

STATE OF NORTH CAROLINA  
COUNTY OF BEAUFORT

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION  
11 CVS 1012

FCC, LLC, D/B/A FIRST CAPITAL, )  
)  
)  
Plaintiff, )  
)  
)  
v. )  
)  
)  
AMERICAN MARINE HOLDINGS, )  
LLC, DONZI MARINE, LLC, AMH )  
GOVERNMENT SERVICES, LLC, )  
PRO-LINE BOATS, LLC, FOUNTAIN )  
POWERBOATS, LLC, FOUNTAIN )  
POWERBOAT INDUSTRIES, INC., )  
FOUNTAIN POWERBOATS, INC., )  
FOUNTAIN DEALERS' FACTORY )  
SUPER STORE, INC., BAJA BY )  
FOUNTAIN, INC., PALMETTO )  
PARK, FINANCIAL, LLC, )  
50509 MARINE, LLC, LIBERTY )  
ACQUISITION FPB, LLC, )  
and JOSEPH G. WORTLEY, )  
)  
Defendants. )  
\_\_\_\_\_ )

**ORDER APPOINTING  
TEMPORARY RECEIVER**

I. Procedural Posture

THIS MATTER is before the Court on the Verified Complaint (“Verified Complaint”) and Emergency Motion to Appoint Receiver (“Emergency Motion”) filed by Plaintiff FCC, LLC, d/b/a First Capital (“First Capital,” “FCC,” or “Plaintiff”) against AMERICAN MARINE HOLDINGS, LLC, a Delaware limited liability company (“AMH”); DONZI MARINE, LLC, a Delaware limited liability company (“DM”); AMH GOVERNMENT SERVICES, LLC, a Delaware limited liability company (“AMH GS”); PRO-LINE BOATS, LLC, a Delaware limited liability company (“PLB”); FOUNTAIN POWERBOATS, LLC, a Florida limited liability company (“Fountain Florida”) (AMH, DM, AMH GS, PLB, and Fountain Florida are

sometimes referred to herein individually as an “American Marine Defendant” and collectively as “American Marine Defendants”); FOUNTAIN POWERBOAT INDUSTRIES, INC., a Nevada corporation (“Fountain Industries”); FOUNTAIN POWERBOATS, INC., a North Carolina corporation (“Fountain Powerboats”); FOUNTAIN DEALERS’ FACTORY SUPER STORE, INC., a North Carolina corporation (“Fountain Super Store”); BAJA BY FOUNTAIN, INC., a North Carolina corporation (“Baja”) (Fountain Industries, Fountain Powerboats, Fountain Super Store, and Baja are sometimes referred to herein individually as a “Fountain Defendant” and collectively as “Fountain Defendants”); PALMETTO PARK FINANCIAL, LLC, a Florida limited liability company (the “Palmetto Park Defendant”) (the American Marine Defendants, the Fountain Defendants, and the Palmetto Park Defendant are sometimes referred to herein individually as a “Borrower Defendant” and collectively as “Borrower Defendants”); 50509 MARINE, LLC, a Delaware limited liability company (“50509 Defendant”); LIBERTY ACQUISITION FPB, LLC, a Florida limited liability company (“Liberty FPB Defendant”); and JOSEPH G. WORTLEY, an individual resident of the State of Florida (“Wortley”) (the 50509 Defendant, the Liberty FPB Defendant, and Wortley are sometimes referred to herein individually as a “Pledgor Defendant” and collectively as the “Pledgor Defendants” and the Borrower Defendants and the Pledgor Defendants are sometimes referred to herein individually as a “Defendant” and collectively as “Defendants”).

The Verified Complaint was filed in this matter on October 12, 2011. Prior to such date, Plaintiff sent letter notice to Defendants of Plaintiff’s intention to institute the litigation in Beaufort County Superior Court and to seek emergency relief from that Court on October 12, 2011. Prior to the Verified Complaint being filed but after notice of Plaintiff’s intention to file it, Fountain Powerboats’ counsel began the process of having the matter assigned to this Court, including filing a Notice of Designation on October 11, 2011 that acknowledged receipt of correspondence from Plaintiff indicating its intention to file the Verified Complaint and the Emergency Motion, together with a draft of the Verified Complaint. The

matter was then designated a Complex Business Case by the order of Chief Justice Parker at 2:38 p.m. on October 12, 2011 and then assigned to this Court. The matter was called before the Honorable Wayland J. Sermons, Jr. presiding in Beaufort County on the morning of October 12, 2011; however, he did not proceed with a hearing on the Emergency Motion in light of the Notice of Designation Fountain Powerboats had filed. This Court held a telephone conference with counsel for Plaintiff and counsel for Fountain Powerboats at 3:00 p.m. on October 12, 2011, pursuant to which the Court noticed the matter for hearing on the Emergency Motion.

The Court held a hearing on the Emergency Motion on Thursday, October 13, 2011. Counsel for the Plaintiff appeared. Counsel for Fountain Powerboats also appeared, having made a general appearance for purposes of having the matter assigned to this Court. The same counsel filed a Motion to Dismiss on behalf of other Fountain Defendants for lack of personal jurisdiction, on the basis that summons had not been served at the time of the hearing. No appearance was made on behalf of the American Marine Defendants, although as noted in the exhibits to the Verified Complaint, owners of some or all of these Defendants had prior to the filing of the Verified Complaint surrendered their equity interests to Plaintiff. Plaintiff requested the appointment of a receiver over the American Marine Defendants so that Plaintiff would not have to directly undertake management responsibilities for American Marine Defendants.

