

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NASSAU

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HIGH TIDES, LLC, a New York  
limited liability company,

*Plaintiff,*

-against-

DON DEMICHELE, CHRISTOPHER CORTESE,  
STEVEN A. GALLOWAY,  
BART D. THORNE, JEFFREY SERKES,  
KENNETH KELLAWAY, and  
DUNKIN' BRANDS, INC.,

*Defendants.*  
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Index No.

**COMPLAINT**

Plaintiff, HIGH TIDES, LLC, by and through its undersigned counsel, hereby sues Defendants, DON DEMICHELE, CHRISTOPHER CORTESE, STEVEN A. GALLOWAY, BART D. THORNE, JEFFREY SERKES, KENNETH KELLAWAY, and DUNKIN' BRANDS, INC. for damages and other relief, and in support thereof states as follows:

**THE PARTIES**

1. Plaintiff, HIGH TIDES, LLC, is a New York limited liability company having its principal place of business in the State of New York. Patrick LaFontaine, who played professional hockey for the New York Islanders, Buffalo Sabres and New York Rangers, and was inducted into the Hockey Hall of Fame in 2003, is High Tides' managing member. High Tides is the owner of 1752.53 Class A Units (shares) in Kainos Partners Holding Company, LLC, a limited liability company formed under the laws of the State of Delaware ("Kainos"). Kainos operates, through itself or through its subsidiary companies, Dunkin' Donuts and Dunkin

Donuts/Baskin-Robbins combo retail shops throughout Buffalo, New York, Las Vegas, Nevada, and South Carolina.

2. Defendant DON DEMICHELE is an individual who resides in Plymouth, Massachusetts. Defendant DeMichele is a founding member of Kainos. At all times relevant to the allegations contained in this complaint, Defendant DeMichele was the Chairman and Chief Executive Officer of Kainos. Defendant DeMichele was also a board member of Kainos who actively participated in the fraud alleged herein.

3. Defendant CHRISTOPHER CORTESE is an individual who resides in Nassau County, New York. Defendant Cortese is a founding member of Kainos. At all times relevant to the allegations contained in this complaint, Defendant Cortese was the Chief Financial Officer of Kainos. Defendant Cortese was also a board member of Kainos who actively participated in the fraud alleged herein.

4. Defendant STEVEN A. GALLOWAY is an individual who resides in Simsbury, Connecticut. Defendant Galloway is a founding member of Kainos. At all times relevant to the allegations contained in this complaint, Defendant Galloway was a board member of Kainos and the President and Chief Operating Officer of a Kainos subsidiary that operated Dunkin Donuts shops in Buffalo, New York, on behalf of Kainos. Mr. Galloway was also a board member of Kainos who actively participated in the fraud alleged herein.

5. Defendant BART D. THORNE is an individual who resides in Greenville, South Carolina. Defendant Thorne is a founding member of Kainos. At all times relevant to the allegations contained in this complaint, Defendant Thorne was a board member of Kainos and the President and Chief Operating Officer of Kainos Partner South Carolina, LLC, a Kainos

subsidiary that operates Dunkin Donuts shops on behalf of Kainos in South Carolina, who actively participated in the fraud alleged herein.

6. Defendant JEFFREY SERKES is an individual who, on information and belief, resides in the State of New Jersey. Defendant Serkes is the Chief Operating Officer of Palisade Capital Management, LLC, an SEC Registered Investment Adviser with approximately \$2.2 billion of assets under management. Palisade manages assets for a variety of clients and products, including large corporations, foundations, endowments, ERISA plans, mutual funds, hedge funds, private limited partnerships, offshore commingled funds, family offices and high net worth individuals. Palisade, through its affiliate PCEP II KPHC HOLDING, INC., invested \$10,000,000.00 in Kainos in March of 2007. In total, PCEP Holdings has invested approximately \$14,000,000.00 in Kainos and is its largest single stakeholder. Mr. Serkes was elected to Kainos' board of directors in March of 2007 by PCEP Holding, and actively participated in the fraud alleged herein.

7. Defendant KENNETH KELLAWAY is an individual who resides in the State of Massachusetts. Defendant Kellaway is a founding member of Kainos. At all times relevant to the allegations contained in this complaint, Defendant Kellaway was a board member of Kainos, who actively participated in the fraud alleged herein.

8. Defendants DeMichele, Cortese, Galloway, Thorne, Serkes, and Kellaway (collectively, the "Defendant Board Members") are corporate insiders and/or board members who each had active daily roles in Kainos and/or the ability and right to access information concerning Kainos' day-to-day operational and financial performance, and who, at all relevant times, had detailed knowledge of and experience with, and was responsible for, overseeing the financial and business affairs of Kainos. Defendant Board Members chose not to make the

financial and operational issues that significantly impacted Kainos known to High Tides or to the other investors, fearing a loss of their investment (or that of their employer) and a flight of capital that would otherwise quickly sink Kainos.

9. Defendant, DUNKIN' BRANDS, INC. ("Dunkin' Brands"), is a Delaware limited liability company having its principal place of business in the State of Massachusetts. Defendant Dunkin' Brands does business in the State of New York.

### **JURISDICTION AND VENUE**

10. This Court has jurisdiction pursuant to Section 302(a)(2), N.Y. C.P.L.R., as the tortious acts alleged in this pleading were committed within the state. Jurisdiction is also founded on Section 302(a)(3), N.Y. C.P.L.R., since the tortious acts alleged in this pleading, to the extent not having taken place in this state, caused injury to High Tides in this state, and the Defendants either (i) regularly do or solicit business, or engage in any other persistent course of conduct, or derive substantial revenue from goods used or consumed or services rendered, in the state, or (ii) expect or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce.

