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13 Counsel to Howrey LLP

14 **UNITED STATES BANKRUPTCY COURT**
15 **NORTHERN DISTRICT OF CALIFORNIA**
16 **SAN FRANCISCO DIVISION**

17 In re:)
18 HOWREY LLP,) Case No. 11-31376-DM
19 A District of Columbia Limited Liability) Chapter 11
Partnership,)
20 Debtor(s).)
21 1299 Pennsylvania Avenue) Dept: U.S. Bankruptcy Court
22 Washington, D.C., 20004) 235 Pine Street, 22nd Floor
San Francisco, CA
23 Employer's Tax I.D. No.: 53-0231650) Judge: Honorable Dennis Montali
24 HOWREY LLP,) Adv. Pro. No. _____
25 Plaintiff,)
26 v.)
27 WARNER INVESTMENTS, L.P.,)
28 Defendant.)

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1 **COMPLAINT**

2 Howrey LLP, the debtor and debtor in possession in the above-captioned case (the “Debtor”
3 or “Plaintiff”), files this Complaint against Warner Investments, L.P. (“Landlord”) stating to the
4 Court as follows:

5 **Jurisdiction and Venue**

6 1. This Court has jurisdiction over this proceeding pursuant to 28 U.S.C. §§ 1334 and
7 157.

8 2. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A)-(C), (K) and
9 (O).

10 3. The Debtor has filed a motion seeking to transfer the venue of this case, which is
11 currently pending before the Court. By filing this Complaint, the Debtor is not consenting to venue
12 in this Court and expressly reserves its arguments that venue in this Court is both improper and
13 inconvenient.

14 **Parties**

15 4. The Debtor is a limited liability partnership organized under the laws of the District
16 of Columbia, and was founded in 1956.

17 5. On April 11, 2011 (the “Petition Date”), certain alleged creditors of the Debtor filed
18 an involuntary petition for relief under chapter 7 of the Bankruptcy Code. On June 6, 2011, the
19 Court entered the ORDER FOR RELIEF AND CONVERTING CASE TO ONE UNDER CHAPTER 11 (“Order
20 for Relief”). Following the Petition Date through the date of entry of the Order for Relief (“Gap
21 Period”) the Debtor continued to operate its business in accordance with § 303(f) of the Bankruptcy
22 Code.

23 6. Upon information and belief, Landlord is a Delaware limited partnership.

24 **The Former Lease**

25 7. On March 3, 1992, the Debtor entered into a lease (the “Former Lease”) with Warner
26 Theatre Associates Limited Partnership for certain space in 1299 Pennsylvania Avenue, Washington,
27 D.C. 20004. The Former Lease was amended from time to time, and on January 1, 2011 covered
28 nine floors plus a portion of the penthouse and basement levels totaling 324,763 square feet (the

1 “Premises”) for a monthly rental of approximately \$1.47 million.

2 8. Upon information and belief, Landlord is the successor-in-interest to Warner Theatre
3 Associates Limited Partnership.

4 9. Upon information and belief, at all times relevant to this Complaint, Vornado/Charles
5 E. Smith L.P. and the Vornado Realty Trust (collectively “Vornado”) acted as agents of the
6 Landlord.

7 **Surrender of the Premises and The New Lease**

8 10. On or around March 8, 2011, Plaintiff advised Landlord that the firm was likely to
9 dissolve and that it planned to vacate the Premises pursuant to such dissolution.

10 11. On March 9, 2011, Plaintiff’s partners voted to wind-down its operations in
11 accordance with a certain Plan of Dissolution and approved the creation of a Dissolution Committee
12 to oversee the wind-down.

13 12. Shortly thereafter, the Dissolution Committee investigated its options with respect to
14 the Premises.

15 13. The Dissolution Committee initially decided to move its operations to nearby
16 Virginia where it held office space and housed much of the Plaintiff’s technology and personal
17 property in order to save substantial amounts in rent.

18 14. On March 15, 2011, Plaintiff advised Landlord of its intention to vacate the Premises
19 and move its wind-down operations to Virginia. Landlord urged Plaintiff not to move and offered to
20 provide a reduced rental rate comparable to the rate being offered to Plaintiff for space in Virginia
21 plus the cost of the move.

22 15. At the March 15, 2011 meeting, Landlord also requested that Plaintiff provide a
23 written inventory of the furniture, fixtures and equipment (“FFE”) located on the Premises, as to
24 which Landlord asserted a priority security interest and landlord’s lien.

