

PLAINTIFFS
 ROWECOM, INC.

DEFENDANT
 DIVINE, INC.

ATTORNEYS (Firm Name, Address, and Telephone No.)
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ATTORNEYS (If Known)

03 - 1028
FILING FEE PAID

PARTY (Check one box only) 1 U.S. PLAINTIFF 2 U.S. DEFENDANT 3 U.S. NOT A PARTY

CAUSE OF ACTION (WRITE A BRIEF STATEMENT OF CAUSE OF ACTION, INCLUDING ALL U.S. STATUTES INVOLVED)
 Complaint to recover, *inter alia*, fraudulent transfers

NATURE OF SUIT
 (Check the one most appropriate box only)

<input checked="" type="checkbox"/> 454 To Recover Money or Property	<input type="checkbox"/> 455 To revoke an order of confirmation of a Chap. 11, Chap. 12, or Chap. 13 Plan	<input type="checkbox"/> 456 To obtain a declaratory judgment relating to any of foregoing causes of action
<input type="checkbox"/> 435 To Determine Validity, Priority, or Extent of a Lien or Other Interest in Property	<input type="checkbox"/> 426 To determine the dischargeability of a debt 11 U.S.C. 523	<input type="checkbox"/> 459 To determine a claim or cause of action removed to a bankruptcy court
<input type="checkbox"/> 458 To obtain approval for the sale of both the interest of the estate and of a co-owner in property	<input type="checkbox"/> 434 To obtain an injunction or other equitable relief	<input type="checkbox"/> 498 Other (specify)
<input type="checkbox"/> 424 To object or to revoke a discharge 11 U.S.C. 727	<input type="checkbox"/> 457 To subordinate any allowed claim or interest except where such subordination is provided in a plan	

ORIGIN OF PROCEEDINGS (Check one box only)

<input checked="" type="checkbox"/> 1 Original Proceeding	<input type="checkbox"/> 2 Removed Proceeding	<input type="checkbox"/> 3 Reinstated or Reopened	<input type="checkbox"/> 5 Transferred from Another Bankruptcy Court	<input type="checkbox"/> CHECK IF THIS IS A CLASS ACTION UNDER E.R.C.P. 23
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DEMAND NEAREST THOUSAND \$63,600,000.00 OTHER RELIEF SOUGHT

JURY DEMAND

BANKRUPTCY CASE IN WHICH THIS ADVERSARY PRECEDING ARISES

NAME OF DEBTOR
 ROWECOM, INC.

BANKRUPTCY CASE NO.
 03- 10668

DISTRICT IN WHICH CASE IS PENDING
 District of Massachusetts

DIVISIONAL OFFICE
 Eastern Division

NAME OF JUDGE

RELATED ADVERSARY PROCEEDING (IF ANY)

PLAINTIFF	DEFENDANT	ADVERSARY PROCEEDING NO.
DISTRICT	DIVISIONAL OFFICE	NAME OF JUDGE

FILING FEE (Check one box only) FEE ATTACHED FEE NOT REQUIRED FEE IS DEFERRED

DATE
 January 27, 2003

PRINT NAME
 Jeffrey D. Sternklar, Esq.

SIGNATURE OF ATTORNEY (OR PLAINTIFF)


U.S. BANKRUPTCY COURT
 DISTRICT OF MASS.
 2003 JAN 27 3:43
 INC. ERCP 23
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
EASTERN DIVISION

In re
ROWECOM, INC., et al.,
Debtors.

ROWECOM, INC.,
Plaintiff,
v.
DIVINE, INC.,
Defendant.

) Chapter 11
)
) Case Nos. 03 B _____
) (Jointly Administered)
)
) Honorable _____
)
)
) Adv. No. _____

03 - 1028

COMPLAINT

RoweCom, Inc. ("RoweCom"), as debtor and debtor-in-possession, by and through its undersigned attorneys, for its Complaint hereby alleges as follows:

NATURE OF THE ACTION

1. RoweCom brings this action for damages and to recover over \$73.7 million which Defendant divine, inc. ("divine") has fraudulently and wrongfully transferred from RoweCom to itself, within the 12 months prior to the commencement of RoweCom's chapter 11 bankruptcy case on January 27, 2003.
2. The transfers to divine were fraudulent, preferential, induced by fraud and negligent misrepresentation, unjustly enriched divine, were improperly converted and deepened RoweCom's insolvency.

