

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

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<b>In re</b>	:	<b>Chapter 11</b>
<b>SEMCRUDE, L.P., et al.,</b>	:	<b>Case No. 08-11525 (BLS)</b>
<b>Debtors.</b>	:	<b>Jointly Administered</b>
	X	
<b>OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF SEMCRUDE, L.P., et al.</b>	:	
for and on behalf of the Debtors' Bankruptcy Estates,	:	
<b>Plaintiff,</b>	:	
<b>and</b>	:	
<b>BANK OF AMERICA, N.A., as Administrative Agent</b>	:	
for the Debtors' Pre-Petition and Post-Petition Lenders	:	
<b>Plaintiff/Intervenor,</b>	:	<b>Adversary No. 09-50189-BLS</b>
<b>v.</b>	:	
<b>THOMAS L. KIVISTO, GREGORY C. WALLACE,</b>	:	
<b>WESTBACK PURCHASING CO., LLC, BRENT</b>	:	
<b>COOPER, KEVIN L. FOXX, ALEX G. STALLINGS,</b>	:	
<b>Defendants.</b>	:	
	X	

**THIRD AMENDED COMPLAINT**

Plaintiff, the Official Committee of Unsecured Creditors (the "Committee") of SemCrude, L.P., its parent SemGroup, L.P. ("SemGroup"), and certain direct and indirect subsidiaries of SemGroup, L.P. (collectively, with SemGroup, the "Debtors" or "SemGroup Entities"),<sup>1</sup> and Plaintiff/Intervenor Bank of America, N.A., as Administrative Agent for the

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<sup>1</sup> The jointly administered Debtors in these chapter 11 cases, along with the last four (4) digits of each Debtor's federal tax identification number, are: SemCrude, L.P. (7524), Chemical Petroleum Exchange,

Debtors' Pre-Petition and Post-Petition Lenders, upon information and belief, bring this action on behalf of the Debtors' estates against Defendants Thomas L. Kivisto ("Kivisto"), Westback Purchasing Co., LLC ("Westback"; with Kivisto, the "Kivisto Defendants"), Brent Cooper ("Cooper"), Kevin L. Foxx ("Foxx"), Alex G. Stallings ("Stallings"), and Gregory C. Wallace ("Wallace") (collectively, the "Defendants"). Plaintiff respectfully alleges as follows:

### **NATURE OF COMPLAINT**

1. Founded in February 2000, SemGroup and its affiliates rapidly built a thriving business by providing diversified services to crude oil producers and refiners in North America's energy corridor stretching from Canada to the Gulf Coast. Those services included transportation, storage, and distribution of oil and gas products. SemGroup and its affiliates acquired significant assets to carry out and expand these operations, including pipelines, gathering systems, processing plants, storage facilities, terminals, and other distribution facilities. Their success, as measured by significant growth, led Forbes magazine, in November 2006, to recognize the SemGroup Entities as the fifth largest privately-held company in the United States.

2. Unfortunately, in addition to the SemGroup Entities' legitimate operations, SemGroup's Chief Executive Officer, Kivisto -- with the assistance of fellow corporate officers Wallace and Cooper, among others -- caused SemGroup to borrow billions of dollars to engage in secret, unauthorized, and speculative trading practices to further their own rather than SemGroup's interests. Kivisto kept his speculative practices hidden from members of

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Incorporated (8866), Eaglwing, L.P. (7243), Grayson Pipeline, L.L.C. (0013), Greyhawk Gas Storage Company, L.L.C. (4412), K.C. Asphalt L.L.C. (6235), SemCanada II, L.P. (3006), SemCanada L.P. (1091), SemCrude Pipeline, L.L.C. (9811), SemFuel Transport LLC (6777), SemFuel, L.P. (1015), SemGas Gathering LLC (4203), SemGas Storage, L.L.C. (0621), SemGas, L.P. (1095), SemGroup Asia, L.L.C. (5852), SemGroup Finance Corp. (3152), SemGroup, L.P. (2297), SemKan, L.L.C. (8083), SemManagement, L.L.C. (0772), SemMaterials Vietnam, L.L.C. (5931), SemMaterials, L.P. (5443), SemOperating G.P., L.L.C. (5442), SemStream, L.P. (0859), SemTrucking, L.P. (5355), Steuben Development Company, L.L.C. (9042), and SemCap, L.L.C. (5317). SemGroup Holdings, L.P. (6746) is also a Debtor, but is not currently jointly administered.

SemGroup's Management Committee, other partners, and creditors by, among other things, preparing or causing to be prepared false trading position reports, making misstatements, and causing false and misleading statements to be made in SemGroup's financial statements.

Kivisto's speculative trading also violated SemGroup's internal policies, lender covenants, and Bond Indenture. Because this trading strategy was not tied to SemGroup's physical inventory, Kivisto and other Defendants exposed SemGroup to unauthorized risk of commodities price fluctuations at a time of unprecedented volatility in the price of crude oil. That risk eventually became reality, as Kivisto's unauthorized and speculative trading activity rendered the SemGroup Entities insolvent.

3. Kivisto also abused his executive position by causing SemGroup Entities to fund his *personal* investment activities. Kivisto caused SemGroup through Debtor entity Eaglwing to purchase derivatives and to post margins for his personal benefit via his alter-ego and personal trading company, Westback, offsetting these cash payouts with an account receivable in an amount exceeding \$289 million. Kivisto caused many of these cash payouts to occur after his speculative trading strategy had rendered the SemGroup Entities insolvent. Like his speculative trading practices, Kivisto's conduct in connection with the Westback arrangement violated SemGroup's internal policies, lender covenants, and Bond Indenture, and was not adequately disclosed to outside members of SemGroup's Management Committee, SemGroup's partners, and Semgroup's creditors. Rather than repay SemGroup, as promised, Kivisto has caused – and may continue to cause – Westback to sell off its assets, including its interests in hundreds of oil and gas leases, at suspicious times and under suspicious circumstances.

4. Kivisto, Wallace, and Foxx consciously disregarded their fiduciary duties of loyalty and care, and acted in bad faith by causing SemGroup Entities to pay bonuses that

Kivisto unilaterally – and without any independent Management Committee authority – determined and approved, and Wallace and Foxx knowingly received, at a time when Kivisto, Wallace, and Foxx knew the SemGroup Entities’ financial condition was much worse than represented in the SemGroup financial statements and at a time when the SemGroup Entities were operating in or near the zone of insolvency. Kivisto caused some of these bonuses to be paid after his speculative trading strategy had rendered the SemGroup Entities insolvent. As they were pocketing millions of dollars in unauthorized bonus payments from Kivisto, the defendants consciously disregarded their fiduciary duties of loyalty and care, and acted in bad faith by intentionally failing to try to halt Kivisto’s harm to SemGroup, and, in various instances, actively assisting in his misdeeds. Kivisto, Wallace, and Foxx also engaged in self-dealing by causing SemGroup to enter into transactions with companies in which they had an ownership interest without disclosing their self-interest to outside members of the Management Committee. In undertaking these actions, Kivisto, Wallace, and Foxx abandoned SemGroup’s interests and were acting solely for their own interests and outside the course and scope of their employment as officers and employees. As a direct consequence of their misconduct, Kivisto, Wallace, and Foxx wrongfully dissipated SemGroup’s assets in an amount yet to be determined but at a minimum more than several hundreds of millions of dollars.

### **JURISDICTION AND VENUE**

5. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334 because this is a civil proceeding arising in or relating to Plaintiff’s case under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). This is a core proceeding pursuant to 28 U.S.C. § 157(b).

6. Venue is proper in this Court under 28 U.S.C. § 1409(a).

7. This proceeding is initiated pursuant to Rule 7001(1) & (7) of the Federal Rules of Bankruptcy Procedure.

### **PARTIES**

8. On July 22, 2008 and October 17, 2008 (the “Petition Dates”), the Debtors filed voluntary petitions for relief (the “Bankruptcy Cases”) under chapter 11 of the Bankruptcy Code. The Debtors have continued in the management and operation of their businesses and properties as debtors in possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

9. Plaintiff, the Committee, was appointed in the Bankruptcy Cases by the United States Trustee on August 5, 2008. The six-member Committee consists of three representatives of the trade vendor community and three representatives of the Debtors’ public bond holders.

10. On February 17, 2009, the Committee filed a motion for authority to prosecute this action on behalf of the Debtors’ estates pursuant to Sections 105(a), 1103(c)(5) and 1109(b) of the Bankruptcy Code. The Court granted the Committee’s motion on March 16, 2009.

11. On April 14, 2009, the Court granted the motion of Bank of America, N.A., in its capacity as administrative agent for Debtors’ pre-petition secured lenders and post-petition secured lenders, to intervene pursuant to Fed.R.Civ.P. 24 and to adopt the Committee’s pleading, on information and belief, to ensure that the interests of the agent and the secured lenders are protected.

12. On May 15, 2009, the Committee and the Debtors filed a Motion to Approve a stipulation with the Debtors conferring upon the Committee the authority to prosecute

the additional claims at issue in the Second Amended Complaint that were not addressed in the Committee's first motion for standing. The Court approved the stipulation on June 5, 2009.

13. On October 2, 2009, the Committee filed a Certification of Counsel regarding a stipulation with the Debtors conferring upon the Committee standing to prosecute the Third Amended Complaint. The Court entered an order approving the stipulation on October 5, 2009.

14. SemGroup is one of the Debtors in this Chapter 11 proceeding. SemGroup was engaged in diversified services for the North American crude oil and refined products industry, and its business operations included gathering, transporting, marketing and hedging services. Most of the SemGroup Entities, including Eaglwing, L.P., SemCrude, L.P., SemCanada, L.P., SemFuel, L.P., and SemStream, L.P., are limited partners of SemGroup or subsidiaries or affiliates of such limited partners. Accordingly, upon information and belief, SemGroup controlled the activities of its limited partners and their subsidiaries and affiliates.

15. SemGroup, G.P., L.L.C. ("SGGP") is the general partner of SemGroup. Pursuant to the SGGP Operating Agreement, the Management Committee of SGGP (the "Management Committee") has nine members. At all relevant times, Kivisto, Wallace and Foxx were among the members of the Management Committee.

16. SemGroup owns a 100% interest in SemManagement L.L.C. ("SemManagement") and is the sole member of SemManagement. SemManagement is also one of the Debtors. SemManagement's business consists of providing services to SemGroup and its operating affiliates and conducting any lawful business that may be conducted by limited liability companies.

17. Defendant Kivisto is a citizen and resident of the State of Oklahoma and may be served with process at 11425 S. Louisville Place, Tulsa, Oklahoma 74137. Kivisto was the President of SemManagement and the President and Chief Executive Officer of SemGroup from 2000 to 2008. Kivisto reported directly to the Management Committee of SGGP. Kivisto also was the President and Chief Executive Officer of Eaglwing L.P. f/k/a Eaglwing Trading, L.P. Finally, Kivisto had the right to appoint three of nine seats on SemGroup's Management Committee.

18. Defendant Wallace is a citizen and resident of the State of Oklahoma. Wallace was the Chief Financial Officer, Vice President, and Secretary of SemGroup from 2000 to 2008. Wallace reported directly to the President of SemManagement and to the Management Committee of SGGP. Wallace also was a member of the Management Committee as Kivisto's designee. Wallace may be served with process at 1810 E. 43rd Street, Tulsa, Oklahoma 74105.

19. Defendant Cooper is a citizen and resident of the State of Oklahoma. Cooper was the Corporate Treasurer of SemGroup and served as the head of SemGroup's Treasury department from 2000 to 2008. Cooper may be served with process at 9927 S. Irvington Avenue, Tulsa, Oklahoma 74137-5520.

20. Defendant Stallings is a citizen and resident of the State of Oklahoma. Stallings was the Chief Accounting Officer of SemGroup from 2003 to 2008. Stallings may be served with process at 5616 E. 104th St, Tulsa, Oklahoma 74137-6072.

21. Defendant Foxx is a citizen and resident of the State of Texas. Foxx was the Vice President and Chief Operating Officer of SemGroup from 2000 to 2008. Foxx reported directly to the President of SemManagement and to the Management Committee of SGGP. Foxx also served as a member of the Management Committee as Kivisto's designee. Foxx is currently

President and Chief Executive Officer of SemGroup Energy Partners L.P. (“SGLP”). Foxx may be served with process at One Greenway Plaza East, Suite 700, Houston, Texas 77046.

22. Defendant Westback is a limited liability company organized under the laws of the State of Oklahoma. Westback may be served with process through its registered agent, Michael D. Cooke, at 320 S. Boston Ave., Suite 400, Tulsa, Oklahoma 74103.

### **STATEMENT OF FACTS SUPPORTING RELIEF**

#### **A. Kivisto’s Speculative Trading Strategy and The SemGroup Entities’ Descent into Insolvency**

23. The SemGroup Entities were involved in the selling and storing of crude oil, refined oil products such as heating oil and gasoline, natural gas, and natural gas liquids such as propane and other related products. In connection with their businesses, and to reduce exposure to the risk of fluctuating commodities prices, the SemGroup Entities traded commodities on a physical and financial basis and used a variety of derivative instruments to execute transactions, including futures, options, and swaps.

24. The SemGroup Entities generally adhered to a trading strategy that reduced risks associated with fluctuating commodity prices by relying upon their ability to purchase and store the commodities at issue. To execute this strategy – generally known as “hedging” – the SemGroup Entities used certain forward and/or futures contracts for the limited purpose of “locking in” profits on actual purchased inventory, enabling them to secure a profit on purchase transactions. The fact that the product was maintained in inventory until that future date protected them from underlying commodity price fluctuation.

25. SemGroup’s financial statements represented that its trading adhered to the above-described strategy. For example, SemGroup’s Management Report for the Year

Ended December 31, 2007 states, in the Management's Discussion and Analysis section, that "We seek to maintain a neutral net purchase and sale position and minimize exposure to commodity prices. Our commodity price risk management policy dictates that all derivative transactions entered into must offset our inventory and other risk positions. *Speculative transactions in commodities are not permitted.*" (emphasis added). SemGroup's Consolidated Financial Statements for the Years Ended December 31, 2006 and 2005 state that SemGroup "utilizes various derivative instruments to . . . manage exposure to commodity price risk." SemGroup's Condensed Consolidated Guarantor Financial Statements (Unaudited) As of December 31, 2007 and 2006 state that "[t]o mitigate the Partnership's physical product and inventory exposure to adverse market changes, the Partnership enters into various derivative transactions."

26. Kivisto, who tightly controlled SemGroup's options trading, did not adhere to the above-described trading policy. Instead, Kivisto engaged in a pattern of speculative trading untethered from physical commodity inventory that violated SemGroup's internal policies, Credit Agreement, and Bond Indenture, and subjected the SemGroup Entities to excessive and improper risks, given SemGroup's business objectives.

27. In late 2004, Kivisto hired Melina Oven ("Oven") and James Coen ("Coen") to assist him in executing his options trading strategy. According to the Court-appointed Independent Examiner (the "Examiner") in the Bankruptcy Proceedings, Kivisto hired these individuals knowing that they had "little or no prior commodity options trading experience, and could be trusted to do what he directed."

