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Wextrust/HPC Mortgage Fund, LP

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

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In re:

Chapter 11

56 WALKER LLC,

Case No. 13-11571 (ALG)

Debtor.

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SETTLEMENT AGREEMENT AND RELEASE
AMONG DEBTOR AND WEXTRUST/HPC MORTGAGE FUND, LP

This Settlement Agreement and Release is entered into as of the ____ day of January 2014 (this "Agreement"), by and among 56 Walker LLC ("Debtor"), as debtor and debtor in possession ("Debtor"), and Timothy J. Coleman ("Receiver")¹ as Receiver of various entities

¹ Mr. Coleman was appointed Receiver on September 8, 2008 by order of Judge Denny Chin of the US District Court for the Southern District of New York. Judge Chin has since been appointed and confirmed to the U.S. Court of Appeals for the Second Circuit, but has continued to preside over the receivership, sitting by designation. See *SEC v. Byers*, No. 08 Civ. 7104 (DC) (the "Receiver Order").

related to Wextrust Capital, LLC (“Wextrust”) (collectively, the “Wextrust Receivership”), including Wextrust/HPC Mortgage Fund, LP (f/k/a Wexford/HPC Mortgage Fund, LP) (“Wex/HPC”) (together the “Parties”).

RECITALS

A. Debtor is the owner of real property located at 56 Walker Street, Borough of Manhattan in the City, County and State of New York (Section 1, Block 194, Lot 4 on the tax map of New York County), improved by a six-story mixed use building, consisting of a commercial unit (with basement) and five residential condo units (the “Premises”).

B. On August 9, 2007, Debtor counter-signed a commitment letter under which Wextrust agreed to organize, facilitate, service and in part fund an \$11.3 million loan together with partners of its choice, namely, Broadway Bank (“Broadway”), and Wex/HPC, (Wextrust, Broadway and Wex/HPC are referred to herein jointly as “Lenders”) to be made available to Debtor.

C. On September 21, 2007, Debtor executed several notes, mortgages and associated collateral documents (the “Loan Documents”) to document the loan in respect of the Premises in favor of Broadway and Wex/HPC, including (i) a Mortgage and Note Splitter Agreement for a mortgage on the Premises in the principal amount of \$8,750,000, (ii) an Amended and Restated Land Loan Note making \$8,000,000 of the loan payable to Broadway; (iii) an Amended and Restated Loan Note making \$750,000 of the loan payable to Wex/HPC, and (iv) additional loan notes payable to Wex/HPC (“Wex/HPC Additional Loans”). The property referred to in the Loan Documents and securing the obligations thereunder shall be referred to herein as the “Mortgaged Property.”

D. It is the Debtor's position that the Lenders breached the Loan Documents first by failing to deliver up to \$2 million of the \$11.3 million loan amount, and subsequently, by delivering only \$200,000 of \$1.2 million in construction funds due to be provided to Debtor by December 2007, causing construction to be halted. It is the Debtor's position that the Mortgaged Property had a market value of between \$5 and \$6 million at the time the Lenders stopped funding and construction was halted in January 2008.

E. It is the Debtor's position that following the failure of the Lenders to fund pursuant to the Loan Documents, Guy Morris, sole member of Debtor, together with his brother, John Morris, made arrangements in April 2008 using personal resources to provide over \$3 million to Debtor to pay construction and related expenses. The Debtor further contends that these funds, which were not provided to Debtor under the Loan Documents, permitted the completion of the condo conversion of the Mortgaged Property that is currently under contract to be sold, subject to Bankruptcy Court approval, for \$18 million.

F. On August 11, 2007, the U.S. Securities Exchange Commission and the Department of Justice filed civil and criminal fraud complaints against Wextrust and its principals, Steven Byers and Joseph Shereshevsky, charging them with having developed, orchestrated, and operated a Ponzi Scheme and mortgage fraud dating to 2004.

G. On April 22, 2009, Broadway filed a Summons and Verified Complaint against Debtor, Wex/HPC, and others before the Supreme Court of the State of New York, County of New York, seeking to foreclose on the Mortgaged Property (the "Foreclosure Action"). MB Financial Bank, N.A., Broadway's successor-in-interest, replaced Broadway as plaintiff in the Foreclosure Action on February 1, 2011. The Foreclosure Action is now captioned *MB*

Financial Bank, N.A. v. 56 Walker, LLC, et al., No. 105617/2009. Debtor filed cross-claims against Wex/HPC in the Foreclosure Action.