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U.S. BANKRUPTCY COURT
DISTRICT OF MASS.



3. Moreover, the corporate veil between RoweCom and divine should be pierced to make divine liable for RoweCom's obligations, debts and claims asserted against RoweCom. At all relevant times, RoweCom and divine were operated as a single entity and RoweCom was held out to the world as an integrated part of divine. In doing so, divine stripped RoweCom of all trappings of corporate separateness such that equity demands that the veil be pierced. Finally, as a result of being a single employer divine should be jointly and severally liable for any WARN Act liability to RoweCom's employees.

JURISDICTION AND VENUE

4. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. § 1334. This proceeding is a "core" proceeding within the meaning of 28 U.S.C. §§ 157(b)(2)(A), (B), (E), (F), (H), (L), and (O). The relief requested herein is authorized by Bankruptcy Code sections 541, 544, 547, 548, and 550, Bankruptcy Rules 7001, *et seq.*, and applicable state law.

5. Venue in this district is proper pursuant to 28 U.S.C. § 1409(a) as a proceeding arising under the Bankruptcy Code and arising in or related to a case under the Bankruptcy Code.

6. Venue properly lies in this Court pursuant to 28 U.S.C. §§ 1391, 1408 and 1409.

THE PARTIES

7. Plaintiff RoweCom is a Massachusetts corporation with its principal place of business at 15-17 Southwest Park, Westwood, Massachusetts. RoweCom, along with its subsidiaries, is a leading business-to-business provider of high quality service and e-commerce solutions for purchasing and managing the acquisition of magazines, newspapers, journals and e-journals, books and other printed sources of commercial, scientific and general interest information and analysis, to which it collectively refers as "knowledge resources." RoweCom also provides its customers, including Fortune 1000 companies and academic institutions, with

effective ways of managing and controlling the purchase and acquisition of knowledge resources and reducing the related costs.

8. RoweCom's services can be divided into two categories: library services and desktop services. In the area of library services, RoweCom has established relationships with the staffs of professional libraries and with publishers. In recent years, RoweCom has developed its services in the area of assisting libraries and publishers with the difficult and time-consuming challenges created by the increasing use of electronic knowledge resources. In the area of desktop services, RoweCom provides businesses with the tools necessary to manage and control the purchase of knowledge resources. It has become a leading supplier of knowledge resource catalogs to several major e-procurement software vendors.

9. On January 27, 2003 (the "Filing Date"), RoweCom and its subsidiaries filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code. The debtors are seeking to consolidate these cases for purposes of joint administration. RoweCom is operating its business as a debtor-in-possession pursuant to 11 U.S.C. § 1107(a) and 1108.

10. Defendant divine is a corporation organized under the laws of the State of Delaware, with its principal place of business in Chicago, Illinois. RoweCom is a wholly-owned subsidiary of divine.

FACTUAL BACKGROUND

I. divine's Acquisition of RoweCom

11. divine acquired RoweCom pursuant to a merger agreement whereby RoweCom was merged into a newly-formed, wholly-owned subsidiary of divine (the "Acquisition"). The merger became effective on November 6, 2001 (the "Acquisition Date").

12. On or after the Acquisition Date, divine accounted for the payments and/or funding of liabilities assumed at the Acquisition Date as intercompany advances from divine. RoweCom was not capitalized sufficiently to repay the intercompany obligations.

13. As of the Acquisition Date, divine knew that RoweCom was a struggling company which had a negative net worth. RoweCom's filings with the United States Securities and Exchange Commission in connection with the Acquisition state that RoweCom had a negative net worth of at least \$19 million.