11. Venue in this county is appropriate pursuant to CPLR § 503 in that at least one of the Defendants resides in Nassau county.

### **General Allegations**

12. Kainos was formed in November of 2006 to create a long-term business alliance with Dunkin' Brands, and was initially capitalized by its founding members for \$6,000,000.00. Through its predecessor, Kainos Partners, LLC, Kainos commenced operations on May 2, 2005, and soon thereafter purchased the rights to develop 40 Dunkin Donuts and Dunkin Donuts/Baskin Robbins combo retail shops in the greater Buffalo, New York Designated

Marketing Area (the “Buffalo DMA”). According to Kainos at the time, “[t]he Dunkin’ Brands products and marketing plan, combined with [Kainos’] management team, business expertise and its financial resources, *will definitively distinguish [Kainos] from its competition.*” As history shows, Kainos indeed distinguished itself from its competitors, but not in the way expected or represented.

13. From March through December, 2007, the equity holders of Kainos, including High Tides, invested an additional \$20,000,000.00, and in August of 2008, these same investors invested an additional \$5,000,000.00.

14. As part of its expansion into the Buffalo DMA, and at a cost in excess of \$4,000,000, Kainos also developed and operated a Central Manufacturing Facility (a bakery) in Buffalo that was expected to supply baked goods and products to both its own shops and to other Dunkin’ Brands franchisees in the greater Buffalo and Rochester areas. Later, High Tides would come to learn from a Kainos board member that the Buffalo market was “pushed” on Kainos by Defendant Dunkin’ Brands “as a favor to [Jon Luther],” Dunkin’ Brands’ then Chairman and CEO, and that the Central Manufacturing Facility was a major cash drain on Kainos from its inception.

15. Dunkin’ Brands is the master servicer for Dunkin’ Donuts Franchised Restaurants, LLC, the company that franchises to third parties the right to develop and operate Dunkin Donuts shops. In 2006, Thomas H. Lee Partners LP, Bain Capital Partners and the Carlyle Group, purchased Dunkin’ Donuts for a reported \$2.43 billion. As part of this purchase, and through a complicated securitized structure, Dunkin’ Brands burdened itself with secured debt estimated to be in excess of One Billion Dollars---a debt that needs to be retired. On information and belief, Dunkin’ Brands is also preparing an initial public offering, whereby it

hopes to offer common stock to the general public for the first time, for the benefit of itself and its investors.

16. The relationship between Defendant Dunkin' Brands and its franchisees is based upon written franchise agreements and certain ancillary documents. Under the standard form franchise agreements offered by Dunkin' Brands on a take it or leave it basis, Defendant Dunkin' Brands requires that its franchisees disclose to it every detail of their on-going financial affairs, as well as those concerning the operation of their business. Based upon the personal, financial, and operational information provided by its franchisees, including Kainos, Defendant Dunkin' Brands is fully aware at all times of every aspect of its franchisees' financial condition (including whether a franchisee is current on fees), as well as the gross sales and profitability of a particular Dunkin' Donuts shop. In fact, Defendant Dunkin' Brands has "real time" computer access to the profitability and financial and operational performance of its franchisees, including Kainos, through its contractually required point of sale systems.

17. Jon Luther, a native of Buffalo and Pat LaFontaine's former neighbor, was named by Dunkin' Brands as its Chief Executive Officer in January of 2003 and as its Chairman in 2006. In addition, Mr. Luther is a member of the Board of Directors of Companions In Courage, a non-profit charitable foundation created by Pat LaFontaine that constructs and installs interactive game rooms in children's hospitals throughout North America. Mr. Luther and Mr. LaFontaine are friends.

18. During a Buffalo Sabres alumni golf tournament in August of 2005 attended by Mr. LaFontaine and Mr. Luther, Mr. Luther first introduced Mr. LaFontaine to Defendants DiMichele, Cortese and Thorne. At that time, and in the context of discussing a possible equity investment by Mr. LaFontaine, Mr. LaFontaine learned that Kainos was working with "Jack

[Luther] to develop Dunkin' Donuts shops in Buffalo" and elsewhere, and that Mr. Luther believed that Mr. LaFontaine's status as a former Buffalo Sabres hockey icon would assist Kainos in developing and growing the Buffalo market.

19. In October of 2006, Mr. LaFontaine and Mr. Luther again discussed a possible equity investment in Kainos. During the 4<sup>th</sup> Annual Companions In Courage Golf Classic held at Deepdale Golf Club in Long Island, Mr. Luther suggested exercising some patience before making a significantly large investment in Kainos, stating that "it's early on, let's see how these guys are doing," and that if any investment was being considered, that it should be "a smaller investment at this time." Mr. LaFontaine relied on the advice given to him by Mr. Luther, which advice earned Mr. LaFontaine's trust in Mr. Luther and in Dunkin' Brands.

20. In November of 2006, one month after Mr. Luther suggested patience to Mr. LaFontaine and instilled in him a false sense of security, Kainos signed a second Store Development Agreement with Defendant Dunkin' Brands to build 37 shops in Greenville and Spartanburg, South Carolina. And, in March of 2007, Kainos continued what it defined as its "aggressive growth" by signing a third Store Development Agreement with Defendant Dunkin Brands to build 41 shops in Las Vegas, Nevada. Kainos and Defendant Dunkin' Brands would jointly announce these deals in press releases delivered to High Tides and to the general public.

21. Collectively, the three Store Development Agreements obligated Kainos to develop at least 117 Dunkin Donuts and Dunkin Donuts/Baskin Robbins combo retail stores.