H. It is the Debtor's position that in April 2010, at the request of Guy Morris, representatives of Debtor met with Steven Rawlings, the New York Regional Director of SEC, who confirmed that the agency had determined that Debtor and Mr. Morris were direct victims of the Wextrust Ponzi Scheme.

I. On September 23, 2011, Debtor commenced a Chapter 11 Case by filing a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Southern District of New York (the "Bankruptcy Court"), captioned *In re 56 Walker LLC*, Case No. 11-14480 (ALG), which action was subsequently dismissed voluntarily on August 10, 2012 (the "Initial Chapter 11 Case").

J. On May 13, 2013, Debtor filed a voluntary petition for relief under chapter 11 of title 11 of the Bankruptcy Code in the Bankruptcy Court, captioned *In re 56 Walker LLC*, Case No. 13-11571 (ALG) (the "Current Chapter 11 Case").

K. Wex/HPC filed a timely proof of claim against the Debtor in the Initial Chapter 11 Case, asserting a secured claim under the Loan Documents for not less than \$4,916,835 (the "Wex/HPC Claim"), but did not file a proof of claim in the Current Chapter 11 Case.

L. The Receiver filed a motion with the Bankruptcy Court in the Current Chapter 11 Case seeking entry of an order finding that the Wex/HPC Claim is a valid proof of claim in the Current Chapter 11 Case, or, in the alternative, for the Receiver to be permitted to file the Wex/HPC Claim as a late proof of claim in the Current Chapter 11 Case (the "Late Filed Claim").

Motion”). The Debtor filed an objection to the Late Filed Claim Motion, and an initial hearing was held on November 6, 2013.

M. It is Debtor’s position that as a result of the Lenders’ breach of the Loan Documents by ceasing all funding and causing Guy Morris and John Morris to provide the funding necessary to complete construction of the Mortgaged Property, Lenders are responsible for damages resulting from their breaches, and under the equity doctrine of Unjust Enrichment, they are not entitled to any of the post- April 2008 appreciated value of the Mortgaged Property that has resulted from the funding supplied by Guy and John Morris, who are owed the return of their capital.

N. In both the Foreclosure Action and the Current Chapter 11 Case, the Parties disagree as to the amount, if any, owed by Debtor to Wex/HPC and as to any lender liability that Wex/HPC may have to Debtor.

O. Debtor believes it has valid defenses and counterclaims against Wex/HPC and the Receiver in both the Foreclosure Action and the Current Chapter 11 Case. However, given the cost, expense and delay associated with pending and prospective litigation between the Parties, the result of which is uncertain, the Parties have concluded that a compromise and settlement of their respective claims and disputes is in their best interests.

WHEREFORE, in consideration of the promises, undertakings, payments and releases stated herein, the sufficiency of which consideration is hereby acknowledged, the Parties agree as follows:

TERMS AND CONDITIONS

1. As used herein, the following terms shall have the meanings set forth below:

(a) “Plan” shall refer to the Second Amended Liquidating Chapter 11 Plan filed by Debtor on December 10, 2013, and amended as contemplated herein.

(b) “Disclosure Statement” shall refer to the First Amended Disclosure Statement filed by Debtor with the Plan on December 10, 2013.

(c) “Federal Actions” shall refer collectively to *56 Walker, LLC, et al. v. MB Financial, Inc., et al.*, No. 1:11-cv-05512-RMB, filed on August 9, 2011 and voluntarily dismissed without prejudice on February 21, 2013, and *56 Walker, LLC, et al. v. MB Financial, Inc., et al.*, No. 1:13-cv-00782-DLC, filed on February 4, 2013 and dismissed without prejudice on June 3, 2013.

2. This Agreement shall be deemed effective as of the first day on which it has been executed by both Parties and has been approved by the Bankruptcy Court as contemplated in paragraph 6 below (the “Effective Date”).

3. The Wex/HPC Claim is hereby reduced and allowed as a secured claim against the Debtor in the Current Chapter 11 Case in the amount of \$150,000 (the “Wextrust Allowed Claim”), which claim shall not be subject to any defense, cross-claim, counterclaim, offset or objection by the Debtor or any other party in interest in the Current Chapter 11 Case.

4. As soon as practicable after the Effective Date, the Debtor will amend the Plan and the Disclosure Statement to provide, *inter alia*, as follows:

(a) As full and final satisfaction of the Wex/HPC Claim, Wex/HPC shall receive a cash payment in the amount of \$150,000 (the “Settlement Payment”) from the proceeds of the sale of the Mortgaged Property on the payment date set forth in the Plan (the “Payment Date”).

(b) On the Payment Date, Wex/HPC will deliver a satisfaction of mortgage and the Wex/HPC Loan Documents to Debtor.