14. Beyond RoweCom's negative net worth, divine knew as of the Acquisition Date that divine was acquiring a financially troubled company. divine knew or should have known, among other things, that:

- a. divine's financial experts believed that RoweCom would have to grow revenue by \$313 million (90%) to break even, assuming no increase in operating expenses;
- b. divine's financial experts believed that RoweCom had poor internal accounting controls;
- c. divine's financial experts believed that RoweCom's customer base was declining significantly;
- d. divine's financial experts believed that RoweCom required a significant amount of working capital in the fourth quarter of every year due to the cyclical nature of RoweCom's business; and
- e. divine's financial experts believed that there was a grave risk that RoweCom would be unable to meet its obligations as they became due and operate the business in a competitive fashion and, therefore, that there was a serious question as to whether RoweCom could continue to operate as a going concern.

15. As of the Acquisition Date, divine knew that RoweCom was obligated to pay no less than \$40 million to creditors and publishers on behalf of RoweCom's customers one month later, *i.e.* December 2001. As part of the Acquisition, divine agreed to assume all of RoweCom's existing debt obligations and agreed to fund RoweCom's current obligations due to publishers in

December 2001. In January 2002, divine was required to pay approximately \$7.4 million in obligations to publishers. All of these advances/funding were treated as intercompany loans to RoweCom from divine. In addition, in February 2002 divine arranged a working capital loan for RoweCom from a third party bank that expired in April 2002.

16. Upon information and belief, as of the Spring of 2002, divine reached the conclusion that they had no intention of making further commitments to ensure RoweCom's viability and formulated a plan to enrich divine at the expense of RoweCom, its employees and its creditors.

II. divine Loots RoweCom

17. divine directed RoweCom employees to implement two programs to obtain prepayments from its customers: (i) the prepaid program offered substantial cash discounts to customers who paid for their orders by certain deadlines; and (ii) the "cash first" program whereby customers were required to pay for orders in advance of RoweCom placing orders with the publishers.

18. divine, through Ken Mueller, senior vice president and controller of divine, among other divine employees, represented to RoweCom that divine would hold such prepayments until RoweCom was obligated to make payments due to publishers, generally in the fourth quarter of 2002. At the time divine made these statements, divine had no intention of honoring those obligations. As a result of these actions, RoweCom came into possession of in excess of \$65 million through November 30, 2002 of its customers' money which it was supposed to be holding to pay for future subscription purchases.

19. After these prepayments were received by RoweCom, divine systematically diverted at least \$73.7 million from RoweCom's accounts to divine commencing in April 2002 and continuing through December 2002. A list of the cash transfers from RoweCom to divine

(the "Transfers") is appended hereto as Exhibit A. The Transfers comprised prepayments from RoweCom's customers and revenue received by RoweCom in the ordinary course of its business.

20. At the time of each of the Transfers, divine knew or should have known that RoweCom's business could not continue absent re-payment of the Transfers, that RoweCom was destined for financial misfortune absent re-payment of such funds, and that RoweCom was rendered insolvent, in the vicinity of insolvency and/or without adequate capital as a result of divine's looting of RoweCom's assets.

21. Up to the second week of December 2002, divine continued to represent to employees of RoweCom that divine would fund all publisher obligations due in December 2002. divine had no intention to pay those obligations. As a result, these representations were fraudulent when made and divine was aware of the falsity of those representations.

22. The representations were material because, inter alia, RoweCom's ability to honor the publisher obligations depended on the truth of these representations.

23. RoweCom and its employees relied to their detriment on these representations by continuing to solicit prepayments from RoweCom's customers and continuing to allow divine to make Transfers. RoweCom's reliance on the aforementioned representations caused RoweCom to suffer damage, including falling into breach of agreements with its customers and being rendered insolvent, as alleged below.

24. In December 2002, at least \$37 million in payments became due to publishers from RoweCom. Had divine not wrongfully stripped RoweCom by making the Transfers, RoweCom would have been able to make these payments. Due to the Transfers, however, RoweCom was hopelessly insolvent and could not make these payments unless divine honored its commitment to pay those obligations. As a result, RoweCom has defaulted on tens of

millions of dollars of orders that it should have placed on behalf of its customers in December 2002.

25. Having looted RoweCom for its own benefit, divine announced on December 20, 2002 its "intent to divest the content subscription business delivered through its RoweCom, Inc. subsidiary." divine made this announcement at a time it knew that RoweCom was insolvent.