28. Kivisto, Coen, and Oven bought and sold "naked options," or options not matched against physical inventory or an offsetting trading position, for the purpose of

increasing revenue. The fact that the options were not backed by physical inventory or offset by another open trade exposed SemGroup to enormous risks if the price of oil were to rise or fall dramatically. For instance, if SemGroup sold a call permitting a counterparty to purchase oil from SemGroup for \$100 per barrel without having oil on hand to meet the call, and if the price of oil rose to \$120 per barrel, SemGroup would have to go into the market and buy a barrel of oil for \$120, sell it for \$100, and sustain a \$20 per barrel loss on its position. If, on the other hand, it was “covered,” that is, matched against SemGroup’s own inventory, and SemGroup already had enough oil on reserve to meet all calls, SemGroup could simply hand over those reserves to its counterparties, without incurring any additional financial loss.

29. Furthermore, Kivisto’s trading strategy attempted to defer the realization of options trading losses. Kivisto “rolled forward” options positions that would otherwise expire at a loss by writing new options, which had the effect of delaying the loss temporarily and potentially increasing the loss significantly. Like calling “double or nothing” after losing a bet, this strategy not only rolled the original position (already at a loss) forward, but also magnified it. Each time a position was rolled forward, it became more disconnected from any actual inventory. Kivisto essentially “bet” that the price of oil would always return to historical price ranges and that the unrealized losses associated with the “rolled forward” trades would eventually expire worthless.

30. As oil prices became volatile in 2007 and 2008, however, Kivisto’s trading strategy generated increasingly large margin calls. For all of its exchange traded options bought and sold via NYMEX, Kivisto sometimes had to cause SemGroup to post an “initial margin,” an amount of cash the company must deposit as collateral in order to execute a futures or option sales transaction. NYMEX would issue additional “margin calls” to SemGroup if the

expected future losses from the trade were likely to exceed the dollar value of the initial margin payment. In an actively traded market, the net present value of the cashflows from a given futures or options trading contract are theoretically reflected in the underlying market value of that trade, known as the mark-to-market value (“MtM”).<sup>2</sup> Thus margin calls were also affected by changes in the MtM of Kivisto’s trading positions. Kivisto’s strategy of rolling forward his trading positions was very risky because that strategy resulted in huge demands for cash, i.e. initial margin payments and margin calls, that were increasingly difficult to meet. If SemGroup were unable to satisfy these demands, it would have to realize those losses at that point in time.

31. During this time, the Debtors’ financial strength -- as evidenced by its balance sheet -- declined dramatically. According to its audited fiscal year 2007 consolidated financial statements, as of December 31, 2006, SemGroup’s assets, on a consolidated basis, totaled approximately \$4.449 billion and its liabilities, on a consolidated basis, totaled approximately \$4.089 billion, such that there was approximately \$359.5 million in positive partner capital.

32. By the end of the fourth quarter of 2007, SemGroup’s audited consolidated financial statements revealed that the SemGroup Entities, including, on information and belief, Eaglwing L.P. (“Eaglwing”), were insolvent to a significant degree. Specifically, as of December 31, 2007, SemGroup’s liabilities, on a consolidated basis and as disclosed in its audited financial statements, were approximately \$7.047 billion, while its assets, on a consolidated basis, were valued at only approximately \$6.705 billion. Thus, according to the audited financial statements, partner capital was a negative \$342.1 million. On information and

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<sup>2</sup> Marking to market is the act of adjusting the valuation of a security or portfolio to reflect current market values. John Downes, A.B. & Elliot Goodman, A.B., M.A., Dictionary of Finance and Investment Terms 415 (7<sup>th</sup> ed. 2006).

belief, the fair value of the SemGroup Entities' assets were actually significantly lower than depicted on SemGroup's balance sheet, because the balance sheet included as an asset a questionable \$300 million-plus receivable owing from Kivisto's alter ego and personal trading company, Westback.<sup>3</sup> Moreover, because each of the Debtors was also a borrower or guarantor under various bank facilities and/or note indentures, on information and belief, any Debtor that made transfers to the defendants, including Debtor Eaglwing, was insolvent as of this date.

33. As discussed more fully below, this Westback Receivable was itself a product of speculative trading, and was equivalent to an unsecured loan from the SemGroup Entities to Westback without any fees or interest. Kivisto's conduct in connection with the accrual of the Westback Receivable violated covenants in SemGroup's Credit Agreement with its lenders, SemGroup's Bond Indenture, and SemGroup's internal risk management policies. On information and belief, Westback was significantly undercapitalized. Given that Kivisto's personal net worth and his ability to ensure that Westback repaid the obligation were largely driven by the value of his interests in SemGroup (according to information provided by Kivisto), the value of this receivable asset was highly dependent upon the net asset value of SemGroup. In short, it was worth nothing close to the dollar-for-dollar valuation it was given on SemGroup's balance sheet as an asset.

34. Also, on information and belief, SemGroup's consolidated earnings before interest, taxes, depreciation, and amortization ("EBITDA"), another metric for examining SemGroup's financial condition, was approximately *negative* \$308.2 million for the year ended

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<sup>3</sup> SemGroup's auditors, PricewaterhouseCoopers, recently retracted its "clean" audit opinions previously certifying that SemGroup's financial statements for 2005-07 were fair and accurate presentations of SemGroup's financial condition. SemGroup's financial condition during these years thus may very well be significantly worse than what was disclosed in its financial statements for various other reasons.

December 31, 2007, and was approximately *negative* \$208.7 million for the first three months of 2008. Thus, on information and belief, as of December 1, 2007, the fair value of the assets of the SemGroup Entities exceeded the fair value of the liabilities of the SemGroup Entities.

35. By the spring and summer of 2008, oil prices had become extremely volatile, and the market price of crude oil continued to rise. As market prices went up, the expected losses from Kivisto's trading positions increased and the corresponding margin demands on SemGroup escalated as well – until SemGroup's available cash was exhausted.

36. An unaudited consolidated financial statement as of March 31, 2008 disclosed that SemGroup's liabilities, on a consolidated basis, were approximately \$6.0 billion, while its assets, on a consolidated basis, were valued at only approximately \$5.2 billion. These financial statements indicate that partner capital had increased to a negative \$801.51 million.

37. Coen and Oven implemented Kivisto's strategy of buying and selling naked options and rolling expiring options forward to avoid realizing a loss. In addition, to leverage Kivisto's desire to take on even greater risk, Coen and Oven placed options trades on the books of SemGroup's subsidiaries SemGas, SemFuel, SemMaterials, SemEuro and SemStream under Kivisto's direction and generally without the prior knowledge of the business unit leaders of those subsidiaries. Coen admitted to the Examiner that Kivisto's trading activities were not tied to SemGroup's inventory and that he did not take inventory into account when making daily trading decisions. Furthermore, despite their lack of trading experience -- and SemGroup's mounting billions of dollars of trading losses resulting from trades executed by Coen and Oven -- Kivisto rewarded Coen and Oven with bonuses of over \$2.1 million and over \$1.5 million, respectively, from July 2007 to July 2008.

38. The Examiner's investigation concluded that Kivisto had engaged in speculative trading and that Kivisto's speculative trading strategy was "inappropriate and violated SemGroup's internal risk policies and its lender covenants."

39. In approximately 2003, SemGroup established a Risk Management Policy ("RMP") as a requirement of its lender covenants. The RMP stated that "[a]s a seller of options, SemGroup faces significant market risk. Therefore it is SemGroup's policy not to sell naked options." In limited circumstances, the RMP did allow for the sale of naked options to offset other positions or as "part of a defined marketing program approved by the CEO." In addition, the RMP provided that if there was an exception to the policy, the Treasurer was supposed to bring the matter to the attention of the CFO and the CEO. The understanding of the outside members of SemGroup's Management Committee was that SemGroup's RMP was intended to preclude exposing the SemGroup Entities to significant trading and liquidity risk from speculative or "naked" trading.

40. Kivisto's speculative trading also violated SemGroup's lender covenants. The Credit Agreement between SemGroup and its lenders prohibited naked options sales. It provided that the domestic crude option writing program "is limited to the volume of physical storage available to SemCrude, L.P. and Eaglwing, L.P." and lists a storage capacity of 8 million barrels of crude oil for the United States and Canada. According to the Examiner, as of May 12, 2008, however, SemCrude and SemFuel had sold the equivalent of 56 million barrels of crude oil via sales of call options.

41. The Credit Agreement also required SemGroup to submit MtM and position reports to its lenders every week on Friday, reflecting Thursday's trading data. The purpose of these reports was to enable its lenders to assess whether SemGroup's trading

positions were in compliance with the limits set forth in the Credit Agreement and provide lenders assurance that they were only lending against hedged inventory.

42. Defendant Cooper was responsible for and oversaw the submission of these MtM and Position Reports to SemGroup's lenders, and signed these reports on behalf of SemGroup. By signing these reports, Cooper not only certified that SemGroup was operating within the limits set forth in the Credit Agreement, but he further certified that the relevant SemGroup personnel had "operated within the guidelines of the SemGroup Entities' Risk Management Policy."

43. SemGroup's Credit Agreement also required SemGroup to submit Borrowing Base Reports ("BBR") to its lenders bi-weekly, or weekly if certain limits were being approached. In the BBRs, SemGroup set forth the amounts of current Borrowing Base assets, the amounts of current Borrowing Base deductions and the resulting amount available for working capital loans and letters of credit. The officer signing each BBR certified that he was the Corporate Treasurer of SemGroup and its General Partner, that no default or event of default has occurred and is continuing and that all of the information reflected on the BBR and attached schedules was true and correct in all material respects. The BBRs were designed to demonstrate that SemGroup was complying with the Credit Agreement, and to protect SemGroup from any attempt by its managers to over-extend the company.

44. Cooper was responsible for and oversaw the submission of the BBRs to lenders, and signed these reports on behalf of SemGroup. By signing these reports, Cooper certified that all information submitted was true and correct.

45. On or about July 11, 2008, Cooper submitted or caused to be submitted a materially false BBR to SemGroup's lenders. In this BBR, Cooper falsely represented that there

was in excess of \$72 million of credit available to SemGroup. One day earlier, on July 10, 2008, SemGroup's Senior Vice-President of Finance, Terry Ronan ("Ronan"), had communicated to the lenders that SemGroup was out of money.

46. In addition to violating the RMP and Credit Agreement, Kivisto's speculative trading violated SemGroup's 2005 Bond Indenture, under which a total of approximately \$600 million face value notes were issued.

47. Upon information and belief, Cooper and Wallace were aware of, or consciously or recklessly disregarded, the speculative aspects of Kivisto's trading strategy. Wallace was responsible for SemGroup's overall financial affairs, while Cooper was responsible for many of its day-to-day financial decisions. Cooper was also responsible for risk management and was notified if SemGroup's trading losses for any given day were inordinately high. According to the Examiner, although Cooper had a spreadsheet "early on" that matched SemGroup's physical inventory to the trading positions, during the later years, physical inventory became unlinked from the commodities trades.

48. On information and belief, Cooper and Wallace provided inaccurate and misleading information to outside members of SemGroup's Management Committee that SemGroup's trading activity was supported by its physical inventory. Among other things, Cooper certified in weekly position reports provided to SemGroup's Management Committee (and SemGroup's lenders, as noted above) that "all restricted persons have operated within the guidelines of the risk management policy," when, in fact, such persons had not operated within any such guidelines, had violated the RMP's trading limits on hundreds of days in 2007 and 2008, and had not even been provided with a copy of the RMP.

49. On July 18, 2008, due to concerns about unauthorized bonus payments and personal trading activities, Kivisto was placed on administrative leave, and Ronan (SemGroup's Senior Vice president of Finance) was named "acting" SemGroup President and Chief Executive Officer. At or around this time, SemGroup, its lenders, and the market generally had developed a concern that Kivisto had engaged in speculative commodities trading, and a failure to hedge against commodity price fluctuations. On October 24, 2008, SemGroup terminated Kivisto's employment.

50. Kivisto, Cooper, and Wallace all asserted their Fifth Amendment privilege against self-incrimination when deposed in the Bankruptcy Cases. Specifically, Kivisto asserted his Fifth Amendment privilege against self-incrimination at his January 12, 2009 deposition when asked, among other things, about his trading strategy and whether it was speculative.

**B. Failure to Implement Adequate Risk Management Practices**

51. The RMP required that a Risk Management Committee ("RMC"), consisting of the CEO (Kivisto), COO (Foxy), CFO (Wallace), and CAO (Stallings), meet at least once each month to evaluate SemGroup's trading activity. According to the RMP, the RMC was responsible for, among other things: (i) "ensur[ing] appropriate risk management policies are created, implemented and enforced"; (ii) "preparing new policies and updating existing policies"; and (iii) "ensuring SemGroup operates within acceptable and defined risk parameters, monitoring positions, profit/loss, and overall marketing strategies." On information and belief, the RMC failed to ensure that the existing RMP was implemented and enforced, failed to ensure that SemGroup traded within acceptable and defined risk parameters, and failed to ever meet for the specific purposes contemplated by the RMP.

52. The members of the RMC also failed to implement appropriate risk analytics and risk reporting considering the large volume of options executed by traders, including implementing a system to reconcile SemGroup's physical inventory with its trading activity. Indeed, the Examiner concluded that "Kivisto, Wallace, and Cooper failed to integrate properly the commodities trading function into SemGroup's financial controls, which subjected SemGroup to additional risk."

53. Cooper was responsible for risk management until March 2007, when Bill Allen ("Allen") was promoted to the newly created position of "Risk Director." According to the Examiner, Kivisto promoted Allen to this position notwithstanding that Allen had no prior risk management experience. Upon information and belief, Cooper continued to be engaged in assessing daily risk and should have, but failed to, implement a system to reconcile SemGroup's physical inventory with its trading activity.

54. Wallace, as supervisor of SemGroup's administrative group, was responsible for "monitoring, controlling, and reporting risks." Upon information and belief, Wallace failed to monitor, control, or report risks.

55. In addition, on information and belief, neither Stallings nor anyone in Stallings' group made any effort to compare SemGroup's overall inventory with its trading activity.

56. SemGroup's RMP mandated that all relevant personnel read the policy at least annually. Kivisto, Cooper, and Wallace failed to distribute SemGroup's RMP to the traders and failed to integrate it into SemGroup's policies and procedures and its day-to-day trading decisions. For example, according to the Examiner, Coen did not receive a copy of the RMP until July 1, 2008 – shortly before the Debtors' bankruptcy petitions.

57. The RMP also set per transaction volume limits for each trader. Upon information and belief, Kivisto, Cooper, and Wallace intentionally failed to monitor traders and to enforce the trader “per transaction” limits.

58. Thus, despite (i) Kivisto’s fiduciary duty as CEO to establish and enforce risk limits; (ii) Cooper’s fiduciary duty as Treasurer to ensure that appropriate risk management policies and controls were in place and that the daily affairs of the company were in accordance with such controls; (iii) Wallace’s fiduciary duty as CFO to monitor and oversee SemGroup’s overall financial condition; and (iv) Stallings’ fiduciary duty as CAO to monitor and compare SemGroup’s overall inventory with its trading activities, these Defendants consciously disregarded their fiduciary duties of loyalty and care, and acted in bad faith by utterly failing to ensure that a reasonable risk management and monitoring system was implemented and enforced. Moreover, these Defendants failed to ensure that SemGroup’s trading activities were integrated in the internal controls and reporting. This failure was not an isolated event but a systematic and sustained failure that occurred over a period of time. At the same time these Defendants were breaching these duties, Kivisto was causing them all to be paid millions of dollars in unauthorized bonuses, as outlined more fully below.

**C. Westback is Kivisto’s Alter Ego**

59. Kivisto and his wife Julie L. Kivisto each own or owned fifty percent (50%) of Westback. Kivisto is the sole member-manager of Westback and also acts as its President and Chief Executive Officer. Kivisto established Westback to conduct investment activities for his own personal benefit and to engage in commodities trading with two Kansas oil and gas producers.