25 16. Following the meeting on March 15, 2011, and in order to induce Plaintiff to remain
26 in the building, the Landlord made a formal proposal to the Dissolution Committee which included a
27 reduced amount of space through the end of 2011 and a rental rate equal to the rental rate offered to
28 Plaintiff at its Virginia office space plus the cost of the move.

1 17. In March 2011, the Landlord notified Plaintiff's subtenants, Baker Botts, LLP and
2 Digital Evidence Group, L.L.C. that rent under those subleases was to be paid directly to the
3 Landlord.

4 18. On March 17, 2011 and April 6, 2011, the Landlord drew upon a letter of credit
5 ("Letter of Credit") in the total amount of \$2 million which secured Plaintiff's obligations under the
6 Former Lease.

7 19. In April 2011, the parties reached an agreement to terminate the Former Lease and
8 enter into a new lease covering 22,445 square feet of office space on the fourth floor of the Premises
9 ("4th Floor Space") for a term commencing on April 1, 2011 and expiring December 31, 2011
10 ("New Lease"). The parties agreed that total rent under the New Lease would be \$586,757
11 (approximately \$65,195 per month). The Landlord further agreed to discuss leasing additional space
12 located on the B-3 basement level ("B-3 Space") for the housing of technology equipment once
13 Plaintiff had determined its needs in this area.

14 20. Pursuant to the New Lease, Plaintiff and the Landlord further agreed that Plaintiff
15 would vacate and surrender the Premises seriatim in accordance with a schedule. Specifically, the
16 Landlord requested and Plaintiff agreed to vacate the Premises, with the exception of the 4th Floor
17 Space and the B-3 Space, starting with the top floors and working downward toward the basement
18 level, as quickly as possible. Landlord further directed Plaintiff not to remove any of the FFE or
19 phones, screens, docking stations, mice, monitors, keyboards, wiring, AV or other technology
20 equipment (the "Technology") from the Premises.

21 21. All material terms of the New Lease had been agreed to by April 2011.

22 22. The New Lease was intended to, and did, terminate and supersede the Former Lease.

23 23. In reliance on the terms of the New Lease, Plaintiff ceased negotiations with other
24 potential landlords concerning space in Virginia.

25 24. The Debtor immediately began performing its obligations in good faith and in
26 accordance with the New Lease, including spending significant time and money to surrender the
27 Premises in clean and marketable condition. The Debtor began the arduous task of vacating the
28 Premises including processing accounting records and client files for removal from the Premises,

1 cleaning the Premises, and, at the Landlord's request, arranging furnishings in the offices to
2 maximize appeal to prospective tenants.

3 25. Landlord knew of, demanded, and approved Plaintiff's actions and, on information
4 and belief, exploited them in dealings with potential new tenants.

5 26. On or around May 17, 2011, Landlord, contrary to its previous instructions, suddenly
6 demanded that Plaintiff remove all Technology located on the Premises. The removal of the
7 Technology required significant time and expense and delayed Plaintiff's ability to vacate and
8 surrender the Premises.

9 27. Plaintiff vacated and surrendered Floors 11, 8, 7, 6, 4 (with the exception of the 4th
10 Floor Space) and 3 on or about June 10, 2011, and surrender was accepted by the Landlord on such
11 date.

12 28. Plaintiff subsequently vacated and surrendered Floors 5, 2 and 1 (lobby area) on or
13 about June 22, 2011, and such surrenders were accepted by the Landlord on those same dates.

14 29. With the exception of that portion of the B-3 Space covered by the New Lease,
15 Plaintiff vacated the B-3 Space on or about June 29, 2011. The B-3 Space is used primarily for
16 storage and is not suitable space for offices.

17 30. As of the date of this Complaint, Plaintiff is operating out of the 4th Floor Space and
18 the B-3 Space, and is using a portion of the penthouse level as a storage area. However, as a result
19 of the Landlord's actions discussed herein, Plaintiff has made plans to relocate its operations at great
20 expense.

21 31. Each floor of the Premises vacated and surrendered by Plaintiff was left in
22 exceptional condition. All personal property (with the exception of the FFE which the Plaintiff had
23 been instructed not to move) was removed and the Premises were thoroughly cleaned. The FFE was
24 cleaned inside and out, polished and arranged in a manner so as to maximize appeal to prospective
25 tenants.

26 32. On multiple occasions, the Landlord advised Plaintiff that it was pleased with the
27 condition of the Premises surrendered by the Debtor.