26. divine planned and effectuated the Transfers in bad faith and with the intent of hindering, delaying or defrauding RoweCom and its creditors.

27. RoweCom received less than fair consideration in exchange for the obligations that it incurred and either: (i) was rendered insolvent, in the vicinity of insolvency and/or with unreasonably small capital by reason of the Transfers; (ii) was engaged in business or a transaction, or were about to engage in a business or a transaction, for which their remaining assets constituted unreasonably small capital; or (iii) divine intended RoweCom to incur or believed that RoweCom would incur debts beyond its ability to pay such debts as they matured.

III. divine's Domination and Control of RoweCom

28. Defendant divine is a high-profile company that built a vast corporate empire by acquiring companies largely through stock transactions. divine routinely takes an active role in the management of its businesses and maintains a tight reign over the affairs of each of its investments. To exercise that domination and control, divine typically vests ownership of its acquisitions into a sophisticated web of wholly-owned subsidiary organizations and hand-picks their boards of directors and corporate officers. In many instances, divine appoints divine employees as the chief executive officer and/or chairman of the board of these organizations.

29. divine owns 100% of the issued and outstanding shares of RoweCom and is an insider within the meaning of 11 U.S.C. § 101(31).

30. At all relevant times, divine controlled and directed the policies and affairs of RoweCom.

31. At all relevant times, RoweCom and divine were operated as a single economic entity or instrumentality under the control of divine.

32. To solidify its control over RoweCom, divine appointed Jude M. Sullivan ("Sullivan"), the General Counsel, Senior Vice President and Secretary of divine, as the Vice President, Secretary and the sole director of RoweCom and all of RoweCom's subsidiaries. At the direction of divine, Sullivan was in direct charge of divine's supervision, management and control of RoweCom. Sullivan was the conduit for communicating divine's plans for RoweCom and was responsible for ensuring RoweCom's adherence to those plans. As a result, divine exercised complete control over RoweCom and directed its management, policies and affairs at all relevant times.

33. After consummating its acquisition of RoweCom, divine caused RoweCom to integrate its entire banking relationship with that of divine. divine controlled all disbursements from the RoweCom accounts, both as to timing and amounts.

34. All RoweCom employees were placed on divine's payroll and RoweCom's employees received their employee benefits through divine's health, retirement and other plans, which were administered by divine.

35. divine also caused RoweCom to hold itself out to its customers, creditors and publishers as divine. For example:

- a. All RoweCom employees were instructed to use divine business cards;
- b. All RoweCom employees were provided with divine email addresses;
- c. All RoweCom employees were instructed to discontinue using the name RoweCom for all business purposes and to promote the divine name instead;

- d. All RoweCom receptionists were instructed to answer the phone using the name divine, rather than RoweCom;
- e. All RoweCom marketing materials, including trade show booths, prominently displayed divine's name and logo and not that of RoweCom;
- f. All RoweCom invoices and purchase orders contained divine's name and logo and not that of RoweCom;
- g. divine's name and logo are prominently displayed on and throughout RoweCom's headquarters; and
- h. RoweCom amended contracts to reflect its name change from RoweCom to divine.

36. At divine's instruction, RoweCom held itself out to its customers, creditors and publishers as a fully integrated part of divine.

CAUSES OF ACTION

COUNT I

FRAUDULENT TRANSFER PURSUANT TO 11 U.S.C. § 548(a)(1)(A)

37. Plaintiff realleges the facts contained in paragraphs 1 - 36, as if fully set forth therein.

38. The Transfers made to divine were done with actual intent to hinder, delay, or defraud the creditors of which RoweCom was or became indebted, on or after the dates such Transfers were made and such obligations were incurred.

39. The Transfers made to divine are avoidable pursuant to 11 U.S.C. § 548(a)(1)(A).

WHEREFORE, Plaintiff prays that the Transfers by Plaintiff be avoided and Defendant be ordered to transfer to Plaintiff all said assets, or the value of said assets, and for such other, further or different relief as this Court may deem just and proper.

