

damages can be proven and it is determined that one or more of those parties has the resources to satisfy a judgment.

As noted, above, the Examiner believes that the weight of evidence indicates that VitroTech had actual knowledge of the Gitto Principals' fraudulent activities by no later than the Fall or Winter of 2003. The Examiner does not believe that any reasonable person in VitroTech's position could have interpreted such actions as being for a purpose other than to manipulate creditors. The Examiner also believes that the weight of evidence compels the conclusion that VitroTech was aware that the Gitto Principals were personally profiting from the schemes described in this Report.

The evidence reviewed by the Examiner also suggests that VitroTech gave substantial assistance to the Gitto Principals. Allegations were made that Mr. Booth, VitroTech's Chief Executive Officer, helped the Gitto Principals "manage" Gitto Global's lenders. There appears to be no dispute that the Gitto Principals were aware that Gitto Global used the pending acquisition by VitroTech to reassure both LaSalle and Clinton that Gitto Global's obligations to those entities would be satisfied as a result of the acquisition. Representatives of VitroTech went so far as to participate in a telephone conference with Clinton and write a letter to LaSalle for the express purpose of reassuring those entities. VitroTech also caused a substantial number of its shares of common stock to be pledged to Clinton as Gitto Global's existence was imperiled in the Summer of 2003. At the time of any of these instances, a refusal by VitroTech to provide assistance to the Gitto Principals may have resulted in the termination of Gitto Global's existence. Instead, Gitto Global remained in business presumably incurring liabilities that otherwise would not have existed.

The Examiner lacks sufficient information to determine whether Gitto Global's estate suffered an injury that was the proximate result of the conduct by VitroTech and the VitroTech Principals. Given that substantial evidence exists with regard to at least some of the elements of claims for aiding and abetting a breach of fiduciary duties and deepening insolvency, however, additional investigation appears merited.

The Examiner has considered VitroTech's response to these issues. Among other things, the VitroTech Principals interviewed by the Examiner disputed whether VitroTech obtained any benefit from its negotiations with Gitto Global; indeed, the VitroTech Principals argued that VitroTech itself was seriously damaged as a result of Gitto Global's misrepresentations. While it is not clear whether VitroTech actually obtained benefits, the Examiner is informed by VitroTech's stated need to effectuate a "vertical integration" strategy by acquiring a company such as Gitto Global. Although VitroTech's own promotional materials described it as possessing rights to a mineral of immense value, its own financial performance has been dismal.⁶⁸ It appears, then, that VitroTech may have viewed the Gitto Global acquisition as its only feasible means of obtaining new financing and potentially raising its stock price. Unfortunately, VitroTech's prolonged pursuit of Gitto Global appears to have resulted in substantial harm to Gitto Global's estate and creditors.

3. Clinton

The evidence made available to the Examiner in relation to Clinton is more ambiguous than that which relates to VitroTech. It appears that, as a result of Gitto Global's bankruptcy,

⁶⁸ For the six months ended June 30, 2004, VitroTech had revenue of only \$133,770 and suffered a net loss of \$5,754,234. VitroTech 10-QSB for 2Q/2004. The company reported that it had "losses, negative cash flows from operations and negative working capital." *Id.* Notwithstanding this bad news, VitroTech also reported that it had raised \$4.1 million in equity capital during the period February through July 2004, during which it was attempting its acquisition of Gitto Global's assets. *Id.*

Clinton suffered a loss significant enough to result in the removal of the Bank's President. Nonetheless, the Examiner believes that the evidence related to Clinton's knowledge and participation in the improper conduct described in this Report requires substantial further investigation before a decision is made as to whether claims exist by the Debtor's estate against Clinton.