60. On information and belief, Kivisto exercised complete and unfettered control over Westback. He operated Westback out of his office at SemGroup and directed SemGroup employees to perform the work of Westback.

61. Upon information and belief, Kivisto did not establish a separate corporate identity for Westback. Kivisto treated the assets of Westback as his own, did not keep Westback finances separate from his personal finances, and used a Westback account to make payments for his personal needs, such as vehicle payments, property purchases, personal loans, personal investments, and donations to charity.

62. Upon information and belief, Westback is undercapitalized, as its assets are grossly inadequate to cover the amount of its liabilities, most significantly the Westback Receivable owed to SemGroup, as defined below.

63. The Examiner concluded, among other things, that Westback was Kivisto's alter ego.

**D. Kivisto Saddles the Debtors with a \$290 Million Westback Receivable**

64. Kivisto, with the help of Wallace, Cooper, and Stallings saddled the Debtors with an uncollectible account receivable (the "Westback Receivable") that ballooned to almost \$300 million at the same time that the SemGroup Entities were experiencing billions of dollars of trading losses, and margin calls for trading activity that ultimately depleted the SemGroup Entities' cash.

65. Kivisto caused the Debtors to fund Westback's trading activities for his sole benefit by, *inter alia*, purchasing derivatives and posting margin for Westback's account. Kivisto caused this Westback-related trading activity to be carried out through Debtor entity Eaglwing, L.P. ("Eaglwing"), a business unit of SemGroup that was also used to carry out trades

on behalf of SemGroup. The Debtors recorded no revenues, charged no fees to Westback or Kivisto, and received no pecuniary benefit as a result of this agency relationship. On information and belief, any transfers from SemGroup to Westback through Eaglwing treated Eaglwing as a mere conduit.

66. Westback had a brokerage account established at Merrill Lynch under the name “ETI2.” Upon information and belief, the Westback account at Merrill Lynch was called “ETI2” to create the false impression that it functioned solely for the benefit of Debtor entity Eaglwing -- which had a Merrill Lynch Account referred to as “ETI” -- and to conceal the fact that the account functioned for the sole benefit of Westback, Kivisto’s personal non-Debtor entity. Upon information and belief, Kivisto took no steps to clarify that Westback was his personal company as opposed to a subsidiary of SemGroup.

67. At Kivisto’s behest, his personal assistant, Sharon Pens, and his personal accountant, Gregory Price, were responsible for the accounting for both Westback and Debtor entity Eaglwing. This arrangement continued during the time period when the Westback Receivable was building into hundreds of millions of dollars, and tens of millions of dollars of transfers from the SemGroup Entities to Westback, as described below, were occurring.

68. On information and belief, Pens and Price accounted for Eaglwing trading activity -- conducted on behalf of both SemGroup and Westback -- outside of SemGroup’s ordinary accounting system. This practice set Eaglwing apart from other SemGroup business units, whose activities were immediately integrated into SemGroup’s accounting system. On information and belief, Pens and Price initially prepared separate records for Westback and Eaglwing, later removed Westback trades done through Eaglwing from Eaglwing’s results, and then provided Eaglwing results to be integrated with results from other SemGroup business units.

Stallings was aware that Kivisto had Pens and Price keeping a separate set of books for Eaglwing, but did nothing about it. On information and belief, Price was paid a salary from an Eaglwing account for services he performed for Kivisto. Under this arrangement, Eaglwing made tens of millions of dollars of transfers to Westback -- discussed more fully below -- for which SemGroup appears to have no supporting documentation.

69. Kivisto's conduct in connection with the Westback trading arrangement violated SemGroup's Credit Agreement with lenders and SemGroup's Bond Indenture. The Credit Agreement prohibited SemGroup from, among other things, (a) entering into transactions with affiliates other than on fair and reasonable terms that would be obtainable in a comparable arm's length transaction from a person other than an affiliate; and (b) extending credit except in very limited circumstances. The terms through which Kivisto and Westback caused SemGroup to pay money to support Westback trading (which effectively gave Kivisto and Westback hundreds of millions of dollars of unsecured loans for no fees and no interest) were certainly not as favorable as SemGroup could have been obtained in a comparable arm's length transaction from an unrelated third party, fell outside the limited exceptions to the credit extension prohibitions in the Credit Agreement, and violated the Bond Indenture.

70. Kivisto's Westback trading activity also violated SemGroup's RMP, which prohibited SemGroup's traders from engaging in trades for the benefit of the traders' own account. Coen and Oven, at Kivisto's instruction and direction, carried out trades for Westback that were for the benefit of Kivisto, not SemGroup.

71. Kivisto only revealed his Westback trading activity to a limited number of people in the company. For example, on information and belief, neither SemGroup's Vice President for Operations nor Vice President of Finance heard of Westback before July 2008.

Those who knew about Kivisto's Westback trading activity, at least as of 2006, included Wallace, Cooper, Stallings, and PwC, SemGroup's outside auditors. None disclosed to outside members of the Management Committee that the Westback trading was solely for Kivisto's personal benefit.<sup>4</sup>

72. At the suggestion of SemGroup's outside auditor, who was aware of the Westback trading losses, Stallings prepared a written agreement between Kivisto, Westback, and Eaglwing, dated March 20, 2006, which confirmed the parties' understanding that when Eaglwing entered into trading contracts, it is "doing so only as Westback's authorized agent and representative, and all obligations and benefits under [such] [c]ontracts shall be for the sole account of Westback." Wallace signed the agency agreement on behalf of Eaglwing by its general partner SGGP, and Kivisto signed it on behalf of Westback.

73. In or about early 2007, Stallings and Wallace discussed the Westback Receivable and the inquiries of SemGroup's outside auditor regarding the Westback Receivable.

74. On information and belief, despite the fact that Stallings knew that (i) Kivisto owned Westback, (ii) Kivisto was engaging in trades for the benefit of Westback, and (iii) the RMP prohibited SemGroup's traders from engaging in trades for the benefit of the traders' own account, Stallings did nothing about it.

75. On information and belief, at the urging of SemGroup's auditors -- who had known about the Westback Receivable for two years and were getting ever more worried that the Westback Receivable might be called into question -- Stallings sent Kivisto a letter on or

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<sup>4</sup> At all relevant times, the outside members of the Management Committee included Ritchie Capital Management's ("RCM") designee, Thane Ritchie ("Ritchie"), and Carlyle/Riverstone Global Energy and Power Fund II's ("Carlyle/Riverstone") designees Andrew Ward ("Ward") and Bartow Jones ("Jones").

about February 28, 2008, requesting him to acknowledge that the total amount of the Westback Receivable owed to SemGroup was over \$333 million. On or about February 28, 2008, Stallings sent Kivisto another version of the letter requesting him to acknowledge that the total amount of the Westback Receivable was over \$323 million.

76. On or about March 18, 2008, Kivisto signed the first acknowledgement confirming that, as of December 31, 2007, Westback owed SemGroup \$333,894,953. On or about March 19, 2008, Kivisto signed the second version of the acknowledgement confirming that, as of December 31, 2007, Westback owed SemGroup \$323,831,503 as a result of trades entered into by the SemGroup Entities on behalf of Westback.

77. Despite the fact that the amount of the Westback Receivable differed by approximately \$10 million between the two versions of the acknowledgements, Kivisto signed both documents in order to continue his trading activities on behalf of Westback.

78. On or about March 18, 2008, Kivisto provided SemGroup and its outside auditors with his personal financial statement and a signed acknowledgement that Kivisto's personal assets were to be considered available to support the creditworthiness of the Westback Receivable. According to this personal financial statement, Kivisto represented that he had a net worth of approximately \$252 million, about \$232 of which was based on his interest in SemGroup. At the time, Kivisto's personal assets consisted primarily of the partnership units he held in SemGroup – both through his personal trust, the Thomas L. Kivisto Trust, for which he was the trustee, and through a separate entity, non-Debtor Eaglwing Energy, LLC, which is held 20% by Kivisto, 40% by J. Michael Vess (“Vess”), and 40% by another Kansas oil producer. In the acknowledgement, which he signed on March 18, 2008, Kivisto represented that “the financial statement . . . is materially complete and accurate . . . [and that] these net assets,

inclusive of both Westback and [his] personal assets, are to be considered in total and available to support the credit worthiness of the outstanding Westback account receivable . . . recorded on the financial statements of SemGroup, L.P.”

79. Despite the fact that Kivisto’s net worth was \$71 to \$88 million less than the amount of the Westback Receivable, upon information and belief, Stallings undertook minimal testing of the creditworthiness of the Westback Receivable and little to no verification of the financial wherewithal of Westback. To the contrary, Stallings drafted a memorandum dated March 20, 2008 entitled “Evaluation of Westback Credit” with a copy to SemGroup’s outside auditors, concluding that “as of December 31, 2007, the overall creditworthiness of [Westback] and Tom Kivisto considered in the aggregate is adequate to support the amount of the [R]eceivable.”

80. Stallings acknowledged to the Examiner that the Westback situation was “unusual,” but he claimed that he did not view it as a major problem until the Westback Receivable became larger and questions were raised about its collectability. Stallings told the Examiner that at the end of 2007, he asked the Controller to track the Westback Receivable balance on a daily basis, and to send e-mails to Kivisto, Wallace, himself, and possibly others, about the balance. Stallings did nothing to stop the Westback trading arrangement, however. Despite Wallace and Stallings’ knowledge about the growth in the Westback Receivable and the increasing concerns about the collectability of the Westback Receivable, neither Wallace nor Stallings presented any invoices to Kivisto or Westback until July 14, 2008, just one week before the bankruptcy filing.

81. According to the Examiner, Cooper also knew about the Westback Receivable and was evasive when questioned about it. For instance, when Ronan, then

SemGroup's Senior Vice President of Finance, asked Cooper about Westback, Cooper stated, "You don't want to know what it is." When SemGroup's Vice President of Finance asked Cooper about the Westback Receivable sometime prior to July 2008, "Cooper brushed off the question, responding somewhat flippantly that Kivisto would be able to resolve the receivable by additional trading."

82. The Examiner concluded that Wallace, Cooper, and Stallings "were aware that Kivisto was using SemGroup's funds and resources to engage in options trading activity on his own behalf (through Westback), and that such activity had the potential to expose, and did expose, SemGroup to risk, yet they failed to stop it." Kivisto, Wallace, Cooper, and Stallings intentionally failed to bring the Westback Receivable to the attention of outside members of the Management Committee and failed to adequately monitor and control the amount of the Westback Receivable, which grew dramatically under their watch. As of December 31, 2005, the Westback Receivable was \$19.8 million. The Westback Receivable amount increased to \$136.3 million as of December 31, 2006, and ballooned to \$323.8 million as of December 31, 2007.

83. Between February 2008 and July 2008 -- at a time when the SemGroup Entities were insolvent -- Kivisto caused SemGroup to increase the Westback Receivable by \$19.9 million.

84. On information and belief, the existence and size of the Westback Receivable was one of the reasons that SemGroup was unable to undertake an equity offering to raise capital during the time immediately preceding the July 2008 Chapter 11 filings.

85. On or about July 14, 2008, SemGroup informed Westback that SemGroup would no longer hold or enter into commodity trading transactions for the account of Westback

and presented an invoice to Westback in the amount of \$289,990,637 by hand-delivering it to Kivisto.

86. Since presenting the invoice to Kivisto and Westback, SemGroup has made oral and written requests for payment of the Westback Receivable. For example, on October 22, 2008, SemGroup, through its legal counsel, sent a letter to the Kivisto Defendants demanding immediate payment of the Westback Receivable. To date, the Kivisto Defendants have refused to pay the invoice. According to the Examiner, if the Kivisto Defendants had reimbursed SemGroup for the Westback Receivable, “it might have affected the timing of, or the necessity of, SemGroup’s bankruptcy petitions.”

87. Notwithstanding Kivisto’s promise that his personal assets would be available, Kivisto is attempting to avoid his obligation to repay the debt that arose out of transfers made for the benefit of Westback and Kivisto by hiding behind the corporate façade of Westback. Recognition of any corporate distinctions between Kivisto and Westback will result in injustice and inequity by, among other things, defeating the rightful claims of the SemGroup Entities against Kivisto. The corporate existence of Westback should be disregarded, and the wrongs, obligations, and liabilities of Westback should be attributed to Kivisto.

88. At his deposition, Kivisto asserted his Fifth Amendment privilege against self-incrimination when asked about the Westback agency agreement, the Westback Receivable, Kivisto’s March 18, 2008 acknowledgement, the July 14, 2008 invoice, and Kivisto’s obligation to pay, failure to pay, and efforts to avoid paying the Westback Receivable.

**E. The Post-Petition Transfers from Westback**

89. Rather than repay his debt to SemGroup, Kivisto began to sell off assets by causing Westback to transfer its interests in hundreds of oil and gas leases to VAP-IV, LLC

(“VAP-IV”), at a suspicious time and under suspect circumstances. VAP-IV was an entity created on or about August 25, 2008, for purposes of consummating the transfer with the Kivisto Defendants. At the time Kivisto liquidated the oil and gas leases, he had received the Debtors’ invoice for the Westback Receivable and still served as a member of the Management Committee.

90. Subsequent to the Petition date, the Kivisto Defendants transferred interests in hundreds of oil and gas leases to VAP-IV in exchange for approximately \$6 million. Kivisto signed the Assignments of Oil and Gas Leases and Bills of Sales that Westback and VAP-IV entered into in connection with such transactions on behalf of Westback, and Vess signed as “Designated Representative” of Vess Holding Corporation, as “Manager” of VAP-IV. Vess is also the registered agent and part owner of VAP-IV.

91. Vess is a close business associate of Kivisto. For example, Vess or one of his affiliated businesses, with Kivisto, held units of SemGroup through non-Debtor Eaglwing Energy LLC. Vess and Kivisto have also partnered, directly or indirectly, in other entities, including VAP-I, VAP-II, VAP-III, Brazos Acquisition Group, LLC, and High Plains Energy Trading. Further, Kivisto utilized Westback to act as a counterparty to a Vess-affiliated company in certain hedging transactions.

92. At his deposition, Kivisto asserted his Fifth Amendment privilege against self-incrimination when asked about transfers of the oil and gas leases. He made the same assertion when asked whether he would agree, on behalf of Westback and himself, to cease transferring or selling Westback’s assets.

**F. Kivisto's Use of Westback to Generate Improper Commissions and Unsupported Payments of Tens of Millions of Dollars for Himself**

93. While the SemGroup Entities received absolutely no commission and zero benefit for acting as agent to Westback and taking on the Westback Receivable, Kivisto improperly collected commissions from the SemGroup Entities by making his alter ego, Westback, an agent to Debtor entity Eaglwing.

94. On information and belief, pursuant to a purported verbal agreement between Kivisto, Cooper, and Wallace, Westback operated as an agent for Eaglwing for the physical commodities trades Kivisto conducted for SemGroup. Under this purported arrangement, Kivisto, on behalf of Westback, collected commissions from SemGroup. These commission payments totaled approximately \$4.14 million from January 2007 through May 2008. However, this trading activity -- to the extent it actually occurred -- was within the scope of Kivisto's duties at SemGroup, and, therefore, he was already being compensated for it.

95. Few records have been found verifying that these transfers were, in fact, commission payments. As noted above, Kivisto caused his personal administrative assistant, Sharon Pens, and personal accountant, Gregory Price, to handle the accounting for Westback and debtor entity Eaglwing. On information and belief, Pens provided Price with the amount payable for the purported commissions to Westback, which Price booked, without further supporting documentation. On information and belief, documents obtained from Pens' office reflect a single, nondescript line item with an amount payable to Westback from Eaglwing, and offer no basis for how the amount was calculated.