22. By July of 2007, recognizing what appeared to be the meteoric growth of Kainos, and after consulting again with Mr. Luther, Mr. LaFontaine, through High Tides, was induced to invest in Kainos through an initial investment of \$500,000.00. As a result of this initial investment, High Tides became the owner of 500 Class A Units of Kainos on July 1, 2007. It

was intended that a portion of the profits High Tides would realize from its investment in Kainos would be contributed to the Companions in Courage foundation.

23. Immediately after making its initial investment in Kainos, Dunkin' Brands and Kainos sought to leverage Mr. LaFontaine's popularity in Buffalo for the benefit of both Kainos and Dunkin' Brands. On August 17, 2007, through a carefully planned public relations event targeting well-known Buffalo sports reporters and local fans, Kainos and Dunkin' Brands jointly announced Mr. LaFontaine's investment in Kainos at a Dunkin' Donuts shop located in downtown Buffalo. Among others in attendance at this event were Mr. LaFontaine and Mr. Luther, who each signed autographs and served coffee and donuts to the customers in attendance. In effect, Mr. LaFontaine was used by Kainos as a public figure to draw customers and possible new investors, and by Dunkin Brands to attract prospective franchisees and potential investors.

24. On September 7, 2007, Defendant Cortese delivered to Mr. LaFontaine and to High Tides a letter from Defendant DeMichele that enclosed Kainos' Second Quarter Business Update.

25. In October of 2007, at the 5<sup>th</sup> Annual Companions In Courage Golf Classic in Manhasset, New York, sponsored by Dunkin' Brands, Mr. LaFontaine was approached by Defendant Cortese about increasing High Tides' investment in Kainos. According to Defendant Cortese, because a strategic investor of Kainos backed out of its \$4,000,000 commitment, Kainos was offering its investors on a pro-rata basis the ability to increase their equity stake in the company.

26. On October 24, 2007, Kainos and Dunkin' Brands jointly announced the opening of Kainos' first Dunkin' Donuts store in Las Vegas, which store purportedly "set new all time

records in Dunkin' Brands entire history." Later, Kainos would abandon all plans to develop additional Dunkin' Donuts shops in the State of Nevada.

27. By all accounts, things appeared to be going great for Kainos, at least according to both Defendant Board Members and Dunkin' Brands. In November of 2007, Dunkin Brands recognized Kainos as "Dunkin' Brands Rising Star" at an Enterprise Awards dinner held at the John F. Kennedy Presidential Library and Museum in Boston. In a press release issued on November 13, 2007, Dunkin' Brands highlighted the remarks made by Mr. Luther in a toast given at the awards ceremony. Referring to Kainos and to the other award recipients, Mr. Luther was quoted as saying, "At this dinner we have assembled a remarkably accomplished and elite group of leaders from all around our world. In the business world, a true leader is a pathfinder. You are the best that the Dunkin' Brands system has to offer."

28. Before making a further investment in Kainos, Mr. LaFontaine again sought the counsel of Mr. Luther. As Dunkin' Brands' Chief Executive Officer and Chairman, Mr. Luther and Defendant Dunkin' Brands, through its required financial reporting policies, were in the unique position of knowing the true financial condition of Kainos, as well as its performance as a franchisee. According to Mr. Luther, Kainos was Dunkin's "number one builder," and that he "feels really good about the group." Providing additional confidence for Mr. LaFontaine to increase High Tides' equity investment, and creating an additional false sense of security, Mr. Luther allayed any fears Mr. LaFontaine had, advising Mr. LaFontaine that he "would not put his friends and family into an investment that he did not feel good about" himself.

29. High Tides, in its consideration of a further investment in Kainos, received from Defendant Cortese a Confidential Investor Summary Memorandum on November 6, 2007. Then later, Defendant Cortese delivered Kainos' 2008 Annual Operating Plan to High Tides.

30. In December of 2007, relying on the foregoing, and Mr. Luther's representations as Chairman and CEO of Dunkin' Brands, High Tides increased its investment in Kainos by \$1,000,000.00, acquiring 1000 additional Class A Units of Kainos.

31. During the period of time between its initial investment in July of 2007 and its subsequent investment in December of that same year, High Tides received communications from Kainos that routinely touted the continued growth and success of Kainos in Buffalo, South Carolina and Las Vegas. Importantly, there was never any disclosures made in any of these communications (or the financial reports, statements, and business updates) that Kainos was facing any serious financial or operational problems that could negatively impact its ability to continue operating as a going concern. Instead, Defendant Board Members and Defendant Dunkin' Brands jointly continued to talk about the success of the existing shops, as well as plans to grant Kainos further development opportunities in certain untested and undeveloped markets.

32. On February 17, 2008, High Tides received from Defendant Cortese Kainos' quarterly financial report for the three month period ending December 31, 2007.

33. On June 17, 2008, Kainos announced by letter to its investors that its board had elected to pursue the rights to open up to 75 Dunkin' Donuts restaurants in the Houston, Texas market, and that it intended to issue 5,000 new Class A Units at the price of \$1,000 per unit to support the operations of the new subsidiary that would oversee the Houston market, for the purchase of real estate, and for the continued growth of Kainos and its subsidiaries. This secondary offering, if and when fully subscribed, would result in an additional \$5,000,000.00 being invested in Kainos.

34. As part of that offering, Defendant Cortese offered High Tides the opportunity to increase its equity in Kainos by \$252,525.00, allowing High Tides to acquire an additional 252

Class A Units of Kainos. Defendant Cortese said that each of the other investment groups had already subscribed to this offering, and stated that High Tides' investment in Kainos would deliver a 3 - 5 times multiple return on its investment. According to Cortese, who continually emphasized this point, High Tides' investment in Kainos was on course to return "3 to 4 times" within the next 2 to 4 years, since "Palisades has buyers for this kind of investment once we hit the 100-store mark."

