made as to the amounts Plaintiff is entitled to recover from claimant. Plaintiff reserves the right to further amend this objection.

193. Objection to Claim No. 1032 as amended by 1829. Plaintiff objects to the allowance and payment of Claim No. 1032 as amended by Claim No. 1829 filed by James M. Short Jr. (i) pursuant to § 502(d), because claimant is the recipient of property or a transfer which may be avoided, as more fully set forth *supra*, and is therefore not entitled to a claim until such time as claimant has paid over such amount, or turned over such property, (ii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, (iii) pursuant to Rule 3001(f), because claimant has failed to provide adequate information or transparent calculations of the claims amount, and (iv) because Plaintiff possesses claims against the claimant in amounts substantially in excess of those claimed by claimant as more fully set forth *supra*, and because claimant is therefore not entitled to payment of a claim until such time as all such matters have been resolved and a determination made as to the amounts Plaintiff is entitled to recover from claimant. Plaintiff reserves the right to further amend this objection.

194. Objection to Claim No. 1245 as amended by 1843. Plaintiff objects to the allowance and payment of Claim No. 1245 as amended by Claim No. 1843 filed by Arthur Fields (i) pursuant to § 502(d), because claimant is the recipient of property or a transfer which may be avoided, as more fully set forth *supra*, and because claimant is therefore not entitled to a claim until such time as claimant has paid over such amount, or turned over such property, (ii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, (iii) pursuant to Rule 3001(f), because claimant has failed to provide adequate information or transparent calculations of the claims amount, and (iv) because Plaintiff possesses claims against the claimant in

amounts substantially in excess of those claimed by claimant as more fully set forth *supra*, and because claimant is therefore not entitled to payment of a claim until such time as all such matters have been resolved and a determination made as to the amounts the Trustee is entitled to recover from claimant. Plaintiff reserves the right to further amend this objection.

195. <u>Omnibus Objection to Duke Entity Scheduled Claims</u>. Plaintiff objects to the payment of the scheduled claims attached as Exhibit 35 to this Complaint based upon one or more of the objections (as specifically set forth in the exhibit) and (i) pursuant to § 502(d), because claimant is the recipient of property or a transfer which may be avoided, as more fully set forth *supra*, and because claimant is therefore not entitled to a claim until such time as claimant has paid over such amount, or turned over such property, (ii) pursuant to § 502(e), because claimant has asserted a claim for reimbursement or contribution that is contingent, (iii) pursuant to Rule 3001(f), because claimant has failed to provide adequate information or transparent calculations of the claims' amount, and (iv) because Plaintiff possesses claims against the claimant in amounts substantially in excess of those claimed by claimant as more fully set forth *supra*, and because claimant is therefore not entitled to payment of a claim until such time as all such matters have been resolved and a determination made as to the amounts Plaintiff is entitled to recover from claimant. Plaintiff reserves the right to further amend this objection.

VII. MISCELLANEOUS

196. <u>Alter Ego.</u> Duke Energy, Duke Ventures, and Duke Capital were, at all material times, the alter egos of one another.

197. Agency. Whenever it is alleged that a defendant entity engaged in an act or omission, such act or omission was engaged in by its officers, agents or other persons having authority to engage in such conduct and such defendant entity is thus liable for the acts of its agents.

198. Limitations. With respect to any defense based on a statute of limitations the Litigation Trust asserts that such defense is barred by 11 U.S.C. § 108 and § 546 and by such tolling or deferred accrual doctrines as the discovery rule; equitable tolling; adverse interest; fraudulent concealment; and adverse domination.

VIII. RELIEF REQUESTED

199. Plaintiff seeks an order sustaining its objections to Claim Nos. 172, 1053, 1054, 1065, 1066, 1860, 1861, 1862, 1032 (as amended by 1829), and 1245 (as amended by 1843), as well as to those claims listed on Exhibit "A", or, in the alternative, an order subordinating such claims to all other claims;

200. Plaintiff seeks an order that the guarantees of the Debtor Subsidiaries are unenforceable;

201. Plaintiff sues for actual damages, including but not limited to the $1.187 billion transferred to Duke Energy, Duke Ventures, and/or Duke Capital as well as the damages caused by the breaches of duty set forth herein;

202. Plaintiff seeks a constructive trust on the $1.187 billion transferred to Duke Energy, Duke Ventures, and/or Duke Capital;

203. Plaintiff seeks such statutory damages and penalties as provided by applicable state law;

204. Plaintiff seeks punitive damages as provided by applicable state law;

205. Plaintiff seeks reasonable and necessary attorneys' fees incurred in connection with the prosecution of this action and any appeal thereof;

206. Plaintiff seeks pre-and post-judgment interest on amounts recovered as provided by law; and

207. Plaintiff seeks its costs of court.

Date: May 11, 2011.