96. Eaglwing made several mysterious transfers to Westback during the time when Pens and Price were handling the books and records for the two entities. Between January

2007 and June 2008, Eaglwing transferred approximately \$21.9 million to Westback. On information and belief, although Price indicated that these transfers may have been for settlements of actual barrels of oil purchased, SemGroup has no documentation supporting these transfers, other than line item entries in Eaglwing and Westback records kept by Pens and Price.

97. In addition, Eaglwing and Westback records indicate that Eaglwing recorded a \$13.1 million receipt from Westback in the general ledger on July 25, 2007. However, on information and belief, this cash inflow is not reflected in a corresponding entry on Eaglwing's account statement from Bank of Oklahoma, N.A. ("BOK"). On information and belief, Eaglwing recorded a payment to Westback of \$13.1 million less than a month later, on August 20, 2007. This \$13.1 million "payback" -- unlike the earlier transfer of the exact same amount into Eaglwing's account -- is reflected on Eaglwing's BOK account statement as a cash outflow. On information and belief, SemGroup has no documentation supporting these transfers, other than the line item Eaglwing ledger entry and bank records discussed above.

98. Moreover, despite the large sum of money owed to the SemGroup Entities by Westback as reflected in the Westback Receivable, the SemGroup Entities, through debtor entity Eaglwing, continued to make large payments to Westback during 2007 and 2008. These payments included payments of \$27.3 million and \$8.0 million on February 20, 2008, and payments of \$5.0 million and \$2.7 million on February 29, 2008. In total, between February 20, 2008 and April 18, 2008, Eaglwing made a total of \$45 million in payments to Westback.

99. These tens of millions of dollars of transfers from the SemGroup Entities to Westback occurred at the same time that Kivisto and other Defendants were causing and permitting the SemGroup Entities to fund Westback's trading activities, which were building the Westback Receivable to hundreds of millions of dollars.

**G. Unauthorized Bonus Payments and Undisclosed Outside Business Activities**

100. Kivisto, Wallace, and Foxx breached their employment agreements and breached their fiduciary duties of loyalty, care, and good faith to the SemGroup Entities. Under the agreement governing Kivisto's employment dated April 30, 2004 (the "Kivisto Employment Agreement"), Kivisto reported to the Management Committee and was also a member of the Management Committee, controlling one-third of its seats until December 2008. The Kivisto Employment Agreement also imposed upon Kivisto an obligation to "exercise due diligence and reasonable care in the performance of his responsibilities and to use his best efforts to maintain and enhance the business and reputation of SemManagement, LLC and SemGroup, L.P."

101. Under the agreement governing Wallace's employment dated April 30, 2004 (the "Wallace Employment Agreement"), Wallace also reported to the Management Committee. Wallace served as a member of the Management Committee from May 2007 until December 2008, as Kivisto's designee. The Wallace Employment Agreement also imposed upon Wallace an obligation to "exercise due diligence and reasonable care in the performance of his responsibilities and to use his best efforts to maintain and enhance the business and reputation of SemManagement, LLC and SemGroup, L.P."

102. Under the agreement governing Foxx's employment dated April 30, 2004 (the "Foxx Employment Agreement"; collectively, the "Employment Agreements"), Foxx also reported to the Management Committee. Foxx served as a member of the Management Committee from May 2007 until July 2008, as Kivisto's designee. The Foxx Employment Agreement also imposed upon Foxx a obligation to "exercise due diligence and reasonable care in the performance of his responsibilities and to use his best efforts to maintain and enhance the business and reputation of SemManagement, LLC and SemGroup, L.P."

103. The Kivisto Employment Agreement provides that Kivisto, as a member of the Management Committee, “shall not participate in any Management Committee action or decision required or otherwise taken with respect to the Employment Agreement.” It further provides that the Management Committee will determine the amount of the “Cash Bonus Pool paid to management” and “the amount of such Cash Bonus Pool paid to [Kivisto].”

104. The Wallace and Foxx Employment Agreements also provide that the Management Committee will determine the amount of the “Cash Bonus Pool paid to management” and “the amount of such Cash Bonus Pool paid to [Wallace or Foxx].”

105. Although the Management Committee was required to determine and approve all bonuses, Kivisto unilaterally awarded bonuses to himself, Foxx, and Wallace without the approval of the Management Committee and, therefore, not in the ordinary course of the SemGroup Entities’ businesses. In awarding and accepting these unauthorized bonuses, Kivisto, Foxx, and Wallace breached their duties of loyalty, care, and good faith to the SemGroup Entities.

106. Since 2004, Kivisto has caused SemGroup to pay himself bonuses in the amount of \$46,001,000 million (the “Kivisto Bonus Transfers”) without the approval of the Management Committee, to pay Wallace bonuses in the amount of \$25,101,000 (the “Wallace Bonus Transfers”) without the approval of the Management Committee, and to pay Foxx bonuses in the amount of \$10,651,000 (the “Foxx Bonus Transfers”) (collectively, the “Bonus Transfers”) without the approval of the Management Committee as follows:

<b>Year</b>	<b>Kivisto Bonus</b>	<b>Wallace Bonus</b>	<b>Foxx Bonus</b>
July 2004 – July 2005	\$5,600,000	\$2,400,000	\$551,000
July 2005 – July 2006	\$15,901,000	\$7,701,000	\$3,500,000
July 2006 – July 2007	\$13,500,000	\$7,500,000	\$3,600,000
July 2007 – July 2008	\$11,000,000	\$7,500,000	\$3,000,000
Total	\$46,001,000	\$25,101,000	\$10,651,000

107. Within two years of the Petition date, Kivisto unilaterally awarded \$24.5 million to himself (the “Kivisto 2-Year Bonus Transfers”), \$15 million to Wallace (the “Wallace 2-Year Bonus Transfers”), and \$6.6 million to Foxx (the “Foxx 2-Year Bonus Transfers”) (collectively, the “2-year Bonus Transfers”).

108. In December 2007, Kivisto unilaterally awarded \$7.5 million to himself (the “Kivisto December 2007 Bonus Transfers”), \$5 million to Wallace (the “Wallace December 2007 Bonus Transfers”), and \$2 million to Foxx (the “Foxx December 2007 Bonus Transfers”) (collectively the “December 2007 Bonus Transfers”).

109. In addition, Kivisto awarded over \$1.2 million in bonuses to Cooper, and over \$500,000 in bonuses to Stallings, between January 1, 2006 and July 21, 2007.

110. Kivisto unilaterally awarded these tens of millions of dollars of bonuses, and Wallace, Foxx, Cooper, and Stallings accepted them, at the same time that Kivisto and defendants were breaching fiduciary duties of loyalty, care, and good faith to the SemGroup Entities and otherwise harming the SemGroup Entities through various misconduct, including, among other things, engaging in speculative trading and thereby exposing the SemGroup Entities to high levels of risk, in violation of the Credit Agreement, SemGroup’s RMP, and SemGroup’s Bond Indenture Agreement; causing and permitting Kivisto and his alter ego, Westback, to

receive hundreds of millions of dollars of benefits through the SemGroup Entities funding of Westback trading, with nothing in return to the SemGroup Entities; causing and permitting Kivisto -- through Westback -- to receive tens of millions of dollars of questionable payments from the SemGroup Entities, recorded on the SemGroup Entities' books and records kept by Kivisto's personal assistant and personal accountant; and engaging in other interested transactions more fully described below.

111. In addition, in December 2007, Kivisto awarded Coen \$1.4 million in bonus payments, and Owen \$1 million in bonus payments.

112. The Employment Agreements also provided that, in the event that Kivisto, Wallace, or Foxx were terminated for "cause," no further compensation or benefits would be due under the Employment Agreements except for the base salary accrued to the date of termination. In other words, if Kivisto, Wallace, or Foxx were terminated for "cause," they would not be entitled to the Bonus Transfers, among other things. According to the Employment Agreements, an executive may be terminated for "cause" as a result of "any material breach" of the Employment Agreement and "any material violation of the policies of the Company."

113. Kivisto materially breached the Kivisto Employment Agreement in other respects beyond the unilaterally awarded Bonus Transfers, and otherwise not exercising due diligence and reasonable care in the performance of his responsibilities. For example, under the Kivisto Employment Agreement, Kivisto agreed to "devote all of his business time, efforts and attention to the business and affairs of the SemGroup Entities and SemGroup, L.P. on an exclusive basis, and not to engage in any other business activities for any person or entity, other than as expressly provided in this Section 2.1." Kivisto also agreed that he could only engage in

personal investment activities, which did not materially affect the performance of his duties “in the good faith opinion of the Management Committee.”

114. Notwithstanding the above and in breach of his fiduciary duties of loyalty, care, and good faith, Kivisto devoted significant business time and attention to numerous non-Debtor corporate ventures at the same time that he served as CEO and President of SemGroup. These other business ventures included, without limitation, D’Novo Lean Gourmet, L.L.C. (“Lean Gourmet”); Cogan CD Development, LLC; Ivory Energy, L.L.C.; and Quote, L.L.C. Kivisto also took a leading financial and/or management role in several art galleries. The foregoing entities were not mentioned in the Kivisto Employment Agreement; nor were they disclosed to outside members of the Management Committee.

115. Kivisto, as President and CEO of SemGroup, also breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities by directing SemGroup to enter into transactions with his separately owned companies without disclosing his self-interest to the SemGroup Entities or to outside members of the Management Committee.

116. For example, SemGroup contracted with Lean Gourmet, which was 65% owned by Kivisto, to provide pre-packaged meals and related services for SemGroup employees. Kivisto caused SemGroup to pay a portion of the costs incurred by its employees in purchasing prepackaged meals and related services and to furnish certain information technology services to Lean Gourmet free of charge. Specifically, Kivisto gave his partner in Lean Gourmet, with whom he had an undisclosed personal relationship, access to SemGroup’s resources, including its office space, IT services, and employees to conduct her Lean Gourmet business without any benefit to SemGroup in return.

117. In addition, Kivisto caused SemGroup to purchase artwork for its offices from galleries owned in whole or in part by Kivisto and caused SemGroup employees and resources to be diverted to these art galleries. Kivisto failed to disclose his financial interest in these galleries to outside members of the Management Committee.

118. Finally, Kivisto materially violated the SemGroup Entities' policies, including but not limited to the policy against creating the appearance of a conflict of interest, by, among other things, awarding bonuses to someone with whom he had a personal relationship and engaging in the above-mentioned personal investment activities.

119. At his deposition, Kivisto asserted his Fifth Amendment privilege against self-incrimination when asked about his interest in these companies, the time he devoted to these companies, and his use of the SemGroup Entities' resources and personnel for the benefit of these companies.

120. Wallace and Foxx also agreed to "devote all of [their] business time, efforts and attention to the business and affairs of the Company and SemGroup, L.P. on an exclusive basis, and not to engage in any other business activities for any person or entity, other than as expressly provided in this Section 2.1" and that they could only engage in personal investment activities that did not materially affect the performance of their duties "in the good faith opinion of the Management Committee."

121. Wallace and Foxx materially breached their employment agreements and SemGroup's policy by, among other things, maintaining an ownership interest in Lean Gourmet that was not disclosed nor approved by outside members of the Management Committee. Wallace and Foxx, as officers of SemGroup, also breached their fiduciary duties of loyalty, care, and good faith to the SemGroup Entities by permitting SemGroup to contract with Lean Gourmet

without disclosing their self-interest. In addition, Wallace and Foxx breached their obligation to exercise due diligence and reasonable care in the performance of their responsibilities, for all the reasons discussed herein, including their failure to address Kivisto's speculative trading, the Westback Receivable (as to Wallace), and inadequacies in the RMP.

#### **H. Partnership Distributions**

122. In 2007, SemGroup adopted a Master Limited Partnership ("MLP") business model, which resulted in the July 2007 formation of SGLP, a publicly owned company. The strategy was to take assets with stable cash flows from SemGroup and its subsidiaries and drop them down into SGLP, in an effort to raise capital for SemGroup through public offerings.

123. The first dropdown occurred pursuant to a Purchase and Sale Agreement ("PSA") dated January 14, 2008, in which SemMaterials agreed to transfer liquid asphalt assets, valued at \$378.8 million, to SGLP and certain of its affiliates. The transaction closed on February 20, 2008. Foxx and Stallings worked on the transaction for SGLP. Wallace and Kivisto worked on the transaction for SemGroup.

124. On February 15, 2008, SemGroup's Management Committee authorized a \$100 million partner distribution from this dropdown. The Memorandum of Action ("MOA") documenting the distribution was signed by the Management Committee members and provided that after the closing of the transactions set forth in the PSA, the Partnership (SemGroup) would make a \$100 million distribution to its partners in accordance with their respective ownership percentages (the "Partnership Distributions").

125. As a result of the "dropdown" transaction, upon information and belief, the following inside partners received distributions in the following approximate amounts:

<b>Partner</b>	<b>Distribution</b>
Kivisto	\$16,318,630
Wallace	\$4,270,957
Foxx	\$4,561,726
Cooper	\$121,691.21
Stallings	\$66,803.29

**COUNT ONE**

**Actual Fraudulent Transfer under §§ 544 and 550 Based on Westback Transfers  
against the Kivisto Defendants**

126. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-125.

127. Pursuant to Bankruptcy Code section 544(b), Plaintiff has the rights of an existing unsecured creditor of each of the Debtors. Section 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under applicable state law.

128. Within the four-year period immediately preceding the filing of this complaint, Kivisto caused the Debtors to advance funds in excess of \$289 million for the benefit of his alter ego, Westback (the “Westback Transfers”), resulting in the Westback Receivable. The transfer of such funds constituted a transfer of the Debtors’ property interests.

129. The Kivisto Defendants caused the Debtors to make the Westback Transfers with the actual intent to hinder, delay, or defraud the Debtors’ creditors. The Westback Transfers were made for the benefit of an insider, Kivisto. Furthermore, the Debtors recorded no revenues, charged no fees to the Kivisto Defendants, and received no pecuniary

benefit as a result of the agency relationship. The Kivisto Defendants caused the Westback Transfers to be made in violation of the RMP, the Credit Agreement, and the Bond Indenture. Kivisto did not timely and adequately disclose the transactions giving rise to the Westback Receivable. Instead, Westback's brokerage account was established under the name "ETI2," likely to create the false impression that it functioned for the benefit of a Debtor entity and to conceal the fact that it functioned for the sole benefit of Kivisto and Westback, Kivisto's personal non-Debtor entity. The Debtors became insolvent during the time that the Westback Transfers were being made. Therefore, the Westback Transfers are voidable under section 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

130. Because the Westback Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

## **COUNT TWO**

### **Constructive Fraudulent Transfer under §§ 544 and 550 Based on 2008 Westback Transfers against the Kivisto Defendants**

131. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-130.

132. Pursuant to Bankruptcy Code section 544(b), Plaintiff has the rights of an existing unsecured creditor of each of the Debtors. Section 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under applicable state law.

133. Within the four-year period immediately preceding the filing of this complaint, and more specifically between February 2008 and July 2008, Kivisto caused the

Debtors to advance \$19.9 million for the benefit of his alter ego, Westback, thereby building upon the Westback Receivable (the “2008 Westback Transfers”). The transfer of such funds constituted a transfer of the Debtors’ property interests.