35. Soon after the announcement made by Kainos, Defendant Dunkin Brands recognized Kainos as an outstanding franchisee at its third annual Franchisee & Enterprise Awards dinner held on June 26, 2008, declaring Kainos the "Dunkin' Donuts Developer of the Year." Clearing referring to Kainos and the other award recipients, Mr. Luther was quoted as saying in a press release issued by Dunkin' Brands, "[t]his room is filled with an accomplished and elite group of leaders from all around the world who represent the very best of Dunkin' Brands system. I applaud the values and dedication you all bring to this company." Within six months after being awarded one of Dunkin' Brands' highest honors, Kainos would find itself without money and financially insolvent.

36. On August 7, 2008, Kainos signed a fourth Store Development Agreement with Defendant Dunkin' Brands, wherein it committed to build 75 shops throughout Houston. The execution of this agreement was publicized by Defendant Dunkin' Brands in regional and national newspapers and on on-line publications.

37. On August 15, 2008, Kainos announced that it had completed its \$5,000,000.00 securities offering that had been announced earlier on June 17. This announcement was false and materially misleading, in that High Tides had not yet made its investment in this offering.

38. On August 24, 2008, in anticipation of High Tides' upcoming investment, Defendant Cortese delivered to Mr. LaFontaine an email that included Kainos' Financial Statements, Kainos' balance sheet dated December 31, 2007 and the related consolidated statements of income, changes in members' equity, and cash flow for the fiscal year ending December 31, 2007, the unaudited consolidated balance sheets of Kainos as of March 31, 2008, and the related statements of income, cash flow and stockholders' equity.

39. At the time, Kainos and its board of directors made the following representations and warranties regarding the documents transmitted by Mr. Cortese on August 24, 2008:

- the balance sheet dated December 31, 2007 and the related consolidated statements of income, changes in members' equity, and cash flow for the fiscal year ended December 31, 2007 and the unaudited consolidated balance sheets of Kainos as of March 31, 2008 and the related statements of income, cash flow and stockholders' equity "fairly represent the financial condition and the results of operations, changes in stockholders' equity, and cash flow of [Kainos] as of the respective dates of any of the periods referred to...
- The books of account, minute books, stock record books, and other records of [Kainos] and each Company Subsidiary are complete and correct and have been maintained in accordance with sound business practices.
- Since [March 31, 2008], there has not been any material adverse change in the business, operations, properties, prospects, assets, or conditions of the Company and the Company Subsidiaries, and no event has occurred or circumstances exist that may result in such material adverse change.
- The Company and the Company Subsidiaries are, and at all times after their inception, have been, in full compliance with all applicable terms and requirements of each Contract under which the Company has or had any obligations or liabilities or by which the Company or the Company Subsidiaries or any of the assets owned or used by the Company or the Company Subsidiaries is or was bound;
- No event has occurred or circumstance exists that (with or without notice or lapse of time) may contravene, conflict with, or result in a violation or breach of, or give the Company or the Company Subsidiaries or other Person the right to declare a default or exercise any remedy under, or to accelerate the maturity or performance of, or to cancel, terminate, or modify, any Applicable Contract;

- No representation or warranty of the Company in this Agreement or the exhibits, annexes and schedules hereto and no statement in the Disclosure Letter omits to state material facts necessary to make the statements herein or therein, in light of the circumstances in which they were made, not misleading.
- No notice given pursuant to Section 8.3 will contain any untrue statement or omit to state a material fact necessary to make the statements therein or in this Agreement, in light of the circumstances in which they were made, not misleading;
- There is no fact known to the Company that has specific application to the Company and that materially adversely affects or, as far as the Company can reasonably foresee, materially threatens, the assets, business, prospects, financial condition, or results of operation of the Company or any of the Company Subsidiaries (on a consolidated basis) that has not been set forth in this Agreement or the Disclosure Letter.

40. On behalf of Kainos and its board, Defendant Cortese certified to High Tides that the foregoing representations and warranties were true and correct in all material respects. In reality, the representations and warranties were fraudulent when made, and intended to further mislead and deceive High Tides into a continued false sense of security that the “house was still in order.”

41. Based on the representations and warranties found in the financial statements received on August 24, 2008, and relied on by High Tides, as well as press releases issued by Defendant Dunkin’ Brands, High Tides executed the documents and returned them, together with a check dated August 25, 2008, made payable to Kainos in the amount of \$252,000.00, directly to the attention of Defendant Cortese. High Tides’ investment in Kainos totals \$1,752,525.00.

42. According to both Defendant Board Members and Defendant Dunkin’ Brands, things continued to go well for Kainos. So good, in fact, that on December 1, 2008, Defendant Cortese advised Mr. LaFontaine that Kainos’ board was looking for yet another round of funding to support its “incredible growth.” According to Defendant Cortese, the price for any units sold

in any new round of funding would be priced at \$1,250.00 per unit, given the fact that Kainos, which currently had a value of \$40,000,000.00, would have a value of “\$77,000,000.00” after the closing. Remarkably, the December 2008 Investor Summary Memorandum provided by Defendant Cortese to High Tides said nothing about the actual dire financial condition of Kainos that was, or should have been, otherwise known to Defendants at that time.

43. In fact, and as only recently learned through filings made in Kainos’ bankruptcy, Defendant Dunkin’ Brands made a loan to and entered into a master equipment lease agreement with Kainos in December of 2008 that was secured by mortgages granted on certain real property owned by Kainos. On information and belief, at the time of the loan, Kainos was insolvent, a fact that Defendant Dunkin’ Brands knew, must have known, or should have known before making such a large financial investment. As of June 30, 2009, the outstanding obligations owing to Dunkin Brands were approximately \$4.2 million.