Respectfully submitted,

GEORGE & BROTHERS, L.L.P.

By: ______________________

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document was served via the Court's CM/ECF automatic electronic notice system and/or by hand delivery or first class mail upon the persons listed on the service list below on this the 11th day of May, 2011.

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LIST OF EXHIBITS

1. Consolidated Financial Statements, 2004-2005, Crescent Resources, LLC
2. Crescent Resources LLC, Senior Secured Credit Facilities, October 2006, page 9
3. Formation and Sale Agreement dated September 7, 2006
4. Credit Agreement, dated as of September 7, 2006
5. Notes entitled "Status Call 6/13/06"
6. Notes entitled "Meeting with Keith Trent to Update Debt Financing 6/29/06"
7. Bank of America Letter to Crescent Resources dated September 5, 2006
8. E-mail from Charles Wilson to Brent Bowman, Henry Lomax, Kevin Lambert, Peter Harned, Stephen De May, Kevin Donnelly (February 20, 2007)
9. Powerpoint slides entitled "Crescent Resources, Art Fields President and CEO, November 2005"
10. Pre-Transaction Unsecured claims
11. Consolidated Financial Statements, 2006, Crescent Resources, LLC
12. Crescent Resources LLC, 2006 Budget
13. E-mail from Kevin Lambert to Charles Wilson (March 19, 2008)
14. Morgan Stanley "Discussion Materials" (June 29-30, 2005)
15. Morgan Stanley "Discussion Materials" (July 19, 2005)
16. Power point presentation "The 'New' Duke Energy" (April 3, 2006)
17. Morgan Stanley "Updated Valuation Package" (December 16, 2005)
18. E-mail from Kevin Lambert to Charles Wilson (September 1, 2006)
19. June 13, 2006 Project Galaxy discussion materials and attached performance charts regarding real estate and homebuilding companies

20. Crescent Resources, LLC 2007 Business Plan Summary of Assumptions

21. E-mail from James Mozley to James Page, John Yelverton, James Short, Thomas Glenn, Henry Webb, William Peacher (February 14, 2007)

22. E-mail from Daniel Kohlhepp to Arthur Fields and Robert McGee (May 22, 2006)

23. E-mail from Robert McGee to Daniel Kohlhepp, Arthur Fields, and Edward Burr (June 5, 2006)

24. Notes entitled "Galaxy Status – 6/28 2 pm."

25. E-mail from Shawn Lese to Katherine Ettridge, et al (September 5, 2006)

26. E-mail from Henry Lomax to Arthur Fields, Robert McGee (June 1, 2006)

27. E-mail from Kevin Lambert to Peter Harned, Charles Wilson, Gregg Dawley, Robert McGee, Henry Lomax (March 13, 2007)

28. E-mail from Charles Wilson to Kevin Lambert, Gregg Dawley, and Peter Harned (March 12, 2007)

29. E-mail from Kevin Lambert to Keith Trent, Gregg Dawley, Robert McGee, Shawn Stine, Ryan Wheatley, Michael Zagora (April 24, 2007)

30. E-mail from Kevin Lambert to Charles Wilson (June 17, 2007)

31. E-mail from Kevin Lambert to Charles Wilson (August 21, 2007)

32. E-mail from Levin Lambert to Lisa Bellucci (October 25, 2007)

33. E-mail from Charles Wilson to Shawn Stine, David Hauser, Marc Manly, Thomas O'Connor, Arthur Fields, Robert McGee, Kevin Lambert, Ryan Wheately, Stephen De May (November 20, 2007)

34. Email from Todd Farrell to Kevin Lambert (February 12, 2009)

35. Claims List