COUNT II

FRAUDULENT TRANSFER PURSUANT TO 11 U.S.C § 548 (a)(1)(B)(i) and (ii)(I)

40. Plaintiff realleges the facts contained in paragraphs 1- 39, as if fully set forth herein.

41. RoweCom received less than reasonably equivalent value from divine for the Transfers made to divine.

42. RoweCom was insolvent as of the date of each Transfer.

43. The asset Transfers made to divine are avoidable pursuant to 11 U.S.C. § 548 (a)(1)(B)(i) and (ii)(I).

WHEREFORE, Plaintiff prays that the Transfers by Plaintiff to Defendant be avoided and Defendant be ordered to transfer to Plaintiff all said assets, or the value of said assets, and for such other, further or different relief as this Court may deem just and proper.

COUNT III

FRAUDULENT TRANSFER PURSUANT TO 11 U.S.C. § 548(a)(1)(B)(i) and (ii)(II)

44. Plaintiff realleges the facts contained in paragraphs 1 - 43, as if fully set forth therein.

45. RoweCom received less than reasonably equivalent value from divine for the Transfers.

46. At the time of each of the Transfers, RoweCom was engaged in a business for which the property remaining in its hands was an unreasonably small amount of capital.

47. The Transfers made to divine are avoidable pursuant to 11 U.S.C. § 548(a)(1)(B)(i) and (ii)(II).

WHEREFORE, plaintiff prays that the Transfers to Defendant be avoided and Defendant be ordered to transfer to Plaintiff all said assets, or the value of said assets, and for such other, further or different relief as this Court may deem just and proper.

COUNT IV

FRAUDULENT TRANSFER PURSUANT TO 11 U.S.C. § 548(a)(1)(b)(i) and (ii)(III)

48. Plaintiff realleges the facts contained in paragraphs 1 - 47, as if fully set forth herein.

49. RoweCom received less than a reasonably equivalent value from divine for the Transfers.

50. At the time of each of the Transfers, RoweCom had intended to incur, or believed it would incur, debts that would be beyond RoweCom's ability to pay as such debts matured.

51. The Transfers made to divine are avoidable pursuant to 11 U.S.C §548(a)(1)(B)(i) and (ii)(III).

WHEREFORE, Plaintiff prays that the Transfers be avoided and Defendant be ordered to transfer to Plaintiff all said assets, or the value of said assets, and for such other, further or different relief as this Court may deem just and proper.

COUNT V

FRAUDULENT TRANSFER PURSUANT TO MASS. GEN. LAWS. ch. 109A, § 5(a)(1)

52. Plaintiff realleges the facts contained in paragraphs 1 - 51, as if fully set forth herein.

53. The Transfers made to divine were done with actual intent to hinder, delay or defraud the creditors of which RoweCom was or became indebted, on or after such Transfers were made and such obligations were incurred.

54. These Transfers were of substantially all of the debtor's assets.

55. RoweCom became insolvent shortly after the Transfers were made.

56. The Transfers made to divine are avoidable pursuant to MASS. GEN. LAWS. ch. 109A, § 5.

WHEREFORE, Plaintiff prays that the Transfers be avoided and Defendant be ordered to transfer to Plaintiff all said assets, or the value of said assets, and for such other, further or different relief as this Court may deem just and proper.

COUNT VI

FRAUDULENT TRANSFER PURSUANT TO MASS. GEN. LAWS. ch. 109A, § 5(a)(2)

57. Plaintiff realleges the facts contained in paragraphs 1 - 56, as if fully set forth herein.

58. RoweCom received less than reasonably equivalent value from divine for the Transfers.

59. At the time of each of the Transfers, RoweCom was engaged in a business for which the property remaining in its hands was an unreasonably small amount of capital.

60. The asset Transfers made to divine are avoidable pursuant to MASS. GEN. LAWS ch. 109A, § 5(a)(2).

WHEREFORE, Plaintiff prays that the Transfers to Defendant be avoided and Defendant be ordered to transfer to Plaintiff all said assets, or the value of said assets, and for such other, further or different relief as this Court may deem just and proper.