The first two elements that of a claim for aiding and abetting fiduciary duty are (i) knowledge of the improper conduct by a fiduciary and (ii) a substantial contribution to such breach. It is difficult to accept that Clinton was not aware of the improper uses to which the J&J Chemical Account was being put by the Gitto Principals. The check kiting scheme that was effected through the Account seemingly should have been obvious to any experienced banker. One of Clinton's own representatives, Mr. Paulhus, advised the Examiner that he never accepted Frank Miller's explanation of the way the Account was being used. Still, the Examiner is mindful of the admonishment by various Courts that *actual* knowledge of misconduct by the fiduciary is required.

The evidence of whether Clinton provided substantial assistance to the Gitto Principals is similarly ambiguous. Clinton routinely allowed Kingsdale to draw on uncollected funds of substantial amounts and write checks that were being used to recycle funds back to Gitto Global. It is difficult to conceive of how a bank of Clinton's size could have viewed the use of the J&J Chemical Account as anything but extraordinary. A finder of fact could reasonably find in those circumstances an affirmative act by Clinton that assisted in the underlying wrongs being perpetrated by the Gitto Principals. The Examiner is not aware, however, of any incident under which Clinton made false or misleading statements about Kingsdale or Gitto Global to any other person, the types of affirmative acts that have led to finding of liability in other cases.

Clinton's actions may fit more precisely within a deepening insolvency claim. There appears to be no question that Clinton's administration and maintenance of the J&J Chemical Account prolonged Gitto Global's existence for an extended period of time by allowing the Gitto Principals to hide the company's true financial condition. This may well have caused Gitto Global to become more insolvent by incurring additional liabilities or dissipating assets to the Gitto Principals, each resulting in a loss of any value that could have been realized if Gitto Global had not continued in operation. Further, it is beyond dispute that Clinton took a number of affirmative actions to secure its own position through, among other things, obtaining a guaranty from Gitto Global and a security interest in certain of Gitto Global's assets. Clinton also extended its relationship with Kingsdale and Gitto Global on at least two occasions in the Summer of 2004, perhaps to prevent the lien granted by Gitto Global to Clinton in June 2004 from being voidable as a preference in Gitto Global's bankruptcy proceedings. See Exide, 299 B.R. at 750-51. The uncertainty of whether deepening insolvency exists as a separate cause of action, of course, should be considered by the appropriate estate representative in regard to Clinton.

4. LaSalle

The Examiner has received no evidence which suggests that LaSalle had actual knowledge of or participated in the misconduct of the Gitto Principals or anyone acting in concert with them. In fact, all indications are that LaSalle will suffer the largest financial loss of any party (other, perhaps that Gitto Global itself) as a result of that misconduct.

That said, it is striking that LaSalle did not grow suspicious of Gitto Global's activities at some point after the credit facility was established in July 2002. Given all the various field examinations and the audit that they are reported to have taken (fully five field examinations and one audit are recounted as having occurred between July 2002 and July 2004 in the LaSalle

Complaint), one would think that LaSalle would have discovered something that would have raised red flags. Further, it is difficult to understand how LaSalle did not notice that the amounts of cash being deposited in its own lockbox – in excess of \$1 billion in approximately two years, by LaSalle’s own calculation in its Complaint – seemingly could not be reconciled with even the vastly overstated sales figures that Gitto Global was reporting. The Examiner does recognize that the prior two sentences may be the product of perfect hindsight vision. Various other lenders were also deceived by Gitto Global and it is not clear whether any of them discovered the Gitto Principals’ misconduct (except perhaps Guaranty and there is some suggestion that it may have been warned by a disgruntled employee) or simply were fortunate enough to be refinanced prior to the company’s demise.

5. Guaranty

The evidence made available to the Examiner in relation to Guaranty suggests that further investigation and analysis is required concerning Guaranty’s knowledge and possible participation in the improper conduct described in this Report before a decision is made as to whether the Debtor’s estate holds claims against Guaranty.