134. At the time of the 2008 Westback Transfers, the Debtors were insolvent. The Debtors received less than reasonably equivalent value in exchange for the 2008 Westback Transfers. Therefore, the Westback Transfers are voidable under section 544 of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

135. Because the 2008 Westback Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

### **COUNT THREE**

#### **Actual Fraudulent Transfer Under §§ 548 and 550 Based on Westback Transfers against the Kivisto Defendants**

136. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-135.

137. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, Kivisto caused the Debtors to effectuate the Westback Transfers, advancing funds in excess of \$289 million for the benefit of his alter ego, Westback. The transfer of such funds constituted a transfer of the Debtors’ property interests.

138. The Kivisto Defendants caused the Debtors to make the Westback Transfers with the actual intent to hinder, delay, or defraud the Debtors’ creditors. The Westback Transfers were made for the benefit of an insider, Kivisto. Furthermore, the Debtors

recorded no revenues, charged no fees to the Kivisto Defendants, and received no pecuniary benefit as a result of the agency relationship. The Kivisto Defendants caused the Westback Transfers to be made in violation of the RMP, the Credit Agreement, and the Bond Indenture. Kivisto did not timely and adequately disclose the transactions giving rise to the Westback Receivable. Instead, Westback's brokerage account was established under the name "ETI2," likely to create the false impression that it functioned for the benefit of a Debtor entity and to conceal the fact that it functioned for the sole benefit of Kivisto and Westback, Kivisto's personal non-Debtor entity. The Debtors became insolvent during the time that the Westback Transfers were being made. Therefore, the Westback Transfers are voidable under section 548(a)(1)(A) of the Bankruptcy Code.

139. Because the Westback Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

#### **COUNT FOUR**

##### **Constructive Fraudulent Transfer Under §§ 548 and 550 Based on Westback Transfers and the 2008 Westback Transfers against the Kivisto Defendants**

140. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-139.

141. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, Kivisto caused the Debtors to effectuate the Westback Transfers, advancing funds in excess of \$289 million for the benefit of his alter ego, Westback. The transfer of such funds constituted a transfer of the Debtors' property interests.

142. The Debtors received less than reasonably equivalent value in exchange for the Westback Transfers. Because Kivisto was an officer of the Debtors, the Westback Transfers were for the benefit of an insider under an employment agreement. Further, the Westback Transfers were not in the ordinary course of business for various reasons, including because Kivisto caused them to be made in violation of the RMP, the Credit Agreement, and the Bond Indenture, and were not adequately disclosed to outside members of the Management Committee. Therefore, the Westback Transfers are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

143. Between February 2008 and July 2008, Kivisto caused the Debtors to make the 2008 Westback Transfers for the benefit of his alter ego, Westback, thereby building upon the Westback Receivable. The transfer of such funds constituted a transfer of the Debtors' property interests.

144. At the time of the 2008 Westback Transfers, the Debtors were insolvent. The Debtors received less than reasonably equivalent value in exchange for the 2008 Westback Transfers. Therefore, the Westback Transfers are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

145. Because the Westback Transfers and the 2008 Westback Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

## COUNT FIVE

### **Actual Fraudulent Transfer under §§ 544 and 550 Based on Bonus Transfers against Kivisto, Wallace, and Foxx**

146. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-145.

147. Pursuant to Bankruptcy Code section 544(b), Plaintiff has the rights of an existing unsecured creditor of each of the Debtors. Section 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under applicable state law.

148. Within the four-year period immediately preceding filing of this complaint, Kivisto caused the Debtors to pay the Kivisto Bonus Transfers in the amount of over \$46 million, the Wallace Bonus Transfers in the amount of over \$25 million, and the Foxx Bonus Transfers in the amount of over \$10 million, all without the approval of the Management Committee as follows:

<b>Year</b>	<b>Kivisto Bonus</b>	<b>Wallace Bonus</b>	<b>Foxx Bonus</b>
July 2004 – July 2005	\$5,600,000	\$2,400,000	\$551,000
July 2005 – July 2006	\$15,901,000	\$7,701,000	\$3,500,000
July 2006 – July 2007	\$13,500,000	\$7,500,000	\$3,600,000
July 2007 – July 2008	\$11,000,000	\$7,500,000	\$3,000,000

149. The Bonus Transfers constituted transfers of interests of the Debtors' property.

150. The Bonus Transfers were made with actual intent to hinder, delay, or defraud the Debtors' creditors. Kivisto, the CEO and President of SemGroup, unilaterally awarded the Bonus Transfers to himself, Wallace, and Foxx, all insiders, without the approval of

the Management Committee. A large portion of the Bonus Transfers were awarded when the Debtors' financial condition was rapidly deteriorating, and some of the Bonus Transfers were awarded after the Debtors were insolvent. Kivisto awarded the Bonus Transfers in violation of his Employment Agreement. The Debtors received less than reasonably equivalent value in exchange for the Bonus Transfers. Therefore, the Bonus Transfers are voidable under section 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

151. Because the Kivisto Bonus Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Kivisto as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

152. Because the Wallace Bonus Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Wallace as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

153. Because the Foxx Bonus Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Foxx as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

#### **COUNT SIX**

#### **Constructive Fraudulent Transfer under §§ 544 and 550 Based on December 2007 Bonus Transfers against Kivisto, Wallace, and Foxx**

154. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-153.

155. Pursuant to Bankruptcy Code section 544(b), Plaintiff has the rights of an existing unsecured creditor of each of the Debtors. Section 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under applicable state law.

156. Within the four-year period immediately preceding filing of this complaint, specifically in December 2007, Kivisto caused the Debtors to pay the Kivisto December 2007 Bonus Transfers in the amount of \$7.5 million without the approval of the Management Committee, the Wallace December 2007 Bonus Transfers in the amount of \$5 million without the approval of the Management Committee, and the Foxx December 2007 Bonus Transfers in the amount of \$2 million without the approval of the Management Committee.

157. The December 2007 Bonus Transfers constituted transfers of interests of the Debtors' property.

158. The Debtors received less than reasonably equivalent value in exchange for the December 2007 Bonus Transfers. At the time of the December 2007 Bonus Transfers, the Debtors were insolvent. Therefore, the Bonus Transfers are voidable under section 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

159. Because the Kivisto Bonus Transfers and Kivisto December 2007 Bonus Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Kivisto as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

160. Because the Wallace Bonus Transfers and Wallace December 2007 Bonus Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to

Bankruptcy Code section 550, Plaintiff may recover from Wallace as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

161. Because the Foxx Bonus Transfers and Foxx December 2007 Bonus Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Foxx as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

### **COUNT SEVEN**

#### **Actual Fraudulent Transfer Under §§ 548 and 550 Based on 2-Year Bonus Transfers against Kivisto, Wallace, and Foxx**

162. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-161.

163. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, since July of 2006, Kivisto caused the Debtors to pay the Kivisto 2-Year Bonus Transfers in the amount of \$24.5 million without the approval of the Management Committee, the Wallace 2-Year Bonus Transfers in the amount of \$15 million without the approval of the Management Committee, and the Foxx 2-Year Bonus Transfers in the amount of \$6.6 million without the approval of the Management Committee.

164. The 2-Year Bonus Transfers constituted transfers of interests of the Debtors' property.

165. The 2-Year Bonus Transfers were made with actual intent to hinder, delay, or defraud the Debtors' creditors. Kivisto, the CEO and President of SemGroup, unilaterally awarded the 2-Year Bonus Transfers to himself, Wallace, and Foxx, all insiders, without the approval of the Management Committee. A large portion of the 2-Year Bonus Transfers were

awarded when the Debtors' financial condition was rapidly deteriorating, and some of the 2-Year Bonus Transfers were awarded after the Debtors were insolvent. Kivisto awarded the 2-Year Bonus Transfers in violation of his own Employment Agreement. The Debtors received less than reasonably equivalent value in exchange for the 2-Year Bonus Transfers. Therefore, the 2-Year Bonus Transfers are voidable under section 548(a)(1)(A) of the Bankruptcy Code.

166. Because the Kivisto 2-Year Bonus Transfers and Kivisto December 2007 Bonus Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Kivisto as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

167. Because the Wallace 2-Year Bonus Transfers and Wallace December 2007 Bonus Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Wallace as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

168. Because the Foxx 2-Year Bonus Transfers and Foxx December 2007 Bonus Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Foxx as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

### **COUNT EIGHT**

#### **Constructive Fraudulent Transfer Under §§ 548 and 550 Based on 2-Year Bonus Transfers and December 2007 Bonus Transfers against Kivisto, Wallace, and Foxx**

169. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-168.

170. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, since July of 2006, Kivisto caused the Debtors to pay the Kivisto 2-Year Bonus Transfers in the amount of \$24.5 million without the approval of the Management Committee, the Wallace 2-Year Bonus Transfers in the amount of \$15 million without the approval of the Management Committee, and the Foxx 2-Year Bonus Transfers in the amount of \$6.6 million without the approval of the Management Committee.

171. The 2-Year Bonus Transfers constituted transfers of interests of the Debtors' property.

172. The Debtors received less than reasonably equivalent value in exchange for the 2-Year Bonus Transfers. Because Kivisto, Wallace, and Foxx were officers of the Debtors, the 2-Year Bonus Transfers were for the benefit of an insider under an employment agreement. For various reasons, including because Kivisto unilaterally awarded these bonuses to himself, Wallace, and Foxx without the approval of the Management Committee, the 2-Year Bonus Transfers were not in the ordinary course of business. Therefore, the 2-Year Bonus Transfers are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

173. In December 2007, Kivisto caused the Debtors to pay the Kivisto December 2007 Bonus Transfers in the amount of \$7.5 million without the approval of the Management Committee, the Wallace December 2007 Bonus Transfers in the amount of \$5 million without the approval of the Management Committee, and the Foxx December 2007 Bonus Transfers in the amount of \$2 million, without the approval of the Management Committee.

174. The December Bonus Transfers constituted transfers of interests of the Debtors' property.

175. The Debtors received less than reasonably equivalent value in exchange for the December 2007 Bonus Transfers. At the time of the December 2007 Bonus Transfers, the Debtors were insolvent. Therefore, the December 2007 Bonus Transfers are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

176. Because the Kivisto 2-Year Bonus Transfers and Kivisto December 2007 Bonus Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Kivisto as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

177. Because the Wallace 2-Year Bonus Transfers and Wallace December 2007 Bonus Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Wallace as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

178. Because the Foxx 2-Year Bonus Transfers and Foxx December 2007 Bonus Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Foxx as an initial transferee or entity for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

#### **COUNT NINE**

#### **Actual Fraudulent Transfer under §§ 544 and 550 Based on the Purported Commissions for Commodities Trading against Kivisto Defendants**

179. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-178.

180. Pursuant to Bankruptcy Code section 544(b), Plaintiff has the rights of an existing unsecured creditor of each of the Debtors. Section 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under applicable state law.

181. Within the four-year period immediately preceding the filing of this complaint, and more specifically between January 2007 and May 2008, Kivisto caused the Debtors to transfer funds in excess of \$4.14 million to his alter ego, Westback, for purported commissions on physical commodities trades (the “Commission Transfers”). The transfer of such funds constituted a transfer of the Debtors’ property interests.

182. The Kivisto Defendants caused the Debtors to make the Commission Transfers with the actual intent to hinder, delay, or defraud the Debtors’ creditors. The Commission Transfers were made for the benefit of an insider, Kivisto. Kivisto did not adequately and timely disclose the Commission Transfers. Indeed, various circumstances surrounding the Commission Transfers are extremely suspicious, including that (i) the purported “agreement” supporting the Transfers (if any agreement existed at all) was an oral agreement between Kivisto and co-defendants Cooper and Wallace that is nowhere memorialized in writing; (ii) on information and belief, there is no documentation in the Debtors’ records supporting approximately \$2.2 million of the Commission Transfers; and (iii) on information and belief, the only Debtor documentation relating to the remaining Commission Transfers were single, nondescript line items in records generated by Kivisto’s administrative assistant, Pens, which offer no basis for how the purported commissions were calculated. The Debtors did not receive reasonably equivalent value in return for the Commission Transfers because, to the extent Kivisto actually provided any services in connection with the Commission Transfers, such services were within the scope of Kivisto’s duties for the Debtors, for which he was already

compensated under his Employment Agreement. The Debtors became insolvent during the time that the Commission Transfers were being made. Therefore, the Commission Transfers are voidable under section 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

183. Because the Commission Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as a subsequent transferee.

#### **COUNT TEN**

#### **Constructive Fraudulent Transfer under §§ 544 and 550 Based on the Purported 2008 Commissions for Commodities Trading against Kivisto Defendants**

184. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-183.

185. Pursuant to Bankruptcy Code section 544(b), Plaintiff has the rights of an existing unsecured creditor of each of the Debtors. Section 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under applicable state law.

186. Within the four-year period immediately preceding the filing of this complaint, and more specifically between January 2008 and May 2008, Kivisto caused the Debtors to transfer funds in excess of \$1.4 million to his alter ego, Westback, for purported commissions on physical commodities trades (the “2008 Commission Transfers”).

187. The 2008 Commission Transfers constituted transfers of interests of SemGroup’s property.

188. The Debtors received less than reasonably equivalent value in exchange for the 2008 Commission Transfers because, to the extent Kivisto actually provided any services in connection with the 2008 Commission Transfers, such services were within the scope of Kivisto's duties for the Debtors, for which he was already compensated under his Employment Agreement. At the time of the 2008 Commission Transfers, the Debtors were insolvent. Therefore, the 2008 Commission Transfers are voidable under section 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

189. Because the 2008 Commission Transfers are avoidable under the Bankruptcy Code and applicable state law, then, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

### **COUNT ELEVEN**

#### **Actual Fraudulent Transfer under §§ 548 and 550 Based on the Purported Commissions for Commodities Trading against Kivisto Defendants**

190. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-189.

191. During the two-year period immediately preceding the commencement of the Bankruptcy Cases, and more specifically between January 2007 and May 2008, Kivisto caused the Debtors to make the Commission Transfers to his alter ego, Westback. The transfer of such funds constituted a transfer of the Debtors' property interests.

192. The Kivisto Defendants caused the Debtors to make the Commission Transfers with the actual intent to hinder, delay, or defraud the Debtors' creditors. The Commission Transfers were made for the benefit of an insider, Kivisto. Kivisto did not

adequately and timely disclose the Commission Transfers. Indeed, various circumstances surrounding the Commission Transfers are extremely suspicious, including that (i) the purported “agreement” supporting the Transfers (if any agreement existed at all) was an oral agreement between Kivisto and co-defendants Cooper and Wallace; (ii) on information and belief, there is no documentation in the Debtors’ records supporting at least \$2.19 million of the Commission Transfers; and (iii) on information and belief, the only Debtor documentation relating to the remaining Commission Transfers were single, nondescript line items in records generated by Kivisto’s administrative assistant, Pens, which offer no basis for how the purported commissions were calculated. The Debtors did not receive reasonably equivalent value in return for the Commission Transfers because, to the extent Kivisto actually provided any services in connection with the Commission Transfers, such services were within the scope of Kivisto’s duties for the Debtors, for which he was already compensated under his Employment Agreement. SemGroup became insolvent during the time that the Commission Transfers were being made. Therefore, the Commission Transfers are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

193. Because the Commission Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

## COUNT TWELVE

### **Constructive Fraudulent Transfer under §§ 548 and 550 Based on the Purported Commissions and 2008 Commissions for Commodities Trading against Kivisto Defendants**

194. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-193.

195. Within the two-year period immediately preceding the filing of this complaint, and more specifically between January 2007 and May 2008, Kivisto caused the Debtors to make the Commission Transfers to his alter ego, Westback.