At the hearing, the documentary materials before the Court were those attached to Defendant Fountain Powerboat's Notice of Designation, the Verified Complaint with its exhibits, and a Deed of Trust admitted at the hearing as Exhibit 13. The Court granted all counsel present leave to argue factual matters beyond the documentary material in order to place matters in context. For example, the Verified Complaint alleges that the Fountain Defendants have ceased operations and terminated employees (*see, e.g.*, Verified Compl. ("Compl.") ¶¶ 4, 7, 81), whereas counsel for Fountain Powerboats indicated that the Fountain Defendants had only determined to suspend operations for a short period of time, that

employees had been furloughed for a two week period, and that these events were caused by Plaintiff's election to cease further funding of operations, and that the cessation of funding and Plaintiff's refusal to allow the Fountain Defendants to use cash on hand left the Fountain Defendants without the financial ability to continue operations, in response to which Plaintiff's counsel indicated that Plaintiff will only consider further future financing upon the appointment of a receiver, but that in the event a receiver is appointed the lender intended that the companies resume at least some operations.

This Order represents the Court's consideration of matters for the limited and express purpose of the Emergency Motion in order to enter what it appears to the Court to be appropriate interim relief pending more plenary hearing upon notice and the opportunity to present evidence by all Parties. The Court's findings for purposes of this Order are without prejudice to the Court's ability to make alternative or inconsistent findings based upon a fuller evidentiary presentation.

Capitalized terms appearing in this Order shall have the meanings assigned in First Capital's Complaint, unless otherwise defined in the Order. The Court refers to the American Marine Defendants and the Pledgor Defendants collectively as the "American Marine Related Defendants."

## II. Findings of Fact

1. The Defendants' business consists, *inter alia*, of manufacturing, marketing, distributing, and selling boats and related products in the State of North Carolina, in addition to such further business as may be conducted outside of North Carolina. Each of the Defendants, whether incorporated in North Carolina or outside of North Carolina do business in the State of North Carolina, including Beaufort County.
2. The Borrower Defendants have a primary place of business at 1653 Whichards Beach Road, Chocowinity, Beaufort County, North Carolina 27817 (the "Manufacturing Facility").
3. Fountain Powerboats owns the real estate at the Manufacturing Facility.

4. The Borrower Defendants' products are sold under several brand names including, at least, Donzi, Fountain, Pro-Line, and Baja. Fountain Powerboats' counsel previewed evidence that may subsequently show that that the Baja brand was and is independently promoted and recognized.
5. The vast majority of the Borrower Defendants' assets are located at the Manufacturing Facility. Plaintiff acknowledges that the American Marine Defendants also own real property in Florida identified as collateral in loan documents that are at issue. The majority, if not all, of the production employees for the Borrower Defendants conducted operations at the Manufacturing Facility until the events of October 7, 2011 alleged in the Verified Complaint or demonstrated by the documents attached to the Verified Complaint.
6. Plaintiff provides secured financing for the Borrower Defendants' businesses. Plaintiff initially established a lending relationship with the American Marine Defendants in 2007, and later established a lending relationship with the Fountain Defendants in 2010 at the request of Wortley who was the principal of the American Marine Defendants. In 2010, loan agreements with the borrowers were modified to allow for the sale of certain assets by some of the Fountain Defendants, not including Baja, to American Marine and the release of the Fountain Defendants, including Baja, from certain enumerated liabilities. The combined financing includes several terms loans and lines of credit, with outstanding balances totaling not less than \$61.04 million, including, without limitation:
  - a. Revolving Loans under the American Marine Loan Agreement (the "AMH Revolver"), having an aggregate principal balance, as of October 7, 2011, in the amount of \$43,951,412.36.
  - b. The Base Term Loan under the American Marine Loan Agreement having a principal balance, as of October 7, 2011, in the amount of \$3,533,333.38.

c. The Base Term Loan B under the American Marine Loan Agreement having a principal balance, as of October 7, 2011, in the amount of \$4,000,000.00.

d. A term loan under Fountain the Loan Agreement (the "Fountain Term Loan"), having a balance, as of October 7, 2011, in the amount of \$7,041,007.35.

e. Revolving loans under the Palmetto Park Loan Agreement (the "Palmetto Park Revolver") having a principal balance, as of October 7, 2011, in the amount of \$2,513,812.23.

Such balances are exclusive of accrued interest, as well as certain costs and expenses for which Borrower Defendants may be obligated to reimburse FCC. Items a., b., and c. above are referred to as the "AMH Loans."

7. The Fountain Term Loan is secured by, among other things, a lien on the Manufacturing Facility, as evidenced by a recorded Deed of Trust, a true and correct copy of which was admitted into evidence during the emergency hearing as Plaintiff's Exhibit 13 ("Deed of Trust"). This Deed of Trust secures both a Term Loan and a Revolving Loan. The Fountain Term Loan indebtedness survived the sale of certain assets of the Fountain Defendants to American Marine described below. The separate 2010 Fountain Revolving Loan was extinguished as a part of that sale. The documentary evidence, pleadings, and admission of Fountain Powerboats' counsel confirm that the American Marine Defendants and the Palmetto Park Defendant are in default under the AMH Loans and the Palmetto Park Revolver. The Fountain Defendants state that the Deed of Trust was not modified to provide that it was cross-collateralized to the American Marine loans.
8. It is undisputed that all of the officers of the American Marine Defendants and the Palmetto Park Defendant have resigned and that the American Marine Related Defendants have authored a document evidencing their intent to tender their capital stock and/or membership interests to the

Plaintiff pursuant to the pledge agreements attached to the Verified Complaint. The American Marine Related Defendants are in default of their loan agreements.