28 33. Notwithstanding the New Lease agreed to by the parties, the Landlord refused to

1 execute a written agreement memorializing the New Lease prior to entry of the Order for Relief and
2 conversion of the case to chapter 11. Notwithstanding the Landlord's delay, Landlord at all times
3 reiterated its intention to be bound by the terms of the New Lease.

4 34. On or about July 12, 2011, as Plaintiff was prepared to execute a written agreement
5 memorializing the New Lease, Landlord, for the first time and to the Debtor's surprise, demanded
6 payment of approximately \$2.8 million in alleged administrative rent as a condition to executing a
7 formal memorialization of the New Lease.

8 35. The Debtor disputes that the Landlord is entitled to administrative and/or priority rent
9 under the Former Lease.

10 36. Upon information and belief, Landlord delayed execution of a written agreement
11 memorializing the New Lease as part of a deliberate strategy to increase its alleged administrative
12 expense and/or priority claims.

13 37. Had Plaintiff known that Landlord intended to condition execution of a written
14 agreement memorializing the New Lease on payment of alleged administrative expense and/or
15 priority claims for vacated premises, Plaintiff would have made immediate arrangements to relocate
16 and rejected the Former Lease upon conversion of the case.

17 **Landlord's Failure to Object to Cash Collateral Budget**

18 38. On June 6, 2011, the Debtor filed its EX PARTE MOTION TO CONVERT CASE TO
19 CHAPTER 11 CONDITIONAL CONSENT TO ENTRY OF ORDER FOR RELIEF AND MOTION TO CONVERT
20 DEBTOR'S CASE TO CHAPTER 11 and several "First Day" Motions, including the MOTION OF DEBTOR
21 FOR ORDER: (A) AUTHORIZING USE OF CASH COLLATERAL ON AN INTERIM AND FINAL BASIS; (B)
22 GRANTING ADEQUATE PROTECTION AND RELATED RELIEF; AND (C) SCHEDULING FINAL HEARING ON
23 USE OF CASH COLLATERAL ("Cash Collateral Motion"). The Cash Collateral Motion was served on
24 the Landlord. The Cash Collateral Motion included a proposed budget ("Cash Collateral Budget")
25 that reflected rent to be paid at the rate agreed upon between the Debtor and the Landlord pursuant to
26 the New Lease and no other rent or payments to the Landlord.

27 39. On June 8, 2011, the Court held a hearing on the First Day Motions, including the
28 Cash Collateral Motion. Counsel for the Landlord appeared at this hearing but did not object or raise

1 any concerns with respect to the Cash Collateral Budget. The Debtor reasonably relied upon this
2 lack of objection.

3 Subsequent Bankruptcy Court Proceedings

4 40. On July 20, 2011, the Landlord filed its MOTION TO COMPEL PAYMENT OF POST-
5 PETITION ADMINISTRATIVE RENT FOR 1299 PENNSYLVANIA AVENUE, WASHINGTON, D.C. 20004
6 (“Motion to Compel”).

7 41. On July 20, 2011, the Debtor filed its MOTION FOR ORDER AUTHORIZING THE
8 REJECTION OF UNEXPIRED LEASE BETWEEN THE DEBTOR AND WARNER INVESTMENTS, L.P. FOR
9 PREMISES LOCATED AT 1299 PENNSYLVANIA AVENUE, N.W., WASHINGTON, D.C. (“Motion to
10 Reject”).

11 42. On July 26, 2011, the Court held a hearing on the Motion to Reject.

12 43. At the July 26 hearing, the Court granted the Motion to Reject and entered its Order
13 of July 27, 2011 (“July 27 Order”) directing the filing of this Complaint. The July 27 Order further
14 directed that the Debtor deliver to Landlord the sum of \$312,000 as administrative rent for the
15 months of June and July 2011 and the sum of \$156,000 as administrative rent for the month of
16 August 2011. The Debtor timely paid these amounts.

17 44. The Debtor has advised Landlord that it will vacate the 4th Floor Space and the B-3
18 Space by August 31, 2011.

19 BDO Audit

20 45. In April of 2010, Plaintiff engaged BDO USA, LLP (formerly BDO Seidman,
21 LLP)(“BDO”) to perform an audit of the 2009 operating expenses and real estate taxes billed to
22 Plaintiff by Landlord pursuant to the Former Lease.