5. On the Payment Date, Debtor shall pay the Wextrust Allowed Claim amount to Wex/HPC via wire transfer to the following account:

Bank:	The Private Bank & Trust Co.
Bank Address:	120 South LaSalle Street, Chicago, IL 60603
Account to Credit:	Timothy J. Coleman as Receiver for Wextrust Capital and Affiliates – WEXTRUST/HPC MORTGAGE FUND LP
Account Number:	0002339413
Routing Number:	071006486

6. Within five days after the execution of this Agreement, the Debtor shall file a motion pursuant to section 9019 of the Bankruptcy Rules to approve this Agreement (the “Wex/HPC Settlement Motion”) with the Bankruptcy Court, and serve the Wex/HPC Settlement Motion on required parties in interest, and the Debtor shall obtain a hearing thereon at the earliest available date provided by the Bankruptcy Court. The Debtor shall use its reasonable best efforts to obtain entry of an order in form and substance acceptable to the Receiver approving the Wex/HPC Settlement Motion and the Debtor’s entry into this Agreement (the “9019 Order”).

7. The Debtor shall obtain the entry of a final, non-appealable order confirming the Plan, as amended pursuant to paragraph 4 of this Agreement and in form and substance reasonably satisfactory to Wex/HPC, within 60 days after the Effective Date.

8. Effective upon consummation of the Plan, the Debtor unconditionally and forever does fully and finally release, acquit, and discharge the Receiver, Wex/HPC, and any and all other entities that are a part of the Wextrust Receivership and each of their present and former officers, directors, shareholders, managers, members, partners, employees, agents, successors,

assigns, representatives, and affiliates from any and all claims, rights, demands, charges, damages, complaints, actions, suits and causes of action, fees, costs, interest and expenses, whether fixed or contingent, asserted or unasserted, known or unknown, at law or in equity, that the Debtor ever had, now has, or hereafter can, shall, or may have against the Receiver, Wex/HPC, or any other entity that is a part of the Wextrust Receivership in connection with the Loan Documents, this Agreement, the Mortgaged Property, or the subject matter of this Agreement, from the beginning of the world to consummation of the Plan. As part of the release contemplated in this paragraph, Debtor hereby and irrevocably releases Wex/HPC, the Receiver, and any entity that is a part of the Wextrust Receivership from all claims previously asserted against Wex/HPC in the Federal Actions, and agrees not to assert such claims in the event that it re-files the Federal Actions. The Parties agree that this shall be construed as a Covenant Not To Sue, and Debtor shall not commence any action against the Receiver, Wex/HPC, or any other entity that is a part of the Wextrust Receivership.

9. Within five days of consummation of the Plan, the Debtor agrees to dismiss, with prejudice, all cross claims asserted by Debtor against Wex/HPC in the Foreclosure Action. Debtor shall file notices or other pleadings reasonably necessary to cause the dismissal of such claims and proceedings with prejudice.

10. Within five days of consummation of the Plan, the Receiver, on his own behalf and on behalf of Wex/HPC and the other Wextrust Receivership entities, agrees to file notices or other pleadings reasonably necessary to cause the dismissal, with prejudice, of all claims asserted by him or an entity included in the Wextrust Receivership against Debtor and/or Guy Morris in the Foreclosure Action, and to withdraw, with prejudice, the Late Filed Claim Motion.

11. By no later than the date on which the Bankruptcy Court enters an order confirming the Plan, the Debtor shall provide the Receiver with a list of notices or other pleadings that should be filed to discharge the Receiver's obligations under the preceding paragraph 10.

12. Effective upon consummation of the Plan, the Receiver, on behalf of Wex/HPC and the other entities included in the Wextrust Receivership, shall be deemed to have unconditionally and forever, fully, and finally released, acquitted, and discharged the Debtor and its present and former officers, directors, shareholders, managers, members, partners, employees, agents, successors, assigns, representatives, attorneys, and affiliates from any and all claims (including its unsecured deficiency claim under the Loan Documents) rights, demands, charges, damages, complaints, actions, suits and causes of action, fees, costs, interest and expenses, whether fixed or contingent, asserted or unasserted, known or unknown, at law or in equity, that Wex/HPC or Wextrust ever had, now has, or hereafter can, shall, or may have against the Debtor in connection with the Loan Documents, the Agreement, the Mortgaged Property or the subject matter of this Agreement from the beginning of the world to consummation of the Plan. Within 5 days following consummation of the Plan, the Receiver, on behalf of Wex/HPC, shall file a notice or other pleading as may be reasonably necessary to effect the dismissal with prejudice of its cross claims against Debtor in the Foreclosure Action.