9. The Fountain Defendants do not oppose the appointment of a Receiver with respect to the assets of, and the capital stock and/or membership interests in, the Defendants other than the Fountain Defendants.
10. Plaintiff contends that the Fountain Defendants are in default by reason of defaults of the American Marine Defendants. It further claims that the Fountain Defendants have independently defaulted. The Fountain Defendants vigorously contest their separate default. Plaintiff asserts its right to proceed, and to appoint a receiver for all Defendants based on agreements with the Fountain Defendants that include cross-default and cross-collateralization provisions, as well as the Fountain Defendants' consent to the appointment of a receiver in the event of a default under the Fountain Loan Agreements.<sup>1</sup> The Second Amendment to the Fountain Loan Agreement includes the following cross-collateralization and cross-default provision:

Borrowers hereby acknowledge and agree that any "Default", [sic] as defined in the AMH Loan Agreement, any "Default," as defined in the Newco Loan Agreement and any "Default," as defined in the Palmetto Park Loan Agreement, shall also be deemed to constitute a Default under the [Fountain] Loan Agreement. In addition, all Collateral securing the Obligations of Borrowers under the Loan Agreement shall also secure the "Obligations," as defined in the AMH Loan Agreement, the "Obligations," as defined in the Newco Loan Agreement, and the "Obligations," as defined in the Palmetto Park Loan Agreement. Without limiting the provisions of the Loan Agreement relating to the maturity of the Obligations, the Obligations shall be due and payable in

---

<sup>1</sup>The Fountain Loan Agreement provides that, upon default "without demand, or notice to any Borrower . . . Lender may . . . apply for the appointment of a receiver of the Collateral to which appointment each Borrower consents . . ." The Deed of Trust contains a similar provision.

full, and Lender shall have no further obligation to make Revolving Loans to any Borrower, from and after the earlier of the termination of the AMH Loan Agreement for any reason, the termination of the Newco Loan Agreement for any reason or the termination of the Palmetto Park Loan Agreement for any reason.

(Compl. Ex. 4 at 118, ¶ 3.)

11. A subsequent Fourth Amendment to the Fountain Loan Agreement was entered in contemplation of the closing of a 2010 Asset Purchase Agreement whereby certain assets of the Fountain Defendants would be sold to American Marine, in exchange for which the Fountain Defendants would receive cash and a release from certain specified assumed Liabilities. The Fourth Amendment provides:

Sale of Certain Assets. Borrowers desire to sell all Accounts, all Inventory (excluding certain sportswear Inventory), certain intellectual property, and certain Equipment to American Marine Holdings, LLC (“Buyer”) pursuant to that certain Asset Purchase Agreement dated as of December 31, 2010 among Buyer, Fountain Powerboats, Fountain Industries, Fountain Super Store, and Liberty Acquisition FPB, LLC (the “Asset Purchase Agreement”). Such sale is prohibited by the Loan Agreement, and Borrowers have requested that Lender consent thereto. In order to induce Lender to grant such consent, Borrowers hereby represent and warrant to Lender, and acknowledge, covenant and agree in favor of Lender, as follows:

.....

(d) Buyer will assume the existing outstanding principal balance of the Revolving Loans, together with all accrued interest thereon, as of the date hereof.

(Compl. Ex. 4 at 134, ¶¶ 2, 2(d).)

12. The Fourth Amendment further provided that the Manufacturing Facility would continue to be owned by Fountain Powerboats (Compl. Ex. 4 at 134, ¶ 2(c)) and that upon the closing of the Asset Purchase Agreement, “no



Borrower shall have any liability to Lender for any Revolving Loans.” The Fourth Amendment did not include any express modification or deletion of the cross-default and cross-collateralization provisions of the Second Loan Amendment, although Fountain Powerboats contends these were “Current Liabilities.” The Fourth Amendment contemplated the survival of the Term Loan as evidence by its paragraph 3 which modified the interest rate on that loan and obligated “Borrowers” to pay the Term Loan. (Compl. Ex. 4 at 134, ¶ 3.) Baja was among the companies defined as a “Borrower” in the Fountain Loan Agreement but was not a “Seller” in the Asset Purchase Agreement. Paragraph 3 of the Asset Purchase Agreement, referred to in the Fourth Amendment, is entitled “Assumption of Liabilities” and provides:

The Buyer shall assume from Seller the following liabilities and obligations of the Seller (collectively, the “Assumed Liabilities”): (a) Seller’s Current Liabilities, including those listed on Seller’s Balance Sheet as of December 31, 2010, which specifically include Seller’s Accounts Payable, Accrued Expenses, Accrued Dealer Incentives, Warranty Reserve and Customer Deposits; and (b) that certain Revolving Loan made by FCC, LLC, d/b/a First Capital, a Florida limited liability company (“Lender”), to Seller on March 1, 2010, copies of which liabilities and loan documents as to the Revolving Loan are attached hereto as Exhibit B (the “Seller Revolving Loan”). Each party hereby agrees to take such action and execute such documents as any other party hereto may reasonably request to document that the Seller, together with all of Seller’s shareholders, members, managers, officers, directors, employees, affiliates, successors and assigns, including without limitation, Baja by Fountain, Inc., a North Carolina corporation (“Baja”), other than the Buyer, will no longer have any liability with respect to the Assumed Liabilities and the Buyer has assumed the payment and performance of the Assumed Liabilities.

(Compl. Ex. 4 at 142, ¶ 3.) This paragraph did not expressly mention the Fountain Term Loan.