196. Within the two-year period immediately preceding the filing of this complaint, and more specifically between January 2008 and May 2008, Kivisto caused the Debtors to make the 2008 Commission Transfers.

197. The Commission Transfers and 2008 Commission Transfers constituted transfers of interests of the Debtors' property.

198. Because Kivisto was an officer of the Debtors, the Commission Transfers were for the benefit of an insider under an employment agreement. In addition, the Debtors received less than reasonably equivalent value in exchange for the Commission Transfers because, to the extent Kivisto actually provided any services in connection with the Commission Transfers, such services were within the scope of Kivisto's duties for the Debtors, for which he was already compensated under his Employment Agreement. Therefore, the Commission Transfers are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

199. The Debtors received less than reasonably equivalent value in exchange for the 2008 Commission Transfers because, to the extent Kivisto actually provided any services in connection with the 2008 Commission Transfers, such services were within the scope of

Kivisto's duties for the Debtors, for which he was already compensated under his Employment Agreement. At the time of the 2008 Commission Transfers, the Debtors were insolvent. Therefore, the 2008 Commission Transfers are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

200. Because the Commission Transfers and 2008 Commission Transfers are avoidable under the Bankruptcy Code, pursuant to Bankruptcy Code section 550, Plaintiff may recover from the Kivisto Defendants as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

### **COUNT THIRTEEN**

#### **Constructive Fraudulent Transfer Under §§ 544 and 550 Based on Partnership Distributions against Kivisto, Wallace, Foxx, Cooper, and Stallings**

201. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-200.

202. Pursuant to Bankruptcy Code section 544(b), Plaintiff has the rights of an existing unsecured creditor of each of the Debtors. Section 544(b) permits Plaintiff to assert claims and causes of action that such a creditor could assert under applicable state law.

203. In February 2008, the Management Committee caused the Debtors to pay the Partnership Distributions to the following insiders, directly or indirectly, in the following approximate amounts:

<b>Partner</b>	<b>Distribution</b>
Kivisto	\$16,318,630
Wallace	\$4,270,957
Foxx	\$4,561,726

Cooper	\$121,691.21
Stallings	\$66,803.29

204. The Partnership Distributions constituted transfers of interests of the Debtors' property.

205. The Partnership Distributions occurred at a time that the Debtors were insolvent or became insolvent as a result of such distributions.

206. The Debtors received less than reasonably equivalent value in exchange for Partnership Distributions. Therefore, the Partnership Distributions are voidable under section 544(b) of the Bankruptcy Code, incorporating applicable nonbankruptcy law.

207. Because the Partnership Distributions are avoidable, pursuant to Bankruptcy Code section 550 and applicable state law, Plaintiff may recover from Kivisto, Wallace, Foxx, Cooper, and Stallings as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

**COUNT FOURTEEN**

**Constructive Fraudulent Transfer Under §§ 548 and 550 Based on Partnership Distributions against Kivisto, Wallace, Foxx, Cooper, and Stallings**

208. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-207.

209. In February 2008, the Management Committee caused the Debtors to pay the Partnership Distributions to or for the benefit of the following insiders under an employment contract and not in the ordinary course of business, directly or indirectly, in the following approximate amounts:

<b>Partner</b>	<b>Distribution</b>
----------------	---------------------

Kivisto	\$16,318,630
Wallace	\$4,270,957
Foxx	\$4,561,726
Cooper	\$121,691.21
Stallings	\$66,803.29

210. The Partnership Distributions constituted transfers of interests of the Debtors' property.

211. The Partnership Distributions occurred at a time that the Debtors were insolvent or became insolvent as a result of such distributions.

212. SemGroup received less than reasonably equivalent value in exchange for Partnership Distributions. Therefore, the Partnership Distributions are voidable under section 548(a)(1)(B) of the Bankruptcy Code.

213. Because the Partnership Distributions are avoidable, pursuant to Bankruptcy Code section 550, Plaintiff may recover from Kivisto, Wallace, Foxx, Cooper, and Stallings as initial transferees or entities for whose benefit the fraudulent transfers were made, or as subsequent transferees.

### **COUNT FIFTEEN**

#### **Breach of Fiduciary Duties Based on Westback Trading & Westback Receivable against Kivisto, Wallace, Cooper, and Stallings**

214. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-213.

215. Kivisto, in his capacity as an inside member of the Management Committee and CEO and President of SemGroup, was actively involved in the management and

governance of SemGroup. Kivisto was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

216. Wallace, in his capacity as an inside member of the Management Committee and CFO of SemGroup, was actively involved in the management and governance of SemGroup. Wallace was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

217. Cooper, in his capacity as Treasurer of SemGroup, was actively involved in the management and governance of SemGroup. Cooper was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

218. Stallings, in his capacity as CAO, was actively involved in the management and governance of SemGroup. Stallings was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

219. Kivisto breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities as follows:

- a. Kivisto knowingly subordinated the best interests of the Debtors to further his own personal interest by secretly causing the Debtors to purchase derivatives on behalf of his alter ego, Westback, and causing the Debtors to post Westback's margins, without the Debtors receiving anything in return. Kivisto caused the Debtors to transfer over \$289 million for his own benefit and for the benefit of Westback without reasonably expecting that the Debtors would benefit from such transfer and without adequate and timely disclosure to outside members of the

Management Committee. Kivisto did so in violation of the Debtors' Credit Agreement and RMP.

b. Rather than repay the Debtors for the Westback Receivable, as promised, Kivisto, at a time when he still owed the Debtors fiduciary duties, caused Westback to liquidate its interests in hundreds of oil and gas leases by transferring them to VAP-IV, an entity managed and owned in part by his close business associate, Vess, for approximately \$6 million.

c. Kivisto also purportedly engaged in physical commodities trades for the Debtors through his alter ego, Westback, for which Kivisto received commissions from the Debtors in an amount equal to or exceeding \$4.14 million. At the same time, Kivisto's duties as CEO and President included engaging in the same type of physical commodities trades for the Debtors, for which the Debtors already compensated Kivisto. Assuming that the \$4.14 million in payments were commissions for physical trading, Kivisto, through his alter-ego and personal trading company, Westback, improperly received additional compensation from the Debtors for activities that were within the normal scope of his duties (if the payments were not considered "commissions," then Kivisto simply looted the funds and the commissions payment explanation is a fabricated excuse).

d. Kivisto caused his personal assistant and personal accountant to be responsible for accounting and bookkeeping for Westback and the debtor entity, Eaglwing, through which Westback trading activity was being conducted. In 2007 -- at the same time that the Westback Receivable was building into the hundreds of millions of dollars -- Eaglwing transferred \$21.9 million and \$13.1

million to Westback. On information and belief, the Debtors have no supporting documentation for these transfers, other than line entries with no detail made by Kivisto's personal assistant and/or accountant in Eaglwing books and records.

e. Kivisto caused the Debtors to pay Oven and Coen bonuses of \$2.1 million and over \$1.5 million, respectively, between July 2007 and July 2008, even though Oven and Coen carried out trades through Eaglwing on behalf of Westback that cost Debtors at least \$289 million, and provided no pecuniary benefit to the Debtors.

220. Stallings breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities as follows:

a. At the suggestion of SemGroup's outside auditor, who was aware of the Westback trading losses, Stallings took steps to allow Kivisto to continue to execute trades on behalf of Westback in violation of the SemGroup's RMP and lender covenants. For example, Stallings prepared a written agreement between Kivisto, Westback, and Eaglwing, dated March 20, 2006, which confirmed the parties' understanding that when Eaglwing entered into trading contracts, it is "doing so only as Westback's authorized agent and representative, and all obligations and benefits under [such] [c]ontracts shall be for the sole account of Westback." Stallings also sent Kivisto two letters requesting him to acknowledge that the total amount of the Westback Receivable owed to SemGroup was over \$323 million. Stallings took these steps at the request of SemGroup's auditors so that they could appear to be conducting the proper level of due diligence when in

fact both Stallings and the auditors were turning a blind eye to the true gravity and potential impact of the Westback Receivable.

b. Despite his knowledge that Kivisto's net worth was \$71 to \$88 million less than the amount of the Westback Receivable, Stallings intentionally failed to conduct any genuine testing of the creditworthiness of the Westback Receivable and obtained little to no verification of the financial wherewithal of Westback . Instead, contrary to the facts as he knew them, Stallings drafted a memorandum stating that the "overall creditworthiness of [Westback] and Tom Kivisto considered in the aggregate is adequate to support the amount of the [R]eceivable."

c. Despite Stallings' knowledge of the growing amount of the Westback Receivable and the increasing concerns about the collectability of the Westback Receivable, Stallings did nothing to stop the Westback trading arrangement giving rise to the Westback Receivable.

d. On information and belief, Stallings intentionally failed to take appropriate action because he was motivated by his personal interests in receiving hundreds of thousands of dollars in bonuses. By taking steps to make sure that the full scope and increasing amount of the Westback Receivable did not come to light, Stallings ensured that Kivisto could remain in his position as SemGroup's President and CEO, thereby allowing Stallings to receive hundreds of thousands of dollars of unauthorized bonus payments unilaterally awarded by Kivisto.

221. Wallace breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities as follows:

a. Despite Wallace's knowledge of the growing amount of the Westback Receivable and the increasing concerns about the collectability of the Westback Receivable, Wallace made no attempt to collect any payments from either Kivisto or Westback until July 14, 2008, just one week before the bankruptcy filing.

b. On information and belief, Wallace intentionally failed to take any action because he was motivated by his personal interests in receiving millions of dollars in bonuses. By taking steps to make sure that the full scope and increasing amount of the Westback Receivable did not come to light, Wallace ensured that Kivisto could remain in his position as SemGroup's President and CEO, thereby allowing Wallace to receive tens of millions of dollars of unauthorized bonus payments unilaterally awarded by Kivisto.

222. Wallace, Cooper, and Stallings breached their fiduciary duties of loyalty, care, and good faith to the SemGroup Entities. Each knew that Kivisto utilized Westback for his own personal benefit and to the detriment of the Debtors with respect to the Westback Receivable. Each also knew that Kivisto did not adequately and timely disclose his relationship with Westback to outside members of the Management Committee. Nevertheless, Wallace, Cooper, and Stallings intentionally did nothing to stop Kivisto from using the Debtors' money to fund his personal trading activities, including notifying outside members of the Management Committee. Instead, on information and belief, Wallace, Cooper, and Stallings readily accepted tens of millions of dollars of unauthorized bonus payments unilaterally awarded by Kivisto. On information and belief, Wallace, Cooper, and Stallings acted in bad faith, by consciously disregarding their responsibility to take action to prevent Kivisto's misconduct. As a result of their inaction, the SemGroup Entities remained in the dark about the true nature and size of the

Westback Receivable, thus allowing it to grow dramatically, from \$19.8 million at the end of 2005, to \$136.3 million as of December 31, 2006, and to \$323.8 million as of December 31, 2007.

223. On information and belief, Wallace and Cooper further breached their own fiduciary duties of loyalty and care to the SemGroup Entities, and acted in bad faith, by entering into a verbal agreement with Kivisto, to the detriment of the Debtors, under which Westback operated as an agent for a Debtor entity for certain physical commodities trades conducted by Kivisto, and in return Kivisto, through his alter ego and personal trading company, Westback, received commission payments in return for the trades purportedly arranged by Kivisto.

224. Wallace and Cooper were aware that Kivisto engaged in physical commodities trades for SemGroup through Westback, for which Kivisto received additional compensation from SemGroup for activity that was within his normal scope of duties. Yet, neither Wallace nor Cooper did anything to stop Kivisto from causing SemGroup to pay him improper compensation, including notifying outside members of the Management Committee, and deliberately took steps to conceal this arrangement from the SemGroup Entities by entering into a verbal agreement only.

225. On information and belief, despite knowing that Kivisto's actions were not in the SemGroup Entities' best interests, Wallace, Cooper and Stallings intentionally failed to take any action to prevent and stop Kivisto's misconduct. As such, Wallace, Cooper, and Stallings consciously disregarded their fiduciary duties of loyalty and care, and acted in bad faith by allowing the Westback Receivable to grow by an alarming amount, thereby exposing SemGroup to significant financial risk, and by allowing Kivisto through his alter ego and personal trading company, Westback, to receive an additional \$4.14 million in purported

commissions from the Debtors for activities that were within the normal course of his duties and for which he was already generously compensated.

226. The Debtors, and the estates, have been injured as a result of the above-mentioned breaches of fiduciary duties. Plaintiff, on behalf of the estates, seek damages as well as the disgorgement of any funds improperly received by Kivisto, Wallace, Cooper and/or Stallings.

### **COUNT SIXTEEN**

#### **Breach of Fiduciary Duties Based on Undisclosed Bonus Payments against Kivisto, Foxx, and Wallace**

227. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-226.

228. Kivisto, in his capacity as an inside member of the Management Committee and CEO and President of SemGroup, was actively involved in the management and governance of SemGroup. Kivisto was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

229. Kivisto breached his fiduciary duties of loyalty, care, and good faith to the Debtors because Kivisto knowingly exceeded his authority as an officer of SemGroup by causing the company to disburse the Bonus Transfers to himself and others without any prior approval of the Management Committee.

230. Wallace, in his capacity as an inside member of the Management Committee and CFO of SemGroup, was actively involved in the management and governance of SemGroup. Wallace was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

231. Wallace breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities because Wallace accepted the Wallace Bonus Transfers notwithstanding his knowledge that Kivisto breached his fiduciary duties in granting them. Wallace also failed to take any action, including notifying outside members of the Management Committee about the Bonus Transfers, and consciously disregarded his responsibility to take action to prevent Kivisto's misconduct.

232. Foxx, in his capacity as an inside member of the Management Committee and COO, was actively involved in the management and governance of SemGroup. Foxx was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

233. Foxx breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities because Foxx accepted the Foxx Bonus Transfers notwithstanding his knowledge that Kivisto breached his fiduciary duties in granting them. Foxx also failed to take any action, including notifying outside members of the Management Committee about the Bonus Transfers, and consciously disregarded his responsibility to take action to prevent Kivisto's misconduct.

234. The Debtors, and the estates, have been injured as a result of the above-mentioned breaches of fiduciary duties. Plaintiff, on behalf of the estates, seeks damages as well as the disgorgement of any bonuses received by Kivisto, Foxx, or Wallace from these breaches.

## COUNT SEVENTEEN

### **Breach of Fiduciary Duties Based on Other Business Involvement against Kivisto, Foxx, and Wallace**

235. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-234.

236. Kivisto, in his capacity as an inside member of the Management Committee and CEO and President of SemGroup, was actively involved in the management and governance of SemGroup. Kivisto was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

237. Wallace, in his capacity as an inside member of the Management Committee and CFO of SemGroup, was actively involved in the management and governance of SemGroup. Wallace was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

238. Foxx, in his capacity as an inside member of the Management Committee and COO, was actively involved in the management and governance of SemGroup. Foxx was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

239. Kivisto breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities as follows:

- a. Kivisto knowingly subordinated the best interests of the Debtors to further his own personal interest by causing the Debtors to enter into transactions with other companies he separately owned, in whole or in part, without disclosing his

self-interest. For example, Kivisto caused the Debtors to enter into contracts with several art galleries and Lean Gourmet, all owned, in whole or in part, by Kivisto.

b. Kivisto devoted significant business time and attention to numerous non-Debtor corporate ventures at the same time that he served as CEO and President of SemGroup.

c. In addition, Kivisto caused Debtors' resources, such as employee time, office space, money, and equipment, to be used for the benefit of companies in which Kivisto had an undisclosed ownership interest.