44. Two weeks after Kainos’ CFO valued the company at \$77,000,000.00, Kainos found itself without money to continue operations.

45. Less than one month after Defendant Dunkin’ Brands loaned Kainos approximately \$5,000,000.00, Mr. Luther was replaced by Nigel Travis, who took over in January of 2009 as Dunkin Brands’ Chief Executive Officer and Chairman. Mr. Luther is currently Dunkin’ Brands’ Executive Chairman of the Board.

46. As late as January 2009, Defendants continued to conceal from High Tides and the other investors the actual dire financial condition of Kainos. On January 19, 2009, Mr. LaFontaine met with Defendant Cortese at the Celebrity Dinner in Syosset, New York. At the time, High Tides owed \$525.00 for its most recent investment, and Defendant Cortese needed a check in that amount to “close out High Tides’ investment

and the year.” Despite knowing the true financial condition of Kainos, which by this time was insolvent, Defendant Cortese accepted the money from Mr. LaFontaine, having never mentioned that Kainos was without money.

47. In early February, 2009, Mr. LaFontaine travelled to the Bahamas with his family for a vacation. While at the airport waiting for his departing plane, Mr. LaFontaine ran into Andrew Charles, a fellow investor in Kainos, whom Mr. LaFontaine met earlier. Mr. Charles told Mr. LaFontaine that Kainos was in serious financial distress, that there were problems with the board, including allegations of embezzlement and fraud, and that “Palisade was coming in and taking over.” This was the first indication High Tides had that something was seriously wrong at Kainos.

48. Only a few days later, Mr. LaFontaine was blind-copied on an email sent by Defendant Galloway regarding his separation from Kainos. According to Mr. Galloway’s February 6, 2009 email, Kainos had been struggling financially and operationally since its inception--- a fact that was concealed from the general public and from High Tides by both the Defendant Board Members and Dunkin Brands. According to Defendant Galloway,

Since our inception [in 2006], Kainos Partners has struggled with lower than expected sales, rising operating costs and, like many others recently, the freeze up of our credit markets. As you know, we kept growing and with tenure and mass, our initial operating losses improved significantly as more and more guests began to give us their business. Still, we funded these losses with our equity and, due to the continuing slow pace of progress and pressures on cash flow, we began downsizing our support staff last summer [2008] and negotiated with our vendors, landlords and suppliers to lower other operating costs where we could. Many of you have already felt the impact of these difficult decisions.

49. At no time did Kainos or Defendant Dunkin Brands disclose to its investors, including High Tides, that Kainos had “struggled with lower than expected sales,” that it was experiencing “rising operating costs,” that its losses were funded

through “equity,” and that it “began downsizing [its] support staff” beginning in the summer of 2008. Dunkin’ Brands knew of these facts, or at a minimum, should have known.

50. Then, on February 20, 2009, Mr. LaFontaine received an unsolicited email from Defendant Serkes. In his email, Defendant Serkes refers to “unimaginable” issues regarding the manner in which Kainos was operated, and attempts to place blame on Kainos’ management, many of whom were his fellow board members:

Pat, My name is Jeff Serkes and I am Chief Operating Officer at Palisade Capital Management, a fellow investor in Kainos Partners. I understand that Andrew Charles briefed you on the situation at Kainos. I’m sure that you were as surprised as we were when we got the call in mid-December from Don DeMichele and Chris Cortese telling us that the company had one week of cash left. Since receiving that call, we at Palisade have taken a more active role, trying to assist Bart Thorne (President & COO of Kainos) and his new Interim CFO, Suzy Lewis. In addition to providing a \$500,000 bridge loan to get Kainos through the past eight weeks, we have been helping Bart and Suzy with financial analysis (so that we can understand the “root cause” of the financial situation) and negotiations with Dunkin’ Brands and CIT (Kainos’ equipment lender).

Bart and Suzy have done a great job over a short period of time holding this together, improving operations, digging through past due bills (many of which were buried in boxes in Chris’ office) and cutting costs to make the company more efficient. However, as I’m sure Andrew described, there have been many more issues, some of them which I’d label as “unimaginable” that have turned up since we were first called by Don and Chris in December.

Bottom line: While the economy is responsible for a fair amount of the problems at the company, Kainos’ management (excluding Bart) made a real mess of what could have been a thriving business. It is now going to take a lot of time, effort and cash to save the company.

51. Although it is unknown at this time what “unimaginable” issues were found regarding the manner in which Kainos was operated, High Tides recently learned that Defendant Cortese was alleged to have engaged in unapproved financial transactions involving Kainos’ assets for his personal benefit and not the company. Defendant Cortese was terminated by

Kainos for cause effective February 4, 2009. Later, Defendants Serkes and Thorne would announce in May of 2009 that the dire financial condition of Kainos was due in part to “poor management by certain members of the Senior Management Team” and “the alleged fraudulent acts by” Defendant Cortese. Shockingly, Defendant Thorne himself was the President and CEO of Kainos with detailed knowledge of its business affairs at the time of the purported “poor management.” Yet, Defendant Thorne takes no responsibility for the current condition of Kainos, and is slated to be chosen as Kainos’ President and CEO once it emerges from bankruptcy.

52. On or about February 28, 2009, Kainos, Defendant Dunkin Brands, and CIT entered into a Forbearance Agreement whereby Defendant Dunkin’ Brands and CIT agreed to forebear on the collection of monies due from Kainos and from exercising certain default-related rights and remedies. On information and belief, Kainos was at the time unable to pay its bills to Defendant Dunkin’ Brands and to its secured lender CIT.