13. In paragraph 5 of the Asset Purchase Agreement, AMH agreed to cause FCC to:

(i) execute and deliver to the Seller and Baja a written release of all obligations and liabilities with respect to the Assumed Liabilities, including without limitation, the Seller Revolving Loan, and (ii) file a UCC-3 Statement with the applicable Secretary of State such that the Seller and Baja shall be released from any liability or obligation, together with any security interest, related to the Assumed Liabilities, including without limitation, the Seller Revolving Loan.

(Compl. Ex. 4 at 143, ¶ 5.2.) The Fountain Term Loan was not mentioned in this paragraph. Although it was a “Borrower” under the Fountain Loan Agreement, Baja was not included as a “Seller” under the Asset Purchase Agreement, so it had to be separately mentioned in order to benefit from the Assumption of Liabilities provision.

14. Based on this documentation, the Court finds, subject to reconsideration upon the presentation of further evidence, that the Fourth Amendment and Asset Purchase Agreement did not extinguish the cross-collateralization and cross-default provisions of the Second Amendment to the Fountain Loan Agreement so that any default by the American Marine Defendants constitutes a default by the Fountain Defendants.

15. Fountain Powerboats, which had made a general appearance and was represented by counsel, indicated at the hearing on the Emergency Motion that, it contends, and that the remaining Fountain Defendants when properly served will likely contend, that Plaintiff cannot prove that there is any default for which the Fountain Defendants are responsible, so that Plaintiff is not entitled to the relief it seeks against the Fountain Defendants. Among other contentions that may later be presented, Fountain Powerboats raised the following contentions:

a. The Fountain Defendants were relieved of all Current Liabilities and all revolving lines of credit as of December 31, 2010.

- b. Plaintiff released the Fountain Defendants and their assets from the cross-default, cross-termination, and cross-collateralization provisions in the Fountain Loan Agreement pursuant to paragraph 3 of the Asset Purchase Agreement approved and funded by Plaintiff. Specifically, it contends that the cross-default, cross-termination, and cross collateralization obligations of the previous Second Amendment to Loan and Security Agreement dated August 24, 2010 were “Current Liabilities” and were thereby released. Pursuant to paragraph 5.2 of the Asset Purchase Agreement, the Fountain Defendants, including Baja, were released from all “Current Liabilities” and Plaintiff/lender was obligated to file an appropriate UCC-3 Statement to that effect. American Marine received substantial consideration in exchanges for the releases of liability, including assets that are valued at or approximately at \$20 million.
- c. While the Fountain Term Loan remains in force, Plaintiff has failed to allege or document with evidence any monetary or non-monetary defaults entitling Plaintiff to default remedies against the Fountain Defendants. Further, Baja was specifically released from the Fountain Term Loan by the Fourth Amendment and Asset Purchase Agreement.
- d. The cross-default, cross-termination, and cross-collateralization provisions upon which Plaintiff relies from the Second Amendment to the Fountain Loan Agreement, dated August 24, 2010, was not supported by consideration.
- e. Plaintiff did not amend Exhibit 13, the Deed of Trust encumbering the Manufacturing Facility, to provide for cross-default, cross-termination, and cross-collateralization, and a default under the AMH Loans is not an Event of Default pursuant to the existing Deed of Trust.
- f. Fountain Powerboats owns the Manufacturing Facility, and the lease to American Marine, represented by Exhibit 12 to the Verified Complaint, provides for rental payments, which payments have been

funded by Plaintiff which has also otherwise acknowledged the lease. American Marine is in default and Fountain Powerboats has accelerated the indebtedness owed on the lease, and filed a UCC with the Secretary of State in accordance with the terms of the lease on October 12, 2011, File Number 20110086542.

- g. Other Defendants and discovery may support additional bases precluding the relief Plaintiff seeks.

16. While acknowledging the contentions that Fountain Powerboats raises, the Court finds that there is substantial likelihood that the Plaintiff will prevail on the merits on at least the following issues:

- a. That the cross-default, cross-termination and cross-collateralization provisions of the Fountain Loan Agreement remain in effect and all assets of and equity interests in the Fountain Defendants serve as collateral for the AMH Loans, as well as the Fountain Term Loan;
- b. That even if the Deed of Trust does not provide for a cross-default, the Fountain Term Loan is in default;
- c. That there are substantial questions of ongoing material non-monetary defaults under the Fountain Term Loan, including, without limitation, the existence of a lease and other contracts between the Fountain Defendants and the American Marine Related Defendants which are prohibited by the Fountain Loan Agreement without Plaintiff's consent which has not been given;
- d. That the Fountain Defendants consented to the appointment of a receiver following a default under the Fountain Loan Agreement, and that the questions raised as to whether there are independent monetary or non-monetary defaults by the Fountain Defendants, or any of them, do not preclude the necessity or the propriety of the temporary appointment of a receiver as sought by the Emergency Motion;