13. In the event that the Debtor fails to perform any of its obligations under this Agreement, any releases and waivers granted by this Agreement and any duties imposed upon the Receiver or upon any entity in the Wextrust Receivership shall be terminated and the parties shall be restored to the *status quo* as it existed prior to entry into this Agreement.

14. Except as provided herein, the effectiveness of this Agreement, including each of the Recitals set forth herein, shall be conditioned upon the entry of the 9019 Order.

15. This Agreement is binding upon and shall inure to the benefit of the Parties and their legal representatives, predecessors, successors, and assigns, including any trustees and administrators and any committees appointed in the Current Chapter 11 Case or any successor case under any relevant chapter or provision of the Bankruptcy Code. This Agreement shall survive dismissal of the Current Chapter 11 Case or any successor case.

16. Each Party shall do and perform, or cause to be done and performed, all such further acts, testimony, and things, and shall execute and deliver all such other agreements, instruments, and documents, as the other Parties may reasonably request in order to carry out the intent and accomplish the purposes of this Agreement and the consummation of the transactions contemplated hereby.

17. This Agreement may be executed in multiple counterparts, each of which shall be deemed to be an original, but all of which together will constitute one and the same agreement. Additionally, signature pages delivered by facsimile or via electronic mail in portable document format (.pdf) shall be deemed original.

18. The Parties make the following representations and warranties:

(a) The Debtor represents and warrants that, subject to the entry of the 9019 Order by the Bankruptcy Court, it has full power, authority and legal right and has obtained all approvals and consents necessary, to execute, deliver and perform all actions required under this Agreement.

(b) The Receiver represents and warrants that it has full power, authority and legal right and has obtained all approvals and consents necessary, to execute, deliver and perform all actions required under this Agreement.

19. This Agreement sets forth the entire agreement between the Parties as to this subject matter and contains the final, complete and exclusive agreement between the Parties hereto. This Agreement fully supersedes any and all prior agreements and understandings, written or oral, between the Parties pertaining to the subject matter hereof.

20. This Agreement may not be modified, amended, altered, or supplemented except upon the execution and delivery of a written agreement executed by the Parties hereto.

21. The Parties hereby acknowledge and warrant that prior to executing this Agreement they had the opportunity to fully discuss its meaning and effect with their attorneys and that they fully understand its meaning and effect. In particular, the Parties represent and warrant that they have full comprehension of the meaning of each of the provisions of this Agreement and that this Agreement has been entered into voluntarily.

22. The Parties acknowledge that this Agreement was jointly negotiated, prepared and accepted by attorneys for the Parties prior to its execution. No Party shall be entitled to have any wording of this Agreement construed against any other Party on the ground that the other Party drafted this Agreement in the event of any dispute arising between them in connection with this Agreement.

23. If any provision of this Agreement is declared illegal, invalid or unenforceable by a court having proper jurisdiction, it is mutually agreed that this Agreement shall endure except for the part declared illegal, invalid, or unenforceable by order of such court, provided, however, that in the event that the terms and conditions of this Agreement are materially altered, the

Parties will, in good faith, renegotiate the terms and conditions of this Agreement to reasonably replace such illegal, invalid, or unenforceable provisions in light of the intent of this Agreement.

24. This Agreement is a contract made in New York and shall be governed by and construed in accordance with the laws of the State of New York, without regard to New York's rules governing conflicts of laws.

25. The Parties hereby irrevocably consent to the jurisdiction of the Bankruptcy Court presiding over the Current Chapter 11 Case in connection with any action, suit, or proceedings arising out of or relating to this Agreement.

26. EACH PARTY HEREBY IRREVOCABLY WAIVES ALL RIGHT TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER BASED ON CONTRACT, TORT OR OTHERWISE) ARISING OUT OF OR RELATING TO THIS AGREEMENT OR THE ACTIONS OF THE PARTIES TO THIS AGREEMENT IN THE NEGOTIATION, ADMINISTRATION, PERFORMANCE AND ENFORCEMENT HEREOF.

Dated:

January 8, 2014

56 WALKER LLC, a New York limited liability company

By: /s/ Guy Morris
Guy W. Morris
Managing Member and Sole Member

Dated:

January 8, 2014

WEXTRUST/HPC MORTGAGE FUND L.P.

By: /s/ Timothy J. Coleman
Timothy J. Coleman
Receiver for Wextrust Entities and Affiliates,
including Wextrust/HPC Mortgage Fund, LP