As discussed above, the first two elements of a claim for aiding and abetting fiduciary duty are knowledge of the improper conduct by a fiduciary and a substantial contribution to such breach. It is certainly possible that Guaranty was aware of the fraud being perpetrated upon it and others by the Gitto Principals. The First Amendment and the events surrounding it, Mr. Slattery’s discussion of the inventory examination, Mr. Deakin’s recitation of the extent of Guaranty’s knowledge, and the unusual language in Guaranty’s payoff letter all suggest that Guaranty may have known of the fraud.

The evidence concerning whether Guaranty provided substantial assistance to the Gitto Principals is more ambiguous. Certainly Guaranty appears to have allowed continued

borrowings at the inflated amounts, but the case law suggests that that alone may not be considered an affirmative act by Guaranty that assisted in the underlying wrongs perpetrated by the Gitto Principals. See Sharp Int'l Corp. at 775. The Examiner believes that further analysis is necessary to determine whether there were any circumstances in which Guaranty made false or misleading statements about Gitto Global to any other person or otherwise took the type of affirmative act that has led to a finding of liability in other cases.

As with Clinton, Guaranty's actions may fit more precisely within a deepening insolvency claim. There appears to be no question that Guaranty's failure to call the loan prolonged Gitto Global's existence for an extended period of time by allowing the Gitto Principals to hide the company's true financial condition. This may well have caused Gitto Global to become more insolvent by incurring additional liabilities or the dissipation of assets to the Gitto Principals and the loss of any value that could have been realized if Gitto Global's business activities had not been improperly prolonged. The uncertainty of whether deepening insolvency exists as a separate cause of action, of course, should be considered by the appropriate estate representative in regard to Guaranty as well. Further, if simply allowing continued borrowings does not meet the standard of the second test of an aiding and abetting claim, query why it should be sufficient for a deepening insolvency claim, if indeed such a claim exists.

6. Potential Defenses to Claims Available to Third Parties

In assessing whether a fact-finder could determine that a third-party has any liability under an aiding and abetting or deepening insolvency theory, the Examiner has considered potential defenses. The Examiner has considered potential defenses by reference to the elements of the claims as well as additional defenses unrelated to knowledge or conduct. The elements most likely to present issues of material fact for consideration by the fact-finder are:

- The degree of the third-party's knowledge of the acts giving rise to the breaches of fiduciary duty by the Gitto Principals;
- The degree of assistance provided by the third-party to the Gitto Principals;
- Whether it was reasonably foreseeable to the lender that its transactions would cause injury to the Debtor or its creditors; and
- Whether the lender committed an actionable tort that contributed to the continued operation of the Debtor and its increased debt.

Whether the third-party will succeed on one or more defenses to any of these causes of action will depend upon the fact-finder's resolution of the facts. The third-party may also be able to defend any claim by resort to the *in pari delicto* theory discussed above.

VII. CONCLUSION

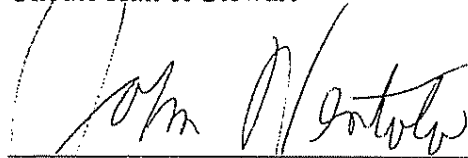
The Examiner's task was investigate "the existence of any prepetition fraud, dishonesty, incompetence, misconduct, mismanagement or irregularity in the management and business affairs of the Debtor." Many unanswered questions remain as of the filing of this Report. Three general conclusions are, however, inescapable, at least in the Examiner's opinion:

1. The evidence that the Gitto Principals engaged in substantial misconduct for the purpose of defrauding Gitto Global's lenders and other creditors is overwhelming. There is further substantial evidence that the Gitto Principals misappropriated substantial sums from Gitto Global for their personal use or benefit.
2. Persuasive evidence exists that the Debtor's estate may hold claims against parties in addition to the Gitto Principals, including Louis Pellegrine and VitroTech.
3. Substantial additional investigation is required into the areas identified in this Court's order appointing an Examiner before definitive determinations can be made as to whether the Debtor's estate holds claims against certain other parties, including (without

limitation) Bowditch & Dewey, Clinton and Guaranty and the various parties identified in Section V.K.2. of this Report and the Appendix.