- e. That the cessation or suspension of operations by the Fountain Defendants, including the termination or furlough of employees, the termination of the management agreement, and the resignation of management threatens the ongoing operations and goodwill of the various defendants, including the Fountain Defendants, as well as the interests of Plaintiff and that the appointment of a temporary receiver may afford an opportunity for additional funding necessary to such operations and goodwill that would not be available without such appointment.
17. The Court does not find an adequate basis to except Baja from the provisions of its Order, and finds that the specific reference to Baja in the Assumption of Liabilities provision of the Asset Purchase Agreement was because Baja was not a Seller under the Asset Purchase Agreement and would not have been benefited by the Assumption of Liabilities but for being separately enumerated as a beneficiary of the release of liabilities.
18. At the time of the emergency hearing, while none of the Defendants had been served with Summons and a copy of the Verified Complaint, they had been notified of Plaintiff's intention to file its Verified Complaint and its intention to seek Emergency Relief. Further, while all Defendants had not yet been served, Fountain Powerboats made a general appearance and other Fountain Defendants have filed jurisdictional motions. Notice of the hearing on the Emergency Motion as well as other pleadings in the case, and Fountain Powerboat's filings in advance of the filing of the Verified Complaint, were in advance of the hearing posted to this Court's website, which is publicly available.
19. Plaintiff gave written notice to the Defendants that it intended to seek the appointment of a receiver from the Beaufort County Superior Court at 10:00 a.m. on October 12, 2011. The notice included an unsigned copy of a Complaint without verification, a copy of an unsigned Emergency Motion, and a draft copy of a proposed order appointing receiver, none of which had

been filed at that time. The notice was received by the Fountain Defendants and Fountain Powerboats acknowledged in its Notice of Designation filed with this Court on October 11, 2011 that it had received notice of the unfiled Verified Complaint and its attachments to be filed. The matter did not proceed to hearing in Beaufort County on October 12, 2011. Following notice that the case had been assigned to this Court, the Court convened a telephone conference, as a result of which the Court scheduled and noticed an emergency hearing on Plaintiff's Emergency Motion which was held at 11:00 a.m. on October 13, 2011 at the facilities of Business Court in Greensboro, North Carolina.

20. In addition to the posting of the Notice of Hearing on the Court's web site, written notice of the October 13, 2011 hearing was sent by Plaintiff's counsel via facsimile and e-mail to all of the Defendants at the addresses set forth in the notice provisions of the Loan Documents, individuals at the facsimile numbers and e-mail addresses set forth in the notice provisions of the respective loan documents, and numerous other attorneys and persons Plaintiff's counsel identified as reasonably likely to provide actual notice to Defendants.
21. The Court finds that the Plaintiff has complied with its obligation to provide reasonable notice to the Defendants of its intent to seek emergency relief from this Court. The Court further notes that this Order provides for emergency relief without prejudice to the Parties to present evidence of or the Court's determination of facts which vary from the terms of this Order.
22. Fountain Powerboats has made a general appearance but contends that this Court does not have jurisdiction to impose a receivership on parties who have not yet been formally served with Summons and Complaint.
23. Plaintiff's counsel asserted at the hearing that the business operations and personal property assets, both tangible and intangible, of the American Marine Defendants are so intertwined with the other Defendants that the operations and assets cannot readily be separated, and that, for example,

without limitation, Fountain Powerboats, which owns the real estate at which the Manufacturing Facility is located, pays the salaries of the employees of all of the Defendants and that funds loaned by the Plaintiff under the AMH Revolver have been used, until recently, by Defendants to pay interest payments under Fountain Term Loan and otherwise to fund the operations of all Borrower Defendants. Plaintiff further contends and states in its Verified Complaint that there is evidence of co-mingling of funds and physical assets. The Court does not have adequate evidence to find each of these assertions as a fact, but the Court notes the concession by Fountain Powerboats' counsel that Plaintiff's determination to cease further funding required the various Fountain Defendants to suspend operations and to take those actions it undertook regarding notification to employees.

24. Fountain Powerboats contends that there is an inherent conflict of interest between the Plaintiff, the American Marine Defendants, and Fountain Powerboats because of a dispute as to the validity, enforceability and default under the Manufacturing Facility Lease and the Deed of Trust, such that if the Court is to appoint any receiver, it should appoint a separate receiver for Fountain Powerboats. The Court does not intend that this Order be read or construed to authorize the termination of the lease or to have made findings necessary to authorize foreclosure pursuant to the Deed of Trust. The Court then defers further consideration of the necessity or advisability of appointment of a second receiver until a subsequent hearing.
25. There are immediate business decisions necessary to the protection of the interest of all Parties which should be made by a receiver.
26. Plaintiff has indicated that it is only willing to provide additional financing if a receiver is appointed for all Borrower Defendants and immediate funding is necessary to protect the interests of all Parties, including employees of the Fountain Defendants.
27. Prior to appointing any receiver, the Court has considered other less intrusive remedies. In addition, it invited the Parties at the hearing to

suggest any such alternative, and took a recess to allow the Parties an opportunity to formulate and propose any such remedy that would adequately protect the interests of the various Parties to this litigation. The Court does not find and the Parties did not suggest a meaningful less onerous alternative to temporary receivership.

28. The Plaintiff will suffer irreparable harm if this Court does not impose a receivership over all the Borrower Defendants, all assets of Borrower Defendants, and all equity interests in the Borrower Defendants on an expedited basis.

### III. Conclusions of Law

1. Plaintiff is entitled to relief on an emergency basis.
2. Rule 65 of the North Carolina Rules of Civil Procedure clearly grants the Court authority to issue a temporary restraining order on an *ex parte* basis. It is less immediately apparent that a Court may appoint a receiver on the same *ex parte* basis. However, N.C.G.S. § 1-501 provides that:

Any judge of the superior or district court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers...
3. The Court concludes that it has the same jurisdiction to appoint receivers on an *ex parte* basis as it does to grant a restraining order. The Court likewise concludes that it should only appoint a receiver on an interim basis pending a fuller hearing, in the same manner that the grant of a temporary restraining order is followed by a preliminary injunction hearing.
4. The Court finds that the notice requirements of Rule 65(b) should also be utilized for purposes of appointing an interim receiver, and that such notice requirements have been fulfilled.
5. This Order shall be effective from its issuance until the hearing as noticed below.