240. Wallace breached his fiduciary duties of loyalty, care and good faith to SemGroup Entities by permitting the Debtors to contract with Lean Gourmet, in which Wallace had an ownership interest with Kivisto, without disclosing his self-interest to outside members of the Management Committee or SemGroup.

241. Foxx breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities by permitting the Debtors to contract with Lean Gourmet, in which Foxx had an indirect ownership interest with Kivisto, without disclosing his self-interest to outside members of the Management Committee.

242. The Debtors, and the estates, have been injured as a result of the above-mentioned breaches of fiduciary duties. Plaintiff, on behalf of the estates, seeks damages as well as the disgorgement of any profits received by Kivisto, Foxx, or Wallace from these breaches.

## COUNT EIGHTEEN

### **Breach of Fiduciary Duties Based on Speculative Trading and Failure to Adequately Implement Risk Management against Kivisto, Wallace, Cooper, Stallings, and Foxx**

243. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-242.

244. Kivisto, in his capacity as an inside member of the Management Committee, a member of the RMC, and CEO and President of SemGroup, was actively involved in the governance and operation of SemGroup. Kivisto was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

245. Wallace, in his capacity as an inside member of the Management Committee, a member of the RMC, and CFO of SemGroup, was actively involved in the governance and operation of SemGroup. Wallace was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

246. Foxx, in his capacity as an inside member of the Management Committee, a member of the RMC, and COO, was actively involved in the governance and operation of SemGroup. Foxx was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

247. Stallings, in his capacity as CAO and a member of the RMC, was actively involved in the governance and operation of SemGroup. Stallings was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

248. Cooper, in his capacity as Treasurer of SemGroup and director of risk management, was actively involved in the management and governance of SemGroup. Cooper was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

249. Kivisto breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities by:

- a. knowingly engaging in a secret and unauthorized speculative trading strategy on behalf of the Debtors that violated the Debtors' internal risk policies, violated the Debtors' lender covenants, and was unreasonably risky;
- b. knowingly failing to adequately consider alternative trading strategies, knowingly failing to disclose his speculative trading strategy to outside members of the Management Committee, and knowingly hiring individuals with *no* prior trading experience to implement his strategy;
- c. knowingly continuing to do all of the above as trading losses mounted into the billions of dollars, so that he could continue to remain in a position to engage in other misconduct that advanced his interests at the expense of those of the Debtors (such as granting additional Bonus Transfers, effectuating distributions, and continuing Westback-related trading for his own personal benefit).
- d. knowingly failing to implement, comply with, and enforce SemGroup's risk management policy, thereby allowing Kivisto to engage in the aforementioned risky and speculative trading strategies, and other misconduct that advanced his interests at the expense of those of the Debtors, and knowingly

hiring as SemGroup's risk management director someone with no prior risk management experience.

250. Wallace and Cooper violated their fiduciary duties of loyalty, care, and good faith to the SemGroup Entities because they knew about, consciously disregarded, or were reckless in not knowing about Kivisto's speculative trading strategy and that it violated SemGroup's internal policies and lender covenants. By doing so, Wallace and Cooper allowed a dangerous financial situation to develop and continue which exposed the Debtors to unreasonable risk. Wallace was responsible for SemGroup's overall financial affairs, while Cooper was responsible for many of its day-to-day financial decisions. Cooper was also responsible for risk management and was notified if SemGroup's trading losses for any given day were inordinately high. Although Cooper had a spreadsheet "early on" that matched SemGroup's physical inventory positions with the derivative transactions related to them, during the later years, physical inventory became unlinked from the financial trades.

251. Notwithstanding their knowledge of Kivisto's speculative trading strategy, Cooper and Wallace took no action to change the trading strategy nor properly integrate the commodities trading function into SemGroup's financial controls. Indeed, on information and belief, Cooper and Wallace provided inaccurate and misleading information to members of SemGroup's Management Committee that SemGroup's trading activity was supported by its physical inventory.

252. Foxx, Wallace, and Stallings breached their fiduciary duties of loyalty, care, and good faith to SemGroup Entities because they consciously disregarded their responsibilities to implement a suitable risk management policy or integrate one into SemGroup's business controls. As members of the RMC, they were supposed to ensure that

“appropriate risk management policies are . . . implemented and enforced.” Upon information and belief, the RMC members abdicated their risk management responsibilities and failed to monitor or report the risks inherent in Kivisto’s options trading strategy. Upon information and belief, the RMC failed to even meet for the specific purposes contemplated by the RMP and failed to enforce the RMP.

253. Cooper was formally responsible for risk management until March 2007 and then continued to be engaged in assessing daily risk. Cooper breached his fiduciary duty of loyalty and care, acted in bad faith to the SemGroup Entities, and was reckless in failing to implement a system to reconcile SemGroup’s trading activity with its physical inventory. Cooper also failed to comply with SemGroup’s RMP by, *inter alia*, failing to distribute SemGroup’s RMP to the traders and failing to integrate it into SemGroup’s policies and procedures and its day-to-day trading decisions. For example, Coen did not receive a copy of the RMP until July 1, 2008 – shortly before the Debtors’ bankruptcy petitions. Cooper also failed to monitor traders and to enforce the RMP’s trader “per transaction” limits.

254. In addition, Cooper breached his fiduciary duties of loyalty, care, and good faith to the SemGroup Entities by:

- a. knowingly submitting and causing to be submitted false and misleading MtM and position reports representing that SemGroup was in compliance with the limits set forth in the Credit Agreement and SemGroup’s RMP when in fact Cooper knew and consciously disregarded the fact that Kivisto was engaging in a secret and unauthorized speculative trading strategy on behalf of the Debtors that violated the Debtors’ internal risk management policies and the lender covenants;

- b. knowingly making materially false and misleading statements, including representing that SemGroup's trading activities were fully hedged against its inventory when in fact Cooper knew and consciously disregarded the fact that SemGroup made no efforts to track and compare SemGroup's overall inventory with its trading activities; and
- c. knowingly submitting and causing to be submitted a false and misleading Borrowing Base Report on July 11, 2008 representing that there was in excess of \$72 million in credit available to SemGroup when in fact Cooper knew and consciously disregarded the fact that SemGroup was out of cash and was facing a severe liquidity constraints.
- d. Through these false statements and misrepresentations, Cooper intentionally concealed the speculative trading strategy employed at SemGroup from its lenders and outside members of the Management Committee, and thereby allowing it to continue without detection.

255. By intentionally failing to take any action to stop Kivisto's speculative trading activities even though such activities violated SemGroup's internal policies and its lender covenants and were not in the best interests of the SemGroup Entities, Wallace, Cooper, Stallings, and Foxx consciously disregarded their fiduciary duties of loyalty and care, and acted in bad faith by enabling a dangerous financial situation to develop and continue at SemGroup which exposed the company to unreasonable and enormous financial risk. By violating these duties, Wallace, Foxx, Cooper, and Stallings advanced their own interests at the expense of the Debtors, allowing Kivisto to remain in a position where he could cause bonus and/or partnership

distribution payments to be made to each, while he continued to engage in conduct harmful to the Debtors.

256. The Debtors, and the estates, have been injured as a result of the above-mentioned breaches of fiduciary duties.

### **COUNT NINETEEN**

#### **Breach of Fiduciary Duties Based on Bonuses Paid to Coen and Oven against Kivisto**

257. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-256.

258. Kivisto, in his capacity as an inside member of the Management Committee and CEO and President of SemGroup, was actively involved in the management and governance of SemGroup. Kivisto was at all relevant times a fiduciary of the SemGroup Entities and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith.

259. Kivisto breached his duties of care, loyalty, and good faith by hiring the inexperienced Coen and Oven to assist him in executing his speculative trading strategy and Westback trading activities through a debtor entity, and then rewarding the two with millions of dollars of bonuses, even though Coen and Oven's trades generated billions of dollars of losses to the Debtors, and built up hundreds of millions of dollars on the Westback Receivable.

260. Coen and Oven were responsible for all options transactions executed for the SemGroup Entities other than SemCanada in 2007 and 2008. Coen and Oven's options trading results were disastrous. The 2007 MtM liability from sold options for the SemGroup Entities was \$2.4 billion, and the Westback Receivable at the end of 2007 stood at \$323.8 million. From the beginning of 2008 through July 2008, the MtM liability from sold options for the SemGroup Entities ballooned to \$4.0 billion. Despite those results, Kivisto caused the

Debtors to pay Coen and Oven bonuses of over \$2.1 million and over \$1.5 million, respectively, between July 2007 and July 2008, with a large portion of those bonus payments being made *after* SemGroup was insolvent.

261. The Debtors, and the estates, have been injured as a result of the above-mentioned breaches of fiduciary duties.

### **COUNT TWENTY**

#### **Aiding and Abetting Kivisto's Breach of Fiduciary Duties against Wallace and Cooper**

262. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-261.

263. As set forth above, Kivisto breached his fiduciary duties to the SemGroup Entities by (i) engaging in physical commodities trades for SemGroup through his alter ego, Westback, for which Kivisto through Westback, improperly received commissions, (ii) causing the Debtors to engage in speculative trading, and (iii) causing the Debtors to incur the Westback Receivable on behalf of his alter ego, Westback.

264. Wallace and Cooper knew that Kivisto engaged in physical commodities trades for SemGroup through Westback, for which Kivisto received additional compensation from SemGroup for activity that was within his normal scope of duties.

265. Wallace and Cooper substantially assisted Kivisto in his breach of fiduciary duties of loyalty, care, and good faith by entering into a verbal agreement with Kivisto acknowledging that Westback operated as an agent for a Debtor entity for certain physical commodities trades conducted by Kivisto. Wallace and Cooper also took no action to stop Kivisto from causing SemGroup to pay him improper compensation, including notifying outside members of the Management Committee.

266. Wallace was responsible for SemGroup's overall financial affairs, while Cooper was responsible for many of its day-to-day financial decisions. Upon information and belief, Cooper and Wallace were aware of, or consciously or recklessly disregarded, the speculative aspects of Kivisto's trading strategy. Cooper and Wallace substantially assisted Kivisto in breaching his fiduciary duties of loyalty, care, and good faith to the Debtors by intentionally failing to take any action to stop Kivisto from engaging in his unreasonably risky trading strategy. Indeed, on information and belief, Wallace and Cooper provided inaccurate and misleading information to outside members of SemGroup's Management Committee that SemGroup's trading activity was supported by its physical inventory.

267. Upon information and belief, Cooper and Wallace were also aware that Kivisto caused the Debtors to fund his personal investment activities through his alter ego and personal trading company, Westback. Cooper and Wallace also substantially assisted Kivisto in breaching his fiduciary duties of loyalty, care and good faith to the SemGroup Entities by intentionally failing to take any action to stop Kivisto from using the Debtors' funds to engage in options trading activity for Westback, and by failing to disclose Kivisto's activities to outside members of the Management Committee or SemGroup.

268. By reason of the foregoing, Kivisto was able to breach his fiduciary duties to the Debtors and cause them damages in an amount to be determined at trial for which Cooper and Wallace are also liable.

#### **COUNT TWENTY-ONE**

#### **Waste of Partnership Assets against Kivisto, Wallace, Foxx, Cooper, and Stallings**

269. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-268.

270. Kivisto, Wallace, Foxx, Cooper, and Stallings owed the SemGroup Entities the duties of loyalty, care, and good faith, and the obligation to protect their assets from undue loss or waste.

271. Kivisto, Wallace, Foxx, Cooper, and Stallings knowingly and intentionally breached their duties of loyalty, care, and good faith, and their obligation to the SemGroup Entities, by wasting and diverting partnership assets for improper and/or unnecessary purposes, and engaging in transactions that were flagrantly one-sided, offering little or no benefit to SemGroup in return, including:

- a. Causing the Debtors to purchase derivatives on behalf of Kivisto's alter ego, Westback, and causing the Debtors to post Westback's margins without the Debtors receiving any pecuniary benefit in return, in violation of SemGroup's lender covenants;
- b. Causing the Debtors to pay Kivisto through his alter ego and personal trading company, Westback, commissions for purported activities that were within Kivisto's normal scope of duties as President and CEO of SemGroup;
- c. Causing the Debtors to award Kivisto, Wallace, Foxx, Cooper, and Stallings millions of dollars of unauthorized bonuses (and accepting those bonuses) while the Debtors' financial condition was deteriorating, and over \$10 million of bonuses while the Debtors were insolvent;
- d. Causing the Debtors to award bonuses to Coen and Oven in 2007 and 2008 that were unreasonably high in light of their lack of prior trading experience, their facilitation of Kivisto's breaches of fiduciary duties of loyalty, care and good faith, and their disastrous trading results;

- e. Causing the Debtors to pay \$100,000 for Foxx's country club membership (on information and belief, Foxx is still a member);
- f. Causing the Debtors to provide Lean Gourmet and one of his Lean Gourmet partners access to SemGroup's office space, employees, and IT services free of charge; and
- g. Causing the Debtors to make unauthorized, undisclosed, and unsupported payments to Eaglwing.

272. The Debtors, and the estates, have been injured by reason of Defendants' intentional waste of partnership assets. Plaintiff, as representative of the estates, seeks damages and other relief for the estates as stated herein.

### **COUNT TWENTY-TWO**

#### **Breach of Contract against the Kivisto Defendants**

273. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-272.

274. SemGroup had an enforceable contract with Westback, obligating Westback to pay SemGroup for any obligations SemGroup incurred for Westback's benefit, including the Westback Receivable. That contract was evidenced by, among other things, the March 20, 2006 agreement between Westback and the debtor entity through which Westback trades were conducted, which confirmed the parties' understanding that when the Debtors entered into trading contracts, they are "doing so only as Westback's authorized agent and representative, and all obligations and benefits under the [contracts entered into by Debtor entity on behalf of Westback] shall be for the account of Westback." Kivisto signed the May 20, 2006 agreement on behalf of Westback, his alter ego.

275. SemGroup had a separate, enforceable contract with Kivisto, in which Kivisto agreed to be personally responsible for the Westback Receivable in the event that Westback could not pay. This agreement was evidenced by, among other things, a document signed by Kivisto on March 18, 2008, in which he affirmed Westback's obligation and promised that his assets were available to support the creditworthiness of the Westback Receivable. In consideration for Kivisto's promise in the agreement and in reliance on that promise, the Debtors, among other things, (i) allowed Kivisto to remain in his position, and continue to maintain the Westback trading relationship, (ii) continued to extend credit to Westback, and (ii) refrained from taking immediate legal action against Kivisto.

276. The Kivisto Defendants breached these agreements by failing to pay SemGroup for the Westback Receivable upon demand, causing SemGroup to suffer damages in an amount exceeding \$289 million. As alter egos of each other, Kivisto and Westback are liable for damages resulting from each others' breaches of the respective agreements.

### **COUNT TWENTY-THREE**

#### **Breach of Contract against Kivisto, Wallace, and Foxx**

277. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-276.

278. The Debtors and Kivisto had an enforceable contract, the Kivisto Employment Agreement, in which SemManagement contracted for the services of Kivisto. The contract obligated Kivisto to, among other things, "exercise due diligence and reasonable care in the performance of his responsibilities," and to "use his best efforts to maintain and enhance the business and reputation of SemGroup."

279. Kivisto materially breached his employment agreement by, among other things, taking part in decisions regarding whether a bonus was paid to him and the amount of said bonus and devoting significant business time and attention to numerous non-Debtor corporate ventures at the same time that he served as CEO and President of SemGroup without disclosing his other business interests to outside members of the Management Committee.