Respectfully submitted,

Charles L. Glerum and
Choate Hall & Stewart

A handwritten signature in dark ink, appearing to read "John F. Ventola", is written over a horizontal line.

Charles L. Glerum, P.C. (BBO# 195240)

John F. Ventola, P.C. (BBO# 567972)

Lisa E. Herrington (BBO# 655678)

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Schedule 1

Schedule 1
Examiner's Discovery Efforts

| Party | Document Subpoena Served | Deposition Subpoena Served | Documents Produced | Examination / Interview Date | Notes |
|-------------------|--------------------------|----------------------------|--|---|--|
| America Online | November 16, 2004 | | | | American Online responded by letter dated November 19, 2004 indicating that it cannot produce requested records for legal and practical reasons. |
| Angelini, Michael | November 1, 2004 | November 1, 2004 | Produced documents 11/30/04, 12/6/04. | December 7 and 8, 2004 (Examination Under Oath) | |
| Bartlett, Rita | | | | October 28, 2004; November 16, 2004 | Provided Affidavit November 22, 2004. |
| Booth, Jess Rae | | | | December 9, 2004 | |
| Bowditch & Dewey | November 1, 2004 | | Produced documents 11/30/04, 12/6/04. | | |
| | | | Produced limited number of documents (2002 Hemisphere tax return) on December 7, 2004. | | |
| Carland, Kathleen | November 15, 2004 | November 15, 2004 | | December 8, 2004 | |
| Carlson, Walter | | | | | |
| Chaisson, Janice | November 15, 2004 | November 15, 2004 | | | Asserted 5th Amendment |
| Clinton Savings | November 1, 2004 | | November 17, 2004 | Interviewed Harmon, Paulhaus and Tenaglia on 11/17/04 | |
| Deakin, William | November 16, 2004 | | | November 11, 2004; December 7, 2004; January 4, 2005 | |
| Delisle, Roger | | | | November 16, 2004 | Provided Affidavit November 19, 2004. |
| Direct Wood | November 22, 2004 | | | | |
| Doherty, Thomas | | | | October 18, 2004 | |
| Durkin, Kevin | | | | November 10, 2004 | |

Schedule 1
Examiner's Discovery Efforts

| Party | Document Subpoena Served | Deposition Subpoena Served | Documents Produced | Examination / Interview Date | Notes |
|---------------------------|--------------------------|----------------------------|--|--|------------------------|
| Fairfull, Richard | | | | October 26, 2004 | |
| Flanagan, Derek | | | | October 28, 2004; November 30, 2004 | |
| Fleet National Bank | November 1, 2004 | | Fleet has produced documents on a rolling basis | | |
| Gelschion, Matthew | | | | December 6, 2004 | |
| Gitto Sales | November 22, 2004 | | | | |
| Gitto, Charlie | November 1, 2004 | November 4, 2004 | | | Asserted 5th Amendment |
| Gitto, Gary | November 1, 2004 | November 4, 2004 | | | Asserted 5th Amendment |
| Gitto-Pangiototes, Nancy | November 1, 2004 | November 4, 2004 | November 9, 2004 | November 15, 2004 (Examination under oath) | |
| Goldschneider, Michel | | | | December 6, 2004 | |
| Grimely, James | | | | October 28, 2004; December 2, 2004 | |
| Guaranty Business Capital | November 15, 2004 | | December 29, 2004 | | |
| Harmon, David | | | | November 17, 2004 | |
| Harrington, William | | | | November 4, 2004 | |
| Kelly, Henry | | | | November 6, 2004; November 9, 2004 | |
| Kingsdale | November 1, 2004 | | Documents produced and reviewed at Dwyer & Collora | | |
| Kozak, Helen | November 16, 2004 | November 16, 2004 | | | Asserted 5th Amendment |