23 46. On October 25, 2010, BDO issued a report (the “Audit Report”) concerning its
24 findings.

25 47. The Landlord was provided with a copy of the Audit Report.

26 48. Pursuant to the Audit Report, the Landlord’s estimated overcharges to Plaintiff
27 totaled approximately \$400,000. The Audit Report indicated that additional information would be
28 necessary in order to confirm the exact amount of overcharges owed to Plaintiff by the Landlord.

1 49. In response to the Audit Report, Landlord acknowledged adjustments owed to
2 Plaintiff in the amount of approximately \$250,000.

3 50. Audits for 2010 and 2011 have not yet been conducted.

4 **FIRST CLAIM FOR RELIEF**

5 **(Breach of Contract)**

6 51. Plaintiff realleges and incorporates each and every allegation set forth above as if
7 fully set forth and restated herein.

8 52. The New Lease constitutes a valid and binding contract between the Debtor and the
9 Landlord.

10 53. Pursuant to the New Lease, Landlord was obligated to lease a reduced portion of the
11 Premises at the reduced rental rate agreed upon by the parties.

12 54. Landlord breached the New Lease by, among other things, demanding payment of
13 rent at the rate set forth in the Former Lease as administrative and/or priority rent and failing to
14 accept the New Lease rental rate for the period of the New Lease.

15 55. Landlord further breached the New Lease by refusing to accept surrender of the
16 Premises seriatim as agreed to by the parties.

17 56. As a result of Landlord's breaches, the Debtor has been damaged in an amount to be
18 determined at trial.

19 **SECOND CLAIM FOR RELIEF**

20 **(Breach of Implied Covenant of Good Faith and Fair Dealing)**

21 57. Plaintiff realleges and incorporates each and every allegation set forth above as if
22 fully set forth and restated herein.

23 58. The New Lease contains an implied covenant of good faith and fair dealing.

24 59. Landlord breached the implied covenant of good faith and fair dealing by, among
25 other things, conditioning the execution of a written agreement memorializing the New Lease on the
26 Debtor's payment of alleged administrative and/or priority rent.

27 60. As a result of Landlord's breach, the Debtor has been damaged in an amount to be
28 determined at trial.

1 **THIRD CLAIM FOR RELIEF**

2 **(Breach of Implied Contract)**

3 61. Plaintiff realleges and incorporates each and every allegation set forth above as if
4 fully set forth and restated herein.

5 62. In the alternative, to the extent that the Court finds that the New Lease does not
6 constitute an express contract, the conduct of the Landlord and Plaintiff indicates an intention to be
7 bound by the terms of the New Lease sufficient to constitute an implied contract.

8 63. Pursuant to the New Lease, Landlord was obligated to lease a reduced portion of the
9 Premises at the reduced rental rate agreed upon by the parties.

10 64. Landlord breached the New Lease by, among other things, conditioning the execution
11 of a written agreement memorializing the New Lease on the Debtor's payment of alleged
12 administrative and/or priority rent.

13 65. As a result of Landlord's breach, the Debtor has been damaged in an amount to be
14 determined at trial.

15 **FOURTH CLAIM FOR RELIEF**

16 **(Promissory Estoppel)**

17 66. Plaintiff realleges and incorporates each and every allegation set forth above as if
18 fully set forth and restated herein.

19 67. As described above, Landlord agreed to lease the 4th Floor Space for a term
20 commencing on April 1, 2011 and expiring December 31, 2001. At no time did Landlord indicate
21 that the New Lease was conditioned on Plaintiff's payment of any alleged administrative expense
22 and/or priority claims.

23 68. The Landlord further agreed to accept surrender of the Premises on a rolling basis as
24 Plaintiff wound down its business operations. The Landlord instructed Plaintiff not to remove the
25 FFE located on the Premises and initially instructed Plaintiff to likewise leave all Technology in
26 place.

27 69. The Landlord expected or should have expected Plaintiff to rely on the terms of the
28 New Lease and Landlord's agreement to accept a rolling, partial surrender of the Premises.

1 Landlord was aware that based on the New Lease, Plaintiff had ceased negotiations with other
2 landlords and intended to vacate the Premises on a floor-by-floor basis consistent with the parties'
3 agreement.

4 70. In reliance upon the terms of the New Lease, Plaintiff ceased negotiations with other
5 potential landlords concerning space in Virginia and proceeded to vacate the Premises starting with
6 the top floors and working toward the basement level just as requested by the Landlord. Plaintiff
7 also left the FFE and Technology in place as expressly instructed by the Landlord.