53. Following the execution of the Forbearance Agreement, Mr. Luther and Mr. LaFontaine spoke on or about March 3, 2009, regarding the circumstances surrounding the precipitous fall of Dunkin Brands’ Developer of the Year. In that conversation, Mr. Luther, in an attempt to deflect blame from Defendant Dunkin’ Brands, stated that Kainos’ board of directors and Palisade were at fault for the serious financial problems now facing Kainos, and that the same board had misrepresented to High Tides the true financial condition of Kainos. According to Mr. Luther, Palisade “must have insurance for cases like this.”

54. Based on the misrepresentations that were ascribed to individual members of Kainos’ board, Mr. Luther would also later advise Mr. LaFontaine prior to Kainos’

bankruptcy filing that “[High Tides] should not sign anything that would give up any of its rights,” recommending instead that High Tides “get a lawyer” to protect its interests.

55. On July 6, 2009, Kainos and its subsidiary affiliates filed voluntary petitions for relief under Chapter 11 of Title 11 of the the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware. As part of the proposed reorganization, High Tides’ equity interest in Kainos will be reduced to an unsecured claim---its \$1,752,525.00 investment essentially lost. Defendant Dunkin’ Brands and CIT would become Kainos’ largest stakeholder, through what both Defendants Serkes and Thorne described as “collusion” between them.

56. The extent of the material misrepresentations made by Defendant Board Members and Defendant Dunkin’ Brands are peculiarly within Defendants’ knowledge. However, at this time, it is clear that Defendant Board Members and Defendant Dunkin’ Brands withheld from High Tides and the public at least the following material facts:

- Since its inception in 2006, Kainos struggled with lower than expected sales and rising operating costs;
- The Central Manufacturing Facility represented a large cash drain on Kainos since its inception and was forced on Kainos by Dunkin’ Brands;
- Based on the lower than expected sales and rising operational costs, the financial forecasts, projections and pro-forma received from the Defendant Board Members were false and materially misleading when made;
- Contrary to the stated purpose of the equity investments made by High Tides and others, Defendant Board Members were funding Kainos’ operating losses through the equity investments;
- Kainos began downsizing its support staff during the summer of 2008 and that such downsizing negatively impacted the company;
- Kainos’ financial statements were necessarily false and misleading, in that they did not reflect costs and expenses represented in bills and invoices that had been buried and concealed in boxes stored in Defendant Cortese’s office, and improperly included costs

and expenses that were for Defendant Cortese's own personal benefit and not of Kainos;  
and

- Self-admitted "Unimaginable issues" surrounded the manner in which the financial and business affairs of Kainos were being handled.

57. Defendant Board Members each knew, or should have known, that the financial and operational representations and information provided to High Tides before each of its investments, including the November 6, 2007 Confidential Investor Summary Memorandum, the December 31, 2007 quarterly financial report, and Kainos' Business Update as of March 31, 2008, were (i) false and materially misleading, in that the information contained untrue statements and omitted material facts necessary to make the statements therein, in light of the circumstances in which they were made, not misleading; and (ii) did not contain facts known to Kainos and the board that materially threatened the assets, business, prospects, financial condition, or results of operation of Kainos and its subsidiaries.

58. Furthermore, Defendant Board Members and Defendant Dunkin' Brands, through their concealment and suppression of material facts, and their deception and manipulation, had a duty to High Tides to disclose such additional facts to make the statements made by Defendants, in light of the circumstances in which they were made, not misleading.

59. In order to attract new large area developers and demonstrate to both Wall Street and potential investors the purported success of the Dunkin' Donuts franchise system, all for its own pecuniary gain, Defendant Dunkin' Brands blatantly ignored and/or otherwise concealed from High Tides, its customers, potential franchisees, and potential investors, Kainos' lack of profitability and the significant difficulty that the company (as well as other Dunkin' Donuts franchisees) faced in expanding into markets where Dunkin' Donuts had no significant presence. Instead, Dunkin' Brands continued to

publicly herald the success of Kainos by: (i) awarding Kainos with its highest honors; (ii) issuing favorably, yet materially misleading, press releases lauding Kainos in spite of its spiraling operational and financial decline; and (iii) awarding Kainos new and large territories in which to develop Defendant Dunkin' Donuts shops, knowing full well that Kainos lacked the financial and operational ability to develop and ultimately operate those shops, while at the same time realizing significant profits through the execution of these agreements by Kainos.

60. Indeed, on information and belief, Dunkin' Brands has otherwise concealed from the public, prospective franchisees, potential investors, and High Tides, the significant difficulties facing many of its franchisees and area developers in non-core markets, including Cleveland, Virginia, Houston, and the city of Dallas, where, on information and belief, a large area developer backed by executives from the Zales Jewelry store chain withdrew its commitment to continue developing Dunkin Donuts shops in that territory.

61. All conditions precedent to the commencement of this action have occurred, or have been performed, excused, satisfied or waived.

### **CAUSES OF ACTION**

#### **Count I - Fraudulent Inducement**

**[By Plaintiff High Tides, LLC against Defendant Board Members DeMichele, Cortese, Galloway, Thorne, Serkes and Kellaway]**

62. Plaintiff incorporates each and every allegation in paragraphs 1 through 61 above as though fully set forth in this Count.

63. Defendant Board Members fraudulently induced High Tides into investing in Kainos through the making of false statements of material fact, and through their omission of material facts necessary to make the statements contained in the financial statements and other materials, in light of the circumstances in which they were made, not misleading.

64. Each of these situations and statements were material and should have either: (i) been disclosed to High Tides or (ii) been disclosed with the utmost truth, which they were not. By omitting or misrepresenting these facts, Defendant Board Members were attempting to conceal and/or misrepresent the overall corporate financial condition and other material information about Kainos to Plaintiff, and to otherwise lull High Tides into a false sense of security regarding the viability of its investment.