Schedule 1
Examiner's Discovery Efforts

| Party | Document Subpoena Served | Deposition Subpoena Served | Documents Produced | Examination / Interview Date | Notes |
|---------------------------------|--------------------------|----------------------------|--|--|---------------------------------------|
| LaSalle Business Credit, LLC | | | Documents produced at various times | Examiner spoke on various occasions with Matthew Stilwell, Regional Audit Manager for LaSalle, Kevin P. Durkin, an auditor for LaSalle, and Steven Snyder, an investigator for LaSalle | |
| Merchant, Robyn | | | | November 16, 2004 | Provided Affidavit November 22, 2004. |
| Miller, Frank | November 1, 2004 | | | | Asserted 5th Amendment |
| Miller, Maria | November 15, 2004 | | | | Asserted 5th Amendment |
| Miller, Marvin | November 15, 2004 | | | | Asserted 5th Amendment |
| Minardi, David | | | | November 1, 2004 | Provided Affidavit November 19, 2004. |
| O'Riordan, Paul | | | | October 26, 2004 | |
| Paulhus, Robert | | | | November 17, 2004 | |
| Pellegrine, Louis | November 1, 2004 | | Documents produced at Nixon Peabody, Examiner has yet to review. | November 1, 2004 | |
| Powell-Kotoch, Sharlene Enright | | | | October 28, 2004; November 11, 2004 | Asserted 5th Amendment |
| Seder, J. Robert | | | | October 26, 2004 | |
| Skupen, Dean | | | | December 3, 2004 | |
| Slattery, Christopher | | | | November 10, 2004 | |
| Snyder, Steven | | | | November 4, 2004; November 11, 2004 | Provided Affidavit December 2, 2004. |
| Sovereign Bank | November 15, 2004 | | Limited number of documents produced | | |

Schedule 1
Examiner's Discovery Efforts

| Party | Document Subpoena Served | Deposition Subpoena Served | Documents Produced | Examination / Interview Date | Notes |
|---------------------|--------------------------|----------------------------|--------------------------------------|------------------------------|---------------------------------------|
| Stilwell, Matthew | | | | November 10, 2004 | Provided Affidavit October 25, 2004. |
| Stonefield | | | Limited number of documents produced | | |
| Josephson, Inc. | November 15, 2004 | | | | |
| Sullivan, Thomas J. | November 15, 2004 | November 15, 2004 | | October 23, 2004 | Asserted Fifth Amendment |
| Superior Polymers | November 22, 2004 | | | | |
| Tenaglia, Michael | November 1, 2004 | | | November 17, 2004 | |
| Terisigni, John | November 16, 2004 | November 16, 2004 | | | Provided Affidavit November 24, 2004. |
| Tradex | November 1, 2004 | | | October 25, 2004 | |
| VitroTech | November 1, 2004 | | December 8, 2004 | | |
| White, Oren | | | | November 16, 2004 | Provided Affidavit November 19, 2004. |

Schedule 2

Schedule 2

**Gitto Global
Gitto Principals Salaries**

| | <u>1999</u> | <u>2000</u> | <u>2001</u> | <u>2002</u> | <u>2003</u> |
|------------------|---------------|---------------|---------------|---------------|---------------|
| | | | | | |
| Charles N. Gitto | \$ 236,640.00 | \$ 216,840.00 | \$ 216,840.00 | \$ 211,002.00 | \$ 249,810.00 |
| Gary Gitto | \$ 226,300.00 | \$ 215,800.00 | \$ 251,800.00 | \$ 275,965.00 | \$ 396,875.00 |
| Frank Miller | \$ 254,800.00 | \$ 254,800.00 | \$ 263,300.00 | \$ 247,940.00 | \$ 259,700.00 |
| | | | | | |
| | \$ 717,740.00 | \$ 687,440.00 | \$ 731,940.00 | \$ 734,907.00 | \$ 906,385.00 |