6. The appointment of a receiver is equitable in nature and the Court has certain inherent equitable powers to appoint a receiver where necessary. The Court concludes that absent a significant countervailing equity, it is generally fair to bind sophisticated parties to the language in their written agreements. In reaching this conclusion, the Court is mindful of the fact that Plaintiff has advanced significant sums in reliance on the covenants contained in the Fountain Loan Agreement and Deed of Trust and finds that there is good reason to hold the Fountain Defendants accountable for their consent to the appointment of a receiver.
7. The events surrounding the cessation of the Fountain Defendant operations, the termination of the management agreement, the resignation of the management of the American Marine Defendants, the tender of all equity interest in the American Marine Defendants, and other events justify the grant of emergency relief.
8. The Fountain Defendants have not adequately demonstrated that Baja should be excluded from the provisions of this interim Order.
9. Seeking to separate the companies or company operations to which the receiver will apply has the capacity to create more harm than good.
10. Plaintiff has made an adequate showing entitling it to emergency relief. There is a substantial likelihood that Plaintiff will prevail on the merits of its claim that the Fountain Defendants are in default of the Fountain Loan Agreement and Plaintiff is entitled to the appointment of a receiver.
11. The appointment of an interim receiver is in the public interest, particularly to the extent that it may allow for the resumption of business operations and the recall of employees. Further, the receiver has responsibilities to preserve assets for the interest of all Parties and can better guard against losses and erosion of goodwill than would

result from leaving the various companies without anyone with clear authority to make decisions necessary to those interests.

12. The Court finds that GlassRatner Advisory and Capital Group, LLC is a suitable and proper receiver of all Borrower Defendants, all assets of all Borrower Defendants, and all equity interests in all Borrower Defendants.

IT IS THEREFORE ORDERED, that Plaintiff's Emergency Motion is GRANTED as provided by this Order, and, pursuant to Rule 65, N.C.G.S. §§ 1-501 through 1-507, the Court's inherent equitable powers, and other applicable law, a Receiver is hereby appointed for all Borrower Defendants, all assets of all Borrower Defendants, and all equity, capital stock, and/or membership interests in all Borrower Defendants.

IT IS FURTHER IS ORDERED that Ronald L. Glass and the firm of GlassRatner Advisory & Capital Group, LLC (collectively referred to as "Receiver") is appointed as temporary receiver of all Borrower Defendants, all assets of all Borrower Defendants, and all equity, capital stock, and/or membership interests in all Borrower Defendants.

IT IS FURTHER IS ORDERED that, from the date of this Order until the hearing noticed below, or unless extended by further order of the Court or by the consent of the Parties:

1. The Receiver is hereby authorized to take immediate possession of, hold, and secure all capital stock and membership interests in the Borrower Defendants, together with all assets of the Borrower Defendants, including, without limitation, all real property, personal property (both tangible and intangible), and business records. Borrower Defendants, each of their respective officers, directors, and representatives, and all other affiliates of Borrower Defendants, are hereby ordered immediately to surrender to the Receiver the possession, use, occupancy, and control of the Collateral. Borrower Defendants and each of their respective officers, directors, and representatives, and all other affiliates of Borrower Defendants, are hereby ordered immediately to turn over, surrender and deliver to

the Receiver any Collateral in the possession, custody, or control of any of them, including, without limitation, any and all keys and combinations to any locks or passwords to open or gain access to any part of any of the Borrower Defendants and the Collateral, whether such access relates to physical or electronic space.

2. The Receiver's authority with respect to the Borrower Defendants and the Collateral shall supersede that of any other individual, member, manager, officer, director, or shareholder of any Borrower Defendant or any other person or entity claiming any authority to act on behalf of any Borrower Defendant with respect to such Borrower Defendant and the Collateral, and no one other than the Receiver shall have any further authority to act with respect to any of the Borrower Defendants and the Collateral; provided, however, that nothing in this Order shall affect First Capital's rights in and to the Collateral, except as specifically provided by this Order.

3. The Receiver shall maintain, monitor, and enforce the lockbox and similar cash dominion arrangements established by First Capital pursuant to the loan documents among First Capital and the Borrower Defendants, as well as all other provisions of such loan documents. All powers and obligations of the Receiver set forth in this Order shall be governed by and construed in a manner consistent with the foregoing sentence.

4. Subject to the provisions of paragraph 3 above, the Receiver shall have all of the rights and powers permitted under the laws of the State of North Carolina, including, without limitation, the Receiver is hereby authorized and empowered to take any or all of the following actions:

a. to take immediate possession of and to use, maintain, preserve, and protect the Collateral, to the exclusion of Borrower Defendants; to secure (including, without limitation, changing locks), hold, retain, preserve, protect, maintain, and manage the Collateral; to marshal the Collateral; and to receive rents, income, license fees, and revenues arising from or relating to the operation, sale, or other disposition of any of the Collateral (collectively, "Revenues");

b. to make claims pursuant to any insurance policy relating to the Collateral or any portion thereof on behalf of Borrower Defendants and/or their affiliates, and any of Borrower Defendants' or their affiliates' respective officers and/or directors;

c. to engage attorneys, accountants, appraisers, brokers, auctioneers, environmental experts, contractors, management companies, investment bankers, and other consultants and experts (collectively, "Consultants") to assist the Receiver in the performance and discharge of its rights, powers, and duties hereunder, including, but not limited to, the maintenance, operation, and marketing of the Collateral;