280. Kivisto also violated the SemGroup Entities' policies by, among other things, engaging in personal relationships with an employee and otherwise creating the appearance of a conflict of interest. Such material violations of company policy and breaches of his employment agreement gave the Debtors cause to terminate Kivisto's employment. Kivisto further materially breached his employment agreement by, among other things, engaging in speculative trading, causing the buildup of the Westback Receivable, failing to adequately disclose the Westback Receivable to outside members of the Management Committee, setting up an arrangement to be paid extra commissions for physical commodities trading already within his SemGroup job responsibilities, and failing to implement a reasonable RMP.

281. The Debtors and Wallace also had an enforceable contract, the Wallace Employment Agreement, in which SemManagement contracted for the services of Wallace. The contract obligated Wallace to, among other things, "exercise due diligence and reasonable care in the performance of his responsibilities," and to "use his best efforts to maintain and enhance the business and reputation of SemGroup."

282. Wallace breached this contract by, among other things, accepting bonuses which he knew had not been approved by the Management Committee, and by engaging in outside business interests without disclosing his activities to outside members of the Management Committee. Such material breaches of the Wallace Employment Agreement gave

the Debtors cause to terminate Wallace's employment. Wallace further materially breached his employment agreement by, among other things, intentionally failing to take action in response to Kivisto's misconduct in connection with speculative trading, the buildup of the Westback Receivable, and the taking of commission payments for physical commodities trading within Kivisto's normal responsibilities, as well as Wallace's failure to implement a reasonable RMP.

283. The Debtors and Foxx also had an enforceable contract, the Foxx Employment Agreement, in which SemManagement contracted for the services of Foxx. The contract obligated Foxx to, among other things, "exercise due diligence and reasonable care in the performance of his responsibilities," and to "use his best efforts to maintain and enhance the business and reputation of SemGroup."

284. Foxx breached this contract by, among other things, accepting bonuses which he knew had not been approved by the Management Committee, and by engaging in outside business interests without disclosing his activities to outside members of the Management Committee. Such material breaches of the Foxx Employment Agreement gave the Debtors cause to terminate Foxx's employment. Foxx further materially breached his employment agreement by, among other things, failing to implement a reasonable RMP.

285. The Debtors, and the estates, were injured by the abovementioned breaches.

#### **COUNT TWENTY-FOUR**

##### **Unjust Enrichment Based on Bonus Payments against Kivisto, Wallace, and Foxx**

286. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-285.

287. Defendants Kivisto, Wallace, and Foxx were enriched upon receipt of the Bonus Transfers by receiving something of value that belonged to the Debtors.

288. Kivisto unilaterally awarded himself, Wallace, and Foxx the Bonus Transfers without the approval of the Management Committee. Over \$10 million of these Bonus Transfers were awarded after SemGroup was insolvent. Furthermore, Kivisto, Wallace, and Foxx materially breached their employment agreements, which does not entitle them to any bonus payments. Therefore, retaining those funds at the Debtors' expense is contrary to the principles of equity and good conscience.

289. Plaintiff does not have an adequate remedy of law.

#### **COUNT TWENTY-FIVE**

#### **Unjust Enrichment Based on Based on Westback Trading against Kivisto**

290. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-289.

291. Kivisto was enriched through the collection of commissions from SemGroup by making his alter ego and personal trading company, Westback, an agent to a Debtor entity. Under this arrangement, Kivisto, through Westback, collected commissions from SemGroup totaling approximately \$4.14 million from approximately January 2007 through May 2008.

292. However, this activity was within the scope of Kivisto's duties at SemGroup, for which he was already compensated. Therefore, retaining those funds at the Debtors' expense is contrary to the principles of equity and good conscience.

293. Plaintiff does not have an adequate remedy of law.

## **COUNT TWENTY-SIX**

### **Accounting in Equity Against Kivisto**

294. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-293.

295. Kivisto, in his capacity as an inside member of the Management Committee and CEO and President of SemGroup, was actively involved in the management and governance of SemGroup. Kivisto was at all relevant times a fiduciary of the Debtors and owed them the duty to conduct the business of the Debtors with care, loyalty, and good faith. As a fiduciary of SemGroup and Eaglwing, Kivisto was entrusted with the funds of SemGroup and Eaglwing, and is duty bound to reveal his dealings involving such funds.

296. Kivisto breached his fiduciary duty and other duties to the SemGroup Entities by failing to faithfully execute service in various ways, and profiting from his breach of duty through the receipt of unauthorized, undisclosed, and unsupported payments from debtor entity Eaglwing, a limited partner of the SemGroup, L.P.

297. Kivisto, on behalf of his alter-ego and personal trading company, Westback, improperly collected a total of \$4.14 million in payments from Eaglwing from approximately January 2007 through July 2008. Few records have been found verifying that these transfers were, in fact, commission payments. As noted above, Kivisto caused his personal administrative assistant, Sharon Pens, and personal accountant, Gregory Price, to handle the accounting for Westback and Eaglwing. On information and belief, Pens provided Price with the amount payable for the purported commissions to Westback, which Price booked, without further supporting documentation. On information and belief, documents obtained from Pens'

office reflect a single, non-descript line item with an amount payable to Westback from Eaglwing, and offer no basis for how the amount was calculated.

298. Westback also received several additional mysterious transfers of funds from Eaglwing during the time when Pens and Price were handling the books and records for the two entities. Between January 2007 and June 2008, Eaglwing transferred approximately \$21.9 million to Westback. On information and belief, although Price indicated that these transfers may have been for settlements of actual barrels of oil purchased, SemGroup has no documentation supporting these transfers, other than the Eaglwing line item entry and bank records discussed above.

299. Moreover, Eaglwing and Westback records indicate that although Eaglwing recorded a \$13.1 million payment from Westback in the general ledger on July 25, 2007, upon information and belief, this payment is not reflected in a corresponding entry on Eaglwing's BOK account statement. However, less than one month later, on August 20, 2007, Eaglwing recorded a payment to Westback of \$13.1 million in the general ledger and this payment -- unlike the earlier transfer of the exact same amount into Eaglwing's account -- is reflected on Eaglwing's BOK account statement as a cash outflow. On information and belief, SemGroup has no documentation supporting these transfers, other than the line item Eaglwing ledger entry and bank records discussed above.

300. Finally, despite the large sum of money owed to SemGroup by Westback as reflected in the Westback Receivable, Eaglwing continued to make large payments to Westback during 2007 and 2008. These payments included payments of \$27.3 million and \$8.0 million on February 20, 2008, and payments of \$5.0 million and \$2.7 million on February 29, 2008. In total, between February 20, 2008, and April 18, 2008, Eaglwing made \$45 million in

payments to Westback. On information and belief, SemGroup has no documentation supporting these transfers.

301. These tens of millions of dollars of transfers from debtor entity Eaglwing to Westback occurred at the same time that Kivisto and other Defendants were causing and permitting SemGroup to fund Westback's trading activities, which was building the Westback Receivable to hundreds of millions of dollars.

302. Kivisto treated the assets of Westback as his own, did not keep Westback finances separate from his personal finances, and used a Westback account to make payments for his personal needs, such as vehicle payments, property purchases, personal loans, personal investments, and donations to charity. Kivisto commingled the funds he received through Westback with his own funds.

303. As a fiduciary, Kivisto must account for the funds that he received during the course of his employment, an amount that, in total, exceeds \$84 million.

304. In addition, SemGroup has little to no documentation supporting these transfers. Moreover, it was Kivisto's personal administrative assistant and personal accountant who handled the accounting for Westback and debtor entity Eaglwing. As such, the nature and amount of the total payments are fraught with uncertainty and complexity, thus requiring an accounting in equity.

305. Because Plaintiff has no adequate remedy in law, Kivisto must render an account to SemGroup for the funds that he and Westback received during the course of his employment from Eaglwing, including an accounting for the interest on the funds he obtained and benefits he obtained as a result of his wrongful use of SemGroup's funds.

## COUNT TWENTY-SEVEN

### **Disallowance of Claims As To All Defendants**

306. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-305.

307. The Debtors' schedules and financial records indicate that Kivisto, Wallace, Cooper, Foxx, Stallings, and Westback may be creditors of the Debtors' estates.

308. Kivisto, Wallace, Cooper, Foxx, Stallings, and Westback have or may file in the future proofs of claim in the Bankruptcy Cases.

309. Westback has failed to turn over to the Debtors property of the Debtors' estates which is recoverable, namely the amounts demanded in Counts One, Two, Three, Four, Nine, Ten, Eleven, Twelve, and Thirty above.

310. Kivisto has failed to turn over to the Debtors property of the Debtors' estates which is recoverable, namely the amounts demanded in Counts One through Fourteen and Thirty above.

311. Wallace has failed to turn over to the Debtors property of the Debtors' estates which is recoverable, namely the amounts demanded in Counts Five, Six, Seven, Eight, Thirteen and Fourteen above.

312. Cooper has failed to turn over to the Debtors property of the Debtors' estates which is recoverable, namely the amounts demanded in Counts Thirteen and Fourteen above.

313. Foxx has failed to turn over to the Debtors property of the Debtors' estates which is recoverable, namely the amounts demanded in Counts Five, Six, Seven, Eight, Thirteen and Fourteen above.

314. Stallings has failed to turn over to the Debtors property of the Debtors' estates which is recoverable, namely the amounts demanded in Counts Thirteen and Fourteen above.

315. Pursuant to Section 502(d) of the Bankruptcy Code, to the extent that Kivisto, Wallace, Cooper, Foxx, Stallings, and Westback assert claims against Debtors, such claims must be disallowed because property of the Debtors' estates is recoverable from each of these Defendants, that has not been turned over to the Debtors.

### **COUNT TWENTY-EIGHT**

#### **Equitable Subordination of Claims Pursuant to 11 U.S.C. § 510(c) As To All Defendants**

316. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-315.

317. Kivisto, Wallace, Cooper, Foxx, Stallings, and Westback filed proofs of claims in the Debtors' bankruptcy cases.

318. Kivisto established Westback as his alter ego and used it to engage in inequitable conduct to the detriment of the Debtors, as set forth above. For example, Westback used the Debtors' money to fund Kivisto's personal trading activity without intending to repay the Debtors. Furthermore, any recovery by Westback would inure to the benefit of Kivisto, who also engaged in inequitable conduct to the detriment of the Debtors.

319. Wallace did nothing to stop Kivisto from using the Debtors' money to fund his personal trading activities. In addition, Wallace failed to take any action regarding the Westback Receivable despite his knowledge that it was growing in amount and the increasing concerns about its collectability. Wallace also entered into a verbal agreement with Kivisto

which enabled Kivisto to receive, through Westback, millions of dollars of purported commissions payments for work that was already within the scope of his employment. On information and belief, Wallace intentionally failed to take appropriate action so that Kivisto could remain in his position as SemGroup's President and CEO, thereby allowing Wallace to receive tens of millions of dollars of unauthorized bonus payments unilaterally awarded by Kivisto.

320. Cooper did nothing to stop Kivisto from using the Debtors' money to fund his personal trading activities. Cooper also entered into a verbal agreement with Kivisto which enabled Kivisto to receive, through Westback, millions of dollars of purported commissions payments for work that was already within the scope of his employment. On information and belief, Cooper intentionally failed to take appropriate action so that Kivisto could remain in his position as SemGroup's President and CEO, thereby allowing Cooper to receive tens of millions of dollars of unauthorized bonus payments unilaterally awarded by Kivisto.

321. Stallings did nothing to stop Kivisto from using the Debtors' money to fund his personal trading activities. In addition, Stallings took steps to persuade SemGroup's outside auditors to stop inquiring about the Westback Receivable and thereby allow Kivisto to continue to execute trades on behalf of Westback in violation of SemGroup's RMP and lender covenants. On information and belief, Stallings intentionally failed to take appropriate action so that Kivisto could remain in his position as SemGroup's President and CEO, thereby allowing Stallings to receive hundreds of thousands of dollars of unauthorized bonus payments unilaterally awarded by Kivisto.

322. Foxx accepted millions of dollars of unauthorized and undisclosed bonus payments notwithstanding his knowledge that Kivisto breached his fiduciary duties in granting

them. Foxx also permitted SemGroup to contract with Lean Gourmet, in which Foxx had an indirect ownership interest with Kivisto, without disclosing his self-interest to outside members of the Management Committee.

323. As a proximate and foreseeable result of the Defendants' conduct, the Debtors' estates have been damaged in an amount to be established at trial.

324. Equitable subordination of any claims of Kivisto, Wallace, Cooper, Foxx, Stallings, and Westback is not inconsistent with the provisions of the Bankruptcy Code.

325. Pursuant to Bankruptcy Code section 510(c), to the extent that Kivisto, Wallace, Cooper, Foxx, Stallings, and Westback assert claims against the Debtors, such claims should be equitably subordinated to the claims of the Debtors' other creditors.

#### **COUNT TWENTY-NINE**

##### **Indemnification against the Kivisto Defendants**

326. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-325.

327. Kivisto and his alter ego Westback used a Debtor entity as its agent and representative to enter into and execute trading contracts on behalf of Westback for the sole account of Westback and Kivisto. As a result of that agency relationship, the Debtors have entered into and executed trading contracts, and the Debtors suffered a loss arising out of the trades entered into or on behalf of Westback for which the Debtors were never paid.

328. As the Debtors' principals, the Kivisto Defendants have a duty to indemnify the Debtors for the expenses incurred by the Debtors on Westback's behalf and for the losses suffered by the Debtors because the Debtors have made payments within the scope of their actual authority or because the Debtors' losses fairly should be borne by Westback.

329. Plaintiff seeks an order directing the Kivisto Defendants to indemnify the estates and provide restitution to Plaintiff, on behalf of the estates, in an amount in excess of \$289 million.

### **COUNT THIRTY**

#### **Turnover of Property of the Estates against the Kivisto Defendants**

330. Plaintiff repeats and re-alleges each and every allegation contained in the preceding paragraphs 1-329.

331. The Kivisto Defendants owe the Westback Receivable to the Debtors, and that debt is the property of the estates. The Westback Receivable is a debt that is matured, payable on demand, or payable on order.

332. Pursuant to section 542(b) of the Bankruptcy Code, Plaintiff seeks an order directing the Kivisto Defendants to immediately turnover property of the estates.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff, on behalf of the Debtors' chapter 11 estates, prays for relief and judgment, as follows:

- a. Ordering the turnover of the Westback Receivable, and any and all other property of the Debtors' chapter 11 estates wrongfully held by the Defendants;
- b. Ordering the payment of restitution to Plaintiff in an amount to be determined at trial;
- c. Awarding the Plaintiff preliminary and permanent injunctive relief;
- d. Awarding Plaintiff compensatory damages against the Kivisto Defendants in the amount to be determined at trial, including pre-judgment interest;
- e. Declaring that the above-described transfers are avoidable pursuant to Bankruptcy Code sections 544 and/or 548;

- f. Awarding Plaintiff judgment in an amount equal to the amount by which the Defendants were unjustly enriched, or ordering the Defendants to disgorge those amounts to Plaintiff;
- g. Awarding Plaintiff judgment in an amount equal to the challenged transfers and directing the Defendants to pay Plaintiff an amount equal to the challenged transfers pursuant to Bankruptcy Code section 550(a), together with interest on such amount from the date of the Transfer;
- h. Awarding punitive damages in an amount to be determined at trial;
- i. Awarding an accounting in equity;
- j. Awarding Plaintiff attorneys' fees, costs and other expenses; and
- k. Granting such other and further relief as the Court considers appropriate.

Dated: October 6, 2009

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