COUNT VII

RECOVERY OF PREFERENCE PURSUANT TO 11 U.S.C. § 547

61. Plaintiff realleges the facts contained in paragraphs 1 - 60, as if fully set forth herein.

62. divine did not have a perfected security interest in any of the intercompany accounts loans or obligations. As a result, loans or obligations were unsecured debt obligations.

63. Upon information and belief, the Transfers were made in payment of the intercompany loans or obligations..

64. The Transfers were made for the benefit of divine.

65. The Transfers were made on account of an antecedent debt to divine allegedly owed by RoweCom. RoweCom received no new value for the Transfers.

66. Certain of the Transfers were made within ninety days of the Filing Date. All of the Transfers were made within one year of the filing date. (See Exhibit 1 Hereto). divine is an Insider as that term is defined in 11 U.S.C. § 101(31) and used in 11 U.S.C. § 547.

67. The Transfers were not made in the ordinary course of RoweCom's business.

68. The Transfers enabled divine to receive more than divine would have received under this Chapter 11 case if the Transfers had not been made and divine received payment to the extent permitted by the Bankruptcy Code.

69. Each of the Transfers constituted a voidable preference pursuant to 11 U.S.C. § 547 in an amount to be determined at trial.

70. By reason of the foregoing, pursuant to 11 U.S.C. §§ 547 and 550, RoweCom may avoid and recover the value of the Transfers.

WHEREFORE, Plaintiff prays that the Transfers be avoided and Defendant be ordered to transfer to Plaintiff all said assets, or the value of said assets, and for such other, further or different relief as this Court may deem just and proper.

COUNT VIII

FRAUDULENT INDUCEMENT

71. Plaintiff realleges the facts contained in paragraphs 1 - 70 as if fully set forth herein.

72. divine fraudulently induced RoweCom to: (i) solicit and accept prepayments from its customers; and (ii) to allow the Transfers to occur by misrepresenting the material fact that divine would satisfy RoweCom's obligations to publishers in December 2002.

73. At various points from April through December 2002, Ken Mueller, senior vice president and controller of divine, as well as other employees of divine, represented to RoweCom that divine would satisfy RoweCom's obligations to publishers.

74. These representations were false when made and at that time divine was aware of their falsity. At the time divine made these statements it had no intention of using the money collected to make such payments.

75. RoweCom reasonably relied on the truth of the representations to its detriment. In reliance on the truth of the representations, RoweCom continued to solicit prepayments from its customers and allowed the Transfers to occur. Had RoweCom been aware that the representations were false, RoweCom would have either: (i) not continued to solicit customer prepayments; or (ii) not allowed the Transfers to occur.

WHEREFORE, Plaintiff prays that Defendant be ordered to pay damages, a constructive trust be imposed on the funds acquired by the Transfers, and for such other, further or different relief as this Court may deem just and proper.

COUNT IX

NEGLIGENT MISREPRESENTATION

76. Plaintiff realleges the facts contained in paragraphs 1 - 75, as if fully set forth therein.

77. divine induced RoweCom employees to implement a prepayment system with RoweCom's customers, whereby RoweCom would solicit and accept prepayments from its customers. divine misrepresented to RoweCom and its employees the material fact that divine would satisfy RoweCom's obligations to publishers in December 2002.

78. At various points from April through December 2002, Ken Mueller, senior vice president and controller of divine, as well as other employees of divine, represented to RoweCom that divine would satisfy RoweCom's obligations to publishers.

79. These representations were false where made.

80. RoweCom reasonably relied on the truth of the representations to its detriment. In reliance on the truth of the representations, RoweCom continued to solicit payment from its customers and allowed the Transfers to occur. Had RoweCom been aware that the representations were false, RoweCom would either have ceased to solicit customer prepayment, or would not have allowed the Transfers to occur.

WHEREFORE, Plaintiff prays that Defendant be ordered to pay damages, a constructive trust be imposed on the funds acquired by the Transfers, and for such other, further or different relief as this Court may deem just and proper.