d. to notify any account debtors of the Receivership estate, and any other person obligated to make payment to the Receivership estate, to make payment on any accounts or other monetary obligations directly to the Receiver; to take any and all actions that are necessary or appropriate in connection with recovery and collection of the accounts; to file suit in any appropriate jurisdiction to collect any amounts owed to the Receivership estate and otherwise to bring and defend actions to recover and preserve the Collateral; and with the prior express consent of Plaintiff, to sell, settle or compromise any amounts owed to the Receivership estate;

e. to utilize the assets of and operate the Borrower Defendants' business(es);

f. to request and receive from FCC advances under the loan documents ("Advances") to the extent deemed necessary by the Receiver for the Receiver's preservation, management, marketing, safeguarding, insurance, operation, or repair of the Collateral and the operation of Borrower Defendants' business, including, without limitation, premiums for insurance and amounts needed to make necessary and essential repairs to any real property constituting part of the Collateral; all of which Advances may be made or not made by Plaintiff at such times and in such amounts as Plaintiff may elect in its sole discretion; and Plaintiff shall be authorized, but

not required, to apply Revenues received from the Receiver first to the satisfaction of the outstanding Advances until such Advances are paid and satisfied in full; and all Advances shall constitute Obligations under and as defined in the loan agreements among FCC and the Borrower Defendants, regardless of whether such Advances exceed the current borrowing limits under the loan documents between FCC and Borrower Defendants:

g. to use such Advances as are made by FCC to pay the actual and reasonable expenses of the receivership, including, *inter alia*, expenses for heat, light, water, other utilities, supplies, insurance, ordinary and necessary repairs, protecting the Collateral against damage, and the repair and maintenance of any of the Collateral;

h. to use such Advances as are made by FCC to pay the Receiver for reasonable expenses and fees incurred in amounts and on terms set forth in this Order;

i. to open bank accounts in the name of the Receiver on behalf of Borrower Defendants;

j. to deal with all existing and prospective subcontractors, brokers, vendors, counterparties, credit card processors, suppliers, distributors, customers, licensors, licensees, landlords, tenants, and subtenants of Borrower Defendants, including, without limitation, by way of negotiating and executing leases, licenses, and other agreements and any amendments, renewals, extensions, modifications, or waivers of any leases, licenses, or other agreements between Borrower Defendants and any such existing or prospective subcontractors, brokers, vendors, counterparties, suppliers, distributors, customers, licensors, licensees, landlords, tenants, and subtenants of Borrower Defendants;

k. to lawfully remove any persons residing in, occupying, inhabiting, or otherwise using the Collateral and to lawfully exclude such persons from gaining reentry to the Collateral;

l. to provide a written cash flow statement each month to Plaintiff

and the Court, together with such other financial and collateral information as may be reasonably requested by Plaintiff from time to time;

m. to prepare immediately a list of all of the Borrower Defendants' lien and general creditors and promptly to notify the creditors of the appointment of the Receiver;

n. to assert any and all claims held by any of the Borrower Defendants in a court of competent jurisdiction or arbitration, to execute any and all documents and take any corporate action on behalf of any of the Borrower Defendants, and/or with respect to the Collateral and which are reasonably necessary to carry out any or all of the responsibilities and powers of the Receiver under this Order and/or otherwise to carry out the provisions of this Order;

o. to the extent consistent with the other provisions of this Order, to have all other powers and authority granted to a receiver under N.C.G.S. §§ 1-502 and 1-507.2 and/or by further Order of this Court; and

p. it being provided, however, that this Order shall NOT grant the Receiver, without further order of the Court, the right to terminate the lease between American Marine and Fountain Powerboats or to initiate foreclosure proceedings pursuant to the Deed of Trust that was introduced in this matter as Exhibit 13, or to pledge the Manufacturing Facility as collateral for any indebtedness to which it is not already subject.

The Receiver may apply to the Court for instructions whenever the Receiver deems it necessary to do so but should exhaust all other efforts to secure agreement before doing so.

5. The Receiver shall maintain appropriate property insurance for the Borrower Defendants and the Collateral, including public liability insurance, workmen's compensation insurance, fire and extended coverage insurance, and burglary and theft insurance.

6. Plaintiff shall be authorized, at any time or times, upon reasonable prior notice, to enter upon any real property constituting part of the Collateral for

the purpose of inspecting and taking inventory of any of the Collateral, including all records; conferring with officers, employees, or agents of the Receiver; and reviewing and making copies of any and all of records and any other documents at any time in the possession, custody, or control of the Receiver. The Receiver shall (i) as soon as practicable, prepare a budget containing the estimated revenues and expenses of the Receiver relating to its services hereunder and provide a copy of same to Plaintiff, who shall have an opportunity to file an objection with the Court with respect to the reasonableness of the expenses on the budget, and (ii) no less frequently than monthly, update the Receiver's budget and provide to Plaintiff such budget and financial and other reports of the Receiver's operations and maintenance of the Collateral as may be reasonably requested by Plaintiff. By virtue of the entry of this Order alone, Plaintiff shall not be deemed to be in possession or control of any of the Collateral, or to have asserted any supervisory control or decision-making authority with respect to the management, operation, protection, or maintenance of any of the Collateral, and Plaintiff shall not be deemed to have assumed any obligation under Borrower Defendants' agreements with any third parties and shall not be liable for the control, use, maintenance, repair, or operation of any of the Collateral. Upon reasonable prior notice to the Receiver or Receiver's counsel, all officers, attorneys, and authorized representatives of Plaintiff shall be entitled to review, inspect, and copy any of the Borrower Defendants' records during normal business hours.