8 71. Plaintiff relied on the terms of the New Lease and the promises made by Landlord to
9 its detriment to the extent that the Landlord now asserts an administrative expense or priority claim
10 for the Premises.

11 72. Plaintiff is entitled to recover damages from Landlord in an amount to be proven at
12 trial.

13 **FIFTH CLAIM FOR RELIEF**

14 **(Equitable Estoppel)**

15 73. Plaintiff realleges and incorporates each and every allegation set forth above as if
16 fully set forth and restated herein.

17 74. Landlord intentionally delayed execution of the New Lease and misled Plaintiff as to
18 its actual intent in order to drive up the amount of its administrative and priority claims.

19 75. Landlord concealed these material facts with the intention that Plaintiff act in reliance
20 on the New Lease and Plaintiff in fact relied on the New Lease and the representations made by
21 Landlord.

22 76. Plaintiff was unaware of Landlord's intention to seek administrative and/or priority
23 treatment for rent accrued subsequent to the New Lease and to refuse to accept surrender of the
24 Premises on a rolling basis.

25 77. Plaintiff relied on the terms of the New Lease and the representations made by
26 Landlord to its detriment to the extent that the Landlord now asserts administrative expense or
27 priority claims for the Premises.

28 78. Plaintiff is entitled to recover damages from Landlord in an amount to be proven at

1 trial.

2 **SIXTH CLAIM FOR RELIEF**

3 **(Unjust Enrichment)**

4 79. Plaintiff realleges and incorporates each and every allegation set forth above as if
5 fully set forth and restated herein.

6 80. As described above, Plaintiff spent significant time and money, in excess of its
7 obligations under the Former Lease, cleaning the Premises and arranging the furnishings so as to
8 maximize appeal to prospective tenants. Per the Landlord's instructions, the FFE and, initially, the
9 Technology, remained on the Premises, increasing the aesthetic appeal to prospective tenants. As a
10 result, Plaintiff conferred significant benefits on the Landlord.

11 81. Landlord has retained the benefits it received under circumstances that render it
12 unjust for it to do so, and without paying for their value.

13 82. As a result, the Landlord has been unjustly enriched at the expense of the Plaintiff.

14 83. Plaintiff is entitled to recover damages from Landlord in an amount to be proven at
15 trial.

16 **SEVENTH CLAIM FOR RELIEF**

17 **(Declaratory Judgment Regarding Landlord's Waiver)**

18 84. Plaintiff realleges and incorporates each and every allegation set forth above as if
19 fully set forth and restated herein.

20 85. The Landlord asserts an administrative and/or priority claim for rent and other
21 charges allegedly owed pursuant to the Former Lease.

22 86. The New Lease was intended to, and did, terminate and supersede the Former Lease.

23 87. The Cash Collateral Budget reflected rent to be paid to the Landlord at the rate agreed
24 upon between the Debtor and the Landlord pursuant to the New Lease.

25 88. The Landlord appeared at the hearing on the Cash Collateral Motion and did not
26 object to or voice any concern regarding its treatment in the Cash Collateral Budget.

27 89. The Landlord knowingly and intentionally waived its right to assert an administrative
28 expense or priority claim for rent and other charges allegedly owed under the Former Lease.

1 90. There exists a justiciable controversy with respect to Landlord's entitlement to
2 administrative and/or priority rent pursuant to the Former Lease and whether Landlord waived its
3 right to assert such claims.

4 91. A judicial determination is necessary with respect to Landlord's entitlement to
5 administrative and/or priority rent pursuant to the Former Lease and whether Landlord waived its
6 right to assert such claims.

7 92. Pursuant to 28 U.S.C. § 2201, Plaintiff hereby seeks declaratory relief and requests
8 that the Court find that the Landlord knowingly and intentionally waived its right to assert an
9 administrative expense and/or priority claim for rent and other charges under the Former Lease.

10 **EIGHTH CLAIM FOR RELIEF**

11 **(Declaratory Judgment Regarding Avoidance of Statutory Lien**
12 **Pursuant to 11 U.S.C. § 545(3))**

13 93. Plaintiff realleges and incorporates each and every allegation set forth above as if
14 fully set forth and restated herein.

15 94. Pursuant to D.C. Code § 42-3213, Landlord asserts a statutory lien for alleged unpaid
16 rent against the FFE located on the Premises.