65. The fraudulent misrepresentations and/or omissions were made wantonly and willfully, the statements were made with actual knowledge of their falsity and/or with a reckless disregard for the truth, and the omissions and statements were intended by Defendant Board Members to fraudulently induce Plaintiff into investing \$1,752,525.00 in Kainos, and to induce High Tides to maintain that investment.

66. Plaintiff High Tides reasonably relied upon such false statements, fraudulent conduct, omissions of material fact and/or failure to act in entering into these agreements, that included Mr. Luther's private and public statements regarding Kainos, the joint press releases issued by Kainos and Defendant Dunkin' Brands, Kainos' Second Quarter Business Update, Defendant Dunkin' Brands' recognition of Kainos as "a Rising Star" and as its "Developer of the Year," the Confidential Investor Summary Memorandum on November 6, 2007, Kainos' 2008 Annual Operating Plan to High Tides, Kainos' quarterly financial report for the three month period ending December 31, 2007, Defendant Cortese's statement that High Tides'

investment in Kainos would deliver a 3 - 5 times return on its investment within two to four years, Kainos' Financial Statements and balance sheet dated December 31, 2007, the related consolidated statements of income, changes in members' equity, and cash flow for the fiscal year ended December 31, 2007, the unaudited consolidated balance sheets of Kainos as of March 31, 2008, the related statements of income, cash flow and stockholders' equity, and the representations and warranties made by Defendant Cortese regarding Kainos' financial statements. As a result, High Tides has suffered significant damages.

### **Count II-Fraudulent Concealment**

**[By Plaintiff High Tides, LLC against Defendant Board Members DeMichele, Cortese, Galloway, Thorne, Serkes and Kellaway]**

67. Plaintiff incorporates each and every allegation in paragraphs 1 through 61 above as though fully set forth in this Count.

68. Defendant Board Members have knowingly and intentionally withheld existing material facts from Plaintiff, as outlined in this Complaint and particularly at paragraph 56.

69. Defendant Board Members had an affirmative duty to disclose the withheld information on the basis that: (a) the withheld facts are solely within the knowledge of Defendant Board Members; (b) Defendant Board Members used artifices and tricks to prevent independent investigation by Plaintiff; (c) Defendant Board Members, responding to inquiries, undertook to make partial disclosures, and thereby became obligated to make full disclosure; (d) the high degree of trust Plaintiff had in Defendant Board Members, which trust Defendant Board Members knowingly induced and encouraged; and (e) the special nature of the parties' relationship.

70. The material information withheld by Defendant Board Members includes, but is not limited to, the material financial information regarding the financial and operational performance of Kainos, as more fully described in paragraph 56.

71. Plaintiff did not know, have reason to know, nor could have discovered, through the exercise of reasonable diligence, the existence of the foregoing fraudulent suppressions and concealments.

72. Defendant Board Members used artifices and tricks to forestall any investigation by Plaintiff.

73. As a direct, proximate, and foreseeable result of Defendant Board Members' fraudulent suppressions and concealments, Plaintiff has been damaged.

### **Count III- Fraud and Misrepresentation**

**[By Plaintiff High Tides, LLC against Defendant Board Members DeMichele, Cortese, Galloway, Thorne, Serkes and Kellaway]**

74. Plaintiff incorporates each and every allegation in paragraphs 1 through 61 above as though fully set forth in this Count.

75. Defendant Board Members: (a) made numerous false representations to Plaintiff; (b) of existing material fact; (c) with knowledge that the representations were false; (d) with the intent that the representations induce injurious action; (e) with consequent injury to Plaintiff; (f) acting in reasonable reliance thereon.

76. Defendant Board Members' false representations of material fact, made knowingly and intentionally, include, but are not limited to, those allegations specifically alleged in paragraph 56.

77. Plaintiff did not know, have reason to know, nor could have discovered, through the exercise of reasonable diligence, the falsity of the foregoing misrepresentations.

78. Defendant Board Members intended for Plaintiff to rely upon the foregoing misrepresentations as an inducement for the purposes of investing \$1,752,525.00 in Kainos, and maintaining that investment.

79. Plaintiff High Tides reasonably relied upon such false statements, fraudulent conduct, omissions of material fact and/or failure to act in entering into these agreements, that included Mr. Luther's private and public statements regarding Kainos, the joint press releases issued by Kainos and Defendant Dunkin' Brands, Kainos' Second Quarter Business Update, Defendant Dunkin' Brands' recognition of Kainos as "a Rising Star" and its "Developer of the Year," the Confidential Investor Summary Memorandum on November 6, 2007, Kainos' 2008 Annual Operating Plan to High Tides, Kainos' quarterly financial report for the three month period ending December 31, 2007, Defendant Cortese's statement that High Tides' investment in Kainos would deliver a 3 - 5 times return on its investment, Kainos' Financial Statements and balance sheet dated December 31, 2007, the related consolidated statements of income, changes in members' equity, and cash flow for the fiscal year ended December 31, 2007, the unaudited consolidated balance sheets of Kainos as of March 31, 2008, the related statements of income, cash flow and stockholders' equity, and the representations and warranties made by Defendant Cortese regarding Kainos' financial statements.

80. As a direct, proximate, and foreseeable result of Defendant Board Members' material misrepresentations, Plaintiff has been damaged.

**Count IV - Fraudulent Concealment - Negligent Omission of Fact**

**[By Plaintiff High Tides, LLC against Defendant Board Members DeMichele, Cortese, Galloway, Thorne, Serkes and Kellaway]**

81. Plaintiff incorporates each and every allegation in paragraphs 1 through 61 above as though fully set forth in this Count.