COUNT X

**WRONGFUL TRANSFER AND RETENTION OF PROCEEDS
OR THE BENEFITS THEREFROM AND UNJUST ENRICHMENT**

81. Plaintiff realleges the facts contained in paragraphs 1- 80, as if fully set forth therein.

82. The Transfers constituted fraudulent transfers, the retention of which would unjustly enrich divine because, *inter alia*:

- a. The Transfers rendered RoweCom insolvent, left it in the vicinity of insolvency, unable to pay its debts when they matured and/or with unreasonably small capital, and RoweCom conveyed the benefits of the Transfers to divine without fair consideration or a reasonably equivalent value in exchange for the Transfers, or, alternatively, the conveyance was made with the intent to hinder and defraud RoweCom. Thus, the transactions pursuant to which RoweCom conveyed the benefits of the proceeds of the Transfers constituted wrongful transfers;
- b. At the time RoweCom effected the Transfers or the benefits thereof, to divine, RoweCom lacked the necessary surplus required by law to make a dividend or distribution, or any net profits to support a dividend payment, thereby making the Transfers improper, unlawful, and/or illegal dividend under Massachusetts General Corporation Law and under Massachusetts common law. Moreover, divine willfully and negligently caused the improper dividend to be declared and paid, and caused divine to receive that dividend knowing or with reason to know that such dividend was improper; or
- c. divine engaged in further inequitable and wrongful conduct as alleged herein.

83. There is no legal justification for the Transfers and, given divine's wrongful acts, RoweCom is entitled to seek the return of the proceeds or the benefits of the Transfers which were transferred and traceable to divine and its affiliates.

84. As a direct and foreseeable result of the actions of divine including, but not limited to, the Transfers, RoweCome has been injured.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of the Plaintiff and against the Defendant:

- a. Determining that the Transfers were wrongful transfers contrary to the law and/or equity as set forth above;
- b. Imposing a constructive trust and/or equitable lien over the proceeds of the Transfers which were improperly upstreamed to divine and ordering defendant to make restitution to plaintiff;
- c. Granting such other, further or different relief as the Court deems just and proper.

COUNT XI

CONVERSION

85. Plaintiff realleges the facts contained in paragraphs 1 - 84, as if fully set forth therein.

86. The Transfers constituted conversion under Massachusetts common law, as at the time of each Transfer RoweCom had a possessory interest in the monies being transferred.

87. divine intentionally transferred sums to itself, for its benefit, without fair consideration or reasonably equivalent value in exchange, and wrongfully depleted RoweCom's capital.

88. As a result of such Transfers, RoweCom was rendered insolvent.

WHEREFORE, Plaintiff prays that Defendant be ordered to pay damages, replevin of the funds transferred, and for such other, further, or different relief as this Court may deem just and proper.

COUNT XII

DEEPENING INSOLVENCY

89. Plaintiff realleges the facts contained in paragraphs 1 - 88, as if fully set forth therein.

90. divine created the false appearance of solvency by representing to RoweCom that divine would pay RoweCom's obligations to publishers in December 2002.

91. This false appearance of solvency was created to enable RoweCom to collect more prepayments from its customers.

92. As a result of this false appearance of solvency divine caused RoweCom to solicit and accept prepayments from its customers, and then allowed the Transfers to occur.

WHEREFORE, Plaintiff prays that Defendant be ordered to pay damages, a constructive trust be imposed on the funds acquired under the Transfers, and for such other, further or different relief as this Court may deem just and proper.

COUNT XIII

ALTER EGO CLAIM

93. Plaintiff realleges the facts contained in paragraphs 1 - 92, as if fully set forth therein.

94. As alleged above, at all relevant times herein, divine, by its complete exercise of dominion and control, is the alter ego of RoweCom.

95. An overall element of injustice is present because, *inter alia*:

a. Through a pattern of wrongful transfers, RoweCom was used for the gain of divine; and

b. Distribution of the Transfers left RoweCom inadequately capitalized, unable to pay its debts as they matured, insolvent and/or in the vicinity of insolvency.

96. For the foregoing reasons, the corporate veil of RoweCom should be disregarded and/or pierced rendering divine (and possibly other affiliates of divine yet to be determined) jointly and severally responsible and legally obligated for the repayment of all obligations, debts and claims of RoweCom.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff against the Defendants:

- a. Declaring that divine is the alter ego of RoweCom;
- b. Reclassifying all obligations, debts and claims asserted against RoweCom as debt obligations of divine rendering divine responsible for the repayment thereof; and
- c. Granting such other, further or different relief as the Court deems just and proper.