7. Borrower Defendants, any affiliates of Borrower Defendants, all of their respective managers, officers, directors, agents, representatives, and employees, and all other persons acting at the direction of or in concert with any of them, and anyone who receives notice of this Order by service or otherwise, including providers of insurance and any utility company, shall be, and each of them is hereby, restrained and enjoined from (i) transferring, selling, seizing, encumbering, or otherwise taking action against or disposing of any of the Collateral, (ii) interfering in any way with the Receiver's use, occupancy, maintenance, or operation of any of the Collateral, (iii) withdrawing Revenues

derived from the operation of the Collateral, (iv) paying or transferring Revenues other than to the Receiver, (v) removing, disposing of, destroying, concealing, changing, or altering any records or other documents relating to the Borrower Defendants and the Collateral, or (vi) terminating, canceling, or otherwise affecting insurance coverage or utility service relating to any of the Collateral.

8. Borrower Defendants, all of their respective managers, officers, directors, agents, representatives, and employees, and all other persons acting at the direction or in concert with any of them, and anyone who receives notice of this Order by service or otherwise, are hereby ordered to immediately (i) turn over to the Receiver possession of all of the Collateral and proceeds thereof, any Collateral previously removed from any business location or real estate of the Borrower Defendants by Borrower Defendants or any of Borrower Defendants' affiliates or insiders, and the Records; (ii) pay over to the Receiver all cash proceeds of Collateral (including, without limitation, any Revenues) in the custody, possession, or control of any of them; (iii) turn over to the Receiver all keys to all buildings, safes, deposit boxes, or other safeguarded places on or about any real property or other business premises of the Borrower Defendants and all other personal property and tangible or intangible items of Collateral; and (iv) cooperate with and assist the Receiver when requested by the Receiver and furthermore take no action, directly or indirectly, to hinder, obstruct, or otherwise interfere with the Receiver in the performance of the Receiver's duties. From and after the date of entry of this Order, any payments on account of the Collateral shall be made solely to the Receiver or, if the Receiver so elects, to First Capital.

9. The Receiver shall provide to Plaintiff such reporting as to the financial operations of the Collateral as may be requested by Plaintiff. On the last business day of the month in which this Order is entered, and on the last business day of each month thereafter during the effectiveness of this Order, the Receiver is authorized to file with the Court a Notice of Compensation and Reimbursement, which notice shall be served upon the Plaintiff, stating the Receiver's proposed compensation for professional services rendered pursuant to this Order for the



previous month at the Receiver's reasonable standard hourly rate and reimbursement of the reasonable and actual out-of-pocket expenses incurred by the Receiver in performing its duties hereunder, which compensation and reimbursement shall be made to the Receiver on the tenth (10th) business day following the filing of such notice in absence of objection filed with the Court by the Plaintiff. In the event the Plaintiff files such an objection, compensation and reimbursement shall be made to the Receiver pursuant to further order of the Court after notice and hearing. Compensation and reimbursement shall be made first from the proceeds of the Collateral and second from Advances, if necessary.

10. The Receiver is authorized to register this Order with the appropriate government offices and courts and to serve this Order on any person or entity whom the Receiver reasonably believes to be in possession or control of Collateral.

11. The Receiver shall have the power to compel, including by subpoena, the appearance and testimony of all persons and the production of the originals of any records, of any sort whatsoever, within the possession, custody, or control of any person, as may be necessary to enable the Receiver to effectively carry out its duties. The Receiver's authority under this paragraph shall not be construed to require the waiver by any person of any validly asserted privilege.

12. While the Court would expect, if continuing the receivership, to provide for the receiver's right to be relieved of responsibility should there be no reasonable expectation of continuing assets adequate to defray the cost of receivership, the Court finds no reason to include such provision in its interim Order.

13. Except as necessary to protect the interests of the companies during the interim period of this emergency Order, the receiver shall endeavor not to liquidate collateral except as incidental to normal operations, such as, for example, the sale of finished inventory for market consideration.

14. The Clerk of the Court is authorized and directed to make certified copies of this Order, at the Receiver's request, for use by the Receiver.

15. The Court shall hold a hearing on Plaintiff's Motion for Appointment of a Continuing Receiver to begin at 2:00 p.m. on Wednesday, November 2, 2011 and to continue thereafter but without further provision, shall not continue later than Friday, November 4, 2011. At that hearing the Court will hear the presentation of evidence and further consider the necessity or appropriateness of continuing the receivership, and if so, on what terms and conditions. The terms of this Order shall not prejudice the parties with respect to the relief or defenses to the Motion they may assert at this further hearing. The date of this hearing may be continued upon consent of the Parties. The hearing shall be held at the Business Court, 201 North Greene Street, Greensboro, North Carolina.

16. The Parties shall make a further report as to their respective positions on the scheduling of discovery in advance of such hearing and are directed to discuss how the time for the noticed hearing should be allocated.

17. This Order shall not become effective until Plaintiff and the Receiver have each posted adequate security in the amount of Fifty Thousand Dollars (\$50,000.00). As consented to by Fountain Powerboats, should Plaintiff or the receiver elect to post a security in lieu of a cash bond, only one surety shall be required so long as its maintains the highest rating of a commercially acceptable rating organization.

18. This Court shall retain jurisdiction of this matter for all purposes, including amending and enforcing any of the provisions of this Order.

IT IS SO ORDERED, this 20th day of October, 2011.

/s/ James L. Gale  
James L. Gale  
Special Superior Court Judge  
for Complex Business Cases