82. Defendant Board Members have negligently or recklessly withheld and omitted existing, material facts from Plaintiff, as outlined in this pleading, and particularly at paragraph 56.

83. Defendant Board Members had an affirmative duty to disclose the negligently omitted information on the basis that: (a) the withheld facts are solely within the knowledge of Defendant Board Members; (b) Defendant Board Members used artifices and tricks to prevent independent investigation by Plaintiff; (c) Defendant Board Members, responding to inquiries, undertook to make partial disclosures, and thereby became obligated to make full disclosure; (d) the high degree of trust Plaintiff had in Defendant Board Members, which trust Defendant Board Members knowingly induced and encouraged; and (e) the special nature of the parties relationship.

84. The material information negligently omitted by Defendant Board Members include, but is not limited to the material financial information regarding Kainos, the significant pecuniary interest the Defendant Board Members had in the transaction, and Defendant Board Members' knowledge that the financial and operational information, as well as the assumptions used to develop the shops' pro forma, were inaccurate and/or misleading.

85. Plaintiff did not know, have reason to know, nor could have discovered, through the exercise of reasonable diligence, the existence of the foregoing negligent omissions and concealments.

86. Defendant Board Members' negligence forestalled any investigation by Plaintiff.

87. As a direct, proximate, and foreseeable result of Defendant Board Members' negligent omissions and concealments, Plaintiff has been damaged.

#### **Count V - Negligent Misrepresentation**

**[By Plaintiff High Tides, LLC against Defendant Board Members DeMichele, Cortese, Galloway, Thorne, Serkes and Kellaway]**

88. Plaintiff incorporates each and every allegation in paragraphs 1 through 61 above as though fully set forth in this Count.

89. Defendant Board Members have: (a) made false representations to Plaintiff; (b) of existing material fact; (c) recklessly; negligently; without knowledge of the truth or falsity; and/or under circumstances where the Defendant Board Members should have known the truth or falsity; (d) with consequent injury to the Plaintiff; (e) acting in reasonable reliance thereon.

90. The misrepresentations and/or omissions made by the Defendant Board Members are described supra, in paragraph 56.

91. Plaintiff did not know, have reason to know, nor could have discovered, through the exercise of reasonable diligence, the falsity of the foregoing negligent misrepresentations.

92. As a direct, proximate, and foreseeable result of the Defendant Board Members' misrepresentations and/or concealment, Plaintiff has been damaged.

### **Count VI – Conspiracy to Defraud**

**[By Plaintiff High Tides, LLC against Defendant Board Members DeMichele, Cortese, Galloway, Thorne, Serkes, Kellaway, and Defendant Dunkin' Brands]**

93. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 92.

94. Defendants agreed to convince Plaintiff to invest in Kainos and defraud it through the false and misleading statements described above.

95. Defendants, with the knowledge and approval of the other Defendants, made false statements of material fact to Plaintiff, that were false when made.

96. Plaintiff reasonably relied on these false statements of material fact before making its investments in Kainos.

97. Plaintiff has suffered damages due to Defendants' agreement to defraud them and its reliance on Defendants' false statements of material fact.

### **Count VII – Aiding and Abetting Fraud**

**[By Plaintiff High Tides, LLC against Defendant Board Members DeMichele, Cortese, Galloway, Thorne, Serkes, Kellaway and Defendant Dunkin' Brands]**

98. Plaintiff incorporates by reference the allegations contained in paragraphs 1 through 97.

99. As described above, Defendants made false statements of material fact to Plaintiff. These statements were knowingly false and materially misleading when made.

100. Plaintiff reasonably relied on these false statements of material fact made to it in making its investments in Kainos.

102. Defendants had knowledge of the false statements of material fact made to Plaintiff and of Plaintiff's reasonable reliance upon those statements.

103. Moreover, those Defendants who did not make a particular false statement of material fact to Plaintiff upon which it relied provided substantial assistance to advance the commission of fraud as described above.

104. Plaintiff has suffered damages due to Defendants' aiding and abetting fraud upon it and its reasonable reliance on Defendants' false statements of material fact.

**WHEREFORE**, Plaintiff respectfully requests that the Court enter judgment in Plaintiff's favor and against Defendants as follows:

(a) On Plaintiff's First Cause of Action for Fraudulent Inducement, damages in an amount to be determined at trial of at least \$5,000,000;

(b) On Plaintiff's Second Cause of Action for Fraudulent Concealment, damages in an amount to be determined at trial of at least \$5,000,000;

(c) On Plaintiff's Third Cause of Action for Fraud and Misrepresentation, damages in an amount to be determined at trial of at least \$5,000,000;

(d) On Plaintiff's Fourth Cause of Action for Negligent Omission of Fact, damages in an amount to be determined at trial of at least \$5,000,000;

(e) On Plaintiff's Fifth Cause of Action for Negligent Misrepresentation, damages in an amount to be determined at trial of at least \$5,000,000;

(f) On Plaintiff's Sixth Cause of Action for Conspiracy to Defraud, damages in an amount to be determined at trial of at least \$5,000,000;

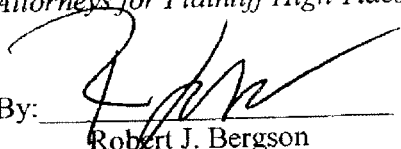
(g) On Plaintiff's Seventh Cause of Action for Aiding and Abetting Fraud, damages in an amount to be determined at trial of at least \$5,000,000;

- (h) For an award of Plaintiff's Attorneys' Fees and Costs; and
- (i) For such other relief that this Court deems just and fair.

Dated: New York, New York  
November 20, 2009

ABRAMS GARFINKEL MARGOLIS BERGSON, LLP  
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By: \_\_\_\_\_

  
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