17 95. Pursuant to 11 U.S.C. § 545(3), the asserted statutory lien is avoidable.

18 96. There exists a justiciable controversy with respect to the validity, priority, and extent
19 of the alleged statutory lien.

20 97. A judicial determination is necessary with respect to the validity, priority, and extent
21 of the alleged statutory lien.

22 98. Pursuant to 28 U.S.C. § 2201, Plaintiff hereby seeks declaratory relief and requests
23 that the Court find that the asserted statutory lien is avoidable and that Plaintiff owns the FFE free
24 and clear of any liens, claims or interests of Landlord.

25 **NINTH CLAIM FOR RELIEF**

26 **(Declaratory Judgment Regarding the Effective Date of Rejection of the Former Lease and**
27 **Amount and Priority of Post-Petition Rent Due Landlord)**

28 99. Plaintiff realleges and incorporates each and every allegation set forth above as if

1 fully set forth and restated herein.

2 100. Out of an abundance of caution, and to the extent that the Court finds that the Former
3 Lease was not terminated and superseded pursuant to the New Lease, the Motion to Reject filed by
4 the Plaintiff seeks entry of an order rejecting the Former Lease as of July 20, 2011.

5 101. As set forth above, the parties had entered into the New Lease as of the Petition Date.

6 102. Further, Plaintiff surrendered the Premises other than the 4th Floor Space and the B-3
7 Space prior to the Order for Relief.

8 103. There exists a justiciable controversy with respect to the date of rejection of the
9 Former Lease.

10 104. A judicial determination is necessary with respect to the effective date of rejection of
11 the Former Lease.

12 105. Pursuant to 28 U.S.C. § 2201, Plaintiff hereby seeks declaratory relief and requests
13 that the Court find that the Former Lease was rejected as of the Petition Date or such other date as
14 the Court deems appropriate.

15 106. Plaintiff further requests that the Court declare that the Landlord is not entitled to an
16 administrative or priority claim for post-petition rent or other charges pursuant to the Former Lease.

17 **TENTH CLAIM FOR RELIEF**

18 **(Equitable Subordination Pursuant to 11 U.S.C. § 510(c))**

19 107. Plaintiff realleges and incorporates each and every allegation set forth above as if
20 fully set forth and restated herein.

21 108. Landlord engaged in inequitable conduct as described herein. Specifically, the
22 Landlord's concealment and deception as to its actual intent, its failure to honor the terms of the
23 New Lease, and its demand for payment of approximately \$2.8 million in alleged administrative rent
24 as a condition to executing a written agreement memorializing the New Lease constitute inequitable
25 conduct.

26 109. Landlord's inequitable conduct has injured both the Debtor and other creditors.

27 110. Landlord's inequitable conduct has conferred an unfair advantage on Landlord to the
28 detriment of the Debtor's estate and creditors.

1 111. Subordination of Landlord's claims is consistent with equitable principles and
2 applicable bankruptcy law, and does not violate any provision of the Bankruptcy Code.

3 112. Accordingly, this Court should subordinate the claims filed by Landlord pursuant to
4 11 U.S.C. § 510(c) to all other claims against the Debtor's estate.

5 **ELEVENTH CLAIM FOR RELIEF**

6 **(Setoff Pursuant to 11 U.S.C. § 553)**

7 113. Plaintiff realleges and incorporates each and every allegation set forth above as if
8 fully set forth and restated herein.

9 114. Landlord holds or will hold a claim against the Debtor's estate, deemed to have arisen
10 prior to the commencement of the case, in an amount to be determined at trial, arising from the
11 Debtor's rejection of the Former Lease.

12 115. Pursuant to the Audit Report, Landlord owes the Debtor a refund of overcharges
13 incurred by Plaintiff, in an amount to be determined at trial, pursuant to the Former Lease for the
14 2009 calendar year. Landlord may owe additional amounts for the 2010 and 2011 calendar years.
15 Such debt arose prior to the commencement of the case. Landlord may further owe the Debtor a
16 refund to the extent that the Landlord received proceeds from the Letter of Credit on account of rent
17 accrued subsequent to the New Lease.

18 116. The claims identified in paragraphs 114 and 115 are mutual.

19 117. The claims identified in paragraphs 114 and 115 are valid and enforceable.

20 118. Plaintiff has a right to setoff under applicable nonbankruptcy law.