COUNT XIV

DECLARATION OF JOINT AND SEVERAL LIABILITY

97. Plaintiff realleges the facts contained in paragraphs 1 - 96, as if fully set forth therein.

98. For purposes of the Worker Adjustment and Retraining Act ("WARN Act"), 29 U.S.C. §§ 2101-09, divine and RoweCom constitute a single employer.

99. At all relevant times, RoweCom was a wholly owned subsidiary of divine.

100. At all relevant times, divine conducted the affairs and directed the policies and management of RoweCom. divine and RoweCom effectively operated as a single economic entity or instrumentality under the control of divine

101. At all relevant times, RoweCom's employees:

- a. Were paid by divine from divine accounts;
- b. Were provided with health, retirement and other benefits pursuant to benefit plans which divine sponsored and administered; and
- c. Were supported and managed by divine's human resource operations.

102. To the extent that RoweCom has any liability to its employees under the WARN Act, divine is jointly and severally liable.

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in favor of Plaintiff against Defendant declaring that Defendant is jointly and severally liable for any WARN Act liability to Plaintiff's employees, and for such other, further or different relief as this Court may deem just and proper.

REQUEST FOR RELIEF

103. Plaintiff respectfully requests that the Court enter judgment in its favor and against Defendant as set forth in the foregoing claims and causes of action.

Respectfully submitted,

By: 
Jeffrey D. Sternklar

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RoweCom Cash Transfers to divine

<u>Date</u>	<u>Amount</u>
04/01/02	\$ 3,337,662.41
04/01/02	4,430,112.32
04/02/02	2,086,620.88
04/02/02	(600,000.00)
04/03/02	1,013,585.64
04/04/02	570,750.61
04/05/02	437,508.39
04/08/02	533,087.18
04/09/02	304,461.28
04/10/02	289,659.18
04/11/02	492,943.37
04/16/02	338,287.26
04/17/02	1,432,075.05
04/17/02	(700,000.00)
04/18/02	266,058.47
04/19/02	1,139,677.60
04/22/02	341,903.07
04/24/02	1,083,850.69
04/25/02	207,616.84
04/26/02	235,080.19
04/29/02	475,132.00
04/30/02	283,278.00
05/01/02	163,000.00
05/14/02	500,000.00
05/16/02	400,000.00
05/22/02	600,000.00
05/30/02	1,500,000.00
06/04/02	500,000.00
06/21/02	600,000.00
06/27/02	350,000.00
06/28/02	956,000.00
07/03/02	500,000.00
07/10/02	900,000.00
07/11/02	1,300,000.00
07/12/02	100,000.00
07/22/02	1,800,000.00
07/23/02	600,000.00
07/25/02	1,000,000.00
07/26/02	500,000.00
07/26/02	223,000.00
07/31/02	1,000,000.00
08/02/02	1,000,000.00
08/05/02	450,000.00
08/06/02	1,000,000.00
08/07/02	1,000,000.00
08/13/02	1,000,000.00
08/19/02	1,000,000.00
08/22/02	1,700,000.00
08/27/02	800,000.00
08/30/02	600,000.00
09/09/02	800,000.00
09/12/02	800,000.00
09/25/02	1,600,000.00
10/07/02	2,000,000.00
10/09/02	1,000,000.00
10/15/02	1,000,000.00
10/21/02	1,200,000.00
10/22/02	1,000,000.00
10/24/02	800,000.00
10/29/02	1,000,000.00
10/31/02	1,200,000.00
11/07/02	1,600,000.00
11/12/02	1,000,000.00
11/14/02	1,500,000.00
11/15/02	3,500,000.00
11/19/02	1,000,000.00
11/20/02	1,500,000.00
11/21/02	1,500,000.00
11/26/02	1,000,000.00
11/27/02	1,000,000.00
12/02/02	3,700,000.00
12/10/02	40,000.00
12/10/02	4,000,000.00

\$ 73,781,350.43