21 119. To the extent that it is determined that Plaintiff is liable to Landlord as a result of
22 rejection of the Former Lease, the Court should permit Plaintiff to exercise its right of setoff with
23 respect to the proceeds of the Letter of Credit and overcharges incurred by Plaintiff pursuant to the
24 Former Lease for the 2009, 2010, and 2011 calendar years.

25 WHEREFORE, the Debtor prays for entry of an order and judgment in its favor and against
26 Landlord:

- 27 1. Awarding the Debtor final judgment on all counts against Landlord;
28 2. Awarding the Debtor damages for breach of contract, breach of the implied

1 covenant of good faith and fair dealing, breach of an implied-in-fact contract, promissory estoppel,
2 equitable estoppel, and unjust enrichment in an amount to be determined at trial;

3 3. Finding that Landlord waived its right to assert an administrative expense
4 and/or priority claim under the Former Lease for amounts accrued subsequent to the New Lease;

5 4. Avoiding any statutory liens for alleged unpaid rent asserted by Landlord;

6 5. Declaring that the Former Lease was rejected as of the Petition Date or such
7 other date as the Court deems appropriate;

8 6. Equitably subordinating the claims of Landlord;

9 7. Permitting the Debtor to exercise its right of setoff;

10 8. Declaring the rights and obligations of the parties to resolve the controversies
11 alleged above; and

12 9. Granting such other and further relief as this Court deems appropriate.
13

14 Dated: August 19, 2011

WILEY REIN LLP
H. Jason Gold
Thomas W. Kirby
Valerie P. Morrison
Dylan G. Trache

17 and

18 MURRAY & MURRAY

19
20 By: /s/ Robert A. Franklin

21 Robert A. Franklin
22 Counsel to Howrey LLP
23
24
25
26
27
28

ADVERSARY PROCEEDING COVER SHEET (Instructions on Reverse)		ADVERSARY PROCEEDING NUMBER (Court Use Only)
PLAINTIFFS Howrey LLP	DEFENDANTS Warner Investments, L.P.	
ATTORNEYS (Firm Name, Address, and Telephone No.) Robert A. Franklin, Murray & Murray 19400 Stevens Creek Blvd., Suite 200 Cupertino, CA 95014-2548 (650) 852-9000	ATTORNEYS (If Known) Michael A. Isaacs, Gregg S. Kleiner Luce, Forward, Hamilton & Scripps LLP 121 Spear St., Suite 200, San Francisco, CA 94105-1582	
PARTY (Check One Box Only) <input checked="" type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	PARTY (Check One Box Only) <input type="checkbox"/> Debtor <input type="checkbox"/> U.S. Trustee/Bankruptcy Admin <input checked="" type="checkbox"/> Creditor <input type="checkbox"/> Other <input type="checkbox"/> Trustee	
CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED) Breach of Contract; Breach of Implied Covenant of Good Faith and Fair Dealing; Breach of Implied Contract; Promissory Estoppel; Equitable Estoppel; Unjust Enrichment; Declaratory Judgment Re. Landlord's Waiver; Declaratory Judgment Re. Avoidance of Statutory Lien - 11 U.S.C. § 545(3); Declaratory Judgment Re. the Effective Date of Rejection of the Former Lease and Amount and Priority of Post-Petition Rent Due Landlord; Equitable Subordination 11 U.S.C. § 510(c); Setoff § 553		
NATURE OF SUIT (Number up to five (5) boxes starting with lead cause of action as 1, first alternative cause as 2, second alternative cause as 3, etc.)		
FRBP 7001(1) – Recovery of Money/Property <input type="checkbox"/> 11-Recovery of money/property - §542 turnover of property <input type="checkbox"/> 12-Recovery of money/property - §547 preference <input type="checkbox"/> 13-Recovery of money/property - §548 fraudulent transfer <input checked="" type="checkbox"/> 14-Recovery of money/property - other FRBP 7001(2) – Validity, Priority or Extent of Lien <input checked="" type="checkbox"/> 21-Validity, priority or extent of lien or other interest in property FRBP 7001(3) – Approval of Sale of Property <input type="checkbox"/> 31-Approval of sale of property of estate and of a co-owner - §363(h) FRBP 7001(4) – Objection/Revocation of Discharge <input type="checkbox"/> 41-Objection / revocation of discharge - §727(c),(d),(e) FRBP 7001(5) – Revocation of Confirmation <input type="checkbox"/> 51-Revocation of confirmation FRBP 7001(6) – Dischargeability <input type="checkbox"/> 66-Dischargeability - §523(a)(1),(14),(14A) priority tax claims <input type="checkbox"/> 62-Dischargeability - §523(a)(2), false pretenses, false representation, actual fraud <input type="checkbox"/> 67-Dischargeability - §523(a)(4), fraud as fiduciary, embezzlement, larceny (continued next column)	FRBP 7001(6) – Dischargeability (continued) <input type="checkbox"/> 61-Dischargeability - §523(a)(5), domestic support <input type="checkbox"/> 68-Dischargeability - §523(a)(6), willful and malicious injury <input type="checkbox"/> 63-Dischargeability - §523(a)(8), student loan <input type="checkbox"/> 64-Dischargeability - §523(a)(15), divorce or separation obligation (other than domestic support) <input type="checkbox"/> 65-Dischargeability - other FRBP 7001(7) – Injunctive Relief <input type="checkbox"/> 71-Injunctive relief – imposition of stay <input type="checkbox"/> 72-Injunctive relief – other FRBP 7001(8) Subordination of Claim or Interest <input checked="" type="checkbox"/> 81-Subordination of claim or interest FRBP 7001(9) Declaratory Judgment <input checked="" type="checkbox"/> 91-Declaratory judgment FRBP 7001(10) Determination of Removed Action <input type="checkbox"/> 01-Determination of removed claim or cause Other <input type="checkbox"/> SS-SIPA Case – 15 U.S.C. §§78aaa <i>et seq.</i> <input checked="" type="checkbox"/> 02-Other (e.g. other actions that would have been brought in state court if unrelated to bankruptcy case)	
<input type="checkbox"/> Check if this case involves a substantive issue of state law	<input type="checkbox"/> Check if this is asserted to be a class action under FRCP 23	
<input type="checkbox"/> Check if a jury trial is demanded in complaint	Demand \$	
Other Relief Sought		

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PROCEEDING ARISES		
NAME OF DEBTOR Howrey LLP		BANKRUPTCY CASE NO. 11-31376-DM
DISTRICT IN WHICH CASE IS PENDING Northern	DIVISION OFFICE San Francisco	NAME OF JUDGE Montali
RELATED ADVERSARY PROCEEDING (IF ANY)		
PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT IN WHICH ADVERSARY IS PENDING	DIVISION OFFICE	NAME OF JUDGE
SIGNATURE OF ATTORNEY (OR PLAINTIFF) /s/ Robert A. Franklin		
DATE August 19, 2011	PRINT NAME OF ATTORNEY (OR PLAINTIFF) Robert A. Franklin	

INSTRUCTIONS

The filing of a bankruptcy case creates an "estate" under the jurisdiction of the bankruptcy court which consists of all of the property of the debtor, wherever that property is located. Because the bankruptcy estate is so extensive and the jurisdiction of the court so broad, there may be lawsuits over the property or property rights of the estate. There also may be lawsuits concerning the debtor's discharge. If such a lawsuit is filed in a bankruptcy court, it is called an adversary proceeding.

A party filing an adversary proceeding must also complete and file Form 104, the Adversary Proceeding Cover Sheet, *unless the party files the adversary proceeding electronically through the court's Case Management/Electronic Case Filing system (CM/ECF). (CM/ECF captures the information on Form 104 as part of the filing process.) When completed, the cover sheet summarizes basic information on the adversary proceeding. The clerk of court needs the information to process the adversary proceeding and prepare required statistical reports on court activity.

The cover sheet and the information contained on it do not replace or supplement the filing and service of pleadings or other papers as required by law, the Bankruptcy Rules, or the local rules of court. The cover sheet, which is largely self-explanatory, must be completed by the plaintiff's attorney (or by the plaintiff if the plaintiff is not represented by an attorney). A separate cover sheet must be submitted to the clerk for each complaint filed.

Plaintiffs and Defendants. Give the names of the plaintiffs and defendants exactly as they appear on the complaint.

Attorneys. Give the names and addresses of the attorneys, if known.

Party. Check the most appropriate box in the first column for the plaintiffs and the second column for the defendants.

Demand. Enter the dollar amount being demanded in the complaint.

Signature. This cover sheet must be signed by the attorney of record in the box on the second page of the form. If the plaintiff is represented by a law firm, a member of the firm must sign. If the plaintiff is pro se, that is, not represented by an attorney, the plaintiff must sign.

*Per LBR 7003-1, in the EDVA, a properly completed Adversary Proceeding Cover Sheet is required.